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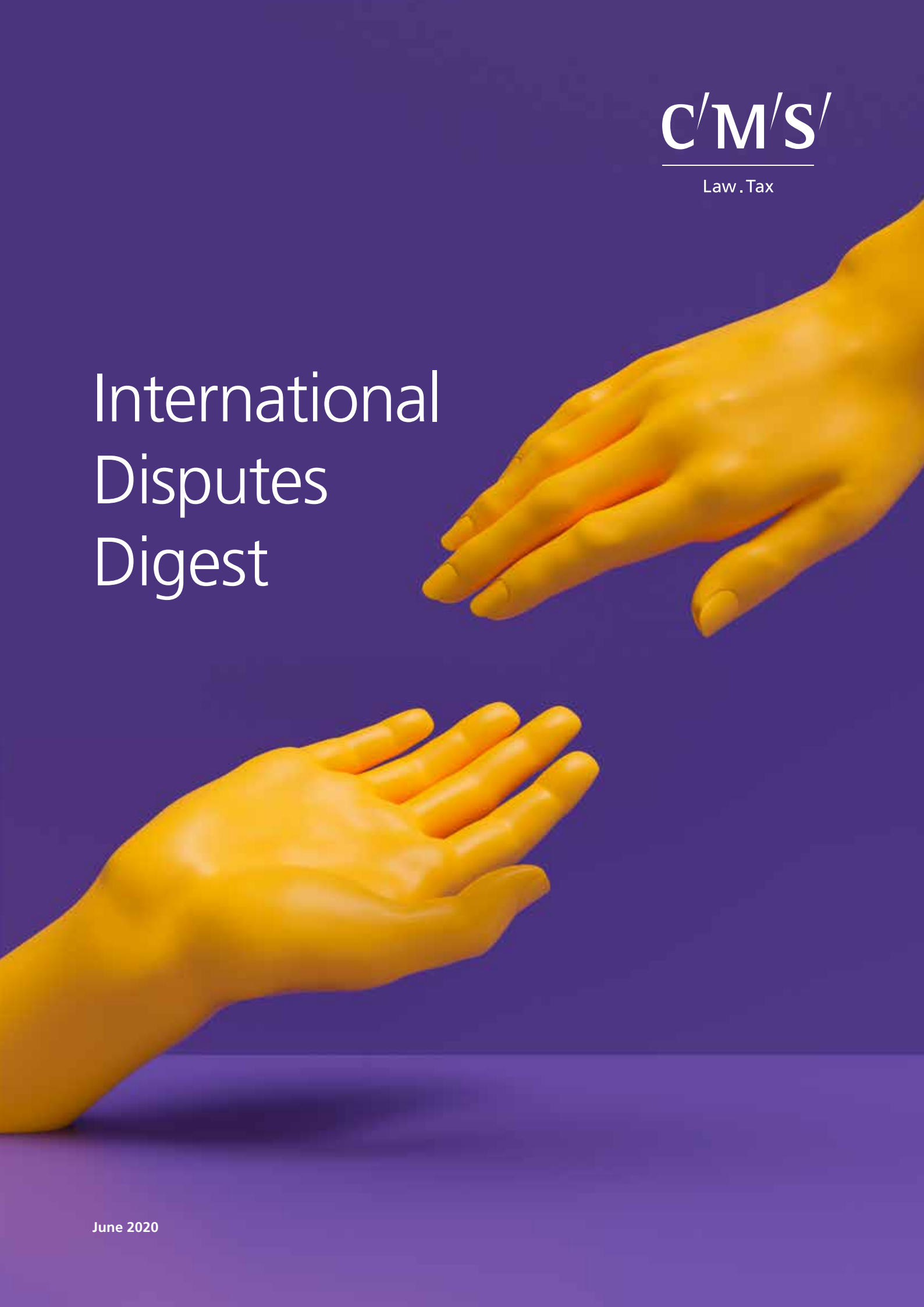
International Disputes Digest



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Introduction

Welcome to the summer edition of our International Disputes Digest, a bi-annual publication featuring analysis and commentary on the key trends currently shaping the global dispute resolution market.

In these uncertain times, global businesses in almost every sector are facing challenges brought about by an unprecedented operational climate. Actions and decisions taken during and immediately after the COVID-19 pandemic may be subject to even greater scrutiny than normal and, together with new legislative developments around the world, we bring you the latest news on important global issues, opportunities and challenges.

We begin this issue by considering whether there is going to be a pandemic of litigation in Italy against insurers and medical practitioners alleging malpractice arising from COVID-19, together with potential criminal liabilities for those at fault.

We then explore the ever increasing importance of mediation during times of crisis, following the Singapore Mediation Convention, together with its role in the resolution of international disputes. We also look ahead to the future development of International Arbitration. Our experts take their inspiration from Enlightenment thinkers and consider how Kantian courage could be applied to take International Arbitration into the Age of Enlightenment. On that theme, we address the rise of virtual arbitration hearings and whether they are here to stay.

We also cover new developments in the UK regarding the classification of cryptocurrency as property, competition class actions, changes to Swiss international arbitration law, as well as new data protection legislation in Kenya.

Our experts from Belgium give a summary on certain new measures intended to protect companies in financial difficulty and in Bulgaria we examine contractor liabilities.

In Spain we also consider new measures to facilitate acquisitions following insolvency.

Finally, the unprecedented circumstances that businesses currently face may open up the possibility of resolving disputes in alternative and innovative ways, particularly in jurisdictions where the use of alternative dispute resolution has been less widespread. We reflect on the changing dispute resolution landscape arising from the state of emergency around the globe before our colleagues in Ukraine conclude matters by showcasing their new electronic courts and the progressive modern technology being applied to dispute resolution.

We hope you enjoy this edition of our International Disputes Digest and welcome your feedback on any of the issues raised.

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The impact of COVID-19: D&O and medical malpractice liability – the Italian perspective

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The COVID-19 health emergency is causing incalculable economic losses to businesses and individuals. In periods of great crisis like this one, some parties will inevitably seek to apportion blame for those losses or pursue claims in relation to them. As Dwight D Eisenhower remarked: "The search for a scapegoat is the easiest of all hunting expeditions". As a result, we expect a substantial increase in conflicts and disputes, which will undoubtedly impact the insurance industry. In short, companies will face an explosion of insurance claims in the coming months.

Lloyd's of London, one of the major players in the insurance market, recently said that claims deriving from the pandemic would affect 14 categories of insurance products, including event cancellation insurance, travel insurance, medical malpractice, worker compensation and employer liability (among health care workers and airline flight attendants). In this article, we focus on director and officer (D&O) liabilities and medical malpractice liabilities.

D&O liabilities

An increase in claims is expected relating to alleged violations of schemes, usually imposed by law, which were put in place for the prevention of diseases in the workplace. The obligations imposed by these schemes generally include: the identification of risk factors, risk assessments, and identification of health and safety measures; the development of preventive and protective measures and control systems of the measures adopted; the elaboration of safety procedures for various company activities; and the implementation of training programmes for workers. D&Os in charge of safety and control that do not enforce state regulations and cannot guarantee the safety of workers could face subsequent claims.

In civil law areas, employers have a specific obligation to protect the mental and physical health of employees from any risks they are exposed to when carrying out their job-related duties. In particular, employees should consider several primary regulations. The first is the

general rule of Article 2087 of the Italian Civil Code, which states that "the entrepreneur is obliged to adopt the measures that, according to the particular nature of the activities, the experience and the technique, are necessary to protect the physical integrity and moral personality of the employers". They should also consider the provisions of Legislative Decree no. 81/2008, which is generally referred to as the "Code on the protection of health and safety in the workplace". In addition, recently released Circular no. 13/2020, issued by Istituto nazionale Assicurazione Infortuni sul Lavoro (INAIL), which safeguards employees against damages due to work-related accidents and occupational diseases via a compulsory employee public-insurance scheme, provides a series of relevant clarifications in relation to protections against COVID-19 and other categories of professional risk. This sets out the evidentiary threshold for recognising who is at fault when accidents at work occur. For example, when employees who are highly exposed to diseases such as COVID-19 (e.g. healthcare providers, cashiers and cleaning staff) become infected, the presumption is that the infections were contracted in the workplace.

In addition to a company's in-house employees, third-party employees who carry out work within other companies should also be considered (e.g. the employees of cooperatives, plant maintenance companies or companies that second their employees out). Companies must protect these workers in the same way that they safeguard onsite employees. Finally, D&Os may also be responsible for third parties who do not have contractual relationships with the company, but come into contact with the company's premises, such as suppliers or customers who are infected while on company property.

Criminal liability is also possible. Such cases will primarily involve natural persons (i.e. the company's legal representative, responsible persons, managers, and heads of the prevention and protection service) who could be held liable if emergency legislation relating to COVID-19 is ignored or applied incorrectly. There are now numerous Italian emergency decrees relating to the lockdown and security protocols that must be applied in the workplace. These decrees include the reorganisation of production processes to enable social distancing; the introduction of hygiene rules; providing employees with specific training and information; and the wearing of masks. In the most extreme scenario, an employer could be held liable for the crime of culpable epidemic, which under Article 438 of the Italian Civil Code states that "Anyone who causes an epidemic through the spread of pathogenic germs is punished with life imprisonment". Such misconduct can be considered a culpable crime even if it is not done maliciously. In practice, however, this type of misconduct is difficult to prove.

In addition to criminal liability, prosecutors can also identify cases of corporate administrative or criminal liability pursuant to Legislative Decree no. 231/2001. In summary, this Decree triggers a series of pecuniary and disqualification sanctions if certain crimes are committed (i.e. "predicated offenses") within the sphere of corporate life. If during the COVID-19 emergency, directors violate provisions designed to protect health in the workplace, companies could face penalties. This could result where preventive but inadequate measures failed to prevent the spread of COVID-19 among employees or prevent deaths as a result of infection. In such cases, directors could be charged with the crimes of negligent personal injury (Article 590 of Criminal Code) or manslaughter (Article 589 of Criminal Code) if rules for the protection of health and safety at work were breached in a way that constituted "predicated offenses".

