APPLICABLE LAW AND CHOICE OF VENUE RECOMMENDATION

BACKGROUND

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).

It is the understanding of this Subgroup that it cannot and would not require ICANN to make amendments to the RA or the RAA through this Recommendation. Not only would that go beyond the stated mandate of the CCWG, but that would also constitute an infringement of the Bylaws and more specifically an infringement of the prerogatives of the GNSO

Rather, this Recommendation should be understood as suggesting possible changes to the aforementioned contracts, changes which, as stated above, would increase ICANN's accountability.

Through its discussion, the Subgroup has identified three separate issues which appeared to influence 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 undetermined, 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**

[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

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).

Comment [1]: GS: What is a "general choic of venue provision" and how does it differ fro other kinds of venue provisions?

POSSIBLE SOLUTIONS

1. **Choice of law provision in registry agreements**

A. Menu Approach

It has emerged from the subgroup's discussions that, aside from the status quo, there is a 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.
This would overall result in a "Menu" approach, whereby the law(s) governing 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.

Comment [2]: RBL: My understanding of th current consensus was that the no choice wa overall detrimental. I for one think the absolut best solution is to have a single, set law (and minimal disruption, California law). Still I do s the value of the freedom of choice and the m open options such as the menu. And I also te to believe that imposing California law could lead to problems of legitimacy.

Comment [3]: RBL: We still have to determ who chooses; i.e. can the R choose on its ow or must it be the result of a negotiation with ICANN?

~~The said~~ This menu needs to be defined. It may be best to leave it to ICANN, working with the gTLD registries, to define the menu options. The Subgroup discussed a number of possibilities:

- The menu could be composed of one country from each ICANN Geographic Region.
- The menu could be composed of a small number of countries from each Region..
- The menu could also include the status quo, i.e., no choice of law.
- The menu could also include the registrar's jurisdiction of incorporation as a choice.
- The menu could also include the countries in which ICANN has physical locations.
- Conceivably, the menu could include every country in the world.

The Subgroup has not determined what the menu items should be. However, the Subgroup believes that a balance needs to be struck between the freedom to choose (or at least to negotiate for) a particular choice of law, and negative consequences from unchecked proliferation of laws to which the standard base Registry Agreement is subject. The proper balance is likely struck by having a relatively limited number of choices on the menu.

Thi~~s~~e menu 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, since the RA would be interpreted under the same national law that governs the registry (this assumes that the registry operator's national law is "on the menu").t. It may also help registries that are more

Comment [4]: GS: Is this referring to the RA as a whole, or just saying the parties should b reasonable in coming to agreement on the choice of law?

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 definition of California law as the governing 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.

There are several disadvantages of the Menu approach.

AOn such first disadvantage is the fact that the chosen law may not be entirely compatible with the contents of the RA. Indeed, the current RA has been drafted with US law in mind and uses a style of drafting which corresponds with the American legal tradition. The result of this would be that some parts of the RA might find themselves inoperative or "knocked-off" the contract in the context of litigation. Moreover, some provisions might be outright invalid and as such could have been deemed to have never applied between the parties.

A second disadvantage, which is related to the first, is that some registries could ultimately find themselves with a different RA governing their relation with ICANN by virtue of mandatory modifications brought about by a different governing law.[2] These differences could turn out to be either an advantage or a disadvantage to some registries but could likely be perceived as unfair. Over time, this could lead to some form of jurisdiction shopping by registries.

A third disadvantage is the fact that a choice must be made on the contents of the "Menu" and that while there are some regions which are highly legally integrated (Europe, namely,) others are not at all, such as APAC. Where exactly to draw the line and how to regionalise the world in terms both compatible with ICANN's operations and with the variety of legal systems and traditions may end up being a difficult and contentious task.

B. "California" (or "fixed law") Approach

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.

