

What is the influence of ICANN's existing jurisdiction(s) relating to resolution of disputes (i.e., choice of law and venue) on the actual operation of ICANN's policies and accountability mechanisms?

A. Jurisdiction Concepts Relating to Resolution of Disputes

1. Jurisdiction for Interpretation of Contracts, etc. (Choice of Law), including contracts with contracted parties, contracts with other third parties, and actions of the Empowered Community.

- a. This refers to the jurisdiction whose laws will be used to interpret the rights and responsibilities of parties to a litigation, arbitration or other dispute resolution mechanism.
- b. Choice of law may be specified in an agreement. Under U.S. law, the parties are generally free to agree in a contract on a state or country whose substantive law will apply to disputes related to that contract.
 - i. California follows the rules set out in section 187 of the Restatement of Law 2d (1971) ("Restatement 2d") 561, Conflict of Laws, and will enforce the parties' choice-of-law clause, unless either:
 1. the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice; or
 2. application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state.
- c. If the parties have not agreed on a choice of law, the judge, panel or other decision-maker will engage in a choice of law analysis, which will look at a number of factors set forth in that forum's "Conflict of Laws" rules, including the place(s) where the contract is performed and the jurisdiction of incorporation/HQ for both parties.
 - i. California follows Restatement 2d for contractual disputes where there is no specific choice of law using the "significant relationship" test of Restatement 2d § 188. The contacts to take into account in determining those principles are:
 1. the place of contracting,
 2. the place of negotiation of the contract,
 3. the place of performance,
 4. the location of the subject matter of the contract, and
 5. the domicile, residence, nationality, place of incorporation and place of business of the parties.
 6. If the place of negotiating the contract and the place of performance are in the same state, the law of that state will usually apply, except as provided in the sections regarding specific kinds of contracts (e.g. contracts relating to the transfer of interests in land or chattel, life, fire, surety or casualty insurance, contracts of suretyship, repayment of loans, services, or transportation). In those sections, the Restatement directs application of a specific state's law subject to the "significant relationship" test of Section 6.
 - ii. ICANN legal should be consulted to determine if conflict of law issues have been raised in contractual disputes with ICANN

Comment [1]: DM: As particular issues crystalize under this overall topic it would be nice to hear from ICANN legal as we consider them. There may be matters that they cannot disclose, for instance information known or held under a duty of confidentiality. But general observations about experience gained and issues presented at the intersection of dispute-resolution jurisdiction and ICANN ops (especially as to accountability and policy) should be helpful.

2. Jurisdiction for the physical location of litigation of disputes (Venue).

- a. Types of Disputes
 - i. Contractual disputes with contracted parties.
 - ii. Contractual disputes with other third parties.
 - iii. Non-contractual disputes with third parties.
 - iv. Enforcement of actions of the Empowered Community.

- b. This refers to the type of proceeding (e.g., litigation, arbitration, IRP, etc.), the provider of that proceeding, and the physical location in which the proceeding will take place. It does not refer to the substantive law applied to the dispute, which is covered under Section 1 (Choice of Law).
 - i. For IRP proceedings, there is no physical location of venue. Under Bylaw Section 4.3, the proceedings are designed to be done electronically. The IRP Implementation Oversight Team is close to finishing supplemental rules of procedures for IRPs and those too will likely direct a panel to conduct its proceedings by electronic means to the extent feasible and if hearings are needed then to do those by telephone or video conference.

B. ICANN's existing jurisdictions relating to resolution of disputes

1. Choice of Law

- a. Which jurisdictions' laws currently govern disputes involving ICANN?

Comment [2]: JC: ICANNs main agreements (with registries and registrars) are generally silent on applicable law. This silence may be construed differently by different courts in different jurisdictions, although I feel there is a natural tendency in courts to apply its own laws if the agreement is silent and there are no compulsory rules clearly applicable to the case (as if when in the EU one of the parties is a consumer). This means that the choice of applicable law may be limited nowadays in practice, which in principle may disadvantage stakeholders not familiar with the implicit choice of law.

