

**INDEPENDENT REVIEW PROCESS
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION
ICDR CASE NO. 01-21-0004-1048**

Between

GCCIX, W.L.L. (Bahrain)
Claimant

-and-

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS (USA)
Respondent

(hereinafter "the Parties")

EMERGENCY ARBITRATOR ORDER

Klaus Reichert SC
Brick Court Chambers
7-8 Essex Street
London WC2R 3LD
England

Introduction & Procedure

1. This is the Emergency Arbitrator's Order made pursuant to Art. 7(4) of the ICDR's International Arbitration Rules¹, which determines the Respondent's application for interim measures. For the reasons set out below, that application is successful. At the outset the Emergency Arbitrator makes it clear that the brevity of this Order is intentional; this is because the issue before him for his interim ruling is actually very narrow, but also he is keenly aware in the circumstances of this matter that his reasons are necessarily confined to those actually relevant to whether or not to grant the interim relief sought. While it may go without saying, it is said anyway: the reasons for and outcome of the Respondent's application for interim measures have absolutely no binding or even influential consequence for the tribunal (to be formed in due course) which will hear and determine this dispute.
2. The relevant procedural history leading to this Order is:
 - a. The Claimant, represented by Rodenbaugh Law, commenced this arbitration by its Notice of Arbitration dated June 3, 2021, and subsequently filed its Request for Independent Review ("the Request") with the ICDR.
 - b. On July 15, 2021, the Respondent, represented by Jones Day, requested² the ICDR to appoint an emergency arbitrator and set out, in brief, the nature of the interim relief it was seeking.
 - c. On July 16, 2021, the ICDR notified the Parties of the appointment of the Emergency Arbitrator.
 - d. A procedural hearing took place, via Zoom, on July 26, 2021.
 - e. On July 27, 2021, the Respondent sent the following email:

"Pursuant to the Procedural Hearing on 26 July 2021, ICANN has conferred with Claimant to draft this email memorializing the hearing as follows:

The Emergency Panelist and the Parties participated in a Procedural Hearing on 26 July 2021. The following people attended the hearing:

- ICDR: Tom Simotas
- Emergency Panelist: Mr. Reichert
- Claimant: Mr. Rodenbaugh and Mr. Frost
- ICANN: Mr. Enson, Ms. Watne, and Ms. Furey

The Emergency Panelist and the Parties agreed to the following briefing schedule for ICANN's Application to Strike:

- 5 August 2021: Deadline for ICANN's Application to Strike

¹ For the sake of simplicity and to not overburden this Order with innumerable defined terms, the Emergency Arbitrator will use abbreviations without further elaboration, as these could not possibly be open to any real as opposed to contrived doubt as to what is intended.

² The Claimant's email of July 17, 2021, opposed the appointment of an emergency arbitrator and stated, *inter alia*, "[T]here is no emergency in this matter. ICANN controls whether and when our IRP complaint is published on its website, and with what redactions. ICDR controls whether and when to forward whatever version of our IRP complaint to any prospective panelists." The latter proposition as to what the ICDR "controls" is without any foundation. That institution, like any other arbitral institution, has nor could possibly have any editing role over a party's submission.

- 26 August 2021: Deadline for Claimant's Response to ICANN's Application to Strike
- 29 August 2021: Emergency Panelist will provide the parties with the points they should address in the Reply/Rejoinder
- 8 September 2021: Deadline for ICANN's Reply
- 20 September 2021: Deadline for Claimant's Rejoinder

Additionally, should either party wish to have oral argument on ICANN's Application to Strike, it shall notify the Emergency Panelist and a hearing not to exceed a half day will be held in October 2021.

The Parties agree that ICANN's deadline to respond to Claimant's IRP Request is either (1) 15 days after Claimant submits an amended IRP Request, or (2) if the Emergency Panelist denies ICANN's Application to Strike, 15 days after the Panelist so orders.”

