~~9~~10 October 2017

RECOMMENDATION REGARDING CHOICE OF LAW AND CHOICE OF VENUE PROVISIONS IN ICANN AGREEMENTS

BACKGROUND

~~In keeping with its stated mandate,~~[1] ~~t~~This Subgroup has considered how ICANN's jurisdiction-related choices, in the gTLD base Registry Agreement (RA) as well as the Registrar Accreditation Agreement (RAA), may have an influence on accountability.

Three such jurisdiction-related choices have retained the attention of the members of this Subgroup, namely the absence of a choice of law provision in registry agreements, the absence of a choice of law provision in registrar accreditation agreements, and the contents of the choice of venue provision in registry agreements.

Both the RA and the RAA are standard-form contracts which do not typically give rise to negotiation between ICANN and the potentially contracted party, with some minor exceptions when the contracted party is an intergovernmental organisation or a governmental entity. Any changes to the base agreements are now determined through an amendment procedure, detailed in each agreement (see, e.g., Art. 7.6 of the RA).

It is the understanding of this Subgroup that it cannot and would not require ICANN to make amendments to the RA or the RAA through this Recommendation. Not only would that go beyond the stated mandate of the CCWG, but that would also constitute an infringement of the Bylaws (see, e.g., Sec. 1.1(d)(iv) of the Bylaws) and more specifically an infringement of the remit of the GNSO.

Rather, this Recommendation should be understood as suggesting possible changes to the aforementioned contracts for study and consideration by ICANN the Organization, by the GNSO and by contracted parties. The Subgroup believes that these changes would increase ICANN's accountability. It should be noted that, in formulating these recommendations, the Subgroup did not consult with ICANN's contracted parties or seek outside legal advice.

Through its discussions, the Subgroup has identified three separate issues which appeared to influence ICANN's accountability. These issues are listed below. ~~It is acknowledged that in its discussions and considerations about these matters the subgroup did not consult with ICANN's contracted parties, nor did it seek outside legal advice.~~

ISSUES

1. **Choice of law provision in registry agreements**

[1] ~~"At this point in the CCWG-Accountability's work, the main issues that need to be investigated within Work Stream 2 relate to the influence that ICANN's existing jurisdiction may have on the actual operation of policies and accountability mechanisms. This refers primarily to the process for the settlement of disputes within ICANN, involving the choice of jurisdiction and of the applicable laws, but not necessarily the location where ICANN is incorporated." CCWG Accountability WS1 Report~~

Commented [1]: Thanks Greg, I offer some suggestions below but want to reserve my position as strongly in favor of the status quo. My comments below are meant to be helpful but not to signify support for the menu option other than to recognize it is the subgroup's preferred option. The subgroup recognizes that it did not study these proposals with the assistance of consultation from either contracted parties, or from outside legal experts, and therefore these proposals should be informed by such consultation prior to implementation or further policy development work.

Commented [2]: See again my comment above about needed consultations with contracted parties and outside legal experts.

Commented [3]: + 1 David. Also, I would suggest that it might be useful to add language to this effect in a final paragraph before the section on issues. It is important that these recommendations be caveated as such.

Commented [4]: I have moved this to the previous paragraph and revised it to reflect that this relates to the Subgroup's work in formulating the recommendation (and, implicitly, not any earlier fact-gathering).

Commented [5]: I think we should recall, to be fair, that there was an open questionnaire open to all interested parties

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Commented [6]: As I read this note, it is a clarification regarding how the Subgroup deliberated on the recommendation, rather than relating to earlier requests for input on facts relating to possible issues. More specifically, I think the point is that we are making a suggestion to certain parties without having consulted with those parties, and advice on amending a legal document without outside legal advice..

ICANN's Registry Agreement does not contain a choice of law provision. The governing law for the RA is thus undetermined, until a judge or arbitrator takes a decision on that matter in the context of a litigation or until the parties to any specific contract agree otherwise.

2. Choice of law provision in registrar accreditation agreements

ICANN's Registrar Accreditation Agreement does not contain a choice of law provision. As with the RA, the governing law for the RAA is undetermined until a judge or arbitrator takes a decision on that matter in the context of a litigation or until the parties to any specific contract agree otherwise.

