Ownership, Control, and Nationality in Investor-State Dispute Settlement: Analysis of 2021 Cases (UNCTAD Review)

September 13, 2023

Navigating the labyrinthine complexities of Investor-State Dispute Settlement (ISDS) often requires a discerning eye for detail, especially when it comes to pivotal issues such as ownership, control, investor nationality, and corporate structuring. The 2021 review by the United Nations Conference on Trade and Development (UNCTAD) published in July/August 2023 serves as a recent cartography of this intricate landscape, shedding light on how arbitral tribunals have approached these multifaceted questions. This article highlights these dimensions, guided by the interpretive subtleties and judicial temperaments exhibited in recent tribunal decisions.

Çap and Sehil v. Turkmenistan: Ownership and Third-Party Funding

The tribunal in this case was confronted with the question of whether it had jurisdiction over the claimants, considering the allegation that the claims had been assigned to a third-party funder with non-Turkish nationality. The tribunal found that no evidence had been presented to suggest that the claimants were no longer the proper owners of the claims. This decision underscores the need for concrete evidence when challenging the ownership of claims, particularly in the context of third-party funding.

Carrizosa Gelzis v. Colombia: Dual Nationality and Dominant Nationality

The tribunal had to determine its jurisdiction over the claimants, who were dual nationals of the United States and Colombia. The tribunal found that Colombia was the center of the claimants' professional, private, and public lives at the critical dates. Consequently, it concluded that the dominant and effective nationality of the claimants was Colombian, not American. This decision highlights the importance of the "dominant and effective nationality" test in ISDS cases involving dual nationals.

Eco Oro v. Colombia: Nationality Requirement and Beneficial Ownership

The tribunal had to ascertain whether Eco Oro met the nationality requirement under the Canada-Colombia Free Trade Agreement (FTA) and whether it was owned or controlled by Canadian investors. The tribunal found in favor of Eco Oro on both counts, emphasizing that the respondent did not present any evidence of actual control by non-Party investors. This decision elucidates the need for a meticulous examination of beneficial ownership and control structures in ISDS cases.

Fynerdale v. Czechia: Corporate Structuring and Jurisdiction

The tribunal had to decide whether the alleged investments made by a Dutch entity through a Maltese company were protected under the Czechia-Netherlands BIT. The tribunal declined jurisdiction on another basis, rendering it unnecessary to entertain this argument. Nevertheless, the case raises pertinent questions about the role of corporate structuring in determining the jurisdiction of arbitral tribunals.

Hope Services v. Cameroon: Denial of Benefits and Ownership

The tribunal had to determine its jurisdiction over the claims

despite the respondent's invocation of the denial of benefits clause. The tribunal found that the respondent's invocation was not valid, as it failed to "promptly consult" with the United States, the other contracting party to the BIT. Moreover, the tribunal found that the claimant did not own or control investments in the online platform and related government contracts. This decision accentuates the procedural and substantive aspects of invoking the denial of benefits clause in ISDS cases.

Infracapital v. Spain: Abuse of Process and Good Faith

The tribunal had to decide whether it had jurisdiction over the claims, considering the respondent's objection that there was an abuse of process or lack of good faith on the part of the claimants. The tribunal found no elements to sustain such allegations, emphasizing that the investment was not restructured solely for gaining access to investment arbitration. This decision serves as a cautionary tale against hastily alleging abuse of process or lack of good faith without substantial evidence.

Littop and Others v. Ukraine: Minority Shareholding and Business Activities

The tribunal had to ascertain whether the claimants had an investment under the Energy Charter Treaty at the time the arbitration was commenced. The tribunal found that they did not, as they failed to prove ownership of any Ukrnafta shares at that time. Moreover, the tribunal found that the claimants did not have substantial business activities in Cyprus, the alleged home state. This decision underscores the importance of proving ownership and substantial business activities in the alleged home state for establishing jurisdiction.

MAKAE v. Saudi Arabia: Control and Physical Presence

The tribunal had to decide whether it had jurisdiction over the claims, considering the respondent's allegation that the

claimant did not control the investment in the host State. The tribunal found that the claimant had no ownership interest in the alleged investment and did not exercise de facto control over it at any relevant time. This decision highlights the need for concrete evidence of control and ownership for establishing jurisdiction in ISDS cases.

