

ICANN Responses to WS2 Jurisdiction Questions – 10 April 2017

Jurisdictions Where ICANN May be Subject to Litigation. The CCWG-Accountability Jurisdiction Subgroup would like to understand in which jurisdictions ICANN (incorporated as a nonprofit corporation in California) may be subject to litigation as a defendant (i.e., where the court's personal jurisdiction over ICANN may be satisfied and maintained). The Jurisdiction Subgroup would appreciate the assistance of ICANN Legal in this task. The Subgroup has prepared the following questions:

1. We have assumed, but would like to confirm, that ICANN is subject to suit in the countries where it has the following "physical presences":

O_ _Headquarters office and state of incorporation:2

- _USA (specifically Los Angeles, California)

O_ _Hub offices:

- _Turkey
- _Singapore

O_ _Engagement offices:

- _China
- _Belgium
- _Switzerland
- _Uruguay
- _Kenya
- _Republic of Korea
- _USA (specifically Washington DC)

ANSWER: There are many places where ICANN could appropriately subject to suit, and ICANN has submitted to the jurisdiction of courts in some of the above locations. There is no jurisdiction where ICANN has been provided with immunity from the courts/litigation. As a result, there is always the possibility that litigation could be initiated or maintained against ICANN in any of the above-referenced locations, or any other location. Whether any specific court is an appropriate place to maintain a suit against ICANN is a separate question based upon the facts and the circumstances of each case, including the conduct alleged, the ties to the selected jurisdiction, and the propriety of the court to hear any individual case (based on issues of both personal jurisdiction and subject matter jurisdiction or analogous concepts). These are questions for the court to decide.

As a result, there is no bright-line rule as to whether any litigation can or cannot be successfully maintained against ICANN in any location just by virtue of ICANN having a hub or engagement office in that location. ICANN has never agreed to waive its ability to bring any and all appropriate defenses to litigation.

2. We believe it would be useful for us to know whether jurisdiction over ICANN in litigation could be maintained elsewhere (other than the above). Specifically, we would like to know about the following categories of jurisdictions:

a. US states and jurisdictions other than California and the District of Columbia (e.g., Illinois, Guam).

b. Countries or jurisdictions other than the above where ICANN employees reside and work remotely (and are being paid by ICANN in the employee's local currency) (e.g., France).

c. Countries or jurisdictions where ICANN has no ongoing physical presence but has held one or more ICANN public meetings (e.g., ICANN 57 in Hyderabad, India) or other significant events (e.g., GDD Summit) which are significant to ICANN's multistakeholder operations.

d. Jurisdictions where contracted parties are incorporated, headquartered or located (e.g., Ireland).

e. Jurisdictions where ICANN meets none of the above criteria.

ANSWER: As noted above, ICANN could appropriately be subject to jurisdiction in multiple places. The propriety of any court's assertion of jurisdiction over ICANN must be viewed in light of the claims at issue in the litigation, how those claims are tied to the selected jurisdiction, ICANN's alleged ties to those jurisdictions, etc. ICANN cannot presume to know what any court would do if faced with these claims, but ICANN would assert any and all appropriate defenses to any litigation, including jurisdictional challenges (among other items). As noted in response to Question 1, there is no bright-line rule as to whether any litigation can or cannot be successfully maintained against ICANN in any location just by virtue of the contacts (or lack of contact) noted in this question.

3. If there is a judgment against ICANN, would the impact on ICANN differ based on the category of jurisdiction above? Would ICANN be able to avoid the effects of a judgment in any jurisdiction (e.g., by ending its physical presence in that jurisdiction).

ANSWER: There is a wealth of jurisprudence on the ability to enforce judgments in jurisdictions other than where a judgment is initially rendered. If a judgment (appropriately rendered) is then appropriately perfected against ICANN in an appropriate jurisdiction, it would be difficult for ICANN to avoid the effects of that judgment. It is worth noting that litigation in the United States tends to look at the state of the parties at the time of initiation of the suit. For example, ICANN could not avoid having a judgment entered against it (if appropriate after litigation, etc.) for conduct brought to suit in 2016 by ending its presence in the jurisdiction in 2017.

