ARI REGISTRY SERVICES

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26 February 2013

ICANN

12025 Waterfront Drive
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Dear Sir/Madam,

Public Comments on New gTLD Registry Agreement

This letter is submitted on behalf of ARI Registry Services ("ARI").

It is the first of two letters providing comments in response to the New gTLD Registry Agreement (the "Agreement") released by ICANN on 5 February 2013. The second letter will provide comments on the Agreement specifically in terms of the latest raft of amendments proposed to the existing draft. Comments regarding operational issues will be submitted separately.

The purpose of this letter is to flag issues with the Agreement which are of concern to ARI and which we suspect will be of concern to the bulk of the applicant community at the point of contract election.

Executive Summary

The Agreement contains a number of clauses likely to encourage applicants, as advised by their lawyers, in-house or external, to feel compelled from a risk perspective to enter into contractual negotiations with ICANN, thereby delaying delegation for their TLD in light of the Prioritisation Draw.

Such clauses can be characterised as traditional "lawyer's clauses", that is to say, those boilerplate clauses which go to the heart of standard contracting and which time and again pose roadblocks if such are not weighted equitably. We have pinpointed the following such clauses:-

- Jurisdiction (clause 5.2)
- Arbitration (clause 5.2)
- Liability (clause 5.3)
- Warranties (clause 7.14)

Having reviewed each of the previous ICANN registry agreements, we note that it has been willing to negotiate all of these critical elements to some extent.

In this letter we seek no greater amendments than those previously agreed to by ICANN with respect to other TLD's.

We propose that ICANN adopt limited, in some cases optional amendments to these key clauses for the benefit of all applicants. We argue that such is fair as the proposed wording would not unduly weaken the contractual protection afforded to ICANN under the current Agreement.

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Critically, please note that we do not seek a wholesale review of the Agreement in these areas or any extended discussion that might impact the already repeatedly delayed timelines.

We would be bitterly disappointed were ICANN to simply reply to the effect that previous iterative negotiation rounds were the appropriate venue for such proposals. The new Prioritisation Draw actively disadvantages those applicants who seek to negotiate the Agreement for any reason. ICANN has moved the goalposts. We request the opportunity to mitigate the detriment that such has caused.

Prioritisation Draw – Competitive Disadvantage

On 17 December 2012 ICANN carried out the Prioritisation Draw in an attempt to deal with the volume of applications. Draw numbers will now be used to schedule Agreement negotiation at a specified rate per week. A key implication is that applicants who seek to negotiate the Agreement will be disadvantaged in terms of the delegation timetable.

ICANN's proposal[1] outlining the Prioritisation Draw states as follows:-

...Applicants that do not accept the standard form agreement will enter a negotiation queue that will be processed by Draw Number order. Multiple negotiations will occur simultaneously. It is expected that negotiations will take substantially longer than the process of accepting the standard form agreement.

Given it is an accepted truth that early delegation gives applicants critical first mover advantage, it is clear that applicants who seek to negotiate will be placed at a severe competitive disadvantage.

Negotiation Likelihood

One can assume that a significant number of applicants will have risk policies in place that do not allow the execution of the Agreement in its current form, be they corporate applicants, entrepreneurs, government or otherwise.

It is disturbing therefore to have heard reports suggesting ICANN has indicated applicants will have to simply make exceptions to such policies. We note with similar concern the use of term 'contract acceptance' rather than the 'contract election' in recent correspondence.

If correct, such would indicate a fundamental lack of understanding of corporate risk. We can state with certainty that such an approach would prove impossible for a large number of applicants.

Our own detailed analysis on the issue of negotiation, which was particularly conservatively calculated, indicates that at least 25% of applicants will feel compelled to negotiate despite the potential to lose first mover advantage.

Clearly a reconsideration of this approach is needed.

[1] http://www.icann.org/en/news/announcements/announcement-2-10oct12-en.htm

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Lawyer's Clauses

We would characterise the clauses most likely to cause concern across the board as the "lawyer's clauses" - those elements of any contract which any in-house legal team or external counsel will flag as significant risk factors to be considered.