At the same time, registry agreements for IGO/Governmental entities have some flexibilities built in as to applicable law or, to be more precise, as to conflicts arising from diverging obligations coming from the agreement with ICANN and the international law obligations. This is reflected for instance in section 7.16 of the model registry agreement. This flexibility could be extended to other registries confronted with similar conflicts, not only with international law, but also when confronted with conflicts stemming from national law.

The flexibility could also take the form of a more wider recognition of freedom to choose the ...

Comment [3]: GS: I'm not clear what is meant by an "implicit choice of law." Do you think ICANN has somehow fooled contracted parties by leaving the contact silent as to applicable law? In the US, there are detailed laws and rules covering "Conflicts of Laws," which are used to determine which substantive law will be applied in a particular case, based on a variety of facts and circumstances. These are applied to all cases. The US Courts will look to these rules in making such a determination; I'm not familiar with situations where US courts have ...

Comment [4]: what changes would you propose making to this document relating to these points?

Comment [5]: JC: I feel I explained my point. If you have a contract that is silent on applicable law, but there are a number of external circumstances that link you to a certain jurisdiction (as hq, place of incorporation, venue for arbitration/judicial adjudication, etc.) that tilts the result in favor of the laws of that jurisdiction in absence of clear and compulsory conflict of laws rules.

We may of course engage in an analysis of standard main agreements from ICANN and see how this could play out in the case of ...

Comment [6]: GS: My point is that, at least in the US, clear Conflicts of Laws rules are applied whenever the issue arises; so the "absence of clear and compulsory conflict of laws rules" doesn't occur. There are essentially three versions of Conflict of Laws regimes used in US courts, depending on the state. In some version and for some causes of action, the rules may tilt toward the laws of the jurisdiction (typically, in tort cases). A succinct summary of these four variations can be found at <http://www.proskauerguide.com/litigation/7/IV>

Comment [7]: JC: Perhaps I expressed myself not as precisely as possible. I do not contend that the rules exist. Whether they are clear or not I guess is something that could be contrasted with registries and registrars (and other parties) based in other jurisdictions. That fact-finding exercise would also allow us to see whether and in what instances that "tilting" occurs.

Comment [8]: JC: The material you mention has, at least at first glance, some relevant rules of choice of law that in a foreigners eye seem to clearly tilt for the "forum" jurisdiction (for instance the "government interest analysis test". But, what are the rules followed by California? I see that for contracts (most relevant to contracting parties) the second restatement is followed apparently which provides the following:

"d.Contract: In the first instance, the courts must give effect to the law chosen by the parties. I(...

i.

2. Venue

a. In which locations can disputes involving ICANN be commenced?

i. IRP

1. Has no location when commenced

a. In virtually all cases, there will never be a location, as the IRP is handled in documents, online or telephonically

b. Under exceptional circumstances, it might be possible for an in-person hearing to be held, if justified by the parties and agreed to by the panel. This is still under discussion by the IRP IOT.

Pursuant the new Bylaws the rules of procedure (still in development as I understand) will regulate: "(E)Whether hearings shall be permitted, and if so what form and structure such hearings would take.:

Question: what is considered to be the venue if a hearing is undertaken electronically or telephonically? Where the panel is based?

a-c.

ii. Arbitration

1. Locations typically specified in agreements

a. Los Angeles for private parties

b. Geneva for government and IGO parties

iii. Litigation

1. ICANN can be sued in the following locations:

a.

