

FIDIC 2023 Guide: Navigating Risk Effects and Contractor Relief Amidst COVID-19, Inflation and War

May 18, 2023

The COVID-19 pandemic and the ongoing war have posed unprecedented challenges to the construction industry worldwide. Projects have faced significant disruptions, delays, and cost escalations due to factors such as unavailability of goods, supply chain disruptions, and fluctuating market conditions. In such scenarios, it is crucial for the parties involved to understand the contractual provisions and mechanisms available to them for relief under the FIDIC contract forms.

In this article, references are made to the FIDIC 2017 Red, Yellow, and Silver Books.

On 21 March 2023, FIDIC issued a Guidance Memorandum titled (FIDIC Contracts guidance on the effects of inflation and the unavailability of goods and labour following the global COVID-19 pandemic and the war in Ukraine) to provide a comprehensive guide linking the risk effects of these global events to the relevant provisions in the FIDIC contracts.

To navigate the complexities arising from the COVID-19 pandemic and the war, the FIDIC Guide presents a concise checklist of conditions for relief under the respective FIDIC contract clauses.

Establishing causation between the risk events and the impact

on project performance is critical, and for Force Majeure or Exceptional Events (FM/EE), the party must demonstrate that prevention of performance has indeed occurred.

Additionally, it is essential to comply with the notice requirements outlined in the FIDIC contracts. In accordance with Sub-Clause 1.3 (Communications), any notice provided under the conditions must be in writing and adhere to the stipulated format and content requirements.

And it is imperative for the users to thoroughly analyze the facts, adhere to the detailed procedures specified in the General Conditions, as well as any amendments introduced by the Particular Conditions.

The risk events covered in this article are:

- Unavailability of goods due to COVID-19, with or without alternative sources of supplies.
- Unavailability of goods because of the war in Ukraine, with or without alternative sources of supplies.
- Unavailability of goods due to trade bans against Russia, with or without alternative sources of supplies.
- Damage or loss to the goods, works, or Contractor's documents due to the war.
- Inflation of costs resulting from the global events.
- Unbearable inflation or the continuing performance of the contract being economically non-viable.
- Impossibility to continue the project due to war or COVID-19.

This article elaborates on the risk events, their contractual and legal basis, entitlements, and conditions as proposed by the FIDIC Guide.

Unavailability of Goods Due to COVID-19

Risk Event: The unavailability of goods, with or without alternative sources of supplies, due to the COVID-19 pandemic

can disrupt a project and result in delays and increased costs.

Contractual/Legal Basis: This situation is covered under Sub-Clause 18.4 (Exceptional Events) and Sub-Clause 8.5 (Delay Damages) of the Red and Yellow Books. The Contractor may be entitled to an extension of time (EOT) and reimbursement for cost increases due to inflation.

Entitlement: If the Contractor can prove that the unavailability of goods was caused by a prevention event as per SC 18.2, they may be eligible for relief. The Contractor must follow the claim procedure outlined in SC 20.2, which includes providing timely notice, mitigation efforts, and evidence of the impact.

Conditions: The Contractor must adhere to the requirements in SC 18.2 (prevention), SC 18.2 (Notice), SC 18.3 (mitigation), SC 18.3 (Notices), and SC 20.2 (Claim procedure) to be entitled to relief.

Unavailability of Goods Due to War in Ukraine

Risk Event: The unavailability of goods, with or without alternative sources of supplies, due to the war in Ukraine can lead to project delays and increased costs.

Contractual/Legal Basis: This situation is addressed under Sub-Clause 18.4 (Exceptional Events), which allows the Contractor to claim an extension of time (EOT) and cost, including prolongation costs and additional costs.

Entitlement: If the Contractor can prove that the unavailability of goods was caused by an exceptional event as per SC 18.4, they may be eligible for relief. The Contractor must follow the claim procedure outlined in SC 20.2.

Conditions: The Contractor must adhere to the requirements in SC 18.4, which are the same as mentioned in the COVID-19 risk

event above.

Unavailability of Goods Due to Trade Bans Against Russia

Risk Event: The unavailability of goods, with or without alternative sources of supplies, due to trade bans against Russia can result in project delays and increased costs.

Contractual/Legal Basis: This situation is covered under Sub-Clause 13.6 (Changes in Laws) and SC 20.2 (Claim procedure). The Contractor may be entitled to an extension of time (EOT) and cost, including prolongation costs and additional costs.

Entitlement: The Contractor must prove that the unavailability of goods was caused by a change in the laws of the Country of the Site. They must follow the claim procedure outlined in SC 20.2 to be eligible for relief.

Conditions: The Contractor must adhere to the requirements in SC 20.2 (Claim procedure).

Damage or Loss to Goods, Works, and Contractor's Documents Due to War

Risk Event: Damage or loss to goods, works, or Contractor's documents due to war can lead to project delays and increased costs.

Contractual/Legal Basis: This situation is addressed under Sub-Clause 18.4 (Exceptional Events) for EOT and prolongation costs, and Sub-Clause 17.2 (Variation) for cost and profit related to instructed damage/loss rectification.

Entitlement: If the Contractor can prove that the damage/loss was caused by an exceptional event as per SC 18.4 and follows the rectification instructions (deemed Variation), they may be eligible for relief.

Conditions: The Contractor must adhere to the requirements in SC 18.4 (as mentioned in the COVID-19 risk event above) and SC

17.2 (Variation) for dealing with instructed damage/loss rectification.

Inflation of Costs

Risk Event: Inflation of costs can impact the cost of labor, goods, and other inputs to the works, affecting the financial viability of the project.

Contractual/Legal Basis: This situation is covered under Sub-Clause 13.7 (Adjustment in the cost of labor, goods, and other inputs), Schedule(s) of Cost Indexation in the Contract, and SC 20.2 (Claim procedure). The Contractor may be entitled to an adjustment in costs if they can prove that inflation is above the relief provided under SC 13.7.

Entitlement: The Contractor must follow the claim procedure outlined in SC 20.2 and provide evidence that the cost of labor, goods, and other inputs have increased above the relief provided under SC 13.7.

Conditions: The Contractor must adhere to the requirements in SC 20.2 (Claim procedure) and the Schedule(s) of Cost Indexation in the Contract.

Unbearable Inflation or Economic Non-Viability

Risk Event: Unbearable inflation or the continuing performance of the contract being economically non-viable can lead to project termination.

Contractual/Legal Basis: This situation is addressed under Sub-Clause 15.5 (Termination by Employer) and Sub-Clause 18.5 (Costs and Termination by Contractor). The Contractor may be entitled to costs per SC 18.5 and, if terminated under SC 15.5, additional losses or damages suffered.

Entitlement: The Employer has the discretion to terminate the contract under SC 15.5, subject to a 28-day notice and return of Performance Security. Termination under SC 18.5 requires

prevention for more than 84 days or multiple periods totaling more than 140 days.

Conditions: The Contractor must adhere to the requirements in SC 15.5 and SC 18.5.

Impossibility to Continue Due to War or COVID-19

Risk Event: The impossibility to continue the project due to war or COVID-19 can lead to release from performance.

Contractual/Legal Basis: This situation is covered under Sub-Clause 18.6 (Release from Performance) and SC 18.5 (Costs). The Contractor may be entitled to costs per SC 18.5 if it becomes impossible or unlawful to continue, and the parties cannot agree on an amendment to the contract.

Entitlement: The Contractor must provide notice under SC 18.6 that it has become impossible or unlawful to continue the project, and the parties are unable to agree on an amendment to the contract.

