When Iran Sued NASA: A Lesson in Earnest Money and Space Launch Transactions

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Few cases stand out as starkly as the **Telecommunication Company of Iran (TCI) v. NASA**. The case, heard by the **Iran-US Claims Tribunal (IUSCT)** in 1984 dealt with the often misunderstood concept of "earnest money" within the context of space launch negotiations. The case highlights the critical importance of understanding contractual obligations and the risks inherent in international space agreements.

The Case in a Nutshell

On January 15, 1982, the **Telecommunication Company of Iran** filed a claim against the **National Aeronautics and Space Administration (NASA)**, seeking the return of $100,000 paid as "earnest money" during negotiations for launching two Zohreh satellites. These satellites were intended to bolster Iran's domestic communications infrastructure. However, the negotiations fell apart, and no final agreement was reached. When TCI asked for their money back, NASA refused, leading to the arbitration proceedings that followed.

Understanding Earnest Money in Space Transactions

Earnest money is a concept with roots in commercial practice, often used to show a party's seriousness in negotiations. In the context of this case, the $100,000 paid by TCI was intended as a **non-refundable deposit** that would either be applied to the first payment of the launch services or retained by NASA if the deal did not come to fruition. This was clearly stated in NASA's **Management Instruction (NMI)**

8610.8, which governed the terms of such transactions.

TCI's position was straightforward: they believed that since no agreement was finalized, the earnest money should be returned. However, NASA argued that the payment was meant to cover the costs incurred during the negotiation process, whether or not an agreement was reached. The **Tribunal** accepted the position of NASA, finding that the terms of NMI 8610.8 were clear and unambiguous, and TCI had accepted these terms when they sent the payment.

The Tribunal's Reasoning

The Tribunal's reasoning in dismissing TCI's claim was grounded in the principle that **earnest money** serves a vital function in such negotiations. When a party like NASA invests substantial time and resources into discussions with a potential customer, it is not unreasonable to require compensation if those discussions do not lead to a contract. The Tribunal emphasized that this practice is not uncommon in commercial transactions, particularly those involving significant investments of time and expertise.

The Tribunal found that the **provisions of NMI 8610.8** were "clear and unambiguous" and that TCI understood and accepted these terms. The $100,000 payment was not a mere placeholder; it was a firm commitment by TCI, indicating their intention to move forward with the project. Even though the negotiations eventually fell through, this did not change the nature of the payment or NASA's right to retain it.

Master List and Index to NASA Directives

NASA's **Management Instruction (NMI) 8610.8** is part of a broader set of directives that guide the agency's operations. The **Master List and Index to NASA Directives** provides an exhaustive catalog of all NASA management directives in force as of August 1, 1982. This includes major subject headings showing number, effective date, title, responsible office, and

distribution code. The directives are comprehensive, covering everything from delegations of authority to management handbooks and safety standards.

Understanding these directives is crucial for any entity engaging in transactions with NASA. They offer a roadmap of the agency’s internal processes and expectations, ensuring that parties entering into negotiations are fully informed of their obligations. This comprehensive indexing underscores NASA’s commitment to transparency and operational consistency, essential elements when dealing with complex projects like satellite launches.

Considerations for Dispute Resolution in Space-Related Transactions

Notwithstanding that this arbitration was under the specifically designed **IUSCT (Iran-US Claims Tribunal)**, the **Telecommunication Company of Iran v. NASA** case provides valuable insights into how parties involved in space-related transactions should formulate dispute resolution options. **Arbitration** offers a neutral and structured forum for resolving disputes that arise from these highly technical and often international agreements.

When drafting contracts for space-related transactions, parties should carefully consider the forum for dispute resolution. Arbitration can be advantageous due to its flexibility, confidentiality, and the ability to select arbitrators with specific expertise in space law and related fields. Moreover, the enforceability of arbitration awards across borders under treaties like the New York Convention provides an added layer of certainty in international dealings.

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The Regulatory Void: Why Space Flight Suppliers Face Heightened Risks

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As the commercial space flight industry continues to expand, the nature of liability within this domain presents challenges that are distinctly different from those faced in more established industries. While certain principles, such as the need for robust contracts and clear indemnification clauses, are universal, the specific hazards, regulatory requirements, and the sheer novelty of space operations introduce a level of complexity that demands a closer examination.

The Distinct Nature of Space Flight Liabilities

Space flight is not merely an extension of aviation; it is a radically different environment with its own set of risks and unknowns. Unlike traditional industries where the liabilities are well-defined and governed by decades of regulatory precedents, the space flight industry operates at the cutting edge of technology and human endeavor. This inherently experimental nature of space travel means that the risks are

not only higher but also less predictable.