We could also see mixed civil and criminal liability in insolvency proceedings as a result of the suspension by law of all requests for bankruptcy during the lockdown period (with the exception of bankruptcy petitions filed by public prosecutors for precautionary and conservative measures). Directors who manage their companies in ways that contravene these special measures could see themselves civilly or criminally liable, depending on the circumstances.

Finally, D&Os must also consider the protection and treatment of employee personal data. D&Os must put proper systems in place for the authorisation and storage of personal data when taking steps such as verifying the health status of employees, contact tracing, and using thermo-scanners to detect possible COVID-19 cases.

Medical liability

The COVID-19 pandemic may also lead to doctors and medical organisations being criminally and civilly liable in certain circumstances. There may also be claims relating to the structural limits of the national health system that became apparent during the pandemic, such as insufficient numbers of medical professionals or intensive care units.

Firstly, we should consider the legal imputability of medical treatments. Certain treatments were carried out on a voluntary basis in order to cope with organisational deficits, despite the inherent risks, which the healthcare professionals would have been aware of. Many procedures were likely carried out in violation of the general rule that requires abstention by doctors from procedures that they are not qualified to perform. However, in circumstances where doctors were reacting to an emergency and needed to do what they could to counter the contagion and save lives, punitive measures against doctors and other medical professionals may be considered unjust.

In addition, the current body of legislation on liability was not designed with the COVID-19 pandemic in mind.

As a result, it is largely unsuitable when setting out a legal framework for the conduct of doctors dealing with the exceptional scenarios that have come about as a result of the pandemic. COVID-19 is a new virus for which there are no definitive or clear scientific studies so it is difficult to align the handling of the crisis with existing legislation and regulations.

In regard to criminal liability, the Italian government has dismissed the idea, initially proposed in parliament, of creating a "Criminal shield" for cases of medical liability deriving from COVID-19. Article 590 of the Italian Criminal Code is also unsuitable in respect to the COVID-19 situation. The upshot: currently there are no accredited guidelines or consolidated practices to evaluate whether a medical treatment has been correctly performed in response to COVID-19. Similar concerns can be found for healthcare providers facing liability. The current regulatory framework is ill equipped to deal with the damage claims that courts are likely to see in the coming months. In order to determine fault, judges will have to evaluate cases on an individual basis and strike a balance between possible faults with the organisational structure on the one hand, and the exceptional nature of the COVID-19 pandemic on the other.

Finally, we turn to the use of experimental and "off label" COVID-19 drugs, which during the current emergency have been given to patients on a compassionate basis in an attempt to aid recovery. As with other legislative areas explored in this article, the legislation currently in force suffers from obvious limits in regard to the current pandemic. Decree Law no. 23/2020 goes some way in meeting this challenge by creating a National Committee tasked with evaluating the clinical testing of medicines for human use and medical devices for patients with COVID-19.

In conclusion, it appears that legislative intervention will be necessary to change laws and regulations to prevent future compensation claims, which could make doctors and other medical professionals targets of huge financial demands.

Such claims would not only be injurious to Italy's dedicated medical professionals, who sacrificed and risked so much during the emergency, but it would be insulting to them as well.

The Singapore Convention on Mediation – A star in the making in turbulent times?

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The Singapore Convention on Mediation (the **"Singapore Convention"** or the **"Convention"**), formally known as the United Nations Convention on International Settlement Agreements Resulting from Mediation, was adopted on 20 December 2018 and signed in Singapore on 7 August 2019.

A multilateral convention to promote the enforceability of international commercial settlement agreements reached through mediation, the Convention works in the same way that the New York Convention (or the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards) facilitates the recognition and enforcement of international arbitration awards.

At its signing ceremony on 7 August 2019, a total of 46 countries signed the Convention, including the US, China and India, making history as the highest number of first-day signatories to a UN trade convention to date. As of 27 May 2020, 52 states have signed the Convention and four states have ratified it. In his speech at the signing ceremony, Singapore's Prime Minister Lee Hsien Loong heralded the Convention as a "powerful statement in support of multilateralism". The Convention is set to come into force on 12 September 2020.

How the Convention works

The Convention allows parties who have reached mediated settlements in international commercial disputes to enforce their settlement agreements in the courts of the signatory countries. It aims to implement a regime for the enforcement of such settlements by compelling contracting states to recognise these agreements in their courts or to invoke such agreements as a defence to a claim. In this way, the Convention seeks to allow mediated settlement agreements to be used both as a sword and a shield.

The Convention applies to "an agreement resulting from mediation and concluded in writing", which at the time of its conclusion is "international" in nature in that: (a) at least two parties to the agreement have their places of business in different states; or (b) the states in which the parties have their places or business is different from either: (i) the state in which a substantial part of the obligations under the settlement agreement is performed; or (ii) the state with the subject matter of the settlement agreement.

The Convention does not apply to settlement agreements that:

— relate to personal, family or household transactions or to family, inheritance or employment law;

— have been approved by a court or concluded in the course of court proceedings;

— are enforceable as a court judgment; and

— have been recorded and are enforceable as an arbitral award.

As such, the Convention is designed to avoid overlap with the New York Convention and the Hague Choice of Court Convention.

The Singapore Convention states that each State "shall enforce a settlement agreement in accordance with its rules of procedure, and under the conditions laid down in this Convention". This is consistent with the New York Convention.

The Convention also sets out the instances when relief may be refused by the State, which include situations where:

— a party to the settlement agreement was under some incapacity;

— the settlement agreement sought to be relied upon is null and void, inoperative or incapable of being performed, is not binding or final, or has been subsequently modified;

— the obligations in the settlement agreement have been performed or are not clear or comprehensible;

— granting relief would be contrary to the terms of the settlement agreement;

— there was a serious breach by the mediator of the standards applicable to the mediator or the mediation, without which the party would not have entered into the settlement agreement; or

— there was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts about the mediator's impartiality or independence, and this failure had a material impact or undue influence on a party entering into the settlement agreement.

In addition, relief may also be refused if granting it would be contrary to the public policy of that party; or the subject matter of the dispute is not capable of settlement by mediation under the law of that party.

The Convention also allows member states to reserve, on an "opt-in" basis, the applicability of the Convention to settlement agreements to which it, or any governmental agency or any person acting on its behalf, is a party. Therefore, the Convention will apply to the State and its governmental agency unless it has agreed to reserve its application pursuant to Article 8.1(1) and (b).

While Article 8 is designed to give full effect to party autonomy (a key guiding principle in mediation), it potentially dilutes the effectiveness of the Convention as a global enforcement regime. The fact that some states may apply the opt-in reservation while others do not may also lead to a power imbalance between parties negotiating a mediated settlement agreement.

Mediation's place in the dispute-resolution ecosystem

There have been comments and questions about the need for the Convention given the voluntary nature of the mediation process and the resultant settlement agreement and its effectiveness in light of Article 8. However, given the increasing popularity of mediation as a method of resolving international commercial disputes, the Singapore Convention is a timely addition to the international dispute resolution framework.

In an Asian context, mediation as a tool to resolve disputes has often been considered more consistent with Asian culture and has grown in prominence in recent years. Judiciaries have increasingly encouraged the referral of disputes to mediation at an early stage. Legislatures have enacted mediation legislation and regulations to promote the certainty of mediated settlements (e.g. the Singapore Mediation Act 2017, the Hong Kong Mediation Ordinance 2013, and the Malaysian Mediation Act 2012). Institutions and policies promoting and managing the standards of mediation have also been established.

This is also the trend globally. The Centre for Effective Dispute Resolution (CEDR)'s Eighth Mediation Audit conducted in 2018, which surveyed the civil and commercial mediation landscape (and did not include community and family mediation), showed that there was a 20% increase in civil and commercial mediation in England & Wales since the previous survey conducted in 2016. The total value of cases mediated that year was estimated to be approximately GBP 11.5bn.

This international enforcement structure provided by the Convention addresses the issue that international mediated settlements suffer from in cases of non-compliance: this issue is the need to be able to sue on the agreements in local courts.

Implications on the current COVID-19 pandemic crisis

The timing of the Convention has proved especially prescient in light of the outbreak of the COVID-19 pandemic in March 2020.

With most countries having gone into lockdown and businesses coming to a virtual standstill, global economies have crashed to all-time lows. This has in turn led to an exponential increase in cross-border disputes, as contractors and suppliers find themselves unable to meet their contractual obligations. Unsurprisingly, the crisis has already – directly or indirectly – claimed victims, with several major trading powerhouses applying for bankruptcy or judicial management.

More parties are seeking win-win solutions to their commercial disputes, and are turning to mediation as a method of resolving their differences.

The pandemic has also presented its own unique challenges to the dispute resolution community, as existing arbitration and litigation cases face delays due to travel bans being imposed worldwide. This has rendered parties' attendance at a central location for oral hearings next to impossible. While virtual hearings are quickly becoming part of the "new normal", their overall efficacy and ability to ensure that parties are reasonably heard are still largely perceived as an unknown quantity at best.

Once again, mediation's relative informality makes it less affected by the intricacies of a virtual hearing.

Against this backdrop, the Convention stands to become more relevant in the international disputes arena, and more necessary than ever.

The SIMC COVID-19 Protocol

In the context of Singapore, as a complement to the Convention and Singapore's own COVID-19 (Temporary Measures) Act 2020 – legislation passed to provide temporary relief to parties affected by the pandemic – the Singapore International Mediation Centre (**"SIMC"**) launched the SIMC COVID-19 Protocol (the **"Protocol"**) in May 2020 with the aim of providing "a swift and inexpensive route to resolve commercial disputes during the COVID-19 period". Targeting international disputes, the Protocol introduces expedited online mediation procedures that will be organised within ten working days from the parties filing for mediation.

