UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

AMADEUS IT GROUP, S.A., Petitioner, v. EBIX, INC., Respondent.	CIVIL ACTION NO. 1:22-CV-4109-SEG

ORDER

This case is before the Court on the motion for default judgment (Doc. 10) of Petitioner Amadeus IT Group, S.A. ("Amadeus") and motions to set aside default and for leave to file opposition out of time by Respondent Ebix, Inc. ("Ebix"). Having considered the parties' filings and the applicable law, the Court now enters the following order.

I. Background

In this action, Amadeus petitions the Court to confirm a foreign arbitration award and enter a corresponding judgment against Ebix. (*See* Doc. 1.) After filing its petition on October 14, 2022, Amadeus served Ebix via its registered agent, Linda Banks of National Registered Agents, Inc., on October 21, 2022. (Doc. 1; Doc. 4.) Ebix's answer was therefore due on November 14, 2022. Ebix failed to timely respond to the petition, and

Amadeus moved for the Clerk's entry of default against Ebix on November 21. (Doc. 7.) The Clerk entered Ebix's default the next day. On November 29, this Court directed Amadeus to file a motion for default judgment within 30 days. (Doc. 8.) On December 12, counsel for Ebix filed a notice of appearance (Doc. 9); two days later, on December 14, Amadeus filed its motion for default judgment (Doc. 10). On December 19, Ebix moved to set aside its default and for leave to respond out of time to Amadeus' petition. (Doc. 12; Doc. 13.) Finally, on March 9, 2023, Amadeus moved the Court to expedite its ruling on the motion for default judgment, arguing that Ebix is in a "precarious financial position." (Doc. 21 at 3.) Ebix responded on March 23, arguing that the Court should, if anything, "defer ruling" on the motions, for the parties were engaged in settlement negotiations with the goal of reaching agreement by the end of March. (Doc. 22 at 3.) To date, the docket contains no indication of any settlement.

II. Discussion

In the Eleventh Circuit, "there is a strong policy of determining cases on their merits, and [courts] therefore view defaults with disfavor." *In re Worldwide Web Sys., Inc.*, 328 F.3d 1291, 1295 (11th Cir. 2003). A court may set aside an entry of default for "good cause," which is a "mutable" standard that is intended to be "liberal" but not "devoid of substance." *Rodriguez v.*

Powell, 853 F. App'x 613, 615 (11th Cir. 2021) (quoting *Compania Interamericana Export-Import, S.A. v. Compania Dominicana de Aviacion*, 88 F.3d 948, 951 (11th Cir. 1996)); *see* Fed. R. Civ. P. 55(c). Courts generally consider the following factors, among others dictated by the circumstances, to determine if there is good cause to set aside default: (1) whether a defendant's failure to act was willful; (2) whether setting aside default will prejudice the opposing party; and (3) whether the defendant can present a meritorious defense. *Compania Interamericana*, 88 F.3d at 951. Generally speaking, "the drastic remedy of a default judgment should not be resorted to where a party has made a clear intent to defend." *Woodbury v. Sears, Roebuck & Co.*, 152 F.R.D. 229, 237 (M.D. Fla. 1993); *see also* 2007 Advisory Committee Notes to Fed. R. Civ. P. 55(a) (stating that "[a]cts that show an intent to defend have frequently prevented a default").

Ebix argues that its default was not willful but was, rather, the result of failures of communication. It has introduced affidavits stating that its registered agent forwarded the summons and petition to an incorrect email address, and thus Ebix officials never received them. (Doc. 12-3, Hamil Aff. ¶¶ 12-14.) Ebix's registered agent mailed paper copies to Steven Hamil, Ebix's Chief Financial Officer, which were delivered to Hamil's office in Georgia on November 7, 2022. (*Id.* ¶¶ 4-6.) But, Ebix says, Hamil was

working remotely from November 4 until December 6, and he did not open the package containing the summons and petition until that date, at which point Hamil notified other appropriate Ebix officials. (*Id.* ¶¶ 7-10.) Amadeus argues that these failures merely show neglect on Ebix's part.[1]

Second, Ebix argues that Amadeus will suffer no prejudice from its failure to timely respond, since the delay was brief—a little more than a month—and having to litigate a case on the merits does not, in itself, constitute prejudice. Amadeus argues that it will be prejudiced, for Ebix's failure to honor the arbitration award "has allowed it to unlawfully retain approximately $15 million of Amadeus' money over three years," and forcing Amadeus to litigate this case will undermine "the promise of arbitration" by adding another layer to an already protracted dispute between the parties. (Doc. 18 at 11-12) (quoting *World Business Paradise, Inc. v. Suntrust Bank*, 403 F. App'x 468, 470 (11th Cir. 2020)).

