

SWISS CHINESE

LAW REVIEW

German Virtual AGMs
and the Emergency Law

How Covid-19 has
Fostered Switzerland's
International Litigation
Hub



Thermal Cameras and
GDPR

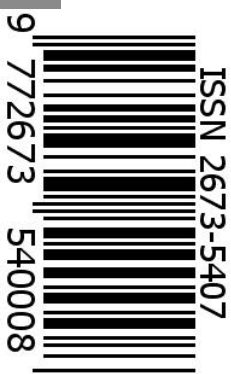
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How the Legal World
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Time To Unite

People across the world are facing a common enemy. This enemy does not recognise race, nationality or religion. The pandemic has exposed the fragility of business as usual. It left us physically isolated from each other. The predicted global recession, soaring unemployment, travel embargoes and long-term self-isolation terrify us.

However, hopefully, the pandemic has taught us something. It softened us, humbled us and humanised us. The pandemic has inspired incredible acts of generosity and courage. It is these human actions that have given us an opportunity to create a new kind of future.

For legal professionals, Covid-19 will ultimately make institutions, law firms and attorneys more agile, lean and adaptable. The pandemic now requires lawyers who facilitate transactions and resolve disputes that span a wide array of legal systems with vastly different legal cultures. The legal profession is being reshaped.

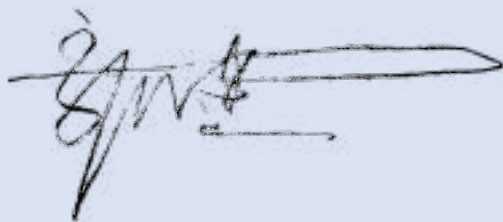
As we battle this coronavirus, it is the time for the legal professionals to unite. It is the time to understand each other and collaborate across different cultures. It is the time that we should cherish on our common values, to cherish the unity and to pride the goals rather than our differences. On a practical level, it is the time to find better protocols to collaborate in online hearings. It is the time to convince courts to take more effective measures toward the pandemic.

It is with this in mind that the first issue of the Swiss Chinese Law Review is born. In compiling this edition, we have been blown away by over three hundred submissions from over forty-five countries and regions. It goes without saying that this would not have been possible had it not been for the huge devotion and time committed by fifteen translators, ten peer-reviewers and four editors. Here we wish to dedicate our sincere thanks to following colleagues for their absolutely essential voluntarily work:

Tianze Zhang (general Coordinator), Jianan Wei (assistant Editor), Peng Hu (translator), Ziru Qu (translator), Haiyan Mao (translator), Min Dan (translator), Yuanhua Fu (translator), Shouwu Song (translator), Wenxin Yang (translator), Zhaoxia Deng (translator), Yin Kui (translator).

We also wish to dedicate our thanks to the colleagues who had helped us to review the articles: Peter Ruggle, Caroline Dulercq, Ameli Koroosh, Fei Tang, Raphael Zumsteg-Yuan and Hermann Knott.

This is a great time to unite. Let us not take this opportunity for granted. The future is what we make of it.



Guo Jian



David Dahlborn



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Court and Arbitration Proceedings During the Covid-19 Crisis in the UK


Elizabeth Chan & Jeff Yiu

As of early May 2020, the UK was one of the countries hit hardest by the Covid-19 crisis. It has reported the fifth largest number of Covid-19 cases in the world, and some 44,000 deaths. Like many countries, the UK government has ordered a nation-wide lockdown. The public was required to stay at home for arbitral proceedings, the London Court of International Arbitration has remained operational, but its staff has been working remotely since 19 March 2020. Filings are made through the court's online filing system or by email. Likewise, documents and correspondence relating to ongoing arbitrations, as well as arbitral awards, are communicated electronically. The LCIA has also, together with other major arbitral institutions, issued a joint statement expressing their commitment to supporting the international arbitral community's ability to ensure that cases are heard without undue delay.

On 23 April 2020, the Government also designated certain lawyers and legal professionals as "key workers", who are entitled to priority access to testing for Covid-19.

Despite these arrangements, commercial parties seem nonetheless to have delayed bringing non-urgent legal disputes. The

number of new court claims filed in the commercial courts fell by fifty percent in the run-up to Easter, compared with the same point last year.

Elizabeth Chan and Jeff Yiu are associates at Three Crowns LLP, London, UK. The views expressed in this article do not necessarily reflect the views of Three Crowns LLP or its clients. 

Swiss Start-ups Gain Covid-19 Support

Peter Ruggle

On 22 April the Swiss Federal Council enacted financial support measures for start-ups in Switzerland. Prior to this, most start-ups had no access the government's general financial measures set out in March, which was limited to financial support of up to ten percent of the sales generated in the preceding business year. Unable to present significant turnovers in their prior years, many start-ups found themselves ineligible for such credit. Furthermore, the pandemic has made raising start-up funds more complicated.

According to the new loan scheme start-ups must:

- Have been incorporated after 1 January 2010 but before 1 March 2020.
- Have been incorporated as companies limited by shares (*Aktiengesellschaft*) or limited liability companies (*Gesellschaft mit beschränkter Haftung*).
- Be suffering from significant financial and liquidity problems due to Covid-19.
- Have its registered seat in a Swiss Canton participating in the scheme.
- Not be over-indebted according to article 725 paragraph 2 of the Swiss Code of Obligations and not be subject to bankruptcy or composition proceedings or in liquidation.


- Provide a scalable, science- or technology-based, innovative business model.
- Not be part of the agricultural sector.

The government-backed loan scheme grants up to CHF 1,000,000 per startup company. The total amount may not exceed one third of the start-up's 2019 running costs, counting salaries, investments (as far as not eligible for capitalisation), rents, patent applications and patent lawyers, internal or outsourced research and development procedures.

A company's business model will be evaluated by cantonal bodies, with the possible support of the Swiss Innovation Agency.

The total support guaranteed by the federal government and the participating cantons is CHF 154 million. The federal government will guarantee 65 percent of the loan, participating canton's backing the remainder. The scheme is not mandatory for any canton.

Applications must be submitted by 31 August 2020 at: www.covid19.easygov.swiss/en/startups. After evaluation and approval by the canton it will be reviewed by an additional federal organisation which prepares the loan guarantee. After this final decision the start-up may apply for a loan from any bank.

Peter Ruggle is the an attorney at law and the owner of Ruggle Partner, Zürich, Switzerland. 



Brief Summary of The Progress of Legal Developments in Argentina

Javier Canosa

In response to the Covid-19 pandemic the Argentine government issued several mitigating regulations in recent months. Social isolation measures were repeatedly extended, most recently for another fifteen days on 23 May.


Face-to-face teaching was suspended for the social isolation period but educational establishments were to remain open to allow the developmental of administrative activities. They were also tasked to coordinate social services and pedagogical activities.

International borders were closed for all residents and nonresidents force from the beginning of the pandemic on 16 March. The government has stopped all commercial flights until 1 September, after which tickets may be sold with prior authorisation from the regulatory body.

In the judicial sector, an extraordinary recess was declared for the Federal Court and national courts as of 20 March 2020. It was also extended alongside the social

isolation period. Argentine tax authorities issued similar resolutions and rolled out tax reliefs for companies and extensions on tax returns.

Sanctions and criminal complaints under sections 205, 239 and concordant provisions against the spread of diseases of the National Criminal Code were ordered against anyone in breach of regulations and could face criminal charges.

Javier Canosa is a partner at Canosa Abogados. 

Shielding The Biotechnology Industry in Spain

Maite Vazquez Calo

The health, pharmaceutical and biotechnology industries have gained special relevance in the Spanish regulation of the Covid-19 crisis. In particular, biotechnology has played a leading role since the Royal Decree-Law 8/2020 of 17 March on extraordinary urgent social and economic measures.

This new regulation has focused on preventing foreign investors from taking control of Spanish companies that could be involved in the study of Covid-19-related vaccines and drugs. However, the wording of the precept is not limited to biotech companies involved in the race for a vaccine.

According to the regulation, biotechnology in the broad sense of the term, along with other activities, has been considered as a strategic sector. In this sense the royal decree modifies Law 19/2003 of 4 July on the legal regime of capital movements and economic transactions abroad. It adds Article 7 bis which suspends of the liberalisation of certain foreign direct investments in Spain relating to public order, public safety and public health. It suspends foreign investments when the investors hold a stake equal to or greater than 10 percent of the share capital of a Spanish company, or when, as a consequence of the transaction, foreign investors effectively partic-



Source: Unsplash

ipate in the company's management or control.

Therefore, foreign investment will be unable to make investments or control Spanish companies in critical fields such as nanotechnology and biotechnology.

The new Regulation, in principle, is expected to be maintained throughout Spain's 'state of alarm' – until 7 June, unless further extensions are passed. However, it has not been indicated by the authorities that this decree will be revoked immediately.

The effect for the biotech industry was immediately apparent as many foreign investors have been forced to put ongoing deals on hold.

It is likely that in the coming months, once the market has reopened, that we will see multiple transactions in the health industry due to the international relevance that it has taken because of the pandemic. It is possible that many countries will follow the Spanish path to protect their biotechnology companies from foreign investors, maintaining control of the research and advances in the field. The pandemic has revealed the tensions between this industry's strategic significance for national economies and global trade.


Maite Vazquez Calo is the founder of VC Biolaw SLP, Madrid, Spain. 



Photo by Sasha Stories on Unsplash

India

Souvik Ganguly

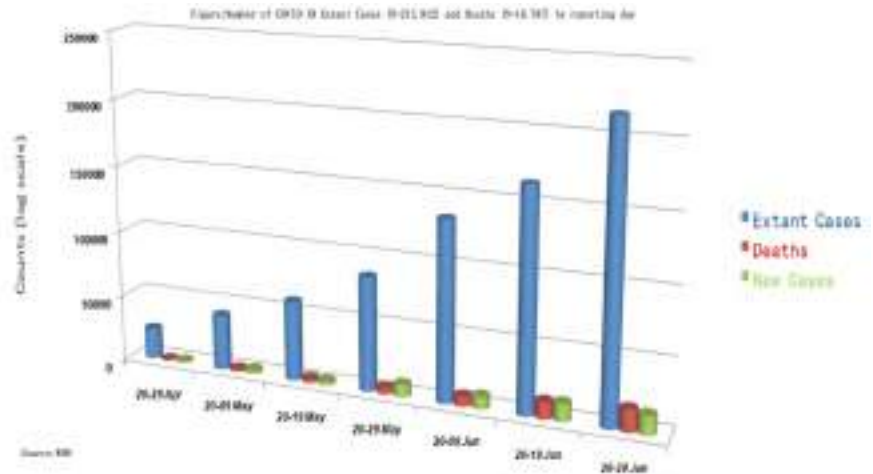
On 19 February the Indian government clarified that supplychain disruption due to spread of Covid-19 in China or other countries will be covered within the force majeure clause of any contract that includes one. Without this clarification, it is possible that the pandemic may not have been treated as a “natural calamity” event.

The upsurge of Covid-19 in India has disrupted activities in every sector including the judiciary. Indian courts have taken prompt measures to prevent a breakdown of the justice system. On 6 April the Supreme Court of India, directed that:

- (i) All high courts shall ensure the functioning of the judicial system through video conferencing (VC) technology.
- (ii) District courts in every state shall adopt VC technology prescribed by the appropriate high court.
- (iii) Courts shall make VC facilities available for those litigants who do not have access to these facilities, including appointment of lawyers as amicus curiae and making VC facility available to advocates.
- (iv) Arguments can be heard on the VC both during trial and appellate stages. However, evidence shall not be recorded using VC except with the mutual consent of the parties.

On 18 April the Department of Promotion of Industry and Internal Trade, in its Press Note 3 of 2020 (PN-3), announced that prior government approval would be required for foreign direct investment from an entity based in a country bordering India or if the owner of the beneficial interest is situated in or a citizen of such a country. The government’s intention is to curb opportunistic takeovers and acquisitions of Indian companies during the pandemic.

Prior to PN-3, Chinese did not require prior approval, except in sensitive areas such as telecom, defense and national security. While existing Chinese investments will not be impacted. However, any fresh infusion of funds by Chinese businesses will require government approval. Equally, any transfer of stocks by existing shareholders to Chinese buyers or to entities whose



Covid-19 Cases in India

beneficial holding may be held by entities in China, will also require government approval. At this stage it is unclear if Hong Kong will be treated differently in so far as this new policy is concerned.

Souvik Ganguly is the founder and head of Acuity Law, India.

Singapore

Nakoorsha A.K.

On 3 April, Singaporean Prime Minister Lee Hsien Loong announced a fourweek period of heightened safe distancing measures would be implemented to preempt an increasing local transmission of Covid-19, commencing 7 April. Most workplace premises, save for those providing essential services, were thereby closed, and schools moved towards full home-based learning. Following these measures, registrars’ circulars were issued by the Supreme Court, state courts and family justice courts stating that only essential and urgent matters would be heard during the distancing period and only, as far as possible, via electronic means of communication.

On 7 April 2020, the Covid-19 (Temporary Measures) Act 2020 (Covid-19 Act) was passed by Parliament. It sought

to provide businesses and individuals with temporary relief from legal action arising from their inability to perform contractual obligations under certain contracts due to Covid-19. The Covid-19 Act also provides temporary relief to financially distressed individuals and businesses, increasing the monetary thresholds and time limits found in bankruptcy and insolvency laws. Pursuant to Section 34(1) of the Covid-19 Act, the Covid-19 (Temporary Measures) (Control Order) Regulations 2020 also came into effect on 7 April 2020. It has seen several amendments to date in keeping up with the government’s incremental response to the Covid-19 outbreak.

On 21 April 2020, the government announced the extension of the safe distancing period to 1 June and implemented fresh, tighter distancing measures.

Nakoorsha A.K. is a lawyer at Nakoorsha Law Corporation, Singapore.

Nigeria


George Etomi

The Nigerian federal and state governments have taken various measures to contain Covid-19 and its effect on citizens’ lives and business. On 29 March the pres-

ident, pursuant to the Quarantine Act, Cap Q2 LFN, 2004, issued the Covid-19 Regulations 2020. It ordered the restriction of movement of people and goods in Lagos State, the Federal Capital Territory and Ogun State, except for essential services. Other states in Nigeria issued similar restrictions.

The Chief Justice of Nigeria sent out circulars suspending court sittings, except for “urgent, essential or time-bound matters”. In response, the Chief Judge of Lagos State issued the 2020 Practice Direction, introducing virtual filing and service of processes, the conduct of remote hearings via the use of appropriate technology to dispense justice. On 5 May, 2020, the State Judiciary delivered its first judgment via remote hearing in a murder and stealing case, Suit Number ID/9006C/2019.

Additionally, on 7 May, 2020, the committee established by the National Judicial Council, in a circular referenced NJC/CIR/HOC/II/660, issued guidelines to enable safe court sittings during the pandemic. The guidelines aim to strengthen the adoption of technological solutions in court and achieve uniformity in the formulation of Rules, Directives and Guidelines at federal and state levels.


These are innovative steps, in line with global trends. Notwithstanding the concerns in some quarters about its tendency to defile age-old traditions, such as seniority at the bar, we posit that Covid-19 will bring about a new normal in all aspects of our lives, including the legal profession. 

South Africa

Theo Boshoff

On 27 March South Africa’s Covid-19 regulations were amended to introduce a national lockdown, fifteen days after the World Health Organisation declared the pandemic to be global. Businesses were obliged to shut down operations unless employees are unable to work from home and individuals could leave their homes only to buy food or seek medical attention. All entities involved in the provision of essential goods or the performance of essential services – medical care, food and fuel production and distribution, including the import and export of essential goods – were exempted. Cabinet ministers were permitted to issue delegated legislation known as “directions” that can add additional restrictions, allow exceptions and clarify conditions under which essential services may operate.

The government decided that, due to the volume of companies required to operate essential services and the speed with which verification was required, businesses would conduct self-evaluations. They would determine which employees were required for essential services and issue them with permits to allow free movement. The restrictions are strictly enforced by the country’s police but no state of emergency has been declared as of yet. Non-compliance with restrictions was criminalised.

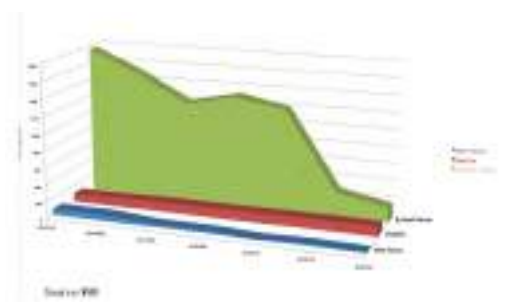
Restrictions were eased somewhat on 1 June. 

