

**IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS BEFORE THE
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION**

ICDR Case No. 50 2013 00 1083

DotConnectAfrica Trust,

Claimant,

v.

Internet Corporation for Assigned Names and Numbers,

Respondent.

**DCA'S RESPONSE TO THE PANEL'S QUESTIONS ON PROCEDURAL
ISSUES**

Weil, Gotshal, Manges, LLP
1300 Eye Street, NW, Suite 900
Washington, DC 20005
Tel: +1 202 682 7000
Fax: +1 202 857 0940

Counsel for Claimant

20 May 2014

TABLE OF CONTENTS

| | <u>Page</u> |
|---|-------------|
| I. INTRODUCTION | 1 |
| II. THE IRP PANEL HAS THE DISCRETION TO DETERMINE THAT THE IRP IS FINAL AND BINDING PURSUANT TO THE DOCUMENTS GOVERNING THE PROCESS AND CALIFORNIA LAW (Questions 1-9, 12-16) | 1 |
| A. The IRP Is Final and Binding Pursuant to the Documents Governing the IRP Process (Question 16) | 1 |
| B. ICANN Submitted Itself to the Jurisdiction of the IRP Panel Because Its Bylaws Contain a Standing Offer to Arbitrate Claims (Question 5) | 2 |
| C. As The Sole Process Through Which DCA Can Pursue Its Claims Against ICANN, The IRP Must Be Capable Of Providing A Final and Binding Decision In This Matter (Questions 1-6, 12-15) | 2 |
| 1. The Principle of <i>Contra Proferentem</i> Should Apply to the Terms Governing the IRP Because Section 6 of Module 6 of the Guidebook is an Unenforceable Adhesion Contract (Question 6) | 4 |
| 2. The Panel May Limit the Application of Certain Terms Governing the IRP Because the Agreement to Use the IRP is Procedurally and Substantively Unconscionable (Questions 1-6, 12-15) | 4 |
| III. INTERNATIONAL PRINCIPLES OF DUE PROCESS APPLY TO THE IRP BECAUSE IT WAS DEvised AS A MECHANISM TO HOLD ICANN ACCOUNTABLE IN A GLOBAL CONTEXT (Questions 10-11, 17-19) | 8 |
| A. The Procedures ICANN Argues Should Apply in the IRP Are More Restrictive of DCA’s Procedural Due Process Rights than Other Major Sets of International Arbitration Rules (Questions 17-18) | 8 |
| B. Document Production is Necessary and Appropriate, In Light of the Restrictions on Procedural Due Process Argued for by ICANN (Question 19) | 9 |
| C. Harvard’s Berkman Center Report on ICANN’s Accountability Structure (Question10) | 9 |
| IV. CONCLUSION | 9 |

I. INTRODUCTION

1. DCA hereby provides its responses to the questions posed by the IRP Panel on 12 May 2014.¹

II. THE IRP PANEL HAS THE DISCRETION TO DETERMINE THAT THE IRP IS FINAL AND BINDING PURSUANT TO THE DOCUMENTS GOVERNING THE PROCESS AND CALIFORNIA LAW (Questions 1-9, 12-16)

2. The documents ICANN itself drafted provide the foundation for responding to the Panel's questions.² ICANN selected the ICDR to administer the IRP under *both* the Supplementary Procedures and the ICDR Rules.³ Within this framework, the Panel "may conduct the arbitration in *whatever manner it considers appropriate*, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case."⁴

A. The IRP Is Final and Binding Pursuant to the Documents Governing the IRP Process (Question 16)

3. The IRP Panel's declaration is final and binding according to these governing documents.⁵ ICANN gave the IRP Panel the power to "*declare* whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws"⁶ and provided that the "*declarations*" of the IRP Panel are "*final and have precedential value*."⁷ ICANN is correct that "Section 3 never refers to the IRP panel's declaration as a 'decision' or 'determination,'"⁸ but the Supplementary Procedures—*the procedures that ICANN designed to govern the IRP*—define "**declaration**" as "**decisions/opinions of**

¹ See Questions for the Parties' Representatives to Address in Their Rebuttal Memorials of 20 May 2014 (12 May 2014).

² ICANN created the IRP to provide for "independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws." ICANN Bylaws, § 3(1) [Amended Notice of IRP, Ex. C-10]. The documents which control the proceeding are the ICANN Bylaws, the ICANN Supplementary Procedures for IRP and the ICDR Rules.

