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## EU's Data Privacy Reg Still Has Arbitration Attys Confused

By **Caroline Simson**

Law360 (October 3, 2019, 9:08 PM EDT) -- Sixteen months after the European Union's expansive data privacy regulation went into effect, many of those practicing in international arbitration remain confused about whether and how it applies to them — but that could be about to change.

In a nutshell, the EU's General Data Protection Regulation strives to give people greater control over the use of their personal data, and to ensure that the processing of personal data is done lawfully, fairly and transparently.

The regulation includes broad definitions of what constitutes personal data and data processing, and that means it potentially applies to any party, counsel, arbitrator, tribunal or professional third party participating in an arbitration within the GDPR's reach.

"It's very ambitious in the breadth of its scope," said Hanotiau & van den Berg senior associate Emily Hay.

### A Slew of Complex Issues

The GDPR has caused much confusion among those practicing in international arbitration and has prompted the formation of a task force on data protection in international arbitration by the International Council for Commercial Arbitration and the International Bar Association, which is working on providing guidance in this space.

And that's a good thing, given that the topic has come up in many practitioners' practices recently. In fact, confusion about the GDPR among those in international arbitration only increased several months ago when an arbitral tribunal determined that the regulation didn't apply to a North American Free Trade Agreement arbitration they were overseeing — despite an open question as to whether the administering institution, the Permanent Court of Arbitration, falls within its scope.

Moreover, there was a question on whether an arbitrator on the tribunal who is U.K.-based might be subject to the GDPR.

And those are just a few of the complex issues that arise in the context of the GDPR: There has also been debate as to whether arbitrations brought under international treaties fall outside the GDPR's scope, and the extent to which individuals participating in an arbitration brought under a treaty may be subject to the GDPR.

Such questions are far from trivial, since the GDPR imposes hefty fines on those found not in compliance.

"As personal data is typically processed in any given arbitration, we have to get our head around data protection compliance in that specific context," said Kathleen Paisley of Ambos Lawyers, who co-chairs the ICCA-IBA task force.

What's more, lawyers are also required to comply with their own country's specific data protection legislation, which may be contributing to the confusion, according to Martin

Zahariev of Dimitrov Petrov & Co. Law Firm in Bulgaria.

"It seems that both business and legal community in general are confused about what particular measures need to be taken to ensure GDPR compliance," he told Law360. "Probably one of the factors causing this confusion is the fact that the data protection legal framework was out of the main focus of many practitioners for a long time."

### Establishing Guidelines

But that's starting to change. Stakeholders in the international arbitration community have recently taken steps to provide guidance on how to comply with data privacy regulations like the GDPR.

For example, the ICCA-IBA joint data protection task force is preparing a guide to data protection in international arbitration proceedings. The guide aims to help practitioners identify the ways data protection needs to be taken into account during the course of an arbitration. And it doesn't just pertain to the GDPR. Similar laws are already in place or are in the process of being enacted in countries like Canada, Japan, Australia and India.

"Like sanctions and other mandatory legal requirements, the data protection laws are fast becoming part of the legal landscape in which arbitration is practiced and disputes are heard, and it is therefore important that international arbitration practitioners understand those laws," said Paisley. "This is especially the case because the laws may impose legal responsibility on the arbitration practitioners themselves, which needs to be managed within the arbitration."

In addition, ICCA, the International Institute for Conflict Prevention and Resolution, and the New York City Bar Association established a working group on cybersecurity in arbitration. It is slated to have the North American launch of its cybersecurity protocol later this year in New York, during an event dubbed New York Arbitration Week. Cybersecurity is considered a crucial component of ensuring data is protected and that institutions and individuals are complying with the GDPR.

### Decision Raises More Questions

The tribunal that decided that the GDPR didn't apply to the NAFTA arbitration they were overseeing raised questions since one of the arbitrators, Daniel Bethlehem QC, is also a barrister practicing in London, meaning that he might be subject to the GDPR. The other two arbitrators on the tribunal are Cavinder Bull SC and R. Doak Bishop.

Counsel for wind energy investor Tennant Energy LLC had argued that the GDPR would be invoked any time data protected under the regulation was transferred between Bethlehem and his fellow arbitrators, or between Bethlehem and the PCA.

Tennant argued that while it views the PCA as being exempt from the GDPR since it's a "supranational" organization — meaning it was established under international law or by an agreement between countries — any protected data going between Bethlehem, the arbitrators and the PCA would cross an "international frontier," triggering GDPR obligations.

The issue was potentially relevant in the case since the GDPR prohibits so-called data controllers from transferring personal data outside the EU, unless it is to a country that provides an equivalent level of protection to personal data, the controller or processor has provided appropriate safeguards, or one of the exceptions in the GDPR applies.

The Tennant tribunal provided little reasoning for its decision — which was issued in June but only made public in August — in which it concluded that NAFTA didn't fall within the scope of the GDPR since it hasn't been signed by the EU or its member states. And even that conclusion might be open to question.

"It is debatable whether this point accurately reflects the rather wide territorial scope of the GDPR, given the broad terms ... that specifically mention how the GDPR applies to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the union, regardless of whether the processing takes place in the union or not," said Garrigues UK LLP partner Joe Tirado, who co-heads the firm's international arbitration and alternative dispute resolution practices, and Markus Gomez, a senior associate

with the firm, in an email.

As such, the decision leaves many relevant questions unanswered, though it's worth noting that tribunals evaluating whether the GDPR applies to their proceeding are under no obligation to follow the Tennant tribunal's reasoning.

Indeed, "even where tribunals agree that the GDPR applies, differences may arise with regard to how they apply it. For example, tribunals may vary with regard to appropriate safeguards for data transfer," said Hugh Carlson, Three Crowns' managing director and a member of the ICCA-IBA task force.

--Editing by Kelly Duncan and Brian Baresch.

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