



One Firm WorldwideSM

MEMORANDUM

TO: ICANN

FROM: Jones Day

DATE: 6 September 2015

RE: Enforceability Of Arbitration Awards Made Pursuant to Proposed Multistakeholder Enforcement Mechanism (“MEM”)

I. Background

The ICANN Board is engaged in discussions with the CCWG regarding the future corporate structure of ICANN. One proposal concerns a new ICANN accountability mechanism provisionally called the Multistakeholder Enforcement Mechanism (“MEM”). The purpose of the proposed MEM is to ensure ICANN’s compliance with its Fundamental Bylaws through a binding arbitration process that would produce an arbitration award that could be enforced in California state courts.

II. Issues Presented

This memorandum, in conjunction with memoranda previously prepared for the CCWG by the law firms Sidley Austin LLP and Adler & Colvin, addresses who might enforce the final arbitration awards that are envisioned to be the result of the proposed MEM arbitration process, and the legal ramifications of the various options in that regard.

III. Short Answer

A MEM final arbitration award may be enforced by an unincorporated association (“UA”) comprised of any collection of SO/ACs, the members of multiple SO/ACs, or the chairs of multiple SO/ACs. In the alternative, the individual (natural) people serving as chairs of the participating SO/AC(s) could enforce the award in an individual capacity pursuant to provisions that would be added to the Bylaws to this effect. Both a UA and an individual person are legal persons capable of filing suit, and either would have standing to enforce an arbitration award provided that the person or entity designated to enforce the award is made a party or third party beneficiary of the arbitration agreement.

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ATTORNEY WORK PRODUCTIV. AnalysisA. **An Unincorporated Association Or An Individual May Enforce a MEM Final Arbitration Award In Court.**

A person or entity must have legal personhood, also known as capacity, to file a lawsuit in court, including to enforce an arbitration award. A plaintiff must also have “standing” to pursue a claim in court. As discussed below, neither capacity nor standing is likely to be an impediment to the enforcement of an arbitration award in court by either a UA made up of an SO/AC, the members of multiple SO/ACs, or the chairs of multiple SO/ACs, or, alternatively, the individual people serving as chairs of the participating SO/AC(s).

1. **Unincorporated Associations And Individual Persons Have Capacity To Sue In Court.**

In addition to individual persons, California statutes confer the capacity to sue upon different types of entities, including UAs. *See* Cal. Code Civ. Proc. §§ 367, 369.5(a).¹ An unincorporated association is defined only as “an unincorporated group of two or more persons joined by mutual consent for a common lawful purpose, whether organized for profit or not.” Cal. Corp. Code § 18035.

Likewise, both individuals and UAs have capacity to sue in federal court. Fed. R. Civ. P. 17(b). Indeed, an unincorporated association with no capacity to sue in the forum state still has capacity to sue in federal court “to enforce a substantive right existing under the United States Constitution or laws[.]” *Id.* Federal law defines an unincorporated association in a manner almost identical to California, namely as “a voluntary group of persons, without a charter, formed by mutual consent for the purpose of promoting a common objective.” *S. Cal. Darts Ass’n v. Zaffina*, 762 F.3d 921, 927 (9th Cir. 2014) (citation and quotation marks omitted). While the standard for an unincorporated association appears to be the same as between California and federal law, a party’s capacity for suit may be broader in a federal than in a California court, such as where a California corporation is suspended but may be treated as an unincorporated corporation with capacity to sue in federal court. *Sierra Ass’n for Env’t v. FERC*, 744 F.2d 661 (9th Cir. 1984). Here, though, whether under the California or federal standard, a single SO or AC, or some collection of the SOs and ACs, should meet the standard for an unincorporated association. But even if the SO/AC did not qualify as an unincorporated association under CA law, for whatever reason, it will likely have capacity to sue in federal court because enforcing the arbitral award constitutes a substantive right existing under federal law. *Laundry, Dry Cleaning & Dye House Workers Int’l Union v. Mahoney*, 491 F.2d 1029, 1033 (8th Cir. 1974) (“right to arbitrate is such a right”).