This question can also be viewed more broadly, and not just about litigation and judgments, but in the impacts of doing business in a particular place. For example, ICANN's business currently is based upon significant contacts and maintenance of business ties within the U.S. If ICANN were to move headquarters outside of the U.S. tomorrow (which it has no plans to do) there are still likely a significant number of contacts that ICANN maintains in the U.S. such that ICANN would still be subject to following the laws required in order to conduct business in the U.S., such as observing U.S.-imposed sanctions.

4. How would concepts of general jurisdiction vs. specific jurisdiction³ apply to any of the above questions?

ANSWER: Concepts of general jurisdiction (where ICANN is generally held to suit based upon its overall contacts with a jurisdiction) and specific jurisdiction (where ICANN is held to suit based upon actions targeted or tied to a specific area) are essential to the answers above. They are part of the facts and circumstances that any court must consider when identifying if the court has jurisdiction over the parties to the litigation.

5. How do issues of proper venue⁴ (or the lack thereof) impact the answers to the above questions?

ANSWER: As with Question 4 (whether the court has jurisdiction over the dispute or the parties to the

dispute) the issue of venue (i.e., whether the court is the appropriate legal forum for the dispute) is also essential to any court's decision to proceed with a suit that has been filed before it.

6. How would questions 1-2 be answered for PTI, rather than ICANN?

ANSWER: As with ICANN, PTI has not been granted immunity in any country, territory or court. The ability to maintain suit against PTI would depend on the facts and circumstances of each case. PTI does not maintain offices or have any employees located outside of the United States.

7. We note that in its [Articles of Incorporation](#) ICANN states, among other things, that it shall promote the global public interest in the operational stability of the Internet and that it will operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law.

We also note that in its [Bylaws](#) ICANN commits, among other things, to operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law.

We generally understand that in many places jurisdiction for litigation is premised on physical presence in some manner. But we wonder whether in the digital age the concept of "targeting" (or some other legal theory) can be used as a basis for litigation jurisdiction over ICANN.

In other words we wonder whether a party, based where ICANN has no office, could successfully maintain a lawsuit against ICANN in a local court based on the argument that ICANN targeted them improperly for some action or on some other legal theory.

ANSWER: ICANN cannot provide a potential roadmap for litigants or provide admissions in response to these questions that might make it easier for a litigant, wherever they happen to be, to bring ICANN into court. The ability for a litigant to state a valid cause of action under law and achieve judgment against ICANN is dependent upon many things, such as: the law the litigant is relying upon/cause of action; the actions of ICANN that the litigant believes supports the cause of action; the propriety of jurisdiction (based on ICANN's actions, the litigants actions, actions of others, the competence and jurisdiction of the court, etc.); and the evidence presented about such a claim. ICANN cannot presume what a court would do in this hypothetical situation, just as ICANN cannot presume or predict what the outcome will be of any litigation actually filed against it.

We are looking for general advice rather than a country-by-country analysis, being interested in trends and reasonable probability and not legal certainty at this point.

B. Choice of Law and Venue in ICANN's Contracts. The Subgroup would also like to understand how ICANN handles choice of law and venue in ICANN's contracts.

1. For each type of ICANN contract, please indicate whether the contract specifies (a) the choice of law or (b) the venue. Where either is specified, please indicate the jurisdiction and/or venue specified, and the reasons for these choices. Where ICANN does not specify choice of law or jurisdiction, please explain why.

ANSWER: Based on the CCWG-Accountability's report setting out the scope of the WS2 topics, ICANN notes that focus is on registry and registrar contracts. ICANN's Registry Agreements and Registrar Accreditation

Agreements are based on model templates, each of which was developed with stakeholders and subject to public comment.

