

CZECH ARBITRATION COURT'S COMMENTS ON URS

GENERAL COMMENTS

1. As stressed out by other UDRP providers during the Prague ICANN meeting, the suggested fees are extremely low and meeting the original fee target (or, at least, staying close to it) would require that the URS would constitute much simpler process than UDRP as to both administrative and substantive point of view. The current draft of URS, unfortunately, is right the opposite. The providers are required to certain actions within hours regardless of whether a business or non-business day is concerned, requiring them to operate a 24/7 business. Moreover, they are not relieved in other respects either which would enable them to reduce their costs (like dropping the necessity to deliver hardcopy of major notices). In addition, there are honestly many blind spots in the current URS draft requiring the providers to create many internal rules. There are several specific tips reducing the demands on providers in the text herein under.
2. The same applies to the work of the examiners. If ICANN wishes to keep the high level of determinations and reduce the fee at the same time there should be substantially less work in URS than there is in UDRP. However, though the URS draft tries to give more specific rules for URS than there are in UDRP, it still keeps a lot of space for interpretation of the rules, so it can be expected that the task of a URS examiner will be very similar to that of a UDRP panelist, while at the same time it will be much less financially appreciated and the consequences of an unqualified decisions more severe for the parties.
3. The Czech Arbitration Court has a lot of experience related to finding ways how to reduce costs in UDRP proceedings. In 2010 it introduced a system within it where the fee is relatively low (though not as low as the current URS draft aims at) in simple proceedings where no response is filed. In case where there is no response and the panel does not find the proceedings too complex at the same time, it is entitled to issue a decision which summarizes the key arguments only (though it should be stressed out that such decision must still contain sufficient reasoning). However, if the response is filed or there is any substantial or administrative complication, the panel shall require an additional fee (which in practice occurs in app. 20 % of cases). This is probably the main issue barring the URS from taking inspiration from other simplified low costs procedures – the URS currently has no tool which would reimburse the providers or examiners of the costs and time spent on cases which turn out to be complicated and therefore costly.

GENERAL RECOMMENDATIONS

1. To lower the burden on both providers and examiners, we recommend the system to be financially supported by ICANN. Alternatively (or additionally), ICANN could provide different kind of help. The CAC's experience has shown that the key element is to develop software that can make both administration and decision-making processes more efficient. However, development and implementation of such a system is probably the most costs-demanding part of the preparation

processes. If the software would be developed by ICANN and all providers could simply use it (without the necessity of paying for the IT support) it would lower their costs to a huge extent.

2. Notwithstanding the above, having unified forms and processes for URS would also be helpful. On the examiners' part, it is recommended to facilitate their task as much as possible (while not shifting more responsibilities at providers at the same time). They should have the minimum of documents to study (in this way reducing the word limit is a good step) and the "determination" itself should (if possible) constitute a short form. A determination in a simple form of tick-boxes should be considered.

SPECIFIC RECOMMENDATIONS

1. The deadlines should be counted in working days otherwise the operation of the process would be too costly for the providers due to human resources. Also, the 24 hour deadline in Art. 4.1 for the registry operator to lock the domain name is probably too demanding.
2. It should be reconsidered if the providers should indeed be required to provide hardcopy and fax notifications. Out of the CAC's UDRP experience, fax numbers provided in whois almost never work and most paper notifications return undelivered.
3. The word limit for complaint is unclear. There is only a limit of 500 words for the explanatory free form text but no express limit for the statement of grounds. The overall word limit for the complaint should be the same as for the response (2 500 words).
4. Language of proceedings is not dealt with by the current draft at all. This is, however an important question. Applying the UDRP rule that the language shall be the language of the registration agreement is impractical for URS as there is no possibility for amending the complaint if filed in an improper language. At the same time, there is no reliable way how to verify the language of the registration agreement (unless there will be an obligation to publish this entry in the whois).
5. It is unclear if the provider shall review the complaint only after receipt of the fees or simply as soon as it receives the complaint (Articles 2.1 and 3.2).
6. Article 4.2 – a notice shall be sent to the respondent in the predominant language of the respondent's country – ICANN could facilitate this step for the providers by creating a list of countries and languages and, preferably, by providing templates of notices for each language.
7. Article 4.4 – the provider shall notify the registrar via the addresses it has on file with ICANN. If one searches ICANN Internic it is possible to find about 10 addresses for each registrar which again increases the administrative burden. ICANN should provide (and update) a list in which registrar would only have one e-mail address.
8. Fees should be calculated depending on the number of domains as there is in fact more work for both the provider and the examiner if there are multiple domains. To say the least, each domain

might be registered with another registry operator and with another registrar. In addition, no doubt that the examiner will have to consider each domain name independently (at least to a certain extent).

9. There seems to be different number of domain names subject to response fee in Art. 2.2 (15) and Art. 5.2 (26). It is unclear if with the response filed more than 30 days after deadline and concerning more than 26 domains the response fee will be charged twice or just once.
10. The task of the examiner seems to be too demanding. Based on Art. 5.2 if the response is late but filed within 30 days of determination it is not subject to fee. So the examiner might be required to decide the case twice for one fee (and very low one) only. This is rather unfair. The examiner should receive another fee in any case where he/she has to re-determine the case.
11. It is unclear if the response shall (or can be) considered if the response fee is not paid.
12. The registrant is prohibited to change the content of the site during the default period (Art. 6.4). It is unclear how this shall be ensured and if there will be any consequences of breaching this rule.
13. Art. 6.4 enables a de novo review if the response is filed up to 6 months (or up to 12 months if the term is prolonged) of the notice of default. With such long timeframes, the rules should address the possible problem of unavailability of the original examiner.
14. The training and certification of the examiners (Art. 7.2) could be provided by ICANN so that the providers are not required to do it themselves.
15. Articles 11.2 and 11.6 barring from URS parties who filed 2 abusive complaints or one deliberate material falsehood and requiring the providers to develop a process of tracking such parties seem to be an extreme burden for the providers. Considering that there will probably be multiple providers, it is recommendable that this process should in fact be developed by ICANN. Besides, it is unclear what shall happen if such party is not tracked and obtains a remedy in another URS.
16. There seem to be a lot of blind spots regarding the appeal process – for instance shall the domain be locked during the appeal process? how many members shall the panel have? can the examiner who issued the original determination be the member of the appeal panel? Generally speaking, it is questionable if the providers shall be given the discretion to adopt further rules and procedures (Art. 12.7) as there will be a space for forum shopping.
17. The appeal fee shall be sufficiently high as the appeal process shall be a matter of exception.
18. Art. 14 speaks of the statistical information. ICANN should probably specify in advance what data exactly it wishes to be followed by the providers.