



One Firm WorldwideSM

MEMORANDUM

TO: CCWG Counsel

FROM: Jones Day

DATE: October 7, 2015

RE: Enforceability of Binding Community Arbitration

There is broad agreement that the mechanisms that are put in place to enhance ICANN's accountability must be enforceable. ICANN has proposed binding arbitration as the path to enforcing the community powers the CCWG has identified as necessary to achieve accountability, discussed as the "MEM proposal". The MEM, or binding arbitration, is a simple enforcement mechanism, based in the IRP and ICANN's existing governance structure, meets NTIA criteria, and does not implicate the concerns that Board members and others have raised as to both capture and the accountability (or lack thereof) of persons who would form the Member in the Sole Member Model.

We are disappointed that confusion persists surrounding the legal viability or enforceability of the Board's proposed binding arbitration process. This confusion was reinforced by CCWG Counsel's latest comments to the CCWG, where CCWG Counsel stated that the Board's proposal is "complex" and its enforceability "murky." We were very surprised to see these statements because CCWG Counsel already has acknowledged that binding arbitration is legally viable.

First, to be clear, the concept of using binding arbitration to enforce certain rights is not new, either within or outside of ICANN. For example, ICANN's standard contracts with registrars and registries call for resolution of contractual disputes, and the enforceability of an arbitration award has never been questioned. Indeed, CCWG Counsel has stated that "of course it's true that binding arbitration is binding." [06-10-15 CCWG Call Tr. Pg. 65.]

Second, extending the binding arbitration process to decisions of the Board is neither new nor novel. Indeed, early on, CCWG Counsel raised this idea and stated that it was perfectly plausible, as CCWG Counsel confirmed in our recent discussions. [See also 10-04-15 Legal Assessment: Proposed Accountability Mechanisms Preliminary Response to Legal Sub-team Templates identified in Memorandum Ref CCWG/SA/002, Pg. 38.]

Indeed, we want to be very clear that CCWG Counsel has never actually said that the binding arbitration process proposed by the Board is unenforceable, nor has CCWG Counsel ever articulated a legal basis for explaining any such legal concerns, either during the extensive

discussions that CCWG Counsel has had with Jones Day as well as ICANN's in-house counsel, or in the written materials that CCWG Counsel has provided to the CCWG or ICANN.

Third, we all agree that in order to enforce an arbitration award, the moving party must have legal personhood. But contrary to CCWG Counsel's recent statements, there exists no "uncertainty" surrounding how the MEM Issue Group can achieve legal personhood. As we have said on multiple occasions, there are multiple ways of creating legal personhood in the Supporting Organizations and Advisory Committees, and so the notion that this is "murky" is incorrect. Specifically, under the Board's Proposal, the decision could be enforced by an unincorporated association comprised of: (i) an individual participating SO/AC or some grouping of participating SOs/ACs; (ii) the members of multiple participating SOs/ACs; or (iii) chairs of multiple participating SOs/ACs. In the alternative, the individual (natural) people serving as chairs of the participating SOs/ACs could enforce the award in an individual capacity. Inasmuch as ICANN has agreed to indemnify the binding arbitration claimant, there is no conceivable justification – and CCWG Counsel has not articulated any legal basis – to oppose the concept.

Fourth, CCWG Counsel has suggested – albeit without explanation – that a decision rendered by the Standing Panel may not be enforced in court if ICANN refused to participate in the binding arbitration proceeding. As an initial matter, it is unlikely that ICANN would refuse to participate in the binding arbitration proceeding. But in all events, CCWG Counsel's concerns are unfounded. When an arbitration agreement explicitly allows *ex parte* proceedings, a court will enforce an arbitration award against a party who refused to appear in the arbitration. As such, ICANN can simply amend its Bylaws to allow *ex parte* arbitration proceedings in conjunction with the binding arbitration, and in the unlikely event that ICANN refuses to participate in the binding arbitration, the arbitration would still take place and, if the claimant is successful, ICANN would suffer the equivalent of a default judgment against it. A court could then enforce the arbitration award even if ICANN refused to participate in the binding arbitration proceedings.

Finally, CCWG Counsel has stated that it is "uncertain" if the MEM Issue Group can "come into existence early enough" to enforce a binding arbitration award. However, capacity to sue is assessed at the time the complaint is filed. There is no requirement that an unincorporated association exist at the time the acts complained of in the binding arbitration occurred.

In sum, we believe that the Board's proposed binding arbitration process is fully enforceable, there is no legal basis for the Board to ignore or resist the results of a binding arbitration award, and that it remains a viable option for the community to consider. We would ask that, if CCWG Counsel disagree, they do so in concrete terms rather than language that reflects "concern."