C. Influence of ICANN's existing jurisdiction(s) relating to resolution of disputes (i.e., choice of law and venue) on the actual operation of ICANN's policies and accountability mechanisms

1. Influence on the operation of ICANN's Policies

a. A US court may find ICANN's actions, involving actual operation if its policies – like delegation of a gTLD, and/ or acceptance of certain terms of registry operation, to be in derogation of US law and instruct it to change its actions.

b. Emergency, including war related, powers of the US state – existing, or that may be legislated in the future, like for instance that involves country's critical infrastructure – may get invoked with respect to ICANN's policies and functions in a manner that are detrimental to some other country (or countries).

c. An US executive agency like OFAC may prohibit or limit engagement of ICANN with entities in specific countries.

d. FCC which has regulatory jurisdiction over US's communication infrastructure may in future find some ICANN functions and/ or policies to be such that it would like to apply its regulatory powers over them in what it thinks is the interest of the US public.

e. US customs, or such other enforcement agency may want to force ICANN to seize a private gTLD of a business that is located outside US which these agencies find as contravening US law, like its intellectual property laws.

f. A sector regulator in the US, say in the area of health/ pharma, transportation, hotels, etc, may find issues with the registry agreement that ICANN allows to a registry that takes up key gTLD denoting these sectors, like .pharma, .car, .hotel and lays exclusion-inclusion and other principles for the gTLD, and it may force ICANN to either rescind or change the agreement, and conditions under it.

ICANNs main agreements (with registries and registrars) are generally silent on applicable law. This silence may be construed differently by different courts in different jurisdictions, although I feel there is a natural tendency in courts to apply its own laws if the agreement is silent and there are internal/national rules that tilt into a certain direction. This means that the choice of

Comment [9]: JC: Pursuant the new Bylaws rules of procedure (still in development as I understand) will regulate: "(E)Whether hearings shall be permitted, and if so what form and structure such hearings would take;"

Comment [10]: DM: I believe this is correct Jorge. The IRP IoT (on which I serve) has wrestled with the issue of whether hearings (and the cross-examination of witnesses) would be allowed and we have considered positions ranging from (1) not at all, to (2) yes, anytime requested by a party, and we appear to be settling on (3) yes, when the panel approves in extraordinary circumstances. Becky presented these views in a recent plenary CCWG call and my recollection is that the sentiment in that call also supported position (3). But this is not finalized yet.

Comment [11]: GS: Hearings may be conducted telephonically or online. It is possible that under extraordinary circumstances a live hearing might be possible, but this will be rare if it occurs at all.

Comment [12]: GS: THIS IS REALLY THE HEART OF THE ASSIGNMENT

Comment [GS13]: PJS Suggested Text

Comment [GS14]: JC Suggested Text

applicable law may be limited nowadays in practice, which in principle may disadvantage stakeholders not familiar with the implicit choice of law.

At the same time, registry agreements for IGO/Governmental entities have some flexibilities built in as to applicable law or, to be more precise, as to conflicts arising from diverging obligations coming from the agreement with ICANN and the international law obligations. This is reflected for instance in section 7.16 of the model registry agreement.

This flexibility could be extended to other registries confronted with similar conflicts, not only with international law, but also when confronted with conflicts stemming from national law.

The flexibility could also take the form of a more wider recognition of freedom to choose the applicable law for the parties in the main agreements ICANN has.

The material you mention has, at least at first glance, some relevant rules of choice of law that in a foreigners eye seem to clearly tilt for the "forum" jurisdiction (for instance the "government interest analysis test").

But, what are the rules followed by California?

I see that for "contracts" (most relevant to contracting parties) the second restatement is followed apparently which provides the following:

"d.Contract: In the first instance, the courts must give effect to the law chosen by the parties. In the absence of any such agreement, the courts are directed to the "significant relationship" test of Section 6. Restatement (Second) of Conflict of Laws § 188. The contacts to take into account in determining those principles are:

i.the place of contracting,

ii.the place of negotiation of the contract,

iii.the place of performance,

iv.the location of the subject matter of the contract, and

v.the domicile, residence, nationality, place of incorporation and place of business of the parties."