Conditions: The Contractor must adhere to the requirements in SC 18.6 and follow the procedures for claiming costs under SC 18.5.

Takeaway

The COVID-19 pandemic and the war have brought about unprecedented challenges in the construction industry, with far-reaching consequences on project timelines, budgets, and overall feasibility. By understanding and applying the relevant provisions of the FIDIC 2017 Red, Yellow, and Silver Books, parties involved in construction projects can navigate these challenges more effectively, seeking appropriate relief and mitigating the impact of these global events on their projects. The FIDIC Guide serves as an invaluable resource in this regard, providing a clear, concise, and comprehensive overview of the risk events and the associated contractual

provisions, conditions, and entitlements.

In conclusion, while the current crisis demands tailored remedies and a flexible, open-minded approach, it is crucial to maintain an objective perspective when evaluating the impact of these global events on construction projects. Causation remains a critical factor, and parties must be diligent in distinguishing the challenges arising from the post COVID-19 inflation and war from those that would have been experienced regardless of these extraordinary circumstances. By carefully assessing the facts, adhering to the contractual provisions, and demonstrating clear causation, stakeholders can effectively navigate the complexities of this unprecedented situation and seek appropriate relief under the FIDIC contract forms.

FIDIC

Guide:

https://www.fidic.org/sites/default/files/Guidance%20Memo%20-%20War%20memorandum_170323_final.pdf

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Landmark Judgment on the Extension of Arbitration Agreements to Non-Parties

through Indirect Claims in Jordan

May 18, 2023

The Economic Chamber of the Amman Court of First Instance issued a groundbreaking judgment addressing the topic of extending arbitration agreements to non-parties through indirect claims.

Case Background

The plaintiff filed a lawsuit against the defendant, demanding a sum exceeding \$30 million. In the statement of claim, the plaintiff insisted that they were filing this lawsuit on behalf of Company S, pursuant to the provisions of indirect litigation as stated in Articles 366 and 367 of the Jordanian Civil Law.

Article 366: (1) Every creditor, even if their right is not due for performance, may pursue all the rights of their debtor, except for those related to their person or unattachable. (2) The creditor's use of the debtor's rights is only accepted if they prove that the debtor has not exercised these rights and that their neglect is likely to lead to their insolvency. The debtor must be included in the lawsuit.

Article 367: The creditor is considered a representative of their debtor in exercising their rights, and any benefit resulting from the exercise of these rights enters the debtor's assets and serves as a guarantee for all their creditors.

Parties Involved and Contractual Relationship

The plaintiff clarified that the defendant, Company P, had previously entered into a construction contract with Company S for the purpose of building a structure. In line with the contract and to fulfill its obligations, Bank A, at the request of Company S, issued two guarantees in favor of the defendant, Company P, as follows:

- A performance bond worth approximately \$20 million.
- An advance payment guarantee worth approximately \$11 million.

Despite Company S fulfilling its obligations and handing over the project to the defendant, the latter allegedly unjustly liquidated the aforementioned guarantees by requesting the issuing bank to do so, and subsequently appropriated the stated amount.

Plaintiff's Demand

As a result, the plaintiff demanded the reimbursement of the guarantee amounts that the defendant company had seized for the benefit of Company S.

Arbitration Clause in the Construction Contract

The court noted that the construction contract connecting Company P and Company S included the latter's obligation to issue an advance payment guarantee and a performance bond. The agreement also defined the scope of each party's obligations and rights.

The agreement stipulated that any dispute or conflict not resolved within forty days after submitting the dispute notice, whether a dispute meeting was held or not, should be referred to arbitration according to the provisions detailed in the contract (the "Provisions"). The arbitration would take place before a tribunal consisting of three arbitrators: one appointed by the employer, another by the contractor, and a third appointed by the appointed arbitrators in accordance

with the Provisions. The arbitration venue would be in the country, and the arbitration language would be English. Both parties would waive any right to appeal before any court in any jurisdiction to the extent that such waiver could be properly made.

The arbitration rules were to be in accordance with the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules.

Indirect Litigation and Plaintiff's Position

The court highlighted in its judgment that the plaintiff did not file the lawsuit in their personal capacity, but rather relied on the rules of indirect litigation, in accordance with Articles 366 and 367 of the Civil Law. The plaintiff confirmed that the lawsuit aimed to return the claimed amounts to Company S's general guarantee, and explicitly stated that they were filing the lawsuit on behalf of Company S.

The court pointed out that the Jordanian legislator regulated indirect litigation as a means to ensure that a creditor has the right to file a lawsuit on behalf of their negligent debtor before the latter's debtor, thereby increasing the general guarantee and collecting the rights that the negligent debtor fails to exercise.

Plaintiff's Role in Indirect Litigation

The court then concluded that, given the plaintiff's position in the lawsuit, the requirements of direct litigation, according to the explicit text of Article 367 of the Civil Law, imply that the plaintiff in direct litigation only claims the rights of their debtor on their behalf.

The court continued that, since the plaintiff in direct litigation legally represents their debtor, it follows that the defendant (the debtor's debtor) has the right to invoke all legal defenses against the plaintiff that they possess

against the debtor.

Legal Subrogation and Arbitration Clauses in Jordanian Courts

The court based its opinion on what was stated by Dr. Abdul Razzaq Al-Sanhouri:

“The effects of the indirect claim are all centered on the basic idea of the creditor representing the debtor, as previously mentioned, and the representation here is a legal one...”

(Dr. Abdul Razzaq Al-Sanhouri, Mediator in the Explanation of Civil Law, Volume 2, General Theory of Obligations: Evidence – Effects of Obligations, Revival of Arab Heritage House, Beirut, p. 269)

The court concluded that the concept of legal representation stipulated in Articles 108-115 of the Civil Law is required in the relationship between the representative and the debtor. The latter can assert before the representative all the conditions or qualities surrounding his obligation when facing the principal. Naturally, this applies to the arbitration clause as well.

The court cited Dr. Fathi Waly's as well in its reasoning:

“If there is a substitution in the obligation, the substitution includes the arbitration clause. Thus, if a third party fulfills the debt and replaces the creditor who has satisfied his claim against the debtor, this third party, whether by law or agreement between them and the creditor or debtor, is bound by the arbitration agreement between the creditor and the debtor. They replace the creditor in this agreement when they claim their right against the debtor, replacing the creditor's right.”

(Dr. Fathi Waly, Arbitration Law in Theory and Practice, First Edition 2007, Knowledge Foundation, Alexandria, pp. 167-168)

The court also quoted Dr. Waly as follows:

“Applying this, it has been ruled that the arbitration clause in the subcontract between the main contractor and the subcontractor regarding disputes related to the execution of the contract extends to any dispute concerning the claim for the work executed under the contract, including the subcontractor’s claim against the main contractor for what is due in his account to the employer.”

(Dr. Fathi Waly, Mediator in National and International Commercial Arbitration, Knowledge and Practice, Part One, Arab Renaissance House, Cairo, 2021, p. 292 and following)

And concluding reference to Dr. Waly the court cited:

“There is no problem if one of the parties in the two contracts claims against the other party in the other contract through an indirect claim, and the other contract includes an arbitration clause. In this case, the creditor is using their debtor’s right arising from a contract that includes an arbitration clause, and the creditor is bound by this clause, which limits their debtor’s right.”