Malaysia

Keith Moo

The Minister of Domestic Trade and Consumer Affairs has implemented temporary protection measures between 23 April 2020 and 31 December 2020 to reduce the number of companies being wound up. This includes prescribing an increased debt threshold of RM10,000 to RM50,000 and exercised powers by:

- (i) exempting the statutory notice period of 21 days; and
- (ii) subjecting the exemption to a statuto-




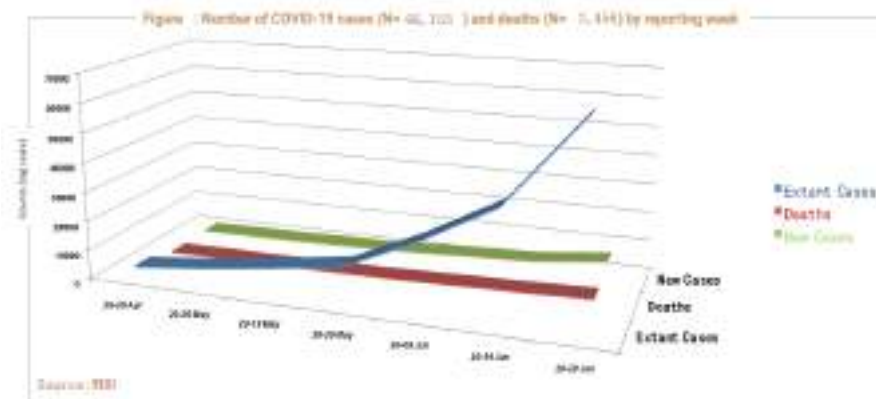
Covid-19 Cases in Malaysia

ry notice period of 6 months;

Recognition and Enforcement of Arbitral Awards – Federal Court. In dealing with an application for recognition and enforcement, a court is not required to go behind the award and to understand the arbitral tribunal’s reasoning. Only the dispositive portion of the arbitral award ought to be registered for purposes of enforcement of the arbitral award.

Online Hearing for Courts in Malaysia. On 24 April 2020, the Chief Registrar of the Federal Court stated that to ensure the continuance of access to justice during the extended Movement Control Order, parties can apply for online hearings for certain matters in the High Court, Court of Appeal and Federal Court.

Keith Moo is an advocate, solicitor and principal at Keith Moo & Co., Kuala Lumpur, Malaysia. 



Covid-19 Cases in South Africa

How Taiwan's Intellectual Property Strategy has Helped Quash the Outbreak

Ann Lai

As Covid-19 spreads around the world and many countries engage the research and development for test reagents, medicines and vaccines, issues of intellectual property rights have been pushed to the fore. Recently, the Taiwanese saying "Taiwan can help, Taiwan is helping" has reflected the determination to show international solidarity in the fight against Coronavirus by sharing knowledge of the how the epidemic was successfully controlled in Taiwan. The Taiwan Intellectual Property Office (TIPO) and the Ministry of the Interior (MOI), Ministry of Economic Affairs (MOEA), Industrial Technology Research Institute (ITRI) recently established a "National IP Team" to accelerate the creation of new technologies to combat the virus. In a brief period of time it has initiated some strategies for analysing and keeping track of Covid-19-related patents¹.

I. MOEA lead a National Mask Team and TIPO provided assistance for patent analysis for the mask manufacturing industry²

In response to the pandemic Taiwan's Ministry of Economic Affairs collaborated with machine tool manufacturers to establish the National Mask Production Team. The team would work to raise the quantity of face masks and also enhance their production. TIPO also publishes information on the overall global status of mask production machines and related technologies so the team's reference so they can avoid infringing patent rights. TIPO will provide a patent analysis services when the team needs their assistance. Currently, some twenty countries have enquired with regard to importing Taiwan-made hardware for manufacturing face masks. Furthermore, as the supply of masks now sufficient to meet basic domestic consumer demand, the government will allow manufacturers to sell and export abroad to help others country. Taiwan's Industrial Technology Research Institute (ITRI), Textile Industry Research Institute Foundation, and Precision Machinery Research Development Center (PMC) have collaborated with the prominent health care producers in a "Mask Industry Factory Export Alliance". This has helped integrate of supply chains and exports to the EU and USA are planned.³

II. Ventilator team: ITRI and the industrial community collaborated to develop a ventilator⁴

Following the national team for masks, MOEA actively organised a national team of respirators, which also expand the visibility of Taiwanese industry in the cutting-edge medical equipment sector. The result has been a medical grade ventilator prototype that is expected to go into trial production by the end of October.

III. Publishing worldwide anti-coronavirus patents and technologies with a user-friendly searchable database⁵

TIPO has set up a "Fighting Covid-19 area" within its Global Patent Search System (GPSS). With one single click technologies related to fourteen anti-Coronavirus industries, such as protective equipment, test reagents and vaccines, can be searched and show up in GPSS system. In addition, for registered GPSS members search conditions can include preferred technologies and the system will automatically show the latest patents. Member can also use statistical analyses, charts and

other valuable services that let the industry quickly grasp key information on the development of global epidemic prevention technology.

Following this information, pharmaceutical manufacturers could identify the patent situation and plan a market strategy. They could prepare licensing and design without having to over worry about patent infringements. Therefore, the future development or invention of new anti-Covid-19 medicines can be smooth and efficient and be marketed as soon as possible for the benefit of people all over the world.

IV. Service lines pertaining to anti-coronavirus trademarks

Some goods and sanitary items, like hypochlorous acid water and antibacterial dry-cleaning hand agent, have come into very high demand and present new business opportunities. Therefore, TIPO has compiled a list of classifications of "epidemic prevention goods and services" for trademark applicants. Simultaneously, the consultation hotline service has been opened where TIPO staff can assist how to conduct searches, provide analysis of the possibility of IP registration, help businesses to quickly swiftly and reduce marketing risks. Official trademark application fees have also been halved during the pandemic for online submissions.

V. Extending certain patent and trademark-related deadlines

If patent and trademark applications are delayed due to the pandemic and the statutory period for other procedures, such as payments for certificate or annual patent fees, requests for substantial examinations, re-examination or similar. In general,



cases will be determined within the statutory or designated period and with leniency to ensure the rights and interests.⁶

VI. Smart consultancy services at home and E-submission

Members of the public can access a professional volunteer consulting service from home. Patent and trademark applications during the epidemic period will also be received electronically during the pandemic.

1. <https://www.tipo.gov.tw/tw/cp-87-875526-a20c9-1.html>

2. <https://www.tipo.gov.tw/tw/cp-853-875532-0f3ee-1.html>

3. <https://www.chinatimes.com/newspapers/20200702000220-260202?chdtv>

4. ITRI Unveils Taiwan's First Medical Grade Ventilator Prototype Highlighting "Taiwan Helps, ITRI Helps" Spirit <https://www.globenewswire.com/news-release/2020/05/08/2030159/0/en/ITRI-Unveils-Taiwan-s-First-Medical-Grade-Ventilator-Prototype.html>

5. <https://www.tipo.gov.tw/tw/cp-853-874498-cb73d-1.html>

6. 1. The Legal period is defined accordingly:


(1) in accordance with Article 17 Paragraph, 2 of the Patent Act and Article 12 of the Enforcement Rules of the Patent Act or Article 8 Paragraph 2 of the Trademark Act and Article 9 of the Enforcement Rules of the Trademark Act, the applicant who apply for restoration shall explain the cause of the Covid-19 epidemic situation is When TIPO considers that it is necessary, it will extend the original specified period for another month; however, the appropriate time of more than one month may be extended depending on the specific case. Due to the delay in the legal period and attach the relevant certification documents to apply for the original status.

(2) If the applicant appoints Trademark/ Patent Attorney, which is affected by the Covid-19 epidemic and thus the applicant delays the statutory period, then the agent may present relevant evidence. In general, TIPO would be lenient in light of the specific circumstances of the case.

2. The Specified period is defined accordingly:

(1) If the applicant delays the Specified period due to the Covid-19 epidemic, the relevant actions can still be corrected before the punishment by the TIPO; if the applicant believes that the original Specified period is necessary for an extension due to the impact of the epidemic.

(2) When the applicant applies for the extension of the Specified period due to the Covid-19 epidemic: the extension of the Specified period will be based on the current review criteria and other practical regulations and the applicant is requested show the credible evidence and ground of the failure of comply the deadline.

Ann Lai is an attorney-at-law at Chien-Yen & Associate, Taipei City. 

Hong Kong SAR

Cherry Chan

Due to the Covid-19 pandemic, the Hong Kong Judiciary adjourned all court proceedings from 29 January. This was known as the General Adjournment Period (GAP) which lasted until 4 May 2020. During the GAP, exceptions were made for "urgent and essential hearings and/or matters". Given the volume of cases in the Court system, this has caused a tremendous backlog of court business.

During the GAP, the Hong Kong Family Court was relatively active in dealing with urgent cases, especially involving children. These included the temporary removal of children from Hong Kong and their "return" due to the pandemic. The Family Court also permitted Children Dispute Resolution hearings and hearings for interim maintenance to be conducted during the GAP.

Following the judgement of the Hon. Justice Coleman in [2020] HKCFI 347, which allowed a telephone hearing in the High Court be held during the GAP, family law practitioners also requested the Family Court to consider telephone hearings.

To minimise disruptions to proceedings, the Family Court dealt with various hearings by way of "paper disposal" without a live hearing in appropriate cases. In some cases, the court was able to deal with the matter based on the written submissions of the parties alone. This was appropriate for giving directions regarding the future conduct of the matter or simple applications, such as for extensions of time for the filing of documents.

The pandemic has been an opportunity for courts and legal practitioners to reassess how to manage cases cost-effectively and expeditiously in new circumstances.


Cherry Chan, Haldanes Solicitors and Notaries, Marketing Manager. 



Photo by Martin Sanchez on Unsplash

Lost in Transit: a brief case comment on Sabah Manal Collabawalla v. Union of India

Gagan Anand (Esq.) & Naman Anand

On 19 March a Mumbai High Court bench consisting of R. I. Chagla and S. J. Kathawalla disposed of an unusual writ petition under Article 226 of the Indian constitution.

The Writ Petition was filed by Sabah Manal Collabawalla, the mother of 19yearold Nyla Imaan Samee who had been stuck without assistance at the Dubai International Airport for the past six days. The airport was alleged to have misinterpreted the Indian Ministry of Health and Family Welfare's 11 March circular "Consolidated Travel Advisory for Novel Coronavirus Disease (COVID-19)" which concerned travellers arriving to India from Covid19affected countries.

Samee, who is both a US and Indian overseas citizen, was pursuing her Bachelor's degree at Tufts University, Massachusetts, when the pandemic broke out.

As instructed by her university authorities she left Boston for Delhi with Emirates Airlines via Dubai. However, Dubai officials denied her boarding due to a misinterpretation of the Indian official advice, having confusing the port of transit for the port of departure.

The Mumbai High Court immediately issued a writ of mandamus to ensure that Samee could be brought home. The judgement was lauded throughout legal circles in India for its promotion of human rights and effective usage of the judicial review mechanism.

Gagan Anand is the founding partner and Naman Anand is the managing partner at Legacy Law Offices, India. 

Source: Unsplash





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Photo by Kelly Sikkema on Unsplash

Thermal Cameras and Article 22 of GDPR: Profiling and automated decision making during the Covid-19 crisis

Mihovil Granic & Kristijan Antunovic

Introduction

Currently, the most common method of measuring body temperature to stop the spread of Covid19 is a standard thermometer. However, due to the virus's fastspreading nature there is now a huge number of proponents of using thermal cameras as an incomparably efficient way of detecting infections. Amazon, for instance, is already measuring the temperature of its employees through thermal cameras in their warehouses. Legal entities in the Republic of Croatia are pushing for a similar solution. Currently, two thermal cameras are be-

ing installed at the General Hospital in Pula. Other hospitals in Croatia are making similar plans. We have to ask ourselves how big the impact of such general digitalization will be. The same goes for the subsequent processing of health data on our privacy and basic human rights. What are the main issues of this type of automatic data profiling? And how do they clash with citizens' rights provided under the EU's General Data Protection Regulation (GDPR)?

Processing personal data during the coronavirus crisis

The GDPR normative framework imposes numerous obligations towards data controllers and data processors when dealing with natural persons' personal data. Technical and organizational measures for processing personal data legally and many others obligations are the responsibility of the controller. Extraordinary circumstances, such as the pandemic, add to the complexity of processing because of the additional obligations that controllers and processors must fulfil. This is especially true regarding health data. Article 4 of the GDPR defines data concerning health as: "personal data related to the physical or mental health of a natural person, including the provision of health care services, which reveal information about his or her health status".

However, the coronavirus pandemic cast a doubt on the legal basis for the processing of personal data during extraordinary circumstances. According to GDPR the basic principle of personal data processing is that it must be lawful, regardless of the external factors influencing it. The legal basis for processing personal data during the pandemic can be found in articles 6 and 9 of GDPR.

As the virus spread the European Data Protection Board (EDPB), and state supervisory authorities, acted relatively quickly. On 20 March 2020 EDPB issued a statement in which GDPR articles 6 and 9 were recognised as the relevant legal basis for processing personal data during the pandemic. As long as extraordinary circumstances persisted processing would be:

"necessary in order to protect the vital interests of the data subject or of another natural person", also important for 'the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller', as well as 'necessary for the purposes of the legitimate interests pursued by the controller or by a third party.'

However, since the certain data categories are more sensitive than other, the processing is generally prohibited. This applies to personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs and trade union membership. It also covers genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexuality. However, extraordinary circumstances call for extraordinary measures. Therefore GDPR article 9 provides that personal health data may be processed under certain conditions. Namely if "processing is necessary for reasons of substantial public interest, on the basis of Union or Member State law". It also allows processing if it is

"necessary for the purposes of preventive or occupational medicine, for the assessment of the working capacity of the employee, medical diagnosis, the provision of health or social care or treatment or the management of health or social care systems and services on the basis of Union or Member State law".

Furthermore, processing is possible when it entails "protecting against serious cross-border threats to health or ensuring high

standards of quality and safety of health care and of medicinal products or medical devices". As long as this processing follows EU or state law. As stated, measurement of with a thermometer is the basic way in which currently health data is processed. Currently, body temperature measurements with thermometers in Croatia are conducted strictly on an individual basis and the collected data is not stored or stored only for a shorter period of time – in accordance with the principle of data storage limitation. As with all personal health data, the legal basis for the usual measurement of the body temperature can be found in GDPR articles 6 and 9, which in our opinion represents a sufficient and flexible legal basis for such methods.

Thermal cameras and article 22 of GDPR

To speed up the fight against the virus, many certain commentators have suggested thermal cameras to detect fevers. Thermal camera can serve at least two different purposes here. They can a) rapidly detect a lot of people with a high body temperature and b) classify these data subjects into specific categories, such as "potentially infected" or "uninfected".

However, the excessive introduction of thermal cameras into our everyday life has the potential to trigger GDPR article 22. This article concerns the profiling of data subjects when coupled with automated decisionmaking. The title of the article 22 is: "Automated individual decision-making, including profiling". It states that: "The data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her."

As for the processing of special categories of personal data, article 22 contains a general prohibition on processing it. A simple analysis of articles 9 and 22 leads to a conclusion that article 9 deals with a specific category of particularly sensitive personal data, whereas article 22 deals with how we process data and the way we make decisions related to the processed data. This might include "regular" personal data, but also those which fall into a special category. Important to define its building blocks of article 22: Firstly, profiling and, secondly, automated individual decision making. In one of its recommendations, the Article 29 Working Party (A29WP) – who helped draft GDPR – also referred to Article 22, with regard to the numerous reactions from the scientific community. These reactions considered article 22 dubious since its first release. GDPR defines "profiling" as:

"any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyze or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behavior, location or movements".

Few constitutive elements can be extracted from this definition. The constitutive elements are: a) profiling must be automated, b) profiling must be performed on personal data, c) the goal of the profiling must be to evaluate certain personal aspects of the individual. The use of the verb 'evaluating'

suggests that profiling involves some form of assessment or judgement about a person. However, this may not always be the case. It is important to approach each case individually and assess whether the profiling occurs or not.

Automated individual decision making is a different concept which deserves its own explanation. A29WP define automated individual decision-making as the “ability to make decisions by technological means without human involvement.” Simply put, we allow artificial intelligence to make decisions and generate an output to achieve a specific purpose based on the processing of our personal data. Although profiling and automated individual decision-making are different concepts, they often go together. GDPR addresses the abovementioned concepts in following manner: (a) general profiling, (b) decisionmaking based on profiling and (c) fully automated decision-making, including profiling. The difference between (b) and (c) is in profiling. The decisionmaking is done by a human, while in case of wholly automated decisionmaking, including profiling, the decision making is done by an artificial intelligence. In our opinion, introducing thermal cameras in the fight against the coronavirus will, most likely trigger article 22.

The pursuit of efficiency and growth by means of digital technology would not make sense if we are not allowed to use its full potential. Therefore, the application of thermal cameras, without subsequent software solutions that will lead to automated decision making and profiling would not be present the most efficient means of data processing. Given that efficiency is the key to successfully defeating the pandemic, the course of action is obvious. As noted, the processing of personal data under article 22 is generally prohibited. However, paragraph 2 of the same article allows the processing of personal data if it is (a) “necessary for entering into, or performance of, a contract between the data subject and a data controller”, or (b) “is authorized by Union or Member State law to which the controller is subject and which also lays down suitable measures to safeguard the data subject’s rights and freedoms and legitimate interests”. A third option is also permitted: (c) when it is “based on the data subject’s explicit consent.”

This processing set out in article 22 paragraph 2 refers to “regular” personal data. Regarding the special category of personal data, article 22 paragraphs 4 prescribes the following:

“decisions referred to in paragraph 2 shall not be based on special categories of personal data referred to in Article 9(1), unless point (a) or (g) of Article 9(2) applies and suitable measures to safeguard the data subject’s rights and freedoms and legitimate interests are in place.”