- f. The Parties, respectively, filed their first round of submission as per the stipulated schedule and on August 27, 2021, the Emergency Arbitrator wrote to them as follows:

“I have reviewed the submissions received from both sides.

In the next phase of this emergency arbitrator procedure, which will see me receiving the reply and rejoinder, I would be assisted by a number of matters to which I draw attention.

First, I consider that it is important that there is a high degree of precision articulated for the curial or operative part of any sought-for interim/emergency order. My overall present appreciation of ICANN's position is that it asks me to strike aspects of the Request, and also remove the Request entirely from the record. This is just a brief summary of my appreciation of that which I am being asked to do (so under no circumstances should either side start ‘wordsmithing’ or seeking to divine anything beyond the present intention to do a headline summary). I am unclear as to what precisely I am asked to do: am I to excise portions (which ones?) of the Request to bring about a Request which does not have any offending (in ICANN's view) portions? If yes, then why would I then go on to remove the Request, as partially excised, from the record? I simply raise this in a general way to invite ICANN, when filing its reply, to give the closest possible consideration to the precision of that which it seeks. I would like to stress that the specific point just made by me is not to be viewed as delimiting exactly what might be done – what is to be done is a matter for Counsel and their own decision, legally and forensically. I invite Counsel to consider the gist or thrust of the point made. Again, lest there be hair-splitting, this is not a direction, but rather an invitation for Counsel to consider when preparing the next filing.

Secondly, upon my review of the filings to date I am content for the Parties to proceed by way of a reply/rejoinder on any and all points they,

in their consideration, feel they wish to address. It is up to either side, in their own estimation and analysis (and at their own risk), to either address, or not as the case may be, the points they wish.

Thirdly, I am particularly interested in the point made by GCCIX as regards the nature of an emergency arbitrator order to be reviewable by the full panel in due course. Please could this be addressed in detail by ICANN. This does not detract from the generality of my “secondly” point just above.”

- g. The Respondent filed its Reply on September 8, 2021 and the following day the Emergency Arbitrator requested, by email, the following confirmation:

“I have had an opportunity read the Reply and understand from it that ICANN does not make the argument (nor would it if it were to come to a consideration by the IRP Panel in due course) that any aspect of an emergency decision (e.g. if I were, strictly and solely for the sake of present argument, to direct that certain parts of the Request be excised) by me would definitively close out GCCIX from later arguing that the “excised parts” should be “reintroduced”. Put differently, any decision by me is not a once-and-for-all resolution of whether GCCIX can utilise certain matters for the purpose of this IRP.

I ask ICANN to confirm my understanding. I do not invite comment on this question from GCCIX.”

- h. Later on September 9, 2021, the Respondent made the following confirmation by email in answer to the Emergency Arbitrator’s question:

“Your understanding is correct. ICANN is seeking an order striking the identified allegations and annexes from Claimant’s IRP Request and removing mention of them from the record, unless and until the full IRP Panel is requested to and then orders otherwise. Although the full IRP Panel is not required under the Bylaws, the Interim Supplementary Procedures, or the ICDR Rules to review such an order from the Emergency Panelist, the Claimant could seek such relief from the IRP Panel.”

- i. The Claimant filed its Rejoinder on September 20, 2021.
- j. Following an enquiry from the Emergency Arbitrator, the Parties stipulated (their emails of September 27, 2021) that they wished to have an oral hearing.
- k. On October 10, 2021, the Emergency Arbitrator indicated to the Parties, by email, the following for the purpose of the oral hearing:

“My topics of interest for the hearing are as follows:

