Austrian Yearbook on International Arbitration 2020
The Content

The Austrian Yearbook on International Arbitration 2020 is a collection of articles and essays on current issues and hot topics in commercial and investment arbitration by leading practitioners and academics. The present 14th edition contains 25 contributions from altogether 57 authors.

Inspired by the theme of the Vienna Arbitration Days 2019, "Science and Innovation in Arbitration", the Yearbook encompasses contributions dealing with
• the impact of sciences in arbitral proceedings,
• psychology in arbitration, and
• the Hofstede Dimensions in international arbitration.

Other issues addressed are foreseeability of damages, third party funding and data protection in arbitration. Yearbook articles further deal with developments in Brazil, Belarus, and Austria.

Procedural issues addressed relate to
• confidentiality and the protection of confidentiality,
• how to make effective use of experts, and
• strategies for mock arbitration.

The chapter on Investment Arbitration deals with the change in effective control over a territory and its influence on BITs, security for costs, and arbitrating under the Energy Charter Treaty.

The Editors

Christian Klausegger, Peter Klein, Florian Kremslehner, Alexander Petsche, Nikolaus Pitkowtitz, Irene Welser, Gerold Zeiler

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Mission (Im)Possible: Where GDPR Meets Commercial Arbitration

Martin Zahariev

I. Principle Applicability of GDPR Towards Arbitration

The ultimate question when exploring the correlation between data protection and commercial arbitration from EU perspective is "Does GDPR apply towards commercial arbitration?". Only the affirmative answer would justify a more detailed analysis on this matter. In order to precisely formulate the answer to this, one should examine the very nature of the EU General Data Protection Regulation (GDPR/the Regulation), namely a legislative act of the EU with strictly defined material and territorial scope. Therefore, an examination is necessary in terms of whether commercial arbitration falls within GDPR’s material (A.) and territorial scope (B.).

A. GDPR’s Material Scope

The material scope of GDPR is proclaimed in Art. 2 of the Regulation. This provision is divided into four paragraphs, as follows: (i) the first one defines what activities GDPR applies to; (ii) the second one excludes certain data processing activities from the material scope of the Regulation; (iii) the third paragraph proclaims the applicable legal framework for processing personal data by the EU institutions, bodies, offices and agencies, namely Regulation (EC) No 45/2001 later repealed with Regulation (EU) 2018/679.

Dr. Martin Zahariev is Associate at Dimitrov, Petrov & Co. Law Firm and Legal expert at Law and Internet Foundation.


1725) the fourth one proclaims that the rules of GDPR do not affect the application of Directive 2000/31/EC, in particular of the liability rules of intermediary service providers in Art. 12 to 15 of that Directive. The first and the second paragraph are particularly relevant for data processing activities in the context of commercial arbitration. In other words, the preconditions in the first paragraph need to be present and the ones in the second - absent, so that a certain data processing activity falls within the material scope of the Regulation.

1. Positive Precondition

According to Art. 2(1) of the Regulation, GDPR “applies to the processing of personal data wholly or partly by automated means and to the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system”. The nature of the information workflow in commercial arbitration, namely the exchange of legal correspondence between the parties, the tribunal and the arbitral institution (e.g. request for arbitration, answer to it, further written submissions, procedural orders, awards, etc.) on paper or via electronic means such as emails, digital platforms for management of cases, etc., as well as the organized manner in which arbitral institutions store and retain information about the various cases administered by them without any doubt triggers the applicability of this precondition. However, as mentioned above, none of the preconditions in Art. 2(2) needs to be present to trigger the applicability of GDPR towards commercial arbitration.

