FOLLOW-UP QUESTIONS FROM JURISDICTION SUBGROUP TO ICANN LEGAL

ICANN Legal responded on April 10 to questions posed by the Jurisdiction Subgroup.

The Subgroup asked the following question:

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.

ICANN Legal's answer included the following statement:

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]

FOLLOW-UP QUESTIONS: The Subgroup would like to better understand ICANN's reasons for not specifying the applicable law in these agreements. Aside from determining the law that governs the parties' conduct (as referred to in ICANN Legal's answer), applicable law is also significant when interpreting the contract itself.

- *What are ICANN's reasons and considerations in not specifying the law of the contract?*
- *How did ICANN take this into consideration when drafting these contracts?*
- *How does ICANN take this into consideration when interpreting contracts where there is no arbitration or litigation (e.g., in contract negotiations, disagreements on contract interpretation, contract compliance, contract enforcement, and allegations of contractual breach?*
- *What other information can you share with the Subgroup to aid it in understanding the lack of an applicable law clause?*

ANSWER:

As noted in ICANN's previous response, these contracts have historically been silent on applicable law. These contracts are not solely matters of ICANN drafting, nor do they

[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.**

represent only ICANN inputs on terms in the contracts. The Registry and Registrar contracts have evolved through direct negotiation and community inputs.

Historically, not having a choice of law clause seems to have worked out well in practice. The lack of a choice of law clause, as far as ICANN is aware, has not presented big problems for either ICANN or contracted parties. The plain language of the agreement has generally been sufficient to resolve questions between the parties and allow the parties to interpret the performance requirements, their rights and obligations in the ordinary course. Reliance on the plain language of the agreements normally does not depend on a choice of which jurisdiction's laws would apply.

As to why the contracts have evolved in this manner, it has essentially been a compromise that allows the choice of law issue to be handled on an issue-specific basis that takes into account the specific conduct being reviewed, the needs of the parties and ICANN's global coordination function.