It would be interesting to know how these contact points are construed in the relation between ICANN and its contracted parties, i.e. what the place of contracting is, the place of negotiation, place of performance, etc. - how they are intended to be construed by the contracting parties and what have been the actual analysis (if any) in the cases had up to today in disputes.

For "torts" (I guess including cases brought for damages by materially harmed parties that are not contractually bound to ICANN) the mentioned "governmental interest analysis" seems to apply ("California uses this test in determining the law applicable to tort claims.").

This test means that "the law of the forum is presumed to apply unless a party demonstrates otherwise."

I feel this could be seen as a significant tilt.

Experiences on how these rules (both on contracts and torts) apply in practice could be of interest and could be contrasted with ICANN, and registries and registrars (and other parties) based in other jurisdictions. That fact-finding exercise would also allow us to see whether and in what instances that "tilting" occurs.

A similar fact-finding should be done for what "applicable law" applies in internal mechanisms (such as the IRP).

2. Influence on the operation of ICANN's Accountability Mechanisms

- a.
- b.

c.

Annex I**Summary of US choice of law rules (from <http://www.proskauerguide.com/litigation/7/IV>)**

- A. There are several distinct choice of law regimes that have emerged, with states falling into one or more in their choice of law analysis. The principal regimes are discussed below.
- B. **The “traditional” test: the First Restatement**
1. Under the traditional test of the First Restatement, followed fully in some jurisdictions today (such as Maryland, Virginia, New Mexico, South Carolina, Georgia, Alabama, Wyoming and Kansas), the law that applies depends on the cause of action and on single points of contact.
 - a. Torts and Fraud: Torts are governed in nearly all issues by the law of the place of wrong, “the state where the last event necessary to make an actor liable for an alleged tort takes place.” Restatement (First) of Conflict of Laws § 377. In most cases the last event is the event causing injury and so the place of the wrong is effectively the place of injury. Frauds are similarly governed by the place of the wrong, which is where the loss is sustained, not where the fraudulent misrepresentation is made. *Id.*, illus. 4.
 - b. Contracts: In contracts, claims regarding the validity (capacity, formalities, consideration and defenses) are governed by the place where the contract was made, where “the principal event necessary to make a contract occurs.” *Id.* §§ 311 cmt. d, 332 (1934).
 - c. Property: Questions concerning interests in land are governed generally by the law of the *situs*. In the case of movables, the law of the place where the movable was located at the time of the transaction generally applies.
- C. **The “significant relationship” test: the Second Restatement**
1. The Second Restatement contains certain sections governing specific causes of action as well as an umbrella “significant relationship” test in Section 6(2). The specific sections governing torts, fraud and contract each refer back to the principles and overriding “significant relationship” test. Some version of the Second Restatement is followed by the majority of States (for example, New York, Delaware, Colorado, Connecticut, Alaska, Arizona, California (contracts only), Idaho, Illinois, Iowa, Maine, Mississippi, Missouri, Montana, Nebraska, South Dakota, Ohio, Texas, Utah, Vermont, and Washington). See Symeon C. Symeonides, *Choice of Law in the American Courts in 2006: Twentieth Annual Survey*, 54 Am. J. Comp. Law 697, 712 (2006).
 2. The Section 6(2) “Significant relationship” test: Section 6(2) provides that, subject to constitutional limitations, courts must follow the statutory directives of their own state on choice of law. In the absence of any, the factors relevant to the analysis of the applicable law include:
 - a. the needs of the interstate and international systems,
 - b. the relevant policies of the forum,
 - c. the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
 - d. the protection of justified expectations,
 - e. the basic policies underlying the particular field of law,
 - f. certainty, predictability and uniformity of result, and
 - g. ease in the determination and application of the law to be applied.
 3. The Second Restatement provides choice of law rules for each cause of action separately, with the analysis reverting to the “significant relationship” test.
 - a. Torts: The rights and liabilities with respect to issues in torts are determined by the local law of the state which, with respect to that issue, has the most significant relationship under the principles stated in Section 6. Second Restatement § 145. Contacts to be taken into account in applying the Section 6 principles are:
 - i. the place where the injury occurred,
 - ii. the place where the conduct causing the injury occurred,
 - iii. the domicile, residence, nationality, place of incorporation and place of business of the parties, and
 - iv. the place where the relationship, if any, between the parties is centered.
 - b. Fraud: Where the plaintiff’s actions in reliance on the misrepresentation took place in the same state as that in which the misrepresentations were made, that state’s laws will govern *unless* another state has a more significant relationship under Section 6. Second Restatement § 148.
 - c. Where the plaintiff’s actions in reliance took place in whole or in part in a state other than that where the misrepresentations were made, the following contacts will be considered in determining which state has the most significant relationship:
 - i. the place where the plaintiff acted in reliance upon the representations,
 - ii. the place where the plaintiff received the representations,
 - iii. the place where the defendant made the representations,
 - iv. the domicile, residence, nationality, place of incorporation and place of business of the parties,
 - v. the place where a tangible thing which is the subject of the transaction between the parties was situated at the time, and
 - vi. the place where the plaintiff is to render performance under a contract which he has been induced to enter by the false representations of the defendant.