2. Negative Preconditions

The negative preconditions that could lead to a given data processing activity falling outside the Regulation’s material scope are described in

Art. 2(2)(a)-(d) of GDPR. In other words, if any of these preconditions is present, the processing will not be subject to GDPR despite the fact that it is conducted wholly or partly by automated means or by non-automated means where the personal data forms is intended to form part of a filing system. These negative preconditions include the following:

- Processing in the course of an activity which falls outside the scope of EU law;
- Processing by the Member States when carrying out activities related to common foreign and security policy (Chapter 2 of Title V of the TEU);
- Processing by a natural person in the course of a purely personal or household activity;
- Processing by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security. In this area the data protection rules are established in Directive 2016/680 and the Member State legislation implementing it.

While the preconditions related to the common foreign and security policy, the household activity and the law enforcement do not create particular uncertainty and their irrelevance towards commercial arbitration is out of question, additional attention should be given to the first precondition. It has become especially relevant in the light of the recent practice of a NAFTA tribunal (Tenant Energy vs. Canada7) which albeit considering the applicability of GDPR towards investment, i.e. treaty-based arbitration and not towards commercial arbitration, still needs additional clarification.

In a nutshell, the parties to the dispute argued on the GDPR’s applicability and the necessity to have “procedures developed to comply with it” given the fact that one of the members of the tribunal is based in the United Kingdom. The rendered directions by email to the parties, according to which “the Tribunal finds that an arbitration under NAFTA Chapter 11, a treaty to
which neither the European Union nor its Member States are party, does not, presumptively, come within the material scope of the GDPR. This conclusion might create the deceptive impression that the data processing within dispute resolution proceedings does not fall within the material scope of GDPR at all.

Evident from the above quote, the main argument of the tribunal is that the underlying treaty on which the arbitration proceedings were based, namely NAFTA, is a treaty to which neither the EU nor its Member States are party to. To put it differently, the tribunal considers that the very source of the arbitration at hand is an international instrument unrelated to the EU or its members, thus falling outside the scope of its legislation, including GDPR.

It is undisputed that the investment arbitration is transnational by its nature and thus, it can reasonably be argued that the rules it is subject to go beyond only national or even regional legislation such as the EU law. From that perspective, the arguments of the NAFTA tribunal sound justified. At the same time, is to be borne in mind that investment arbitration is ultimately a dispute resolution procedure, and that the applicability of the procedural and/or substantial law to a given dispute (including investment one) does not change the nature of the related processing for its resolution, namely processing for the purposes of resolving a legal dispute. Thus, without prejudice to any potential complications that might be derived from the complex framework of investee-state disputes, dispute resolution activities generally fall within the scope of the EU law and therefore, within the material scope of GDPR.

In simple words, the forms for alternative dispute resolution such as commercial arbitration are not excluded from the GDPR. One should not be misled by the conclusions of a tribunal resolving investment dispute under a treaty not related to EU. GDPR does not contain general exception from its scope regarding arbitration. Such a view is also supported in the doctrine by Emily Hay, according to which “There is no general exemption for arbitration that would relieve the data controller of its obligations, although there may be specific exemptions under the GDPR or national legislation that are relevant to particular aspects of arbitration proceedings.”

3. Additional Considerations

Additional arguments in support of the principal applicability of GDPR towards arbitration, in particular commercial arbitration, can be found in

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9) Available at https://pcacases.com/web/sendAttach/3741 (last visited September 27, 2019).

10) More about arbitration as investor-state dispute resolution mechanism see Tsetselina Dimitrova, The Reform in the investment settlement mechanisms: from ad hoc arbitration to an investment court system, in Institute for Legal Studies Yearbook XIV, 330–333 (2016).

11) Hay, supra note 7.

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Mission (Im)Possible: Where GDPR Meets Commercial Arbitration

GDPR itself (a) and in the practice of some Member State supervisory authorities on GDPR’s interpretation (b).

a) GDPR’s Provisions

Recital 20 of GDPR clearly states that the Regulation applies to the activities of courts and other judicial authorities. As a principle, any exception from the data protection granted under the EU legal framework should be interpreted narrowly. That is why the term “other judicial authorities” should also encompass bodies providing alternative dispute resolution such as arbitration institutions and arbitral tribunals. Further to that, the professional activities of lawyers as per Recital 91 of GDPR are also enlisted as being subject to the Regulation’s rules. The lawyer is a figure comparable to the arbitrator, as both are individuals who, on the one hand, act upon assignment (mandate) by a given person (client, party to a dispute, etc.) to perform certain legal tasks, but on the other hand, act upon their own discretion and have their own legal basis for the data processing.

