

Client Alert

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Heightened Audit Risk for Users of mySAP ERP and Other SAP Products

Emboldened by its recent victory in [SAP v. Diageo](#) (2017) EWHC (TCC) 189, SAP may become even more opportunistic when it comes to auditing its customers' use of various SAP products. On February 16, 2017, the England and Wales High Court of Justice, Queen's Bench Division (Technology and Construction Court) ruled that the use by Diageo's sales representatives and customers of various software systems that pulled data from and pushed data to Diageo's instance of mySAP ERP, even though there was no direct access to or use of mySAP ERP by such sales representatives or customers, constituted impermissible access to and use of mySAP ERP under Diageo's license agreement with SAP.

Brief Recitation of Relevant Facts

Diageo and SAP executed a software license and maintenance agreement (Agreement) on May 28, 2004. Among other products licensed under the Agreement, Diageo licensed SAP's mySAP ERP software product. mySAP ERP performs a variety of functions, including materials management, logistics execution, quality management, financial supply chain management, service delivery, recruitment and payroll management. mySAP ERP links each of the foregoing functions together. Diageo also licensed SAP Process Integration (SAP PI), an infrastructure exchange engine that facilitates communications between different SAP systems and between SAP systems and non-SAP systems.

In 2011, Diageo engaged Deloitte to develop two additional systems, Connect and Gen2, using a platform supplied by Salesforce.com. Connect permits Diageo's customers to place orders for products directly through an online portal, while Gen2 permits Diageo's sales associates to collect relevant data to manage and track sales. Connect and Gen2 interact with mySAP ERP using SAP PI.

The parties did not dispute that certain classes of users (e.g., Named Users) who logged directly into mySAP ERP and used its functionality were entitled to such access and that the license fees under the Agreement applied. The dispute, instead, focused on the users of Connect and Gen2. While neither those users nor Connect or Gen2 accessed or used mySAP ERP directly, SAP alleged that Connect and Gen2 used SAP PI to access and process certain data stored in mySAP ERP. In other words, SAP argued that two non-SAP systems indirectly accessed Diageo's instance of mySAP ERP, using an SAP software engine, SAP PI.

Summary of the High Court's Opinion

In short, the High Court found that: (i) any direct access or use of SAP PI to obtain or submit data to mySAP ERP constituted indirect access and use under the Agreement; (ii) the interactions between Connect and mySAP ERP, even if taking place through SAP PI, constitute indirect access to and use of mySAP ERP; and (iii) the interactions between certain classes of users of Gen2 and mySAP ERP, even if taking place through SAP PI, constitute indirect access to and use of mySAP ERP. While the opinion gets into much greater detail, the key factor the High Court used in reaching these findings was whether the various systems (i.e., SAP PI, Connect and Gen2) could perform their tasks absent interaction with mySAP ERP. SAP claimed damages of approximately £55,000,000 for license and maintenance fees owed, though quantum trial, which is yet to commence, will be required to determine the sum payable.

The court's decision as to quantum will be informed by the Named User license category or categories into which the Connect and Gen2 users fall. Importantly, the High Court rejected SAP's argument that all of these users were Professional Users (one of the most expensive categories).

Potential Impact on Licensees of SAP Products

The "indirect access" issue is not necessarily a new one for SAP. Through a combination of broadly drafted license scope and audit provisions in its existing agreements, SAP has sought for years to impose license fees upon certain of its customers for "indirect access" violations. However, absent a judicial finding that such indirect access resulted in impermissible use, SAP often "settled" its disputes with its customers for pennies on the dollar. Now, with judgment in hand, SAP likely believes that it will have greater leverage in these disputes and increase the frequency of its audits. Now is the time for SAP customers to review their existing contracts with SAP (and related technical solutions) to determine whether they are at risk for claims by SAP of impermissible indirect access and use of SAP products. The global technology and outsourcing team at Hunton & Williams LLP has significant experience with SAP, including negotiating SAP agreements on the front end to avoid these risks and reviewing existing agreements to determine whether the risk is present.

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