

# Membership Corporations and Dispute Resolution

- Members of a California Public Benefits Corporation have the right to enforce:
  - Powers specifically granted to the members in the Bylaws, e.g., Board/member spill, budget/strat plan rejection, approval/rejection of Bylaws amendments
  - Fiduciary/Public Benefit obligations of the directors and staff
    - Failure to act in furtherance of the purpose for which the corporation was formed
      - Stated public benefit is preserving stability, security, resiliency by coordinating unique identifiers to the extent coordination is needed/beneficial
    - Breach of fiduciary duties
    - Misappropriation of trust assets

Members do not have the right to enforce other bylaws provisions unless those rights are explicitly granted – e.g., community IRP

# Can a California Public Benefit Corporation Specify the Forum for Dispute Resolution

- Yes!
- Bylaws act as contracts between the corporation and its members
- Courts respect forum specification/ mandatory arbitration requirements in Bylaws except in very rare cases
  - e.g., unilateral bylaws amendment to affect ongoing disputes, unfair burdens depriving members of enforcement rights
- Bylaws provisions may further specify the circumstances under which a claim can be brought
  - e.g., “Community IRP” only with agreement of specified percentage of members, supermajority, etc.
  - No IRP unless the objecting members have participated in the decision to which they are objecting
  - Bond for vexations/abusive claims

## Will California Courts Defer to IRP Decisions?

- Yes, unless the arbitral decision deprives a member of due process or a fundamental right to be heard, courts in California defer to the outcome of binding arbitrations
  - Even in employment agreements
  - Severing unconscionable provisions rather than rejecting the entire arrangement
- Parties to an arbitration can seek the assistance of a California court in enforcing (but not overturning) an arbitral decision

## So, Can we Avoid Having a California Court Resolve Substantive Disputes with ICANN's Members?

- Yes.
- Members rights to sue are limited in any case.
- The Bylaws may further limit derivative disputes so long as statutory rights are protected
  - fiduciary duty, public benefit, misappropriation of trust assets
- The Bylaws may specify the forum in which these claims are brought so long as members have a meaningful right to be heard
  - i.e., through the IRP
- The Bylaws may specify the circumstances under which disputes can be lodged
  - e.g., participation, supermajority, directly affected member agrees, etc.

## The Fine Print

- These are high level conclusions
- This reflects my conversation with Sidley lawyers (Josh and Ed) last night, so it's not in writing
- Their answers do, however, confirm my own legal research on the subject
- Of course, care will be needed to get the details right - devil's in the details, etc.
- We should probably have some stress tests directly on these issues