3. Choice of venue provision in registry agreements

Disputes arising in the context of ICANN's Registry Agreement are to be resolved under "binding arbitration" pursuant to ICC rules. Moreover, the RA contains a choice of venue provision. This provision states that the venue is Los Angeles, California as both the physical place and the seat[2] of the arbitration (to be held under ICC rules).

POSSIBLE SOLUTIONS

1. **Choice of law provision in registry agreements**

A. Menu Approach

It has emerged from the Subgroup's discussions that there is a common ground whereby increased freedom of choice for the parties to the agreement could help registries in tailoring their agreements to their specific needs and obligations.
Specifically, this would involve a "Menu" approach, whereby the law(s) governing the Registry Agreement is (are) chosen at or before the time when the contract is executed. Such choice would be made according to a "menu" of possible governing laws.

Commented [7]: My understanding of the current consensus was that the no choice was overall detrimental. I for one think the absolute best solution is to have a single, set law (and for minimal disruption, California law). Still I do see the value of the freedom of choice and the more open options such as the menu. And I also tend to believe that imposing California law could lead to problems of legitimacy.

This menu needs to be defined. It could be best to leave it to ICANN, working with the gTLD registries, to define the menu options. The Subgroup discussed a number of possibilities for their consideration:

- The menu could be composed of one country from each ICANN Geographic Region.
- The menu could be composed of a small number of countries from each Region..
- The menu could also include the status quo, i.e., no choice of law.
- The menu could also include the registry's jurisdiction of incorporation as a choice.
- The menu could also include the countries in which ICANN has physical locations.

The Subgroup has not determined what the menu items should be. However, the Subgroup believes that a balance needs to be struck between the ability~~freedom~~ to choose (or at least to negotiate for) a particular choice of law, and issues arising~~negative consequences~~ from subjecting ~~unchecked proliferation of laws to which~~ the standard base Registry Agreement

[2] The "seat" of an arbitration is the legal jurisdiction to which the proceeding is tied.

to a multiplicity of different lawsis subject. The proper balance is likely struck by having a relatively limited number of choices on the menu.

The method of "choosing" from the menu also needs to be considered. TWill the registry could simply be able to make a choice from the menu, or it could be part of the registry'swill this be the result of negotiations with ICANN?

The menu option has the following advantages:

1. It provides the parties, especially the registries, with effective freedom to define, within a reasonable agreement with ICANN, the law(s) governing their contracts. This may contribute to avoiding conflicts between provisions established in the contract and the provisions of national or supranational law, since the RA would be interpreted under the same national law that governs the registry (this assumes that the registry operator's national law is "on the menu").

2. It may also help registries that are more comfortable with subjecting their agreement in whole or in part to law(s) with which they are more familiar. This could lower the hurdles for thoseentrepreneurs considering applying to operate a registry who are not familiar with US law or legal language based on US law concept and thereby make ICANN's global outreach efforts more efficient.

3. Another advantage of the menu option is that parties may then choose a governing law which allows them to be compliant with mandatory extra-contractual legal obligations (e.g., personal data protection) while not violating the provisions of the contract.

However, there are several disadvantages of the Menu approach.

A first disadvantage is the fact that the chosen law may not be entirely compatible with the contents of the RA. Indeed, the current RA has been drafted with US law in mind and uses a style of drafting which corresponds with the American legal tradition. The result of this would be that some parts of the RA could be interpreted differently than they would under U.S. law, and differently than intended. In the context of litigation, some provisions could even be found invalid or unenforceable, which could result in the court deciding what an enforceable version would be or even deciding that the provision never applied between the parties.

A second disadvantage, which is related to the first, is that some registries could ultimately find themselves with a different RA governing their relation with ICANN by virtue of mandatory modifications brought about by a different governing law.[3] These differences could turn out to be either an advantage or a disadvantage to these registries but could well be perceived as unfair. Over time, this could, and in all likelihood wouldwill, lead to some form of jurisdiction shopping by registries.

[3] "Mandatory" provisions are understood here as elements of the governing law which may not be contractually set aside and necessarily govern the legal relations of the parties. This is different from *super-mandatory* provisions which apply according to objective criteria (such as the place of performance of the contract) and notwithstanding the choice of governing law made by the parties. This may be more prevalent in civil law countries than common law ones.

Commented [8]: how is this balancing when the two elements are characterized as such?

Commented [9]: Do you have any suggested revisions?