1. **Arbitration**

Section 5.2 of the Agreement provides that Registry Operators are subject to arbitration in California unless they are intergovernmental organizations or governmental entities ("IOGE's) or if there are other "special circumstances" (a term as yet undefined) in which case such will take place in Geneva unless agreed otherwise.

We see no principled reason why non-IOGE Registry Operators should not enjoy the same flexibility.

ICANN is mandated to provide geographic diversity in its activities yet for a number of years it has suffered accusations that it is too North American focussed to the detriment of other localities. Without a published justification for the North American approach in this regard, on one view, section 5.2 stands as further evidence in support of such an accusation.

In anticipation of a response suggesting practicality dictates California as the appropriate venue, we challenge ICANN to establish how it can justify its own practicality needs, a body enjoying over $350million in application fees, over the practicality needs of Registry Operators with substantially less financial power scattered across various continents.

It is simply anachronistic to seek to require California as the sole venue, particularly when one considers over half of applications are from non-US applicants.

Proposal - we propose that the current wording applied to IOGE's be widened to apply to all Registry Operators with the addition of Singapore as an optional location, thereby offering US, Europe and Asia as options. We propose Singapore given its respected reputation as a seat of arbitration and practically owing to the soon to be constituted ICANN Singapore office.

Jurisdiction

Similarly, section 5.2 of the Agreement provides for jurisdiction and exclusive venue for litigation in California for Registry Operators other than IOGE's (and special circumstances) for which jurisdiction and exclusive venue will be in Geneva unless another location is mutually agreed.

We respectfully submit that the same arguments apply as per the arbitration issue above. We see no principled reason why non-IOGE Registry Operators should receive geographically disadvantageous terms in relation to jurisdiction and venue. Such a clause simply prejudices non-US Registry Operators.

Proposal - we propose that the current wording applied to IOGE's be widened to apply to all Registry Operators, thereby offering US and Europe as options as per the revised clause 5.2 above.

Proposed wording per arbitration and jurisdiction as follows:-

> *Arbitration. Disputes arising under or in connection with this Agreement that are not resolved pursuant to Section 5.1, including requests for specific performance, will be resolved through binding arbitration conducted pursuant to the rules of the International Court of Arbitration of the International Chamber of Commerce. The arbitration will be conducted in the English language and will occur in [Geneva, Switzerland/Los Angeles, California/Singapore – to be deleted at the option of the Registry Operator at contract selection stage] unless another location is mutually agreed upon by Registry Operator and ICANN. Any arbitration will be in front of a single arbitrator, unless (i) ICANN is seeking punitive or exemplary damages, or operational*

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sanctions, or (ii) the parties agree in writing to a greater number of arbitrators. In either case of clauses (i) or (ii) in the preceding sentence, the arbitration will be in front of three arbitrators with each party selecting one arbitrator and the two selected arbitrators selecting the third arbitrator. In order to expedite the arbitration and limit its cost, the arbitrator(s) shall establish page limits for the parties' filings in conjunction with the arbitration, and should the arbitrator(s) determine that a hearing is necessary, the hearing shall be limited to one (1) calendar day, provided that in any arbitration in which ICANN is seeking punitive or exemplary damages, or operational sanctions, the hearing may be extended for one (1) additional calendar day if agreed upon by the parties or ordered by the arbitrator(s) based on the arbitrator(s) independent determination or the reasonable request of one of the parties thereto. The prevailing party in the arbitration will have the right to recover its costs and reasonable attorneys' fees, which the arbitrator(s) shall include in the awards. In the event the arbitrators determine that Registry Operator has been repeatedly and willfully in fundamental and material breach of its obligations set forth in Article 2, Article 6 or Section 5.4 of this Agreement, ICANN may request the arbitrators award punitive or exemplary damages, or operational sanctions (including without limitation an order temporarily restricting Registry Operator's right to sell new registrations). In any litigation involving ICANN concerning this Agreement, jurisdiction and exclusive venue for such litigation will be in a court located in [Geneva, Switzerland/Los Angeles, California/Singapore – to be deleted at the option of the Registry Operator at contract selection stage] unless an another location is mutually agreed upon by Registry Operator and ICANN; however, the parties will also have the right to enforce a judgment of such a court in any court of competent jurisdiction.