Pawlowski and Projekt Sever v. Czechia: Incorporation and Control

The tribunal had to decide whether the claimants qualified as protected investors under the Czechia-Switzerland BIT, considering the respondent's objection that Pawlowski AG had neither real economic activities nor its seat in the alleged home state Switzerland. The tribunal found that Pawlowski AG was incorporated under the laws of Switzerland and fully owned and controlled by a Swiss national, thereby qualifying as a protected investor. This decision emphasizes the significance of the place of incorporation and control in determining the status of a protected investor.

Concluding Remarks: The Temperament of ISDS Tribunals in the Current Landscape

In synthesizing the jurisprudential landscape delineated by the UNCTAD's 2021 review, one cannot overlook the discernible temperament of ISDS tribunals as they navigate the intricate corridors of ownership, control, nationality, and other pivotal issues. The tribunals have exhibited a proclivity for rigorous evidentiary scrutiny, eschewing superficial analyses in favor of a more nuanced, fact-intensive inquiry. This is not merely a matter of jurisprudential preference but a reflection of the tribunals' cognizance of the gravity of their mandates.

The tribunals have demonstrated an acute awareness of the dual imperatives that underpin ISDS proceedings: the need to safeguard the legitimate expectations and rights of foreign

investors, and the equally compelling need to respect the sovereignty and regulatory prerogatives of host states. This delicate equipoise is manifest in the tribunals' approach to questions of ownership and control, where the emphasis has consistently been on substantive economic reality over formalistic legal structures.

Moreover, the tribunals have shown a marked attentiveness to the specificities of treaty language, particularly in the context of denial of benefits clauses and nationality requirements. This textual fidelity serves a dual function: it not only ensures fidelity to the parties' bargain as encapsulated in the treaty but also fortifies the legitimacy of the ISDS mechanism itself by mitigating accusations of judicial overreach.

The trend toward a more discerning, evidence-based analysis is especially salient in cases involving complex corporate structures and third-party funding. Tribunals are increasingly wary of claimants who seek to manipulate corporate form to gain access to ISDS or to circumvent treaty limitations, and they are correspondingly rigorous in their scrutiny of the factual matrix that underpins such structures.

In the realm of nationality and dual nationality, the tribunals have evinced a nuanced understanding of the complexities that arise in an increasingly globalized world. The "dominant and effective nationality" test, although not without its critics, has emerged as a pragmatic tool for resolving the dilemmas posed by multiple allegiances, thereby ensuring that the protective ambit of investment treaties is neither over- nor under-inclusive.

In sum, the prevailing temperament of ISDS tribunals, as gleaned from the 2021 UNCTAD review, is one of cautious deliberation, evidentiary rigor, and a nuanced appreciation of the complex interplay between investor rights and state sovereignty. This judicial temperament does not operate in a

vacuum; it is both a response to and a shaping force in the evolving norms and expectations that govern the international investment regime. As such, it warrants close attention from practitioners and scholars alike, serving as both a barometer and a guidepost for future developments in this ever-evolving field.

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“You are not a horse.” – How the US Court’s Ruling on COVID and Ivermectin Impacts Global Industries

September 13, 2023

In an era marked by the global upheaval of the COVID-19 pandemic and the ensuing debates around treatments like Ivermectin, a recent pivotal U.S. Court of Appeals for the Fifth Circuit judgment serves as a beacon of clarity, in Apter et al. v. Dep’t of Health & Human Services et al (No. 22-40802).

The judgment, which delves into the nuanced distinction “between telling about and telling to,” has implications that reverberate far beyond the healthcare sector. It serves as a

timely reminder of the delicate balance that regulatory bodies must maintain in their interactions with various industries.

The judgment comes at a critical juncture, where the line between guidance and directive action has been blurred by the urgency of the pandemic and the hyperbole that often accompanies it. In such times, the role of regulatory bodies becomes even more pivotal, not just in healthcare but across a spectrum of industries that form the backbone of modern society. From construction and finance to new technologies and private wealth management, the judgment underscores the importance of regulatory restraint and nuanced communication.

As we navigate through the complexities of this judgment, we will explore its implications across diverse sectors, shedding light on the intricate dance between regulatory bodies and industries. This exploration is not just an academic exercise; it is a crucial endeavor to understand the commercial consequences and potential liabilities that may arise when industries rely on non-directive government policies, public instructions, private notifications, and more.

In the following sections, we will delve into the multifaceted interactions between regulatory bodies and various industries, offering a global perspective on a judgment that, while rooted in American jurisprudence, has global reverberations.

