

CCWG-Accountability WS2 Jurisdiction Subgroup: Presentation to ccNSO



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Jurisdiction Subgroup: Background

Annex 12 to Work Stream 1 Final Report:

[T]he main issues [for the Jurisdiction Subgroup] 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:

Consideration of jurisdiction in Work Stream 2 will focus on the settlement of dispute jurisdiction issues and include:

- Confirming and assessing the gap analysis, clarifying all concerns regarding the multi-layer jurisdiction issue.*
- Identifying potential alternatives and benchmarking their ability to match all CCWG-Accountability requirements using the current framework.*
- Consider potential Work Stream 2 recommendations based on the conclusions of this analysis.*

Jurisdiction – Overview of Subgroup’s Work

- Discussed the “gap analysis” and whether it could advise changing ICANN’s headquarters or jurisdiction of incorporation.
- Worked on refining the “Multiple Layers of jurisdiction.”
- Prepared several working documents, including one exploring the question: "What is the influence of ICANN’s existing jurisdiction(s) relating to resolution of disputes (i.e., governing law and venue) on the actual operation of ICANN’s policies and accountability mechanisms?"
- Published a questionnaire to allow the community to submit jurisdiction related issues for consideration by the Subgroup.
- Developed a series of jurisdiction-related questions for ICANN Legal which were formally answered.
- Undertook a comprehensive review of ICANN’s litigations.
- Developed a master list of “proposed issues.” From this list, the subgroup prioritized, in the time remaining, the issues relating to OFAC Sanctions and to the Choice of Governing Law and Venue Clauses in Certain ICANN Contracts. After careful consideration of these issues, the Subgroup reached consensus on recommendations for each of these.

Jurisdiction – OFAC Recommendation

ICANN Terms and Conditions for Registrar Accreditation Application Relating to OFAC Licenses

- For ICANN to enter into a Registration Accreditation Agreement (RAA) with an applicant from a sanctioned country, it will need an OFAC license.
- Currently, “ICANN is under no obligation to seek such licenses and, in any given case, OFAC could decide not to issue a requested license.” (Application Terms, Section 4) This uncertainty could discourage residents of sanctioned countries from applying for accreditation.
- **Recommendation:** The above sentence should be amended to require ICANN to apply for, and use best efforts, to secure an OFAC license for qualified applicants. ICANN should be helpful and transparent with regard to the licensing process and ICANN’s efforts, engaging in ongoing communication with the applicant.

Jurisdiction – OFAC Recommendation

Approval of New gTLD Registries

- In the 2012 round of the New gTLD Program, the application process was difficult for residents of OFAC sanctioned countries.
- The AGB states: *“In the past, when ICANN has been requested to provide services to individuals or entities that are not SDNs (specially designated nationals) but are residents of sanctioned countries, ICANN has sought and been granted licenses as required. In any given case, however, OFAC could decide not to issue a requested license.”*

Recommendation: ICANN should commit to applying for, and using best efforts to secure, OFAC licenses for all applicants, as long as they are otherwise qualified. ICANN should also be helpful and transparent with regard to the licensing process, including ongoing communication with the applicant.

Jurisdiction – OFAC Recommendation

Application of OFAC Limitations by Non-US Registrars

- Some non-U.S. based registrars might be applying OFAC sanctions with registrants and potential registrants, based on a mistaken assumption that they must do simply because the registrar has a contract with ICANN.
- Non-U.S. registrars may also appear to apply OFAC sanctions if they “cut and paste” registrant agreements from U.S based registrars containing OFAC provisions.
- While ICANN cannot provide legal advice to registrars, it can bring awareness of these issues to registrars.

Recommendation: ICANN needs to clarify to registrars that the mere existence of their RAA with ICANN does not create a requirement to comply with OFAC sanctions. ICANN should also use various tools to remind registrars to understand the laws that apply to them and to accurately reflect those laws in their customer relationships.