In Registry Agreements, particularly the base agreement developed in the New gTLD Program, venue has two possibilities: (1) arbitration and litigation in Los Angeles County, California, and (2) arbitration and/or litigation in Geneva, Switzerland. Only intergovernmental organizations, governmental entities, or registry operators facing other special circumstances may select Geneva for venue. Agreement on Geneva as an alternative venue for dispute resolution was reached during the development of the Applicant Guidebook for the New gTLD Program, and is reflected by the availability of alternative text of Section 5.2 of the base agreement. As other venue locations have not been considered through the ICANN process, ICANN has not entered into any Registry Agreement with a venue other than Los Angeles or Geneva. There are approximately 10 registry operators that are not IGOs or governmental entities that have Geneva identified for venue.

The model Registrar Accreditation Agreement requires the venue for arbitration and litigation to take place in Los Angeles, California. ICANN does not have any Registrar Accreditation Agreements that vary on this issue.

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.¹

ICANN has other contracts that are core to service to its mission. For example, out of the IANA Stewardship Transition Process, ICANN now has contracts with the Regional Internet Registries for the performance of the IANA Numbering Functions, the IETF for performance of the IANA Protocol Parameters Functions, and Public Technical Identifiers for the performance of the IANA Naming Functions. Each of these agreements had appropriate public consultation associated with their development.

For the SLA with the RIRs, (<https://www.icann.org/stewardship-implementation/service-level-agreement-sla-for-the-iana-numbering-services>) the venue selected is Geneva, Switzerland or such other location as is agreed by the parties. The governing law is specified as the State and Federal laws applicable in the State of California.

For the Memorandum Of Understanding Concerning The Technical Work Of The Internet Assigned Numbers Authority and the supplemental agreement thereto entered into for the protocol parameters work (<https://www.icann.org/en/stewardship-implementation/2016-supplemental-agreement-with-the-internet-engineering-taskforce-ietf>), there is no discussion of an arbitration or litigation process, nor choice of law. The MoU and supplemental agreement maintain other escalation and termination rights.

The ICANN-PTI IANA Numbering Services Agreement specifies the governing law as the laws of the State of California, United States of America (excluding conflict of law rules), and venue in a court within the State of

¹ ICANN has a few legacy agreements with managers of ccTLDs, and a special agreement with EURID for the operation of the .EU ccTLD. Under that EURID/ICANN Agreement, arbitration must occur in a place of legal residence of either party; an injunction may be granted by a court with appropriate jurisdiction in a place of legal residence of the party against whom the injunction is sought; and awards may be enforced in any court of competent jurisdiction. The choice of law requires Belgian law to apply to acts of EURID and California law to apply to acts of ICANN.

California. The customer mediation process is also required to follow the laws of California and to be conducted in the State of California unless mutually agreed.

For all of these agreements, there are no third-party beneficiaries. What this means is that the agreements do not provide rights to people or entities that are not party to the agreements to claim breach of contract (or other causes of action) solely because of the existence of the contract. Therefore, the venue and choice of law clauses define commitments among contracted parties, and do not define generally where ICANN or the contracted party has agreed to be subject to suit for a particular purpose. Modifications to the Registry and Registrar Accreditation Agreements, including modifications to the standard choice of venue or law provisions (where applicable), would have to be reached through the relevant base agreement modification procedure.

ICANN, of course, has a number of other contracts that it enters into in order to perform its operations, ranging from leases for office space, and contracts for office machines and cleaning services, through to engagement with vendors and others professional service contractors. ICANN follows procurement guidelines for those engagements, and, where appropriate, includes clauses related to choice of law and venue for disputes into those contracts. Within these operations-based agreements, ICANN and the contractor negotiate for the most appropriate selection of each, at times even identifying that in relation to a single contract different laws might govern the conduct of different parties. Each negotiation is fact-specific.

2. For the contracts discussed above, please indicate whether there have been instances where different choices were specified, and whether this was requested by ICANN or by the other contracting party. If so, please list the other jurisdictions and/or venues that were used in these contracts.

ANSWER: As discussed above, there are no instances of Registry or Registrar Accreditation Agreements resulting in a different venue or selection of law other than California, USA or Geneva, Switzerland.

Thank you very much for your assistance with these questions.