A. Subsequent Review of any Emergency Arbitrator Ruling

GCCIX says (para. 3 of the Rejoinder) that “ICANN has asked that the Emergency Arbitrator violate the Bylaws by ordering that the entire

record of this motion be forever hidden from public view". GCCIX also says (para. 10 of the Rejoinder) that "GCCIX's hardship would be the dismissal of a core claim in this IRP." These are examples of overstatement. The position ICANN expressly took in answer to the question I posed it by email on September 9 is the one I am taking to be applicable. ICANN expressly accepted the principle that the IRP Panel, in due course, would be in a position, if requested to do so, to determine otherwise. I am taking it that while ICANN's position is that it wishes certain matters not to emerge onto the formal record of the IRP, or into the public domain, nonetheless it accepts that this position is one which is reviewable. As our time at the hearing will necessarily be limited, I want to pre-empt arguments about matters which are not actually of assistance. I place particular value on coldly expressed submissions thoroughly rooted in a fair and balanced reading of the actual record.

What is of present pertinence is how exactly any subsequent review by the IRP might work. For the sake of present argument only, assume that ICANN were to obtain the interim relief it seeks from me as emergency arbitrator; how exactly would any review of that decision work before the IRP Panel? My reason for asking is that this type of process (i.e. something akin to a review of privileged material by someone other than the designated trial judge in a litigation process – and I do not want to be drawn into pedantry about which jurisdiction I have in mind) is not entirely straightforward in the arbitral context. If arbitrators are called upon to see material which is said to be privileged, or otherwise protected from being seen by some legal doctrine or other, then how are they supposed to "unsee" or completely forget what they have seen if they rule that the material is legally protected from view? Given the specific nature of the emergency remedy sought in this matter, it is important that I know how any subsequent process might actually work. I consider this to be both a practical and relevant factor. Its importance should be obvious, but lest there be doubt, the point's relevance can be stated as follows: if the emergency order is granted, it is important that there is a meaningful and workable process before the IRP to permit the review in full. The point is also relevant in the other direction – what if the emergency order is declined and the IRP Panel sees material which it might ultimately find that it should not see; how would a review meaningfully function in that circumstance.

B. Applicable rules/bylaws

The submissions appear to engage in a debate as to the applicable procedural and/or substantive rules/bylaws. The Parties should focus very precisely, in oral argument, as to what are the applicable procedural and/or substantive rules/bylaws, and why.

C. Precedent

Is there anything of assistance in international arbitral literature to show that an order such as the one sought by ICANN has been sought and

obtained in the past, or discussed in an academic context. Municipal (i.e. national court judgments concerning litigation) authorities would not be persuasive as they involve highly specific sets of procedures rooted in the authority of a court system. If the Parties cannot find anything, then that can be stated.

These points, in addition to whatever the Parties wish to say at hearing, are those which I ask to be discussed with some attention.”

1. The oral hearing took place on October 20, 2021, by Zoom.³
- m. On November 22, 2021, the Parties filed the finalised transcript of the hearing with the Emergency Arbitrator.
- n. On December 1, 2021, the Parties filed their submissions on costs.

Interim Relief Sought

3. The Respondent’s Reply sets out, precisely, the interim relief it is seeking from the Emergency Arbitrator:

“6. ICANN is seeking two forms of interim relief from the Emergency Panelist. One, ICANN is requesting that the Emergency Panelist issue an order striking the portions of pages 3, 15–17, 18, 19, and 26 of Claimants IRP Request that refer to the parties’ confidential CEP as well as annexes 11 through 13 to Claimant’s IRP Request. In response to the Emergency Panelist’s question regarding the mechanics of such relief, the Emergency Panelist can award this relief by ordering Claimant to submit an amended IRP Request that excludes the stricken allegations within thirty days of the Emergency Panelist’s order. Second, ICANN is requesting that the Emergency Panelist order the ICDR to remove from the record Claimant’s original IRP Request with the inadmissible allegations and annexes, as well as the briefing and order on this Application to Strike, to avoid the IRP Panel inadvertently reviewing the stricken allegations as it reviews the record. If, however, the Emergency Panelist’s order does not include references to the substance of the stricken allegations and annexes, ICANN would have no objection to the Emergency Panelist’s order remaining part of the record.”