The above recitals indicate that any data processing within the dispute resolution process, either before court or under ADR mechanisms, including arbitration, must be performed in accordance with the GDPR requirements.

Finally, Art. 37(1)(a) of GDPR states that courts acting in their judicial capacity are exempted from the obligation to appoint a data protection officer (DPO). The presence of such an explicit provision is a clear indication that GDPR, in principle, applies to data processing activities when exercising judicial powers and only certain aspects of the GDPR framework do not apply to such activities.

b) National practice

Further to that, a Statement of the Bulgarian Supervisory Body under GDPR (the Commission for Personal Data Protection – CPDP) seems especially relevant to the problem of the applicability of data protection rules towards the judicial activities. CPDP was requested to clarify whether GDPR applies to the courts. The request was sent by the Supreme Judicial Council (SC) which, in first place, was addressed with questions regarding the GDPR’s applicability towards the courts and the storage periods in the judiciary raised by District Court – Plovdiv. CPDP drew the following conclusions:

- First, it emphasized that the courts acting in their capacity as controllers have a dual nature:

12) The rule in particular applies to the term “large scale” processing when determining the necessity to conduct data protection impact assessment.

The courts process personal data when exercising their judicial capacity under the respective procedural rules applicable towards civil, administrative and criminal proceedings;

- The courts also process personal data in the capacity of "ordinary" controllers – e.g. the processing of employees data within the employment relationships; concluding contacts with contractors; conducting competitions for recruitment of court clerks; financial and accounting activity related to the payment of salaries and amounts of different types to various data subjects (experts, jurors, witnesses, etc.); conducting inspections and giving a response/opinion on received complaints, signals and other requests to the respective court, as well as all other activities outside the main court activity of the court;

- Second, CPDP stated that this dual nature reflects the supervision mechanism over the court activities. When they act as a judiciary authority exercising their dispute resolution competences, the courts should be excluded from the supervision of CPDP. In that respect, the Bulgarian legislation will provide for a supervision over the judiciary by the Inspectorate to the SJС – an independent body within SJС that exercises control over the activities performed in the judiciary. For the activities conducted outside the judicial capacity, i.e. as an "ordinary" controller, CPDP will be responsible and could exercise supervision thereover.

All the above considerations made by the Bulgarian CPDP could be well applied for the data processing activities conducted by arbitral institutions/arbitrators. There is no ground to exclude arbitration as a dispute resolution mechanism from the scope of judicial activities in a broader sense. The dispute resolution via arbitration is after all a form of exercising judicial competence. The fact that these judicial powers are exercised by a private body/individual, does not change the nature of the processing as being necessary to resolve a pending dispute. Moreover, it is the respective Member State's legislation that entitles arbitrators to resolve commercial disputes, i.e. dispute resolution through arbitration is a state-regulated activity and the individuals/bodies resolving such disputes should be seen as being part of the judiciary for the purposes of GDPR.

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14) Note of the author: At the time of issuance of this statement the legislative amendments in the Bulgarian data protection legislation aiming to synchronize it with GDPR and providing for such supervisory functions for the Inspectorate were not finally adopted by the National Assembly. These amendments were later introduced in February 2019.

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15) This term is introduced by the European Data Protection Board (EDPB) – see EPDB Guidelines 3/2018 on the territorial scope of the GDPR (Art. 5) – Version for public consultation, adopted on November 16, 2018, 13.

16) Id., EDPB also quotes CJEU Weltimmo v NAIH (C-230/14), paragraph 31.
related processing for providing dispute resolution services should be deemed conducted in the context of that establishment.