Background

The dispute involving the United States Food and Drug Administration (“FDA”) and three medical practitioners (“the Doctors”). The crux of the issue lies in the FDA’s public advisories concerning the use of the drug ivermectin for the treatment of COVID-19, and the alleged impact of these advisories on the medical practice of the Doctors.

The FDA, in its role as a regulatory body, issued public statements and utilized social media platforms to dissuade the general populace from employing ivermectin as a treatment for

COVID-19. The agency employed phrases such as “You are not a horse” to underscore the point that ivermectin, particularly the version formulated for animals, is not approved for treating COVID-19 in humans. This messaging was part of a broader strategy aimed at public health and safety.

The Doctors, on the other hand, contend that they have been prescribing the human version of ivermectin to their patients as a treatment for COVID-19. They argue that the FDA’s public advisories have not only interfered with their medical practice but have also inflicted reputational harm. They further assert that the FDA’s actions are in violation of its enabling act and the Administrative Procedure Act.

The district court initially dismissed the Doctors’ claims, invoking the doctrine of sovereign immunity to shield the FDA and associated officials. However, the United States Court of Appeals for the Fifth Circuit took a divergent view. The Court held that the Doctors could indeed proceed with their claims under the Administrative Procedure Act, bypassing the barrier of sovereign immunity. The Court reasoned that the FDA’s advisories could plausibly be considered “ultra vires” actions, as they ventured into the realm of medical advice, a domain not within the FDA’s statutory mandate.

In light of the foregoing, the Court of Appeals reversed the district court’s judgment and remanded the case for further proceedings. The Court of Appeals’ judgment opens the door for a more nuanced exploration of the tension between regulatory advisories and the autonomy of private sector professionals.

Reasoning

The FDA had argued that the social media posts neither “directed” consumers nor any other parties to act or refrain from acting in a specific manner, and thus should not be classified as rules under administrative law.

Contrary to the FDA’s position, the court found that the posts

contained imperative elements that transcended the realm of mere factual dissemination. The FDA had also posited that these posts could not be considered rules as they did not "prescribe…policy." This line of argument was dismissed by the court, which noted that the FDA itself conceded that the posts "generally recommended that consumers not take ivermectin to prevent or treat COVID-19."

The court discerned no material distinction between an agency employing imperative language to recommend a general course of action and one employing similar language to prescribe a policy.

Moreover, the FDA's assertion that the posts were nonbinding and did not signify the conclusion of the agency's decisional process was found to conflate the criteria for determining what constitutes action with those for determining finality. The court clarified that "nonfinal action" remains action under the law. It also rejected the FDA's attempt to impose a finality requirement for a waiver of sovereign immunity, particularly in the context of the Doctors' ultra vires claim, which constituted a non-statutory cause of action.

The court adjudicated that the posts constituted "agency action," thereby laying down a legal benchmark that could profoundly affect the nuanced distinction "between telling about and telling to." This verdict not only invites further judicial exploration but also carries sweeping implications across diverse sectors. Specifically, it raises questions about the commercial repercussions of depending on non-directive government policies and the potential liabilities that may arise as a result.

Finding

The court emphasized that while the FDA has the authority to "inform, announce, and apprise," it does not possess the authority to "endorse, denounce, or advise" on medical

matters.

The Doctors had plausibly alleged that the FDA's posts crossed this critical boundary, shifting from the realm of "telling about" to "telling to." The court agreed, affirming that the Doctors could use the Administrative Procedure Act to assert their ultra vires claims against the FDA and associated Officials.

The court went further to state that even "tweet-sized doses of personalized medical advice" are beyond the FDA's statutory purview. This statement underscores the court's view that the FDA had overstepped its regulatory mandate by issuing advisories that could be construed as medical advice or recommendations.

In overturning the district court's dismissal and remanding the case for further evaluation, the court's pivotal ruling not only sets the stage for more comprehensive judicial oversight but also establishes a crucial legal framework. This framework is particularly significant in delineating the fine line "between telling about and telling to." The verdict has wide-ranging implications across a variety of sectors, notably in the commercial sphere where businesses often rely on non-directive government policies as a basis for decision-making. The potential for liabilities stemming from such reliance becomes a critical concern, especially in an era where new media platforms like podcasts can amplify or challenge governmental advisories.