4. Accompanying the Reply was an exhibit, Annex A, which contained a copy of the Claimant’s Request and the Respondent identified, with yellow highlighting, the text to which it wished to be “stricken”.

Power to order emergency interim measures

5. Art. 7(4) of the ICDR Rules provides as follows:

“The emergency arbitrator shall have the power to order or award any interim or conservatory measures that the emergency arbitrator deems necessary,

³ The Emergency Arbitrator notes, simply in passing, that the Respondent sought permission to file an application in connection with its deadline for the filing of the Answer in the underlying arbitration. Such permission was denied by the Emergency Arbitrator on October 20, 2021, as that matter fell outside the boundaries of the process before him.

including injunctive relief and measures for the protection or conservation of property. Any such measures may take the form of an interim award or an order. The emergency arbitrator shall give reasons in either case. The emergency arbitrator may modify or vacate the interim award or order. Any interim award or order shall have the same effect as an interim measure made pursuant to Article 27 and shall be binding on the parties when rendered. The parties shall undertake to comply with such an interim award or order without delay.”

6. Art. 10 of the Interim Supplementary Procedures provides, in relevant part:

“Interim relief may only be provided if the EMERGENCY PANELIST determines that the Claimant has established all of the following factors:

- (i) A harm for which there will be no adequate remedy in the absence of such relief;
- (ii) Either: (A) likelihood of success on the merits; or (B) sufficiently serious questions related to the merits; and
- (iii) A balance of hardships tipping decidedly toward the party seeking relief.”

Discussion & Analysis

7. The background to this matter is that in 2012 the Claimant applied to the Respondent to operate the proposed gTLD, namely, “.GCC”. The Emergency Arbitrator does not consider it necessary for present purposes to record in detail the chronology of that application thereafter. What is of relevance is one aspect, namely, something called the Cooperative Engagement Process (“CEP”). What that actually means in the present context is the crux of the interim measures application.
8. In February 2014 the Claimant requested the Respondent to engage in a CEP concerning the application for .GCC. The Respondent’s Bylaws (as of 7 February 2014) stated as follows, in relevant part (Art. IV, s. 3(14)-(17)):

“14. Prior to initiating a request for independent review, the complainant is urged to enter into a period of cooperative engagement with ICANN for the purpose of resolving or narrowing the issues that are contemplated to be brought to the IRP. The cooperative engagement process is published on ICANN.org and is incorporated into this Section 3 of the Bylaws.

15. Upon the filing of a request for an independent review, the parties are urged to participate in a conciliation period for the purpose of narrowing the issues that are stated within the request for independent review. A conciliator will be appointed from the members of the omnibus standing panel by the Chair of that panel. The conciliator shall not be eligible to serve as one of the panelists presiding over that particular IRP. The Chair of the standing panel may deem conciliation unnecessary if cooperative engagement sufficiently narrowed the issues remaining in the independent review.

16. Cooperative engagement and conciliation are both voluntary. However, if the party requesting the independent review does not participate in good faith in the cooperative engagement and the conciliation processes, if applicable, and ICANN is the prevailing party in the request for independent review, the IRP

Panel must award to ICANN all reasonable fees and costs incurred by ICANN in the proceeding, including legal fees.

17. All matters discussed during the cooperative engagement and conciliation phases are to remain confidential and not subject to discovery or as evidence for any purpose within the IRP, and are without prejudice to either party.”

9. In October 2016 the Respondent’s Bylaws changed insofar as CEPs were concerned and thereafter provided as follows, in relevant part (Art. IV, s4(3)(e)):

“(e) Cooperative Engagement Process

(i) Except for Claims brought by the EC in accordance with this Section 4.3 and Section 4.2 of Annex D, prior to the filing of a Claim, the parties are strongly encouraged to participate in a non-binding Cooperative Engagement Process (“CEP”) for the purpose of attempting to resolve and/or narrow the Dispute. CEPs shall be conducted pursuant to the CEP Rules to be developed with community involvement, adopted by the Board, and as amended from time to time.