(Dr. Fathi Waly, Mediator in National and International Commercial Arbitration, previous reference, p. 317)

The Court’s Response to Plaintiff’s Objections

The plaintiff raised objections regarding the arbitration clause, asserting that it should be in writing and agreed upon exclusively by the contracting parties. The court agreed with the plaintiff and highlighted the requirement of the arbitration clause being in writing, as decided by the legislator and the Court of Cassation in various instances. The court confirmed that the arbitration clause under consideration was explicitly stated in the construction contract between Company S and Company P.

Furthermore, the court emphasized that in an indirect claim, such as the one at hand, the plaintiff represents its debtor, in this case, Company S. Consequently, the arbitration clause that governs this case is the one between Company S and the defendant, Company P. The court also verified the existence and validity of this clause.

In addition to reviewing research on extending arbitration clauses, the court referred to judicial decisions issued by the Court of Cassation that determined the extension of arbitration clauses in other cases.

Ultimately, the court dismissed the claim on the basis that jurisdiction lies with an arbitration tribunal subject to the arbitration agreement between Company S and Company P.

Significance of the Judicial Precedent

This case serves as a groundbreaking judicial precedent in Jordanian courts, marking the first instance where the effect of an arbitration clause in a contract is extended to parties other than the original signatories. This innovative approach allows for the activation of arbitration clauses for non-signatories to the arbitration agreement in specific cases, provided that strict rules are followed.

Ultimately, this Jordanian court case highlights the importance of understanding the potential implications of arbitration clauses in construction contracts and the possibility of extending their effects to non-signatory parties under certain circumstances.

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Navigating International Jurisdiction in Fraud Cases: Scenna v Persons Unknown and Its Implications

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Introduction

The introduction of a new jurisdictional gateway into the UK Civil Procedure Rules (CPR) in October 2022 has attracted significant attention from practitioners involved in cross-border fraud disputes. The new gateway, provided under CPR PD6B, para 3.1(25), allows parties to obtain 'Norwich Pharmacal' relief from foreign non-parties, significantly expediting the process of obtaining evidence from overseas parties in comparison to older, more cumbersome mechanisms such as the Hague Evidence Convention. However, a recent High Court decision, *Scenna v Persons Unknown*, has demonstrated that the new gateway may not be the panacea it was initially perceived to be.

The New Jurisdictional Gateway

Purpose and Scope

The new gateway under CPR PD6B, para 3.1(25) was introduced to address the challenges faced by victims of cross-border fraud in obtaining information from non-parties based in other jurisdictions. The gateway permits applications for disclosure

orders to be served on foreign non-parties for the purposes of identifying a defendant or establishing the whereabouts of the claimant's property.

Benefits for Practitioners

The new gateway has been widely welcomed by practitioners in the field of fraud disputes with a cross-border element. The key advantage of the new gateway is its speed and efficiency in obtaining evidence from foreign parties, especially when compared to the more time-consuming and complex processes under the Hague Evidence Convention, or mutual legal assistance treaties.

The High Court Decision in Scenna v Persons Unknown

Background and Facts

In *Scenna v Persons Unknown*, the claimants, a Canadian resident and his Ontario-registered company, were victims of an alleged fraud. The first to third defendants, the alleged fraudsters, persuaded the claimants to make various payments totaling around US\$2.9 million to accounts held at banks in Hong Kong and Australia.

The claimants sought disclosure orders against two Australian banks to obtain information needed to establish the whereabouts of their monies. The court granted the disclosure orders under the new jurisdictional gateway, but the banks argued that complying with these orders would put them in breach of their local laws.

The Court's Ruling

The High Court ultimately set aside the disclosure orders against the Australian banks, stating that such orders should only be allowed in exceptional circumstances. The court reasoned that the risk of foreign banks breaching their local laws when complying with disclosure orders outweighed the

benefits of the new jurisdictional gateway. In the Scenna case, the court characterized the pursuit as “luke warm” rather than a “hot pursuit,” and thus determined that the appropriate course of action was for the claimants to obtain a disclosure order from the Australian courts.

Implications of the Scenna Decision

Limitations of the New Jurisdictional Gateway

The High Court’s decision in Scenna highlights the limitations of the new jurisdictional gateway, which may not be the ‘magic bullet’ practitioners initially hoped for. While the gateway has streamlined the process of obtaining evidence from foreign parties, it is crucial for parties and practitioners to be aware of the potential legal risks and obstacles involved in obtaining disclosure orders against foreign non-parties, particularly financial institutions.

Balancing Interests and Compliance

The Scenna decision underscores the importance of striking a balance between the interests of victims of cross-border fraud and the need for foreign non-parties to comply with their local laws. Practitioners should carefully assess the likelihood of foreign non-parties being able to comply with disclosure orders without breaching local laws before pursuing such orders under the new gateway.

Utilizing Common Law Courts Worldwide

Common law courts in various jurisdictions, such as Singapore, Dubai International Financial Centre (DIFC), Abu Dhabi Global Market (ADGM), Canada, Australia, and others, can consider Mareva injunctions, Norwich Pharmacal orders, and Anton Piller orders. Whether a court has the authority to grant these orders depends on the rules of the jurisdiction and the nexus between the parties and the court.

In some jurisdictions, such as the DIFC and ADGM, the courts can grant these orders even if the parties have no direct nexus to the court's jurisdiction, provided that there are sufficient grounds to justify the exercise of jurisdiction. In other jurisdictions, such as Canada and Australia, the courts may require a more direct connection between the parties or the dispute and the jurisdiction to grant these orders.

A Mareva injunction is a worldwide freezing and asset disclosure order. It extends to all a defendant's assets worldwide, limiting the defendant from utilizing those assets except for regulatory purposes (i.e., paying employment salaries) unless consent is granted by the plaintiff.

Norwich orders – or Norwich Pharmacal orders – are injunctive orders obtained against an innocent third party in order to identify a wrongdoer or details related to a potential wrongdoer. A Norwich order compels an innocent third party (such as a bank) to disclose relevant information to a plaintiff/applicant.

Anton Piller orders, also known as search orders, are a legal remedy granted by common law courts to preserve evidence that may be at risk of destruction or concealment. These orders permit the applicant to enter the defendant's premises to search, inspect, and seize relevant evidence, often without prior notice.

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Arbitration in Europe: new rules on third-party litigation funding

May 18, 2023

On September 13, 2022, the European Parliament passed a resolution to propose a directive (the “**Directive**”) on the regulation of third-party litigation funding. Although not obvious at first sight, the Directive would also apply to arbitration procedures or other alternative dispute resolution mechanisms.[\[1\]](#)

The European Parliament recognizes that, although third-party litigation funding is “virtually non-existent in Europe, it is a booming phenomenon in investment arbitration that multiplies the number and the volume of claims of private investors against States”[\[2\]](#). As it expects the practice of third-party litigation funding to expand in Europe—considering how it is already prevalent in the United States and many Commonwealth countries—the European Parliament is concerned about the potential for abuse by litigation funders, should the status quo of a regulatory vacuum be maintained. Indeed, litigation funders may be tempted to put their own economic interest over the interest of claimants and thus assume undue control over the funded proceedings.

Notwithstanding those concerns, the European Parliament notes that third-party litigation funding, if properly regulated, could enhance access to justice for claimants. Hence, the proposed Directive establishes common minimum standards on third-party litigation funding for Member States that wish to permit the practice within their territory.

The Directive mandates the creation of an independent public supervisory authority responsible for overseeing the authorisation of litigation funders and monitoring of their activities. Litigation funders would thus have to demonstrate annually that they possess adequate financial resources to pursue their activities and to observe a fiduciary duty of care^[3] towards the claimants they are funding. The supervisory authority of a Member State would also be empowered to investigate complaints regarding litigation funders and to share information with the supervisory authorities of other Member States.