Therefore, if data controllers want to process special category personal data that also includes profiling and automated decision making, they must meet certain additional requirements. They must protect the rights, freedoms and legitimate interests of their data subjects.

During the coronavirus pandemic there is a possibility to meet all the above conditions because the fight against the pandemic is currently of supreme importance, and GDPR leaves the possibility to put the protection of legitimate interests before the rights of data subjects. This is an additional reason why

GDPR article 22 will be activated. Suitable and specific measures for safeguarding data subjects’ fundamental rights, freedoms and legitimate interests are not the focus of this paper because they deserve a separate analysis in their own right. To conclude, it should be noted that processing a specific category of personal data under article 22 is possible if the conditions set out in article 9 paragraph 2 and article 22 paragraph 2 and 4 are met cumulatively.

Relation between article 22 of the GDPR and the right to explanation

GDPR prescribes a relatively sound and broad legal basis as it allows for the protection of personal data even in situations we do not encounter on a daily basis. However, the processing of personal data by thermal cameras and the activation of article 22 is not a problem in itself but in relation to the rights of data subjects provided by GDPR. Another area where this is evident is in relation to the so-called “right to explanation”. If we consider that artificial intelligence has repeatedly led to discrimination and violation of data subjects’ right to privacy – for instance through the “artificial intelligence bias” – we can see the importance of GDPR article 22 and why it should be introduced to the general public. There are regulations setting out the standard information a data controller must send a data subjects when



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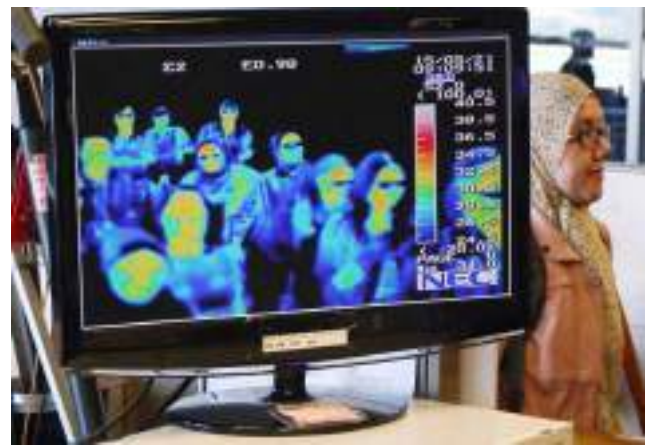
processing their personal data – such as who the controller is and the purpose of processing. However, in addition to this, article 13 (2) (f) stipulates that the controller must provide additional information if

“the existence of automated decision-making, including profiling, referred to in Article 22(1) and (4) and, at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject”.

This provision, together with article 22, has provoked a storm of reactions in the scientific community since its first publication.

Today machine learning goes so far that sometimes even computer scientists do not know how a computer came up with a certain solution. Originally, algorithmic solutions were based on certain rules and procedures that computers followed. The logic of algorithm action was explicit. Input followed a certain steps to arrive at a particular output. The introduction of the machine learning, however, changed the logic of the whole system. We now give a certain amount of data to the computer from which computer learns, and building off what it learnt a new output is generated. Therefore, the logic of the system in some situations tends to become implicit and difficult to explain even for experts.

A29WP tackled this problem in its recommendations. Explaining the logic itself by the data processor does not necessarily mean explaining complex algorithmic procedures to the data subjects, but providing meaningful, significant information in relation to the respondent. Additionally, complexity alone cannot be an excuse for not providing relevant information. Through the A29WP lens the whole issue seems somewhat more flexible compared to the original technical discussion. All rights prescribed by GDPR are directed towards data subject, and they are the center of the whole process. Therefore, the exercise of rights prescribed by GDPR should be viewed from the perspective of the data subject, and not from the perspective of the technological complexity. The significance of this to the present discussion is to take into account high possibility that today's technology could endanger our fundamental rights, without any human intervention in the process. In the absence of human intervention, measuring body temperature by means of machine learning and profiling can be potentially dangerous and discriminatory. For example, conventional thought considers that a “normal” body temperature is 37 degrees, while the temperature of a person infected with influenza virus is 38 degrees. This distinction arose in 1900 when little was known about thermoregulation, immunology, and microbiology. Today, body temperature is observed individually, and is always on a certain spectrum. By measuring temperature through thermal cameras, people can be categorised as infected when they are not and find themselves in inconvenient or even discriminatory situations. Although efficiency is important in the context of current pandemic, certain guarantees for the pro-



Source: abc.net.au

tection of human rights and fundamental freedoms must exist. If the efficiency is the only aim, human rights could easily be violated. Therefore, it is highly significant that the data controllers insure strong guarantees and possible explanations to citizens of the meaningful logic behind their data processing.

Conclusion

Introducing thermal cameras as a measure against the coronavirus necessarily involves the general digitalisation of our social interactions. Life with coronavirus and life after the pandemic will surely change our perception and thoughts about digital technologies. The fear of infection has changed our life priorities. GDPR provides a flexible legal basis that allows for processing personal data in a variety of circumstances. However, the mere existence of a normative framework does not lead to clarity of solutions. We can see this from the relationship of GDPR article 22 to the rights of data subjects, especially in the so-called “right to an explanation”. Thermal cameras and algorithmic solutions can lead to discrimination against individuals. Efficiency is necessary, but it is not the only goal. Therefore, in such circumstances, it is necessary to constantly raise general awareness and warn all relevant parties of the potential dangers of automated processing. Indeed, this is an obligation under GDPR. In sum, our fundamental human rights must be protected, regardless of the circumstances we find ourselves in.


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How Covid-19 has Fostered Switzerland's International Litigation Hub

Cyrrill Suess & Philippe Vladimir Boss

I. What's New in Switzerland's Judicial System Due to the Covid-19 Crisis?

The Covid-19 crisis has prompted many countries, among which Switzerland, into a sanitary emergency and an economic slowdown. However, the rule of law still applies and the judicial system had to find its own response to the crisis in order to remain operational and perform its mission.

As far as judicial proceedings in Switzerland are concerned, the Federal Government has taken various measures to accommodate for the restrictions of the stay-at-home recommendation and to limit the spread of the virus. These measures include the suspension of specific procedural deadlines from 20 March 2020 until 19 April 2020, a simplified notification of certain decisions, the possibility for the Bankruptcy Office to sell seized assets through online auction platforms as well as the possibility to use video- and teleconference in some cases.

These changes occur while Switzerland is reforming its civil procedural framework (II) The possible videoconferencing in court proceedings during the Covid-19 crisis (III) might be a chance for further developments of Switzerland as a hub for international dispute resolution (IV)

II. A Small Change Within A Vast Reform Package

The enactment of the videoconferencing provision in support of the COVID crisis did not emerge as a surprise.

Prior to the crisis, the Federal Council, the Government of Switzerland, had undertaken the preliminary work towards a legislative amendment of the Code of Civil Procedure (CCP), which would have included substantial changes to many aspects in the conduct of civil litigation. On 2 February 2018, a working document (Explanatory Report) issued by the Federal Council initiated the process. This document suggested modifications including the reduction of court fees, multiple instruments aimed at allowing various actors to take part in a joint litigation as well as strengthening conciliation. The changes suggested by the Federal Council were intended at fostering Switzerland's attractiveness as a hub for international dispute resolution.

These suggested modifications did not include any provision on the use of videoconferencing in civil court proceedings. However, in the course of the slow but inclusive Swiss legislative process (including consultations with all 26 local States, political parties and interested parties such as e.g. law faculties and lawyer's associations), the Federal Council suggested, in a final proposition dated 26 February 2020 which is now before Parliament for debate and vote, to include the possibility for local States to allow videoconferencing in civil court proceedings. One reason to introduce videoconferencing lied in its need in international litigation in Switzerland and international legal assistance in civil matters. It shall be stressed that this regulation leaves it to each local State to decide whether they are videoconferencing in civil court proceedings.

Under the current proposition, States can but are not obliged to allow for videoconferencing in civil court proceedings. It will come down to each individual State to decide on the possibility of videoconferencing. In the federal structure of Switzerland, each State is in charge of the judicial organisation and its budget. While it seems reasonable to assume that the economic hubs in Switzerland (such as Zurich, Basel, Bern or Geneva) will probably allow videoconferencing, it is

questionable whether smaller states will pass the budgets to offer this technology.

The actual impact of the proposed possibility to allow videoconferencing will be assessed once it has been enacted into law. However, the Covid-19 crisis is giving videoconferencing in legal proceedings a kickstart effect. On 16 March 2020, Switzerland went into a soft lockdown with a stay-at-home recommendation. As far as courts were concerned, the decision remained with each of the 26 local States. Most cancelled court hearings and limited the remaining hearings to urgent matters (especially those including imprisonment or childcare). On 16 April 2020, the Federal Council enacted an order allowing the use of videoconferencing in civil proceedings where the court and all the parties agree to their use. Now that physical hearings are being rescheduled, not many hearings were replaced by videoconferencing. However, the courts started to assess the different technical options and were given an opportunity to consider conducting hearings by videoconferencing. We hope that this increases acceptance and use of such a possibility in the future.

The Federal Council acted on its emergency powers due to the sanitary crisis deriving from the Swiss Federal Constitution. Hence, this regulation is temporary and limited until 30 September 2020 (latest). In order for videoconferencing to remain available after that date, a specific decision of Parliament will be necessary.

III. Videoconferencing during the COVID crisis

The main characteristic of the offered video- and teleconferencing option in civil court proceeding during the Covid-19 crisis is that a court can grant its use to the parties, which must both agree to it (specific rules apply in family matters). Hence, it will first depend on each court to offer or not offer the option, and the parties have no right to demand it. No consent of the parties is required in cases where reasonable grounds such as emergency or for the hearing of witnesses or experts replace

the party's consent.

The court may forbid the public to attend the videoconference, but accredited journalists must be admitted where the principle of publicity shall be respected. There is no designated platform to host such video- and teleconferences. The one chosen shall guarantee the simultaneity of the sound and image and data protection and security through encryption. As a minimum, the used servers should be based in Switzerland or the European Union. Guidance has been issued in this regard by some data protection bodies in Switzerland.

The video- or teleconference will be recorded, which represents a very important change in today's court experience in Switzerland. For the time being, hearing transcripts are limited to a summary of the statements made, usually without consideration for hesitations, facial expressions or alike. With recorded video- or teleconferences, parties and judges will have the opportunity to review the exact wording and subtleties of the statements made at the hearing, namely the way a question was asked and an answer given in order to assess the credibility of a party or a witness. This may be a source of many controversies, especially in later stages of the proceedings where appeal courts have to review the lower court's assessment of such statements.

Finally, the temporary regulation on the use of videoconference allows the courts, in very specific cases where video- or teleconference cannot take place not to hold a hearing at all and conduct the proceedings only in writing. This is limited to specific situations, mainly those where an emergency arose making it necessary to proceed



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onwards. In any case, the right to be heard of all parties must be safeguarded.

IV. Switzerland As A Hub For International Dispute Resolution

In parallel to the efforts concerning video- and teleconference solutions in civil proceedings, the Swiss Parliament is currently working on further legislative modifications of the PILA and the CCP to increase the attractiveness of Switzerland as a hub for international dispute resolution.

The modifications to the international arbitration framework

The PILA as it stands now already offers excellent conditions for international arbitration. It has proven over decades with its liberal approach, which allows a high degree of flexibility for the parties seeking international arbitration. The currently proposed amendments to the PILA aim at further strengthening international arbitration in Switzerland. Besides transforming into statutory law the key elements of the Federal Supreme Court's case law on international arbitration, the proposed modifications mainly strive for improvement of the PILA's user-friendliness and for an extension of the party autonomy in line with international developments. We address below some of the contemplated changes.

Whereas the current PILA refers to other legal sources (namely the CCP) in certain cases, the contemplated renewed PILA is designed to regulate international arbitration in Switzerland comprehensively. Thereby, access to the Swiss arbitration regulation will be significantly easier for international lawyers that are not familiar with Swiss law.

In the context of extending the party autonomy the new PILA draft explicitly states the admissibility of arbitration clauses in unilateral legal affairs (such as last wills). Even though various courts have already acknowledged the arbitrability of such transactions, the lawmaker provides for clarity by enshrining this in federal statutory law. It can therefore be expected that arbitration clauses will increasingly be used in last wills, foundations, trusts or statutes to settle disputes in connection thereto.

Moreover, the suggested reform intends to assist with arbitration clauses lacking a determination of the arbitrators or the seat. Currently, parties are free to agree upon the seat of arbitration in the arbitration clause or later on. If the arbitration clause does not specify a seat of arbitration or merely refers to "Arbitration in Switzerland" the Swiss PILA and many arbitration rules provide that the designated arbitration institution resp. the arbitral tribunal itself determines the seat. However, in case the arbitration clause is also silent as to the applicable arbitration institution resp. the competent arbitrators, there is legal uncertainty in regard to the determination of the seat. Most practitioners derive from this that the arbitration clause does not meet the requirements of the PILA and arbitration proceedings can thus not take place in Switzerland. The proposed PILA addresses this unsatisfactory situation and provides for a simple solution by giving jurisdiction to determine the seat of arbitration to the regional Swiss court where the case was filed first. Through court assistance, the suggested PILA ensures that clauses lacking the aforementioned specifications will not be considered void.

That being said, the most visible change to Swiss arbitration would be the possibility to submit appeals to the Federal Supreme Court in English. Although some courts conduct settlement negotiations in English or waive the obligation to translate documents in English, submissions to Swiss courts must be made in one of the official languages (i.e. German, French or Italian). The only exception to this rule is the Federal Patent Court which already accepts submissions in English if the parties also agree to. The admission of briefs in English according to the PILA draft is intended at reducing the burden of translation on the parties.

The modifications of international court litigation framework

For various reasons Swiss contract law is among the most chosen laws to govern international transactions (developed, stable and commercially sophisticated). In order to prevent practical problems of interpretation, it is advisable to align the choice of law with the choice of court. Thus, when choosing Swiss law as the governing law of the contract, the choice of the Swiss jurisdiction, which conduct

their proceedings in accordance with the CPP, is recommended.

Apart from the Corona related measures, the Swiss Parliament will soon discuss modifications of the CPP proposed by the Federal Council, amongst which the coordination of procedures, the privilege of in-house counsels and other measures to further facilitate international dispute resolution in Switzerland are particularly noteworthy.

The CPP contains several instruments to handle cases jointly and in a coordinated manner and decide related disputes in one single procedure. The combination of claims in one action is currently often precluded due to the varying values in dispute, the various types of procedure or the material jurisdiction. The envisaged CPP draft aims at easing the combination of actions. As an example, if the mentioned differences are solely caused by the value in dispute, a combination of actions shall in future nevertheless be possible.

The parliamentary discussions on collective redress are rooted in similar considerations to those of the combination of actions. In the wake of the Diesel scandal, demands for legal remedies to enforce mass damages were raised. However, the current discussions are still in a preliminary phase and an actual class-action process will not be offered soon.

With view to other jurisdiction, a right of refusal to cooperate in civil proceedings for in-house counsels is likely to be implemented in the near future. Until now, only lawyers were privileged to refuse cooperation in court. By granting the same privilege to in-house counsels the discrimination of companies will be eliminated and aligning the privileges under the Swiss CPP to those in other countries. Some lawyer's associations have raised concerns about this.

The Federal Council intends to implement appropriate foundations so that the local states can create specialized courts or judicial chambers for international commercial disputes. In addition hereto, civil proceedings may in future also be conducted in English and in any of the official languages of Switzerland, irrespective of the official language of the respective state. These modifications will

allow Switzerland to further increase its attractiveness as dispute resolution hot-spot not only for international arbitration, but also for international commercial litigation in general.

As a final remark, choice of court agreements are not always respected under divergent national rules. In particular, when cases are brought before courts other than the one designated by the parties, it may occur that such courts hear the case despite the choice of court agreement. The Hague Convention of 30 June 2005 on Choice of Court Agreements seeks to rectify this situation by ensuring the effectiveness of choice of court agreements. As an increasing number of countries (including China) has ratified or will ratify the aforesaid Convention, there is greater legal certainty with regards to choice of court clauses in international business. It is therefore under consideration that Switzerland will ratify this Convention in the same effort to modernize its civil proceeding regulation.

V. Conclusion

It appears that the Covid-19 crisis is giving an extraordinary chance to Swiss courts to take a step forward in their digitalization. The Swiss judicial system has not always been at the forefront of technological change, mainly for good reasons of confidentiality, equality and costs. The legislative bodies and courts have the opportunity to give videoconferencing a “free try” with “no obligation to buy”. In addition, the already ongoing modernization and adaptation for international dispute resolution provides for the opportunity to include videoconferencing in the Swiss legal system preparing it not only for the next crisis but also strengthening its capabilities in international dispute resolution. Therefore, the worldwide emergency of the Covid-19 crises indirectly assists the agenda to further improve the business friendly and international Swiss legal system and to entice parties to choose Switzerland in their dispute resolution clauses.

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The Flight for Survival: Legal Implications of Covid-19 for the Airline Business

Chan Kit Ho



Photo by Morning Brew on Unsplash

The global scale of flight grounding is so huge that airports cannot provide sufficient parking space. Consequently many aircrafts are being parked in the desert strips of Australia and the USA.

