

Legal SubTeam Meeting #14 (29 April)

Attendees:

Sub-Group Members: Alan Greenberg, Alice Munyua, Athina Fragkouli, Becky Burr, Cheryl Langdon-Orr, Edward McNicholas, David McAuley, Farzaneh Badii, Greg Shatan, Holly Gregory, Izumi Okutani, Janet Zagorin, Josh Hofheimer, Leon Sanchez, Michael Clark, Miles Fuller, Par Brumark, Robin Gross, Rosemary Fei, Rudi Daniel, Sabine Meyer, Samantha Eisner, Sharon Flanagan, Stephanie Petit, Steve DelBianco, Steven Chiodini, Tyler Hilton (16 CCWG) (11 Legal)

Staff: Adam Peake, Alice Jansen, Brenda Brewer

Apologies:

Please let Brenda know if your name has been left off the list (attendees or apologies).

Transcript

[Transcript CCWG ACCT LEGAL SubTeam 29 April.doc](#)

[Transcript CCWG ACCT LEGAL SubTeam 29 April.pdf](#)

Recording

The Adobe Connect recording is available here: <https://icann.adobeconnect.com/p4os5bm8re5/>

The audio recording is available here: <http://audio.icann.org/gnso/gnso-legal-subteam-29apr15-en.mp3>

Proposed Agenda

1. Welcome and roll call
2. Discussion on suggested text by Robin and Izumi on point 6.6.1.1 as follows:

"Designators are a construct in California law that can achieve reliable enforcement of 4 of the 6 community powers sought, specifically with respect to community approval or blocking of changes of bylaws and the selection and removal of board members. There is concern however, regarding the ease and reliability with which the other 2 community powers sought (approval of budget and strategic plan) can be enforced once created under the designator model, according to legal counsel. Legal counsel further advises that the SOs and ACs organize themselves into unincorporated associations in both corporate governance models, whether a designator or membership structure."

3. Review of questions pending answers
4. Discussion on implementation
5. Discussion on overall draft document for public comment
6. Discussion with lawyers
7. AOB
8. IRP process

Notes

1. Welcome and roll call

Rollcall:

Sam Eisner on the phone

2. Discussion on suggested text by Robin and Izumi on point 6.6.1.

Comments from Jordan on 6.1.1.1

Jordan's text. point 4. Legal advisors. No increase in risk ICANN participants face

Q. What are the risks. and are participants covered. Becoming a UA may highlight those risks. What are they? Raise when Counsel present in second part of the call

For discussion with counsel, review now so we can ask more specific questions/examples.

Concern about financial risk, legal risks and liabilities, but also need to think about the internal risks to ICANN.

examples of the internal risks: relationships between the groups, how the switch to member model impacts that. Member statues and his they work. Individual members are granted rights under the statue that are hard to modify. And we have the community consensus based actions, and there are other rights that are not limited by community actions. Some unintended rights. And request more information from Counsel.

Support for Jordan's draft. Izumi agreeing to the text.

Does what we have proposed reflect their advice? And does it reflect the strength of their advice?

Reference model/mechanism. has it been defined in the report. Our primary model in the proposal.

Action: check reference mechanism is defined in the document

Designator model, and the powers regarding budget and strategic plan. Received advice that would have problem delivering these two powers

Enforce has some ambiguity in the document. Some refer to is it valid, and some whether can cause a change a control. Some varied use of the word enforcement throughout the document.

Legal counsel again and again say it is the enforceability of these two issues that is causing us to accept the member model. Member model because this is how we enforces these two issues.

Action: Robin and Greg draft text on these clarifications, to provide suggested wording.

And input from counsel first. Including on the meaning of enforceability.

Status quo. Some may argue that it is a designator model. If discuss why the status quo why not preferable to an explicit designator model or member model. And why. Explaining that they can take on some of the attributes of the designator model. Explain to the community why we made these decisions we did, bring them along so that if they follow our line of agreements they end up with the same conclusions.

Some duplication about NTIA, from paras 2 or 8. And leave the rest in to explain our rationale.

3. Review of questions pending answers

Pedro, Jorge's questions are pending. Sam's questions: will check that the answers received.

Action: Leon, check if Sam's questions answered by counsel.

Eberhard Lisse's questions about the legal basis for the USG claim on the root. Was reviewed by the sub-team on a call of April 8. And not considered on topic. Since on the list, Becky Burr has given a comprehensive answer. Leon, speaking as a member to chair, said he feels out of scope. Do people have comments?

Out of scope. Does not affect ICANN accountability. And likely not german to CWG. Out of scope for the expertise of the legal counsel engaged. A distinguished panel might be able to inform, for example Milton Mueller. But this beyond the scope

Unfortunate that Dr. Lisse has not been able to join the call to explain why the question is fundamental and in scope. His comments would have been very welcome.

To bring to a close, suggestion for a definitive conclusion on the record as a decision of the legal sub-team.