2. Targeting Criterion

The targeting criterion supplements the establishing criterion by providing for additional scenarios where GDPR could be applicable for processing activities taking place outside the EU. For commercial arbitration the hypothesis where arbitrators and arbitral institutions located outside EU provide dispute resolution services to individuals located in the EU seems to be of practical importance. The citizenship or legal status of the data subject located in the EU does not affect (i.e. cannot limit or restrict) the territorial scope of the Regulation as per Art. 3(2) of GDPR.\(^7\)

As per this criterion, e.g. a China-based or Russian-based arbitral institution or arbitrator could become subject to GDPR’s requirements. It is important however to assess whether such an institution or a practitioner proactively targets individuals in the EU with its services. The mere accessibility of a website from EU and its maintenance in English which is the standard business language worldwide would most likely not be sufficient to justify the presence of the targeting criterion (as per the argument of Recital 23 of GDPR). Furthermore, according to the European Data Protection Board (EDPB) "the mention on the website of its e-mail or geographical address, or of its telephone number without an international code, does not, of itself, provide sufficient evidence to demonstrate the controller or processor's intention to offer goods or a service to a data subject located in the Union".\(^8\) However, Recital 23 explicitly acknowledges that factors such as the use of a language or a currency generally used in one or more Member States with the possibility of ordering goods and services in that other language, or the mentioning of customers or users located in the EU may be deemed relevant for proving the controller's intention to offer goods or services to data subjects in the EU. Bearing these considerations in mind, if an arbitral institution located e.g. in the USA maintains on its website the tariff for the provision of arbitration services or a calculator for estimating the arbitration costs in both USD and in EUR, this can be an indication for targeting the EU market and thus, triggering the GDPR’s applicability to such processing activities by virtue of Art. 3(2)(a) of GDPR.

The applicability of the targeting criterion should be carefully assessed taking into account the particular circumstances of each respective situation. In any case, however, its presence in GDPR proves that the standard territorial-based approach for applying the EU rules is being further expanded. The very nature of modern technologies and relationships requires the creation of

\(^{17}\) Id. at 13.

\(^{18}\) Id. at 16. See also the examples given by the EDPB on the matter.

provisions like Art. 3(2) of GDPR. All this means that any organization or practitioner, including practicing in the area of commercial arbitration, regardless of where its main establishment and practice is, should consider the potential applicability of the EU data protection rules to its activity in case it provides its services on the EU market. Probably the safest approach for organizations and practitioners such as arbitral institutions and arbitrators offering their services worldwide, including on the EU market, will be to comply with GDPR. As some authors say, GDPR serves "as a standard for updates to data protection regimes globally".\(^{19}\) This means that being compliant with the most stringent regime possible might be a safe bet for providing services, including dispute resolution ones, in an international context.

II. Main Consequences of GDPR’s Applicability Towards Commercial Arbitration

The fact that GDPR applies to commercial arbitration from a material point of view and could also be applied to commercial arbitration from a territorial point of view leads to at least two important consequences. First, the main actors in commercial arbitration, namely arbitral institutions and arbitrators, need to be qualified within the roles envisaged in GDPR (controllers, processors, joint controllers), as the different roles of the parties predetermine different scope of obligations (A.). Second, depending on the role they have, they must be able to fulfill the respective obligations attributed to that role by the Regulation (B.).

A. The Role of Arbitral Institutions and Arbitrators from Data Protection Perspective

1. Arbitral Institutions

The institutions do not themselves resolve disputes but administer the resolution of disputes by sole arbitrators and arbitral tribunals in accordance with their rules.\(^{20}\) The institutions engage in various data processing operations related to the arbitration services proved by them such as:

\(^{19}\) Hay, supra note 7.