The Directive also sets minimum requirements with regards to third-party funding agreements. For instance, such agreements would have to be written in one of the official languages of the Member State in which the claimant and intended beneficiaries are resident.^[4] Also, any agreement that would entitle the litigation funder to a share of over 40% of the total award would, absent exceptional circumstances, be deemed to null and void. Finally, unilateral termination of funding agreements by the litigation funder would also be prohibited.

The Directive further seeks to give courts and arbitral bodies more power by requiring claimants to inform the adjudicational authority of the existence of a third-party funding agreement. Such transparency would allow a tribunal to ensure that litigation funders do not get an unreasonable share of an award, to impose penalties for not respecting the Directive and to hold litigation funders responsible for adverse costs arising from unsuccessful litigation.

It is to be noted that the Directive is still in the proposal stage, and the rules relayed above must go through the European parliamentary process and implementation at the national level by each Member State before becoming law. Nonetheless, such rules go hand in hand with arbitration rules that are already in place on a global scale. Indeed, the International Chamber of Commerce's Arbitration Rules, the

International Centre for Dispute Resolution's International Arbitration Rules, and most recently the International Centre for Settlement of Investment Disputes' Arbitration Rules, already provide for the obligation to disclose to the tribunal any funding arrangement involving a non-party to a proceeding.[\[5\]](#)

Given the *Comprehensive Economic and Trade Agreement* (CETA) in place between Canada and the European Union, and considering how CETA potentially allows for a degree of investor-state dispute settlement through arbitration, the Directive's solidification into law would provide for an interesting playing field where Canadian and European investors would have an enhanced financial ability to seek compensation.[\[6\]](#)

Author: [Martin Aquilina](#)

[\[1\]](#) In the Directive, "proceedings" is described as including "any voluntary arbitration procedure or alternative dispute resolution mechanism, through which redress before a court or administrative authority in the Union is sought concerning a dispute" and "court or administrative authority" is described as "a competent court, administrative authority, arbitral body or other body tasked with adjudicating on proceedings, in accordance with national law"

[\[2\]](#) Paragraph F of the recitals of the European Parliament resolution of 13 September 2022.

[\[3\]](#) Although the Directive specifically provides for a "fiduciary duty of care", it is interesting to note that the French text of the Directive uses the term *devoir de loyauté* (duty of loyalty). The ambit of the former is of course much wider than that of the latter.

[\[4\]](#) "intended beneficiary" here means a person who is entitled to receive a share of an award in proceedings and whose

interests in the proceedings are represented by the funded claimant or a qualified entity (meaning an organisation representing consumers' interests (and designated as such under Directive (EU) 2020/1828)) bringing the action as a claimant party on that person's behalf.

[\[5\]](#) See article 11(7) of the ICC Arbitration Rules 2021 and article 14(7) of the ICDR International Arbitration Rules (2021 edition) and Rule 14 of the ICSID Arbitration Rules (July 2022 edition).

[\[6\]](#) CETA entered into force provisionally on September 21, 2017, but its provisions on investor-state dispute settlement only come into force when all EU Member States have completed their ratification process. To date, CETA remains to be ratified by 11 Member States (Belgium, Bulgaria, Cyprus, France, Germany, Greece, Hungary, Ireland, Italy, Poland and Slovenia).

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Highlights of the recently published ICSID 2022 Annual Report

May 18, 2023

The International Centre for Settlement of Investment Disputes of the World Bank (ICSID) published its 2022 Annual Report on 14 October 2022.

Highlights of the report include:

- 346 cases administered by ICSID, marking the largest number of cases ever administered at ICSID in a single fiscal year.
- A record 77 concluded cases, reflecting ICSID's ongoing efforts to reduce the time of cases.
- Individuals of 42 nationalities were represented amongst the appointments made in the fiscal year. This is the second largest number of different nationalities appointed in a single year at ICSID.
- 45% of first-time appointees in FY2022 were women and 25% involved nationals of low- or middle-income economies.

(<https://icsid.worldbank.org/news-and-events/news-releases/icsid-publishes-2022-annual-report>)

Other notable report highlights in the Report are as follows:

- ICSID administered **18 cases governed by non-ICSID rules** in FY2022 with the majority (13 cases) applying the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL). (p. 14 of the Report)
- Distribution of cases registered in FY2022 **by region**:
 - 22%: South America
 - 20%: Eastern Europe and Central Asia
 - 12%: Central America and the Caribbean
 - 12%: Middle East and North Africa
 - 12%: Sub-Saharan Africa
 - 8%: South and East Asia and the Pacific
 - 8%: Western Europe
 - 6%: North America (Canada, Mexico, and the US)

(p. 15 of the Report)

- Basis of **consent to establish jurisdiction** in FY2022:
 - 56%: Bilateral Investment Treaty
 - 13%: Investment Contract between the Investor and the Host-State
 - 11%: Energy Charter Treaty
 - 4%: U.S.-Mexico-Canada Agreement
 - 4%: North American Free Trade Agreement
 - 4%: Investment Law of the Host State
 - 2%: Dominican Republic-United States-Central America Free Trade Agreement
 - 2%: Colombia-El Salvador, Guatemala and Honduras Free Trade Agreement
 - 2%: Central America-Panama Trade Promotion Agreement

(p. 15 of the Report)

- Distribution of cases registered in FY2022 **by economic sector**:
 - 24%: Electric Power and Other Energy
 - 22%: Oil, Gas and Mining
 - 12%: Construction
 - 10%: Information and Communication
 - 8%: Other Industry
 - 8%: Water, Sanitation and Flood Protection
 - 6%: Finance
 - 6%: Transportation

(p. 16 of the Report)

- Top three distribution of cases registered in FY2022 **by country**:
 - Peru: 5
 - Romania: 4
 - Spain: 3

(p. 16 of the Report)

- **91% of hearings or sessions were conducted remotely** in cases administered by ICSID during FY2022 using ICSID audio/video conferencing services. (p. 18 of the Report)
- **77 proceedings concluded in FY2022**: 56 original arbitrations, 20 post-award proceedings, and one conciliation proceeding. (p. 19 of the Report)
- Of the 56 original arbitration proceedings that concluded in FY2022, **27 were settled or otherwise discontinued**, and 29 were decided by the tribunal. (p. 19 of the Report)
- **Outcomes of arbitration proceedings** under the ICSID Convention and Additional Facility in FY2022:
 - 25%: Award upholding claims in part or in full.
 - 23%: Proceeding discontinued at the request of both parties.
 - 14%: Award dismissing all claims.
 - 14%: Proceeding discontinued at the request of one party.
 - 11%: Award declining jurisdiction.
 - 9%: Proceeding discontinued for lack of payment of the required advances.
 - 2%: Settlement agreement embodied in an award at parties' request.
 - 2%: Award deciding that the claims are manifestly without legal merit.

(p. 19 of the Report)

Link to the Report in English:
https://icsid.worldbank.org/sites/default/files/publications/ICSID_AR.EN.pdf

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2022 ICSID Arbitration Rules: Seven key takeaways

May 18, 2023

On 01 July 2022, the 2022 ICSID Rules and Regulations for resolving international investment disputes came into effect.

This is the first amendment to the ICSID Arbitration Rules since 2006 aimed at modernizing the ICSID procedures.