One of the most significant differences lies in the **absence of a mature regulatory framework**. Unlike the aviation industry, where safety standards and liability norms are well-established, the space flight industry is still developing its regulatory backbone. The FAA's regulations for commercial space flight, while comprehensive, are designed to evolve as the industry matures. This creates a fluid environment where liability standards can shift rapidly, depending on technological advancements and legislative changes.

Informed Consent and the Assumption of Risk

One of the cornerstones of liability management in the space flight industry is the concept of informed consent. Space flight participants, unlike passengers on a commercial airline, must explicitly acknowledge the high-risk nature of their journey. This goes beyond the typical waivers found in other industries; participants must understand that they are embarking on a venture where the government itself has not certified the safety of the vehicles involved. This recognition of risk is not just a legal formality but a fundamental aspect of managing liability in space operations.

For third-party suppliers, this means that the traditional safeguards—such as product liability insurance—might not offer the same level of protection as they would in other industries. Suppliers must account for the fact that their components will be used in an environment where failure rates, even if minimal, can have catastrophic consequences. **The standard of care required** in the space industry is therefore significantly higher, and the consequences of a breach are more severe.

Regulatory Requirements and the Chain of Liability

Another unique aspect of the space flight industry is the way regulatory requirements interact with the supply chain. In

most industries, liability tends to be concentrated at the end of the supply chain—typically with the manufacturer or service provider directly interacting with consumers. However, in the space flight industry, the **regulatory obligations extend throughout the supply chain**. This means that even subcontractors and component suppliers can be directly impacted by regulatory actions.

For instance, FAA regulations may require that specific safety standards be met not just by the space flight operator but by all entities involved in the construction and operation of the spacecraft. This creates a situation where third-party suppliers could be held liable for regulatory non-compliance, even if their products are only a small part of the overall system. The interconnectedness of space flight operations means that liability is often shared, and a failure in one component can lead to legal repercussions across the entire supply chain.

The International Dimension of Space Liability

The space flight industry is inherently international, with operators, suppliers, and customers often spread across multiple jurisdictions. This global nature introduces additional layers of complexity to liability management. Different countries have varying regulatory standards, and there is no unified international framework for space flight liability akin to what exists in maritime or aviation law.

For third-party suppliers, this means navigating a patchwork of national regulations, each with its own approach to liability and indemnification. **Jurisdictional conflicts** can arise, particularly in cases where an incident leads to legal actions in multiple countries. Suppliers must therefore ensure that their contracts account for these international dimensions, incorporating choice of law and jurisdiction clauses that clearly define where and how disputes will be resolved.

Insurance and Risk Transfer in Space Operations

Traditional insurance models also struggle to adapt to the unique risks of space flight. The high cost of space missions, combined with the potential for catastrophic losses, makes insuring these operations a challenge. While insurance products are available, they often come with high premiums and significant exclusions, particularly concerning third-party liabilities.

Suppliers must be aware that the **insurance coverage for space flight operations** may not fully protect them from liability. This necessitates a more proactive approach to risk management, where suppliers not only rely on insurance but also on comprehensive contractual protections. This might include obtaining additional coverage, negotiating higher limits on existing policies, or requiring the space flight operator to bear a greater share of the risk.

Conclusion: A New Paradigm in Liability Management

The space flight industry is pushing the boundaries of what is possible, but with this comes a need for a new approach to liability management. For third-party suppliers, the traditional models of risk transfer and liability protection may not be sufficient. Instead, they must engage with the unique challenges of space flight—ranging from the evolving regulatory landscape to the international nature of operations—and develop strategies that are as innovative and forward-thinking as the industry itself.

As space flight becomes more commonplace, the lessons learned today will shape the liability frameworks of tomorrow. Third-party suppliers have a critical role to play in this evolution, and by understanding and adapting to the unique liabilities of the space flight industry, they can help ensure not only their own protection but also the safety and success of future space missions.

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Impact of the U.S. Supreme Court overturning of the Chevron Doctrine on Commercial Space Regulation

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In 1984, the **Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.** decision established the **Chevron Doctrine**, a cornerstone of administrative law in the United States. This doctrine directed courts to defer to federal agencies' reasonable interpretations of ambiguous statutes. Its influence extended across various sectors, including emerging fields like **commercial space**, where regulatory frameworks were still evolving or absent.

