

Enforceability of Community Designated Powers

Perhaps the one area of reform, proposed by the CCWG, around which there has been the most discussion is the structural mechanism used to ensure that powers designated to the community are enforceable. Two mechanisms have been proposed: a membership structure and a designator structure and both require a more formalized relationship between the community (via their SOs and ACs) and ICANN the corporation. While the legitimacy of the membership model lies in California not for profit law and rights afforded members of organizations and the designator model relies on contract law, ultimate enforcement of designated powers rests with the California courts.

It stands to reason that if the community is meant to have ultimate authority over ICANN some mechanism of last resort to enforce that authority is essential to create a culture of respect for that authority within ICANN. However, there are some within the community that believe that the formalization required for that enforceability creates not only the standing but incentive for litigation in the US courts rather than multistakeholder conflict resolution within ICANN. Adherents to this concern believe the risks of litigation outweigh the risks of malfeasance on the part of the board. With the changes to the bylaws and improvements to processes for redress and reconsideration, it's argued, the board will feel compelled to adhere to community wishes.

Certainly the likelihood of either aggressive malfeasance on the part of the board or frivolous litigation on the part of an entire SO or AC should be considered low so the question ultimately is about which structure for ICANN is most likely to incent the most cooperative behavior on the part of both the board and the community.

FACT: There is *no* enforceability absent some scenario in which the community could take ICANN to court.

FACT: Both the member and designator models empower the community to take ICANN to court, should it fail to adhere to the powers set forth in the revised bylaws proposed by the CCWG.

FACT: Both the member and designator models create additional standing for SOs and AC's (via their more formal personas) to take ICANN to court. A great deal can be done to mitigate the risk of misuse of this standing by specifying in the bylaws that the community must use the IRP process to resolve disputes and only use the courts to enforce the decision of the IRP.

FACT: When able to reach broad consensus, the community *has* been able to move the board to change course in the past. That said, it has not always been easy and has always been in the context of the abstract watchdog role played by the NTIA.

Given the facts, the question becomes one comparative risk and institutional faith. The rhetorical question the community must attempt to answer is whether enforceability is likely to foster a more cooperative board or an uncooperative community and which outcome should be the priority. As you examine this question ask yourself are you more concerned about malfeasance on the part of a future incarnation of the board or on the part of a future incarnation of the GNSO or ALAC. The bylaws act as a safeguard against frivolous litigation by the community and sense of purpose and personal reputation are the safeguards against board obstinacy. Where do you put your faith?