Here we cover seven key takeaways:

- Key steps in ICSID procedures will require **mandated case management** conferences with precise deadlines to make procedures more efficient. Tribunals must convene one or more case management conferences to identify uncontested facts, clarify and narrow the issues in dispute, or address any other procedural or substantive issue related to the resolution of the dispute.
- The Rules now provide for **expedited arbitration** procedures reducing case time in half and permitting a tribunal of one or three arbitrators.
- Any **third-party funding** arrangements must be disclosed to the Secretary-General upon registration of the request for arbitration, or immediately upon concluding a third-party funding arrangement after registration.
- The 2022 ICSID Institution Rules now require that at the request for arbitration filed with the Secretary-General include a description of the investment and of its

ownership and control. Previously, no requirement was in place to describe the **control of the investment**. This creates a new consideration for claimants with complex investment structures.

- Consent to **publish awards, orders, and submissions** is now the default position unless one of the parties expressly objects to such publication within 60 days after the dispatch of the document.
- There is now an express provision governing **security for costs** under Rule 53 of the new ICSID Arbitration Rules which provides a procedural timetable for security for costs applications and the considerations that must be made by the tribunal.
- ICSID has also introduced its **2022 ICSID Mediation Rules** for investment-related disputes and its **2022 ICSID Fact-Finding Rules**.
 - The new Mediation Rules provide for an avenue for parties to resort to mediation under ICSID with or without a prior party agreement.
 - The new Fact-Finding Rules offer parties the option to constitute a committee to inquire into and report on relevant circumstances in the pre-dispute phase and provide an impartial assessment of facts arising in the dispute between the parties.

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Lebanon Pushes for Activation of Medical Cannabis Law

May 18, 2023

On 20 April 2020, the Lebanese Parliament passed a law permitting the cultivation, trade, research, and use of medical cannabis.

As a result of multiple factors, including the socioeconomic health of the nation, progress on the legalization of the cultivation of cannabis has been stagnant in Lebanon. The law establishes an authority named the Regulatory Authority for the Cultivation of Cannabis Plants for Medical and Industrial Use (the "Authority") which would oversee all cannabis-related operations in Lebanon; however, the Authority has been inactive to date and has yet to approve any applications for the license types provided for in the law.

On 28 October 2021, more than a year and a half after the enactment of the law, the Lebanese Ministry of Agriculture confirmed that the cultivation of cannabis will be implemented in Lebanon very soon. Lebanese Minister of Agriculture, Mr. Abbas Al-Hajj Hassan, stipulated that:

"Today I would like to talk about Lebanon as a whole and the Baalbek-Hermel region and the Bekaa in particular, which is the subject of cannabis and is central and essential today for many reasons; we all know that the law exists and is approved, and therefore we await the executive decrees of the cabinet"

Minister Hassan added that *"Prime Minister Najib Mikati promised good things and has begun communicating with the ministries concerned, so that the law can be implemented."*

Minister Hassan stated that the cultivation of cannabis in Lebanon will “*save the Lebanese economy and the deprived areas of Kekar and Baalbek-Hermel*”, stressing that “*this will have internal and external positives, but the interior positive is the revitalization of the region*”. Minister Hassan concluded his remarks by emphasizing that “*the cultivation of cannabis will take us [Lebanon] far and will be presented at the international stage as an auxiliary solution on the subject of global health security, and we [Lebanon] will be strongly present in the international stage as a country that helps the international community in this context*”.

Over the past year, Lebanon has seen some drastic events that have deteriorated the health of the nation. With that being said, there is a strong belief within the nation that the legal cultivation of cannabis will be Lebanon’s saving grace. The area currently planted with plants producing hashish – the illegal form of cannabis – in the area of Baabalk-Hermel is estimated at 5,000 dunams (1,200 acres), located within the Bekaa Valley; the production of cannabis in the area, which is equivalent to \$10,000 per plant, is the most expensive quality cannabis in the world.

With the legalization and regulation of cultivated cannabis in Lebanon, the nation will seek to take advantage of the prosperous geological factors which make the production of cannabis in Lebanon the cheapest and highest quality cannabis currently available in the international markets.

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Are Arbitral Awards Truly Confidential: Recent Court Judgment Proves Otherwise

May 18, 2023

Arbitration is a dispute resolution mechanism that enjoys a multitude of benefits and advantages; one of the prime benefits being the confidentiality that befalls the proceedings and the subsequent arbitral awards. This is because parties do not see any upside to the publicity as disputes do not look good. And no one wants the world to know confidential information about how one operates their business, much of which may be disclosed in litigation. Despite the consensus that arbitral awards enjoy the utmost confidentiality, a recent judgment has proven otherwise, leaving individuals and companies scavenging for possible deterrents that could protect their confidentiality.

FACTS

In early 2021, the United States Court of Appeal for the Third Circuit warned that arbitration might not be as confidential as the parties to disputes probably think it is and want it to be. But in their decision, the Court provided some easy measures to preserve the much-desired confidentiality of arbitration.

The case developed when two insurance companies encountered a dispute. The parties took the matter to arbitration where one of the companies won. Accordingly, the arbitrator issued an

award in favor of that company. It is important to note, a winner in arbitration does not automatically have the legal right to enforce an arbitral award against the loser. Instead, the winner needs to go to court, file the award in court, and ask the court to issue a regular court judgment based on the award. This is often referred to as the “enforcement of the arbitral award”. That judgment is just like any other judgment issued by a court. The holder of the judgment, the “judgment creditor,” can use it against the loser’s bank accounts and other property to claim the amount they have been awarded.

The company that won the arbitration did exactly that. It filed the arbitration award in court and requested the court issue a judgment in order to enforce the contents of the award. Furthermore, the company asked the court to seal the court papers, to preserve the confidentiality of the arbitration award. This is when another insurance company, curious about how the arbitration turned out, filed papers asking the court to unseal the award “*under the common-law right of access*”.

The Court ruled in favor of the curious third party asking for the Court to unseal the award, declaring that the filing of the award was a judicial record, and therefore should be open to the public. The court ordered it unsealed and the third party got to see the award and whatever secret information it disclosed.

This demonstrates an inconsistency with the structure of arbitration and puts parties in an awkward position: if the party wants to enforce the award by obtaining a court judgment, the party is faced with the risk of losing the confidentiality which may have been a reason the party opted for arbitration in the first place.

WHY THIS IS SIGNIFICANT TO THE UAE?

Despite the jurisdiction of the case in question being the

United States, individuals and companies in the UAE need to be weary as they could face similar difficulties.

In the UAE, after an award is rendered by an arbitrator, the winning party must submit an application to the local courts requesting the enforcement of the award's contents. Article 48 of UAE Federal Law No. 6 of 2017 on Arbitration states:

"The arbitrators' awards shall be confidential, and they may not be published in whole or in part, unless with the written approval of the Parties. The publication of the judicial judgments which cover the arbitration award shall not be considered a violation of this principle."

Hence, UAE legislation acknowledges that arbitral awards are confidential in principle, however, the publicity of the local courts judgment enforcing the contents of the award do not violate the principle of the awards confidential. Therefore, the details of such award can be made public.

Furthermore, in its ruling for case no. 32/23 issued on 08 June 2003, the UAE Federal Supreme Court stipulated that:

"It is sufficient that the arbitrators' award includes a copy of the arbitration agreement, a summary of the statements and documents of the parties, the grounds on which the award is based, its ruling, date, and location of issuance and the signatures of the arbitrators. The court ratifying such an award must verify the fulfilment of such conditions without broaching the subject matter, except of the dispute matters related to the public order."