By providing a tailored mediation solution to international parties, the SIMC hopes to give businesses the opportunity to "devote their resources towards navigating other challenges, instead of diverting them to conduct potentially protracted and expensive legal proceedings". The SIMC charges anywhere between SGD 3,000 and SGD 10,000 for disputes valued at below SGD 1m to above SGD 5m, emphasising mediation's key strengths as an affordable and efficient method of dispute resolution.

Conclusion

How the Singapore Convention will be developed and applied once it comes into force in September 2020 remains a fascinating question. While its significance in the long run is still a relative unknown, there is no reason why it will not be utilised in the international disputes arena, particularly given the increased popularity of mediation as a dispute-resolution tool.

By making mediated settlement agreements enforceable across borders, the Convention aims to broaden mediation's appeal by tackling the issues that have traditionally caused it to be regarded with scepticism by disputes practitioners. Its potential to become the "missing puzzle" in the global dispute resolution framework should not be underestimated.

Kantian courage and enlightenment in international arbitration

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The ICCA 2020 Congress, which was due to be held in Edinburgh in May 2020, had as its theme "Arbitration's Age of Enlightenment". In keeping with this theme, CMS has produced six articles on trends in international arbitration taking inspiration from Enlightenment thinkers. Here, we look at how the writings of one of the Enlightenment's most influential thinkers, Immanuel Kant, can be applied to each of these trends.

Kant wrote in 1784 that the "motto of the enlightenment"[1] is "Have the courage to use your own understanding"[2]. Two hundred years later in 1984, Michel Foucault interpreted Kant's slogan as being a motto and "an instruction that one gives oneself and proposes to others". This means, according to Foucault, that Enlightenment is to be considered "both as a process in which men participate collectively and as an act of courage to be accomplished personally … [Men] may be actors in the process to the extent that they participate in it; and the process occurs to the extent that men decide to be its voluntary actors".

In other words, man is the driver of this process; a process that requires each individual to use his knowledge with courage.

Kant's motto (and Foucault's interpretation of it) is applicable to the field of international arbitration today, and to two features in particular: party autonomy and a lack of institutional rigidity (which is perceived to be characteristic of the court system). These factors enable us, as stakeholders in the field of international arbitration, to play a significant role in furthering the Age of Enlightenment in international

1 All Kant extracts are taken from Mary C Smith (tr), 'What is Enlightenment?' <www.columbia.edu/acis/ets/CCREAD/etscc/kant.html> accessed 21 May 2020.
2 All Foucault extracts are taken from Catherine Porter (tr), 'What is Enlightenment? (Was ist Aufklärung?)' in Paul Rabinow (ed), *The Foucault Reader* (Pantheon, New York 1984) 32-50.

arbitration. This is important – international arbitration cannot afford to be left behind as the world moves into a period of profound technological change, known as the fourth revolution. There is a demand for it – the users of international arbitration are bound to benefit from any improvements in the system, particularly in light of its inherent flexibility. And there is an obligation to do it. By virtue of the knowledge and understanding that we have as international arbitration practitioners, we are required to be the "voluntary actors".

Courage & Technology

The fourth revolution is expected to see the widespread use of AI, VR and blockchain. Technology will no doubt affect the functions and processes of international arbitration. The use of technology in international arbitration today is currently limited to improving the existing processes such as document storage and review, and video links for hearings. However, the fourth revolution may well require fundamental changes to the design of the system of international arbitration based on the needs of parties. The current advisory role of practitioners is largely restricted to legal and strategic advice. This needs to evolve to the point where parties are advised on their options in relation to system design based on time sensitivity, availability of resources, and methodologies available for evidence. Parties will also have to consider their priorities (i.e. if a speedy resolution of the dispute is required). Is the cost of the process the most significant factor or is their goal an award based on a legally reasoned and sound position?

An upshot of the increased use of technology is that it will remove some of the more subjective factors that human nature takes into account such as presentation and articulation of factual and expert witnesses. The review and analysis of primary material can be more objectively assessed. Above all, as users, we should be willing to talk about ideas of technological advancement and open our minds to the possibility of adopting new and unfamiliar methods.

Courage & Capacity

Expanding the capacity of international arbitration from a purely legal perspective can do much to advance its cause. For instance, most users of international arbitration share the concern that there are no means (or limited means) available in international arbitration to protect their interests at short notice. Users will usually look to the courts in times where emergency or interim relief is sought. However, international arbitration is likely to prove a more efficient platform when interim relief is required against multiple parties in several jurisdictions. Taking advantage of provisions put in place by the institutions, such as requiring an emergency arbitrator to be appointed within two days (ICC Rules) or three days (LCIA Rules) of an application being made, or the increased use of expedited and/or summary procedures in some of the major international institutional rules (such as SIAC and HKIAC), should result in users obtaining emergency relief more expeditiously than through the courts.

Concerns in this regard, such as the lack of clarity on criteria to be taken into account in granting interim relief or the enforceability of such awards, may not necessarily translate into practical concerns for the parties. For instance, the ICC Arbitration and ADR Commission Report on Emergency Arbitrator Proceedings (2019) shows that the vast majority of parties are complying with awards for interim relief. Indeed, it is these uncertainties that may lead to creative and flexible solutions that take users' needs into account.

Courage & Equality

Apart from his call for courage, Kant also wrote extensively on the philosophy of war. It has been stated that Kant's view of war was that it "must be conducted in a way that preserves equality and mutual respect among nations"[3]. His principles are interpreted as requiring that "all rational agents be treated equally in a fair and public manner"[4].

This viewpoint should also be examined here, in the light of the importance of equal treatment for parties in international arbitration. Traditionally, certain types of disputes such as employment disputes, consumer claims and claims involving entities under liquidation have been considered non-arbitrable due to the perceived inequality between the parties. However, the sphere of arbitrable disputes has been steadily expanding over the years, underscoring a growing trust in the ability of the field to effectively manage power imbalances and ensure equality. Given its multifaceted role, the technology discussed above will also – one hopes – significantly contribute to increasing this desired equality. Other developments such as conflict-of-interest rules (e.g. the IBA Guidelines on Conflicts of Interest in International Arbitration), the IBA Guidelines on Party Representation in International Arbitration, the LCIA General Guidelines for Parties' Legal Representatives, and the increased availability

[3] Christine M Korsgaard <www.people.fas.harvard.edu/~korsgaar/CMK.Kant.EE.pdf> accessed 22 May 2020.
[4] Brian Orend, 'Kant's Just War Theory', *Journal of the History of Philosophy*, vol. 37, no. 2, 1999, p.323, 340.

of third-party funding all serve to promote equality between parties.

Notwithstanding the lengths and efforts that institutions go to, enhancing equality for the benefit of international arbitration as a whole still lies in the hands of the users. Nowhere is this more apparent than in the promotion of diversity in arbitral tribunals. Promoting diversity contributes to equality by removing unconscious bias and pursuing the goal of a level playing field. Initiatives in this regard include the Equal Representation in Arbitration Pledge launched in 2015 to deal with fair representation of women candidates for tribunals, and the African Promise launched in 2019 to improve the profile and representation of African arbitrators in international arbitration. Statistics of almost all the major institutions show that a greater number of women are being appointed to tribunals by the institutions. For example, the LCIA's 2019 Annual Casework Report shows that 48% of all arbitrators selected by the LCIA in 2019 were women. However, the equivalent statistic for party-appointed arbitrators, who outnumber institution-appointed arbitrators, lags behind (e.g. 12% in the LCIA's 2019 report). This is the situation despite the 2018 Queen Mary/White & Case International Arbitration Survey revealing that the majority of parties agree diversity in tribunals is a good thing. The survey shows that parties inevitably resort to re-appointing the same arbitrators because they become the 'usual suspects' or through 'word of mouth'. It is entirely up to the parties and their counsel to usher in change in this regard. This is a telling example of Kant's scenario of great difficulty "for the individual to work himself out of the nonage which has become almost second nature of him".

Courage & Specialisation

Counsel also plays a significant role in furthering arbitral equality by invoking the age-old maxim of "quality, not quantity". Counsel specialisation, which must be informed by both experience and academia, can go a long way in furthering the aim of achieving equality. Although there has been a surge in legal scholarship on it, international arbitration will really be enhanced by parties and institutions coming together and working towards more widespread access to a greater set of awards.

Such an increase in scholarship and transparency should help lessen any concerns that international arbitration is stifling the development of precedent-based legal systems. On the contrary, using the English example, scholarship can bolster the view that international arbitration provides "cutting edge cases or the courts to consider on many occasions" and helps shape English commercial law to a "significant degree"[5].

Counsel can also contribute to an increase in 'quality' by assisting tribunals through maximising efficiency in all aspects of procedure. By exploiting the comparatively informal and flexible nature of arbitral proceedings, counsel can enhance their experience while concurrently contributing to the advancement of international arbitration. Written submissions should be kept succinct and to the point, while oral submissions should be made in a coherent and timely manner. The value of streamlined submissions is increasingly being dwelt on in scholarship, such as the Global Arbitration Review's Guide to Advocacy. Indeed, improving the quality of advocacy should benefit the broader field of dispute resolution. It has been suggested that this experience in arbitrations is "not lost to the courts" and that an emphasis on quality "increases the skills and attractiveness of [the] legal profession and [the] judiciary"[6].

Courage & Restriction

Adapting Kant's examples that pastors and policemen should be bound by their orders, international arbitration would become a dysfunctional means of dispute resolution if its users were not required to adhere to some restrictions. In Kant's words, a "certain… mechanism is necessary in which some members of the community remain passive. This creates an artificial unanimity which will serve the fulfilment of public objectives, or at least keep these objectives from being destroyed. Here arguing is not permitted; one must obey".