Is this out of scope for the CCWG. Please signal with a green tick.

Decision: the group indicates out of scope.

4. Discussion on implementation of the CCWG draft report

Any comments wrt to the general CCWG report and legal issues?

5. Discussion on overall draft document for public comment

Confirmation - can we have SO and AC and the NomCom as unincorporated with different powers, including as zero votes.?

6. Discussion with lawyers

Para 7 of the document (from Jordan) in the AC room. The level of certainty around the powers designators can have and can they be enforced. And do we currently have a designator system? Do we need to take on UA which take on some of the characteristics of the SO/AC?

We adopt this model because it brings these additional 2 powers. Walk the community through our thinking that of the 6 powers 2 are tricky under the designator model.

Advice is that if you want a true and robust designator model you need to be a legal person. And under the status quo it is hard to label under corporate law, they lack the rights associated with a designator model. If want to avoid the difficulties of UA, then will end with a weak model, and unenforceable.

The member model provides the clearest path to the mechanism we want to put in place (not control of the board)

Under current bylaws, could the So AC remove their Directors as designators, could it be enforced? Not clear how a court would respond. Would have to convince a court that you had the powers.

SO/AC not legal persons, so who would go to court? Directors and Officers have standing, they could make the argument before the court, so would need to persuade a director or officer to go to court.

Current SO/AC. Can we revise the bylaws to make them more like designators? Yes, can do that. But to give them the powers need to be UA.

The bylaws and fundamental bylaws, remove directors and while board (with some contract) Possible. But the power to reconsider/reject the budget and strategic plan only through member. And would create some issues for the IRP.

If these two powers are desired, then the member path is how to archive this.

Summary chart of powers will be included in the document.

If the GNSO names a director, conceivably the board might say you don't have the power to do that? If the bylaws amended to say SO/AC have recall powers, the director can refuse to stand down saying lack of enforceability under CA law.

These types of issues are examples of what the powers protect against and the mechanisms allow.

Do we have to create UA to archive all these powers? What can be achieved if not created as UA?

"powers" Lawyer will say how to enforce. But if, as under the current bylaws, you make rules that people agree to follow, but are not enforceable, then that is fine. But, there are some powers that would not be legal. Cannot take away from the board decisions related to its fiduciary duty, such as budget and strategic plan

(inaudible) Naming a person to represent. as a middle ground approach (check AC at 1:18)

Suggestion for the CCWG report. does a member of the SO implicitly be member of the unincorporated association. Some have comment that govt may struggle in this regard

The law requires at two persons associate. once beyond that, law says that the entity can create its own rules about who is part of it.

Who can join, Can allow any mechanism for the people to associate with the association. And these can be as loose or tight as you wish. Suggestion is to take whatever is in the current bylaws. Just piggyback in that. The articles of association just point to that. But do need to persons to become part of the unincorporated association.

Would it be possible to have a ccTLD participating in the decisions of the ccNSO but not consider a member of the UA. The UA can make its own rules. It does not require you consider them a member

Could, it be disregarded in litigation outside CA. unincorporated association vary a lot even within the US.

In all 50 US states, unincorporated association are not novel, and can sue or be sued. And CA has pretty robust protections from liability. In the US it could sue and be sued in the US.

Outside the US: significant work to research this.

Most who need to rely on the protections will never set foot in the US. March 18 memo from Sidley. However... a number of non US jurisdictions do not recognize unincorporated associations and loom thru the UA at the individuals as having liability

Context: about the transition. Issue here, how to give power to the community vis a vis the board/ICANN. That issue governed by CA law.

From a stress test issue. What statutory given rights given to an individual member, and how are they balanced against community rights. How are they constrained. Do individual members have control the affairs of ICANN.

Exposure in other countries If you want to bring an action against ICANN need to be in a jurisdiction where it has an office. Could look at the 7 countries where there is an office and see how they would resolve the choice of law question

On the rule decision issue. Should it extend to other law or only relate to the bylaws

Out sourcing the IRP panel, to the ICC etc. Might be outsourced as a secretariat function. Lawyers can suggest language. Standing, people need to agree on accepting the arbitration.

Geographic diversity, but no specification of the location. Will it be virtual, or based at an office location.

Q. can we have SO and AC and the NomCom as unincorporated with different voting powers, 5:2, 4:2, 4:0 etc. Feasible?

Voting on what (e.g. a petition)

Differential voting power - yes. proposed that each member would be sole class of member. And each would have a set number of seats. And they don't come together to do that.

How long to implement UA and have in place. Once docs drafted it can be a quick process and can help with the document drafting

Greg and Robin to provide clarifying text? Yes

END

Action Items

Action: Leon, check if Sam's questions answered by counsel.

Action: check reference mechanism is defined in the document

Action: Robin and Greg draft text on these clarifications, to provide suggested wording.

