

Samantha Eisner [Samantha.Eisner at icann.org](mailto:Samantha.Eisner@icann.org)

Thu Mar 30 18:25:27 UTC 2017

<https://mm.icann.org/pipermail/iot/2017-March/000178.html>

Thanks Malcolm -

I wanted to follow up on one issue from your email, which I'd raised during the last IOT call. Specifically, I had requested inputs on where Sidley said that a limitation on repose was inappropriate. I note you include below the following argument:

"Perhaps even more important, though, is the opinion of our independent legal Counsel, who says that the statute of repose is incompatible with the Bylaws that have just been adopted to ensure ICANN's accountability.

"Sidley writes:

'Applying a strict 12-month limit to any IRP claim that commences at the time of the ICANN action or inaction and without regard to when the invalidity and material impact became known to the claimant, is inconsistent with the Bylaws (and is inconsistent with the terms of Annex 7 of the CCWG Report)." (page 4, letter of January 4, 2017).^{1 2}

To be clear, this quote is taken out of context. Sidley was not responding to a a question of whether it was inappropriate to have an outside time limit on when IRPs can be raised. Sidley was responding to a question of whether the rules [as posted for comment] were consistent with a suggestion raised in the IOT that ICANN actions that are ³facially invalid² under the Bylaws should be subject to challenge at any time. {notably, this ³facially invalid² issue is no longer being discussed). Their answer (as well as ICANN's) was that the rules as written did not support such a claim being brought at any time.

HOWEVER, Sidley also noted that their proposed revisions that would allow for the ³facially invalid² claim ALSO INCLUDED language that would "leave in place the 45-day/12-month limit for ³as applied² challenges." (I.e., ICANN acts that result in injury).

While there may be other bases for the IOT seeking to not include an ultimate period of repose on IRP claims, I think that it is important to make sure it's not based on an assertion (taken out of context) that a period of repose is against the Bylaws. ICANN is not of the opinion that the Bylaws would be violated if an outside repose period were instituted.

>From my perspective, there are many ways to address the outside time limit claims issue. The concept that it's against any sort of arbitral norms doesn't really make sense - there are statutes of limitations in many areas, and access to arbitration doesn't overtake those statutes. There also seem to be some concerns, for example, that decisions on acceptance of policy recommendations set up the time limit on ICANN actions in implementing the policy - but those would be separate actions with their own separate deadlines. Indeed, any time that ICANN acts outside of the Bylaws is its own new starting point. Maybe there are ways that we can

make that clearer, as part of this discussion?

<

Samantha Eisner
Deputy General Counsel, ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, California 90094
USA
Direct Dial: +1 310 578 8631