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[1] Ebix also argues that its foreign counsel—and counsel associated with EbixCash, the Indian subsidiary that participated in the February 2022 arbitration—were engaged in negotiations with Amadeus related to the arbitration award in August and December 2022. (*See* Doc. 12-1 at 10-11; Doc. 12-2, Kundu Aff. ¶¶ 6-8.) Amadeus disputes that the communications between the parties, most of which occurred in mid-December *after* Ebix's CFO claims to have first become aware of this suit, constituted settlement negotiations or serve to justify Ebix's default. The Court finds that, whatever the significance of the communications between the parties in August and December, they are of little relevance to the "good cause" inquiry.

Finally, Ebix argues that it has meritorious defenses to present. In particular, it argues that the arbitrators exceeded their authority by awarding attorneys' fees and other costs to Amadeus, and it disputes that Amadeus is entitled to attorneys' fees or costs in this action. (*See* Doc. 12-1 at 13-15.) Ebix has also argued that EbixCash is an indispensable party to this action, and that Amadeus should have named EbixCash as a co-respondent. (Doc. 13-1 at 2 n.1.) Amadeus responds that these defenses are frivolous and do not warrant setting aside default. It argues that the underlying arbitration agreement incorporated the International Chamber of Commerce ("ICC") Rules of Arbitration, which provide that the final arbitration award may assign the costs of arbitration, including legal costs, to the parties. (*See* Doc. 18 at 8) (citing Doc. 1-1, Bentham Decl. Ex. A, at 15; ICC Rules of Arbitration, Art. 38). Amadeus further argues that Ebix's challenge to the award of fees in this action is "premature and more properly considered in connection with the Petitioner's Motion for Default Judgment," for the Court has not yet awarded fees to either side, although Amadeus does seek such fees in its motion for default judgment. (Doc. 18 at 15; Doc. 10 at 9-10.)

On the whole, and in light of this Circuit's "strong policy of determining cases on their merits," *Worldwide Web Sys.*, 328 F.3d at 1295, the Court finds that the circumstances weigh in favor of setting aside Ebix's default. With

respect to willfulness, maintaining a registered agent who has an erroneous email address and failing to open business mail for over a month are certainly not best practices. But negligence is not willfulness, which in this context means "flaunting an intentional disrespect for the judicial process," *Compania Interamericana*, 88 F.3d at 952, or "decid[ing] not to respond to the complaint for tactical reasons," *Architectural Ingenieria Siglo XXI, LLC v. Dominican Repub.*, 788 F.3d 1329, 1344 (11th Cir. 2015). The Court finds no indication in the record that Ebix's failure to respond was willful rather than merely negligent. *See id.* ("At best, the record suggests that [the defendant's] failure to respond was the result of negligence that is excusable."). Further, it appears that Ebix moved to remedy its default soon after learning of this confirmation action.

Nor does the Court find an indication that Amadeus would be prejudiced if Ebix's default were set aside. Whatever the length of time since Amadeus first demanded the money it allegedly is owed by Ebix or its subsidiary, the delay caused by Ebix's failure to answer Amadeus' petition in *this* action was only about a month. At bottom, Amadeus' arguments amount to the contention that it would be legally prejudiced, or that the "promise of arbitration" would be undermined, if it were compelled to litigate its petition against Ebix. But under Rule 55(c), "the inquiry is whether prejudice results

from the delay, not from having to continue to litigate the case." *Conn. State Dental Ass'n v. Anthem Health Plans, Inc.*, 591 F.3d 1337, 1357 (11th Cir. 2009) (citing *Walter v. Blue Cross & Blue Shield United*, 181 F.3d 1198, 1202 (11th Cir. 1999); *Lacy v. Sitel Corp.*, 227 F.3d 290, 293 (5th Cir. 2000)); *see also id.* ("There is no prejudice to the plaintiff where the setting aside of the default has done no harm to plaintiff except to require it to prove its case."). Ebix has shown no prejudice from the relatively brief delay caused by Ebix's default in this action.