- d. Contract: In the first instance, the courts must give effect to the law chosen by the parties. In the absence of any such agreement, the courts are directed to the “significant relationship” test of Section 6. Restatement (Second) of Conflict of Laws § 188. The contacts to take into account in determining those principles are:
 - i. the place of contracting,
 - ii. the place of negotiation of the contract,
 - iii. the place of performance,
 - iv. the location of the subject matter of the contract, and
 - v. the domicile, residence, nationality, place of incorporation and place of business of the parties.
- e. If the place of negotiating the contract and the place of performance are in the same state, the law of that state will usually apply, except as provided in the sections regarding specific kinds of contracts (e.g. contracts relating to the transfer of interests in land or chattel, life, fire, surety or casualty insurance, contracts of suretyship, repayment of loans, services, or transportation). In those sections, the Restatement directs application of a specific state’s law subject to the “significant relationship” test of Section 6.
- 4. New York courts employ, relatively consistently, a version of the “significant relationship” test, applying the law of the state with the greatest concern for the specific issue. *Babcock v. Jackson*, 12 N.Y.2d 473 (1963).

D. The “governmental interest analysis” test:

1. Many states are moving to, or already incorporate, some version of the government interest analysis test which is in some measure incorporated in the “substantial relationship” test of the Second Restatement. California uses this test in determining the law applicable to tort claims.
2. The law of the forum is presumed to apply unless a party demonstrates otherwise. *Washington Mut. Bank v. Superior Court*, 15 P.3d 1071, 1080 (2001). The burden of proof is on the proponent of the non-U.S. law to show that it “materially differs” from the forum and that applying the non-U.S. law will further the interest of the non-U.S. jurisdiction. *Id.* The non-U.S. law is presumed to be the same as the law of the forum absent a showing to the contrary. *United States v. Westinghouse Elec. Corp.*, 648 F.2d 642, 647 n.1 (9th Cir. 1981) Absent the non-U.S. law proponent carrying its burden, the forum law governs. *In re Seagate Tech. Sec. Litig.*, 115 F.R.D. 264, 269 (N.D. Cal. 1987).
3. The government interest analysis is a three step one. First, the court determines whether the non-U.S. law differs from that of the forum. If not, there is no conflict, and the forum law applies.
 - a. The non-U.S. law that is invoked must “materially differ” from the forum law. *Garamendi v. Mission Ins. Co.*, 131 Cal. App. 4th 30, 41, 31 (2005) (absent a showing of “conflicting authority” in the non-U.S. jurisdictions, the forum law applies)
 - b. Laws are “materially different” if their application would lead to different results. *Costco Wholesale Corp. v. Liberty Mut. Ins. Co.*, 472 F. Supp. 2d 1183, 1200 (S.D. Cal. 2007).
4. Second, if there is a difference, the court examines each jurisdiction’s interest in the application of its own law to determine whether a “true conflict” exists. If not, and only one jurisdiction actually has a governmental interest in having its laws apply, there is only a “false conflict” and the law of the interested jurisdiction will apply.
 - a. But even where the forum’s interest is too weak to sustain its side of a “true conflict,” the non-U.S. state must still be shown to have its own legitimate interest in applying its laws. *McGhee v. Arabian Am. Oil Co.*, 871 F.2d 1412, 1424 (9th Cir. 1989).
