CHOICE OF LAW IN REGISTRY AGREEMENTS

1. Raphael Beauregard-Lacroix

I would like to officially submit this issue to the attention of our subgroup.

I attach here
-the case in which I raised this as an issue:
https://community.icann.org/download/attachments/59643282/Employ%20Media%20LLC%20v%20ICANN_v2.pdf?version=1&modificationDate=1492550302000&api=v2
-the question we formulated to ICANN legal:
https://community.icann.org/download/attachments/59643282/Jurisdiction%20Questions%20for%20ICANN%20Legal.pdf?version=1&modificationDate=1487972863000&api=v2
-the response we got from ICANN legal.
https://community.icann.org/download/attachments/59643282/ICANN%20Responses%20to%20JX%20Questions-SE.pdf?version=1&modificationDate=1491916439000&api=v2
-the follow up
https://community.icann.org/download/attachments/59643282/Employ%20Media%20LLC%20v%20ICANN_v2.pdf?version=1&modificationDate=1492550302000&api=v2
-the response to the follow up
https://community.icann.org/download/attachments/59643282/Follow%20Up%20on%20ICANN%20Legal%20Answers-%20RESPONSE%20FROM%20ICANN.pdf?version=1&modificationDate=1495543994000&api=v2
I can also refer you all to an email from Bernie dated 26 July which contains links to these.

and for reference purposes

-The standard registry agreement (RA)
https://newgtlds.icann.org/sites/default/files/agreements/agreement-approved-31jul17-en.docx

I did not find ICANN legal's answer to be fully satisfying, especially regarding registries, and I would thus like this issue to be included in the final report, with a solution that we will hopefully all agree to!

Because of the nature of the dispute resolution clause in RAA's concluded with registrars, I think they should be treated as a separate issue, if at all. At any rate, this submission is already long enough as it is!

Issue

ICANN's standardised contracts with registries do not include a choice of law provisions and are subject to dispute resolution by arbitration under ICC rules. See RA, art. 5.2

As for RAA's concluded with registrars, they can be litigated in court or in arbitration under American Arbitration Association rules. For the simple reason that they can be litigated in court, this makes this issue less of an issue for them.

For RA litigation, the above clause means that in effect, the arbitrators are free to decide the applicable law according to various factors or methods generally accepted in private international law practice. See ICC Rules of Arbitration art. 21:

> *1)*
> *The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate.*
> *2)*
> *The arbitral tribunal shall take account of the provisions of the contract, if any, between the parties and of any relevant trade usages.*

This also means that we cannot rely on Californian private international law to predict which law is applicable. Moreover, as far as my understanding of commercial arbitration goes, arbitrators would always decide on a single law for the whole of the contract and will not start carving up legal niches here and there.

Reasonably, there are two options as for the applicable law to these contracts: California law, or the law applicable to the registry, whether it be the law of its main place of business or its own company law.

I would like to quote here ICANN legal's answer to our follow-up:

> *"Historically, not having a choice of law clause seems to have worked out well in practice.*
>
> *The lack of a choice of law clause, as far as ICANN is aware, has not presented big problems for either ICANN or contracted parties.*
>
> *The plain language of the agreement has generally been sufficient to resolve questions between the parties and allow the parties to interpret the performance requirements, their rights and obligations in the ordinary course.*
>
> *Reliance on the plain language of the agreements normally does not depend on a choice of which jurisdiction's laws would apply.*
>
> *As to why the contracts have evolved in this manner, it has essentially been a compromise that allows the choice of law issue to be handled on an issue-specific basis that takes into account the specific conduct being reviewed, the needs of the parties and ICANN's global coordination function"*

I fail to see how the RA would satisfy registries outside of the US. Would not they prefer to have a set choice of law rather than an undefined one? And not there being a problem does not mean it cannot be improved. Registries can very well refuse to litigate because of the costs, and this will look like an absence of problem from ICANN's perspective.

Moreover, I plainly reject the contention that *"The plain language of the agreement* (allows) *the parties to interpret the performance requirements, their rights and obligations in the ordinary course."* The only time this can be true is between US parties. This is just wrong for parties outside the US.

We can all see that these contracts are drafted with US law in mind. I do not even want to imagine what kind of mess would result of trying to fit this contract into any continental European legal system! Or any other legal system for that matter. And even more so if you try to divide obligations between the parties and ascribe them a different governing law...

The issue I see with this is that this situation 1) is detrimental to ICANN's accountability and 2) results in more costs for registries in case of dispute.

As for 1), I believe it is detrimental because being accountable is also being predictable. ICANN has the means to figure out these legal questions well in advance and do a proper risk assessment, while registries and registrars (especially considering the small players) might not.

As for 2), an undetermined choice of law means you need to hire a lawyer (and not just your ordinary lawyer, a specialised one) to do first and foremost an assessment of which law would be applicable and which is most likely to be applied by the arbitrator(s). This means more money (maybe too much money) gone into legal fees for the small businesses.

Solution

Set the choice of law in those contracts. Given their drafting style, California would make most sense. Now to jump the gun on some criticism that I can see coming, I do believe that most if not all lawyers who can handle domain name industry/ICANN disputes do know California law anyway. This is for the sake of predictability, not for the sake of favouring the US above anyone else.

I went well beyond the "12 standard lines" rule, but I do hope I made it clear and understandable.

If there is one thing I would add, is that the lack of control of risks associated with an unclear choice of law might be discouraging some registries to sue ICANN; they might then prefer to cave in and it is my opinion that such a situation is detrimental to accountability in general. Of course I invite all involved with registries here to comment on that :)

I am fully aware that this particular issue might not be as engaging as other issues we have been discussing. Still, it would be good to know what is the general opinion on this one. I will follow up with whatever any member of this subgroup has to say, may it be through the transcript of the call or directly here.

While I will certainly try to make my point understood, please note that I have no personal feelings about it and should it emerge in the end that there is no consensus on the fact that this is an issue, then so be it! We have enough contention as it is on other fronts...

2. From Jorge Cancio

1. 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.

There already exist special provisions for registries that are IGO/Governmental entities (section 7.16 registry agreement): if international law is at stake, there is a procedure (mediation and arbitration ex 5.2.) to resolve disputes between the registry and ICANN – this special provision could be extended:

To other registries that are not IGOs/Public authorities

To cover not only “international law obligations” but also national law obligations

2. Issue: arbitration clause

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. This provision also provides for some flexibilities restricted to IGOs or governmental entities as regards the competent court.

However these flexibilities are 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/competent court;

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