\(^{20}\) This is explicitly acknowledged in various arbitration rules such as Art. 1(2) of ICC Arbitration Rules "The Court does not itself resolve disputes. It administers the resolution of disputes by arbitral tribunals, in accordance with the Rules of Arbitration of the ICC (the 'Rules'). The Court is the only body authorized to administer arbitrations under the Rules, including the scrutiny and approval of awards rendered in accordance with the Rules ..."; Art. 1 of the SCC Rules "The Arbitration Institute of the Stockholm Chamber of Commerce (the 'SCC') is the body responsible for the administration of disputes in accordance with the 'SCC Rules'; the Arbitration
2. Arbitrators

Irrespective of whether ad hoc or institutional arbitration is subject to examination, in either scenario the arbitrator is the most important figure in the dispute resolution process. The arbitrator is a third neutral natural person that is appointed by either of the parties or by another person (e.g. arbitral institution, appointing authority, the other arbitrators from the tribunal, etc.) whose main task is to resolve the dispute provided to him/her.

Of course, there might be some national peculiarities determining the role and exact relations of the arbitrator with the parties and the arbitral institution (if any). In Bulgarian legal doctrine it is accepted that a special civil relationship arises between the arbitrator and the parties according to which the arbitrator has the obligation to consider and resolve the dispute referred to him/her, and the parties that have assigned the resolution of the dispute – to pay remuneration therefor.23) Such a relationship arises not only where both parties agree to appoint a given arbitrator, but also where one of the parties refuses to participate in the constitution of the arbitral tribunal and the respective arbitral institution/appointing authority appoints an arbitrator instead. The consent of the parties for establishing an arbitral tribunal and determination of arbitrators in such a case is expressed by concluding an arbitration agreement. In order for this civil relation to arise, consent of the arbitrators is required as well. Further to that, Prof. Stalev clarifies that each of the parties is in a legal relationship with each of the arbitrators and not only the one designated by it.24)

Considering the above considerations, it can be concluded that the purposes of processing the personal data within the arbitration proceedings are determined by law and (to some extent) by the parties through the arbitration agreement. The parties cannot resolve the dispute via arbitration on their own, they need the involvement of the third neutral person(’s) to consider and resolve the case. In addition, the arbitrator is the one who determines the means of the processing. A person determining the purposes and means of the processing is considered a data controller. The definition of a data controller under Art. 4(7) of GDPR explicitly acknowledges the possibility that data controllers may have the purposes of the data processing determined by law. Therefore, arbitrators should be qualified as data controllers under the meaning of the data protection legislation at least for the purposes of conducting the arbitration proceedings, consideration and resolution of the dispute, for tax and accounting purposes regarding the received arbitrator fees, for establishment and defense of legal claims that may be brought by the parties against the arbitrators.

This conclusion is also supported by Recital 91 analyzed above which explicitly recognizes the lawyer as a data controller.

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23) Stalev, supra note 20, at 37.
24) Id.
B. Key Obligations

The fact that arbitral institutions and arbitrators are data controllers entails significant responsibilities to them under the data protection legal framework. The present paper will focus on some of the most important ones under GDPR without claims for exhaustiveness. In that respect, subject to analysis below will be the record-keeping obligation (1.), the necessity to ensure security of the processing (2.), the appropriate regulation of the relations with data processors (3.).

The requirement to implement privacy by default and privacy by design principle remains outside the scope of the present analysis, as well as certain obligations which may apply in specific circumstances such as the data transfers to third countries outside EU or others which are unlikely to be applicable at all in the traditional forms of arbitration – these include conducting data protection impact assessments and appointing data protection officers.

1. Keeping Records of Processing Activities

GDPR envisages one key principle – accountability (Art. 5(2)). Being accountable under GDPR means being able at any time to prove compliance with GDPR which inter alia requires keeping documentary evidence and proof that the GDPR requirements have been met by the respective data controller.