The airline industry is facing severe danger and prospects for recovery seem bleak. In 2003, after the SARS outbreak, it took carriers six months to recover. That outbreak was largely confined to the AsiaPacific region. Even before Covid-19 forced borders to close worldwide airlines experienced falling demand in January. If there is a recovery this time it will be far longer. Already, Virgin Australia has commenced voluntary administration and Avianca had filed for bankruptcy.

For customers, airports and employees a precise and situational understanding of contract law could make the difference between irrecoverable losses and a second chance. Whether Covid-19 amounts to a frustrating or force majeure event will largely depend on its impact on specific relationships.

Customers

Many customers will have been left in a tough spot if the terms of their ticket do not allow a full refund.

But in the absence of a relevant force majeure clause in the ticket contract could a customer who cancels their flight ticket claim that the contract was frustrated because of Covid-19? Such cases would have to be assessed individually. A customer has lower chances of invoking frustration if they cancelled a ticket before official advice cautioning against travel to their intended destination was issued. He may have a stronger argument if such travel advisory has been issued. A travel ban or mandatory quarantine requirement would advance his case. But absent such circumstances, it would be difficult for a customer who voluntarily cancels a ticket to invoke the doctrine of frustration for a refund.

Customers may look to other means of redress, such as any their insurance or

other policies airlines may have in place. Vietjet, for instance, rolled out a universal complimentary insurance scheme to compensate any passenger who contracts the virus on its domestic flights. Those with third-party travel insurance subject to policy terms and interpretation, however, may generally only claim for cancelled trips if they purchased it before Covid-19 was a “known event” by the company. Most Singapore insurers set a cut-off date in January 2020.

If an airline cancels a ticket a force majeure clause may apply. A customer’s options will be subject to its terms and is generally not entitled to further relief from the airline for other losses caused by the cancellation, such a lost business deal. Instead of cash, the force majeure clause may also limit the refund to vouchers or credits with the carrier, or it may offer to reschedule a flight. However, even if an airline is not obligated to provide a refund, it may do so to secure customer loyalty and goodwill.

Airline-Airport Relationship

While planes are grounded parking contracts will have to deal with parking fees, maintenance, allocation of liability, in-

surance, and more. Some airports such as Melbourne and Brisbane have offered free parking, possibly for goodwill or fees from other sources such as maintenance. Unfortunately, in Perth, the airport seized Virgin Australia planes as collateral against unpaid debts by the airline. This illustrates an uglier side of the tension in the airline-airport relationship.

Airports rely on airlines’ airport fees and passenger traffic for their commercial activities. With reduced air travel, airport operators suffer.

The airline-airport agreement generally determines an airline’s fees and access to ground facilities. During the pandemic, parties are often unable to meet their contractual obligations. For example, a contract may state that a carrier must average 250 jet flights per day from a given airport. The BBC has reported that some airlines operated near-empty flights just to retain coveted privileges at major airports such as London’s Heathrow. Certain landing slots are crucial to airlines as they occupy the most popular times for business travellers to depart and arrive at major destinations. A “use it or lose it” rule under international guidelines is enshrined in EU law.

Forcing airlines fulfil such terms like this constitute a massive waste of fuel, with significant economic and environmental consequences. Should airlines that are unable to reasonably fulfil the minimal flight volume be deprived of their gates/slots?

Airlines have successfully lobbied the European Council to disapply the “use it or lose it” rule till October 2020. But what about private airline-airport contracts? The frustration doctrine is not useful here, as airlines are not seeking a discharge from the entire contract, simply a suspension of its flight volume obligation. However, a force majeure term which temporarily suspends certain obligations may be helpful. Remember that where the contract provides for a force majeure clause, frustration cannot be raised.

Airfreight Services

Many airlines are also involved in air-

freight services. Although airfreight accounts for only one percent of global trade by volume, it represents thirtyfive percent by value. Since 1 May 2020, Covid19 had caused a 29% reduction in global air cargo capacity compared to 2019. This is primarily because cargo often travels in the hold on passenger flight.

Interestingly, airfreight prices are rising as demand for medical supplies spiked while capacity collapsed. Airlines are increasingly using passenger cabins to transport goods. The Australian government contracted Singapore Airlines and Qantas to transport Australian food products to help their struggling exporters.

Carriers (and others in the logistics supply chain) struggling to deliver on their contractual obligations due to Covid19related disruptions should note the English Unfair Contract Terms Act (UCTA), which also applies in Singapore. It invalidates certain “unreasonable” liability exclusion clauses but these restrictions do not apply to an “international supply contract” (as defined in the UCTA). It is likely that the restrictions imposed by UCTA will not apply to many contracts for international airfreight.

Furthermore, Article 19 of the 1999 Montreal Convention, which applies to over 130 states, including Singapore, makes clear that “the carrier shall not be liable for damage occasioned by delay if it proves that it [...] took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.”

Airfreight carriers unable to cope with cargo due to reduced capacity may have to consider these laws (besides frustration or force majeure) for relief.

Airline-Employee Relationship

If airlines are struggling to stay afloat, many of their employees are in an even tighter spot. Singapore Airlines grounded 138 of its 147 planes and cut 96% of its capacity forcing and roughly 10,000 staff to take pay cuts, furloughs, or compulsory no-pay leave. This is bad news to airline staff. Many have turned to gig and part-time work to supplement their slashed incomes. But what measures are airlines



photo by Nathan Dumlao on Unsplash

allowed to subject their employees to?

In Singapore, as long as airlines abide by the specific employment contracts (including collective agreements with registered unions), the Singapore Employment Act, airlines are generally allowed to take such action, subject to any renegotiation with employees. However, the interests of businesses must be balanced against the interests of employees, as unemployment it is detrimental to society.

The Tripartite Alliance – Singapore’s forum for labour unions, employers and government – has advised businesses to take a longterm view and to only re-trench excess employees as a last resort. Employers are encouraged to send their employees for training, redeploy staff, implement flexible work arrangements, reduce wages reasonably, or implement no-pay leave. This is, however, is only advisory, without binding obligations. However, employers cannot slash wages or re-trench with impunity. They are still subject to the Employment Act and other rules. Further, Singapore employers must now notify the Ministry of Manpower if employees’ wages are cut. This allows the Ministry to monitor the scale of such measures throughout the country, and to step in if necessary. It also “encourages a sense of social responsibility and prevents downstream salary disputes”, according to Manpower Minister Josephine Teo.

Notably, in Sweden, furloughed airline and hotel employees are retrained to work in hospitals and nursing homes to combat Covid19. This benefits both employers and employees, as the former can cut costs while the latter maintains an income. Not to mention providing more frontline workers to stop the virus. In Singapore, furloughed airline staff are similarly redeployed as “safe distancing ambassadors” to remind and educate the public on such measures.

The Singapore government has also rolled out subsidies to help businesses pay as much as seventyfive percent of workers’ salaries. This should help airlines stay afloat and disincentivise excessive wage-cutting and retrenchment. As an additional disincentive for employers to cut wages, incomeslashing companies will receive lower government wage

subsidies. MOM has also cautioned that employers who treat their employees in “irresponsible or unfair” ways could lose future support and benefits.

Singapore’s Workplace Safety and Health Act requires employers to “take, so far as is reasonably practicable, such measures as are necessary to ensure the safety and health of his employees at work.” Breaches may attract a fine or private liability to employees exposed to Covid19 at work. Similar rules elsewhere and in Singapore may oblige airlines to take precautions to protect their staff. This may mean reducing flights to risky countries, ensuring adequate sanitation of cabins and workplaces, or providing cabin crew with personal protection equipment. Furthermore, cabins may be subject to compulsory government disinfection if there are suspected cases. As an AirAsia flight in India recently experienced, such cleansing costs precious time.




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Conclusion

In such unprecedented times, many airlines are struggling for their lives. Some have already collapsed. However, despite Virgin Australia’s \$7 billion debt the airline’s administrators revealed that as many as twenty interested parties had considered a bid. It remains to be seen if Virgin Australia will rise from the ashes.

Whatever happens airlines will have to manage their relationships with regulators, customers, airports, and employees carefully. Many airlines have a special place in the national economy, not least as major employers. With the influx of government aid in Singapore and some other countries, airlines must adapt to survive if they are to emerge from the pandemic as they did for 9/11 and SARS crises.

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What is Force Majeure?

Junichi Horie

For all commercial and contractual agreements, the rule of thumb for all parties is to respect and uphold their contractual obligations to the best of their ability and capacity. However, there are circumstances or events which could prevent this; Force Majeure events.

Force majeure is French for “superior force”.

Definition. “Force Majeure” means the occurrence of an event (“Force Majeure Event”) that prevents or impedes a party from performing one or more of its contractual obligations. If and to the extent that the party affected by the impediment (“the Affected Party”) proves that: a) such impediment is beyond its reasonable control; and b) that it could not reasonably have been foreseen at the time of the conclusion of the contract; and c) that the effects of the impediment could not reasonably have been avoided or overcome by the Affected Party.

Most commercial contracts include a Force Majeure clause.

Even though the specifics of each clause can vary, they commonly share similar principles.

Contracts that do not contain a Force Majeure clause will by default be governed by the applicable law. Not all jurisdictions recognise Force Majeure and different legal systems provide different remedies on the occasion such an event would occur.

If one or more parties to a contract successfully invoke the Force Majeure clause, within reasonable a timeframe, they are generally exempt of: the duty to perform the contractual obligations hindered by the Force Majeure event; and any liability to pay damages for the non-performance or “breach of contract”.


Does Covid-19 qualify as an event that invokes the Force Majeure clause?

Covid-19 was classified as a pandemic by the World Health Organisation on 11 March 2020.

With relation to Force Majeure clauses, many contracts make explicit reference to “pandemics” as a Force Majeure event. In this instance, it is very likely that the relief provided for under this clause will apply to the Covid-19 pandemic.

- If there is no specific reference to “pandemics” in a Force

Majeure clause, it is most likely there will not be relief from contractual obligations or damages. However there is a possibility to seek relief under another clause of the contract that pertains to the interruption of trade/business/other activities due to the unprecedented exercise of government powers (Federal and State) to curb the spread of Covid-19.

- Contracts without a Force Majeure clause often cannot rely on an implied Force Majeure concept under many common law jurisdictions. For contracts governed by laws in many civil law countries there may be an implied Force Majeure notion. 



Source : bricker

What is Voluntary Administration?

Junichi Horie

If a company becomes insolvent (unable to pay its debts) they may enter voluntary administration. The company is then placed in the hands of an independent person/party. The purpose of voluntary administration is to save the company.

Voluntary administration allows creditors an opportunity to negotiate with the company and seek an independent review of its operations, with the primary goal of maintaining the business. Voluntary administration is initiated as a result of a “resolution by a majority of directors”. However, voluntary administration is seldom a successful process.

Who is the voluntary administrator?

The administrator is the person nominated by the director (or liquidator/secured creditor) to run the process and take control of the company and its restructuring. Under Australian law, an administrator must be a registered liquidator and is monitored closely by the Australian Securities and Investments Commission.

The administrator will involve the directors and hold meetings with the creditors throughout the evaluation process, and potentially draft the Deed of Company Arrangement (DOCA).

What does the voluntary administration process involve?

The initiation of a voluntary administration will block creditors (in most circumstances) from legal or recovery actions against the insolvent company.

Voluntary administrations are intended to be quick and efficient – the whole process is intended to be complete within

a month. At the end of the investigations, the aim is to place the company into liquidation or finalise a deal with the creditors – the DOCA.

The administrator must report any offences or wrongdoings detected during their investigations. The administrator must also disclose to creditors all the details around the company’s insolvency, directors’ actions or wrongdoings, hidden assets and potential legal actions.

The primary aim of voluntary administration is to reach a deal or DOCA to facilitate the business’s continuation or offer creditors compensation better than that of a liquidation.


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Virtual General Meetings for Joint-stock Companies in Germany: Legislation in times of crisis

Prof. Dr. Hartmut-Emanuel Kayser

&

Isabella Pereira Kayser

Evaluating the legal changes

To reduce the impacts of the Covid-19 pandemic German legislators passed the COVZvRMG emergency law. Among the many changes this entailed the law regarding joint-stock companies (Aktiengesetz) was altered, notably with regard to annual general meetings (AGMs). This was intended to simplify general meetings and mitigate the consequences of inevitable postponements. Now, with the approval of its supervisory board, the board of a joint-stock company may take the decision to hold a virtual AGM even without prior authorisation. This can be considered essential as many AGMs would otherwise not have taken place this, or possibly even the next, financial year.

Bearing in mind the past issues that have arisen due to technical problems and administrative work, simplifying these regulations is sensible to enable AGMs during the pandemic. Due to the risk of unacceptable questions associated with the increased possibility of anonymous attendance or filibusters, it also might seem appropriate to let the board decide whether to and how questions may be put in a virtual setting.

Yet, despite the ongoing emergency, the new regulations raise several questions from a critical perspective. In particular, replacing the strict right to information in the German stock corporations act (AktG) with a strongly curtailed right of shareholders to ask questions of the board appears to be a move worthy of interrogation. As a body of equal importance to the executive and supervisory boards, the AGM has to decide on fundamental questions for the company's future and offers the only avenue for the shareholder to exert their influence. It usually only takes place once a year and is of enormous importance. Shareholders' right to information is recognised by the German constitution and European law. The new law makes it possible to undermine this right.

At a virtual AGM the right to ask questions is not linked to the right to an answer, so unanswered questions do not have to be



Source: Swiss Chinese Law Association

included in the minutes. If it is stipulated that questions must be submitted ahead of a virtual meeting, it is generally difficult for shareholders to see clearly to what extent the board of management has complied with its duties (unless, the questions are published prior the AGM, for example on the company's website).

A lack of trust could lead to a change in the decision-making mentality at future AGMs. Therefore, the basic right to information should be honoured by answering the questions asked in full in the virtual plenary session.

Conceivably, at the least, institutional investors and shareholder association representatives could hold a small face-to-face event or connect via video in the virtual AGM to enable a more extensive dialogue. But it is unclear whether corporate bodies will extend any scope of the emergency law in favour of the shareholder. The right of appeal has also been cut back enormously by the new legislation – generally and not only with regard to the right to ask questions.

Furthermore, legislators, in addition to the exclusion of the right of contestation already present in the German Stock Corporation Act, removed all statutory grounds for contestation in connection with the facilitated planning and execution of the virtual AGM. This includes the right to contest resolutions.

The legislator wanted to free the virtual AGMs as far as possible

from the risk of large numbers of digitalised contestations in order to prevent companies from avoiding teleconferencing. However, a contestation pertaining to content or procedural deficiencies remains legally possible under the new law.

A practice of supporting the shareholders' rights has been observed in certain cases. Deutsche Bank AG, for example, published the management board's speech in advance so that shareholders could base their questions on it.

However, a general legal improvement regarding to the drastic limitations in the emergency law of shareholder's right to information and of appeal is highly desirable. Enabling a virtual plenary exchange of information appears confusing and time-consuming. An alternative approach could be to hold discussions in designated forums with question and answer facilities. It would also be possible to make shareholders' questions public, so that, when in doubt, the extent to which the executive board fulfilled its responsibilities can be verified.

The AGM should remain the essential site of shareholder democracy, where general debate should not be curtailed or under-

mined until further notice. Especially in times of crisis such as these, it is particularly important that shareholders can exert influence on, for example, important capital measures.

Furthermore, the right to propose a motion is lost if the general meeting is held only by postal vote and proxy voting. Here a solution also needs to be found. Trustees can entrust their assets to investment companies to represent their interests. However, the current legal regulations do not allow them to file counter- or supplementary applications.

Companies whose AGMs have not yet taken place must consider whether and to what extent a virtual general meeting is a viable option or whether it should first be postponed. In any case, the conditions of participation must be adapted and the AGM must be convened again; both must be announced in invitations to shareholders. The shorter deadlines for giving such notice under COVZvRMG, in particular for convening the meeting, will play a rather minor role with regard to this planning effort, especially the technical requirements.

The decision should be made with great


care and with legal advice and the involvement of the technical experts and virtual meeting service providers. At least on the part of the companies, uncertainties exist regarding technical disruptions. Shareholders will be concerned for their rights and that their ability to contest resolutions has now been eliminated. However, since the virtual AGM also entails enormous cost savings, some companies have already made use of this option.

To shareholders ultimately, accepting these provisions by will depend on how far companies will be fair and widen the scope of their rights beyond the restrictive minimums set out in the new legislation.

There are good reasons why there has not yet been a digital revolution in company law in Germany. There is still a great need for clarification regarding the legal gaps and uncertainties that have come to light during this emergency situation.

Outlook

The virtual general meeting provides short-term relief for companies' ability to act. It also makes it possible to gather experience from this crisis situation for future developments in stock corporation law. It is important to note, however, that these new regulations are emergency laws which were put in place hastily. Especially the restrictions of AGM attendees' fundamental rights that they entail are only temporarily acceptable to regulate a state of emergency. With regard to the legal security of virtual AGM (such as identification of shareholders or technical challenges), there is still some resistance to overcome in order to bring about an amenable solution. In the long term, however, a curtailment of shareholder rights such as we have seen during the pandemic is hardly acceptable.