Documents Presented

Chat Transcript

Brenda Brewer: (4/29/2015 09:30) Welcome to the LEGAL SubTeam Meeting #14 on 29 April. Please note that chat sessions are being archived and follow the ICANN Expected Standards of Behavior: <http://www.icann.org/en/news/in-focus/accountability/expected-standards>

Sabine Meyer: (09:59) hi guys!

Athina Fragkouli (ASO): (10:00) hello all

Sabine Meyer: (10:00) this is by far the longest I've waited to get hold of a coordinator.

Pär Brumark (GAC Niue): (10:00) Hi!

Farzaneh Badii: (10:00) hi

David McAuley: (10:00) Hello all

Adam Peake: (10:01) can hear you :-)

Adam Peake: (10:01) I am accessing from the room and all seems to be working OK

Sabine Meyer: (10:02) yeah, I managed to get through and hearing everyone just fine :)

David McAuley: (10:02) Thank you CLO

Leon Sanchez: (10:03) 1. Welcome and roll call (5 minutes)2. Discussion on suggested text by Robin and Izumi on point 6.6.1.1 as follows: (20 minutes)" Designators are a construct in California law that can achieve reliable enforcement of 4 of the 6 community powers sought, specifically with respect to community approval or blocking of changes of bylaws and the selection and removal of board members. There is concern however, regarding the ease and reliability with which the other 2 community powers sought (approval of budget and strategic plan) can be enforced once created under the designator model, according to legal counsel. Legal counsel further advises that the SOs and ACs organize themselves into unincorporated associations in both corporate governance models, whether a designator or membership structure."3. Review of questions pending answers (10 minutes)4. Discussion on implementation (10 minutes)5. Discussion on overall draft document for public comment (15 minutes)6. Discussion with lawyers (50 minutes)7. AOB (10 minut

Adam Peake: (10:03) Thanks

Becky Burr: (10:04) hello all

Sabine Meyer: (10:05) got it. I guess we're supposed to focus on the highlighted sections?

Sabine Meyer: (10:09) and maybe also if risks exist, how could they be mitigated?

Greg Shatan: (10:11) I think that moving to a California unincorporated association (which is a limited liability vehicle) is a risk mitigation tool.

Greg Shatan: (10:12) I'm still not sure what the new or increased risks are....

Sabine Meyer: (10:12) I recall several mentions of insurance.

David McAuley: (10:12) Sam can you give an example

Sabine Meyer: (10:13) just generally speaking, I tend to prefer not just laying out problems but also pointing out a way forward if possible.

Becky Burr: (10:13) agree, i am a little confused Sam

Greg Shatan: (10:15) Risks generally come from the exercise of powers, rather than from a change of form.

Greg Shatan: (10:16) Unless we believe that under the current form, the members of each SOAC are shielded from risk because the SOACs don't really "exist", moving to an unincorporated association should be an upgrade.

Alan Greenberg: (10:17) Greg, from my particular point of view, it is not just the members of a SO/AC but the chairs who take actions on behalf of the SO/AC>

Greg Shatan: (10:18) I think but would want to confirm that the Chairs would be more protected acting as an officer of a limited liability entity than as an organization without legal personality.

Izumi Okutani (ASO): (10:20) I am good with Jordan's text if that is what is on the screen

Izumi Okutani (ASO): (10:20) great thanks Leon

Alan Greenberg: (10:20) As I said, it may not be an issue of changing the level of risk/protection, but that by bringi focus to the issue, the risks (and possible lack of protection) is highlighted.

David McAuley: (10:21) yes, that is what I meant to say, the strength of the advice

Izumi Okutani (ASO): (10:22) I agree with David and Greg - to have this reviwed by the CCWG lawyers to see if they think it is consistent with their advice

David McAuley: (10:23) I don't think we have, an dl took it the same way Alan did

Izumi Okutani (ASO): (10:25) I agree

Greg Shatan: (10:26) Why are we making up phrases and then defining them?

Leon Sanchez: (10:26) @Greg for the lack of better terms?

Greg Shatan: (10:27) Primary Mechanism

Alan Greenberg: (10:27) @Greg, we are doing it because there may not be a word in English for a"sort of presumption which may change"

Sabine Meyer: (10:28) give me a few minutes to hunt down the German word for that ;)

Alan Greenberg: (10:28) Sabine, to make this fully multi-lingual, Touche!

Adam Peake: (10:29) I think it may be defined. But I can't find while on the call. But we can suggest it is clear in the exec sumamry and any reading guide

Samantha Eisner: (10:30) Why can't we just say "membership model" instead of trying to say "reference mechanism"?

Sabine Meyer: (10:30) wait, isn't it explained under 6.?

Robin Gross [GNSO-NCSG]: (10:30) Note that #8 was a re-write of #2, so there is some duplicative language to remove in one of them.

Robin Gross [GNSO-NCSG]: (10:31) Agree with Sam, let's say "membership model" rather than assume everyone will read, understand, and remember.

