
Enhancing ICANN Accountability – Work Stream 2 (WS2)

Recommendation 4.2 - Implementation Documentation

Enhancing ICANN Accountability – Work Stream 2 Final Report

<https://www.icann.org/en/system/files/files/ccwg-acct-ws2-final-24jun18-en.pdf>

See <https://www.icann.org/resources/work-stream-2-implementation-en> for more information on Work Stream 2 implementation.

WS2 - Jurisdiction - Recommendation 4.2

Recommendations relating to Choice of Law and Choice of Venue Provisions in ICANN Agreements

This sub-group considered how the absence of a choice of law provision in the base RA, the absence of a choice of law provision in the standard RAA, and the contents of the choice of venue provision in RAs could impact ICANN's accountability. These are standard-form contracts that are not typically negotiated; changes are now determined through an amendment procedure (e.g. Art. 7.6 of the RA). The sub-group understands that it cannot require ICANN to make amendments to the RA or the RAA. Rather, this recommendation suggests possible changes to the RA and RAA for study and consideration by ICANN the organization, the GNSO, and the contracted parties. The RA and RAA do not contain choice of law provisions. The governing law is thus undetermined, until determined by a judge or arbitrator or by agreement of the parties.

4.2.1 Choice of Law and Venue Provisions in the Registry Agreement The sub-group identified several alternative approaches for the RA, which could also apply to the RAA. The body of the report discusses the advantages and disadvantages of each approach.

4.2.1.1 Menu Approach. The sub-group supports a “Menu” approach, where the governing law would be chosen before the contract is executed from a “menu” of possible governing laws. The menu needs to be defined; this may be best left to ICANN and the registries. The sub-group discussed a number of possible menus, which could include one country, or a small number of countries, from each ICANN geographic region, plus the status quo (no choice of law) and/or the registry's jurisdiction of incorporation and/or the countries in which ICANN has physical locations. The sub-group has not determined what the menu items should be, but believes there should be a balance between the advantages and disadvantages of having different governing laws apply to the same base RA, which likely suggests having a relatively limited number of choices on the menu. The sub-group recommends that the Registry choose from among the options on the menu (i.e., the choice would not be negotiated with ICANN).

4.2.1.2 “California” (or “fixed law”) Approach. A second possible option is for all RAs to include a choice of law clause naming California and U.S. law as the governing law.

4.2.1.3 Carve-Out Approach. A third possible option would be a “Carve-Out” approach, whereby parts of the contract that would benefit from uniform treatment are governed by a uniform predetermined law (e.g., California) and other parts are governed either by the law of the registry's jurisdiction or by a jurisdiction chosen using the “Menu” approach.

4.2.1.4 Bespoke Approach. In the “Bespoke” approach, the governing law of the entire agreement is the governing law of the Registry Operator.

4.2.1.5 Status Quo Approach. A fifth possible approach is to retain the status quo, (i.e., have no “governing law” clause in the RAA).

4.2.2 Choice of Law Provisions in Registrar Accreditation Agreements The options for the RAA are essentially the same as for the RA.

4.2.3 Choice of Venue Provisions in Registry Agreements Under the RA, disputes are resolved by “binding arbitration,” pursuant to ICC rules. The RA contains a choice of venue provision stating that the venue is Los Angeles, California as both the physical place and the seat of the arbitration. When entering into contracts with registries, ICANN could offer a list of possible venues for arbitration rather than imposing Los Angeles, California. The registry that enters into a registry agreement with ICANN could then choose which venue it prefers at or before the execution of the contract.

Final Implementation Report

Recommendation 4.2 identifies potential areas for contractual amendments to Registry Agreements

ICANN org took action to integrate the topic of this recommendation into the new gTLD Registry Agreement contract amendments that are required for the next round of new gTLDs.

On 16 March 2023, the ICANN Board [approved](#) outputs of the new gTLD Subsequent Procedures Policy Development.

In February 2024, ICANN org officially kicked off a project team to work on the Base Registry Agreement for the Next Round. Subsequent steps include convening the Next Round Implementation Review Team to review a redline followed by a public comment proceeding on a proposed version.

Rationale

Work Stream 2 Recommendation 4.2 is considered addressed by ICANN org’s decision to include this recommendation into new gTLD Registry Agreement contract amendments that are required for the next round of new gTLDs.

This decision will serve to ensure the topic of this recommendation is addressed, as appropriate, through contract amendments discussions with contracted parties. Outputs will be submitted for public comment.

Timeline

Expected implementation date: N/A

Final implementation date: N/A

Milestones

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- March 2023 - Board approval of Subsequent Procedures outputs and steps taken to integrate Recommendation 4.2 into potential contract amendments.
 - February 2024 - Launch of project team