³ See ICANN Supplementary Procedures for IRP [Amended Notice of IRP, Exhibit C-3]. The Supplementary Procedures provide that, in the event of a conflict between the Supplementary Procedures and the ICDR Rules, the Supplementary Procedures govern. Where there is no conflict or where the Supplementary Procedures are silent, the ICDR Rules govern. See *id.*, at § 2.

⁴ ICDR Rules, Art. 16 (emphasis added) [Ex. C-M-15]; see also DCA's Submission on Procedural Issues, para. 45 (5 May 2014).

⁵ See DCA's Submission on Procedural Issues, paras. 23-35.

⁶ ICANN Bylaws, Art. IV, § 3(11)(c) [Amended Notice of IRP, Ex. C-10].

⁷ *Id.*, at Art. IV, § 3(21).

⁸ ICANN's Memorandum Regarding Procedural Issues, para. 33.

the IRP PANEL.”⁹ By contrast, ICANN used different terminology to describe the reconsideration process in order to leave no doubt that that process is non-binding, specifying that the Board need not follow Board Governance Committee recommendations.¹⁰

B. ICANN Submitted Itself to the Jurisdiction of the IRP Panel Because Its Bylaws Contain a Standing Offer to Arbitrate Claims (Question 5)

4. ICANN’s Bylaws contain its standing offer to arbitrate disputes concerning Board actions, much as some sovereign States provide a standing offer to arbitrate investment disputes in bilateral or multilateral treaties.¹¹ On 24 October 2013, DCA accepted ICANN’s standing offer to arbitrate by submitting its Notice of Independent Review (the “Notice”) to the ICDR.¹² Thus, this process is consensual.

C. As The Sole Process Through Which DCA Can Pursue Its Claims Against ICANN, The IRP Must Be Capable Of Providing A Final and Binding Decision In This Matter (Questions 1-6, 12-15)

5. The New gTLD Applicant Guidebook (the “Guidebook”) shepherds applicants through the new gTLD application and evaluation process.¹³ Module 6 of the Guidebook contains eight pages of terms and conditions that an applicant “agrees to . . . without modification” by submitting an application for a gTLD, including significant waivers of rights:¹⁴

APPLICANT AGREES *NOT TO CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA*, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION, AND *IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FOR A [SIC]* ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION. . . . PROVIDED, THAT APPLICANT MAY

⁹ ICANN Supplementary Procedures for IRP, § 1 [Amended Notice of IRP, Exhibit C-3]. A decision or opinion connotes finality. *See* BLACK’S LAW DICTIONARY (9th ed. 2009) (defining “opinion” as “[a] court’s written statement explaining its decision in a given case,” and “decision” as “[a] judicial or agency determination after consideration of the facts and the law; esp., a ruling, order, or judgment pronounced by a court when considering or disposing of a case”) [Ex. C-M-24].

¹⁰ *See* ICANN Bylaws, Art. IV, § 2 [Amended Notice of IRP, Ex. C-10]; *see also* DCA’s Submission on Procedural Issues, paras. 33-35 (5 May 2014).

¹¹ *See* ICANN Bylaws, Art. IV, § 3(1), 3(7) [Amended Notice of IRP, Ex. C-10].

¹² DCA Notice of Independent Review (24 Oct. 2013) [Amended Notice of IRP, Ex. C-51].

¹³ *See* ICANN Guidebook (Version 2012-06-04) [Amended Notice of IRP, Ex. C-11].

¹⁴ *Id.*, Module 6.

UTILIZE ANY ACCOUNTABILITY MECHANISM SET FORTH IN ICANN'S BYLAWS FOR PURPOSES OF CHALLENGING ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION.¹⁵

Applicants also forgo the right to recover “any application fees, monies invested in business infrastructure or other startup costs and any and all profits that applicant may expect to realize from the operation of a registry for the TLD.”¹⁶ In exchange for waiving these significant legal rights, Section 6 of Module 6 grants applicants the right to challenge a final decision of ICANN through the accountability mechanisms set forth in ICANN’s Bylaws, including the IRP.¹⁷

6. As a result, the IRP is the *sole forum* in which an applicant for a new gTLD can seek independent, third-party review of Board actions. Remarkably, ICANN makes no reciprocal waivers and instead retains all of its rights against applicants in law and equity. ICANN cannot be correct that the IRP is a mere “corporate accountability mechanism.”¹⁸ Such a result would make ICANN—the caretaker of an immensely important (and valuable) global resource—effectively judgment-proof.

