

9 December 2009

Dear Colleagues,

Here are some comments on the Expedited Decision proposal of the Czech Arbitration Court.

Perhaps, to be more correct, they are only questions, as I hope I could work as a panellist within whatever system exists. However, these questions might be asked during the debate and it would be a useful contribution to the debate to see if there are answers to them. I think it would be agreed that the answers should be clear and beyond argument, to avoid creating further disputes about a system designed to resolve disputes.

I will try to deal with some of the important issues under several headings.

**QUESTION: Can the Expedited Decision proposal be implemented by amendments to the Supplemental Rules of the Czech Arbitration Court?**

When parties register domain names they enter into an agreement with their registrar that includes the Uniform Domain Name Dispute Resolution Policy ("the UDRP"). The UDRP provides that proceedings to deal with disputes " will be conducted according to (the Rules) ...and the selected administrative-dispute-resolution service provider's supplemental rules."

Most people would say that it is a fair interpretation of this clause of the UDRP that to be within the UDRP, proposed dispute resolution proceedings must comply with the ICANN Rules for Uniform Domain Name Dispute Resolution Policy ("the Rules"). But the clause also means that the proceedings must comply with the provider's supplemental rules.

The clause is really clear that the proceedings must comply with both sets of rules. The Expedited Decision proposal of the CAC is that the substance of the expedited scheme will be implemented by the CAC's supplemental rules. The question therefore is whether the substance of proceedings can be provided for by a provider's supplemental rules. The CAC says that it can.

Some observers, however, would say that the substance of the proceedings must come from the ICANN Rules and that the providers' supplemental rules may only govern incidental or procedural matters that do not go to matters of substance.

Those observers might draw attention to several things tending to suggest that procedures such as the proposed expedited decision scheme cannot be dealt with in supplemental rules, but that it must be dealt with in the ICANN Rules themselves.

The first is the name itself. When the word "supplemental" is used it suggests, perhaps strongly, that only minor and incidental administrative matters should be dealt with by them and not matters of substance like the substance of a new dispute resolution process.

Secondly, the UDRP undoubtedly provides that the dispute resolution process " will be conducted according to (the Rules) ...and the selected administrative-dispute-resolution service provider's supplemental rules." The Rules give a definition of supplemental rules which includes the notion that they will deal with "such topics as fees, word and page limits

and guidelines...communicating ...and the form of cover sheets." It is a well known principle of statutory interpretation that, if you are trying to give meaning to a general expression like supplemental rules, you may look at any examples given of the sort of things to be covered. The examples may then be used to colour the meaning to be given to the expression. So, on that argument, supplemental rules would cover incidental administrative matters like fees and word limits, but not matters of substance.

So, someone would want to argue against the whole Expedited Decision proposal might say that the process itself could not be implemented by supplemental rules because the process itself is too substantial to deal with in supplemental rules.

Of course, some aspects of the expedited process deal with incidental or administrative matters like forms, word limits and fees. But it might be said that other aspects of the proposal seem to be matters of substance such as a deliberative finding one way or the other, on:

(ii) whether a case was "too factually or legally complex for" an expedited decision; or a finding that

(iii) "it would for any other reason be unfair or otherwise inappropriate" for an expedited decision,

which are really judicial functions and substantial, not incidental, matters.

The other query about supplemental rules is that the definition in the ICANN Rules says that they "shall not be inconsistent with the Policy (i.e. the UDRP) or these Rules." Some people might say that an expedited process resulting in a check box form where the panellist fills in "Yes" or "No" and without a decision with published reasons, is inconsistent with the Rules, because the Rules expressly require a decision with reasons and the publication of the whole text of the decision, including the reasons. So it might be said that the Expedited Decision proposal was inconsistent with the Rules.

So the question is whether these points suggest that the Expedited Decision proposal cannot be implemented by changes to a provider's supplemental rules as that is not what supplemental rules are supposed to deal with.

As I have said above all that I am doing is to pose some questions to see if there are ready and persuasive answers to them.

**QUESTION: Is the Expedited Decision proposal outside the Uniform Domain Name Dispute Resolution Policy ("the UDRP") itself. In other words, if the Expedited Decision proposal could be implemented by supplemental rules, would that be the end of the matter or would it be contrary to the Policy itself?**

When parties register domain names they enter into an agreement with their registrar that includes the Uniform Domain Name Dispute Resolution Policy ("the UDRP").

The UDRP provides that proceedings to deal with disputes "will be conducted according to (the Rules) ...and the selected administrative-dispute-resolution service provider's supplemental rules."

Accordingly, the only proceedings that can be imposed on a registrant are those where the proceedings "will be conducted according to (the Rules)". The Rules provide a detailed procedure. The expedited procedure is a different procedure. It is clearly intended to be different because it is called the Expedited Decision proposal.

It might therefore be said that irrespective of its merits, the expedited procedure is not a procedure in accordance with the Rules simply because it is a different, although additional one.

Put differently, some people might say that when a registrant signed up for a domain name it did so on the basis that it agreed to the dispute resolution system set out in the registrar agreement and not a different one.

The other question that comes from this is that if it is a different system and if the changes are within the Rules, can they apply to the millions of domain names already issued subject to a contract that the only dispute resolution scheme is the current one prescribed under the Policy or would they apply only to new domain names issued after the changes were introduced?