2. Liability

Section 5.3 of the Agreement provides that Registry Operators are liable for punitive and exemplary damages if so awarded by an arbitrator.

Such amount is uncapped. One could understand how an applicant's risk appetite might not extend to an unlimited punitive award by a US based arbitrator, a jurisdiction well known for its excessive punitive awards.

Such a clause will inevitably trigger risk policy breaches across a wide range of applicants, both US and non-US based.

We see no principled reason why Registry Operators should be the subject of a punitive damages award. ICANN has been substantially enriched as part of the application process. Its coffers are full. From a risk perspective, ICANN is far better protected by the new slew of TLD's than it ever was previously. To seek to retain the same protections as before is untenable. In addition, the Agreement and arbitration process already provide for ICANN to terminate and remove a TLD from a breaching Registry Operator. Such nuclear option serves as an eminently adequate deterrent.

To that end, we note with interest that the registry agreement entered into with regard to the .post TLD[2] had no such power and stated that arbitrators had *"no authority to award consequential, incidental, indirect or punitive damages to either Party."* That being the case it would seem ICANN has been convinced of the inequitable nature of such a clause previously. Indeed, it has also in the past been willing to cap such amount as per the .mobi[3] and .tel[4] TLD's.

Proposal – we propose the removal of the arbitrator's power to award punitive or exemplary damages.

3. Warranties

Section 7.14(e) of the Agreement requires that an IOGE *"represents and warrants that, to the best of its knowledge as of the date of execution of this Agreement, no existing ICANN Requirement conflicts with or violates any Applicable Law."*

[2] http://www.icann.org/en/about/agreements/registries/post/post-agreement-11dec09-en.htm
[3] http://www.icann.org/en/about/agreements/registries/mobi/registry-agmt-mobi-01jan07-en.htm
[4] http://www.icann.org/en/about/agreements/registries/tel/tel-agreement-07apr06-en.htm

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We do not understand the legal basis or motivation for requiring such a representation and warranty.

Without entering into a detailed discussion of the legal ramifications of such under Californian or Swiss law, we do not understand what further protection it offers to ICANN.

Jurisdiction and fact specific issues will dictate whether ICANN could sue based on it for either breach of a fundamental term, breach of a warranty, or misrepresentation, but regardless, ICANN has the ability under the remainder of clause 7.14 to follow a process that will allow for termination of the Agreement if an applicable law conflicts or violates ICANN policy, or to take such matter to arbitration and seek damages.

Taking matters one step further, any attempt to seek to prove that an IOGE applicant had breached such warranty or misrepresented itself and that it was actually aware of a conflict or violation of an applicable law would be fanciful. We fail to see what could motivate ICANN to pursue an IOGE in such manner.

In short, from a legal analysis, the term adds no further immediately apparent avenues of redress and would appear redundant.

Upon further consideration, a more worrying application might be postulated. ICANN could launch litigation over any breach or misrepresentation and in doing so circumvent the controls put in place to deal with conflict contained within the remainder of clause 7.14. Such an option is clearly of concern.

When one considers the hurdle that this clause will pose for IOGE's, weighed against the fact it adds no further redress for ICANN over and above that already contained in the Agreement, we suggest it is eminently logical and reasonable that such be removed. Such would cause no detriment to ICANN.

Proposal – removal of clause 7.14(e).

4. Indemnity

The inclusion of an indemnity of any sort is likely to breach a significant number of applicant risk policies. Such point is amplified when one considers that the indemnity in question is uncapped.