Thus, for the local courts in the UAE to enforce the arbitral award, the application must include details of the dispute, which the parties may want to keep confidential. This would arguably mean that third parties could have access to said details by being privy to the court judgment for the enforcement of the award.

PROTECTIVE MEASURES TO MAINTAIN CONFIDENTIALITY

There are a number of measures that a party can take to ensure that an arbitral award issued in their favor maintains its illustrious confidentiality.

The first is setting a time limit for the opposing party to comply with the contents of the award. The party can request that when the arbitrator(s) issue(s) an award, the opposing party has a set number of days in which to comply, or to agree to comply within a short time following its issuance. If the time limit for the opposing party's compliance was in place, then there would be no need to file the award with the court and risk a breach of confidentiality.

As a second protection, the parties might agree that they will direct any arbitrator to issue as short and simple an award as possible – ideally just stipulating the amount that the opposing party must pay. Such an award minimizes any loss of confidentiality, as opposed to a “reasoned” award, in which the arbitrator might explain the basis for the award and, in doing so, go into details that the parties might want to keep private.

Finally, the parties might mix and match, directing the arbitrator to issue two awards. One would require payment of a certain amount and could be the basis for a judgment in that amount, although that judgment would inevitably become a public document. The second award would explain the reasoned basis for the award.

CONCLUSION

In his analytical work on arbitration and the confidentiality that they possess, Francois Dessemontet, a Professor of law at the Universities of Lausanne and Fribourg in Switzerland, stipulated that *“the cloak of confidentiality that surrounds the arbitral proceedings puts the parties, their counsel and the arbitrators in a somewhat awkward position in many*

instances.”

This statement is highlighted by the inconsistency that sometimes befall the arbitral proceedings. However, parties can realign those inconsistencies by putting in place protective measures that maintain the confidentiality of their disputes. Every individual or company that is subject to arbitration proceedings, must keep these measures in mind and implement them prior, throughout, and following the conclusion of the proceedings.

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A Guide to GDPR Compliance

May 18, 2023

The GDPR (General Data Protection Regulation) which came into effect on May 25, 2018, in brief, is a European Union data privacy law that requires organizations to keep data safe, whilst also giving people more control over how their data is used. Compliance with this law requires a coherent review of all processes in an organization followed by the implementation of a comprehensive change plan. In previous contributions, we paid attention to the steps to be taken in order to achieve an acceptable level of compliance through such a change program.

In this article, we will focus on infringements and fines.

In search of guidance on how to define its own data protection strategy and prioritize data protection measures, a company will naturally want to look at its peers and the competent authorities' practice. Apart from the lawfulness of each data processing operation, bolstering data security should remain a board room matter for every organization. Litigation of data protection is set to increase in the near future and organizations that maintain up-to-date security measures will be best prepared for the future and be protected from potential litigation.

This article offers an analysis of the provisions cited to support the imposition of fines on GDPR violators. Based on this analysis, in-house legal advisors may be better able to predict which European Union (EU) member countries may take a leading role in enforcement actions and levying future fines under the GDPR. This article may serve as guidance to organizations doing business in the EU. These findings suggest changes in behavior or business location that could reduce both the likelihood and severity of GDPR fines.

During the first year of enforcement, the Data Protection Authorities (DPAs), the independent bodies charged with investigating and enforcing the GDPR, largely followed the European Commission (EC) guidelines for assessing violations and setting associated fines. The guidelines were developed by the EC European Data Protection Board (EDPB), an independent body charged with the consistent application of data protection rules across the EU, and the 28 EU DPAs.

A total of 15 EU Member States brought enforcement proceedings that resulted in the issuance of an estimated 91 fines. The fines levied to date indicate EU DPAs are acting conservatively, generally imposing fines below the maximum allowable under the regulation. Even for more serious violations of data principles and rights, DPAs generally did not impose the maximum allowable fines. In the first year of enforcement, DPAs tended to issue fines in conjunction with

corrective measures in what appears to be an attempt to encourage changes in attitude and behavior concerning the protection of personal data.

Under the GDPR, there are two tiers of fines. The lower, tier-one fines – up to €10 million or 2% of the firm's worldwide annual revenue from the previous financial year, whichever is higher—are applied for less severe infringements. Typically, violations of Articles 8, 11, 25-39, and 42-43 receive tier-one fines. These articles generally address rules governing data collection, control, and processing (i.e., data collection, recording, organization, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction);

The higher, tier-two fines – up to €20 million or 4% of the firm's worldwide annual revenue from the previous financial year, whichever amount is higher – are applied to more severe infringements. Generally, violations against Articles 5, 6, 7, 9, 12-22, and 44-49 warrant higher fines because these infringements *“go against the very principles of the right to privacy and the right to be forgotten that are at the heart of the GDPR.”*

Germany, Hungary, the Czech Republic, Bulgaria, and Cyprus issued the most fines during the first year of GDPR enforcement. Of these countries, Germany issued more fines than any other EU Member State (about 45), while France issued the highest fine (€50 million against Google). In the coming years, DPAs from Germany, France, the United Kingdom (UK), and Ireland are likely to be among the most influential in terms of calculating and setting fines. The sheer volume of multinational corporations headquartered and/or doing business in these countries suggests the fines issued by these DPAs will be precedent-setting.

Importantly, in late 2015, the European Court of Justice (ECJ) – Europe’s highest court – invalidated the US-EU Safe Harbor Agreement between the EC and the U.S. Department of Commerce. The Safe Harbor agreement was succeeded by the Privacy Shield Framework in 2016, which, along with binding corporate rules and standard contract clauses, allowed for the legal transfer of EU residents’ personal data from the EU to the United States. However, *“organizations that self-certified under the Privacy Shield are not GDPR compliant simply by virtue of their self-certification and must take additional steps to document their compliance with the GDPR.”* Therefore, an organization that is certified under the Privacy Shield program may not be GDPR compliant and may be exposed to fines and other enforcement actions under the GDPR.

In the future, one country may emerge as the most influential DPA—Ireland. Ireland’s Data Protection Commission (DPC) may play an outsized role among all EU DPAs. Ireland is home to approximately a thousand globally recognized U.S. multinational companies across the financial, information, communication, technology, and pharmaceutical industries. Companies such as Google, Apple, Facebook, PayPal, Microsoft, Yahoo, eBay, AOL, Twitter, all have a presence in Ireland. DPC enforcement actions, therefore, will have an extraterritorial impact on some of the world’s most recognized companies and serve as a model for how the GDPR should be enforced by other EU DPAs. As interpreted by more than one U.S. law firm, this expansive view of jurisdiction under the GDPR leads to the conclusion that a firm not located within the EU *“will still be subject to the GDPR if it processes personal data of data subjects who are in the EU where the processing activities are related ‘to the offering of goods or services’ (Article 3(2)(a)) (no payment is required) to such data subjects in the EU or ‘the monitoring of their behavior’ (Article 3(2)(b)) as far as their behavior takes place within the EU.”*

EU data regulators focused on four GDPR Articles – Articles 5,

6, 15, and 32 – to substantiate the bulk of levied fines. By far the most frequently cited was Article 5 (principles relating to the processing of personal data). The principles of Article 5 include protecting personal data by ensuring appropriate levels of security to reduce the risk of unauthorized or unlawful processing and against accidental loss, destruction, or damage, using appropriate technical or organizational measures (“*integrity and confidentiality*”). Article 5 also ensures personal data is collected in a limited manner, for a specific, explicit, and legitimate purpose. Article 5 violations were cited an estimated 30 times from among the 91 fines levied. Many regulators from across the EU found Article 5 infringements such as failure to process personal data lawfully, fairly, and in a transparent manner; prevent the use of personal data for new purposes incompatible with the purpose for which the data were initially collected; delete personal data; and, prevent indiscriminate access to an excessive number of user data.