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Source: Admin



Source: Swiss Chinese Law Association

Arbitration after Lockdown

John G. Walton

As governments begin their slow and tentative steps out of lockdown the question on everyone's lips is, what next?

The press is full of ideas on the new economy and an opportunity not to be wasted. What opportunities will there be for dispute resolution, and what will arbitration look like? While we all schedule zoom meetings and breathe a sigh of relief for technology, we need to be careful that we don't let this particular opportunity slip through our fingers.

For international commercial arbitration (as opposed to inter-State treaty based arbitration), the annual Queen Mary University of London survey reads like Groundhog Day. Each year, clients tell us they are unhappy at the cost and delay in arbitration. Yet, as one famous international arbitrator observed recently, most of those issues are driven by the clients themselves. But that is only part of the picture.

Investor-State, international trade and other treatybased arbitrations are likely to suffer the combined blows of the pushback against globalisation and growth of economic nationalism that is sure to follow the pandemic. That is a shame, as investor-state dispute settlement has, despite some criticism, been pivotal in promoting the rule of law in international relations, and rigour in cross-border investment. International commercial arbitration, enforced under the New York Convention, has also established itself as the only effective means of determining disputes in cross-border transactions. For all the criticism of international arbitration, few will consent to the uncertain jurisdiction of a foreign court.

Domestically, arbitration has often drifted into a legal twilight zone. Its use is almost

universal in some industries (construction, maritime and technology), but not so assured in others. We talk of party autonomy, the benefits of selecting the tribunal, setting the procedures best suited to the dispute; but do these benefits truly withstand close scrutiny? The reality seems to be that most clients actually do not care too much about confidentiality, and they rely on their legal advisors' recommendations on the other issues. In many cases, clients are relatively indifferent to the choice of court or arbitration, or the benefits of confidentiality or the doctrine of precedent. Provided they get a result they like and can enforce.

And here lies the problem. Like many a well-crafted commercial agreement, arbitral procedures in the hands of lawyers have tended to become more complex, more detailed, and more refined. No lawyer worth their salt is going to leave a stone unturned in looking after their clients' interests. This is, perhaps, compounded by many arbitration practitioners and tribunal members having a background in the tried and trusted, and it has to be said arcane, practises of court litigation. As many practitioners comment, the rules of evidence and procedure have been refined over the years, and they are a very sound starting point.

And yet, replicating traditional court procedures will carry with it many of the criticisms of the court process. Are we really making the most of the advantages which arbitration has to offer?

So what are the core ingredients of a system capable of providing fair and durable results? The opportunity for the parties to present their cases to a fair and impartial adjudicator, in accordance with the principles of natural justice, certainly. The parties must also perceive that they have been dealt with in a transparent fashion, with durable decisions. It does not automatically follow, however, that an oral hearing is required, or that reasons for the determination must be given, or that the adjudicator has the discretion to stray from the relief sought (as in baseball or pendulum arbitration).

Objectively speaking, the Model Law provides considerable procedural flexibility which enables parties to achieve a durable and fair result without much of the criticism levelled at traditional litigation and international commercial arbitration. Post Covid-19, that flexibility is more attractive than ever.

The compulsory requirements of the Model Law are surprisingly limited:

- Agreements to arbitrate may be oral.
- If the parties cannot agree on their tribunal, the appointment may be made for them.
- The tribunal can rule on its own jurisdiction.
- The parties may select the applicable law and language of the proceedings.
- Emergency and interim relief is available.
- The tribunal has the power to determine the rules of procedure, subject to the overriding requirement of equal treatment.
- The requirement for oral hearings – confidentiality, the means of presentation of evidence and provision of a reasoned

award – are all subject to agreement by the parties.


- The courts may provide support, and the opportunities for court intervention are reasonably limited.

In cross-cultural disputes, whether international or domestic, this flexibility is of considerable value. To resolve an indigenous dispute, for example in my country Māori treaty disputes, in accordance with tribal laws (tikanga Māori) arbitration is of considerable value. Similarly, in the international context, to have regard to cultural values can only enhance arbitration as a disputes procedure, provided the approach is well managed.

A level of confidence and courage might be required by the participants, but that is surely what the parties are paying for. In a time of uncertainty, such as we are approaching, that flexibility will almost certainly make arbitration a more attractive procedure for resolving commercial disputes; particularly as the backlog of cases increases as courts struggle with social isolation and safe practises.

To be fair, most institutional rules have this level of flexibility built into them; emergency arbitration, expedited arbitration for lowvalue disputes, dismissal of unmeritorious claims, issues hearings, dispensing with strict rules of evidence in favour of the International Bar Association guidelines, dealing with costs and allowing for appeals on questions of law. However, their use, particularly domestically, is infrequent.

If arbitration is to thrive and yield its benefits, both domestically and internationally then counsel and their arbitral tribunals must focus at the outset (preferably at the first preliminary conference) on the best and most appropriate procedure for the dispute at hand. Proportionality is a relatively new concept to some common lawyers, but its time has surely come.

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Legal Advice During The Pandemic: Main issues from the Italian pharmaceutical industry

Laura Opilio



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During the Covid19 pandemic, pharmaceutical companies have been among those whose activities have been the most affected. They have been required to make a major effort to produce personal protective equipment and to research and develop treatments and vaccines for the virus. Some companies even joined forces by creating joint ventures with the aim of carrying out joint research and development.

To facilitate market access for safe and innovative products, national regulators have often introduced new and exceptional rules, to which operators had to adapt quickly.

This emergency has also led many actors new to the pharmaceutical industry to seek legal advice. They include those who converted their industrial production to make personal protective equipment. Another example are the wholesalers involved in online distribution who have marketed various emergency-related products such as masks, gloves and virus tests.

All these companies had to implement a series of procedures to balance the need of solidarity, personal profit and citizens' safety. Although some institutions set up new emergency rules; to introduce products on the Italian market according to faster and simpler procedures, for instance. But the need to guarantee the full safety of citizens has never lost priority. Hence the need to clear legal advice.

Pharmaceutical companies who were already on the market saw the most significant impact to their operations. They were asked to make the greatest efforts to combat the pandemic, both in terms of production and of sharing innovative products with hospitals to launch clinical trials. In Italy, AIFA – the state agency

responsible for the regulation and supervision of the pharmaceutical market alongside the Ministry of Health – introduced a series of simplified rules for access to clinical trials or compassionate use programs. The main objective was to fast track the use innovative drugs in hospitals.

Some Italian clients took advantage of these simplified measures and sought legal advice on how to initiate clinical trials or compassionate use programs on their medicines. The requirements for accessing these procedures were not changed substantially meaning that there were no particular delays in the study of new rules or regulations, other than procedural ones. Undeniably the authorities also made enormous efforts with regard to legal operators, often making themselves available to discussion and clarify the new procedural rules.

This interaction between regulators and the business community was crucial to implement the rules comprehensively and efficiently. I hope these special circumstances have taught us that discussions and debates between the government and industries are essential for achieving optimal mutual solutions.

However, some critical issues nevertheless emerged. There was confusion regarding the labelling of products imported from outside the European Economic Area. Although the new procedures were meant to speed up clinical trials or compassionate use programs, they did not simplify labelling for the required drugs. This risked delays because companies could not always relabel products fast enough.

Marketing pharmaceuticals to healthcare professionals also presented legal dilemmas. Certain promotional campaigns from wholesalers were based on recent publications from scientists around the world who are searching for a suitable virus treatment protocol. However, the authorities in charge of approving the advertising material before its dissemination maintained a rather restrictive attitude. The health authorities insisted on carefully monitoring all scientific information to avoid misleading doctors or sending them contradictory messages.

However, this caution must be assessed in relation to businesses' needs to exploit the opportunities (regretfully) created by the pandemic. Pharmaceutical manufacturers and distributors may benefit from highlighting that, according to the scientific literature, a particular product or active ingredient can have a beneficial effect on patients.

Yet here the authorities seemed to maintain a lenient attitude to sanctions. In most cases where a clamp down was deemed necessary advertising materials were merely prohibited, without the use of fines.

All in all, the pandemic seems, so far, to confirm the pharmaceutical industry's central role in the state's public health strategy, especially in emergencies. Studying new solutions inevitably involves dialogue between pharmaceutical industry associations and national regulatory agency representatives. This dialogue must focus on a careful evaluation of the interests at stake to strike the right balance between profits and the maximal protection of citizens' health.

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The Abuse of Prices Increases from a Criminal Law Perspective

Isadora Fingermann

There is a recurring perception that all conflicts that our society cannot resolve will be pacified, as if by magic, by criminal law. Even worse, for some, criminal law has long been the first alternative for solving social conflicts, abusing the concept that it should be serve only as a last resort.

In Brazil, the Covid19 health crisis has triggered new conflicts of interest in society. To some, criminal law quickly emerged as a magic wand to resolve pandemic-related problems.

Brazil has lacked a national health policy

to deal with the Covid-19 crisis. The decision of many Brazilian states to embrace social isolation without adopting a complete lockdown has meant that roughly half of the population of Sao Paulo disregarded recommendations to stay at home. It was not long before public authorities considered using police force and threats of imprisonment to enforce social isolation. Soon, hardline policies were discarded since overburdening an already overcrowded prison system that lacks minimum sanitation conditions would do much more to spread of the virus than to contain it.

Supply issues soon followed the isolation policies, aggravated by the consumer stockpiling. Shortages, combined with rising demand, led to sudden price increases, especially for basic food and hygiene products.

It did not take the authorities long to announce inspections aiming to fine, or even close, businesses practicing abusive price hikes. In the State of Sao Paulo alone, over two thousand inspections were carried out during April. This often stopped essential products, such as hand sanitizer

and masks, from being sold at prices up to three times higher than the precrisis index.

However, in the last week of April the authorities began speaking as if raising prices was a crime. Under the pretext of possible criminal embezzlement – inappropriate in the absence of fraud – Sao Paulo's authorities began to publicly threaten the arrest of business owners for crimes against consumers.

However, analysing the two Brazilian laws related to consumer protection – Law No. 8,078 and Law No. 8,137, (both from 1990) – it appears as if abusive price increases do not qualify in law as a criminal offense. The Consumer Protection Code (Law No. 8,078/1990) qualifies abusive increases as an administrative offense, subjected to administrative sanctions, such as fines, the suspension of activities or interdiction of businesses. However, neither law offers scope for criminalisation.

Aware of this fact, the administrative authorities quickly began to invoke a 1951 law to justify threats of arrest against proprietors during the pandemic, in another attempt to curb recurrent price hikes.

On one hand, article four of this law (1,521/1951) qualifies obtaining profits that exceed one fifth of a commodity's current value while taking advantage of consumer's pressing needs, as a criminal offense. But this crime, in addition to being antique and dissociated from the free market that permeates current commercial relationships, has such a low penalty that it would not even admit imprisonment under Brazil's criminal procedure code.

On the other hand, the third article, item VI, of the same law provides for a severe punishment. Two to ten years' imprisonment may be handed out, but only if price of certain goods rise due to false information or other means of frauds. Although politicians and prosecutors used this article to in order to justify authoritarian speeches and threats of arrest such a high penalty, fraud must constitute an indispensable element of this crime.

But there was no fraud. There was a pandemic, which led, among other things, to an increase in the cost of raw materials,



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transportation and US dollar exchange rates. There is a shortage of goods and there is an increase in demand. That is more than enough to justify a lawful and justified price increase on a free market.


But, if the hike proves to be abusive, dissociated from this just cause, it is an administrative offense. Absent any fraud, they should never be classified as a crime.

Furthermore, to make this point abundantly clear, there are at least three different bills pending in Congress, aiming to provide for this crime in Brazilian criminal law, especially during pandemics or other emergencies.

The rise in goods prices during the pandemic, often abusing consumers' needs, highlights the conflict between ensuring that certain indispensable goods remain affordable to the population and guaranteeing free market principles. Politicians should pay attention to this complex problem. But the issue also highlights a perpetual problem in criminal law studies, which is to assess the criminal relevance of administrative offenses.

Not every price increase is abusive; and, if abusive but not fraudulent, it is not, by any circumstance, a crime. This is because not all non-compliance with administrative and civil laws is criminal. This is true in the formal aspect, since no Brazilian define abusive price increase as a crime; but also in the material aspect of the legitimacy and effectiveness of criminal intervention.

Criminal law is guided by the idea of subsidiarity, that is, it should be a resort in situations when other legal instruments are insufficient to resolve social conflicts. Therefore, caution should be exercised in the use of criminal law. Politicians should avoid unnecessarily creating new criminal offenses where the administrative legal frame is capable of curbing undesired behavior.

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Third Party Funding after Covid-19: A remedy for companies to pursue their claims

Antonio Bravo



Source: Swiss Chinese Law Association

Given the uncertainty as to when and how the pandemic nightmare will end, companies are trying to mitigate this crisis' consequences by adopting cost restriction and capital preservation measures. The aim is to reserve financial resources to meet primary needs. However, it is foreseeable that Covid-19 will generate a significant increase of litigation; numerous companies will find themselves unable to meet their contractual obligations or will prefer litigation to avoid investments which no longer interest them.

In this context, should companies 'forget' their justified claims because they do not have the means to meet the costs of proceedings, or should they spend part of their limited resources to an uncertain outcome?

The truth is that companies can rely on a viable alternative that allows them to

pursue their claims without having to spend economic resources: third party funding. In other words, they could work with an investment expert willing to bear the costs of litigation in exchange of a portion of the outcome. On the one hand, the company files the claim. On the other, the third party fund provides the financial resources to face its costs and takes part of any winnings.

Third party financing has been around for a long time. But whereas before it constituted an additional option for companies Covid-19 has made it the only possible alternative when considering a claim.

This is generating a significant increase in the available funds for eligible cases. Accordingly, funders will adopt a more selective approach, showing interest only in the most economically and prestigiously attractive cases.


Hence, companies wishing to benefit from this alternative must be extremely cautious when presenting their case. They will want to attract funders' attention from the very beginning. Funds will have multiple investment opportunities and will choose some and reject many others, sometimes without even having the time to study them thoroughly. Therefore, an excellent assessment of the elements of a case that must be highlighted will be decisive to broaden a company's options to secure third party funders.

In addition, it is also very important to know what specific fund the case should be offered to. Nowadays there are funds of all kinds, some have a general approach and fund all types of cases whilst other specialize in certain geographic

areas (e.g. Latin America) or sectors (construction, engineering, etc.) so it is important to know who to approach in the first place and reach out to the appropriate fund and not waste time in presenting a case that may not be of interest.

Lastly, and considering the foreseeable flood of cases, it is not uncommon for funds' terms and requirements to become more 'demanding'. In such cases, we suggest to not be rushed into accepting the first offer were made, but rather to survey the market and compare several options to then chose the most beneficial one without losing sight of the markets standard conditions.

Ultimately, third party funding has become a more than necessary option for a lot of companies after COVID-19 but appropriate advice should be sought when handling this product to secure a successful result. Otherwise, clients may lack financial resources to bring the claim despite it being solid and well grounded.

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Current Developments in Germany

Marcel Barth

Selected changes in insolvency law

Germany's Covid-19 Insolvency Act contains far-reaching temporary changes to the country's insolvency law. Sections 1 and 2 of the act regulate the requirements for suspending the obligation to file for insolvency and the subsequent consequences. Section 3 limits insolvency proceedings filed for by a creditor between 28 March and 28 June 2020 to cases where the reason for opening was present on 1 March. Notably, the Federal Ministry of Justice is authorized to extend some of the act's provisions until 31 March 2021.

Suspending the obligation to file for insolvency

Until 30 September 2020, the Covid-19 Insolvency Act suspends the obligation to file for insolvency if the legal entity is insolvent or overindebted. However, this does not apply if the reason for insolvency does not stem from the consequences of the pandemic or if there is no prospect of eliminating an existing inability to settle debts. Since the law does not define



Source: Swiss Chinese Law Association

these grounds of exclusion, the wording will remain subject to further judicial interpretation.

If the company was not insolvent on 31 December 2019 it is assumed that the pandemic was the basis of the insolvency and that there is a prospect of eliminat-



Photo By Benjamin-Child on Unsplash

ing inability to pay its debts. These presumptions are rebuttable. Yet, a rebuttal may only be considered in cases where there can be no doubt that the Covid-19 pandemic was not the cause for the insolvency and that the elimination of an insolvency could not be successful.

Consequences of suspending the obligation to file for insolvency

The Covid-19 Insolvency Act provides for certain consequences associated with the suspension of the obligation to file for insolvency. During the crisis, affected companies are supposed to have the opportunity to stay in business and eliminate their insolvency. The following regulations mostly apply to companies not subject to insolvency application too – such as traders and limited partnerships with a natural person as general partner – and solvent companies who find themselves into serious economic difficulties due to the pandemic.

a) By way of a legislative fiction, the Covid-19 Insolvency Act states that payments made in the ordinary course of business are deemed compatible with the diligence of a prudent and conscientious business owner. It specifically mentions payments to maintain or resume business operations or to implement a reorganisation. Therefore, the personal liability risks for representative bodies in companies affected by insolvency have been reduced. According to the draft legislation, representative bodies are expected to “be able to take the necessary measures to continue the company in the ordinary course of business”. This includes not only “measures to maintain or resume business operations, but also measures in the course of the reorientation of the business within the framework of a restructuring”.

b) Additionally, the new act aims at ensuring that companies affected by the crisis continue to receive the funds they need. However, the repayment of loans granted during until 30 September 2020 and collateralization during the same period are not considered disadvantageous to creditors. In this respect, trade credits and other forms of performance on target are also regarded as loans. Since the new

regulation pursues to provide the affected companies with fresh money, novation or prolongation and similar situations are not covered.

c) The act indicates that granting loans and collateral during the suspension period is not to be regarded as an immoral contribution to the delay in filing for insolvency. In fact, lenders are to be protected against the risk that such credit be classed as immoral. Unlike in the case of repayment relief, this also covers prolongations and novations.

d) Finally, during the suspension period, the act exempts so-called congruent cover – such as payment and collateral – and certain incongruent cover – like payment instead of performance or payments by a third party on the instruction of the debtor – from a future insolvency challenge. This intends to prevent landlords, lessors or suppliers from quickly terminating a contractual relationship with a company in crisis. They will not have to fears repaying received payments in case a company’s restructuring efforts fail.