(ii) The CEP is voluntary. However, except for Claims brought by the EC in accordance with this Section 4.3 and Section 4.2 of Annex D, if the Claimant does not participate in good faith in the CEP and ICANN is the prevailing party in the IRP, the IRP Panel shall award to ICANN all reasonable fees and costs incurred by ICANN in the IRP, including legal fees.

(iii) Either party may terminate the CEP efforts if that party: (A) concludes in good faith that further efforts are unlikely to produce agreement; or (B) requests the inclusion of an independent dispute resolution facilitator (“IRP Mediator”) after at least one CEP meeting.”

10. The current Bylaws of the Respondent (November 2019) made no change to the foregoing.

11. The issue which divides the Parties is simply expressed: do the Bylaws which were in place at the time the CEP was instigated (*i.e.* the 2014 Bylaws with the wide confidentiality provision) apply to that CEP for all time and for all purposes, particularly for this IRP, notwithstanding any changes which were subsequently made (*i.e.* the 2016 Bylaws make no express reference to confidentiality).

12. This issue is not easily answered, and insinuation or argument to say that it is clearly in favour of one side or the other is not persuasive. While the Emergency Arbitrator might go through all the substantive arguments in either direction as presented by the Parties and subject them to detailed scrutiny, he does not consider that to be of assistance, whether for present purposes or indeed for the subsequent proceedings before the yet-to-be-constituted tribunal. In the latter regard, the Emergency Arbitrator considers that any view he might express, one way or the other, will likely be latched on by the Party that might perceive it to be to its benefit on the merits. That would be both tedious (for the tribunal) and unmeritorious (as a matter of practice). The issue is one which is to be

decided, finally, by the tribunal in due course according to the procedure and manner it shall determine and to the extent necessary.

13. For present purposes, the Interim Supplementary Procedures require a showing there is a sufficiently serious question related to the merits. An applicant does not have to show, in addition, a likelihood of success on the merits. The Emergency Arbitrator, for the reasons set out in the foregoing paragraph, chooses not to examine whether the Respondent has a likelihood of success on the merits of the issue. Rather, the Emergency Arbitrator considers it to be of more relevant assistance to assess whether the issue is sufficiently serious in relation to the merits.
14. The question answers itself: the issue is sufficiently serious and does engage with the merits of the case. The Claimant wishes to advance a series of allegations and claims (putting it most obliquely and without any intimation as to what such allegations and claims are⁴) against the Respondent arising from the CEP. The Respondent says⁵ that the confidentiality provision in the 2014 Bylaws precludes the Claimant from delving into the CEP before the tribunal for the purposes of the IRP. The Claimant contests this stance. The merits of the Claimant's case insofar as it concerns the CEP must, therefore, engage with the issue and it is plainly a matter of seriousness in that regard.
15. The Emergency Arbitrator, therefore, considers that factor (ii)(B) of the Interim Supplementary Procedures is established for present purposes.
16. Turning to factor (i) of the Interim Supplementary Procedures, namely, a "harm for which there will be no adequate remedy in the absence of such relief", the Emergency Arbitrator considers this to be established. This is not a complex question in the present matter as it stands to obvious and logical reason that if the tribunal were to see materials which were later to be found to have had a confidential or an "off the record"⁶ nature, then it cannot "unsee" such materials. No remedy conceptually exists which can expunge, for all purposes, from the minds of tribunal members that which they have seen which they should not have seen. While, of course, there is always the practical risk of an arbitrator seeing something by accident, or a privileged (for example) document making its way onto the record of a case, the present situation is well removed from that sort of occurrence. Here there is a serious dispute between the Parties about the consequence for the CEP process of the iteration of the Respondent's Bylaws in connection with confidentiality. Whether as a matter of threshold principle the tribunal should, or should not see some or all of the contents of the CEP process, is a matter of dispute to be resolved. It stands to reason that resolution, finally, of that threshold principle is a necessary predicate for whether the tribunal sees, or not, the contents of the CEP process. This is not simply a question of admissibility of evidence, and the Claimant's arguments to that effect are not persuasive.