The Joe Rogan controversy over the use of ivermectin exemplifies the complexities of this landscape. Rogan's endorsement of the drug on his widely-followed podcast added another layer of public discourse, complicating the role of traditional regulatory advisories. In a world where new media can rival or even overshadow governmental instructions, the court's judgment serves as a timely reminder of the legal intricacies involved. It raises questions about how much

weight should be given to government instructions in commercial activities and private sector disputes that may arise when those instructions are deemed to have crossed the line from informational to directive.

Thus, the ruling is not just a legal touchstone but also a lens through which to view the evolving dynamics between governmental advisories, new media influences like podcasts, and the commercial risks and disputes that may ensue from the interplay of these factors.

A Tapestry of Interactions Across Industries

This recent judgment by the U.S. Court of Appeals Fifth Circuit has cast a spotlight on the nuanced but pivotal distinction "between telling about and telling to." This distinction, while seemingly subtle, has far-reaching implications across various sectors, particularly when it comes to the commercial consequences of relying on non-directive government policies and the liabilities that may ensue.

Following we aim to examine its far-reaching effects across various industries, illuminating the delicate interplay between regulatory authorities and commercial sectors. This investigation goes beyond mere scholarly inquiry; it serves as an essential effort to grasp the commercial ramifications and possible legal risks that could emerge when industries depend on non-directive governmental guidelines, public advisories, private alerts, and the like.

<u>Construction / Infrastructure</u>

In the construction and infrastructure sector, the distinction between regulatory guidance and directive action can have profound implications. For example, when a regulatory body merely informs about the safety standards for construction materials, contractors may interpret this as a green light to use specific materials in their projects. However, if those

materials later prove to be substandard or unsafe, the contractors could face significant legal liabilities. Similarly, if a regulatory body provides information about environmental sustainability but stops short of issuing directives, construction firms may adopt certain green technologies. If these technologies later prove to be ineffective or problematic, the firms could face both reputational damage and legal challenges.

In the realm of construction and infrastructure, regulatory bodies are akin to architects sketching the outlines of a cityscape. Beyond mere guidelines, they often employ public consultations and even mobile apps to update contractors on safety norms. In Germany, the Federal Ministry of Transport and Digital Infrastructure uses social media to announce public hearings on new construction projects, inviting citizen participation in shaping their own neighborhoods. In Australia, the Building Codes Board not only issues construction guidelines but also holds public forums where contractors and citizens alike can voice their concerns. In India, the Real Estate Regulatory Authority (RERA) sends SMS notifications to registered builders about compliance deadlines, making sure everyone is on the same page.

Insurance / Reinsurance

In the insurance and reinsurance sectors, the line between guidance and directive action is equally critical. Regulatory bodies often issue frameworks for risk assessment. If insurers interpret these frameworks as tacit approval for specific risk assessment models and those models later prove to be flawed, the insurers could face a slew of legal disputes from policyholders. Additionally, if regulatory bodies inform about but do not direct specific claims processes, insurers may adopt these processes as best practices. Should these processes later be found to violate consumer rights, the legal ramifications could be severe.

In the U.S., the National Association of Insurance Commissioners (NAIC) not only sets standards but also conducts webinars and podcasts to clarify complex insurance terms. Meanwhile, the UK's Prudential Regulation Authority sends out private notifications to insurers about risk assessment changes, ensuring a dynamic and responsive insurance landscape.

Biotech / Pharmaceuticals

In the biotech and pharmaceutical sectors, the stakes are incredibly high. Regulatory bodies frequently issue guidelines on drug safety and clinical trials. Companies may interpret these guidelines as endorsements of specific research methods or treatments. If these methods or treatments later prove to be harmful or ineffective, the companies could face not only legal action but also severe reputational damage. Moreover, if regulatory bodies provide information about the efficacy of certain drugs but do not issue formal approvals, pharmaceutical companies may proceed with production. Should these drugs later be found to have adverse side effects, the companies could face both legal challenges and public backlash.

The European Medicines Agency (EMA) in the EU issue guidelines and also holds annual public meetings to discuss the ethical implications of new drugs. In Japan, the Pharmaceuticals and Medical Devices Agency (PMDA) uses newsletters to update companies on changes in clinical trial protocols, ensuring a seamless blend of innovation and safety.

Energy / Natural Resources

In the energy sector, the implications of the distinction between "telling about and telling to" are vast. Regulatory bodies often issue guidelines on sustainable energy practices. Energy companies may interpret these guidelines as an endorsement of specific technologies or methods. If these

technologies later prove to be environmentally harmful or less efficient than initially thought, the companies could face legal action. Additionally, if regulatory bodies provide information about extraction methods without issuing directives, companies may proceed with extraction activities that later prove to be environmentally damaging, leading to both legal liabilities and reputational loss.