Many companies’ crises not down to their business models as such but are rather triggered by uncontrollable external cir-

cumstances. If not for these measures, this would be further aggravated, making a future restructuring much more difficult.

Assessment and outlook

In the current crisis, German legislators seems to be on the right track. The temporary suspension of strict requirements in company and insolvency law makes it far easier for many companies to manoeuvre through the crisis.

The temporary restrictions in insolvency law will contribute to preventing insolvencies and help healthy companies who ran into difficulties as a result of the pandemic. They offer other market participants an incentive to support these companies too. The measures taken constitute an important element in supporting and maintaining the German economy. Without them, an economic recovery after the pandemic would likely be much more difficult.

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Will the Covid-19 Crisis Catalyse the Dispute Resolution Movement and Improve Access to Justice?

Kay K.W. Chan & Katja Ziehe

The Covid-19 crisis has hit many sectors hard. One of the problems legal professionals face is the closure of courts for all but urgent matters. Courts in Hong Kong have been closed since 27 January and in Switzerland since 13 March. Many cases will remain unresolved until new court dates are set unless a settlement is reached during this adjourned period. The wait to relist court dates adds further delays as courts lack the capacity to deal with their colossal backlog. Compounded with the inherent problem of stretched court resources across many jurisdictions, this new crisis has accentuated an age-old problem we face in accessing justice.

One of the possible solutions to speeding up this access is technology. However, not all jurisdictions are ready to migrate court operations to the internet. For example, Hong

Kong courts have a very low rate technology use. There is one “technology court” in the High Court and other e-communication capabilities in the lower courts are supported by a portable set of equipment, commonly referred to as “the trolley”. Whilst the “trolley approach” is adequate for makeshift adaptations to enable the odd e-case – such as taking overseas witness testimonies – it is inadequate to make up for a total court lockdown.

With the courts shut, parties are left to their own devices to find solutions. In our view, many negotiations among litigators on immediate case management issues are just kicking the can down the road. The immediate effect is to ask the clients to wait for the crisis to ease and then re-joining the courts’ mammoth listing queues. In Hong Kong a bilingual commercial trial may already have to wait for as long as eighteen months. Some might have to wait two years or longer. Can a dispute wait that long for resolution?

Family professionals have always been ahead of the curve in looking at ways to solve disputes outside the litigation model. Of course a divorce decision requires a court pronouncement in most countries. But there is nothing stopping families from using non-trial methods to resolve their differences before applying to court for the final decree. Family issues are personal, emotionally charged and almost always urgent. As we say: life goes on doesn’t matter whether you like it or not. Finding a suitable solution quickly helps families move on and avoid secondary issues stemming from the original disputes.

Depending on the jurisdiction you are in, alternative options could be mediation, collaborative practice or arbitration. In Hong Kong there is also adjudication for family law-related financial disputes.

Swiss courts have been much quicker to adopt tech solutions to speed up resolutions. After reopening they have been flooded by unsettled cases. In Switzerland individuals can file at most courts as litigants-in-person. But even families willing to court-negotiate will have to wait for an unknown period of time for their cases to be heard. However, Swiss courts are used to receiving divorce agreements and can



Source: Swiss Chinese Law Association

handle cases in a single hearing which can be as short as half an hour. Even before the pandemic, a remote hearing was possible if, for instance, one party lived abroad and or was unable to travel. Now the pandemic has catapulted Swiss courts into the IT age in a matter of weeks. We believe divorce hearings by phone or video conference will become more frequent in the future.

In Hong Kong legal professionals have rethought how best to proceed. We take the view that this is a good opportunity for dispute resolution professionals to further establish themselves in the legal market. Mediation and collaborative practice have a greater flexibility of delivery and a speed which is much needed in this time of crisis. Without the constraint of a binary right/wrong outcome required in litigation these methods are also more desirable for parties looking to preserve ongoing relationships.

Obviously, recognition by courts of these methods is important for the dispute resolution movement. In Switzerland, lower level courts dealing with divorce cases tend to schedule consensual procedures quicker than litigated cases when a full agreement has already been reached. Lawyers can also seek a remote court hearing for the formalisation of the agreement. In the coming months we will see


in practice how this will help the Swiss court system.

Learning from experience in the Swiss Family Court, mediators and collaborative professionals can support families in relationship breakdowns. We would argue that the same applies to other people in conflict.

Financially, the pandemic is exerting incredible strain on businesses of all sizes. Given that commercial litigation can take years to conclude even without the present delays, we believe that litigation should remain the last choice for businesses to resolve their disputes. In contrast to divorce suits, commercial conflicts usually do not need a court decree to conclude anyway. Companies, businesses, employers, employees and other stakeholders need quick solutions to their disputes so that everyone can move on. Time is money and money is better spent on businesses than in lengthy litigations. Mediators and collaborative professionals can support parties in conflict to find quick, out-of-court solutions while preserving business secrets and saving money. In the current crisis, it seems to be not just economical, but the only viable option.

All in all, lawyers should actively consider ways to help clients ease their concerns over court delays. It is our respectful opinion that lawyers have a professional duty to advise on different options to efficiently resolve disputes.

With the Covid-19 crisis easing as we approach summer, the pressure on our court system will surface. If dispute resolution professionals and lawyers put their efforts into removing cases from courts by offering their services, we may be able to open a new page in effective access to justice for our next generation and push the dispute resolution movement into the post-Covid-19 era.

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Upgrading Regulatory Compliance Information Sharing with Blockchain

Charlotte Gunka

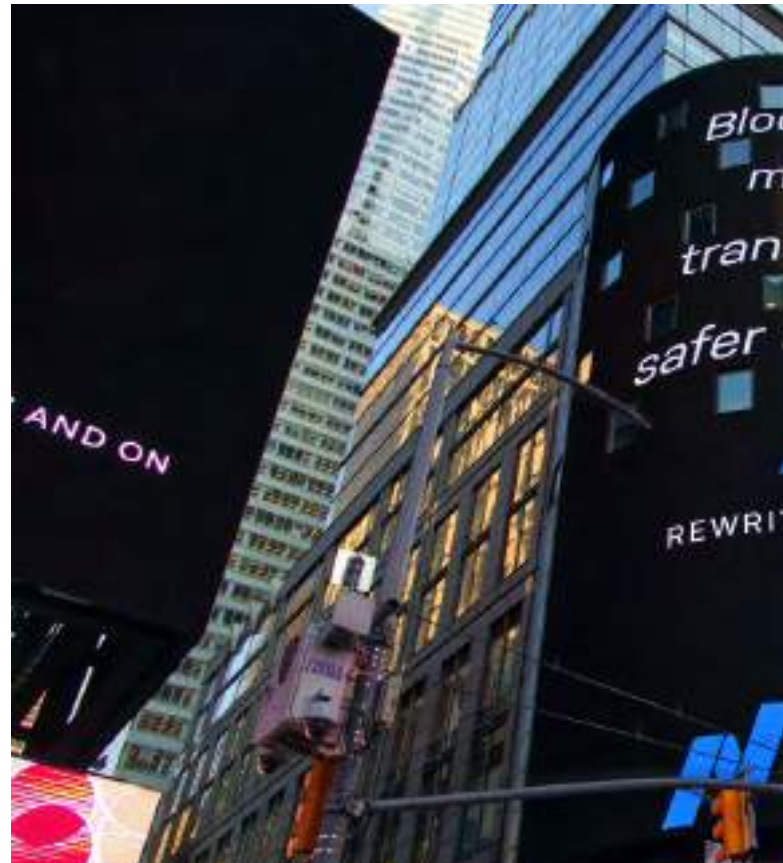
Covid-19 has exposed the private and public sectors' pressing need to rely on new technologies to process information faster, with sufficient trust and at lower costs. This is particularly true for organisations that continuously monitor their customers' and third parties' activities to comply with regulations. Notably standards set to combat money laundering, terrorist financing, fraud and corruption require increasingly sophisticated systems to enforce. How should lawyers consider blockchain and distributed ledger technology (DLT) as a solution in the race for confidence?

Alongside DLT, blockchain has attracted notable attention in recent years as a piece of innovative and secure software for gathering and sharing information. Several key economic stakeholders, including the World Bank and J. P. Morgan have trialed its application. The World Economic Forum releasing its own blockchain deployment toolkit in May 2020. It noted that if there were still doubts over the value of blockchain's DLT, the Covid-19 crisis has eradicated them.

Evidently, certain technological and practical improvements must be consolidated to make blockchain's DLT a fully operational tool. I will explore legal considerations that circumscribe and enhance the blockchain DLT as a due diligence datasharing platform.

Blockchain DLT as a Tool for Efficient Regulatory Compliance Information Sharing

While the terms blockchain and DLT are often used interchangeably, they refer to separate but complementary softwares. The blockchain is a computer program that uses an algorithm and cryptography to recording of information in a highly secure and structured sequence of data "blocks", which all relate to each other in an unalterable logical relationship. In turn, a distributed ledger or DLT describes a specific type of database that allows information to be accessed and shared in synchronicity within a computer network. This could be located across multiple sites, without the need for a designated managing party. A distributed ledger will generally consist of clustered registers, maintained private or public by the participants located at each "node" of the network. No new data "blocks" can be added to the network without all nodes instantly registering the same changes. Because the DLT ledger is replicated simultaneously across many individual computers this increases transparency and credibility. Any



local attempts to manipulate the ledger could be quickly exposed.

In contrast, traditional databases are structured as centralised platforms, or decentralised in complex guarded networks. They require an administrator's approval to be shared between different users. Within a group of institutions, stored information is generally managed by a single user who authorises others to access a unique server. However, blockchain's DLT can create a shielded peertopeer network without intermediaries, built upon a consortium of several users. They share their knowledge by default to facilitate the consulting the information each user registers.

The instrumental features of blockchain's DLT arise from the

mandatory information exchange by financial institutions in the cause of anti-money laundering and combating the financing of terrorism (AML/CFT for short). Its unmodifiable and encrypted nature offers traceability and security for exchanging sensitive data within financial groups with complex interconnectedness. Notably, this is also true regarding customer due diligence (CDD) obligations and third party verification. The Financial Action

sum of all fines imposed by the banking regulator multiplied by a factor of fourteen in two years – from €4.9 million in 2016 to €70 million in 2018. The consulting firm McKinsey & Company estimated in June 2019 that blockchain's DLT-based solutions for customer identification could create up to \$1 billion worth of savings in operating costs for retail banks globally. What is more, it could reduce regulatory fines by \$2-3 billion and lower annual losses from fraud by \$7-9 billion. Despite the initial costs associated with switching from a centralised system to DLT, increased AML/CFT regulation and the growing risks of fines calls for speeding up its implementation. In the long-term it will effectively prevent money laundering, terrorist financing and similar criminal activities.

That said, implementing a blockchain DLT, within financial institutions and other organizations, must comply with the numerous domestic laws and regulations that regulate information exchange. At the same time it should contribute to safeguarding individual rights and public interests.

Domestic Laws as Practical Safeguards to Blockchain's DLT-based Information Sharing

For the purpose of AML/CFT, financial institutions must assess a number of factors to decide whether a blockchain can be adopted at group level. FATF's guidance expect countries to impose and monitor financial groups' information exchange policies and procedures to prevent money laundering and terrorist financing. This covers the parent company, branches and majority-owned subsidiaries, domestic and foreign. This monitoring includes data related to customers and beneficial owners identification (KYC information), and account and transaction monitoring. The latter covers suspicious transaction reports (STRs) and enhanced CDD analysis. Considerations should also include upon elements such as products and services, location, existing legislative and regulatory frameworks, the confidentiality and sensitivity of any shared information, and other risks and context.

Overall, countries have similar definitions of KYC information but even within the EU countries differ over STR sharing. In France, for example, STRs are confidential and their disclosure is forbidden under Article L. 561-18 of the French Monetary and Financial Code except to the French financial intelligence unit (FIU). However, the STRs' underlying data and the fact that it has been submitted, may be revealed under conditions of strict confidentiality to group entities located in countries that are not provisionally considered by the EU as high-risk jurisdictions. In contrast, in the United States, banks (including foreign banks' US branches) can share STRs, but only with their parent entity, whether located in the US or abroad.² In other countries, exchanging STRs-related information may be subject to prior approval by domestic FIUs or, in some cases, forbidden.



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Task Force (FATF, who set international standards for AML/CFT) repeatedly reminds private and public organisation – most recently during the pandemic – that effective information sharing is a cornerstone of a well-functioning AML/CFT framework. In the European Union (EU), the May 2018 Fifth Anti-Money Laundering Directive (5AMLD)¹ introduced enhanced CDD requirements for entities dealing with high-risk countries. It also regulated information sharing within group financial institutions, with financial institutions in different groups, and between AML/CFT competent authorities.

Concretely, blockchain's DLT is a costsaver for group financial institutions who will likely face greater regulation. In France, the

Bank secrecy rules for the protection of clients' privacy in certain jurisdictions may further constrain the implementation of a blockchain DLT. Although the FATF requires countries to ensure that bank secrecy laws do not inhibit their AML/CFT standards, certain jurisdictions remain extremely restrictive. Even a legitimate interest, security concerns or client's express consent may not allow certain banks to unveil a financial secret. According to the 2020 Tax Justice Network's Financial Secrecy Index, the ten toprank countries in this regard are, unsurprisingly, the Cayman Islands, the US, Switzerland, Hong Kong, Singapore, Luxembourg, Japan, Netherlands, the British Virgin Islands and the United Arab Emirates. In Switzerland, the Tax Justice Network reported in 2020, each current and prospective client could have to consent to a data transfer to a foreign group entity, depending on the recipient entity's jurisdiction.

Furthermore, specific trade and state secrecy laws intended to protect states' interests could also prohibit cross-border information transfers between group entities. In both France and Switzerland, governmental approval is required before any evidence or sensitive information can be transferred out of the country, notably in the context of a criminal proceeding.

However, such privacy and data protection laws might actually be compatible with blockchain. One example is the EU's General Data Protection Regulation (GDPR). It imposes strict rules over collection, processing, storage and transfer of personal data by organisations located in the EU; or beyond, if they offering goods or services to persons in the EU. While some issues remain, the European Parliament has encouraged the use of blockchain DLT solutions on the condition that they are private and require permissions to access (as opposed their public default setting) for group-wide information sharing. Specific concerns over the eternal nature of blockchain data could be addressed by encryption techniques which make registered informa-

tion virtually inaccessible after a certain time. Numerous safeguards would nevertheless need to be introduced, including the adoption of binding corporate rules, a prior data protection impact assessment shared with relevant regulators and the designation of a data controller who can attest of the lawfulness of any data processing (such as AML/CFT and CDD). Informing the client about their rights and the purpose of the blockchain DLT would also be necessary in contract clauses.

Despite the financial sector's specific conditions, legal constraints regarding implementing a blockchain DLT-based information sharing system could be overcome. Common sense does not call for blockchain to be used systematically where traditional, and perhaps more flexible, solutions are available. Yet, it could, if designed in compliance with the relevant legislation, represent an efficient tool for transparency within group organisations. Beyond AML/CFT obligations, companies across the board are now subject to heightened anticorruption regulations. In response to the Covid-19 crisis,

the Network of Corruption Prevention Authorities issued a statement on 11 May calling upon regulators and private entities to strengthen their internal anticorruption measures. Blockchain presents an optimal means of storing transparent and accurate databases to this end.

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1. Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018, amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU. The 5AMLD should have been transposed into all EU member states' national laws on January 10, 2020.


2. FinCEN, "Sharing Suspicious Activity Reports by Depository Institutions with Certain U.S. Affiliates", Guidance (FIN-2010-G006), November 23, 2010. 



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Using New Technologies to Battle Covid-19 in Switzerland

Margareth d'Avila Bendayan

The spread of Covid-19 prompted the question of a virus proximity tracking application developed by the Ecole Polytechnique federale de Lausanne (EPFL) along the lines of decentralised privacy-preserving proximity tracing. This application allows Covid-19 infection chains to be tracked through movement data collected by mobile phones. The application gives an opportunity for a person tested positive for Covid-19 to anonymously activate a notification service. Depending on the date of their first symptoms, all users with the application would be informed if they had recently been in contact with the infected person. This practice should be defined as a form of surveillance.