In this regard, one of the key new obligations imposed by GDPR in terms of ensuring accountability is the obligation to keep records of the processing activities (Art. 30). This new record-keeping obligation replaces the old general notification regime imposed by Directive 95/46, according to which controllers needed to notify the supervisory authorities before engaging into data processing operations. The European legislator considers such notification

obligation to be inefficient and producing unnecessary administrative and financial burdens for the controllers (see Recital 89 in that respect).

The records need to be kept in writing, including in electronic form (Art. 30(3) of GDPR). The records are internal documentation, i.e. they need to be kept by the respective controller/processor without having to be accessible for each and every data subject. The records of the processing activities under Art. 30 of GDPR are a key tool for ensuring accountability because they must be made available to the supervisory authority on request (Art. 30(4) of GDPR).

Thus, in case of a GDPR audit conducted by the supervisory authorities, the records of processing activities could play a crucial role in terms of proving compliance with GDPR by providing a clear picture of the various types of processing operations conducted by the respective controller/processor.

It should be noted that arbitrators who regularly participate in arbitration proceedings, i.e. whose professional activity is related to the provision of dispute resolution services, as well as arbitration institutions are obliged to keep records of their processing activities related to the arbitration services. They cannot rely on the exception of Art. 30(5) of GDPR which provides for an exemption of the record-keeping obligation for controllers/processors whose enterprises consist of less than 250 employees. Where given data controller conducts processing that is not occasional, it is obliged to keep records of processing activities irrespective of the numbers of its employees.

Therefore, a single arbitrator, who on regular basis participates in arbitration proceedings, is considered to conduct not occasional processing and as a result needs to keep records with the content prescribed in Art. 30(1) of GDPR. The same considerations apply to arbitral institutions for which providing dispute resolution services is an ordinary business activity.

2. Ensuring Security

Art. 5(1)(f) of GDPR proclaims the principle of integrity and confidentiality, namely that the personal data should be processed in a manner that ensures appropriate security of the personal data, including protection against unauthorized or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organizational measures. Art. 32 of GDPR supplements this principle by envisaging that controllers/processors are obliged to implement appropriate technical and organizational measures (TOM) to ensure a level of security appropriate to the risk for the rights and freedoms of the natural persons, the so-called risk-based approach. Criteria that need to be considered by controllers when deciding what TOM to

27) More about this principle in the context of commercial arbitration can be found in Martin Zahariev, Data Protection in Commercial Arbitration: In the Light of GDPR 149–152 (2019).
28) More about the data transfers to third countries in the context of commercial arbitration can be found in id. at 205–214.
29) More about this requirement and the specific cases where it might be applicable in the context of commercial arbitration can be found in id. at 184–187.
30) More about this requirement and the specific cases where it might be applicable in the context of commercial arbitration can be found in id. at 187–200.
implement include: (i) the state of the art, (ii) the costs of implementation and (iii) the nature, scope, context and purposes of processing and (iv) the risks that may arise in the processing.

In brief, this means that arbitrators and arbitral institutions need to implement TOM which correspond to the risk of data processing in commercial arbitration. It is virtually impossible to draw an exhaustive listing of concrete measures that need to be applied in commercial arbitration. One type of TOM needs to be applied by the sole-practicing arbitrator that uses only email for communication and keeps the files related to a given case on paper in his office where only one secretary is employed. Other types of measures need to be applied by an arbitrator who is also a practicing lawyer and is part of a big law firm with more than 50 employees and receives and keeps all the arbitration-related documentation in the law firm’s office. A third type of TOM needs to be applied by arbitral institutions which communicate with arbitrators and parties via various channels such as email, web-based platforms for storage of documents, cloud solutions, etc. Therefore, the specifics of the concrete processing situation need to be carefully evaluated by controllers when establishing appropriate TOM.