Jurisdiction – OFAC Recommendation

General Licenses

- OFAC “general licenses” cover particular classes of persons and types of transactions.
- ICANN could pursue general licenses to cover transactions integral to ICANN’s role in managing the DNS and contracts for Internet resources, e.g., registries/registrars entering into RAs/RAAs, Privacy/Proxy Accreditation, support for ICANN funded travelers, etc.
- This would enable individual transactions to proceed without needing specific licenses.
- A general license would need to be developed with the U.S. Department of the Treasury, which must amend OFAC regulations to add the new license. This regulatory process may be a significant undertaking.

Jurisdiction – OFAC Recommendation

General Licenses

Recommendation: ICANN needs to take steps to pursue one or more OFAC “general licenses.” ICANN should first prioritize a study of the costs, benefits, timeline and details of the process. ICANN should pursue general licenses as soon as possible, unless the study reveals significant obstacles. If it does, ICANN should report this to the community and seek its advice on how to proceed.

If ICANN is unsuccessful in getting new general licenses added to the OFAC regulations, ICANN needs to find other ways to remove “friction” from transactions between ICANN and residents of sanctioned countries. ICANN should communicate regularly about its progress, to raise awareness in the ICANN community and with affected parties.

Jurisdiction – Choice of Law Provisions

Choice of Law Provisions in the Registry Agreement

The Subgroup identified several alternative approaches for the RA, which could also apply to the RAA:

- 1. Menu Approach.**
- 2. “California” (or “fixed law”) Approach.**
- 3. Carve-out Approach.**
- 4. Bespoke Approach.**
- 5. Status Quo Approach.**

These are discussed on the following slides.

Jurisdiction – Choice of Law Provisions

- 1. Menu Approach.** The Subgroup supports a “Menu” approach, where the governing law would be chosen before the contract is executed from a “menu” of possible governing laws. The menu needs to be defined; this could best be left to ICANN and the registries.
 - The Subgroup discussed a number of possible menus, e.g., (a) one country, or a small number of countries, from each ICANN Geographic Region, along with (b) the status quo (no choice of law) and/or (c) the registry’s jurisdiction of incorporation and/or (d) the countries in which ICANN has physical locations.
 - There should be a balance between the advantages and disadvantages of having different governing laws apply to the same base RA, which likely suggests having a relatively limited number of choices on the menu.
 - The Subgroup has not determined how options will be chosen from the menu, e.g., registry choice or negotiation with ICANN.

Jurisdiction – Choice of Law Provisions

2. **“California” (or “fixed law”) Approach.** A second possible option is for all RAs to include a choice of law clause naming California and U.S. law as the governing law.
3. **Carve-out Approach.** A third possible option would be a “Carve-Out” approach, whereby parts of the contract that would benefit from uniform treatment are governed by a uniform predetermined law (e.g., California) and other parts are governed by the law of the registry’s jurisdiction or by a law chosen using the “Menu” approach.
4. **Bespoke Approach.** In the “Bespoke” approach, the governing law of the entire agreement is the governing law of the Registry Operator.
5. **Status Quo Approach.** A fifth possible approach is to retain the status quo, i.e., have no “governing law” clause in the RAA.

Choice of Law Provisions in Registrar Accreditation Agreements

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

Jurisdiction – Choice of Venue Provisions

Choice of Venue Provisions in Registry Agreements

- Under the RA, disputes are resolved by “binding arbitration,” pursuant to ICC rules. The RA contains a choice of venue provision stating that the venue is Los Angeles, California as both the physical place and the seat of the arbitration.

Recommendation: When entering into contracts with registries, ICANN could offer a list of possible venues for arbitration rather than imposing Los Angeles, California venue. The registry that enters into a registry agreement with ICANN could then choose the venue it prefers from the “venue menu” at or before the time of execution of the contract.

Jurisdiction – Dissenting Opinions and other comments

- Two “dissenting opinions” were filed. These are considered part of the report by the Jurisdiction Subgroup to the CCWG-Accountability Plenary.
- These were filed by the Government of Brazil and Parminder Jeet Singh.

Questions?

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