In Switzerland technological surveillance measures are very tightly regulated. The protection of privacy implies compliance with conditions established in the Swiss Federal Constitution. According to article 13 paragraph 1, everyone has the right to a private life and privacy in at home, in correspondence and in telecommunications relations. Paragraph 2 of article 13 also protects all citizens against the improper use of their data.

Swiss privacy

The Federal Court, Switzerland's highest court, has explained that this protection applies in particular to telephone conversations. It covers not only the content of a conversation, but also to what is called secondary data, such as numbers dialed from a private telephone connection, the duration of the conversation and the identity of the participants.

Generally speaking, Swiss law provides that any restriction of a fundamental right, such as the right of privacy, must be founded on a legal basis. It must be justi-



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fied in the public interest or in the protection of other people's fundamental rights. They must be limited to what is necessary and adequate for achieving specific public interest aims.

The Swiss Federal Law of 6 October 2000 on the surveillance of correspondence by post and telecommunications (LSCPT; RS 780.1) determines which cases where telecommunications surveillance may be mandated. Such measures can only be undertaken in five cases: (1) for criminal proceedings, (2) when executing a request for mutual judicial assistance, (3) in the search for a missing person, (4) in the search for persons sentenced to a custodial sentence or who are the subject of a measure entailing a deprivation of liberty and (5) within the framework of intelligence services under the execution of the Swiss Federal Law of September 25, 2015.

Tracking the virus

Applications similar to the one developed by the EPFL are already in use in several countries. In China, the Alipay Health Code application has been employed across the country. The application allows you to determine if you are at risk, based on your recent trips. Likewise, in

Singapore has a TraceTogether application records contacts between persons to trace the virus. In case of symptoms or a positive Covid-19 test, the user launches a signal and the application warns those who have been in their proximity in the past few days. In Germany, the German Institute for Epidemiology has announced the launch of a similar application. The user voluntarily wears a networked watch or bracelet that records their vital signals to detect any respiratory illness.

In late April, the Swiss Government has issued emergency orders to enable itself to rapidly order measures to combatting the pandemic (Article 6 paragraph 2 letter b of the Law on epidemics). However, there made no provisions relating to technological surveillance measures.

The Commission [ask author to specify which commission?] has ruled that a parliamentary motion must be introduced to ask for the establishment of a legal basis for trackandtrace applications. It also clarified that the application should be voluntary. On 1 May 1, the government proposed that the motion be rejected. The government believes that a legal basis is not necessary and that there are already enough legal instruments to use an application on a voluntary basis. Legislate at the parliamentary level, they argued, would be superfluous. Simultaneously, the government rehearsed the urgent need to make this application available to make virus containment measures more flexible.

The tracking application saw its first implementations in late May.

The democratic debate over the balance between privacy and the public interest has been lively in Switzerland. However, a survey by Deloitte published on 23 April showed that during the pandemic, the protection of privacy is not currently Swiss people's primary concern. Sixty-four percent were favor of using smartphones to contain the virus. Only fourteen percent categorically rejected the anonymised collection of location data.

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Zoom to the Future: Could virtual arbitral hearings be the new normal?

Elizabeth Chan & Jeff Yiu



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As of 5 May, a third of the global population was subject to some form of lockdown or travel restrictions. In this period of social distancing, parties, lawyers and arbitrators are adjusting rapidly to working remotely and even moving arbitral hearings online. But what are the advantages, challenges and solutions presented by Zoom courts?

Using technology in arbitral proceedings and virtual hearings

Before the Covid19 pandemic virtual hearings conducted entirely online were the exception rather than the norm. In 2018 the Queen Mary University of London's International Arbitration Survey found that 78 percent of respondents had "never" or "rarely" used a virtual hearing room.

Nevertheless, for the past few years, video conferencing technology was already widely used to conduct arbitral proceedings. Indeed, by design, arbitration is flexible enough to allow parties to adapt procedures to suit their needs. For example, filing submissions, witness statements, expert reports and exhibits electronically is already the norm in many arbitral proceedings. Many hearings also routinely include some "virtual" element. Conducting case management conferences and other procedural hearings via teleconference, for instance, is already common. As is cross-examining witnesses via video link. This has been practical for arbitrators dialling into a substantive hearing from another time zone, or where witnesses are unable to travel. Yet, until now, there has not been a strong motivation to use fully virtual hearing rooms.

But necessity is the mother of innovation. Lockdown and social distancing measures have not ended the need for efficient dispute resolution. The continuing uncertainty of not settling a dispute as originally scheduled and the time already spent on preparing for a hearing costs money. Parties, therefore, need to consider seriously virtual hearings as an alternative to postponement. In some instances, postponing a hearing is impossible, as arbitrators and counsel's calendars for late 2020 and 2021 are filling up quickly with delayed hearings. Moreover, it is unclear when international travel will resume at full capacity. Even when it does mandatory quarantines may be imposed on foreign arrivals. This makes virtual hearing be the most viable and cost-efficient option for resolving disputes in the near future.

Fortunately, arbitral institutions can accommodate and drive forward procedural and technological innovations. Indeed, many have been at the forefront of offering virtual hearing facilities. They have

reported that the demand for virtual arbitral hearings has increased significantly since the Covid-19 outbreak. The Hong Kong International Arbitration Centre recently reported that approximately 85 percent of hearings in April and May 2020 have required or will require virtual hearing services. For the period February-September 2020, it anticipates that 65 percent of all hearing-related inquiries it receives will involve, virtual hearing support. Similarly, the China International Economic and Trade Arbitration Commission has issued guidance encouraging arbitrators to "first consider the possibility of holding virtual hearings". The Beijing Arbitration Commission and Beijing International Arbitration Centre has advised similar methods for arbitrations in mainland China. It has also recognised the importance of its own work in assisting and operating videoconferencing platforms.

Key benefits of virtual hearings

Given the risk of Covid-19, virtual hearings offer obvious health and safety benefits for participants. Additionally, virtual hearings allow those involved to comply with travel restrictions and social distancing measures and avoid the inconvenience of mandatory quarantines.

Even when the pandemic eventually passes, virtual hearings may remain a viable, indeed preferred, choice for parties. Significantly, it delivers significant cost savings. While there may be upfront costs involved in acquiring hardware and a reliable platform, those costs are usually a fraction of the costs of travel and accommodation for multiple participants involved in face-to-face hearings. For less frequent users of virtual hearings, the required hardware and software may be rented. Although lawyers and clients need to spend time familiarising them-

selves with the technology, such training will deliver long-term benefits. As more parties, counsel and arbitrators use those technologies the arbitration community will benefit from economies of scale.

From an environmental perspective, virtual hearings offer a sustainable and eco-friendly way to conduct arbitral proceedings. The arbitral community has widely recognised the need to “go green” and reduce the environmental cost of arbitration – in large part caused by international flights. Lucy Greenwood’s “Green Pledge” for arbitrations and mediations to avoiding unnecessary travel and requesting electronic rather than hard copies of documents, shows how this mood was increasing even before Covid19. Greenwood’s Campaign for Greener Arbitrations, supported by Dechert LLP, found that a medium-sized arbitration valued at US\$30-50 million requires 20,000 trees to offset its potential carbon emissions. Conducting hearings remotely may be one of the most effective means to minimise the environmental impact of global travel, practical difficulties and solutions

While virtual hearings will not be appropriate for every case, anecdotal evidence from arbitral institutions suggests that virtual hearings have been, possible for many proceedings. Notably, at the Vis International Commercial Arbitration Moot this year, over 240 teams of advocates competed remotely for time slots. Of course, in limited instances, a virtual hearing may be less appropriate. Complex factual issues may be more effectively articulated in face-to-face interactions. Equally, where a case involves participants without secure, reliable internet connections or where the number of participants exceeds software or bandwidth limits, problems will arise.

However, many other difficulties posed by virtual hearings are not so different from the day-to-day challenges faced by international arbitration practitioners. They can be overcome by existing technological or other pragmatic solutions.

Technical difficulties: Technological glitches can be minimised through

testing all participants before the hearing. Some video-conference platforms (including Opus2) provide a dedicated operator to manage the video-link and call up documents from electronic bundles.

Proper equipment: Each participant should consider having at least four screens to display their own video screens; the live transcript; any documents from the electronic presentation of evidence platform; and email or Whatsapp chats for their team.

Witness examination: Arbitral tribunals have often not had significant concerns about their ability to assess a witness’s credibility via video-conference. On the contrary, videolink can sometimes improve visibility of a witness’s facial expressions, especially if high-definition cameras are used.

Furthermore, parties may consider whether witness cross-examination is necessary at all. Few modern commercial agreements are concluded without an extensive paper trial and in psychological research has highlighting the unreliability of human memory. Indeed, Justice Leggatt in the English High Court has commented that memory is “especially unreliable when it comes to recalling past beliefs”, especially during litigation. Indeed lawyers often prepare witness statements that may cause witnesses’ memories to be reshaped by recent interpretations and not their original experience. These concerns also arise in many arbitration contexts.

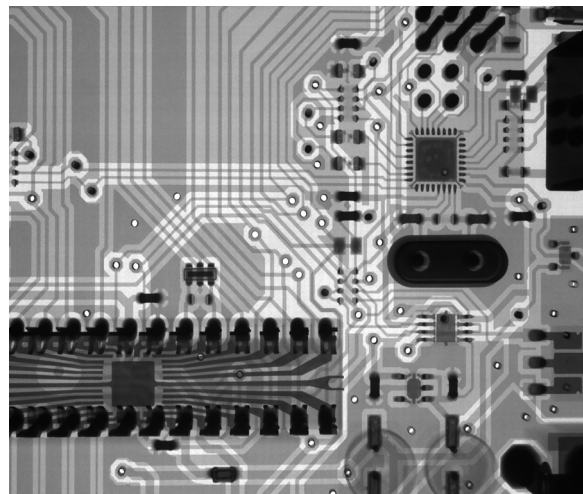


photo by Mathew Schwartz on Unsplash

Unfair advantage for witnesses: Concerns that witnesses are being coached off-camera or reading a hidden script can be addressed by installing rotating cameras, 360 degree cameras or multiple cameras at different angles. Mandatory screen-sharing can also prevent a witness from accessing hints displayed on their computer screen. Close-up video shots should make it readily noticeable if a witness is looking elsewhere for answers or assistance.

Although it would be difficult to strictly enforce witness sequestration, that problem is not unique to virtual hearings. Such issues can be addressed, in some cases, through scheduling so that examination of a witness is completed in one day, or by extending the hearing day slightly to accommodate this.

Interpretation: As in an in-person hearing, various platforms offer consecutive and simultaneous interpretation for virtual hearings. Participants can select their preferred audio channel. The International Centre for the Settlement of Disputes has used Kudo to provide real-time interpretation for virtual hearings.

Audibility: Poor sound quality can be addressed by real-time transcripts. Livenote, for example, is already frequently used in in-person hearings to broadcast real-time transcripts.

Time difference: Coordination of participants attending from different time zones may cause scheduling difficulties. For example, a case involving Asian and US parties may only find two or three overlapping hours in a business day. This could extend the hearing over an unduly number of days or with unreasonably short breaks. It could impose a disadvantage on the party required to attend the virtual hearing either very early or very late each day.

In these situations, it should be considered whether both parties must appear in the virtual hearing room at the same time. An asynchronous hearing might be appropriate. In hearings, each party makes oral submissions, expert presentations,

and even witness cross-examination in front of the tribunal without the other party's presence. A full video recording and transcript is then made available for the other party. They then proceed similarly. The asynchronous hearing would be followed by a "plenary" session with both parties attending the virtual hearing room to address points they consider necessary to raise, such as objections or rebuttals, or to conduct re-examinations. Asynchronous hearings may be appropriate for hearings dealing with relatively straightforward matters, without a large number of witnesses and or issues that are likely to be dispositive of the entire case. Although there may be concerns that in an asynchronous hearing it may make more sense to make objections at the time a submission is made or witness examination is conducted, it is a solution nonetheless worth considering given that "plenary" hearing time would be significantly shortened.

Cyber fraud: Cyber security is an issue that has long existed in international arbitration, where correspondence and data is often exchanged online. It is not unique to virtual hearings. The International Council for Commercial Arbitration, New York City Bar and the Institute for Conflict Prevention and Resolution have jointly issued an up-to-date Protocol of Cybersecurity in International Arbitration, which provides a framework for reasonable information security measures.

Team communication: In an in-person hearing, it is common to see a flurry of post-it notes being passed up and down one side of the hearing room where a party's team is seated. Now, frequently, Whatsapp conversation groups also facilitate communications between counsel, the client, witnesses and experts. However, some thought should be given in advance as to who should be in which conversation groups, and whether anyone should be responsible for filtering messages to the lead advocate. Whatsapp group calls can also be helpful for discussion purposes, although such group calls are currently limited to four members.

Conclusion

The pandemic offers the arbitration



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community an invaluable opportunity to consider the flexibility and novelty possible in arbitration. To think of virtual hearings as merely replicating face-to-face hearings in an online space misses an opportunity to innovate. We should seize the opportunity to consider how to use technology to streamline arbitration proceedings, even after social distancing measures. For example, virtual hearings can promote innovations like the Kaplan Opening, which proposes a hearing after the first round of written submissions and witness statements but before the main hearing, so that the parties can brief the tribunal on their respective positions early in the arbitral process and help facilitate the tribunal's preparation. The arbitration community is on a steep learning curve, but we hope we will emerge from this crisis having embraced this unique opportunity to improve our profession.


For readers who are contemplating a virtual hearing, there are numerous resources that provide helpful guidance, including:

- The Delos checklist on holding arbitration and mediation hearings in times of Covid-19 lists matters to consider when deciding whether to maintain a hearing date, and preparing, conducting and following up regarding the hearing in light of Covid-19.

- The Seoul Protocol on Video Conferencing in International Arbitration provides a guide to best practice for planning, testing and conducting video conferences in international arbitration.

- The International Chamber of Commerce has issued a guidance note for parties, counsel and tribunals on possible measures that may mitigate the adverse effects of the Covid-19 pandemic on its arbitrations.

- The International Bar Association Arb40 Subcommittee has listed the currently available technologies that assist or augment international arbitration, including, but not limited to, virtual hearings.

Elizabeth Chan and Jeff Yiu are associates at Three Crowns LLP, London, UK. The views expressed in this article do not necessarily reflect the views of Three Crowns LLP or its clients. 

An athlete personal experience and perspective of Anti-Doping

Zhang Ping

Doping in sport

As technological development has advanced, athletes who used banned doping substances find new ways to skirt relegation. Different sports need to look out for different stimulants. For instance, if two weightlifters in the 50kilo division manage to lift the same weight, the athlete with the lightest body mass wins. Therefore, diuretics – or “water pills”, which help the kidneys flush extra water and decrease body weight – become a substance that is frequently tested for. For other sports, like shooting or archery, depressants can enable player stay extremely calm. My friend told me a perfect and stable timing for shooting is between heartbeats.

World Anti-Doping Agency

Doping is banned primarily because of the health risks they pose to athletes, but also to ensure equality of opportunity and to set an example for a drug-free sporting world. Performance-enhancing drugs flatly go against the “spirit of sport”.

In-of-competition (IOC) sample collection

I remember that my first experience of being tested in an inofcompetition control was before 2005. The Doping Control Officer (DCO) would speak to our team doctor and select a team member at random to run the test. Because volleyball is a team sport, the DCO only selects one player from each team and I had the luck of being choosing. The DCO leaded me to a room with a toilet where she showed me the testing equipment. We entered toilet cubicle together. She watched me present my urine collection in a disposable cup and verified that it was my body fluid. I placed my urine sample a red and a blue

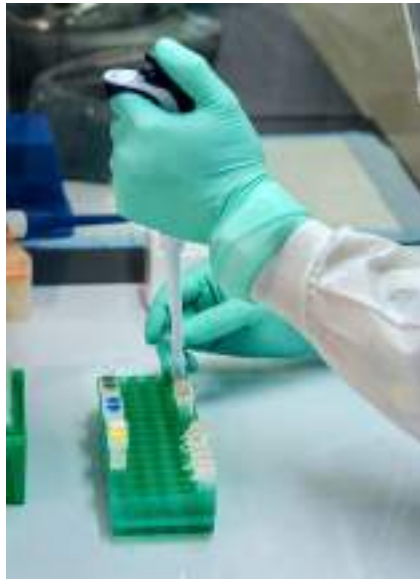


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bottle, marked “A” and “B” respectively. The bottles went inside a white box, which the DCO sealed. Finally, I signed a document attesting that the doping test collection was complete.


The Anti-Doping Administration Management System

Since 1999, the World Anti-Doping Agency (WADA) has taken on the mission to lead a collaborative, worldwide movement for doping-free sport. In 2005 it launched its AntiDoping Administration Management System (ADAMS). The system has by now been introduced and implemented by most national Anti-Doping Organizations (ADOs) and all WADAaccredited anti-doping laboratories. ADAMS is a web-based platform that allows athletes to comply with their sports' whereabouts rules by entering their information from

anywhere in the world. Athletes can report when they have stayed in overnight accommodation and detailed travel information, such as when they will return from a match, so that doping authorities can locate them for testing. This gives the WADA a calendar of every elite athlete around the world. ADOs also make use of this essential database to manage their in- and out-of-competition doping control programs. An elite athlete who fails to accurately file their location three times commits a violation of antidoping rules.

