

MEMORANDUM

TO: Cross-Community Working Group on Enhancing ICANN Accountability
FROM: Sidley Austin LLP and Adler & Colvin
RE: Default Judgment and Arbitration
DATE: October 12, 2015

Question Presented

This memorandum responds to the following question certified to us on October 6, 2015: *What is the availability of default judgments should the Board refuse to participate in an Independent Review Process (“IRP”)?* We understand that this question arose in the context of how the MEM would work but it has application to other models under consideration as well

Summary Conclusion¹

While a default judgment could result from the Board’s refusal to participate in an IRP, such a result is neither certain nor is it necessarily a simple matter to achieve in either a judicial proceeding or in arbitration. Other than in very basic cases, the process of obtaining an enforceable default judgment requires more than mere ministerial action. Rather, the process often requires review by the court or arbitration panel after hearings which may include presentation of summaries of evidence and arguments. Default judgments are not guaranteed, and they can be particularly difficult to obtain when they depend upon evidence in the possession of the defaulting party.

The form of default available from a court can differ from that available in an arbitration proceeding. In particular, an arbitration default award, by itself, cannot fully resolve disputes with a party that is unwilling to submit to arbitration. Court action would be required to obtain an enforceable judgment based on the arbitral award.

We also note that under the MEM proposal as we understand it, it is unclear whether the MEM Standing Panel would be convened before a dispute arose. A pre-existing, fully-funded Standing Panel is required to ensure that there will be a Panel to bring a dispute before, for example should a situation arise where the Board resists participating in an IRP and does so by seeking to

¹ Note as a general matter that our legal analysis is provided on a level in keeping with the question posed. Our legal analysis is tailored to the context in which the particular question arises. It is provided to inform and help facilitate your consideration of the governance accountability models under discussion and should not be relied upon by any other persons or groups for any other purpose. Unless otherwise stated, our legal analysis is based on California law and in particular the laws governing California nonprofit public benefit corporations (California Corporations Code, Title 1, Division 2). In our effort to respond in a limited time frame, we may not have completely identified, researched and addressed all potential implications and nuances involved.

prevent the Panel from being formed . Of course, this problem with the MEM is easily remedied by clarifying that a Standing Panel would be established at the outset.

Analysis

Generally, if a party in federal or state court shows that the other party, against whom judgment is sought, has failed to plead or defend itself, the clerk must enter into the docket that the other party is in default.² In certain types of simple federal cases, a clerk may then enter default judgment against the defaulting party for a verified sum plus costs.³ In more complex federal cases, a party must apply to the court for default judgment and serve the defaulting party with notice.⁴ The court then has discretion to:

- Conduct hearings,
- Enter a judgment, or
- Deny default judgment and continue the case on the merits.⁵

In short, an enforceable default judgment cannot be considered a guaranteed matter.

Similar rules apply in California state court, where the process for obtaining a default judgment is rigorous and is never simply a ministerial action of a clerk. The party requesting default judgment must submit a case summary, a proposed judgment, and declarations or other evidence in support of the judgment it requests, along with other documentation. The court will then set a hearing date, and the party seeking judgment must submit evidence.⁶

True “default” arbitration awards are not available in arbitration proceedings the same way that a default judgment may be available in federal or state court, although there are some similar hurdles. Under the rules of the three most common arbitration organizations—American Arbitration Association (“AAA”), Judicial Arbitration and Mediation Services (“JAMS”), and International Institute for Conflict Prevention & Resolution (“CPR”)—a favorable decision is not automatic when the other party defaults. The absence of the other party alone is never enough to result in a default. It is possible for an arbitrator to enter an award if the other party is not present, but the award requires the party seeking the award to “prove up”—submit evidence

² Fed. R. Civ. P. 55(a).

³ *Moore’s Federal Practice - Civil* §§ 55.2, 55.20[1], 55.24; *see also* Fed. R. Civ. P. 55(b)(1).

⁴ *Federal Practice - Civil* § 55.10; *see also* Fed. R. Civ. P. 5(a); Fed. R. Civ. P. 55(b)(2).