There are multiple examinations in the legal doctrine devoted to appropriate TOM.34) The obligation to ensure security should not be undermined, as any personal data breach triggers the obligation to notify the respective supervisory authority within 72 hours after becoming aware thereof (Art. 33 of GDPR) and where it is likely to result in a high risk to the rights and freedoms of natural persons – the obligation to communicate the personal data breach to the data subject without undue delay (Art. 34 of GDPR). Recently there has been significant sanctioning activity for not applying appropriate security measures – see e.g. the fine intention of UK supervisor to fine British Airways35) and Marriott International,36) as well as the fine imposed on the Bulgarian


National Revenue Agency37) and Bulgarian DSK Bank EAD.38) This proves that the violations for not applying appropriate TOM are amongst the most common and most severely sanctioned in 2019. Lastly, the reputational damage that could be caused by non-ensuring the appropriate security of information (including the personal data) processed within the arbitration proceedings for any arbitral institution or arbitrator could be irreparable.

3. Regulating Relations with Data Processors

Data processors are natural or legal persons, public authority, agency or another body which processes personal data on behalf of the controller (Art. 4(8) of GDPR). The controller may at its discretion decide whether to process the personal data itself or due to various reasons (economic, logistical, managerial, technological, etc.) outsource all or part of the processing activities to other persons (processors). Therefore, the engagement of processors by arbitrators or arbitral institutions is not mandatory, it is optional. What is mandatory, however, is that if such processors are engaged, the relations with them need to be appropriately regulated in accordance with the requirements of Art. 28 of GDPR. In simple words, a detailed agreement (in practice commonly called “Data Processing Agreement”) allocating the respective responsibilities between the parties and describing the nature, purpose and the requirements of the processing needs to be concluded between the controller and any processor who the former may decide to engage.

In order to properly arrange the relationships with a given processor, one must be able to distinguish who acts as a processor. The following is a non-exhaustive listing of some of the most common scenarios where a controller-processor relationship may arise in the context of commercial arbitration:

- **Co-location service providers, i.e.** providers who maintain data centers where servers and networking equipment of third parties are stored. If arbitrators/arbitral institutions use servers whose equipment is not based in their office but in data centers instead, then such arbitrators/arbitral institutions use the services of a co-location service provider acting as a processor;

- **IT maintenance** - if the arbitrators/arbitral institutions use a given software for their normal activities, this software is maintained by an external organization, any problem fixing, debugging, etc. might require the IT maintenance team to be given access to the personal data (parts thereof) contained in the respective system. Such pro-


cessing activities related to the maintenance could also lead to a controller-processor relationship:

- **Cloud solutions** – if the arbitrators/arbitral institutions use cloud solutions for storage of their information and the cloud is owned by an external service provider (e.g., Amazon, Google, Apple, etc.), a controller-processor relationship would arise for the storage of the personal data contained in the cloud-kept information;
- **Internet service providers (ISPs) of hosting services** – they are considered processors for the personal data published online by its customers who use this ISP for their website hosting and maintenance. Thus, if an arbitral institution maintains a website (which is usually the case), the described relations with ISP would be of the nature controller-processor;\(^{39}\)
- **Accounting services** – some smaller arbitral institutions might opt to outsource the accountancy activities instead of hiring a separate employee to perform this task. Similarly, arbitrators and lawyers that are sole practitioners usually conclude a contract with an external accountant. In such a case, a controller-processor relationship is likely to result in the processing of the personal data related to the provision of accountancy services;\(^{39}\)
- **Translators** – there are solid arguments for qualifying external translators as processors as they act on behalf of the controllers and perform an activity (to translate from one language into another) that can be performed by the controller itself (e.g., via secretary or other similarly qualified employee). A controller-processor relationship would arise only regarding the processing of the personal data contained in the documents subject to translation.

For the sake of clarity, it must be acknowledged that arbitral institutions/arbitrators exchange personal data with various other third parties. If such third parties are subject to a strict and detailed legal regulation and perform their activities on the basis of a license or a similar individual permission from a state authority/body, in general, should not be considered processors, but

\(^{39}\) See in that respect the Art. 29 Working Party (Opinion 1/2010 on the concepts of “controller” and “processor”, adopted on February 16, 2010, WPI69, 25).