In addition, Article 6 (“*lawfulness of processing*”) was the second most often cited infringement with a total of twelve violations. Under Article 6, lawful processing of personal data requires one (or more) of six factors: (1) obtained consent of the data subject; (2) data processed in the performance of a contract; (3) data processed to comply with a legal obligation of the Member State or EU; (4) data processed to protect vital interests (i.e., interests essential for the life of the data subject or for humanitarian purposes); (5) data processed to perform a task that is in the public interest (e.g., a local government authority using personal data to collect taxes); or (6) data processed where necessary to fulfill legitimate controller (individual or entity that determines the purpose and means of processing personal data, such as a payroll management company) or third-party interests.

Articles 32 (“*security of processing personal data*”) and 15

(*“right of access by the data subject”*) were the third most cited infringements with a total of 7 violations each. Under Article 32, appropriate technical and organizational measures must be implemented to ensure security appropriate to the risk including, but not limited to, the pseudonymization and encryption of personal data. Article 15 provides a right of access whereby the data subject may request information about how personal data is being processed. Data subjects have a right to request a copy of the data being processed, the purpose for processing the data, categories of data being processed (e.g., name, address, phone number), and any third-party recipients of the personal data, among others. Generally, regulators tend to levy fines for failures related to the lawful processing of personal data, including security measures to protect personal data.

A review of the types of infringements and associated fines shows DPAs – at this stage – want to change the perception of data protection, to view data as an asset to be protected. DPAs seek to change attitudes and behaviors via both compliance with the rules and, for egregious infringements, application of the stick – the fine. One of the EC guiding principles is that fines should *“adequately respond to the nature, gravity and consequences of the breach”* and DPAs should *“identify a corrective measure that is effective, proportionate and dissuasive.”* Neither the guidelines nor Article 83 (*“general conditions for imposing administrative fines”*) define what is meant by *“effective, proportionate and dissuasive”* but the guidelines specify that the DPA may consider whether to *“reestablish compliance with the rules or to punish unlawful behavior (or both).”* As a rule, DPAs did not issue maximum allowable fines, but when they did, they tended to follow EC guidelines.

In accordance with the guidance, DPAs tend to apply higher fines when any one or more of four circumstances are present. First, where *“the number of data subjects affected”*, and

subsequent level of damage, warrants it. For data breaches that are found, for example, that originate from “*systemic breach or lack of adequate routines in place*” and impact a number of data subjects, higher fines might be levied. For example, the Danish DPA issued a €161,000 fine against a Danish taxi company after an investigation found the company stored personal data of approximately nine million customers without a legitimate reason. Here, the number of data subjects impacted warranted a higher fine.

Second, if there are “*several different infringements committed in any one particular case*”, the DPA may impose a higher fine and/or prescribe corrective measures. For example, the DPA of France – the Commission Nationale de l’Informatique et des Libertés (CNIL) – characterized Google’s data processing as “*massive and intrusive in nature*” and levied a €50 million fine against Google in part for violating multiple articles: lack of transparency (Article 5), insufficient information (Articles 13 and 14), and lack of legal basis (Article 6). Though Google is appealing the decision before France’s Supreme Administrative Court, the depth of the fine was in part substantiated by the breadth of different infringements.

Third, “*intentional acts or negligence triggers the possibility of higher fines.*” The guidance specifies, for example, that “*willful conduct on the data controller’s part, or failure to take appropriate preventive measures, or inability to put in place the required technical and organizational measures*” weighs into the DPA’s assessment of the level of a fine. For example, the Portuguese DPA levied a €400,000 fine against a hospital as a result of failure to protect patient data, allowing hospital staff to indiscriminately access patients’ data. The Portuguese DPA substantiated the fine by finding violations of three Articles: Article 5 for allowing indiscriminate access to an excessive number of users, Article 83 for violating basic data

processing principles, and Article 32 for failing to ensure *“continued confidentiality, integrity, availability and resilience of treatment systems and services”* and failure to implement *“measures to ensure a level of security adequate to the risk.”*

Fourth, the *“duration of an infringement”* is another factor. For example, if data is exfiltrated as a result of a data breach and that data breach goes undetected for a long period of time, the length of time will likely be a factor in determining the damage to data subjects and the resulting fine.

The data supports the conclusion that DPAs largely followed the EC guidelines in assessing and levying fines during the first year of enforcement. Most of the fines were for violations of the aforementioned Articles: 5, 6, 32, and 15. By far the most frequently cited was Article 5 (*“principles relating to the processing of personal data”*); Article 6 (*“lawfulness of processing”*) was the second most cited infringement; and, Articles 32 (*“security of processing personal data”*) and 15 (*“right of access by the data subject”*) were the third most cited infringement.

Generally, violations against Articles 5, 6, 7, 9, 12-22, and 44-49 warrant higher fines because these infringements *“go against the very principles of the right to privacy and the right to be forgotten that are at the heart of the GDPR.”* However, in the first year of enforcement, fines were generally conservative and did not reach the maximum threshold. As more fines are levied, and some appealed through the courts, the guidelines will need to be updated to reflect current thinking on interpreting the GDPR enforcement provisions. For example, the outcome of the €50 million fine the French CNIL levied against Google will affect how other DPAs assess and apply fines. The outcome also is likely to influence future guidance issued by the EC.

While only 15 EU Member States issued fines during the first year, the increase in DPA budgets and staff suggests many more Member States will be active in the coming years. Addressing data protection complaints, launching investigations, closing cases, and levying fines and/or corrective action are resource-intensive activities. The European Data Protection Board shows France, Germany, Ireland, Italy, Poland, and Spain have the largest staff to support their respective DPAs. While budget and staff are not the only drivers of future GDPR fines, these well-resourced and staffed Member States are likely to be able to process complaints and issue fines more quickly than less-resourced countries. Of these, Ireland's DPC may play an outsized role among all EU because of the number of large U.S. multinational corporations headquartered or doing business there. The breadth of fines issued by Ireland's DPC as well as the depth of investigative supporting evidence could serve as a roadmap for other EU DPA enforcement actions.

In October 2017, the EC issued guidelines for DPAs to use when applying and setting GDPR fines. The guidelines were developed by the EC European Data Protection Board (EDPB), an independent body charged with the consistent application of data protection rules across the EU, and the 28 EU DPAs. The guidelines include four principles that shape how the DPAs approach assessing fines:

1. Infringement should result in "equivalent sanctions"

This principle encourages DPAs to apply a consistent approach to their *"use of corrective powers"* including the *"application of administrative fines in particular."* The EU Member States want to *"remove the obstacles to flows of personal data within the Union"* by ensuring a standard of data protection across all 28 EU countries. The guidance specifies that while DPAs are independent and may choose corrective measures within their authority in accordance with Article 58, DPAs should avoid different corrective measures, including fines for similar cases.

2. Administrative fines should be “effective, proportionate and dissuasive”

Fines should “adequately respond to the nature, gravity and consequences of the breach” and DPAs should “identify a corrective measure that is effective, proportionate and dissuasive.” Neither the guidelines nor Article 83 defines “effective, proportionate and dissuasive” but the guidelines specify the DPA may consider whether to “reestablish compliance with the rules or to punish unlawful behavior (or both).”