However, being confined to bounds of rules and powers does not mean that users should give up any notions of courage and Enlightenment. As Kant has noted, though the "private use of reason may frequently be narrowly restricted", the "public use of one's reason must be free at all times". Therefore, although a user of international arbitration is obliged to respect and adhere to the relevant rules and exercise of powers, he has "full freedom, indeed the obligation, to communicate to his public all his carefully examined and constructive thoughts concerning errors in [a] doctrine and his proposals concerning improvement…. This is nothing that could burden his conscience".

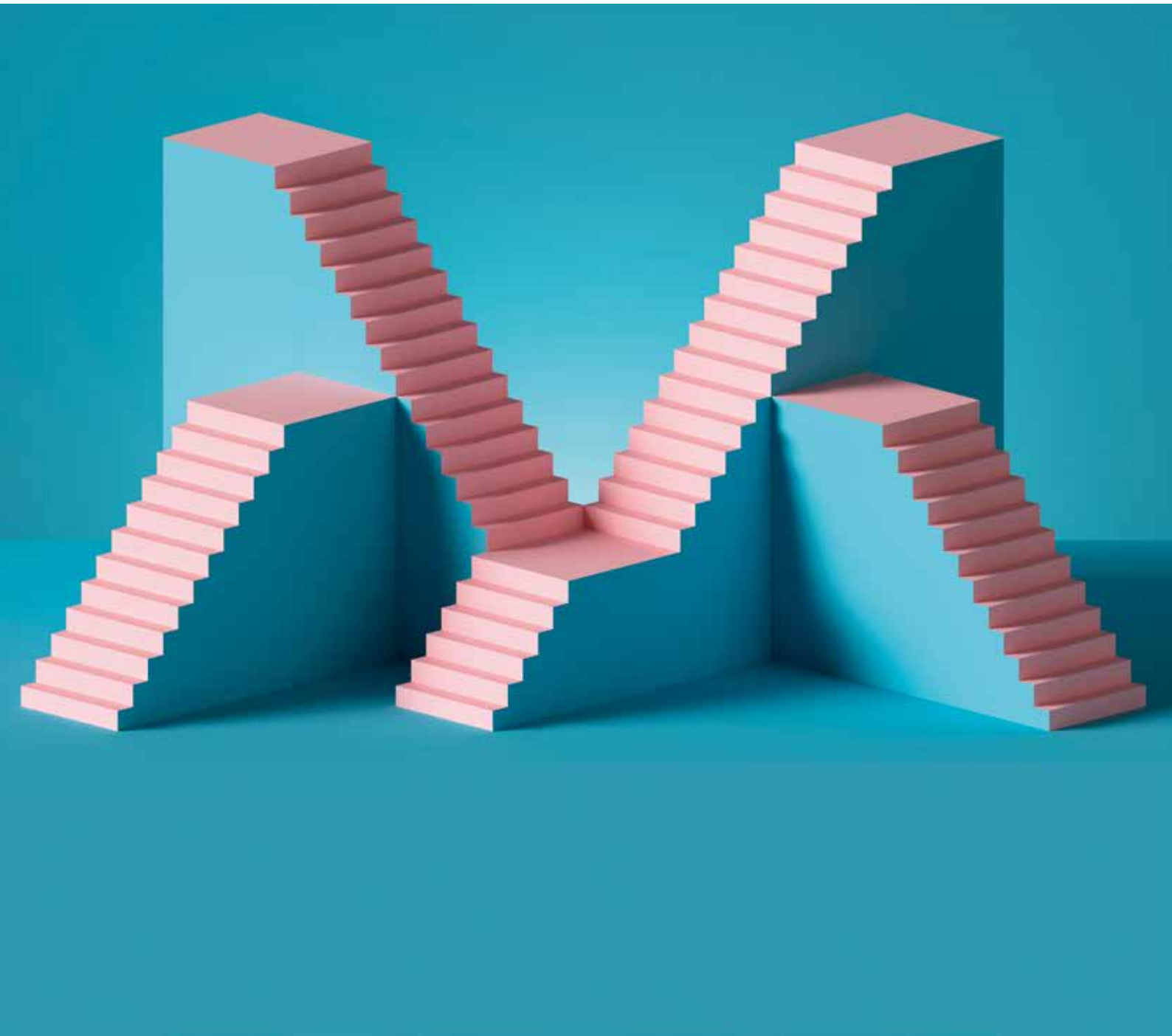
[5] Sir Peter Gross, 'The Civil Justice System in a Time of Change' (Lecture at the London Common Law and Commercial Bar Association in London 2019) <www.judiciary.uk/wp-content/uploads/2019/01/lclcba-lecture-jan-2019.pdf> accessed 22 May 2020.

[6] Sir Peter Gross (n 5).

Towards Enlightenment

We are fortunate to be the users of a system of international arbitration that is open to, and in many instances actively encourages, the airing of feedback and constructive criticism. Institutions are often keen to be responsive to such thoughts and take steps to implement them where possible. Notwithstanding that the underlying reasons for doing so may be competition or commercial benefit, this is a direct and immediate step in bringing about Enlightenment in international arbitration.

Foucault writes, in line with Kant's views, that Enlightenment should be imagined as a "historical change that affects the political and social existence of all people". Somewhat apropos of the field in question here, he continues to expand on Kant's essay and then lays out its shortcomings followed by his own developed arguments. However, even Foucault acknowledges that the task of Enlightenment is one that "requires work on our limits" and is a "patient labour giving form to our impatience for liberty". Giving Kant the last word, it is time now for us, as users of international arbitration, to "[throw] off the yoke of nonage" and continue to take international arbitration into the Age of Enlightenment.



Safeguards to Personal Data: A Kenyan perspective

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Background

The Data Protection Act No. 24 of 2019 (DPA) came into force in November 2019 and was enacted at a time when Kenyans did not have a legislative framework to rely upon for enforcement of their right to privacy. The right to privacy is enshrined in the Kenyan Constitution and is a self-enforcing right, which has been challenged before and enforced by the Kenyan Courts through various constitutional petitions. However, there was a need for a codified law that articulated the components of the right to privacy, set out the measures to be taken to ensure privacy protection and created institutions to safeguard that right.

Objective of the DPA

The Act was enacted to enforce Article 31 of the Kenyan Constitution, which ensures that information relating to a person's family or their private affairs is not unnecessarily requested or revealed. Article 31 seeks to safeguard against the infringement of the right to privacy, including privacy of communications.

In this way, the Act regulates the processing of information, but this processing is limited to personal data of natural persons. Juristic persons may not rely on the DPA to enforce their right to privacy.

Processing is defined as operations, whether automated or not, that include collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, use, disclosure by transmission, dissemination or otherwise making available, restriction, erasure and destruction.

Anyone who processes (as defined above) the personal data relating to natural persons must comply with the provisions of the DPA. The protections afforded by the DPA apply to both citizens and non-citizens in Kenya. On the other hand, the restrictions to the processing of data apply to both natural and juristic persons who are established and resident in Kenya and process data in Kenya, or are not established and resident in Kenya, but process data relating to natural persons in Kenya.

To this end, the Act establishes the office of the Data Commissioner who is the supervising authority.

Data Protection Commissioner

The main functions of the Data Commissioner are to oversee the implementation and enforcement of the DPA; maintain a register of all data controllers and processors; oversee data-processing operations inquiring through assessment whether data processors are processing information legally; inspect entities to ensure compliance; undertake research around development of data processing and perform other incidental functions.

The Data Commissioner has the power to carry out audits to ensure compliance with the DPA and conduct investigations on their own initiative or on the basis of a complaint by a data subject of a violation of rights.

Rights of data subjects

Data subjects have the right to be informed on how their personal data will be used, which is triggered prior to the processing of the data and includes the collection of personal data.

Other rights include the ability to access data in the custody of the data controller (i.e. the person who determines the purpose and means of processing personal data) or the data processor (i.e. the person who processes data on behalf of data controller); the right to object to processing part or all of a data subject's personal data; and the right to collection or deletion of personal data.

Data subjects are also entitled to have a data controller or data processor inform them of their rights; the fact that their personal data is being collected; and the security measures in place to ensure the integrity and confidentiality of their data.

In order for data controllers and data processors to meet these obligations, consideration should be given to development of internal and external documentation, such as data protection policies and privacy policies. Such documents should abide by the data protection principles as set out in the DPA, which require that personal data is:

— processed lawfully, fairly and in a transparent manner with a component of consent, which is addressed below;

— only collected for specific, explicitly stated and legitimate purposes and are not processed in a manner incompatible with those purposes;

— processed in a way that is adequate, relevant and limited to what is necessary in relation to the purposes of the processing;

— accurate and where necessary kept up to date;

— kept and stored for no longer than necessary;

— a processed in a manner that ensures appropriate security, using appropriate technical and organisational measures.

Registration of data controllers and processors

The DPA requires that data controllers and data processors register with the Data Commissioner. The Data Commissioner is charged with the task of prescribing the threshold for registration and, in doing so, must consider the nature of the industry, volume of data being processed and whether the data being processed is sensitive (i.e. that it reveals a natural person's racial background, health status, ethnic and social background, religious belief and conscience, genetic or biometric data, their property details, marital status, family details, sex or sexual orientation).

Not all data controllers and data processors will likely be required to register with the Data Commissioner. Ideally, a *de minimis* for registration will be prescribed. At the time of this writing, the Data Commissioner has not been appointed and it remains to be seen what thresholds for registration will be prescribed.

Data protection officer

While the DPA provides for the designation of a data protection officer by a data controller or data processor, this is not mandatory.

Seemingly set out as a guideline, the DPA states that public and private entities (other than courts of law) engaging in regular and systematic monitoring of data subjects or with the core activity of processing sensitive personal data *may* appoint a data protection officer. This is a departure from comparative laws such as the EU's GDPR, which makes it mandatory to appoint data protection officers where the core activities of the controller or the processor consists of processing operations that – by virtue of their nature, scope or purpose – require the regular and systematic monitoring of data subjects on a large scale.