We see no principled basis upon which ICANN can claim to be equitably entitled to require the security it demands in the current draft at clause 7.1.

We would question why ICANN should enjoy the right to avoid seeking redress via the courts, after it has received significant funds from applicants, a portion of which we understand on a per application basis has been specifically allocated to cover legal expenses.

We could understand, but not agree with, an argument based on the rationale for an indemnity in relation to loss caused by way of breach of the Agreement. However, the current draft goes much further and requires Registry Operators to indemnify ICANN in relation to loss arising from or relating to *"...intellectual property ownership rights with respect to the TLD, the delegation of the TLD to Registry Operator, Registry Operator's operation of the registry for the TLD or Registry Operator's provision of Registry Services..."*

A third party could feasibly sue ICANN for the way it has delegated a specific TLD or indeed all TLDs. ICANN could then call on this indemnity to cover any damages awarded, despite such having nothing to do with the applicant but rather the way it runs its organisation.

We further note that there exists a carve-out of the indemnity in relation to wilful misconduct by ICANN, yet no reference is made to negligence. Is it ICANN's intention to seek to be indemnified for its own negligence? Such a position can hardly be described as equitable.

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We see no reason why ICANN cannot seek to recover loss by traditional redress via the courts. Anything further, as the current draft most certainly is, is simply untenable.

To maintain that such has been agreed in previous registry agreements does not validate the inclusion. ICANN is asking applicants new to the industry to take on board significant unknown risks by way of the indemnity clauses. It is only appropriate that it should have to justify its rationale for such.

To that end, an analysis of previous registry agreements indicates that not only has ICANN entertained significant drafting amendments to indemnity clauses, but that it also has been willing to agree to registry agreements without the need for an indemnity clause at all[5].

Proposal – we propose that clause 7.1 be deleted. In the alternative, in the face of expected intransigence in this regard despite the above persuasive argument, we propose that the indemnity be limited as follows with comparable drafting for IOGE's:-

> *Registry Operator shall indemnify and defend ICANN and its directors, officers, employees, and agents (collectively, "Indemnitees") from and against any and all third-party claims, damages, liabilities, costs, and expenses, including reasonable legal fees and expenses, arising out of or relating to a breach of this Agreement by the Registry Operator, provided that Registry Operator shall not be obligated to indemnify or defend any Indemnitee to the extent the claim, damage, liability, cost or expense arose: (i) due to the actions or omissions of ICANN, its subcontractors, panelists or evaluators specifically related to and occurring during the registry TLD application process (other than actions or omissions requested by or for the benefit of Registry Operator), or (ii) due to a breach by ICANN of any obligation contained in this Agreement or any willful misconduct by ICANN. This Section shall not be deemed to require Registry Operator to reimburse or otherwise indemnify ICANN for costs associated with the negotiation or execution of this Agreement, or with monitoring or management of the parties' respective obligations hereunder. Further, this Section shall not apply to any request for attorney's fees in connection with any litigation or arbitration between or among the parties, which shall be governed by Article 5 or otherwise awarded by a court or arbitrator.*

Conclusion

The Agreement has within it a small number of critical clauses that will inevitably cause applicants to feel compelled to enter into negotiation and thereby delay delegation of their TLD. In a landscape where delay has become endemic, such is simply unacceptable. In light of such, the Agreement has the potential to vastly reduce the field of new TLD's and so stifle competition, the very antithesis of the key goal of the TLD program.

ICANN has within its gift the ability to correct the inequitable nature of the current draft by making the surgical changes proposed in this letter. Such would have little appreciable change to ICANN's risk dynamic, would be possible without further delay and would be to the benefit of all applicants.

We had hoped that the days of the "take it or leave it" approach to contracting were behind us. By the above proposals, we invite ICANN to prove it.

Yours faithfully

David Carrington
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[5] http://www.icann.org/en/about/agreements/registries/verisign/registry-agmt-com-22sep10-en.htm

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