3. Individual assessments should be conducted on each case

The GDPR requires an individual assessment of each case (Article 83). The DPAs are charged with investigating complaints on a case-by-case basis within a reasonable period of time and in an impartial, fair manner. This principle calls on the DPAs to “use a considered and balanced approach in their use of corrective measures, in order to achieve both an effective and dissuasive as well as a proportionate reaction to the breach” and “not to use them in a way which would devalue their effectiveness as a tool.” The EDPB issues a binding decision if disputes arise between authorities regarding the existence of an infringement.

4. Administrative fines should be harmonized across EU member country DPAs

In order to attain consistency, DPAs are directed to cooperate with each other and the EC “to support formal and informal information exchanges, such as through regular workshops.” The purpose of the information exchange is to share the methodology used to formulate fines and the practice of applying fines to “achieve greater consistency” across the EU.

In addition to the guiding principles, DPAs are required to consider a number of factors under the GDPR when determining the scope and level of a fine. Article 58 details supervisory

authority or DPA powers, including the imposition of administrative fines pursuant to Article 83. Article 83 is significant because it directs the DPA to consider many factors when determining the amount of a fine.

The GDPR applies to companies outside the EU because it is extra-territorial in scope. Specifically, the law is designed not so much to regulate businesses as it is to protect the data subjects' rights. A "*data subject*" is any person in the EU, including citizens, residents, and even, perhaps, visitors.

What this means in practice is that if you collect any personal data of people in the EU, you are required to comply with the GDPR. The data could be in the form of email addresses in a marketing list or the IP addresses of those who visit your website.

You may be wondering how the EU will enforce a law in a territory it does not control. The fact is, foreign governments help other countries enforce their laws through mutual assistance treaties and other mechanisms quite frequently. Article 50 of the GDPR addresses this question directly. So far, the EU's reach has not been tested, but no doubt data protection authorities are exploring their options on a case-by-case basis.

Organizations doing business in the EU (or targeting through their marketing programs EU citizens) are advised to regularly assess their level of compliance with the GDPR. One of the means to do so is the GDPR compliance checklist;

GDPR compliance checklist

- Conduct an information audit for EU personal data

Confirm that your organization needs to comply with the GDPR. First, determine what personal data you process and whether any of it belongs to people in the EU. If you do process such

data, determine whether *“the processing activities are related to offering goods or services to such data subjects irrespective of whether connected to a payment.”* Recital 23 can help you clarify whether your activities qualify as subject to the GDPR. If you are subject to the GDPR, continue to the next steps.

- Inform your customers why you’re processing their data

Consent is only one of the legal basis that can justify your use of other people’s personal data. You can find the other *“lawfulness of processing”* justifications in Article 6 of the GDPR. If you choose to process data on the basis of consent, there are extra duties involved. Finally, Article 12 requires you to provide clear and transparent information about your activities to your data subjects. This likely will mean updating your privacy policy.

- Assess your data processing activities and improve protection

A data protection impact assessment will help you understand the risks to the security and privacy of the data you process and decide ways to mitigate those risks. Next, begin implementing data security practices, such as using end-to-end encryption and organizational safeguards, to limit your exposure to data breaches. When beginning new projects, you must follow the principle of *“data protection by design and by default.”*

- Make sure you have a data processing agreement with your vendors

You, as the data controller, will be held partly accountable for your third-party clients if they violate their GDPR obligations. So it’s important to have a data processing agreement that establishes the rights and responsibilities of each party. This includes your email vendor, cloud storage provider, and any other subcontractor that handles personal

data. You can find a data processing agreement template here.

- Appoint a data protection officer (if necessary)

Many organizations (especially larger ones) are required to designate a data protection officer. The GDPR specifies some of the qualifications, duties, and characteristics of this management-level position.

- Designate a representative in the European Union

Article 27 specifies which non-EU organizations are required to appoint a representative based in one of the EU member states. Recital 80 provides further details about this role.

- Know what to do if there is a data breach

Articles 33 and 34 layout your duties in the event personal data is exposed, whether through a hack or any other kind of data breach. The use of strong encryption can mitigate your exposure to fines and reduce your notification obligations if there's a data breach.

- Comply with cross-border transfer laws (if applicable)

As with previous EU regulations on the transfer of personal data to non-EU countries, Article 45 of the GDPR retains tough requirements for organizations wishing to do so. You may be required to self-certify under the Privacy Shield Framework.

By following these steps, along with the steps in our GDPR compliance checklist, you can help avoid drawing scrutiny from EU regulatory authorities. The information and guidance we can offer vary from technical review to providing several forms and templates.

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Investment Treaty Arbitration and USD 3 Billion in Taxes

May 18, 2023

In 2007, Vodafone International Holding, a Dutch company, bought 100% of the shares of CGP Investments, a Cayman Island-based company, for USD 11.1 billion for the indirect control of 67% of Hutchison Essar Limited, an Indian company. The Indian tax department determined that the deal was designed to avoid capital gains tax in India, and thus, imposed a tax demand.

However, in 2012, the government's contention was rejected by the Indian Supreme Court. The Supreme Court noted that the Indian tax authorities' demand for capital gains tax *"would amount to imposing capital punishment for capital investment since it lacks the authority of law."* To prevent the indirect transfers of Indian assets, the government subsequently amended the law to make transfers of this nature taxable in India; this resulted in a new tax demand being placed on Vodafone.

In 2014, Vodafone initiated international arbitration proceedings after an out-of-court settlement with the Indian government failed. The Permanent Court of Arbitration in The Hague ruled in favor of Vodafone. Interestingly, the decision was unanimous with India's own appointed arbitrator – Rodrigo Oreamuno – ruling in favor of Vodafone as well. The tribunal held that any attempt by India to enforce such tax demand would be a violation of India's obligations towards international law.

In August of this year, the International Court of Arbitration ruled that the Indian government – which was seeking USD 3 billion in taxes from Vodafone – was in “*breach of the guarantee of fair and equitable treatment*” which is guaranteed under the bilateral investment protection pact between India and the Netherlands, by using retrospective legislation.

Now, the Indian government is considering its legal options after losing the case regarding the retrospective taxation against Vodafone. The award will potentially be challenged before a court in Singapore in an attempt to limit the damages not only in Vodafone’s case but also in a separate lawsuit with Cairn Energy PLC, a United Kingdom company, which could involve much more significant damages.

The British oil and gas explorer, Cairn Energy PLC, began its investments in India during the 1990s; in 2004, the company made its biggest hydrocarbon discovery of the Mangala oil field in the Rajasthan state. This was subsequently followed by discoveries of the Bhagyam and Aishwarya oil fields. So far, Cairn Energy PLC has invested approximately USD 6.15 billion in various projects in India.

In January 2014, Cairn Energy PLC received notice from the Indian tax authorities requesting information related to the reorganization of the company in 2006. The tax department accompanied this notice with details of the near 10% shareholding of Cairn Energy PLC in its former subsidiary, Cairn India, and implemented retrospective tax demands on the company. In 2015, Cairn Energy initiated international arbitration proceedings against the Indian government to challenge the retrospective taxation.

When it comes to the case against Cairn Energy PLC, the Indian government could potentially end up paying USD 1.5 billion – the losses Cairn Energy PLC claims to have incurred from the expropriation of its investments to enforce the retrospective tax demand – should a separate arbitration panel determine

that India's tax demands are illegal.

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