7. It is fundamentally inconsistent with California law, U.S. federal law, and principles of international law for ICANN to require applicants to waive all rights to challenge ICANN in court or any other forum and not provide a substitute accountability mechanism capable of producing a binding remedy.¹⁹ Such one-sided terms imposed on parties signing litigation waivers have been flatly rejected by California courts.²⁰ Where California courts have considered and upheld broad litigation waivers, the

¹⁵ *Id.*, Module 6(6) (emphasis added).

¹⁶ *Id.*

¹⁷ *See id.*

¹⁸ ICANN’s Memorandum Regarding Procedural Issues, para. 19 (5 May 2014). We are not aware of nor has ICANN cited any genuine support for its argument that ICANN would be in violation of California law if the Panel’s decision on whether ICANN acted consistently with its Articles of Incorporation and Bylaws is final and binding on both parties.

¹⁹ California law and United States federal law constitute the law of the seat and form the relevant legal background for matters of procedure in this IRP. The merits of the dispute are governed by ICANN’s Bylaws and Articles of Incorporation, the gTLD Applicant Guidebook, and international and local law, as provided in Article 4 of ICANN’s Articles of Incorporation. *See* DCA’s Submission on Procedural Issues, paras. 2-3 (5 May 2014). In response to the Panel’s **Question 12**, we are not aware of any other case (aside from *ICM v. ICANN*) in which a decision-maker has upheld an arbitration-like proceeding that was non-binding yet foreclosed the claimant from seeking any other remedies.

²⁰ *See, e.g., Little v. Auto Stiegler, Inc.*, 63 P.3d 979, 987 (Cal. 2003) [Ex. C-M-25]; *Saika v. Gold*, 56 Cal. Rptr. 2d 922, 923 (Cal. Ct. App. 1996) [Ex. C-M-26]; *Beynon v. Garden Grove Medical Group*, 161 Cal. Rptr. 146 (Cal. Ct. App. 1980) [Ex. C-M-27].

alternative to court litigation provided by the parties' contract is inevitably a *binding* dispute resolution mechanism.²¹ Thus, in order for this IRP not to be unconscionable, it must be binding.

1. The Principle of *Contra Proferentem* Should Apply to the Terms Governing the IRP Because Section 6 of Module 6 of the Guidebook is an Unenforceable Adhesion Contract (Question 6)

8. Module 6 of the Guidebook is an adhesion contract under California law.²² ICANN, the party that holds all of the power to decide who is awarded gTLDs, drafted Module 6 of the Guidebook to apply to all applicants on a “take it or leave it” basis. When an applicant submits its application, the applicant agrees to be bound by the terms and conditions “*without modification.*”²³ Furthermore, DCA had *no other option* to obtain the rights to .AFRICA but to apply to ICANN and be bound by ICANN's terms, including those governing its right to relief in the IRP—the *only* process through which DCA can pursue its claims against ICANN.

9. California law supports applying the principle of *contra proferentem* to adhesion contracts, particularly in situations such as this where there is a significant imbalance of power between the parties.²⁴ Accordingly, all ambiguities in the documents governing the IRP should be construed against ICANN.

2. The Panel May Limit the Application of Certain Terms Governing the IRP Because the Agreement to Use the IRP is Procedurally and Substantively Unconscionable (Questions 1-6, 12-15)

10. If the Panel were to find that the IRP were a non-binding procedure that wholly replaces any right of applicants to seek redress against ICANN in any other forum, this proceeding would be unconscionable under California law. A contractual clause or agreement is unenforceable under

²¹ See, e.g., *Little v. Auto Stiegler, Inc.*, 63 P.3d 979 [Ex. C-M-25]; *Saika v. Gold*, 56 Cal. Rptr. 2d 922 [Ex. C-M-26]; *Beynon v. Garden Grove Medical Group*, 161 Cal. Rptr. 146 [Ex. C-M-27] (each upholding the arbitration clause, absent the portion providing for appeal).