Commented [10]: I think the point is that there needs to be a balance between the advantages of choice and the disadvantages of choice.

Commented [11]: I've tried to tone the language down so there is less "characterization."

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Commented [12]: Is this referring to the RA as a whole, or just saying the parties should be reasonable in coming to agreement on the choice of law?

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Commented [13]: Why limit this to "entrepreneurs"?

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Commented [14]: I think we have to assume that the contents of the contract will be the same regardless of the governing law designated in the choice of law provision.

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A third disadvantage is the fact that a choice must be made on the contents of the "Menu" and that while there are some regions which are highly legally integrated (e.g., Europe,) others are not at all, such as the Asia-Pacific region. Where exactly to draw the line and how to regionalise the world in terms both compatible with ICANN's operations and with the variety of legal systems and traditions may end up being a difficult and contentious task. And, of course, the menu option could present ICANN with the ~~difficult~~ challenge of operating under contract clauses with significantly differing interpretations around the world.

B. "California" (or "fixed law") Approach

A second possible option is the "California" approach, whereby all RAs expressly state that the contract is governed by the law of the State of California and U.S. federal law.

This option has the advantage of certainty, since all RAs will be construed under the same governing law. It also has the advantage of being consistent with the drafting approach in the RA, which is drafted according to U.S. law principles. This is more likely to result in the agreements being interpreted as the drafters intended, while avoiding the unintended consequences discussed above under the Menu approach.

The main disadvantage of this option is that it forces all registries worldwide to look to California law when interpreting their contract with ICANN. While US-based registries might not see that as a problem, several members of the Subgroup outlined the inconsistency between the global mandate of ICANN and the imposition of California law in its contracts with registries. Moreover, this might place some non-US registries at a disadvantage in interpreting and potentially litigating the RA, since their knowledge of California and US law might be limited. FInally, California law might act as a chilling effect on potential litigation, discouraging litigants from litigating simply based on their lack of knowledge of California law.

C. Carve-out Approach

A third possible option would be a "Carve-Out" approach, whereby certain parts of the contract which may require or benefit from uniform treatment for all registry operators are governed by a predetermined law (e.g., California) and other parts (e.g., eligibility rules for second level domains, privacy and data protection rules) are governed by the either the same law which governs the registry as a legal person or by using the "Menu" approach for these other parts of the RA.

This approach has the advantage of certainty of interpretation for the uniform provisions of the Agreement, while allowing greater flexibility for other portions.

Moreover, generally speaking, this approach shares many advantages and disadvantages with the menu approach.

Another~~The~~ disadvantage of this option is the fact that the applicable law within~~for~~ each RA is not uniform. This option assumes that all the obligations contained in the RA can be neatly separated in categories, which are then "labeled" with a given applicable law. In practice, it

may well turn out that many obligations are interdependent and as such, this choice may make the RA difficult for interpret for the parties and eventually for arbitrators, and as such make dispute outcomes more difficult to predict, which in turn could diminish accountability.

D. Bespoke Approach

Next, there is the "Bespoke" approach, where the governing law of the entire agreement is the governing law of the Registry Operator.

This approach has some of the advantages of the Menu approach, by allowing each Registry Operator to have their "home" choice of law.

As for disadvantages, they are also shared with the Menu approach and it could be added that these disadvantages find themselves compounded here by the fact that this approach consists, in practice, of a very large menu whose contents are determined by the place of incorporation/location of the registry (as a legal person.) In that sense, it can be very hard to predict the result of the application of a multitude of different bodies of laws to the RA. Some registries might find themselves at an advantage, others at a disadvantages, and some might find themselves with larges parts of the RA reinterpreted or inapplicable due to mandatory provisions of the governing law, or simply with a RA which is very difficult to interpret.

E. Status Quo Approach

A fifth possible approach is to retain the status quo, i.e., have no "governing law" clause in the RAA. The advantages of this approach have been explained by ICANN Legal in a document sent to the Subgroup in response to questions asked by the Subgroup[4]:

Historically, the Registry and Registrar Accreditation Agreements are and have been silent on the choice of law to be applied in an arbitration or litigation. This allows the parties to an arbitration or litigation to argue (pursuant to the relevant arbitration rules, court procedures and rules, and laws) what law is appropriate to govern the specific conduct at issue. Arbitrators and courts are well-suited to make those types of determinations.