Robin Gross [GNSO-NCSG]: (10:32) no, just a sentence in them

David McAuley: (10:34) Agree w/Greg

Greg Shatan: (10:34) If something is not valid, we should not create it in the first place....

Sabine Meyer: (10:35) I'd say we should distinguish between the wording per se and the value judgement inherent in reference/alternative mechanism.

Athina Fragkouli (ASO): (10:35) I agree with Robin

Athina Fragkouli (ASO): (10:36) if "enforce" is not clear, we should explain what we mean by that

Greg Shatan: (10:36) I agree that we need to explain the issue. I also think we need to be clear when we are talking about validity/enforceability and when we are talking about standing/enforceability.,

David McAuley: (10:37) I agree with both Robin and Greg

Greg Shatan: (10:37) I am all for clarity.

Sabine Meyer: (10:41) from the April 10 memo: ICANN's current structure comes closest to adesignator arrangement, although the designators are internal organizational units without anyclear separate legal existence. If the designator structure is retained, we would advise that effortsare undertaken to clearly establish the units as unincorporated associations, which wouldstrengthen the legal foundations of the designator structure and allow the use of contractualagreements with designators as needed for enforceability.

Izumi Okutani (ASO): (10:42) I agree it is helpful to clarify. Also to clearly explain the rationale why the CCWG comes up with a preference.

Izumi Okutani (ASO): (10:43) thanks Sabine for this text

Sabine Meyer: (10:43) wrt the text I copied above I would say there is some support for the "ICANN is designator-based already"

Greg Shatan: (10:44) Sabine: I would respectfully disagree. "closest to" is not "the same as".

Sabine Meyer: (10:44) "if the designator structure is retained" is the phrase that gives me pause, Greg.

Izumi Okutani (ASO): (10:45) To clarify the intention behind my text I didn't mean to imply the same -

Robin Gross [GNSO-NCSG]: (10:45) I'm worried about trying to mitigate any discussion of the benefits of the designator model

Izumi Okutani (ASO): (10:45) which is why the word "consistent" was chosen

Greg Shatan: (10:45) I think we need to clearly ask counsel what they meant.

Sabine Meyer: (10:45) +1

Izumi Okutani (ASO): (10:46) +1 Greg

Pär Brumark (GAC Niue): (10:46) I also agree.

Athina Fragkouli (ASO): (10:46) agree

Greg Shatan: (10:47) Close reading of ancient texts is a scholarly staple. Thankfully, our texts are not ancient, so we can ask the drafters what they meant.

Samantha Eisner: (10:48) There were my questions pending as well

Farzaneh Badii: (10:48) I cannot find this in the document, is there any mention of which specific laws (not just general CA law) applies to the unincorporated associations?

Samantha Eisner: (10:49) When I looked last week, though the document said "answered" I couldn't locate any answers

Robin Gross [GNSO-NCSG]: (10:49) good point, Farzaneh, we need to be clear that these "protections" are under California law and may not exist in many countries. We don't want to mislead people into thinking they are getting some kind of enforceable protection.

Sabine Meyer: (10:50) IIRC his question has not been assigned yet?

Becky Burr: (10:51) I am not sure that we should go down this road in the report. The Government Accounting Office is doing an investigation, and we don't want to get cross-wise with them on that work

David McAuley: (10:51) I agree w/Leon

David McAuley: (10:52) Agree w/Becky as well

Pär Brumark (GAC Niue): (10:52) Agree! Out of scope!

David McAuley: (10:53) Good point Greg, re CWG and possibly even out of their scope

Sabine Meyer: (10:53) tbh I'm not quite sure how an answer to this question would relate to the CCWG'S draft proposal.

David McAuley: (10:55) I also think it worthwhile to see what ccNSO reaction to the proposal is before tackling the question, if it is tackled

Becky Burr: (10:55) I'll reach out to Eberhard to see if my response answered his question

Izumi Okutani (ASO): (10:56) Good idea Becky

Izumi Okutani (ASO): (10:56) I agree with Greg's suggestion

Sabine Meyer: (10:57) it's not the management, but ownership of the root zone, if I'm not mistaken.

Greg Shatan: (10:57) Any red checks?

Greg Shatan: (10:58) Against - red x

Greg Shatan: (10:58) Abstain - step away

Farzaneh Badii: (10:58) Im not a member. Im a participant

David McAuley: (10:58) I am a participant as well

Sabine Meyer: (10:59) alright, I'm very sorry, but I have to leave.

David McAuley: (10:59) i must step away for noon call - will be just two min

Sabine Meyer: (10:59) many thanks to everyone!

Rosemary Fei: (11:02) Good morning (at least here) everyone

David McAuley: (11:02) am back

Holly J. Gregory (Sidley): (11:04) Hello everyone. I just emailed you all a markup of this section

Adam Peake: (11:06) Can the nomcom be an unincorporated association?