²² An ‘adhesion contract’ is a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.” *Mance v. Mercedes-Benz USA*, 901 F. Supp. 2d 1147, 1159 (N.D. Cal. 2012) [Ex. C-M-28]; *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 689 (Cal. 2000) [Ex. C-M-29]; see, e.g., *Saika v. Gold*, 56 Cal. Rptr. 2d 922, 925 (Cal. Ct. App. 1996) [C-M-26].

²³ ICANN Guidebook (Version 2012-06-04), Module 6 [Amended Notice of IRP, Ex. C-11].

²⁴ See *Acorn v. Household Int'l, Inc.*, 211 F. Supp. 2d 1160, 1173 (N.D. Cal. 2002) [Ex. C-M-30]; *Lawrence v. Walzer & Gabrielson*, 256 Cal. Rptr. 6 (Cal. Ct. App. 1989) [Ex. C-M-31].

California law if it is both procedurally and substantively unconscionable.²⁵ “California courts apply a ‘sliding scale’ analysis in making this determination . . . the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.”²⁶

11. Procedural unconscionability arises from the manner of negotiation.²⁷ While there is no consensus among California courts that an adhesion contract is *ipso facto* procedurally unconscionable, at a minimum, adhesion contracts notify courts that a contract may be procedurally unconscionable.²⁸ Courts have found that “negotiations” where one party has no real negotiating power—like DCA when it submitted its application for a new gTLD—are oppressive for purposes of procedural unconscionability under California law.²⁹

12. California courts recognize a heightened degree of procedural unconscionability where there is a lack of disclosure of terms to the weaker party or when the weaker party is bound to terms that are subject to change at the discretion of the stronger party.³⁰ As we have argued elsewhere, the language ICANN used in the documents governing the IRP suggests that the IRP Panel’s decision is final and binding on ICANN.³¹ Yet ICANN now denies that the impression it has given applicants is correct. In addition, ICANN reserved all rights to modify its Bylaws at any time during the gTLD application process.³² While ICANN has not modified the IRP process in the Bylaws since DCA filed its

²⁵ See *Pokorny v. Quixtar*, 601 F.3d 987, 996 (9th Cir. 2010) (citing *Davis v. O’Melveny & Myers*, 485 F.3d 1066, 1072 (9th Cir. 2007) [Ex. C-M-32]).

²⁶ *Id.* (quoting *Davis v. O’Melveny & Myers*, 485 F.3d at 1072).

²⁷ See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746, 179 L. Ed. 2d 742 (2011) [Ex. C-M-33]; *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 922 (9th Cir. 2013) [Ex. C-M-34].

²⁸ See *Roman v. Superior Court*, 92 Cal. Rptr. 3d 153, 161 (Cal. Ct. App. 2009) [Ex. C-M-35]; see generally *Mance v. Mercedes-Benz USA*, 901 F. Supp. 2d 1147, 1160 (N.D. Cal. 2012) [Ex. C-M-28]; *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th at 113 [Ex. C-M-29].

²⁹ See, e.g., *Pokorny v. Quixtar, Inc.*, 601 F.3d at 996 (describing the “oppression” element of procedural unconscionability) [Ex. C-M-32].

³⁰ See *Chavarria v. Ralphs Grocery Co.*, 733 F.3d at 923 [Ex. C-M-34].

³¹ See DCA’s Submission on Procedural Issues, paras. 23-35 (5 May 2014).

³² ICANN Bylaws, Art. XIX [Amended Notice of IRP, Ex. C-10].

application, ICANN did modify the IRP proceeding in December 2012, *after* the application period for new gTLDs had opened and closed.³³

13. The terms of the Guidebook are “oppressive” because applicants like DCA have no opportunity to negotiate the terms and conditions. ICANN is uniquely positioned to distribute TLDs, and applicants wishing to operate one have literally no other market to turn to in order to operate a TLD on the public Internet.³⁴ Because all individuals wishing to operate a new gTLD were required to sign an application in 2012 waiving all their legal rights against ICANN, Module 6 is clearly oppressive under California law. Similarly, because ICANN reserves the sole right to modify the terms of that waiver by modifying its IRP procedures under the Bylaws and Supplementary Procedures, applicants signing Module 6 are subject to an element of surprise. Finally, in this case, DCA was subject to surprise because ICANN has argued an interpretation of its IRP rules that contradicts the reasonable reading that IRP procedures will be “final and binding.” Thus, Section 6 of Module 6 and the IRP procedures are procedurally unconscionable.