Finally, the Court finds that Ebix has shown that it has a defense that is sufficiently "meritorious" for the purposes of setting aside its default. For the purposes of Rule 55(c), the question is not whether the defendant is likely to succeed on its defense, but whether Ebix has "provided by 'clear statements' a 'hint of a suggestion' that [its] defenses have merit." *Argoitia v. C & J Sons, LLC*, No. 13-62469-CIV, 2014 WL 1912011, at *2 (S.D. Fla. May 13, 2014); *see Moldwood Corp. v. Stutts*, 410 F.2d 351, 351 (5th Cir. 1969); *United Artists Corp. v. Freeman*, 605 F.2d 854, 857 n.4 (5th Cir. 1979).[2] Ebix's contention that the arbitration award exceeds the scope of the parties' arbitration agreement is at least a colorable argument under Article V of the

[2] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

New York Convention and, therefore, one that may be raised as a defense in a confirmation action. *See Cvoro v. Carnival Corp.*, 941 F.3d 487, 495 (11th Cir. 2019); *Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1441-42 (11th Cir. 1998), *overruled on other grounds by Corporacion AIC, SA v. Hidroelectrica Santa Rita S.A.*, No. 20-13039, 2023 WL 2922297 (11th Cir. Apr. 13, 2023); 9 U.S.C. § 207.[3] Amadeus has cited

[3] Article V of the New York Convention provides:

> 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
> (a) The parties to the agreement . . . were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
> (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
> (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
> (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

authority that it argues show that district courts have confirmed arbitral awards granting fees and costs under similar arbitration agreements. (*See* Doc. 18 at 8 n.24) (citing *ESCO Corp. v. Bradken Resources Pty Ltd.*, No. CIV. 10-788-AC, 2011 WL 1625815 (D. Or. Jan. 31, 2011), *report and recommendation adopted,* No. CV 10-788-AC, 2011 WL 1630355 (D. Or. Apr. 27, 2011); *Willbros W. Africa, Inc. v. HFG Engr. US, Inc.*, No. CIV.A. H-08-2646, 2009 WL 411565 (S.D. Tex. Feb. 12, 2009); *F. Hoffmann-La Roche Ltd. v. Qiagen Gaithersburg, Inc.*, 730 F. Supp. 2d 318 (S.D.N.Y. 2010); *Broome & Wellington v. Levcor Intern., Inc.*, No. 02-CIV-6566(LTS)(AJP), 2003 WL 21032008 (S.D.N.Y. May 7, 2003)). However, these out-of-circuit district court cases are only persuasive authority in this Court, and none directly

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> (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.
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> 2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
>
> (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
>
> (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. 5, *opened for signature* June 10, 1958, 21 U.S.T. 2517, 2520, 330 U.N.T.S. 38.

addresses a defense like Ebix's in the context of the ICC Rules.[4] To be clear, the Court does not decide here that Amadeus' position is unpersuasive or that Ebix's argument is likely to succeed. The Court finds merely that it does not appear, at this stage, that Ebix's defense is frivolous or foreclosed by binding precedent. Ebix's defense is meritorious enough that, under the circumstances, it weighs in favor of setting aside the default and allowing the action to be litigated under the usual procedures. In addition, the Court finds that Ebix has shown that it has a colorable defense against the award of attorney fees and costs in *this* action. Contrary to Amadeus' position, this matter is not irrelevant at the present stage, for Amadeus seeks attorneys' fees and costs in its petition (Doc. 1 at 8) and in its motion for default judgment (Doc. 10-1 at 9-10).

Finally, the Court is cognizant of the policy behind the New York Convention, as implemented by Chapter 2 of the Federal Arbitration Act, 9 U.S.C. § 201 *et seq*. But the goals of "encouraging the recognition and enforcement of international arbitration agreements and awards" and "reliev[ing] congestion in the courts and . . . provid[ing] parties with an

[4] *ESCO Corp*. concerned an arbitration conducted in accordance with the ICC Arbitration Rules, but the respondent in that action argued that the award violated public policy and was in manifest disregard of the law, not that the fee award was outside the scope of the arbitration agreement. *See* 2011 WL 1625815 at *8-*15.

alternative method for dispute resolution that [is] speedier and less costly than litigation," *Cvoro*, 941 F.3d at 495, do not imply a preference for *ex parte* proceedings in confirmation actions. Ebix has evinced an intent to defend, and the Court finds that its default was not willful, has not prejudiced Amadeus, and that it has shown a colorable defense. Ebix has therefore made a showing sufficient to constitute good cause to set aside its default under Rule 55(c).

III. Conclusion

For the foregoing reasons, the Court **GRANTS** Ebix's motion to set aside the default (Doc. 12) and its motion for leave to file opposition out of time (Doc. 13). Amadeus' motion for default judgment (Doc. 10) and motion for an expedited ruling (Doc. 21) are **DENIED AS MOOT**. The Clerk is **DIRECTED** to file Ebix's proposed pleading (Doc. 13-1) on the docket.

SO ORDERED this 18th day of April, 2023.

Sarah E. Geraghty

SARAH E. GERAGHTY
United States District Judge