Disadvantages of the Status Quo approach are that ~~Some participants to the list believe~~have ~~expressed the fact that various~~ potential contracted parties outside of the United States ~~are~~could be deterred by what they perceive as essentially a contract under US law. In addition, currently, some contracted parties have to ask ICANN for permission to comply with

[4] The questions may be found at https://community.icann.org/download/attachments/59643282/Jurisdiction%20Questions%20for%20ICANN%20Legal.pdf?version=1&modificationDate=1487972863000&api=v2. The response may be found at https://community.icann.org/display/WEIA/Jurisdiction?preview=/59643282/64081953/ICANN%20Responses%20to%20JX%20Questions-SE.pdf

the laws of their own jurisdiction, since~~to the extent that~~ they do not want compliance with these laws to constitute a breach of the RA.[5]

2. Choice of law provision in registrar accreditation agreements

The options for the RAA are essentially the same as for the RA.

3. Choice of venue provisions in registry agreements

When entering into contracts with registries, ICANN could offer a list of possible venues for the arbitration to take place rather than generally imposing Los Angeles, California as the place (and hence, both the "seat" and physical location) of the arbitration. The rest of the arbitration clause (namely, the rules of arbitration being ICC rules) would remain unchanged.

The registry which enters into a registry agreement with ICANN could then choose which venue it prefers at or before the execution of the contract.

Having this option open would diminish the cost of litigation for registries, potentially allowing registries to start arbitration procedures at a location which is more amenable to them than Los Angeles, California (although Los Angeles could remain an option.)

From the perspective of the contract issuer (which, in our case, would be ICANN), one risk associated with such a change is having to deal with a different *lex arbitri* than that of California. ICANN would also have to hire local counsel and travel to various arbitration proceedings. Furthermore,~~Indeed,~~ the *courts* of the seat of the arbitration may be~~are~~ competent to order interim relief and hear challenges to the award, among other things.[6]

Finally, the options given in the "venue menu" could correspond to ICANN's own regions as defined in ICANN's bylaws, that is, ICANN could offer at least one venue per region.[7]

RECOMMENDATIONS

As stated in the Background section, the aim of the Subgroup in formulating these Recommendations is to frame them as a suggestion of possible paths towards increased accountability.

Choice of law in Registry Agreements

[5] ~~C.f. Thomas Rickert, 4 October 2017 email on WS2 Jurisdiction list, referring to his own clients and their problems with regards to the Data Retention Waiver and the GDPR generally~~.

[6] In addition to interim relief and award challenges, the *lex arbitri* is also relevant when witnesses are involved or when one of the parties would claim that the subject matter of the dispute is not arbitrable. The contents of the *lex arbitri* are to be found in the arbitration laws of a given country. Such laws are today rather standardised and in that sense, it is possible to further mitigate this risk by assessing the contents of the arbitration laws of each possible venue offered as an option in the "menu."

[7] "As used in these Bylaws, each of the following is considered to be a "Geographic Region": (a) Europe; (b) Asia/Australia/Pacific; (c) Latin America/Caribbean islands; (d) Africa; and (e) North America." ICANN Bylaws, Art. 7.5

The Subgroup examined several options and suggests that ICANN, the contracted parties and the GNSO consider adopting a "Menu" approach to the choice of law provisions in gTLD Registry Agreements. The Subgroup offers several suggestions for menu options, including:

- The menu could be composed of one country from each ICANN Geographic Region.
- The menu could be composed of a small number of countries from each Region.
- The menu could also include the status quo, i.e., no choice of law.
- The menu could also include the registry's jurisdiction of incorporation as a choice.
- The menu could also include the countries in which ICANN has physical locations.

~~.[While at this point all options remain open to the extent that it is not for this Subgroup to *decide* on one and/or *implement* it, a consensus has emerged from this Subgroup that +++]~~

~~OR~~

~~[At this point all options remain open to the extent that it is not for this Subgroup to *decide* on one and/or *implement* it. Moreover, no consensus was reached at the level of the Subgroup over which **option** was the "best," as all options have advantages and disadvantages +++]~~

Choice of Law in Registrar Accreditation Agreements

The Subgroup suggests that ICANN, the contracted parties and the GNSO consider options for the RAA similar to those discussed for the RA, above.

Choice of Venue in Registry Agreements

The Subgroup suggests that a menu approach also be considered for the venue provision of RA.