14. The terms of Section 6 of Module 6 and the IRP as interpreted by ICANN are also substantively unconscionable because the nature of the terms is so unjustifiably one-sided that it “shocks the conscience.”³⁵ Courts determine substantive unconscionability on a case-by-case basis; however, terms which have been found substantively unconscionable include (i) a one-sided obligation that the weaker party utilize alternative dispute resolution, while the stronger party retains all legal rights;³⁶ (ii) a clause

³³ The application period for new gTLDs opened on 12 January 2012, and all applications were required to be submitted by the closing date of 20 April 2012. See “New gTLD Program,” ICANNwiki.com, http://icannwiki.com/index.php/New_gTLD_Program. Meanwhile, ICANN modified its Bylaws on 16 March 2012, 20 December 2012, 11 April 2013 and 7 February 2014. The 20 December 2012 modification resulted in significant changes to the IRP process.

³⁴ Notably, however, the lack of negotiation of Module 6 of the Guidebook could be considered equally oppressive for the purposes of procedural unconscionability under California law, even if there were an alternate provider for TLDs. See *Pokorny v. Quixtar, Inc.*, 601 F.3d at 997 [Ex. C-M-32].

³⁵ *Chavarria v. Ralphs Grocery Co.*, 733 F.3d at 923 [Ex. C-M-34].

³⁶ See *Pokorny v. Quixtar, Inc.*, 601 F.3d at 1001 [Ex. C-M-32]; *Nyulassy v. Lockheed Martin Corp.*, 16 Cal.Rptr.3d at 307 [Ex. C-M-36]; *Little v. Auto Stiegler, Inc.*, 29 Cal. 4th 1064, 63 P.3d 979 (2003) [Ex. C-M-25]; *Saika v. Gold*, 49 Cal. App. 4th 1074, 56 Cal. Rptr. 2d 922 (1996) [C-M-26]; *Beynon v. Garden Grove Medical Group*, 100 Cal.App.3d 698, 161 Cal. Rptr. 146 (1980) [Ex. C-M-27].

which allows the stronger party to unilaterally modify the terms of the arbitration agreement;³⁷ (iii) an obligation that the weaker party initially utilize a non-binding mechanism that provides the stronger party a “free peek” at the weaker party’s evidence;³⁸ (iv) stringent time limits imposed only on the weaker party;³⁹ and (v) an effect that is binding only on the weaker party.⁴⁰ ICANN’s interpretation of the rules governing this proceeding implicates *every single one of these factors*. To highlight a few—

- Applicants surrender all rights to bring suit against ICANN and must utilize the IRP process, whereas ICANN retains all legal rights against applicants;⁴¹
- ICANN reserves the power to unilaterally alter the IRP process;⁴²
- ICANN effectively forces applicants to give ICANN a “peek” at their cases, by imposing fee sanctions on applicants who do not utilize the cooperative engagement process prior to filing an IRP;⁴³
- Strict time limits apply to applicants: applicants must file their case within 30 days of the Board decision they wish to challenge, and according to ICANN, applicants must present their entire case in the IRP in their initial request for an IRP Panel;⁴⁴ and
- The IRP process is binding on applicants, but ICANN argues it is not binding on ICANN.⁴⁵

15. California courts have ruled non-binding arbitration agreements similar to what ICANN claims the IRP is unconscionable.⁴⁶ Under California law, where a court or a tribunal determines that a contract term is unconscionable, the deciding body may (i) refuse to enforce the contract as a whole, (ii) enforce the remainder of the contract without the unconscionable clause or (iii) limit any unconscionable clause

³⁷ See *Pokorny v. Quixtar, Inc.*, 601 F.3d 987, 998 (9th Cir. 2010) [Ex. C-M-32].

³⁸ *Id.*, at 998; *Nyulassy v. Lockheed Martin Corp.*, 16 Cal.Rptr.3d at 307 [Ex. C-M-36].

³⁹ See *Pokorny v. Quixtar, Inc.*, 601 F.3d at 999 [Ex. C-M-32]; *Nyulassy v. Lockheed Martin Corp.*, 16 Cal.Rptr.3d at 307 [Ex. C-M-36].