⁴ The Emergency Arbitrator notes that the Claimant made various arguments before him about the nature, content and consequences of the CEP. It would not be appropriate to record these in this Order as that would defeat the purpose of the interim relief.

⁵ The Respondent also makes various arguments concerning the evolution (ongoing) of something called the CEP Rules, and also invokes municipal legal principles.

⁶ For the avoidance of doubt, and also the avoidance of the risk of later arrant pedantry, this phrase is one of the Emergency Arbitrator's making and seeks to connote a general intent that material is shielded by applicable rules or law from later emergence into an adjudicative process.

17. The third factor required by the Interim Supplementary Procedures, namely, a “balance of hardships tipping decidedly toward the party seeking relief”, is also established. There are two aspects to this factor which the Emergency Arbitrator considers to be of relevance.
18. First, there is the unambiguous confirmation from the Respondent that it solely wishes to protect its position on the CEP process pending a full argument before the tribunal (to the extent that the Claimant wishes to press the matter in due course, as is its right to do following any emergency arbitrator order). The Respondent was expressly questioned (see above) by the Emergency Arbitrator in this regard and it could not have been clearer that no final determination, for all time, was either sought or capable of being sought within the ambit of this emergency process.
19. The Claimant suffers no hardship in any real sense in this regard, save that it will, if it chooses to, have to fight out the serious question on the threshold issue before the tribunal in due course. There is no final determination or issue estoppel binding it in that regard by this Order. In passing, the Emergency Arbitrator does note that the Claimant repeatedly insinuated that the Respondent was somehow seeking final relief. No fair reading of the record, particularly in light of the Respondent’s explicit confirmation to the Emergency Arbitrator after the Reply, could reasonably lead anyone to think such a thing. Undaunted, para. 10 of the Rejoinder commences with:

“GCCIX’s hardship would be the dismissal of a core claim in this IRP.”

20. The aforementioned submission or pleading is not just unpersuasive, but decidedly unhelpful.⁷
21. The Emergency Arbitrator is, further, fortified in his view of this aspect of the balance of hardships as the Respondent has made clear, in oral argument (pp. 15-16 of the transcript) that the tribunal may, if it wishes, conduct a *de novo* review of the matter. The Respondent, plainly, is not suggesting that it is going to attempt to shut out the Claimant, *in limine*, from making such appropriate arguments as it sees fit in due course as regards the matters which are the subject of the proceedings before the Emergency Arbitrator. Indeed, any attempt to do so by the Respondent, or insinuation that the Claimant could not argue its case on the consequence, for example, of the Bylaw changes, would be irreconcilable with both the nature of emergency interim relief and the former’s representations to the Emergency Arbitrator. It is up to the tribunal, if called upon in due course, to decide for itself in its own procedural discretion, how it would wish to approach a review of this Order.
22. The second aspect as to whether the balance of hardships tips decidedly in the Respondent’s is, for all intents and purposes, identical to the matter discussed at para. 16 above. In short, if the tribunal sees material at the very outset which it should not

⁷ The Answer makes the following points: “16. ICANN’s Application to Strike requests that the Emergency Arbitrator far exceed any bounds of its jurisdiction under the ICDR Rules 1) by requesting final relief, rather than Interim and Conservatory relief, 2) by requesting that the Emergency Arbitrator give an order that would not be reviewable by the IRP Panel (also referred to as the tribunal under the ICDR Rules), and 3) by requesting that the Emergency Arbitrator make a ruling about the admissibility of evidence that would be binding on the IRP Panel.” These points are not persuasive and are, plainly in light of the Respondent’s unambiguous confirmations, not matters of concern.

see as a matter of the Bylaws (assuming purely for the sake of argument that the Respondent were to prevail in due course on the threshold issue) then it could not “unsee” such material.

