Membership Corporations and Dispute Resolution

Members of a California Public Benefits Corporation have the right to enforce:

- Powers specifically granted to the members in the Bylaws, e.g., Board/member spill, budget/strat plan rejection, approval/rejection of Bylaws amendments
- Fiduciary/Public Benefit obligations of the directors and staff
  - Failure to act in furtherance of the purpose for which the corporation was formed
    - Stated public benefit is preserving stability, security, resiliency by coordinating unique identifiers to the extent coordination is needed/beneficial
  - Breach of fiduciary duties
  - Misappropriation of trust assets

Members do not have the right to enforce other bylaws provisions unless those rights are explicitly granted – e.g., community IRP.
Can a California Public Benefit Corporation Specify the Forum for Dispute Resolution

• Yes!
• Bylaws act as contracts between the corporation and its members
• Courts respect forum specification/ mandatory arbitration requirements in Bylaws except in very rare cases
  • e.g., unilateral bylaws amendment to affect ongoing disputes, unfair burdens depriving members of enforcement rights
• Bylaws provisions may further specify the circumstances under which a claim can be brought
  • e.g., “Community IRP” only with agreement of specified percentage of members, supermajority, etc.
  • No IRP unless the objecting members have participated in the decision to which they are objecting
  • Bond for vexations/abusive claims
Will California Courts Defer to IRP Decisions?

• Yes, unless the arbitral decision deprives a member of due process or a fundamental right to be heard, courts in California defer to the outcome of binding arbitrations
  • Even in employment agreements
  • Severing unconscionable provisions rather then rejecting the entire arrangement
• Parties to an arbitration can seek the assistance of a California court in enforcing (but not overturning) an arbitral decision
So, Can we Avoid Having a California Court Resolve Substantive Disputes with ICANN’s Members?

• Yes.
• Members rights to sue are limited in any case.
• The Bylaws may further limit derivative disputes so long as statutory rights are protected
  • fiduciary duty, public benefit, misappropriate of trust assets
• The Bylaws may specify the forum in which this claims are brought so long as members have a meaningful right to be heard
  • i.e., through the IRP
• The Bylaws may specify the circumstances under which disputes can be lodged
  • e.g., participation, supermajority, directly affected member agrees, etc.
The Fine Print

• These are high level conclusions
• This reflects my conversation with Sidley lawyers (Josh and Ed) last night, so it’s not in writing
• Their answers do, however, confirm my own legal research on the subject
• Of course, care will be needed to get the details right – devil’s in the details, etc.
• We should probably have some stress tests directly on these issues