The main disadvantage of this option is that it forces all registries worldwide to abide by California law in their contractual relations with ICANN. While US-based registries might not see that as a problem, several members of the Subgroup outlined the inconsistency between the global mandate of ICANN and the imposition of California law in its contracts with registries. Moreover, this might place some non-US registries at a disadvantage in interpreting and potentially litigating the RA, since their knowledge of California and US law

[2] "Mandatory" provisions is understood here as elements of the governing law which may not be contractually set aside and necessarily govern the legal relations of the parties. This is different from *super-mandatory* provisions which apply according to objective criteria (such as the place of performance of the contract) and notwithstanding the choice of governing law made by the parties.

Comment [5]: GS: Until we have establishe common ground, I think it is prudent to mainta this (fixed choice of law across all agreement as an independent option.

Comment [6]: RBL: Yes I do agree and I would rather keep it there for the sake of the record and also so that pros/cons can be detailed

Comment [7]: GS: Let's discuss whether th is true. I think it is true to say that the contrac would be interpreted using California law -- bu is that the same thing as "abiding by Californi law in their contractual relations."

might be limited. FInally, California law might act as a chilling effect on potential litigation, discouraging litigants from litigating simply based on their lack of knowledge of California law.

C. Carve-out Approach

A third~~Another~~ possible option would be a "Carve-Out" approach~~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., 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.

Comment [8]: GS" Where is this being quot from?

This option has the advantage of certainty of interpretation for the uniform provisions of the Agreement, while allowing greater flexibility for other portions.

The disadvantage of this option is the fact that the applicable law to the RA is not uniform. This option assumes that all the obligations contained in the RA can be neatly separated in categories, which are then "labeled" with a given applicable law. In practice, it may well turn out that many obligations are interdependent and as such, this choice may make the RA difficult for interpret for eventual arbitrators and as such make the result of the litigation difficult to predict, which in turn diminished accountability.

Besides this disadvantage, this option shares other disadvantages of the Menu option.

D. Bespoke Approach

Next~~Finally~~, there is the "Bespoke" approach, where the governing law of the entire agreement is the governing law of the Registry Operator.

This approach has some of the advantages of the Menu approach by allowing each Registry Operator to have their "home" choice of law. Moreover, it shares the advantage of the California option as far as a single law would apply to the RA

As for disadvantages, they are also shared with the Menu option and it could be added that these disadvantages find themselves compounded here by the fact that this approach consists, in practice, of a very large menu whose contents are determined by the place of incorporation/location of the registry (as a legal person.) In that sense, it can be very hard to predict the result of the application of a multitude of different bodies of laws to the RA. Some registries might find themselves at an advantage, others at a disadvantages, and some might find themselves with larges parts of the RA inapplicable due to mandatory provisions of the governing law, or simply with a RA which is very difficult to interpret.~~+++~~

E. Status Quo Approach

The Subgroup acknowledges that a fifth possible approach is to retain the status quo, i.e., have no "governing law" clause in the RAA. The advantages of this approach have been explained by ICANN Legal in a document sent to the Subgroup, and may be summarized as follows:

[insert]

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

Comment [9]: GS: Can this be clarified? Th point being made is not clear to me.

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 t~~he *courts* of the seat of the arbitration are competent to order interim relief and hear challenges to the award, among other things.[3]

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.[4]

RECOMMENDATION

As stated in the Background section, the aim of the Subgroup in formulating this Recommendation is to frame it as a suggestion of possible paths towards increased accountability.

Regarding the choice of law in registry agreements

[3] 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."

[4] "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

[While at this point all options remain open to the extent that it is not for this Subgroup to *decide* on one and/or *implement* it, a consensus has emerged from this Subgroup that +++]

OR

[At this point all options remain open to the extent that it is not for this Subgroup to *decide* on one and/or *implement* it. Moreover, no consensus was reached at the level of the Subgroup over which option was the “best,” as all options have advantages and disadvantages +++]

Regarding the choice of venue in registry agreements

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