High-Performance Team in Sport

Elite athletes should always be accompanied by at least three team members to help them perform at the best of their ability – the coach, the team doctor and the team leader. The coach is responsible for daily training and strategies and tactics in a match. The doctor, of course, helps out with nutrition, rehabilitation and doping checks. Finally, the team leader decides on social policies, advertising endorsements and so on. If you ask me, I hope that one day a lawyer who is proficient in both eastern and western legislation can join this team. This would help the athlete understanding the law and court procedures and safeguard their interests and to help them attend more championships.

Zhang Ping is a professional volleyball player and was a Volleyball Women's Gold Medalist at the 28th Olympic Games. 

A Covid Pondering

Ushantha O'Donnell

I chanced upon an open bookstore today – amidst the furore of Covid-19 lockdown and plethora of surgical masks colouring the winds. Lots of down-cast gazes and squinting eyes poking out from behind paper shields. Sheepish stares peered at the shared sinful pleasure of being let out of mortar cages. A careful waltz of distance to rival the Viennese was being orchestrated in the aisles as rare bibliophiles sampled the fragrance amongst the tomes and savoured the titles salaciously. In truth, I was looking for a coffee this morning as my home was already a shrine – a living variation order dedicated to my adoration of the written word.

I stumbled for a second, for my waltz was less accomplished than my verb, and fell into a fortuitous eavesdrop. I wish I wasn't being cliché, but a lofty-heighted fellow wearing a dark polo-neck sweater, was engaged in a conversation with a coquettish lass in charcoal apparel. She looked up at her conversation consort. They paid no


heed to my presence as their gazes were firmly fixed like the North Star, and also, I had the pleasure of the 'non-fiction' bookcase to linger behind.

I overheard him tell her that she's beautiful whilst the waltzes continued unabated in the background.

She, with a look of atheism in her russet eyes, asked him how he could possibly arrive at such a conclusion when they were both wearing masks.

"Because of the book you are reading," he concluded, gesturing to her hand. A copy of *Love in the Time of Cholera* was resting in her grasp.

And the masquerade was complete. Beauty is in the eye of the book-holder in the time of Covid-19.

I slipped away surreptitiously with a hidden grin that played plainly in my eyes as I reflected, for once, not upon the cost of Covid-19, but its value. 

A Journey Through the Cultures

Chan Leng Sun

It is not time yet to stow my counsel's gown. One does not have to reach one's destination to pause by the side and glance back at the road traversed. Prompted by the kind invitation of the Swiss Chinese Law Association, and confined by a lockdown in Singapore, I reflect on the education in life and in law that I acquired in the past 30 years.

I have worked in different capacities in a varied career. What I am really grateful for are the diverse experiences in numerous countries, in different settings amongst people of all persuasions.

I started my career in Kuala Lumpur, Malaysia after obtaining my first degree in law from the University of Malaya. Mah, Kok & Din has now become Raja, Daryl & Loh. But I joined its litigation department and worked on a variety of domestic civil litigation cases. We operated primarily in English but since the Malaysia's courts operate in Malay, we also had to be proficient in both languages. Hearings were frequently conducted in Malay in the lower courts, but the senior judges in the higher courts were comfortable with the use of English.

Besides the basic pre-requisite competence in law, Malaysian lawyers have to be a hardy and practical bunch. Those were the days before the internet and before electronic documents. Files had to be moved from place to place. Unfortunately, papers were not always where they were meant to be, causing disruption to hearings. Lawyers learnt to roll with the unpredictability of the process. We travelled all over Malaysia, adapting to the



Source: Unsplash

expectations of the judges in each town we landed in.

The year I started practice was a watershed for the Malaysian judiciary. In 1988, a period of tension between then Prime Minister Dr Mahathir Mohamad and the judiciary led to the Lord President of the Supreme Court of Malaysia, Tun Salleh Abas, being suspended from office and a tribunal formed to hear charges against him. Five law firms, including Mah-Kok & Din, acted pro bono in defence of Tun Salleh Abas without fear or favour. I was a pupil then, roped in to assist the stalwarts of the Malaysian bar. The Malaysian Bar Council, fiercely independent and courageous, stood resolutely on the side of the judiciary. The story is dramatic with many twists and turns, but to cut it short, the Lord President and two other Supreme Court judges who had dared to sit in an urgent appellate hearing to stay the tribunal proceedings were removed from office. It took twenty years to vindicate them. In 2008, Prime Minister Tun Abdullah Ahmad Badawi announced ex-gratia payments to Tun Salleh Abas, Tan Sri Wan Suleiman and Datuk George Seah who unjustly lost their offices. A joint report that year by the Malaysian Bar Council, LAWASIA, the IBA and Transparency International (Malaysia) disagreed with the findings of the tribunals against them.

In 1990, I was fortunate enough to pursue a Master in Law (LLM) at the University of Cambridge as a Kuok Foundation scholar, an Honorary Shell scholar and a Pegasus Cambridge scholar. I had hardly travelled before that. My first trip on a plane was as a Jessup International Law mooter representing Malaysia in Washington for the moot finals. That I could one day be studying in Cambridge was not even in my mind when I started law school. I arrived in Cambridge on a bus from London late in the evening. Walking along one of the town's many cobbled alleys, I turned a corner and was struck by the vision of King's College Chapel in all its gothic splendour. That first encounter with the intellectual bastion left a visceral



Source: Swiss Chinese Law Association

impact that has lasted to this day. I soaked in my time as a student of Sidney Sussex College, wandering the historical halls of Cambridge as a privileged insider.

The Pegasus Cambridge scholarship arranged for its scholars to do a few months of internship in the Inner Temple and Clifford Chance in London after our graduation. I experienced for the first time the environment of a big, international law firm and the distinctive traditions of the English bar. It is interesting how completely different the two offices are and yet how seamlessly they work as one. An international law firm is a hive of activity that buzzes throughout the day. A barrister's chambers is quiet, each barrister cloistered in his room in solitary research and drafting, save for the occasional meeting outside or afternoon tea with other members of chambers. Solicitors

are pragmatic and commercial problem solvers for their clients. When deep legal analysis or advocacy is needed, they turn to the barristers. Solicitors and barristers complement each other. My time with them was too brief for me to be of much use to either, but the people assigned to me were all grace. A highlight for me was when the late Lord Robert Goff of Chieveley (as he then was) invited us scholars into the House of Lords where he and other Law Lords were sitting to hear a case. They took a break from their hearing to host us for lunch.

From the UK, I ended up being a lecturer in the Law Faculty of the National University of Singapore on the recommendation of a Cambridge classmate who was teaching there. I enjoyed research, reading and teaching, specialising in shipping law, contract law and international busi-

ness transactions. At that time, that was the only law school in Singapore. Many leading lights of the legal profession were its alumni and the brightest minds gathered there as faculty and students. I have fond memories of the campus at Kent Ridge and the friendships I made there.

Despite the comforts of academia, I felt that my knowledge was mostly theoretical as I had not seen upfront the application of principles to commerce. After three years as an academic, I decided to join Ang & Partners, a boutique law firm in Singapore with a strong reputation in maritime law. There were just a handful of lawyers but that meant every person counted and the learning curve was steep. The juniors worked hard to try to keep up with the three founding partners, who were among the hardest working lawyers I have encountered to this day.

In 2002, the United Nations Compensation Commission (“the UNCC”) offered me a job as a legal counsel in Geneva. I accepted it and took a sabbatical from Ang & Partners. The UNCC was created to process claims and pay compensation for losses and damage caused by Iraq’s invasion and occupation of Kuwait in 1990-1991. Funds for the compensation came from the Government of Iraq. The UNCC legal teams verified and evaluated the claims based on the methodology approved by the UNC. They presented their findings to commissioners who made their assessments and recommendations in reports to the Governing Council. The Governing Council reported to the Security Council. Working in the UN and living in Geneva was a completely new experience for me. It took some adjustments. One cannot be impatient and take the shortest path to achieve the outcome, as practical practitioners like to do. We paid allegiance to the UN processes and procedures, as these were often under scrutiny. Obviously, the teams were as multinational as you could expect. The diversity was an asset, not a hindrance. We could see that differences between people came from their characters and not their nationalities. Switzerland is as beautiful as those who live there know and those who dream of it imagine. It helps to know French if you intend to live in Geneva. I struggled valiantly with the language but my lovely Swiss neighbours often ended the torture (to them) by suggesting that I spoke in English.

My contract with the UNCC was for two years and they contemplated extending my contract. Then Ang & Partners asked me to return to Singapore as they were going through changes and wanted me on board as an equity partner. So I returned to practice in Singapore in 2003.

The new millennium saw downward pressure on fees for shipping work coupled with a shrinking volume of shipping litigation. This was especially so in Singapore. What this meant was that bigger law firms had to diversify their services and smaller law firms could not really expand. In the competition for talent, shipping law firms could not offer competitive salaries and growth to attract enough bright new lawyers. I had enough interesting work but insufficient team support. At one point, I was litigating against two big firms

with sizable teams led by their senior partners in a USD200 million dispute with only one pupil supporting me.

In 2011, when Baker McKenzie came calling for the second time, I said yes and moved to what was then the largest law firm in the world. The environment and work culture were completely different. Going in as a full international partner, I had enviable resources to draw on, both legal and administrative. There was also a lot more responsibility: on business development, firm policies and team building. Before long, I was made Asia-Pacific Head for Arbitration and, a short while after that, Global Head of Arbitration. This was more of a coordinating role than a “head honcho” designation, as there were many more experienced and distinguished colleagues than I in the many Baker McKenzie offices around the world. I had frequent telephone and inperson meetings with many colleagues from different offices with a myriad of specialisations. I learnt about legal practices in markets in the Americas, Europe, the Middle East, Africa and Asia. It was a



real privilege to work with the multi-cultural teams with such varied competencies. Not forgetting the amazing range of talent that surfaces when the lawyers come out to play in social functions.

The size and spread of a global firm can give it a competitive advantage, but can also be a yoke. Conflicts of interest are one real problem. The decision-making process can also be complicated.

In 2017, former Attorney-General, Mr V K Rajah, SC who was also a Justice of Appeal decided to set up Essex Court Chambers Duxton (Singapore Group Practice) (“ECCD”) to offer specialist advocacy services. This was a game changer. Singapore practitioners had hitherto practised in a fused profession. In other words, they are both “Advocate and Solicitor”, as the title of a Singapore-qualified lawyer suggests. Work which may be described as solicitors’ work includes taking instructions from clients, taking statements, preparing paperwork, filing, correspondence, some degree of legal re-

search and advice. The advocate’s work, as the word suggests, is to prepare for and conduct the advocacy in court or arbitration. This distinction is particularly obvious in the English system, where the profession is split between solicitors’ law firms, such as Baker McKenzie or Clifford Chance in London, and barrister’s chambers, such as those of the Inner Temple, Middle Temple or Lincoln’s Inn. Law firms in Singapore do not have this work division and handle all aspects of a dispute, from taking instructions right to the advocacy at a hearing.

Mr Rajah, SC felt that it was time for Singapore to have specialists who focus on the advocacy work, as in England. He therefore set up ECCD to operate on a pure chambers model. Mr Toby Landau, QC who is admitted to practise in Singapore, joined him as a member, along with three junior members. Each member of ECCD operates in a similar fashion to a barrister in London. Each member is an independent and self-employed advocate who can work with any law firm on any dispute. ECCD is not a partnership, nor is any member an employer of another member. It is not a law firm, but a “group practice” comprising independent members. It remains the only chambers model with Singapore-qualified members.

In 2018, on their invitation, I joined ECCD. I am back in a cosy set-up, this time focusing on truly legal work. My work comprises rendering legal opinions, conducting litigation in court or arbitration as lead counsel, sitting as arbitrator and occasionally acting as a mediator. Clients instruct me directly or through a law firm. Where a law firm instructing me has the capability to act in the dispute, I will work with the team of supporting solicitors from that law firm. Where it does not, or if the client comes to me directly, I will assist in forming a team of solicitors from the many good law firms that are available. This allows me to customise the team for the needs of a particular case. It is also common for the clients to appoint one of the junior members of ECCD to assist. The ECCD platform has opened up infinite possibilities of collaboration with any law firm, within or outside Singapore. Within a year of starting, I had already worked with clients and lawyers from USA, Europe and Asia.

I am still on a journey, picking up lessons and experience along the way. As this terrible pandemic has shown us, no one can predict the vagaries of life or career. Whatever happens next, it is clear that the legal profession is multi-dimensional. It has taken me on an incredibly enriching peregrination that reveals so many perspectives on, not just law, but peoples and the lives they live. For that, I am immensely thankful.


Chan Leng Sun is a senior counsel of the Supreme Court of Singapore. He is deputy chairman at the Singapore International Arbitration Centre and a member of the ICC Commission on Arbitration and ADR. 



Photo by Inaki De Olmo on Unsplash

How our law firm has adapted to the pandemic

George Etomi

In Nigeria the pandemic lockdown was eased on 4 May. However, many businesses, including law firms, have continued their remote working protocols pending positive indications towards the virus's successful containment in Nigeria. The uncertain nature of Covid-19 and the global economic downturn has forced the world's corporate sector to re-evaluate its traditional mode of operations and business continuity measures in the wake of these unprecedented times.

Law firms are evolving to ensure they stay in business. Many law firms will experience increased demand for legal advice around employment law and contractual compliance-related issues, as well as other urgent pandemic-related enquiries. Nigerian law firms have realised the importance of digital technology in delivering legal services remotely and to keep up with global technological advances. Consequently, George Etomi & Partners have continued to render legal advisory and company secretarial services to clients through unconventional but modern means.

George Etomi & Partners is a full-service commercial law firm in Lagos, Nigeria. We realised the need to mitigate the impact of Covid-19 by protecting our workforce while preserving our ability to serve clients. Our remote working protocol relies heavily on digital communication channels and video conferencing between employees and the chain of command. We are continuing our company secretarial duties to clients who hold virtual board of directors meetings and management meetings. Furthermore, some of our key clients including multinational companies have migrated us to their own digital technology platform. This way we can continue the ongoing delivery of legal services, contractual engagements and effective communication to ensure continuity of business.

Our firm is currently integrating modern technology solutions with the traditional brick-and-mortar model of legal service provision. This includes utilising cloud-

based management, to ensure that all client business is handled remotely during the pandemic, but also to increase efficiency in future. Another technological innovation is the digitisation of all legal documentation for easy access, retrieval and circulation. Staff with different levels are given appropriate degrees of access to ensure confidentiality. Additionally, our official website is being transformed into a virtual office with a unique user interface design that enables potential clients view the services we offer, our practice areas and competent team of lawyers. This advertently reduces the need for physical interaction.

We have also set up a comprehensive Covid-19 resource centre for the benefit of our clients, businesses and the general public. It was created to pro-

vide easy access to reliable information on the legal, regulatory and commercial changes across different sectors in Nigeria and its impact on businesses. We have recently updated our business focus reports and new information is continuously published on our official website and promptly circulated to clients through our mailing list.

Above all, the importance of technology cannot be understated in navigating the current crisis and the post-pandemic climate. Every business and policymaker must embrace this opportunity to modernise their operations and stay well-equipped to manage similar crises in the future.

George Etomi & Partners can be found online at www.geplaw.com. 



Photo by Chris Montgomery on Unsplash

Our Inaugural Issue

David Dahlborn

We hope that this journal can give readers an idea of the diverse and complex legal questions the pandemic has raised. From around the world our reports from law firms give a snapshot of how different jurisdictions responded similarly to the virus.

The pattern for firms has been quick adaptation to remote work. From virtual offices in Nigeria to the staggering capacity of China's "digital courts", several contributors describe this extended moment. In the economy, analyses of the plummeting airline industry and protectionism in Spanish health tech offer glimpses of future areas of specialisation where legal services will be high in demand.

Anticipating the legacy of a world turned upside down, Charlotte Gunka gives us a vision of how blockchain could give online justice the legitimacy it needs. Elizabeth Chan and Jeff Yiu, meanwhile, evaluate the pros and cons of Zoom trials.

The stark contrasts and contradictions that have characterised the pandemic are also on show. Prof Dr Hartmut-Emanuel Kayser discusses how rushed legislation to enable virtual AGMs has worried Germans over the potential loss of shareholder democracy. Meanwhile, from Taiwan, Yi-an Lai profiles the fleet-footed ingenuity with which public authorities reacted to facilitate access to the data needed to produce and licence antiviral medicines and protective gear. In the EU, the right to free movement and privacy has run into the right to public health, as detailed in Mihovil Granić and Kristijan Antunović's analysis of using thermal cameras to detect fevers. What was science fiction, wishful thinking or startled warnings of state overreach not long ago has been thrust straight into the realm of necessity.

We hope that, like us, readers learn something new from taking the time to study this international exchange. It has been important for us to publish in both English and Mandarin. The aim of the Swiss Chinese Law Association is to bring people together. Lofty words for sure, but the dialogue we hope to facilitate in these pages is one way of putting this into action. It does not take much for us to realise that we have more in common than we think.

It is also important for us that this publication gives space to articles outside the spectacle of the news cycle. Whereas the fever pitch of social media and TV news can disorient us, slowing down helps us think. Slowing down helps us understand our fellow humans better. Like reading Chan Leng Sun's journey through the cultures in this journal slowly, and reflecting that behind every person is a unique destiny. It helps us think more clearly and recognise what is important.



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