The U.S. Department of Energy not only sets efficiency standards but also releases interactive online tools that allow companies to calculate their carbon footprint. In Saudi Arabia, the Ministry of Energy utilizes SMS alerts to inform companies of shifts in oil production quotas, allowing for real-time adjustments.

Banking / Finance

In the banking and finance sectors, the line between regulatory guidance and directive action can have far-reaching implications. Regulatory bodies often issue guidelines on ethical investment and risk management. Financial institutions may interpret these guidelines as tacit approval for specific investment strategies. If these strategies later prove to be high-risk or unethical, the institutions could face both regulatory action and legal disputes from clients. Moreover, if regulatory bodies provide information about lending criteria without issuing formal directives, banks may adopt these criteria. Should these criteria later be found to be discriminatory or unfair, the banks could face legal challenges and reputational damage.

In the world of banking and finance, regulatory bodies act as the traffic lights at busy intersections. The Reserve Bank of India, for instance, employs a mobile app to update banks on changes in interest rates. In Switzerland, the Financial Market Supervisory Authority uses videos to explain complex financial instruments, making the arcane world of finance more accessible to the public.

Hospitality / Leisure

In the hospitality and leisure industry, the distinction between “telling about and telling to” can have significant operational implications. Regulatory bodies often issue guidelines on hygiene and safety standards. Hotel chains may interpret these guidelines as endorsements of specific cleaning products or methods. If these products or methods later prove to be ineffective or harmful, the chains could face legal action from guests. Similarly, if regulatory bodies provide information about licensing requirements without issuing directives, leisure facilities may proceed with operations that later prove to be non-compliant, leading to both legal action and reputational damage.

In the hospitality sector, regulatory bodies are the critics who shape our leisure experiences. The U.S. Food and Drug Administration (FDA) not only sets hygiene standards for restaurants but also uses social media to alert the public about food recalls. In France, the Ministry of Culture employs virtual reality to offer virtual tours of new leisure spaces before they open, gathering public opinion in an interactive manner.

Retail / Consumer Goods

In the retail and consumer goods sector, the line between regulatory guidance and directive action is particularly salient. Regulatory bodies often issue safety standards for products. Manufacturers may interpret these standards as endorsements of specific materials or designs. If these materials or designs later prove to be unsafe, the manufacturers could face legal action from consumers. Moreover, if regulatory bodies provide information about labeling requirements without issuing directives, retailers may proceed with labeling that later proves to be misleading, leading to both legal challenges and a loss of consumer trust.

The UK’s Competition and Markets Authority uses Instagram stories to educate consumers about their rights. In Japan, the Consumer Affairs Agency employs QR codes on product labels to direct consumers to web pages detailing product recalls, ensuring that safety information is just a scan away.

Public Sector / Government

In the public sector, the implications of the distinction between “telling about and telling to” are vast. Regulatory bodies often issue guidelines on public service delivery. Government agencies may interpret these guidelines as endorsements of specific service delivery methods. If these methods later prove to be inefficient or ineffective, the agencies could face legal action from the public. Additionally, if regulatory bodies provide information about budgetary allocations without issuing directives, government departments may proceed with spending that later proves to be wasteful, leading to both legal scrutiny and public outcry.

In the public sector, regulatory bodies are the architects of governance. The U.S. Federal Communications Commission (FCC) not only regulates media but also employs town halls to discuss public concerns about media ethics. In Sweden, the Ministry of Health and Social Affairs uses podcasts to update the public on changes in social welfare policies, making governance a two-way street.

Transportation / Logistics

In the transportation and logistics sectors, the line between regulatory guidance and directive action can have far-reaching implications. Regulatory bodies often issue safety and environmental guidelines. Logistics companies may interpret these guidelines as endorsements of specific shipping routes or cargo handling methods. If these routes or methods later prove to be unsafe or environmentally damaging, the companies could face legal action. Moreover, if regulatory bodies

provide information about import/export regulations without issuing directives, companies may proceed with activities that later prove to be non-compliant, leading to both legal action and reputational damage.

In transportation and logistics, regulatory bodies are the navigators charting the course. The International Maritime Organization (IMO) not only sets shipping standards but also employs webinars to discuss the impact of new regulations on global trade routes. In China, the Ministry of Transport uses WeChat to update trucking companies on changes in road tariffs, ensuring smooth flow of goods.