Where appointed, the data protection officer is responsible for monitoring DPA compliance, providing information and advice, and liaising with the Data Commissioner. The data protection officer may be a staff member of the data controller or processor who ordinarily fulfils other tasks and duties in the organisation, provided that there is no conflict of interest.

While the DPA does not mandate the designation of a data protection officer, it may be prudent for data controllers and data processors to appoint such officers, particularly where large-scale data is being processed. This may provide a necessary safeguard against non-compliance with the DPA and an avenue to expand the capacity of staff involved in the processing of data.

Transfer of data outside Kenya

It is a fundamental principle of data protection that personal data not be transferred outside of Kenya unless there are adequate safeguards. In the case of sensitive personal data, the consent of the data subject must be obtained.

A data controller or data processor is required to give proof to the Data Commissioner of the appropriate

safeguards put in place to ensure the integrity and confidentiality of personal data and – where data is transferred to a jurisdiction with data protection laws – that such laws provide no less protection to data subjects than the DPA.

The DPA does not prescribe the manner in which proof of safeguards should be given to the Data Commissioner. It remains to be seen whether this will take the form of a formal application process for consent or a less formal process where a letter will be requested specifying no objection. These details should be addressed in subsidiary legislation or regulations, or prescribed by the Data Commissioner after being appointed to office.

There are instances, however, where data may be transferred out of Kenya without abiding by the specified requirements, such as when transfer of data is in the public interest, when data is required for preparing a defence to a legal claim, when the data subject is incapable of issuing consent yet the transfer of data will safeguard his vital interests, and when the data processors or controllers have a legitimate interest in the transfer of the data (which does not override that of the data subject).

Notification of breach

The DPA aims to ensure the confidentiality and integrity of personal data and as such requires that data controllers and data processors implement appropriate technical and organisational measures to integrate necessary safeguards.

In the event that personal data is unlawfully accessed or acquired and there is a real risk of harm to the data subject, the data controller must notify the Data Commissioner of the breach within 72 hours of becoming aware of the breach.

The data controller is also required to notify the data subject in writing of the breach within 72 hours. However, in keeping with the constitutional right not to self-incriminate, a data controller may delay the notification to the data subject or restrict information provided in the notification as is necessary and proportionate for the purpose of avoiding an investigation of an offence, which may lead to conviction by a court.

Notably, the data processor does not have an obligation to notify the Data Commissioner of a data breach. The DPA requires that the data processor notify the data controller within 48 hours of becoming aware of a breach, so that he can notify the Data Commissioner. Such a notification must provide the facts relating to the breach, the effects of the breach and the remedial action taken.

Enforcement procedures

A data subject aggrieved by the conduct or decision of a data controller or data processor may lodge a complaint either orally or in writing with the Data Commissioner. Upon receipt of a complaint, the Data Commissioner will have 90 days to conduct investigations and conclude the matter. The Data Commissioner may for the purpose of the investigation summon a person to be interviewed, or ask this person to produce any necessary documentary and electronic evidence or sworn affidavit for the purposes of reaching an informed decision.

Where the Data Commissioner finds a person to have breached the provisions of the Act, they may issue either an enforcement notice or a penalty notice.

An enforcement notice directs a data controller or data processor to take appropriate remedial steps in respect to the breach within a specified timeline that cannot be less than 21 days. Failure to comply with an enforcement notice is an offence for which a person can be convicted and fined up to KES 5m or imprisoned for up to two years, or both.

On the other hand, a penalty notice requiring the person to pay an administrative fine may be issued depending on the nature, gravity and duration of the breach; the intentional or negligent character of the breach; any action taken to mitigate the damage or distress suffered by the data subject; any previous breaches; the degree of cooperation with the Data Commissioner; and whether the penalty is proportionate, effective and dissuasive.

The maximum financial penalty that may be imposed by the Data Commissioner is KES 5m or, in the case of an undertaking, up to 1% of its annual turnover from the preceding financial year, or whichever is lower.

Any administrative action taken by the Data Commissioner may be appealed to the high court.

In addition to lodging a complaint with the Data Commissioner, a data subject is further entitled to compensation for damage arising as a result of contravention of the DPA. Such damage could constitute financial loss, or non-financial loss such as distress.

Offences under the Act

The DPA creates various offences in connection with the conduct of data controllers, data processors and other persons. These offences include disclosure of personal data by a data controller, contrary to the purpose for which the data was collected; disclosure of personal data by a data processor without the prior consent of the data controller; obtaining access to personal data without the consent of a data controller

or data processor; and offering to sell personal data unlawfully accessed or obtained.

Other offences include failure by data controllers and processors to register with the Data Commissioner, if so required, or the filing of false information during the registration process

The general penalty for commission of an offence under the DPA where no specific penalty is provided is a fine not exceeding KES 3m or imprisonment for ten years, or both.

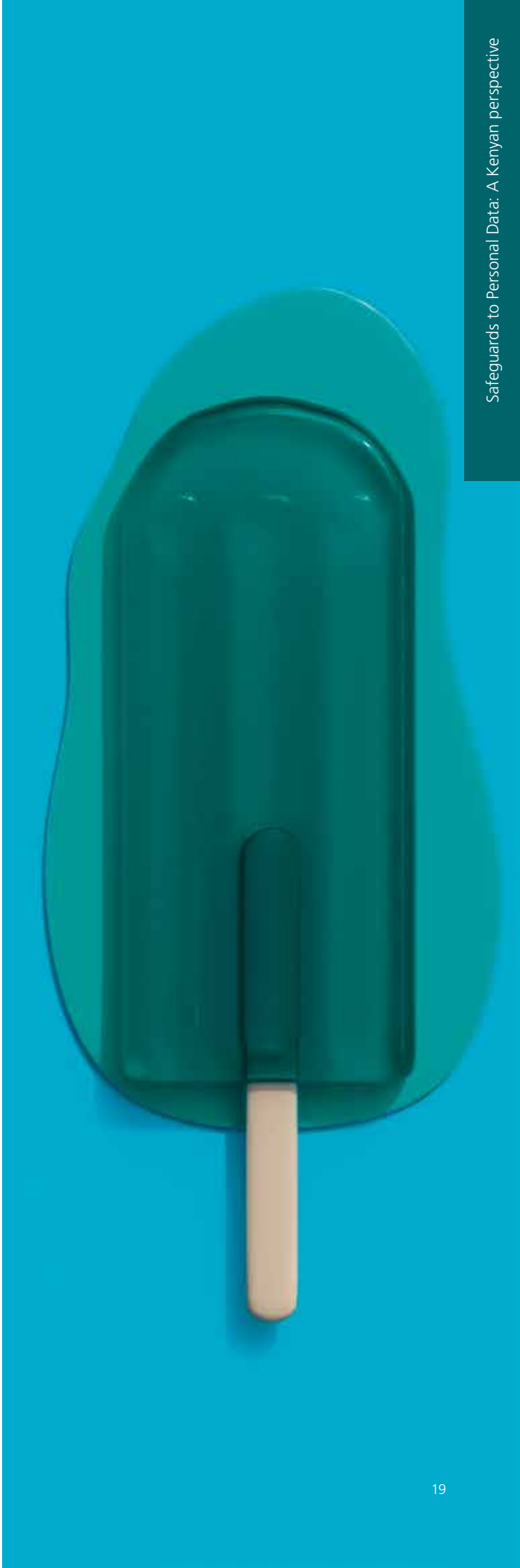
In addition to imposing a fine and prison term, the court can order the forfeiture of any equipment or article that may have been used in the commission of the offence, or issue prohibitory orders.

Conclusion

Although the Data Commissioner – the supervisory authority under the DPA – has yet to be appointed, data controllers and data processors must abide by their legal obligations under the DPA. Certainly, without a Data Commissioner in office, it will not be possible to comply with some legal obligations. This fact, however, will not constitute reasonable grounds for failure to comply with the other provisions of the DPA that do not require the Data Commissioner's involvement or intervention.

As a result, data controllers and data processors, which include employers, should consider putting in place measures and mechanisms to ensure compliance with the DPA, the monitoring of data processing and remedial actions for the breaches.

Consideration should be given to creating documentation and policies, both outward and inward looking. This will go a long way to limiting adverse legal exposure, particularly in a regime that introduces a supervisory authority with the power to carry audits, initiate investigations and issue administrative fines, together with the risk of criminal conviction for a maximum term of ten years.



Spain introduces new measures for acquiring productive units under insolvency

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Although not everyone may realise it, the post-COVID-19 era will be a time of opportunity. In the coming months many companies will face pre-insolvency or insolvency situations like the 2008 crisis, which had a profound effect on the global economy. During that crisis, the sale of productive units within companies in difficulty was not only an effective way of resolving judicial insolvency proceedings, but also represented a business opportunity.

Although the regulatory framework of such sales has undergone successive modifications over the years – often bringing far-reaching and permanent change – courts have issued a significant number of declarations under this regulatory framework (including rulings over acquisitions by foreign investors), which have in turn influenced the design of the framework. As a result of these successive modifications, this framework for the conclusion of judicial insolvency proceedings has been transformed into a way of preserving the value of a debtor's business activity (in whole or in part), and the employment and assets required to carry on the business. A prospective purchaser's offer to acquire a productive unit can accompany the debtor's request for insolvency, which can make the transaction profitable for all involved. This also makes the acquisition process more straightforward from a procedural point of view.

Early identification of the opportunity, together with a legal analysis of the situation from a commercial, insolvency and employment law perspective, can pave the way for an early acquisition proposal, which is essential for maximising the profitability of the acquisition.

It is in this context that recent legal reforms to the Spanish Insolvency Act have facilitated the sale of productive units. The Royal Decree-Law 16/2020 of 28 April 2020 that creates procedural and organisational measures for the Administration of Justice to combat COVID-19 gives priority to proceedings aimed at the sale of productive units or the en masse sale of unit assets until 14 March 2021. This may be carried out at any stage of insolvency proceedings, either by auction, judicially, extra-judicially or by any other means of performance authorised by a judge.