**QUESTION: Is the proposal outside the ICANN Rules for Uniform Domain Name Dispute Resolution Policy ("the Rules")?**

#### **A.GENERAL**

In one sense this is the same as the previous question, because the only compulsory dispute resolution scheme to which a registrant has agreed is one where proceedings "will be conducted according to (the Rules)

When parties register domain names they enter into an agreement with their registrar that includes the Uniform Domain Name Dispute Resolution Policy ("the UDRP").

The UDRP provides that proceedings to deal with disputes " will be conducted according to (the Rules) ...and the selected administrative-dispute-resolution service provider's supplemental rules."

Accordingly, to be within the UDRP the proceedings must be "conducted according to (the Rules)..."

The Rules provide for

- a Complaint
- a Response that may be submitted up to 20 days after the commencement of the proceedings
- the right of the Complainant to elect to have a single member or 3 member panel and the right (in the latter case) to suggest candidates
- the right of the Respondent to elect to have a 3 member panel and the right to suggest candidates

- an obligation on the panel to conduct the proceedings in such manner as it considers appropriate in accordance with the UDRP and the Rules
- the right of both parties to expect that a panel will conduct the proceedings as it considers appropriate and in accordance with the UDRP and the Rules
- an obligation on the panel to determine admissibility, relevance, materiality and weight of evidence
- an obligation on the panel to decide the complaint with reasons
- an obligation on the panel to give those reasons
- an obligation on the provider to provide the full text of the decision and (generally) to publish the full decision.

The proposed rules for Expedited Decision cases propose an additional and different structure at the behest of the Complainant. But the proposal is not contained in the present Rules.

Could it not therefore be said that the expedited proposal is outside the Rules?

## **B. PARTICULAR**

For the process to be in accordance with the Rules, the decision coming at the end of the process must be given:

- for reasons
- the reasons must be given (meaning that there must have been a conscious process leading to reasons and the reasons must be stated)
- there must be something that can be accurately described as “the full text of the decision” and something that can be accurately described (whether or not it is the same thing) as “the full decision”.

Could it be said that the Expedited Decision proposal does not provide for any of these elements? The proposal is that the expedited decision “shall” be in the prescribed form and the prescribed form is therefore an essential part of the process. It might be said that, by implication, the decision is therefore not to be a reasoned decision in the form of building on the evidence and coming to a conclusion on what it all means and why.

It could also be said that the form does not provide for reasons to be given because it provides for boxes to be ticked rather than reasons to be given.

It could also be said that there are no reasons for a decision under the expedited process or at least that there is no provision for reasons to be given in the form of a decision as it presently proposed.

In support of that view critics might say that a recital in the form, already printed before the panel comes to the case, with a check box, is not a statement of reasons.

It could also be said that in the expedited process there is no "full text of the decision" because the intention of the form is that it is a check list and not what is normally understood as a decision with a text.

It could also be said for the same reason that under the Expedited Decision proposal there is no "full decision".

### **Other points about the form of the Decision**

A question may be asked as to why there is provision in the form for additional reasons on the issue of bad faith. It might be suggested that as there is special provision for reasons on the issue of bad faith, this reinforces the notion that there are no reasons normally given under the expedited process on other issues.

The other question about the form and one that has been raised by an observer who has posted some comments on the proposal is why there is no provision in the form for a finding of Reverse Domain Name Hijacking (RDNH). RDNH must be found if the Panel finds that the facts are there to support it (Rule 15(e)). If it is contemplated that there will be no provision for RDNH under the expedited Decision scheme, that would be contrary to the ICANN Rules. If it is still to be considered under the Expedited Decision proposal, then there is probably an explanation needed as to why there is not provision for it in the mandatory form.

Some who wanted to object to the process after the event and set a decision aside might also say that the expedited process is at odds with the ICANN Rule that requires the panel to conduct the proceedings "in such manner as it considers appropriate" (Rule 10 (a)) and the Rule that requires the panel to determine admissibility, relevance, materiality and weight of the evidence. They might say that this so because the expedited process requires the panel to run through a check list and tick the boxes rather than to go through a process requiring it to consider the evidence and weigh it up.

These questions may be asked and if they are, some people may come to the conclusion that the Expedited Decision proposal could not be implemented under the Rules as they are and that the Rules would have to be amended.

### **QUESTION: Can the Rules be amended to accommodate the Expedited Decision proposal of the Czech Arbitration Court?**

Rule 21 allows the Rules to be amended, but only with the express written approval of ICANN. So ICANN could amend the Rules to provide for a new procedure such as the Expedited Decision proposal of the CAC. In fact, as that power of amendment is there, the intention of those who drafted the Rules was presumably that the Rules as they are, were meant to be the only rules that governed the substance of dispute resolution schemes and that if there were to be any other schemes they could only be implemented by amending the Rules themselves.

The question might also be asked whether, if the Rules are amended to institute the Expedited Decision proposal, the amended Rules would apply only to domain names registered after the amendments come into effect or to all domain names.

In that regard, it might be asked what is the significance of the fact that the UDRP itself seems to be saying that the registrant is agreeing, on registration, to dispute resolution under the Rules that were available on 24 October 1999, not the Rules as amended from time to time, which is an expression sometimes used. If those who drafted the UDRP meant this literally, then any change to the Rules might be said to apply only to domain names registered after the change.

Trusting these comments are of some interest even if only to stimulate debate.

Yours sincerely,

The Hon Neil Anthony Brown QC

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