Steve DelBianco [GNSO - CSG]: (11:07) I believe you are addressing only how to give members/designators voting power for blocking bylaws, budgets, strat plan, and spilling board. Community or groups have standing to file Reconsideration or IRP whether they are Members, Designators, or just unincorporated groups

Holly J. Gregory (Sidley): (11:08) we do not like the phrase "tightest control" much prefer "clearest path"

Izumi Okutani (ASO): (11:08) I agree Robin

Rosemary Fei: (11:08) The current system of selecting directors comes closest to a designator model, but it's not at all clear that was intended, or that it works, and it certainly doesn't allow designators to enforce their rights. So I am uncomfortable stating that it IS a designator system. You're trying to put a label on what you have, when what you have doesn't fit under any corporate label well.

David McAuley: (11:08) Good morning Holly

Sharon Flanagan (Sidley): (11:09) @Adam - Legally, NomCom could be an unincorporated association. I think it's an open question on whether that is desirable from a community perspective.

David McAuley: (11:10) Did it fit at one time, Rosemary, and the law has changed? Or was it non-fitting from the beginning?

David McAuley: (11:11) "tightest control" seems forced and inapt

Holly J. Gregory (Sidley): (11:11) We are currently working on another approach to NomCom -- to circulate today

Rosemary Fei: (11:11) A true designator system, under best practices, requires that designators be persons. If we replace what you have but without creating unincorporated associations, it's a step in the right direction, as was suggested in the ARIN memo, but I would say it does not "work" because nothing is enforceable without persons. On the other hand, it's legally more robust than what you have, and that has "worked" for years, without any enforceability.

Robin Gross [GNSO - NCSG]: (11:12) I'd like to understand what "clearest path" means.

Samantha Eisner: (11:12) The reference to the court would only happen if there was a challenge to the action to remove the member, correct?

Holly J. Gregory (Sidley): (11:13) Most likely to provide you with the rights and powers you want because contemplated by law under the membership model -- and most able to support the 6 powers

Robin Gross [GNSO - NCSG]: (11:14) that is so vague, I want us to be specific about which rights and what is the problem with them.

Holly J. Gregory (Sidley): (11:14) The point is that there is a degree of uncertainty in the designator path that is clarified in the membership path

Robin Gross [GNSO - NCSG]: (11:15) I don't just want to state the conclusion, but rather the specific reasons

Robin Gross [GNSO - NCSG]: (11:15) I don't want to just state the conclusion, rather.

Greg Shatan: (11:16) @Robin -- as they say in math class: "show your work"

Robin Gross [GNSO - NCSG]: (11:16) right

Holly J. Gregory (Sidley): (11:16) Robin, We have covered at length in various memos and in the comparison chart we circulated last week

Robin Gross [GNSO - NCSG]: (11:17) right - so a couple sentences in here to explain what it all means to us would be helpful to the community in understanding our rationale

Holly J. Gregory (Sidley): (11:17) I do not think the following is vague although it is conclusory: Most likely to provide you with the rights and powers you want because contemplated by law under the membership model -- and most able to support the 6 powers

Robin Gross [GNSO - NCSG]: (11:18) if we can add another sentence to say *which* rights and *why* then sure.

Rosemary Fei: (11:18) +1 Josh

Izumi Okutani (ASO): (11:18) OK understood

Farzaneh Badii: (11:18) I think we need to be specific about which laws we are talking about. As I said before. I haven't seen it in the doc. it might be there and I overlooked

Holly J. Gregory (Sidley): (11:18) there is a sentence in 7 that speaks of the ease and reliability of the approval powers sought re strategy and budgets

Greg Shatan: (11:18) Then I think Section 7 is too weak -- it only refers to concerns about ease and reliability of approving budget and strat plan under the designator model.

Izumi Okutani (ASO): (11:19) Thanks for the clarification what was helpful

Steve DelBianco [GNSO - CSG]: (11:19) to be clear, the standing to file Reconsideration and IRP does NOT rely upon Member or Designator status. Right?

Holly J. Gregory (Sidley): (11:19) But Greg, that is the point -- not available in designator and available in membership model

Greg Shatan: (11:20) Holly, I think we are in violent agreement.

Robin Gross [GNSO - NCSG]: (11:20) :-)

Robin Gross [GNSO - NCSG]: (11:20) I think that is right, Steve.

Holly J. Gregory (Sidley): (11:20) The Sidley and Adler & Colvin teams would welcome the opportunity to review this document and provide comments. We need a window of time to do so in which the document is not changing. Respectfully requested.

David McAuley: (11:21) Holly, do you feel that the document captures the strength of your recommendation re membership?

Izumi Okutani (ASO): (11:21) I would find it helpful to highlight those differences in powers between the models, including approving budget and strag plan

David McAuley: (11:22) Good question Alan

Holly J. Gregory (Sidley): (11:23) Yes overall, but the details matter -- and That is highlighted in the chart that is in the appendix

Holly J. Gregory (Sidley): (11:24) David, we would like a chance to review.