Although the Royal Legislative Decree 1/2020 of 5 May 2020 (**"May Decree"**), which approved the revised text of the Spanish Insolvency Act, does not generally amend insolvency regulations, it does introduce notable improvements in the substance, form and organisation of the legal provisions overseeing the mechanism of sale. This mechanism is expected to be especially significant in the coming months and will represent a great opportunity, particularly for foreign investors.

One of the especially relevant improvements in the May Decree is the allocation of exclusive jurisdiction to Commercial Judges to declare the existence of a transfer of undertakings. Such declarations must always be made in accordance with the principles and norms of employment law, but this legal provision will help to avoid the disparity of jurisdictional criteria between the commercial, employment and judicial review courts, which has been the case for declarations issued over recent years. This will also help to bring greater legal certainty to these transactions since a lack of certainty previously deterred investors from participating. The new legal provision will make these deals attractive again.

The legal provision on jurisdiction is complemented by a new provision that makes judgments approving the transfer of productive units irreversible. Judgments will be binding through the application of the res judicata principle for all courts and tribunals of any jurisdictional order, without exception, both in terms of the rules governing the sale of a productive unit, and the consequent existence of a transfer of undertaking. In this way, it is not possible to review the judgment, even indirectly, through any appeal by Social Security authorities against administrative acts of derivation of responsibility, or through proceedings brought by employees seeking compensation from the acquiring company of the productive unit to which they belonged. This is because both Social Security authorities and employees will have had the opportunity to exercise their rights and actions before the Commercial Judge.

Additionally, the May Decree provides that when a transfer of undertakings occurs, the acquirer of the productive unit must assume responsibility, under the relevant contracts of the productive units, for payments relating to the employment and Social Security credits of the employees of that unit. In this way, any controversy over the employment credits to be assumed by the acquirer is resolved with the acquirer eligible only for those credits corresponding to the employees of the acquired productive unit. This solution is consistent with the intended purpose that the transfer of productive units in insolvency proceedings, and constitutes an effective and valid mechanism for the maintenance of business activity and employees by offering an opportunity to the acquirer.

Within the regulatory framework of insolvency proceedings, investors who have available cash and are aware of the companies seriously affected by the crisis will be able to acquire the productive units of those companies. This will provide the companies with legal security. The sooner such an acquisition is carried out, even if done simultaneously with the insolvency filing, the more of the company's value will be preserved. All those involved in these types of transfers during the 2008 crisis will have gained important experience confirming that the early identification of opportunities and a refined legal analysis of the surrounding circumstances will offer investors countless acquisition opportunities in the coming months. This approach will help to facilitate the swift conclusion of an insolvency situation and preserve the value of the business concerned as much as possible. Now is the time to act and to do so with the assistance of experts.

The Coming of Age of Virtual Hearings

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For years, we have heard complaints from users that arbitration is too expensive and too long. Some people view court litigation as being similarly problematic, but oral hearings, with everyone in the same room, has always seemed to be the right thing to do. It was what we were all used to. Until now. After first creating paralysis in administrative systems, COVID-19 has led to an outburst of widespread creativity in court and arbitration hearings. In view of impending long delays in proceedings, many have overcome their reluctance to use electronic means and are open to trying new formats. This has been helped by the discovery that, with a moderate investment in time (made easier by working at home), the new technical skills required can be learned more quickly than originally thought. Costs may be saved too by cutting travel and condensing contentious issues to those that really matter. Virtual hearings are not only possible, but – if well prepared – are almost as good as 'normal' hearings. They may be considered second best because of the reduction in the interplay of human chemistry, but they are usually less time-consuming and therefore less costly. What is more, arbitration proceedings can be more flexible n this regard than court proceedings. All the major ADR organisations have embraced virtual proceedings, adapting their rules to facilitate these new processes.

In the relevant press, there is a flood of reports on experiences with virtual hearings, publications that deal with certain legal issues regarding virtual hearings and the publication of guidelines issued by almost every arbitration institution. We do not propose to duplicate these reports here, but to highlight some of the most important issues that need to be kept in mind and dealt with prior to launching into a virtual-arbitration hearing. In doing so, we have benefitted from talking to practitioners and neutral observers in Europe, the UK and the US.

Admissibility of virtual hearings

Virtual hearings are generally admissible – implied and expressly regulated in many statutes, civil procedure rules and most, if not all, of the rules of arbitral institutions. One difficult issue, which has emerged is whether the arbitral tribunal has the power to order a virtual hearing even if one of the parties opposes this. The answer depends on the rules under which the arbitral proceedings are being run. The wording of the rules of each body may vary, but many of them either expressly provide for virtual hearings or at least do not prohibit them. They allow the arbitrators to conduct their proceedings in a manner that seems appropriate. The overriding principle is that each party is treated equally and given a reasonable opportunity to present its case. Some leading examples are: CIArb Rules [2015], Art. 17; the German DIS Arbitration Rules [2018], Art. (21.1) and (21.4); ICC Rules [2017], Art. 22(1); LCIA Rules [2014], Art. 14(1)-(5); UNCITRAL Rules [2017], Art. 17(1); and JAMS International Arbitration Rules [2016], Art. 21. While it is undoubtedly desirable that such an initiative should be made with the agreement and support of all the parties, this is not necessary. The tribunal must balance the disadvantages of indefinite postponement, including the hardship and inconvenience that it may

cause, against the advantages of carrying on by virtual means. In international commercial arbitrations, the inability of a party to access the technology required will rarely be a sustainable objection.

Types of hearings

The suitability of virtual hearings may depend on the type of hearing in question. For instance, case management conferences have already for some years been conducted by telephone. Video hearings are an improvement on these first organisational hearings, providing, as they may do, an opportunity for the parties and their lawyers to see each other and the tribunal for the first time. Hearings on legal issues (e.g. jurisdiction, etc.) are likely to be suited to a virtual format and indeed, given good briefing notes from each party, can be limited where appropriate to a question-and-answer session.

The 'main' hearings with witnesses of fact and expert witnesses is a potentially challenging area. However, virtual hearings with witnesses are in some ways better than those conducted in real life – provided that the integrity of the examination and cross-examination is ensured (for more on this, see below). We say this because everyone – lawyers, members of the tribunal and the parties – may see witnesses full-frame rather than at a relative distance. Everyone has a front-row seat.

Practical matters

Careful planning is essential for virtual hearings. Even before that, acquiring the necessary technical skills to navigate the screens and the documents is an absolute prerequisite for the arbitrators and the lawyers. Careful organisation of the technology and sufficient testing in advance is also vital. Training and practice are essential. Technical support of the panel and each party will also help speed hearings along (and prevent or reduce unplanned disruptions), as will good broadband strength. To ensure that the documents needed during the hearing are properly managed, it may be helpful to have a hearing-bundle manager.

For full-day hearings, consideration should be given to whether the daily hearing hours should be shorter, and structured in such a way that specific matters are tackled on one day and others on another. This would help to focus on the important issues. It may also be better to start early and have, say, a thirty-minute break mid-morning. This becomes even more relevant when working with different time zones and especially where there are great differences between those zones. Many of us find a live transcript to be of great help in 'normal' hearings and it is likely to be even more helpful in virtual hearings. Ensuring the integrity of the examination of witnesses is important to give confidence to all those taking part. A second camera showing the whole room where the witness is sitting can help, as can a roving camera operated by the arbitrators or under their direction.

Communication between the various groups of people (e.g. tribunal members, the lead advocates and their team members) can seem to be an obstacle, but may be resolved by the use of texts and emails exchanged offline.

Security

The security of a virtual hearing and document management can be worrying to some. The security of a hearing may be achieved by limiting 'attendance' to only those who are authorised to be there. This can be done by installing a waiting room through which all participants must pass to be vetted. However, as wryly remarked by an experienced practitioner with whom we spoke, given the necessary time, money and determination, any system can be hacked. In this regard, the nature of the hearings and of the participants will influence the arbitrators in deciding whether to go virtual or not. Some arbitration organisations, such as JAMS, have an electronic filing system, which is used through a secure but dedicated case-management website.

Mediation

For completeness when discussing ADR, we should add a word about mediation. We mention this because several of those we spoke to expressed the view that mediation is likely to be used more commonly – in both arbitrations and litigation. Once again, this is partly due to the wish, and indeed compulsion, to achieve a speedy resolution and to save money; and partly due to a weariness of protracted wrangling. With the untimely loss of family, friends and colleagues due to COVID-19, a new appreciation for life has emerged: time is precious, and human and business relations are best conducted – if possible – more constructively and consensually. Technically, virtual mediation is tough on the mediator, but with training and preparation entirely doable.

Conclusion

Virtual hearings offer a good alternative to traditional proceedings, in particular when parties from different parts of the world are participating. Don't be reluctant to try. Very careful planning, however, is required.

Cryptocurrency gaining international recognition as property

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The popularity of cryptocurrency has seen substantial growth in recent years. A form of virtual currency that exists in a decentralised network, cryptocurrencies offer anonymised, faster peer-to-peer payment options compared to traditional services. A string of recent international cases reflects a developing consensus for the positive treatment of cryptocurrency, with many judgments aligning with the English law position.

Why should cryptocurrency be considered property?

The classification of cryptocurrency as property is of central importance to its legal status and subsequent widespread usage. Proprietary rights enjoy worldwide recognition, whereas other personal rights are only recognised vis-à-vis someone who has assumed a relevant legal duty. The centrality of proprietary rights is evident in cases of insolvency and succession, as well as cases of fraud, theft and breach of trust.