⁴⁰ See *Little v. Auto Stiegler, Inc.*, 29 Cal. 4th 1064, 63 P.3d 979 (2003) [Ex. C-M-25]; *Saika v. Gold*, 49 Cal. App. 4th 1074, 56 Cal. Rptr. 2d 922 (1996) [Ex. C-M-26]; *Beynon v. Garden Grove Medical Group*, 100 Cal.App.3d 698, 161 Cal. Rptr. 146 (1980) [Ex. C-M-27].

⁴¹ ICANN Guidebook (Version 2012-06-04), Module 6 [Amended Notice of IRP, Ex. C-11].

⁴² ICANN Bylaws, Art. XIX [Amended Notice of IRP, Ex. C-10].

⁴³ *Id.*, Art. IV § 3(16).

⁴⁴ *Id.*, Art. IV § 3(3).

⁴⁵ *Id.*, Art. IV § 3(11) (“The IRP Panel shall have the authority to...summarily dismiss requests brought without standing, lacking in substance, or that are frivolous or vexatious”).

⁴⁶ See, e.g., *Pokorny v. Quixtar, Inc.*, 601 F.3d 987 [Ex. C-M-32].

to avoid an unconscionable result.⁴⁷ The IRP can function as an effective accountability mechanism if this Panel limits the application of the unconscionable terms to avoid an unconscionable result.⁴⁸

III. INTERNATIONAL PRINCIPLES OF DUE PROCESS APPLY TO THE IRP BECAUSE IT WAS DEvised AS A MECHANISM TO HOLD ICANN ACCOUNTABLE IN A GLOBAL CONTEXT (Questions 10-11, 17-19)

16. Pursuant to general principles of international law, DCA has a right to view and rebut the evidence presented by ICANN against it.⁴⁹ These same principles give tribunals great latitude to structure a procedure in order to establish the truth of a case.⁵⁰ Pursuant to ICANN's Articles of Incorporation, the ICANN IRP proceeding must accord with these general principles.⁵¹

A. The Procedures ICANN Argues Should Apply in the IRP Are More Restrictive of DCA's Procedural Due Process Rights than Other Major Sets of International Arbitration Rules (Questions 17-18)

17. More specifically, the Bylaws indicate that ICANN must respect fundamental principles of fairness.⁵² According to ICANN's interpretation, it has crafted the IRP so as to deprive claimants of common procedural rights. For example, no other major set of international arbitration rules requires a claimant to submit all evidence supporting its claim with the initial filing.⁵³ None of the other major sets of international arbitration rules preclude live testimony or cross-examination of witnesses.⁵⁴

⁴⁷ See Cal. Civil Code Sec. 1670.5. Section 1670.5 of the California Civil Code gives tribunals the authority to examine whether an arbitration or other alternative dispute resolution clause is unconscionable pursuant to California law, just as it provides the authority to examine the unconscionability of any other contract clause [Ex. C-M-37]. See also, *Chavarria v. Ralphs Grocery Co.*, 733 F.3d at 919 (holding that *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), does not prevent California courts from applying section 1670.5 of the California Code to determine the unconscionability of arbitration agreements) [Ex. C-M-34].

⁴⁸ DCA's position is consistent with the general preference of courts to read the contract so as to exclude the unconscionable portion, unless doing so would achieve an unconscionable result or unless doing so is impossible given the prevalence of substantive and procedural unconscionability throughout the entire contract. See, e.g., *Little v. Auto Stiegler, Inc.*, 63 P.3d 979, 987 (Cal. 2003) [Ex. C-M-25]; *Saika v. Gold*, 56 Cal. Rptr. 2d 922, 923 (Cal. Ct. App. 1996) [Ex. C-M-26]. California courts will invalidate the entire arbitration agreement if two conditions are satisfied: (i) there are multiple unlawful provisions and (ii) the unconscionability is so rampant that there is no way for the court to remove the unconscionable "taint" from the agreement. *Armenariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 124 (Cal. 2000) [Ex. C-M-29].

⁴⁹ According to the principle of *audi alteram partem*, "whenever there is such new evidence, alteration of the legal basis of the claim or amendment of the original submission, the other party is always assured of an opportunity to reply thereto, or comment thereon." Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, 295 (2006) [Ex. C-M-38].

⁵⁰ See *id.*

⁵¹ See ICANN Articles of Incorporation, Art. 4 [Amended Notice of IRP, Ex. C-9].