⁵ *Federal Practice - Civil* §§ 55.20[2], 55.30, 55.31; *see also* Fed. R. Civ. P. 55(b)(2); *Ganther v. Ingle*, 75 F.3d 207, 209 (5th Cir. 1996) (“A party is not entitled to a default judgment as a matter of right even when defendant is technically in default.”); *Enron Oil Corp. v. Masonori Diakuhara*, 10 F.3d 90, 95 (2d Cir. 1993) (“The dispositions of motions for entries of defaults and default judgments and relief from the same under Rule 55(c) are left to the sound discretion of a district court because it is in the best position to assess the individual circumstances of a given case and to evaluate the credibility and good faith of the parties.”); *Eitel v. McCool*, 782 F.2d 1470, 1472 (9th Cir. 1986) (finding that the district court did not abuse its discretion in refusing default judgment); *Rashidi v. Albright*, 818 F. Supp. 1354, 1356 (D. Nev. 1993) (“Because the Court has discretion, a party making a request may not be entitled to default judgment as a matter of right even when the defendant is technically in default and that fact has been noticed under Rule 55(a).”).

⁶ Cal. Rule of Court 3.1800(a); Cal. Code Civ. P. 585.

showing that it is entitled to relief.⁷ This requirement to present evidence can be an insurmountable burden if the case depends upon evidence in the sole possession of the other party.

Moreover default awards are only possible if the structure for the arbitration is already in place: Arbitrators must have been selected, fees paid, and so forth. (Even then, one-sided awards will likely require court intervention to enforce.). If a party were to completely refuse to comply with the process, there can be no default award – indeed there cannot even be a “prove up and default judgment” – unless there is an arbitrator appointed to make such a judgment. Consequently, unless there is a Standing Panel, the party seeking arbitration would be forced to petition a court to compel arbitration, pursuant to 9 U.S.C. § 4.⁸ Court action would be necessary to determine that the case should proceed through the arbitration process and not through the courts.⁹ If the court so ordered and an arbitrator ultimately determined that the other party had defaulted and terminated the arbitration, the one-sided award that issued would likely require court intervention to enforce.¹⁰ If a party obtains an arbitration award after the other party defaults on arbitration proceedings, it would need to obtain a court order confirming the award and enjoining the parties

⁷ See AAA Rule 31 (“Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be made solely on the default of a party. The arbitrator shall require the party who is present to submit such evidence as the arbitrator may require for the making of an award.”); JAMS Rule 22(j) (“The Arbitrator may proceed with the Hearing in the absence of a Party that, after receiving notice of the Hearing pursuant to Rule 19, fails to attend. The Arbitrator may not render an Award solely on the basis of the default or absence of the Party, but shall require any Party seeking relief to submit such evidence as the Arbitrator may require for the rendering of an Award.”); CPR Rule 16 (“Rule 16 empowers the Tribunal to impose a remedy it deems just whenever a party materially fails to comply with the Rules. The power to make an award on default is specifically provided, although such awards may only be made after the production of evidence and supporting legal argument by the non-defaulting party. Pursuant to Rule 19.2, the Tribunal also may take a party’s conduct during the proceeding into account in assessing costs.”).

Courts have enforced such awards. *Berg v. Traylor*, 148 Cal. App. 4th 809, 814 & n.3 (Cal. Ct. App. 2007) (affirming the judgment of the Los Angeles Superior Court, which confirmed an arbitration award even though the opposing party “had not appeared” and the arbitrator issued an award based on “prove-up and default as provided by JAMS Rules”) (citing JAMS Rule 22(j)); see also *Schapiro-Thorn, Inc. v. Mitchell*, 2015 WL 1815414, at *7 (Cal. Ct. App. Apr. 21, 2015) (unpublished) (citing JAMS Rule 22(j) (allowing the arbitrator to enter an ex parte award), the court explained “that a recalcitrant party should not be permitted to obstruct the expeditious resolution of disputes submitted to arbitration.”); *Group 32 Dev. & Eng’g, Inc. v. GC Barnes Grp.*, 2015 WL 144082 (N.D. Tex. Jan. 9, 2015) (denying GC Barnes’s motion to vacate the ex parte arbitration award based on AAA Rule 31).