English law position

The UK Jurisdiction Task Force's report "Legal Statement on Cryptoassets and Smart Contracts" (**"The UK Legal Statement"**) has proven to be influential both domestically and internationally for its analysis of the legal status of cryptocurrency. The report recognises that while the design of crypto assets may create practical obstacles to legal intervention, *"that does not mean that crypto assets are outside the law"*.

Accordingly, it concludes:

— cryptoassets have all of the indicia of property;

— the novel and distinctive features possessed by some cryptoassets (e.g. intangibility, cryptographic authentication, use of a distributed transaction ledger, decentralisation, rule by consensus) do not disqualify them from being property;

— cryptoassets are also not disqualified from being property as pure information or because they may not be classifiable as things in possession or as things in action; and

— cryptoassets are therefore to be treated in principle as property.

This position was adopted in the English court judgment of *AA v Persons Unknown* [2019] EWHC 3556, in which the court held that *"a crypto asset such as Bitcoin are property"* for the purposes of being subject to an interim proprietary injunction.

International recognition

Encouragingly, a growing number of international decisions have taken a similar approach:

— In *Internet and Mobile Association of India v. Reserve Bank of India* [Writ Petition (Civil) No. 528 of 2018], the Indian Supreme Court deemed that cryptocurrencies retain the fundamental elements of money and should be treated as such.

— In the Singapore case of *B2C2 Ltd v Quoine Pte Ltd* [2019] SGHC(I) 3, Thorley LJ considered that cryptocurrencies are not legal tender, but *"do have the fundamental characteristic of intangible property as being an identifiable thing of value"*.

— In the Hong Kong case of *Nico Constantijn Antonius Samara v Stive Jean Paul Dan* [2019] HKCFI 2718, the court granted a freezing injunction of Bitcoins, finding that there was no suggestion that a cryptocurrency could not be considered property.

— In *Shair.Com Global Digital Services Ltd v Arnold* 2018 BCSC 1512, the Canadian court opted to accept that cryptocurrencies could be property within the rules for preservation orders, albeit without providing clear reasoning for doing so.

The recent High Court of New Zealand ruling in *Ruscoe v Cryptopia Limited (in liquidation) CIV-2019-409-000544* [2020] NZHC 728 provides a useful framework for analysing cryptocurrency's increasingly positive judicial treatment.

Background

The cryptocurrency trading exchange Cryptopia Ltd. (in liquidation) (**"Cryptopia"**) suffered a significant hack in January 2019, resulting in the loss of approximately NZD 30m of cryptocurrency from its platform. This is now widely regarded as the biggest theft in New Zealand's history. The ruling arose from an application by the liquidators as to the legal status of cryptocurrencies held by Cryptopia and in particular whether they were a type of "property" that could form the subject matter of a trust.

Is cryptocurrency "property"?

The court found that cryptocurrency was a species of intangible personal property and an identifiable thing of value. In the judgment, Justice Gendall made reference to Lord Wilberforce's now-classic statement of the characteristics of "property" put forth in the House of Lords case of *National Provincial Bank Ltd v Ainsworth [1965] AC 1175 (HL)*. The criteria are that "property" (i) must be definable; (ii) is identifiable by third parties; (iii) is capable in its nature of assumption by third parties; and (iv) have some degree of permanence or stability.

In the court's view, cryptocurrencies satisfied the standard criteria outlined by Lord Wilberforce and were a type of intangible property as a result of three interdependent features. Justice Gendall found that cryptocurrencies obtained their definition as a result of the public key recording the unit of currency, and that the control and stability necessary for ownership are provided by the private key attached to the corresponding public key and the generation of a fresh private key upon a transfer of the relevant coin. The court recognised that two arguments are commonly raised to suggest that cryptocurrencies do not have the status of property. Having considered them, the court dismissed both. It found that the suggestion that common law recognises only two property classes – personal property and several forms of action – was a 'red herring'. The court found that the cited cases did not take a narrow view of what could be classified as property. Similarly, the court acknowledged the assertion that cryptocurrency is only a form of information was "simplistic" and, in the present case, wrong. The court was satisfied that cryptocurrencies were far more than merely digitally recorded information. This is consistent with the UK Legal Statement, which acknowledged that while it was difficult to formulate a precise definition, cryptoassets that are viewed as a *"a conglomeration of public data, private key and system rules"* are not disqualified from being property on the ground that they constitute information.

Finally, the court dismissed the claim that there are public policy grounds for why cryptocurrencies should not be considered property.

Were the cryptocurrencies held on trust?

In finding that cryptocurrencies had the status of "property", the New Zealand court was satisfied that they were capable of forming the subject matter of a trust. The question, however, remained as to whether in the present case the digital assets were held on trust for accountholders.

This issue depended largely on the facts of the case. After a detailed analysis of what constitutes a trust, the court concluded that each type of cryptocurrency was held on separate express trusts by Cryptopia, with the beneficiaries being all accountholders holding currency of the relevant type. The fact that Cryptopia held the private keys such that the accountholders did not know the private key associated with any particular coin was important in concluding that the cryptocurrencies constituted a trust.

In deciding that the cryptocurrencies were held on trust, the court distinguished the current case from the Singaporean case of *B2C2 Ltd v Quoine Pte Ltd* (**"Quoine"**). In Quoine, the Singapore Court of Appeal acknowledged that cryptocurrencies were *"capable of assimilation into the general concepts of property"*, but rejected the view that they were held on trust for one of the parties.

Justice Gendall was satisfied that the factual scenarios could be distinguished. Among the key findings in Quoine, the mere fact that Quoine's assets were segregated was not 'a decisive factor' in and of itself that would lead to the conclusion that there was a trust. However, in the Cryptopia case, there were a number of additional factors, which pointed to Cryptopia being a trustee. These included express trust provisions in the amended terms and conditions, as well as the fact that the company's internal financial accounts and GST returns demonstrated that it did not assert any ownership in the cryptocurrency, beyond being an accountholder itself. Such divergence in treatment makes it clear that rulings on cryptocurrencies and whether they are held on trust like other forms of property will be fact-specific, making it important to review the arrangements put in place. This may also create more competition in this space.

Recovery of stolen digital assets

The court considered certain other issues, including how to deal with any recovered stolen digital assets. Justice Gendall acknowledged that that any recoveries of misappropriated cryptocurrency should be returned to the accountholders who suffered a loss as a result of the misappropriation. As such, the court detailed the following steps:

— as of the date of the theft, the liquidators should determine the accountholders affected and their relative shares in any trust of the digital assets, which are the subject of the theft. The liquidators should then apply the loss from the theft *pro rata* to those existing holdings;

— subsequent to the theft, for any accountholder that acquired digital assets of the type that was stolen, which were added to the relevant trust assets, no reduction for the theft should be applied to that accountholder's share in the trust assets; and

— any recoveries of cryptocurrency lost as a result of the theft should be applied *pro rata* to make up the loss suffered by the affected accountholders.

Conclusion

The status of cryptocurrencies as "property" has attracted significant judicial attention in recent times. As interest in the technology continues to grow, questions concerning digital assets will only become more commonplace and complex. By design, cryptocurrency is an inherently international technology, and as such, courts are likely to consider the approaches taken by others when they come to decide on the legal questions related to it.

The modification of Switzerland's international arbitration law

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Switzerland is one of the leading countries when it comes to international arbitration and it is no secret that this is mainly due to its excellent legal framework, embodied in Chapter 12 of Switzerland's Private International Law Act. Adjustments to optimise this legal framework have recently been discussed in the Swiss parliament with the aim of maintaining Switzerland's attractiveness as a central place of arbitration at the international level.

A. Switzerland's international arbitration law

In Switzerland, international arbitration is governed by Chapter 12 of the Private International Law Act ("PILA") of 18 December 1987, which comprises 19 articles (Articles 176 – 194 PILA) and has been conceived as a self-standing unit within the PILA.

Over the years, Chapter 12 PILA has been of significant importance in consolidating Switzerland's long tradition as a hub of international arbitration. Although Chapter 12 was enacted more than 30 years ago, it is still considered a "modern" piece of arbitration legislation, which strongly favours party autonomy.

In October 2018, the Swiss government published a detailed project for the amendment of Chapter 12 PILA (the "Draft Bill"), intended to modernise Swiss arbitration law and further increase Switzerland's attractiveness as a seat of international arbitration.

B. Key amendments

The key amendments foreseen by the Swiss government are aimed at: (1) enshrining certain elements deriving from the Swiss Supreme Court's consistent case law; (2) strengthening party autonomy; and (3) generally making the law easier to apply.

1. Enshrinement of the Swiss Supreme Court's case law in Chapter 12 PILA and clarification of ambiguities

Chapter 12 PILA applies *"if the seat of the arbitral tribunal is in Switzerland and if, at the time of the conclusion of the arbitration agreement, at least one of the parties had neither its domicile nor its habitual residence in Switzerland"* (art. 176 para. 1 PILA).

There is currently a disagreement between the Swiss Supreme Court and Swiss doctrine as to whether the parties referred to in this provision are the parties to the arbitration *proceedings* or the parties to the arbitration *agreement*.

The Draft Bill therefore includes new wording in Article 176 para. 1 PILA, specifying that the rules of Chapter 12 PILA apply to the parties *"to the arbitration agreement"*. This constitutes a welcome clarification to the scope of application of Chapter 12 PILA.

The proposed wording of Article 176 para. 1 PILA will also explicitly specify that Chapter 12 PILA applies if one of the parties does not have *"its headquarters"* in Switzerland. This is a simple point of clarification, since the concept of *"domicile"* already encompasses the concept of the seat of a company.

In its current edition, Chapter 12 PILA only contains a provision for the setting-aside of an arbitral award. In accordance with case law, parties may nevertheless rely on further legal remedies against an arbitral award. The Draft Bill therefore includes new provisions regarding the rectification, interpretation and revision of an arbitral award.

In addition, the principle that parties must immediately challenge any infringements of the procedural rules of international arbitration is also subject to a new article. Such a provision, which is already included in the law regulating domestic arbitration, will again provide for greater legal certainty.

