**Issues for jurisdiction working group**

1. **From „.swiss“ input**

Issue:

The law applicable to the Registry Agreement has been identified as being the main issue:

The Registry Agreement contains no provision relative to the choice of jurisdiction, the applicable law consequently not being defined by the Agreement.

This creates great legal uncertainty and a potential issue as regards the jurisdiction given that it would be the prerogative of the arbitrators or the judges having jurisdiction -who could come from a US Court- to determine what law governs the relationship between ICANN and the registry.

Pursuant to the current business practice, the applicable law is that of the party that provides the service in question, i.e. ICANN, a priori. A registry should therefore expect the potentially applicable law to be the law of the State of California.

The applicable law further determines the faculty of ICANN to claim punitive or exemplary damages (i.e. under US law, damages highly surpassing the damage actually suffered, in order to punish a behavior), in the event the registry were to breach the contract in a deliberate and repeated manner (section 5.2 of the Registry Agreement.) This well-established institution of Common Law is non-existent under Swiss law, which follows the principle of compensation (damages are used to repair the damage but cannot enrich the claimant,) and should be considered to be contrary to public order. Were the Swiss law to apply to the Agreement, such damages would not be granted. Following the principles of the institutions typical to the Common Law provided for in the Registry Agreement poses issues of compatibility with other legal orders and suggests that Californian law would -a priori- apply to the Registry Agreement.

Possible solutions:

The applicable law should be determined on the basis of the legitimate expectations which the parties may have in terms of applicable law.

It is understandable and appropriate that the fundamental provisions or duties contained in the Registry Agreement should apply equally to all registries around the world and be therefore interpreted in a uniform way.

Beyond a few provisions and duties which are absolutely fundamental, it would be judicious and consistent with a legitimate expectation that the contractual relationship between ICANN and a registry be subject to the national law of the latter. The foregoing is all the more reasonable given that the manager of a generic domain (TLD) is delegated broad powers, as it is within its scope to establish the purpose of the domain, the eligibility, or the terms of the assignment of domain names, not to mention that it has great freedom as to the way in which a domain is actually managed.

1. **From “.swiss” input**

Issue:

With regard to territorial jurisdiction, the arbitration clause (section 5.2 of the Registry Agreement entitled "Arbitration text for intergovernmental organizations or governmental entities") has allowed the ".swiss" registry to submit itself to the arbitration of the International Court of Arbitration of the International Chamber of Commerce in Geneva, Switzerland (in our case, a godsend which was, ultimately, an essential element for the Confederation Swiss to enter into a Registry Agreement with ICANN.) However this flexibility is not open to all registry operators.

Possible solutions:

It would be wise in our opinion:

- to also allow private registries to decide on the choice of their arbitration;

- to broaden the possibilities of choice for all registries (by principle, to choose an arbitration recognized in each country.)

1. **From “.swiss” input**

Issue:

To the ".swiss" registry, it seems extremely problematic that the US Courts may hear disputes regarding the management of a Community domain name as ".swiss," whose sole purpose is to serve the interests of the Swiss community.

Possible solution:

In our opinion, the issues mentioned above regarding applicable law and competent judge or arbiter suggest that additional flexibilities within the contractual arrangements are required in order to allow for a level playing field for registries established outside the US.

In addition, the cases mentioned under 3 and the potential cases that may arise suggest that decisions affecting fundamentally the global community as a whole, or specific local communities, should be protected against undue interference by the authorities of one specific country.

There are many examples of private organizations, based in different countries, which perform public interest functions, such as ICANN does, that are protected by tailor-made and specific rules, which, for instance, guarantee that their internal accountability and governance mechanisms and rules are not overridden by decisions stemming from authorities from the country they are established in.

In our view, the International Committee of the Red Cross (ICRC) is a possible example which would allow ICANN to fulfill its mission whilst protecting itself from undesired and undesirable political or judicial interference.

Like ICANN, the ICRC is of a hybrid nature. As a private association formed under sections 60 and following of the Swiss civil Code (RS 210; https://www.admin.ch/opc/fr/classified-compilation/19070042/index.html), its existence does not in itself stem from a mandate conferred by governments. By contrast, its functions and its activities are universal, prescribed by the international community, and based on international or global laws.

**4, 5 and 6: Issues from my inputs to prior working documents:**

**Issue:**

“ICANNs main agreements (with registries and registrars) are generally silent on applicable law. This silence may be construed differently by different courts in different jurisdictions, although I feel there is a natural tendency in courts to apply its own laws if the agreement is silent and there are internal/national rules that tilt into a certain direction. This means that the choice of applicable law may be limited nowadays in practice, which in principle may disadvantage stakeholders not familiar with the implicit choice of law.

At the same time, registry agreements for IGO/Governmental entities have some flexibilities built in as to applicable law or, to be more precise, as to conflicts arising from diverging obligations coming from the agreement with ICANN and the international law obligations. This is reflected for instance in section 7.16 of the model registry agreement.

[..]

The material you mention has, at least at first glance, some relevant rules of choice of law that in a foreigners eye seem to clearly tilt for the "forum" jurisdiction (for instance the "government interest analysis test").

But, what are the rules followed by California?

I see that for “contracts” (most relevant to contracting parties) the second restatement is followed apparently which provides the following:

"d.Contract: In the first instance, the courts must give effect to the law chosen by the parties. In the absence of any such agreement, the courts are directed to the “significant relationship” test of Section 6. Restatement (Second) of Conflict of Laws § 188. The contacts to take into account in determining those principles are:

i.the place of contracting,

ii.the place of negotiation of the contract,

iii.the place of performance,

iv.the location of the subject matter of the contract, and

v.the domicile, residence, nationality, place of incorporation and place of business of the parties."

It would be interesting to know how these contact points are construed in the relation between ICANN and its contracted parties, i.e. what the place of contracting is, the place of negotiation, place of performance, etc. - how they are intended to be construed by the contracting parties and what have been the actual analysis (if any) in the cases had up to today in disputes.

For "torts" (I guess including cases brought for damages by materially harmed parties that are not contractually bound to ICANN) the mentioned "governmental interest analysis" seems to apply ("California uses this test in determining the law applicable to tort claims.").

This test means that "the law of the forum is presumed to apply unless a party demonstrates otherwise."

I feel this could be seen as a significant tilt.

Experiences on how these rules (both on contracts and torts) apply in practice could be of interest and could be contrasted with ICANN, and registries and registrars (and other parties) based in other jurisdictions. That fact-finding exercise would also allow us to see whether and in what instances that "tilting" occurs.

A similar fact-finding should be done for what “applicable law” applies in internal mechanisms (such as the IRP).

Possible solutions: This flexibility could be extended to other registries confronted with similar conflicts, not only with international law, but also when confronted with conflicts stemming from national law.

The flexibility could also take the form of a more wider recognition of freedom to choose the applicable law for the parties in the main agreements ICANN has.

1. Making sure that the hearings of the IRP are location-neutral

6) In the “multiple layers” doc, under “venue”, I had identified the following issues and solutions:

“Under venue or venues: multiplicity of venues and of providers of dispute resolution mechanisms (be it judicial or arbitration). Flexibilities as to standards, election of providers, language of proceedings, freedom to choose for the parties.]“ and “I guess that under “venue” we would need to consider the IRP and other internal redress mechanisms and how well they  address the needs of a global stakeholder community, in terms of their composition, the language of proceedings, the venue(s), the providers, etc.].”