23. More generally, the Emergency Arbitrator notes that the interim relief sought by the Respondent is not one encountered before. The Respondent explicitly conceded during oral argument (pp. 17-18 of the transcript) that precedent could not be found. The Claimant makes much of this absence of precedent or authority (*e.g.* in its submissions on costs).
24. The Emergency Arbitrator is not persuaded that the apparent uniqueness of the interim relief sought by the Respondent is a reason, in and of itself, to deny the application. This is an international arbitration and not one enmeshed or subsumed by any municipal legal system which places primacy on citation (even if only tangentially relevant) to prior authority, whatever that might actually mean. The ICDR Rules grant a wide discretion to an emergency arbitrator to fashion appropriate interim relief to meet the wide panoply of circumstances which might arise. While some precedent, particularly in the context of authoritative writing by those both knowledgeable and experienced in international practice, would be of assistance, its absence is not determinative.
25. In summary, and taking all of the foregoing (and all of the Parties’ written and oral arguments) duly into account, the Emergency Arbitrator considers that the Respondent has established its case for interim relief.
26. The appropriate form of the interim relief, so as not to unintentionally defeat its purpose, is as follows:
 - a. The Claimant is directed to file a new Request with the ICDR based on its original Request save that the text which the Respondent has highlighted in yellow as per Annex A to the Reply is to be excised along with the exhibits also identified in highlighted yellow. It is a matter for the Claimant to do so at a time of its choosing.
 - b. The sole documents to be placed on the arbitration “file” to be passed to the tribunal when formed will be the new Request and this Order. The submissions leading to this Order along with the transcript are to be held by the Parties and ICDR only, pending any review by the tribunal.
27. The Emergency Arbitrator’s aforementioned decision to require the Claimant to excise all the text marked in yellow as per Annex A to the Reply is not to be seen as his agreeing or in any way ratifying the Respondent’s arguments that such text is actually confidential or not. The purpose of the decision is an exercise in caution confined solely to the present purpose of interim emergency relief.

Costs

28. Per Art. 7.8 of the ICDR Rules, subject to the tribunal’s authority to finally allocate, all administrative fees and the Emergency Arbitrator compensation shall be borne as incurred.

29. As regards the Parties' own legal costs, the Respondent's position on December 1, 2021, is as follows:

"As to the costs of the Emergency Panelist proceedings (including ICDR administrative costs, if any, and the Emergency Panelist fees), ICANN is already paying for those costs, pursuant to ICANN's Bylaws (Article 4, Section 4.3(r)), as I mentioned in my email below. Therefore, there is no need to allocate costs for these proceedings.

To the extent you are referring to other costs, such as attorneys' fees, ICANN is not presently seeking any costs or attorneys' fees from Claimant with respect to the Emergency Panelist proceedings, even if ICANN is declared the prevailing party in these proceedings."

30. The Claimant seeks an order in its favour for its reasonable attorneys' fees. It did not prevail before the Emergency Arbitrator, and is, therefore, denied its claim for reasonable attorneys' fees.

EMERGENCY ARBITRATOR ORDER

31. The Claimant is directed to file a new Request with the ICDR based on its original Request save that the text which the Respondent has highlighted in yellow as per Annex A to the Reply is to be excised along with the exhibits also identified in highlighted yellow. It is a matter for the Claimant to do so at a time of its choosing.
32. The sole documents to be placed on the arbitration "file" to be passed to the tribunal when formed will be the new Request and this Order. The submissions leading to this Order along with the transcript are to be held by the Parties and ICDR only, pending any review by the tribunal.
33. No order is made at this time in respect of the Respondent's claim for costs and/or attorneys' fees.
34. The Claimant's claim for attorneys' fees is denied.

Place of Arbitration: Los Angeles, CA, USA
 Date: December 8, 2021

Signed: 

 Klaus Reichert SC
 Emergency Arbitrator