⁸ “A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.” 9 U.S.C. § 4; see also, e.g., *Int’l Alliance of Theatrical Stage Employee & Moving Picture Technicians v. InSync Show Prods., Inc.*, 2015 WL 5166743, at *2 (9th Cir. Sept. 4, 2015) (plaintiff union filed a petition to compel arbitration under a collective bargaining agreement). Motions to compel arbitration also arise when one party brings action in court and the other party files a motion to stay or dismiss the case and compel arbitration pursuant to an arbitration clause and 9 U.S.C. § 3. See, e.g., *Johnmohammadi v. Bloomingdale’s, Inc.*, 755 F.3d 1072 (9th Cir. 2014) (affirming district court’s grant of employer’s motion to compel arbitration and dismissing the employee’s state-law class action).

⁹ If one party refuses to pay arbitration fees, the arbitrator has discretion to give the non-defaulting party the option to advance the fee (with the assumption that that party would recoup the advance as part of an arbitration award) or may choose to terminate the arbitration, allowing the non-defaulting party to bring a case in court. See *Lifescan, Inc. v. Premier Diabetic Services, Inc.*, 363 F.3d 1010, 1012-13 (9th Cir. 2004); accord *Williams v. Tully*, No. C-02-05687, 2005 WL 645943, at *6-7 (N.D. Cal. Mar. 18, 2005) (applying *Lifescan*).

¹⁰ See *Sink v. Aden Enterprises, Inc.* 352 F.3d 1197, 1199 (9th Cir. 2003) (ruling that party who initially failed to pay arbitration fees and was brought to federal court by the opposing party cannot later ask the court to send the parties back to arbitration because it waived its right to arbitrate by materially breaching its obligation to pay arbitration fees in the first instance).

to comply to enforce the award against a party that was unwilling to acknowledge or abide by the arbitration.¹¹

These uncertainties are lessened by having a specified pre-existing, adequately-funded Standing Panel with the degree of autonomy necessary to convene and issue judgment even if the Board did not deem a particular proceeding to be appropriate. In the absence of such structural assurances, a party could be required to petition a court to compel the Board to participate in arbitration in order to even start the process of empanelling and funding the MEM. This would add additional time, complexity and uncertainty.

In sum, even assuming that an aggrieved party could go to an arbitrator without the cooperation of the Board, under most arbitration rules the arbitrator would not simply enter a default judgment. Instead the arbitrator could choose to either terminate the arbitration and determine that the Board had waived any right to arbitration in the matter, which would require taking the matter to court, or the arbitrator could hold abbreviated *ex parte* hearings in which the aggrieved party would be required to provide evidence for its case – despite the absence of discovery from ICANN – and the arbitrator would make a judgment based on that evidence. Even in the best case default scenario of obtaining this form of *ex parte* arbitral decision against the Board, the Board could ignore the arbitrator’s ruling (because it did not agree to the arbitration in the first place), requiring the aggrieved party to petition a court to confirm and enforce the arbitration award. Courts generally do not like awards resulting from one-sided arbitration, and such awards could be struck down.¹²

¹¹ See, e.g., *Group 32 Dev. & Eng’g, Inc.*, 2015 WL 144082. If the agreement between the parties states that a court judgment should be entered pursuant to any arbitration award, any party to the arbitration may apply to the court specified in the agreement for an order confirming the award, which the court must then grant unless it finds that it should be vacated, modified, or corrected. 9 U.S.C. § 9. If the agreement does not name a court, a party may apply to the United States court for the district where the arbitration award was made. *Id.*

¹² Under common law *ex parte* arbitration proceedings were invalid and awards were subject to being voided by courts. See JAY E. GREINIG, ROCCO M. SCANZA, CASE PREPARATION AND PRESENTATION: A GUIDE FOR ARBITRATION ADVOCATES AND ARBITRATORS 162 & n.16 (2013) (citing *State ex re. Hooten Const. Co. v. Borsberry Const. Co.*, 769 P.2d 726 (N.M. 1989)). Even under modern rules, *ex parte* awards are “subject to challenge on a number of grounds, such as the lack of jurisdiction of the arbitrator and inadequacy of notice.” STEVEN C. BENNETT, ARBITRATION: ESSENTIAL CONCEPTS 107 (2002).