There are various options for how a UA could be created so as to enforce MEM final arbitration awards:

¹ It does not appear that any business entity less formal than a UA could be formed here that would have capacity to sue.

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- an individual SO/AC or some collection of SOs/ACs could form a UA;
- the members of multiple SO/ACs could form one UA; or
- the chairs of multiple SO/ACs could form a UA.

As discussed in detail in the memoranda drafted by Sidley Austin dated 23 April 2015 and 1 May 2015, “forming” an unincorporated association under California law does not require any formalities. However, those memoranda recommend the drafting of governing documents and the submission of forms to the Secretary of State as proof that the SO/ACs meet that standard.

In the alternative, an individual chair of a UA could enforce a MEM final arbitration award.

2. ICANN Should Indemnify The UA Or Individual Who Enforces A MEM Final Arbitration Award.

The capacity to sue comes along with the capacity to be sued, meaning that there is nothing preventing a lawsuit from being filed against any UA or individual that might bring suit to enforce a MEM final arbitration award. However, it would make sense for ICANN to indemnify whichever type of entity is created to enforce an award. Further ICANN should agree to cover the fees and expenses that might be incurred in any lawsuit arising out of the enforcement of an MEM final arbitration award.

3. ICANN Should Also Waive Its Right To Challenge The Legal Personhood Of An Entity Seeking to Enforce a MEM Final Judgment.

We recommend that ICANN expressly waive its right to contest the SO/AC’s capacity to sue; it is a waivable defense under both state and federal law. *See* Fed. R. Civ. P. 9(a)(2) (“To raise any of those issues [concerning capacity to sue or be sued], a party must do so by a specific denial, which must state any supporting facts that are peculiarly within the party’s knowledge.”); *Asbestos Workers Syracuse Pension Fund v. M.G. Industrial Insulation Co.*, 875 F. Supp. 132, 137 (N.D.N.Y. 1995) (“the lack of capacity defense can be waived”); *Oliver v. Swiss Club Tell*, 222 Cal. App. 2d 528, 538 (1963) (noting that “lack of legal capacity” is a defense that may be waived). However, at least one court has held that “if there is a possibility that a party with a valid capacity defense is strategically forgoing it to preserve federal jurisdiction”, the court should “assess the capacity of the parties sua sponte.” *E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co.*, 160 F.3d 925, 936 (2d Cir. 1998) (emphasis added).

In sum, the final MEM arbitration award may be enforced in court by a UA (which might be composed of an individual SO/AC, some grouping of SO/ACs, or some grouping of the members of SO/ACs), or by an individual person such as the chair of an SO/AC.

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In addition to having capacity to sue in court, whatever person or entity seeks to enforce the MEM final arbitration award also must have standing to do so. Under both California and federal law, a party to an arbitration agreement has standing to enforce it. 9 U.S.C. § 9; Cal. Code Civ. Proc. § 1281.2. In addition, as suggested in Sidley's 20 April 2015 memorandum (at Annex A-4), both California courts and federal courts sitting in California permit third party beneficiaries to enforce arbitration agreements. *See, e.g., Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1287 (9th Cir. 2009); *M & M Foods, Inc. v. Pac. Am. Fish Co., Inc.*, 196 Cal. App. 4th 554, 560 (2011); *Collins v. Diamond Pet Food Processors of Cal.*, 2013 U.S. Dist. LEXIS 60173, at *26 (E.D. Cal. Apr. 25, 2013). As such, in order to ensure the standing requirement is met, the UA or individual designated to enforce final MEM arbitration awards must either be party to the written agreement pursuant to which the arbitration takes place (for example, newly created provisions of ICANN's Bylaws), or expressly designated therein as a third party beneficiary of that agreement.

