

APPLICABLE LAW AND CHOICE OF VENUE RECOMMENDATION

BACKGROUND

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In keeping with its stated mandate,¹ this Subgroup has considered how ICANN's jurisdiction-related choices, in the Registry Agreement (hereafter, "RA") as well as the Registrar Accreditation Agreement (hereafter "RAA-"), may have an influence on accountability.

Three such jurisdiction-related choices have retained the attention of the members of this Subgroup, namely the absence of a choice of law provision in registry agreements, the absence of a choice of law provision in registrar accreditation agreements, and the contents of the choice of venue provision in registry agreements.

Both the RA and the RAA are standard-form contracts which do not give rise to negotiation between ICANN and the contracted party, with some exceptions made when the contracted party is an intergovernmental organisation or a governmental entity. The contents of these contracts are now determined through an amendment procedure, detailed in each agreement (for example, see Art. 7.6 of the RA-).

Through its discussion, the Subgroup has identified three separate issues which appeared to as influencing ICANN's accountability. These issues are listed below.

ISSUES

1. Choice of law provision in registry agreements

ICANN's Registry Agreement does not contain a choice of law provision. The governing law for the RA is thus undeterminedate, until a judge or arbitrator takes a decision on that matter in the context of a litigation.

2. Choice of law provision in registrar accreditation agreements

ICANN's Registrar Accreditation Agreement does not contain a choice of law provision. As with the RA, the governing law for the RAA is undetermined until a judge or arbitrator takes a decision on that matter in the context of a litigation.+++

3. Choice of venue provision in registry agreements

Disputes arising in the context of ICANN's Registry Agreement are to be resolved under "binding arbitration" pursuant to ICC rules. Moreover, the RA contains a general choice of venue provision. This provision sets the venue to Los Angeles California as both the physical place and the seat of the arbitration (to be held under ICC rules-).

¹ "At this point in the CCWG-Accountability's work, the main issues that need to be investigated within Work Stream 2 relate to the influence that ICANN's existing jurisdiction may have on the actual operation of policies and accountability mechanisms. This refers primarily to the process for the settlement of disputes within ICANN, involving the choice of jurisdiction and of the applicable laws, but not necessarily the location where ICANN is incorporated." CCWG Accountability WS1 Report

POSSIBLE SOLUTIONS

1. Choice of law provision in registry agreements

It has emerged from the subgroup's discussions that, ~~besides aside from the~~ status quo, there is ~~a possible option~~ ~~common ground~~ whereby increased freedom of choice for the parties to the agreement could help registries in tailoring their agreements to their specific needs and obligations. ~~are three possible options regarding possible changes to the fact that there is currently no choice of law being made in Registry Agreements.~~

~~This would overall result in~~ ~~ae first option is the~~ "Menu" ~~approach~~ ~~option~~, whereby the law(s) governing the ~~whole of the~~ Registry Agreement is ~~(are)~~ chosen at the moment of its conclusion. Such choice would be made according to a "menu" of possible governing laws. The said menu could be composed of ~~one country from each ICANN Geographic Region.~~+++

This option has the advantage of ~~providing the parties, especially the registries, with effective freedom to define, within a reasonable agreement with ICANN, the law(s) governing their contracts. This may contribute to avoiding conflicts between provisions established in the contract and the provisions of national or supranational law. It may also help registries that are more comfortable with subjecting their agreement in whole or in part to law(s) with which they are more familiar.~~+++

~~A possible outcome of this Menu approach would still be the~~ ~~The second option is the~~ definition of "California" law as ~~the governing~~ ~~one option~~ ~~law in a particular contract~~, whereby the law governing the whole of the Registry Agreement is set as being the law of the State of California.

~~A second possible option is the "California" approach, whereby all RAs expressly state that the contract is governed by the law of the State of California and U.S. federal law.~~

This option has the advantage of ~~certainty, since all RAs will be construed under the same choice of law. It will also be consistent with the drafting approach in the RA, which is drafted according to U.S. law principles.~~+++

~~a~~ ~~Another possible option~~ ~~outcome would be a~~ ~~The third option is the~~ "Carve-Out" ~~option~~ ~~solution~~, whereby certain parts of the contract ("some parts of the agreement [which] may require a uniform treatment for all registry operators") are governed by a predetermined law (~~e.g. for example~~, California) and other parts (~~e.g.,~~ "eligibility rules for second level domains, privacy and data protection rules") are governed by the ~~either the~~ same law which governs the registry as a legal person ~~or by using the "Menu" approach for these other parts of the RA.~~

This option has the advantage of ~~certainty of interpretation for the uniform provisions of the Agreement, while allowing greater flexibility for other portions.~~ ~~Finally, there is the "Bespoke" approach, where the governing law of the entire agreement is the governing law of the Registry Operator. This has some of the advantages of the Menu approach by allowing each Registry Operator to have their "home" choice of law.~~+++

Comment [1]: As originally drafted by Raphael, this was a discussion of the various options.

Comment [2]: We will be discussing on the call and on the list whether any of these options has the broad support of the Subgroup. Until then (and based on discussions to date), I think it is premature (at best) to single out one option as the "common ground".

There could potentially be other possible outcomes of exercising the effective freedom to choose warranted under the Menu approach.

2. Choice of law provision in registrar accreditation agreements

+++The options for the RAA are essentially the same as for the RA.

3. Choice of venue provisions in registry agreements

When entering into contracts with registries, ICANN could offer a list of possible venues for the arbitration to take place rather than generally imposing Los Angeles, California as the place (and hence, both the “seat” and physical location) of the arbitration. The rest of the arbitration clause (namely, the rules of arbitration being ICC rules) would remain unchanged.

The registry which enters into a registry agreement with ICANN could then choose which venue it prefers at the moment of the conclusion of the contract.

Having this option open would diminish the cost of litigation for registries, potentially allowing registries to start arbitration procedures at a location which is more amenable to them than Los Angeles, California (although Los Angeles itself could remain an option.)

From ICANN’s perspective, the only risk associated with such a change is having to deal with a different *lex arbitri* than that of California. Indeed, related to the prerogatives given to the courts of the seat of the arbitration are competent to order interim relief and hear challenges to the award, among other things. in matters of challenge of the award, for example. Indeed, only the courts of the seat are competent to entertain a challenge of the arbitral award.²

Finally, the options given in the “venue menu” could correspond to ICANN’s own regions as defined in ICANN’s bylaws, that is ICANN could offer at least one venue per region.³ ~~(e.g. one venue per region.)~~

RECOMMENDATION

+++[TO BE DISCUSSED]

² In addition to interim relief and award challenges, the *lex arbitri* is also relevant when witnesses are involved or when one of the parties would claim that the subject matter of the dispute is not arbitrable. The contents of the *lex arbitri* are to be found in the arbitration laws of a given country. Such laws are today rather standardised and in that sense, it is possible to further mitigate this risk by assessing the contents of the arbitration laws of each possible venue offered as an option in the “menu.”

³ “As used in these Bylaws, each of the following is considered to be a “Geographic Region”: (a) Europe; (b) Asia/Australia/Pacific; (c) Latin America/Caribbean islands; (d) Africa; and (e) North America.” ICANN Bylaws, Art. 7.5