However, the regulatory landscape underwent a seismic shift on **June 28, 2024**, when the U.S. Supreme Court handed down a landmark decision in **Loper Bright Enterprises et al v. Raimondo, Secretary of Commerce, et al**, effectively overturning the **Chevron Doctrine**. This decision marked a departure from decades of judicial precedent, asserting that courts must independently evaluate whether agencies acted within their statutory authority. No longer bound by automatic deference to agency interpretations, courts now wield enhanced

oversight over regulatory decisions.

Justice Kagan, in dissent joined by **Justices Sotomayor and Jackson**, criticized this shift, arguing that it empowers courts excessively at the expense of agency expertise and Congress's intent in delegating interpretive discretion.

The **Chevron Doctrine** operated under a straightforward two-step framework: first, determining if **Congress** explicitly addressed the issue; if not, agencies' interpretations of ambiguous statutes were upheld if deemed reasonable.

For **commercial space regulation**, this decision holds profound implications. Agencies such as the **Federal Communications Commission (FCC)**, **Federal Aviation Administration (FAA)**, and **National Oceanic and Atmospheric Administration (NOAA)**, responsible for overseeing satellite communications, space tourism, and environmental monitoring in space, face a new and more restrictive regulatory environment. Without the **Chevron deference**, agencies' flexibility to adapt regulations to technological advancements and evolving industry practices is diminished. Courts now play a pivotal role in scrutinizing and potentially challenging agency decisions, which could lead to increased litigation and regulatory uncertainty.

The removal of **Chevron deference** not only alters the dynamics of regulatory authority but also impacts **judicial review**. Courts will now take a more active role in interpreting statutes, ensuring closer alignment with legislative intent but potentially lacking the specialized knowledge and nuanced understanding of technical issues that agencies traditionally provided.

The implications extend to **regulatory certainty**. While clearer **legislative mandates** might offer stability, the absence of **Chevron deference** introduces uncertainty. This uncertainty could deter investment in the **commercial space sector**, where rapid technological innovation and global competitiveness are

paramount. Companies may hesitate to innovate or expand operations in an unpredictable regulatory climate where agency decisions are subject to judicial second-guessing.

Real-world examples illustrate these challenges vividly. The **FCC**, for instance, faces heightened scrutiny over its regulation of **satellite constellations** and the burgeoning **space tourism industry**. Previously, the FCC enjoyed significant latitude in adapting regulations to accommodate technological advancements and new market entrants. Now, each regulatory decision is subject to judicial review, potentially slowing down approvals and stifling innovation critical for industry growth. This also has potential implications vis-à-vis the FCC's assumed power to regulate space debris given the FCC's "statutory authority" – as per the Communications Act of 1934 – is the regulation of interstate and international communications.

Similarly, the **FAA**'s oversight of **commercial human spaceflight** is now under increased judicial scrutiny. Safety standards and operational guidelines, which previously evolved in tandem with industry advancements, may now face delays or inconsistencies due to judicial interpretation of agency actions.

Furthermore, **mission authorization and supervision** now face significant obstacles, hindering industry efforts to achieve streamlined processes for mission authorization. The lack of specific **congressional action** has the potential to further complicate the authorization and supervision by the executive branch of new commercial space ventures. **Article 6 of the Outer Space Treaty** requires State signatories to conduct continuing authorization and supervision of its national space activities, including commercial activities.

In November 2023, the **Commercial Space Act of 2023** was introduced in Congress and outlines a certification process for mission authorization under the ambit of the Department of

Commerce. A few days later, the White House published a proposal to split mission authorization under the **Department of Commerce and the Department of Transportation**. Simultaneously, the National Aeronautics and Space Administration (NASA) has consistently emphasized the need for their agency to maintain mission authorization.

Looking ahead, the post-**Chevron era** demands precise **legislative guidance** to navigate these complexities effectively. Congress must play a proactive role in providing clear and detailed statutes that empower regulatory agencies while ensuring accountability and alignment with national priorities. Harmonizing **U.S. regulations** with international standards, including obligations under treaties like the **Outer Space Treaty**, becomes more challenging without the deference framework that previously guided agency discretion.

The evolving **space regulatory landscape** also underscores the need for adaptive governance structures that balance the expertise of regulatory agencies with the oversight of the judiciary. This balance is crucial to fostering an environment that supports innovation, safety, and responsible growth in the **commercial space sector**.

In conclusion, the Supreme Court's decision to overturn the **Chevron Doctrine** represents a watershed moment in **U.S. administrative law** and **regulatory policy**. As **Wasel & Wasel** continues to monitor these developments closely, we are committed to assisting clients in navigating the evolving **space industry** landscape. For guidance on understanding and navigating the complexities of **U.S. space industry**, please contact **Abdulla Abu Wasel**, Deputy Managing Partner at **(awasel@waselandwasel.com)**.