It is also important to consider any national-specific rules that might require arranging the relationships with accountants in a different manner, i.e., to qualify them as “independent controllers”. Such a case might arise where accountants are imposed a statutory obligation to retain the information created during the existence of the assignment contract for a certain period of time after its termination. Then, the necessity to meet these statutory requirements would qualify the accountants as controllers. More regarding the role of the accountants – see the Art. 29 Working Party (Opinion 1/2010 on the concepts of “controller” and “processor”, adopted on February 16, 2010, WPI69, 29).

III. Conclusions

The realities of today demand from all business actors – including those who provide dispute resolution services, such as arbitrators and arbitral institutions – to take into account their compliance obligations very seriously. Information, in particular sensitive business information and personal data, is and will remain the key resource in the 21st century society. At the same time, every consumer and every business demand and will continue to demand faster, efficient and more secure services in any area, including in arbitration.

All this means that achieving GDPR compliance in the area of commercial arbitration is not mission impossible. Quite the contrary, it is a necessity, a *conditio sine qua non*, an absolute must in order to remain competitive and attractive on the market. In commercial arbitration, as well as in any other form of dispute resolution, the very core of the service is related to processing commercially sensitive information. Therefore, only the arbitrators and arbitral institutions who are able to prove they properly safeguard the trusted information, including the personal data contained therein, would attract new customers and businesses.

It is true that the GDPR requirements are stringent, detailed, and difficult to understand for most of the non-privacy legal experts. Nonetheless, only by exploring and analyzing the relevant legal framework, by flagging the problems and by seeking appropriate and compliant solutions will the arbitration community be able to face the new challenges of the GDPR. The aim of the present paper is exactly this – to shed some light on the arbitration activities from a data protection perspective and to support the key actors, arbitrators and arbitral institutions, in their day-to-day routine activities.

The arbitration community should not be afraid to make changes. Quite the opposite: If necessary, appropriate measures need to be taken to ensure GDPR compliance. Undertaking complex reconstructions for circumventing the applicability of GDPR towards commercial arbitration is not the right approach. Commercial arbitration will remain an attractive alternative to state court litigation only if data protection requirements are seriously considered, and the necessary accountability and transparency are achieved.

The views and opinions expressed herein are those of the author and do not necessarily reflect those of Dimitrov, Petrov & Co., Law and Internet Foundation, their affiliates, or their employees.

Enhancing the use of Arbitration through Dispute System Design:

The Brazilian Case

Carmen Sfeir Backsmann

I. Introduction

The purpose of this article is to discuss how a strategic, tailor made dispute system design (from now on DSD) elaborated for companies doing business in Brazil, can improve the success of Adequate Dispute Resolution methods (from now on, ADR's) and especially, the use of arbitration.

On the one hand, it is an undisputed reality that the Brazilian Judicial system has been overloaded for many years now. On the other, there is a general consensus that arbitration is thriving in terms of quality of the arbitral institutions, as well as in terms of qualification of the arbitrators and the arbitration counsels.

It is nowadays of the utmost importance for companies investing or otherwise, doing business with Brazilian partners, to count with a strategic, tailor made DSD for the prevention and the resolution of disputes. It is also essential for those companies to improve their processes for conflict avoidance and/or for conflict reduction, by choosing the adequate ADR for each kind of conflict and by creating the correct sequence for the application of the ADR's in order to prevent and solve disputes in a cost effective and speedy manner.

These measures will certainly improve these companies' business experience in Brazil, will provide them with the legal certainty to develop their business, will save them money and, not less important, will preserve (or improve, as the case may be) their company image in the Brazilian market.

II. Access to Justice\(^1\) in Brazil – The Courts Situation

Brazil is the biggest country in South America, rich in natural resources and a huge market. It is clear from this that foreign companies should think

\(^1\) Kazuo Watanabe, Acesso à Ordem Jurídica Justa 3 (2019).