David McAuley: (11:24) Thanks

Rosemary Fei: (11:25) I agree that it might help to be clear about the current bylaws and enforceability

Holly J. Gregory (Sidley): (11:25) You need unincorporated associations to assure that the entities have the power to enforce

Robin Gross [GNSO - NCSG]: (11:26) This issue on incorporating into SOACs should be a paragraph all by itself. Right now I see it at the end of #7, but I think it should stand alone.

Leon Sanchez: (11:26) My understanding is that we will need to establish UAs in any case

Leon Sanchez: (11:26) right?

Holly J. Gregory (Sidley): (11:26) Current system relies on voluntary good behavior. But not on legal enforcement underlying that behavior.

Athina Fragkouli (ASO): (11:27) thank you for that Rosemary

Holly J. Gregory (Sidley): (11:27) Yes Leon. We strongly advise that even if you go with status quo you organize the ACs and SOs as unincorporate associations -- and there is very little required to do so

Leon Sanchez: (11:27) Thanks @Holly

Rosemary Fei: (11:28) Yes, Greg. Well explained

Athina Fragkouli (ASO): (11:28) I agree with Robin. This needs a lot of explanation

Alan Greenberg: (11:30) That was a really helpful comment (in the absence of an UA, could name a person to prepresent)

Rosemary Fei: (11:31) If non-entity SO or AC appoints an individual to represent them, it's not clear how that person would have standing. Maybe by contract with that person? But not under corporate law.

Holly J. Gregory (Sidley): (11:31) I just dropped off. Will call back

Robin Gross [GNSO - NCSG]: (11:31) I worry that people will think they have some protections if they never step foot into a court that recognizes those protections, they don't really apply. So these protections apply so long as one utilizes a court that recognizes those protections. But every jurisdiction has its own rules. Not every jurisdiction will recognize California protections. We need to state this in the document. (Something to this point - perhaps not these exact words).

Greg Shatan: (11:32) @Alan -- good question.

Holly J. Gregory (Sidley): (11:32) I'm on hold

Greg Shatan: (11:34) @Robin, I think we need to test that with counsel -- when do courts fail to recognize the entities created under another country's rules.

Greg Shatan: (11:34) US courts see plenty of foreign entities -- GmbH, SpA, SA, etc., and don't disregard them.

Robin Gross [GNSO - NCSG]: (11:35) sure and some courts do

Farzaneh Badii: (11:35) So no other statutory law restrict or regulate the membership?

Holly J. Gregory (Sidley): (11:35) im back

Samantha Eisner: (11:36) Alan, sounds like there may be some non-legal concerns to look at - what happens within ICANN if there are unincorporated associations as members, and whether all who would want to participate in that work are able to because of their concerns in participating under a UA recognized in California law

Greg Shatan: (11:36) My understanding is that legal persons can be natural persons or entities with legal personality.

Greg Shatan: (11:37) @Alan, Rosemary, I think so, too, FWIW.

Adam Peake: (11:38) About 3 or 4 hours for the next draft we hope to get for the whole group for the call at UTC 05:00 on thursday

Rosemary Fei: (11:39) @Farzaneh, if you were asking about membership of an unincorporated association, yes -- the law requires 2 legal persons to be members, and beyond that, the unincorporated association is able to set its own rules for membership or other forms of participation

David McAuley: (11:39) Thanks Adam - any chance for a separate email at the time to say it has been mailed - some of us are having mail issues

Alan Greenberg: (11:40) @Sam, yes, I think so. We have been told that many governments, or ccTLDs that are parts of governments might not be allowed to "join" something that has more legal substance than the current GAC and ccNOS. This goes back to discussions that took place at the start of ICANN, and before my time so I can't speak to the details.

Adam Peake: (11:41) David - will make a nkte to do that

Holly J. Gregory (Sidley): (11:41) Greg, we don't see the dangers.

David McAuley: (11:41) Thanks Adam

Farzaneh Badii: (11:42) could they have a choice of law clause that could be applied in other forums?

Holly J. Gregory (Sidley): (11:43) The entities will be no worse off as unincorporated associations than now -- and we think that they will have the great benefit of enforcing their rights and additionally some added protection for individuals who participate in these UAs

David McAuley: (11:43) Important point Holly

David McAuley: (11:44) they face these risks now Robin and have since 1998

Sharon Flanagan (Sidley): (11:44) Also, when we think of enforceability, we should focus on California since that is the place of ICANN's formation and where issues would arise relating to accountability mechanisms.

David McAuley: (11:45) I misunderstood your point, agree that circumstances in other states are not that important @Robin

Josh Hofheimer (Sidley): (11:45) @Robin, this is taking it out of context

Sharon Flanagan (Sidley): (11:45) @Robin - that was about ICANN's structure -- not its members/designators. Right now the SOACs don't have any protection of a legal entity around them

Rosemary Fei: (11:45) You don't have unincorporated associations now -- so what was just described is what you have already.