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U.S. LNG Exports: A Catalyst for Geopolitical Shifts and Terminal Agreement Disputes

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The U.S. LNG Export Boom: A New Energy Landscape

The U.S. has become the largest exporter of liquefied natural gas (LNG), driven by significant infrastructure development and advances in natural gas extraction. This growth has led to debates about environmental sustainability, economic effects on communities, and how this aligns with U.S. climate goals. The CP2 LNG project, in particular, has faced criticism from environmental groups concerned about its fit with climate objectives.

The unexpected rise in domestic shale gas production, due to technological and market developments, has shifted the U.S. from an expected LNG importer to a major exporter. This shift was initially met with concerns about potential increases in domestic gas prices affecting consumers and industries. However, studies by the U.S. Department of Energy from 2012 to 2018 suggested that LNG exports would have minimal impact on domestic prices under certain conditions. Indeed, despite the growth in LNG exports, domestic gas prices have remained stable, supported by increased production in areas like the Marcellus Shale and the Permian Basin.

Yet, the projected doubling of LNG export capacity by 2028 prompts questions about future domestic gas prices and the impact on other industries. The significant use of U.S.

natural gas for LNG exports could potentially affect prices and supply.

Legal Challenges in the Shifting Energy Market

The transition in the energy market raises important questions about contractual risks and the predictability of such major changes. The situation with the Pascagoula Facility in the Eni v. Gulf LNG arbitration (ICDR Case No. 01-16-0000-7065) originally designed for LNG import but underused due to the domestic gas surplus, highlights the legal and economic issues arising from the shale gas boom. The Eni v. Gulf LNG arbitration case underscores the need to consider foreseeability within the broader context of contractual risk allocation, reflecting the parties' initial intentions and expectations.

The shale gas boom has complicated contractual arrangements, particularly Terminal Use Agreements (TUAs), by altering traditional views on supply, demand, and pricing. This has implications not only in the U.S. but also in international energy markets, where U.S. LNG exports have contributed to global energy security and changed trade dynamics.

Companies should be cognizant of supervening events (such as the shale gas revolution) that lead to frustration of the principal purpose of a TUA.

Supervening Events and TUA Contract Frustration

Defining the Supervening Event

The "supervening event" that could potentially disrupt the main purpose of a TUA needs precise definition. Various interpretations include the disappearance of the U.S. import market or technological advancements that led to increased domestic shale gas production. The event is best understood as a combination of factors resulting in the market shifts known as the "shale gas revolution" and its impact on the

contractual relationship.

Nature of Changes and Legal Implications

The distinction between “evolutionary” and “revolutionary” changes does not critically influence the identification of the supervening event. The legal doctrine of frustration is not confined to isolated, instantaneous events but also applies to developments that unfold over time with significant impacts. Both sudden events and gradual developments can usually be recognized as supervening events under the applicable law.

Impact of the Shale Gas Revolution

The shale gas revolution, brought about by several converging factors, has transformed the supply and demand dynamics of the U.S. natural gas market, rendering LNG importation economically unviable. This shift from a net importer to a net exporter of natural gas has fundamentally questioned the economic viability of importing LNG into the U.S. market, leading to the underutilization of infrastructures like the Pascagoula Facility.

Substantial Frustration of the TUA

The shale gas revolution’s impact on the contract was unprecedented, structural, and permanent, rendering the economic rationale of the TUA completely senseless. This situation could not have been reasonably anticipated by the parties at the contract’s inception, indicating a substantial frustration of the TUA’s principal purpose.

Future Directions for Terminal Use Agreements

The shale gas revolution necessitates a reevaluation of TUAs, challenging old assumptions about risk, supply, and demand. As environmental issues become increasingly important in energy discussions, TUAs need to incorporate sustainability and

emissions reduction more prominently. This involves creating agreements that are economically viable and flexible, yet also environmentally responsible.

The impact of the U.S. shale gas boom on TUAs highlights the global implications of domestic energy developments. It emphasizes the need for TUAs to be adaptable and innovative, capable of handling market volatility and the interconnected nature of global energy networks. This shift underscores the importance of evolving contractual frameworks to meet the challenges of today's dynamic energy landscape.

The profound impact of the shale gas revolution on the contractual landscape of the energy sector, particularly affecting TUAs, highlights the need for companies to be aware of supervening events that could lead to the frustration of a contract's principal purpose. This necessitates a reevaluation of existing agreements and careful consideration of future contractual frameworks in the dynamic energy market.