⁵² See ICANN Bylaws, Art. I § 2 [Amended Notice of IRP, Ex. C-10].

⁵³ See ICDR Rules, Art. 2(2), (3)(e) [Ex. C-M-15]; International Chamber of Commerce Arbitration Rules [hereinafter, ICC Rules], Art. 4(3)(c) [Ex. C-M-39]; the United Nations Commission on International Trade Law Arbitration Rules [hereinafter, the UNCITRAL

18. ICANN, however, is asking this Panel, to conduct a one-sided process that—if we accept ICANN’s interpretation of the terms of the IRP—severely limits DCA’s opportunity to gather evidence, test the evidence presented against it and present its case.⁵⁵

B. Document Production is Necessary and Appropriate, In Light of the Restrictions on Procedural Due Process Argued for by ICANN (Question 19)

19. The IRP Panel has the authority to order the production of documents in these proceedings, and DCA respectfully requests that it do so.⁵⁶ ICANN seeks a decision on the merits with the deck stacked against DCA, even relying on documents it has not provided. While DCA agrees that these proceedings should be expedited, they should not be a one-sided process.

C. Harvard’s Berkman Center Report on ICANN’s Accountability Structure (Question 10)

20. The Berkman Center has made available some of the materials it used in preparing its report on its website.⁵⁷ The Panel may wish to consult, *inter alia*, Professor Jack Goldsmith’s reflections on the IRP process based on his knowledge of the *ICM* case,⁵⁸ and the history of the new gTLD process.⁵⁹

IV. CONCLUSION

21. Based on the foregoing, DCA respectfully requests that the Panel issue a procedural order declaring that—

Rules], Art. 3(3)(e)(f) [Ex. C-M-40]; JAMS Comprehensive Arbitration Rules & Procedures, Rule 9(a)-(b) (1 Oct. 2010) [Ex. C-M-41]. Although the UNCITRAL Rules permit a claimant to submit its written submission and all supporting evidence with its notice, the rules do not require it. UNCITRAL Rules, Art. 20(1), (4) [Ex. C-M-40].

⁵⁴ See ICC Rules, Art. 25(3), (5) [Ex. C-M-39]; UNCITRAL Rules, Arts. 17(3), 28(2) [Ex. C-M-40]; JAMS Comprehensive Arbitration Rules & Procedures, Rules 21-22 (1 Oct. 2010) [Ex. C-M-41].

⁵⁵ We note here in response to the Panel’s **Question 11** that, even in advisory proceedings such as those before the International Court of Justice, interested parties are provided an opportunity to make submissions. Similarly, arbitral tribunals increasingly permit submissions by third parties who may have an interest in the outcome of a dispute, and UNCITRAL has recently promulgated rules on transparency in investor-State arbitration encouraging this practice, among others. See UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (effective as of 1 April 2014), available at <http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf> (accessed 19 May 2014).

⁵⁶ See DCA’s Submission on Procedural Issues, paras. 67-68 (5 May 2014).

⁵⁷ See <http://cyber.law.harvard.edu/pubrelease/icann/> (accessed 19 May 2014).

⁵⁸ <http://cyber.law.harvard.edu/pubrelease/icann/pdfs/Jack%20Goldsmith%20on%20ICANN-final.pdf> (noting, among other things, that the IRP process is flawed, but permits fully developed hearings with cross-examination of witnesses, particularly where the facts are complex and the stakes high) (accessed 19 May 2014).

⁵⁹ http://cyber.law.harvard.edu/pubrelease/icann/pdfs/AppendixC_gTLDs.pdf (accessed 19 May 2014).

- The Panel has the authority to strike out any unconscionable element of the IRP framework imposed by ICANN;
- Each party shall have the opportunity to request documents from the other, and to seek an order from the Panel compelling production of documents if necessary;
- Each party shall have the opportunity to submit one additional written pleading on the merits of this dispute;
- There will be a hearing on the merits conducted by videoconference; and
- The Panel retains the discretion to examine witnesses at the hearing.

Respectfully submitted,



Arif H. Ali
Marguerite C. Walter
Erica Franzetti
Erin K. Yates
Meredith Craven

Weil, Gotshal & Manges LLP
1300 Eye Street NW, Suite 900
Washington, DC 20005-3314
+1 202 682 7000 (tel.)
+1 202 857 0940 (fax)
Counsel for Claimant