 - b. Where neither state has an interest in applying its laws, the laws of the forum will apply.
5. Third, if there is a “true conflict” and each jurisdiction has a legitimate interest in the application of its rule of decision, then the court analyzes the “comparative impairment” of the interested jurisdictions to identify the law of the state whose interest would be the more impaired if its law were not applied.
 - a. The analysis does not involve weighing the government interests in the sense of determining which law is worthier or best, but as a process of allocating respective “spheres of lawmaking influence.” *Offshore Rental Co. v. Continental Oil Co.*, 583 P.2d 721, 726 (Sup. Ct. Cal. 1978); *McGhee v. Arabian Am. Oil Co.*, 871 F.2d 1412, 1422 (9th Cir. 1989).
 - b. In determining the policies and interests of a non-U.S. state, courts – looking to case law or legislative histories – may make their own determinations independent of what the parties demonstrate. See *Offshore Rental*, 583 P.2d at 725, n.5.
 - c. The courts will consider the various contacts in determining which state has the greater interest and would suffer the greater impairment, such as the *situs* of the injury, the *situs* of the wrongful conduct, the domicile and business of the parties, and the place of contracting.
6. The governmental interest analysis considers what is in the competing states’ public policy interests. Where a non-U.S. law violates the forum state’s public policy, that law will not be applied. *Kashani v. Tsann Kuen China Enter. Co.*, 118 Cal. App. 4th 531, 543 (“the forum state will not apply the law of another state to enforce a contract if to do so would violate the public policy of the forum state.”)
 - a. For example, recognizing strict liability of manufacturers and compensating injured parties for pain and suffering are public policies of California that will be recognized over non-U.S. law. *Kasel v. Remington Arms Co.*, 24 Cal. App. 3d 711, 735 & n.28 (2d Dist. 1972).
7. The governmental interest approach requires a separate analysis with respect to each issue. *Beech Aircraft v. Superior Court*, 132 Cal. Rptr. 541, 550 (Cal. App. 1976).

OCTOBER 30 2016 DRAFT

8. The courts will determine the relative commitment of the respective states to the law involved, whether the policy underlying the law was more strongly held in the past than now, and whether the law is attenuated and anachronistic. *Offshore Rental*, 583 P.2d at 726.
 9. Courts performing the comparative impairment analysis also consider the modern pertinence of the underlying policy of the competing laws, and whether the policy can be satisfied by some other means (e.g. insurance satisfies the purpose of providing compensation to tort victims instead of laws permitting a broader range of tort claims).
- E. Changing residency after the wrongful conduct will have no bearing on the choice of law analysis, as courts do not want to encourage forum shopping. *Reich v. Purcell*, 432 P.2d 727, 730 (Cal. 1967).
- F. When more than two jurisdictions are involved, once a party has invoked the choice of law analysis, the interests of all potentially affected jurisdictions are considered. States with similar laws may be grouped together for purposes of the comparative impairment step of the analysis. Among the states that are grouped as one, it is the state with the real interest in the outcome of the litigation whose impairment will be measured against that of a conflicting state. *Costco Wholesale Corp. v. Liberty Mut. Ins. Co.*, 472 F. Supp. 2d 1183, 1199 (S.D. Cal. 2007).