Becky Burr: (11:46) Leon, I have a hard stop at the top of the hour. Do you want to talk about the IRP issues?

Robin Gross [GNSO - NCSG]: (11:46) but we also don't potentially create liability either.

Leon Sanchez: (11:46) Yes Becky

Leon Sanchez: (11:47) will jump to that next

Robin Gross [GNSO - NCSG]: (11:47) look folks, I don't disagree with the conclusion, I just think we don't want to mislead people about the level of protections they are *receiving*

Rosemary Fei: (11:48) If the proposal were to fully realize each SO or AC as a legal person, with operations and assets, we would probably not recommend UAs -- w would probably look at corporations. But these UAs are expected to have no assets and no operations, just contract rights and rights under the bylaws, and standing.

Samantha Eisner: (11:48) This may not be part of Robin's point, but I know that we hear from people outside of the US that would find it really unacceptable to have to concede to California law

Rosemary Fei: (11:49) @Sam, what law would they prefer? You're going to have to pick some state or nation's law.

Holly J. Gregory (Sidley): (11:49) Samantha, the internal affairs of a corporation are governed by the laws of the jurisdiction of incorporation so unless we are incorporating elsewhere California law will govern in a dispute.

Rosemary Fei: (11:50) @Robin, not sure what liabilities are being created by having UAs instead of nothing. Please clarify.

Holly J. Gregory (Sidley): (11:50) That does not mean that a California court must be the forum for the dispute resolution -- two distinct issues

Holly J. Gregory (Sidley): (11:52) But Ed, you still need enforceable rights -- which are defined under California law

Robin Gross [GNSO - NCSG]: (11:52) ICANN would be liable today for the GNSO's actions. But unincorporated associations would be the target for liability. If the case is brought in California - no problem. If the case is brought in a jurisdiction that doesn't recognize any protections from the association, the individuals are liable.

Holly J. Gregory (Sidley): (11:53) We do not agree that forming UAs increases or shifts liability

Edward McNicholas, Sidley Austin LLP: (11:53) Agreed with Holly; enforceable rights are also needed. The issue is whether the foreign court recognizes the standing

Josh Hofheimer (Sidley): (11:53) @Robin, on what basis would someone bring the action in the foreign court against the UA? What's the basis for jurisdiction? And why would someone go after the UA, which has no assets or operations, instead of going after ICANN?

Robin Gross [GNSO - NCSG]: (11:54) the gns0 gala gets out of hand, for example

Robin Gross [GNSO - NCSG]: (11:54) a decision of the gns0 is deemed to "harm" an interest so they sue the GNSO

Josh Hofheimer (Sidley): (11:54) @Robin, I struggle to understand why the UAs suddenly become the target, instead of ICANN. Please clarify.

Robin Gross [GNSO - NCSG]: (11:55) because they have organized as the legal entity

Robin Gross [GNSO - NCSG]: (11:55) instead of ICANN

Rosemary Fei: (11:55) @Robin, why would UAs be targets? They have no assets, and the activities would still be housed in ICANN. And if someone is offended by actions of an SO or AC now, there's nothing stopping them from trying to sue it and its members now.

Robin Gross [GNSO - NCSG]: (11:55) lots of folks dislike ICANN and would be happy to sue even if there are no assets.

Josh Hofheimer (Sidley): (11:56) @Robin, are you talking about a party? Who pays for the party if the GNSO has no assets? Is this a party that ICANN throws for them? Then have ICANN sign all the agreements and be the liable party under the contract.

Rosemary Fei: (11:56) @Robin, so they can sue ICANN. Do they dislike the SOs and ACs?

David McAuley: (11:56) For this draft Becky, wouldn't a general outsourcing reference be enough?

Josh Hofheimer (Sidley): (11:57) @Robin, again the UAs take no action other than what is enumerated in the bylaws. They should not be signing contracts or exposing themselves to third party risk.

Robin Gross [GNSO - NCSG]: (11:57) so we can say we hope no one will sue because we have no assets. but that is a different question to could they sue - since the UA is the entity acting

David McAuley: (11:57) I think the panel decides at present and does dso for convenience of all

David McAuley: (11:58) EG DotConnectAfrica hearing to be in DC

Josh Hofheimer (Sidley): (11:58) How does the UA act beyond approving or rejecting bylaws changes, or reserved powers, and selecting/removing directors?

Samantha Eisner: (11:58) The UA, if the UA is, for example, the GNSO, does a whole range of policy development activities

Samantha Eisner: (11:59) Is there an expectation that the UAs here are only about the powers, and are separate from the operational work they do within ICANN?

Josh Hofheimer (Sidley): (12:00) @Sam, yes, but those are policy recommendations to ICANN. They are not imposing obligations on third parties

Greg Shatan: (12:00) What is this community council of which you speak?