ICANN also could waive any challenges to the standing of the enforcing UA or individual. However, because standing (unlike capacity) is jurisdictional under both state and federal law, the issue may not be waivable, and a court may raise the issue *sue sponte*. *See United States v. Viltrakis*, 108 F.3d 1159, 1160 (9th Cir. 1997); *Cummings v. Stanley*, 177 Cal. App. 4th 493, 501 (2009). However, it is highly unlikely that a court would conclude that a UA or individual in these circumstances lacks standing to enforce a final MEM arbitration award, especially if ICANN's Bylaws specifically identified the UA or individual, and if the Bylaws also disclaimed any argument regarding standing. Moreover, as set forth above, both California and federal courts permit parties to an arbitration agreement standing to enforce it.

Because UAs and individuals are likely to have both capacity and standing to enforce the final MEM award in court in the manner described above, a California court would hear a claim to enforce the award. *See Cal. Civ. Proc. Code 1281, et seq.; Guseinov v. Burns*, 145 Cal. App. 4th 944, 954 (2006) (appeal from decision of trial court where "Plaintiff sought judicial assistance to enforce the arbitration award").

One potential issue remains, however, with the availability of a federal forum for MEM award enforcement claims. In order for a MEM final arbitration award to be enforced in federal court, the federal court must have subject matter jurisdiction over the claim. The Federal Arbitration Act ("FAA") provides that a federal District Court may enforce an arbitration award so long as the parties to the arbitration agree that "a judgment of the court shall be entered upon the award made pursuant to the arbitration[.]" 9 U.S.C. § 9.² However, "even when a petition is brought under the Federal Arbitration Act (FAA), a petitioner seeking to confirm or vacate an

² The parties may select which District Court will hear the claim, or "[i]f no court is specified in the agreement of the parties, then such application [for enforcement of the arbitration award] may be made to the United States court in and for the district within which such award was made." *Id.*

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arbitration award in federal court must establish an independent basis for federal jurisdiction.” *Carter v. Health Net of Cal., Inc.*, 374 F.3d 830, 833 (9th Cir. 2004). As such, jurisdiction must arise by virtue of either diversity or federal question jurisdiction. And “the presence of federal questions in an underlying arbitration is insufficient to provide an independent basis for federal question jurisdiction to review an arbitration award under the FAA.” *Id.* at 836.³ Therefore, a federal court will likely only be able to exert subject matter jurisdiction over a claim to enforce an MEM final award by virtue of diversity jurisdiction, which requires both diversity of citizenship amongst the parties and an amount in controversy that exceeds \$75,000. 28 U.S.C. § 1332. The amount in controversy is unlikely to pose any barrier to a finding of diversity jurisdiction, though the analysis would turn on the nature of the claim at issue in the MEM. *See Jackson v. Am. Bar Ass’n*, 538 F.2d 829, 831 (9th Cir. 1976) (“Where the complaint seeks injunctive or declaratory relief . . . the amount in controversy is . . . the value of the right to be protected or the extent of the injury to be prevented.”). Potentially more problematic is diversity of citizenship, as the UA or individual bringing the claim must not be a California citizen. However, there are various feasible ways to ensure a non-California individual or UA may bring these claims, which can be addressed in due course. Again, no such complications arise with respect to California courts, which do not impose the subject matter jurisdictional bar that applies in federal court.

V. Conclusion

The MEM final arbitration award could be enforced either by individual SO/AC chair(s), or by a UA composed of an SO/AC or some grouping of SO/ACs, the members of various SO/ACs, or the SO/AC chair(s). ICANN could agree to indemnify whichever entity or person is designated to enforce the MEM final arbitration award. ICANN could expressly waive any challenge to the capacity or standing of the person or entity designated to enforce the MEM final arbitration award.

³ However, if “the grounds asserted for federal review in a well-pleaded petition” involve “substantial federal questions,” jurisdiction may be found. *Id.* But that scenario is unlikely here, as a petition to enforce an MEM final arbitration award is unlikely to itself raise substantial issues of federal law.