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Biden's Executive Order on Israel / West Bank Sanctions: Global Business Compliance Considerations

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On February 1, 2024, President Joe Biden's executive order

introduced sanctions targeting individuals and entities that contribute to instability in the West Bank, notably through violence or threats against civilians. This directive, with its broad implications, mandates a closer examination of how businesses worldwide engage with Israel and the West Bank, especially given the region's significant contributions to the global technology sector.

The sanctions bring to the forefront the issue of indirect liability, a concept that extends a business's accountability to its wider network of partnerships and supply chains. This complexity is particularly pronounced in today's globalized economy, where the multifaceted layers of production and distribution can obscure the ultimate destination or use of products and services. As a result, businesses utilizing Israeli innovations, for instance, may inadvertently find themselves supporting sanctioned activities, highlighting the need for thorough due diligence.

On February 1, 2024, the State Department invoked the executive order to impose sanctions on individuals for a range of disruptive conduct in the West Bank. This included leading violent riots, attacking civilians and activists, with actions such as arson and physical violence. The executive order, particularly under section 1(a)(i)(B)(2), casts a wide net, sanctioning those "responsible for or complicit in, or to have directly or indirectly engaged or attempted to engage in" these activities.

Financial institutions and companies across sectors must now intensify their scrutiny of transactions and relationships connected to Israel and the West Bank to ensure compliance with the new sanctions. This increased vigilance could have far-reaching effects on international trade and investment, potentially deterring engagement with the region due to the heightened risks and compliance requirements.

The executive order's broad scope may also spark legal debates

over its interpretation, particularly concerning actions that “threaten the peace, security, or stability” of the West Bank. This ambiguity adds a layer of complexity to international business operations, requiring careful navigation to avoid unintended consequences.

Drawing from historical precedents, such as sanctions against Iran and Russia, the potential for these new measures to impact global business and economic landscapes is significant. The sanctions could disrupt supply chains, particularly in industries dependent on resources from the region, and complicate international trade relations. Moreover, the potential for reduced foreign investment could have a profound effect on the region’s economic development and necessitate a reevaluation of existing trade agreements and partnerships.

In response, businesses must adopt a multifaceted strategy to mitigate risks and adapt to the evolving landscape. This includes:

1. **Enhanced Due Diligence:** Corporations must strengthen their due diligence processes to identify and assess any direct or indirect connections to entities or activities that might be targeted under the new sanctions regime. This involves a comprehensive review of partners, suppliers, and customers within the region to ensure they are not involved in activities undermining stability in the West Bank.
2. **Reevaluation of Business Relationships and Investments:** Companies may need to reevaluate their business relationships, investments, and operations in the region. This could involve restructuring agreements, divesting from certain ventures, or seeking alternative suppliers and partners that comply with the new regulations.
3. **Strengthening Compliance Infrastructure:** Investing in robust compliance infrastructure is essential. This includes technology systems that can monitor

transactions and relationships for potential sanctions violations and platforms that facilitate the reporting and management of compliance issues. Automation and artificial intelligence can play a significant role in enhancing the efficiency and effectiveness of these systems.

4. **Open Communication with Regulators:** Establishing and maintaining open lines of communication with relevant regulatory bodies, such as the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) and the State Department, is vital. This ensures that corporations are up-to-date with any changes or updates to the sanctions list and understand the regulatory expectations.
5. **Contingency Planning:** Developing contingency plans to address potential disruptions to operations or supply chains resulting from the sanctions is critical. This includes identifying alternative markets, suppliers, and logistics routes to ensure business continuity in the face of sanctions-related challenges.
6. **Contractual Compliance Review:** A thorough examination of all contractual documents, both current and forthcoming, is imperative to ensure alignment with sanctions regulations to embed specific provisions that mandate adherence to sanctions laws. Such clauses are crucial as they afford the legal groundwork for altering or dissolving agreements in the event a business partner falls under the ambit of the sanctions. This proactive legal safeguarding is essential for maintaining operational integrity and legal compliance in the face of the evolving sanctions landscape.
7. **Stakeholder Engagement:** Engaging with stakeholders, including investors, customers, and business partners, to communicate the steps being taken to comply with the executive order and manage risks is essential. Transparency in these efforts can help maintain trust and mitigate reputational risks associated with

potential sanctions violations.

By embracing a proactive and comprehensive approach to compliance and strategic planning, businesses can navigate the complexities introduced by the Israel / West Bank sanctions, safeguarding their operations and maintaining their strategic objectives in the face of these new challenges.

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

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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

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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.

Construction / Infrastructure

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

September 2, 2024

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 2, 2024

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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