Robin Gross [GNSO - NCSG]: (12:00) we can say we have no assets, so don't make a good target. and we hope we won't do anything other than these narrow things, so that mitigates risk.

Samantha Eisner: (12:01) They are recommending the obligations to be imposed. We could see that people may wish to challenge the GNSO's recommendations

Robin Gross [GNSO - NCSG]: (12:01) but it isn't zero risk. a UA is still the responsible entity.

Samantha Eisner: (12:01) Whether that would be a legitimate attempt is one thing, but we need to be clear - where does this discussion of liability start and stop

Rosemary Fei: (12:01) The proposal is that SO and AC activities would continue to be conducted within ICANN; the UAs would not encompass those activities, only the contract and bylaws rights.

Greg Shatan: (12:02) @Sam, I think the idea is to have "alter ego" organizations, somewhat like the ASO/NRO.

Samantha Eisner: (12:02) On the point under differential voting power that's being discussed - isn't it possible that there be groups that are NOT members that still have their inputs considered at that community level?

Josh Hofheimer (Sidley): (12:02) @Sam, we did discuss that the volunteer activities of the GNSO (and other SO ACs) be conducted still as volunteers for the benefit of ICANN. So yes, then their actions would be under the umbrella of ICANN. The UA's would exist only to exercise the voting rights reserved to them. Or to pursue IRP matters.

Robin Gross [GNSO - NCSG]: (12:03) what is there was a claim of an improper removal of a board director by an UA. And the case was brought in a jurisdiction that does not recognize Cal. UA protections? Might those individuals in the UA be targets there?

Robin Gross [GNSO - NCSG]: (12:03) oops, what "if"

Holly J. Gregory (Sidley): (12:04) That jurisdiction would be applying California law to determine rights and liabilities.

Robin Gross [GNSO - NCSG]: (12:04) All jurisdictions would apply California law? Really?

Adam Peake: (12:04) Is a petition to take some action an example?

Samantha Eisner: (12:05) Rosemary's discussion of "triggering event" answers my question

Holly J. Gregory (Sidley): (12:05) If rights are created under California law what other law would you apply?

Robin Gross [GNSO - NCSG]: (12:05) so the memo I quoted said the individuals could be liable outside the US

Robin Gross [GNSO - NCSG]: (12:06) because those jurisdictions don't recognize CAL law

Holly J. Gregory (Sidley): (12:06) Under your theory Robin, every issue we have been discussing would need analysis under all jurisdictions because any other law could be applied.

Robin Gross [GNSO - NCSG]: (12:06) to give a complete answer, that is true.

Robin Gross [GNSO - NCSG]: (12:06) But we are giving an incomplete answer and I am saying we need to say that.

Robin Gross [GNSO - NCSG]: (12:07) I don't want to mislead people outside the US into thinking they protected, when they may or may not be.

David McAuley: (12:07) But that will not change - any issued can be an issue anywhere, and that is how it is today, the alternative is not to act in the first place

Robin Gross [GNSO - NCSG]: (12:08) I'm not saying we don't do it. I'm just saying let's not mislead people outside the US into thinking they will automatically have protection.

Josh Hofheimer (Sidley): (12:08) @Robin, I don't think your hypothetical case could be brought in the foreign court. There is no jurisdiction. There is no nexus to the foreign court.

Robin Gross [GNSO - NCSG]: (12:08) the boar member lives there.

Michael Clark (Sidley): (12:08) Agreed with Rosemary

David McAuley: (12:08) I think a good paragraph or two could descibe these risks and maybe we can work on one

Robin Gross [GNSO - NCSG]: (12:09) the improper activty took place there.

Robin Gross [GNSO - NCSG]: (12:09) ok by me

Rosemary Fei: (12:09) I didn't realize we were dealing with animals as well as people (apologies to RObin!)

Robin Gross [GNSO - NCSG]: (12:09) :-)

Josh Hofheimer (Sidley): (12:09) @Robin, doesn't matter. They are not taking action in that jurisdiction. They are acting for the CA organization.

Athina Fragkouli (ASO): (12:09) thank you Leon and all

Robin Gross [GNSO - NCSG]: (12:09) thanks all! I do appreciate your working these issues with us.

Adam Peake: (12:09) What is the timeline for the clarifying text? Re-drafting is ongoing now for the 05:00 UTC call

Holly J. Gregory (Sidley): (12:09) Thanks all! Looking forward to seeing the draft ASAP

David McAuley: (12:09) Thanks all, tough discussions but good will persists

Izumi Okutani (ASO): (12:10) Thanks all, bye!

Pär Brumark (GAC Niue): (12:10) Thx! Bye!

Rosemary Fei: (12:10) THanks, all

Michael Clark (Sidley): (12:10) Bye

Greg Shatan: (12:10) Bye akll!

Leon Sanchez: (12:10) thanks everyone!

Leon Sanchez: (12:10) bye!