Blockchain / Digital Assets

In the realm of blockchain and digital assets, the distinction between “telling about and telling to” can have significant legal and financial implications. Regulatory bodies often issue guidelines on security and transparency. Companies operating in this space may interpret these guidelines as endorsements of specific blockchain protocols or trading platforms. If these protocols or platforms later prove to be insecure or non-transparent, the companies could face both legal action and a loss of investor trust.

In the realm of blockchain and digital assets, regulatory bodies are the pioneers mapping uncharted territories. The U.S. Commodity Futures Trading Commission (CFTC) not only sets trading standards but also uses Reddit AMAs to answer questions about digital assets. In Estonia, the Financial Intelligence Unit employs newsletters to update companies on anti-money laundering measures specific to digital currencies.

New Technologies / Space

In the realm of new technologies and space exploration, the line between regulatory guidance and directive action can have profound implications. Regulatory bodies often issue guidelines on safety and ethical considerations for new

technologies. Companies may interpret these guidelines as endorsements of specific technologies or methods for space exploration. If these technologies or methods later prove to be unsafe or ethically problematic, the companies could face not only legal action but also severe reputational damage. Moreover, if regulatory bodies provide information about international collaborations in space exploration without issuing formal directives, companies may proceed with partnerships that later prove to be problematic, either due to technological failures or diplomatic tensions, leading to both legal challenges and a loss of public and international trust.

In the arena of new technologies and space exploration, regulatory bodies are the visionaries dreaming of new worlds. For instance, the European Space Agency (ESA) not only establishes protocols for satellite launches but also engages with the public through interactive webinars to discuss the environmental impact of space debris. In Russia, the Federal Space Agency (Roscosmos) uses televised roundtables to discuss the ethical implications of space colonization.

Private Wealth / Families

For private wealth and family offices, the distinction between “telling about and telling to” can have significant financial and legal implications. Regulatory bodies often issue tax guidelines and estate planning recommendations. Wealth managers and family offices may interpret these guidelines as endorsements of specific investment vehicles or estate planning strategies. If these vehicles or strategies later prove to be less advantageous or even financially detrimental, the offices could face both legal scrutiny and financial loss. Similarly, if regulatory bodies provide information about charitable giving without issuing formal directives, families may proceed with donations that later prove to be non-compliant with tax laws, leading to both legal complications and potential financial penalties.

The U.S. Internal Revenue Service (IRS) not only sets tax guidelines but also employs webinars to discuss the implications of tax reforms on estate planning. In the UK, the Office of Tax Simplification uses newsletters to update family offices on changes in inheritance tax laws, ensuring that legacies are passed down in compliance with the law.

Conclusion

The Court of Appeals' recent judgment provides a practical framework for understanding the limits of regulatory authority. By focusing on the distinction "between telling about and telling to," the Court has clarified an important aspect of regulatory communication that is relevant across various sectors. In a digital age where information is easily accessible, the judgment underscores the need for both regulators and industries to be cautious in how they issue and interpret guidance.

For regulatory bodies, the ruling serves as a reminder to be precise in their communications. Whether issuing public guidelines, private notifications, or other forms of instruction, regulators must be clear about the intent and scope of their messages to avoid crossing into directive action. This is particularly important in a fast-paced information environment where messages can be quickly disseminated and misinterpreted.

Industries also have a role to play in this dynamic. The Court's judgment highlights the importance of scrutinizing regulatory communications carefully. Companies need to consider the nature of these communications—whether they are guidelines, instructions, or other forms of information—when making business decisions. Misinterpreting the intent behind regulatory messages can lead to commercial risks and potential legal liabilities.

The judgment is also relevant for corporate strategists and

policymakers. Corporate strategists can incorporate the ruling into their risk assessment processes, particularly when navigating regulatory environments, and policymakers can take the Court's insights into account when drafting new regulations, aiming for clarity and precision to minimize misunderstandings.

Overall, the Court of Appeals' judgment offers a balanced perspective on the boundaries of regulatory authority. It encourages both regulators and the regulated to exercise caution and due diligence in their interactions, highlighting the complexities and potential pitfalls in this area.

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

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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

September 13, 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

September 13, 2023

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

September 13, 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

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[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

September 13, 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

September 13, 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

September 13, 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

September 13, 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 determents 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 and 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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