Chapter 12 PILA offers the possibility to seek the assistance of the state court (*"Juge d'appui"*) at the seat of the arbitral tribunal, for the constitution of the arbitral tribunal or for the taking of evidence. The Draft Bill provides that the proceedings in front of the court will be subject to the summary procedure (i.e. a faster procedure than the ordinary procedure).

2. Strengthening of party autonomy

Chapter 12 PILA already offers a large degree of autonomy to the parties to the arbitration. The Draft Bill is aimed at strengthening this principle by drawing inspiration from the developments observed in other international arbitration *"hot spots"*.

For example, the Draft Bill expressly provides that the jurisdiction of an arbitral tribunal may be based on an arbitration clause contained in a unilateral legal act – such as a will, a foundation, a trust or the statutes of an association – if the clause meets the necessary formal requirements and if the act in question is valid under the law to which it is subject.

The Draft Bill also proposes that the parties to the arbitration may determine the seat of the arbitral tribunal in the arbitration agreement, or subsequently agree without any further formal requirements. It remains to be seen whether this procedural relaxation will have an impact on the number of international arbitrations conducted before tribunals seated in Switzerland.

Currently, Chapter 12 PILA does not offer any solution regarding a situation where the parties have not determined the seat of the arbitration or have merely indicated that it would be in Switzerland. In order to remedy this legal gap, the Draft Bill provides that the first judge seized in Switzerland will be competent to determine the seat of the arbitral tribunal. This rule again helps to ensure that the willingness of the parties to conduct arbitration proceedings in Switzerland can be fulfilled to the greatest possible extent.

3. Improving Chapter 12 PILA to facilitate its application

New provisions detailing the procedure to follow regarding the challenge or removal of an arbitrator will be integrated into Chapter 12 PILA, and the current reference to the relevant provisions of the Swiss domestic arbitration rules removed. This should contribute in strengthening Chapter 12 PILA as a *"one-stop shop"* law for international arbitration in Switzerland.

The Draft Bill also proposes that the parties to the arbitration be authorised to submit any document in English to the Federal Supreme Court in the event of an appeal or a revision, including the notice of appeal or the application for revision themselves. This would be a significant step forward, as the Federal Supreme Court currently only accepts appendices in English provided that neither party requests their translation.

On another note, the Draft Bill provides for a new article (Article 185a PILA) enabling both foreign arbitral tribunals and parties to a foreign arbitration to request the assistance of a Swiss judge ("*Juge d'appui*") for the execution of interim or protective measures and for the taking of evidence in Switzerland without having to resort to the time-consuming procedure of international mutual legal assistance. This provision will further promote both Switzerland's arbitration-friendly reputation and the accessibility of the provisions of Chapter 12 PILA to foreign parties.

C. Parliamentary procedure

The Draft Bill has been discussed in both chambers of the Swiss parliament: the National Council has adopted the Draft Bill in December 2019 without objection, but with a few minor adjustments. The Council of States has also voted in favour of it at the beginning of March 2020, subject to the increased use of English in proceedings before the Federal Supreme Court, to which a majority of senators have objected.

After a divergence elimination procedure, during which the increased use of English in front of the Federal Supreme Court was eventually accepted, the final Draft Bill was unanimously adopted by members of Parliament on 19 June 2020.

Belgium sets up proactive framework to protect companies during COVID-19 pandemic

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There is no doubt that the COVID-19 global health crisis is also causing a global economic crisis. Because the cash buffers built up by some companies will likely be insufficient to withstand the economic consequences of the crisis, the Belgian government has taken steps to alleviate pressure on businesses, such as granting deferrals on tax payments and social debts, and placing employees into temporary unemployment. Of the government's measures to protect companies, two stand out: the state guarantee scheme for bank loans; and the introduction of a temporary suspension of enforcement and other measures during the COVID-19 crisis to help companies already experiencing financial difficulties.

Guarantee scheme for bank loans

The Belgian government has granted the banking sector a guarantee of up to EUR 50bn, covering any losses on loans issued by the relevant lenders to certain targeted companies during the period of the pandemic and its aftermath. The details of this state guarantee scheme are set out in the Royal Decree (RD) of 14 April 2020.

Targeted companies

Companies eligible for guaranteed credit are all non-financial enterprises that do not owe outstanding credits, taxes or social security contributions, or have had no arrears of that kind for more than 30 days as at 29 February 2020. Additionally, the enterprise cannot have been undergoing debt restructuring with one or more credit institutions as at 31 January 2020. Lastly, the enterprise should not be viewed as having been in difficulty on 31 December 2019 according to the definition of an "undertaking in difficulty" in EU

regulation 651/2014 The Belgian government is currently negotiating with the Commission to further broaden the range of the state guarantee scheme within the scope of EU state aid rules.

Features of the loans

In the context of the state guarantee scheme, the term credit is defined as "any contract under which a lender grants or agrees to grant credit, in the form of a loan, an opening of credit, an authorised overdraft, or any other similar payment facility". This includes credit lines. However, finance leases, factoring agreements, consumer credit and mortgage credit all fall outside the scope of the state guarantee scheme. The guaranteed credit must be granted between 1 April and 30 September 2020, and can only have a maximum term of 12 months, though negotiations are underway to extend this term to 36 months. This includes credits of indefinite duration that can be terminated by the lender or the borrower within 12 months of being granted. Some credit forms are expressly excluded under the RD, including refinancing credit, new drawdowns on credit granted before 1 April 2020, credit granted to persons whose contract stipulates that the credit is used exclusively for non-Belgian activities and credit classified as "non-guaranteed" credit by the lender.

The relevant lenders – namely, Belgian credit institutions or Belgian branches of foreign credit institutions with existing lending activity as of 31 December 2019 – may not place themselves, loans or borrowers within or outside the scope of the RD that is contrary to the objective of supporting companies in difficulty. At the same time, they are still under the obligation to apply good practices when granting credits under the guarantee scheme.

The maximum guaranteed principal amount is capped at EUR 50m or – if lower – at the amount of the borrower's liquidity needs over 18 months for SMEs and 12 months for large enterprises. The Council of Ministers is authorised to grant an exemption from the EUR 50m cap. The guaranteed interest is capped at 1.25% interest per annum in addition to a premium that is charged by the lender amounting to a maximum of 25 basis points for SMEs and 50 basis points for large enterprises.

Burden sharing

After the state guarantee scheme has ended, the recorded losses will be reviewed with the burden being shared by the government and the financial sector. The first 3% of losses will be borne entirely by the financial sector. The financial sector and the government will share losses of between 3% and 5% on a 50-50 basis. For losses higher than 5%, the government will bear 80% and the financial sector 20%. The amended version of the state guarantee scheme that is currently being negotiated proposes that the financial sector will bear 20% of overall losses. This is intended to encourage banks to lend money to companies with financial difficulties.

Legal suspension of enforcement measures

To avoid putting too much strain on business courts, the Belgian government introduced Royal Decree No. 15 on the temporary suspension of enforcement measures and other measures in favour of undertakings during the COVID-19 crisis. The Decree provides for a legal suspension until 17 May 2020, which has been extended to 17 June 2020, for the compulsory collection and execution of debts and the obligation of the board of directors of a company to file for bankruptcy if bankruptcy conditions are met. Furthermore, it also provides protection for creditors if the debtor defaults after the suspension period. Note that the above measures only apply to companies that were not in a situation of cessation of payment as at 18 March 2020.

Legal suspension of protective and enforcement measures

Under the new RD, all enforcement measures will be suspended until 17 June 2020 for all undertakings falling within the scope of Book XX of the Belgian Code of economic law. Thus, with the exception of immovable goods, seagoing and inland vessels, no protective or enforcement attachment can be made, and no enforcement measures can be initiated or continued against the assets of a debtor.

Apart from exceptional cases, a company cannot be declared bankrupt or legally dissolved by writ of summons. Nor can a judicial authority order the transfer of all or part of its activities, unless initiated by the public prosecutor, the interim administrator appointed by the president of the company court, or with the consent of the debtor. In addition, the payment terms already approved in the reorganisation plans under Article XX.82 of the Belgian Code of economic law are extended for the duration of the suspension. Agreements entered into before the entry into force of this measure cannot be unilaterally or judicially dissolved in the event of non-payment, with the exclusion of employment contracts.

It should be noted that the scheme does not affect a company's obligation to pay any other debts due or the contractual penalties provided for under general law. As a result, it will still be possible for the parties to invoke measures such as the exception of non-performance, set-off or lien in the context of a contractual dispute, although a judge may consider the invocation of such exceptions an abuse of rights.

The above measures essentially grant automatic protection to all companies similar to the protection granted to companies undergoing judicial reorganisation. An important difference is that the protection under the RD is broader than the protection provided for in Book XX of the Belgian Code of economic law, since it applies to debts that already existed when the suspension period started, and to new debts arising during the suspension period.

The RD also provides creditors with protection from abuse of these measures. Any interested party can employ a summons to request a court ruling exempting an undertaking from the scope of the above suspension or to lift the suspension in whole or in part. Such claims are to be filed and tried as interim proceedings, and should include a reasoned argument. In reaching a judgment, the court is required to take into account a number of factors, including the potential impact of the crisis on the company's turnover or activities, whether it instituted temporary unemployment, whether there was a government order to close down the company, and the over all interests of the applicant. This judicial review protects creditors against companies abusing these temporary measures to defer the payment of debts that they are in a position to meet despite the COVID-19 crisis or because they should have filed for bankruptcy before the crisis began.

Legal suspension of obligation to file for bankruptcy

The usual procedure under Article XX.102 of the Belgian Code of economic law requires directors of companies to file a bankruptcy petition within one month after the bankruptcy conditions have been met (i.e. the company is definitively no longer able to pay its debts and can no longer apply to its creditors, suppliers or banks for credit). If this deadline is missed, the directors may be held personally liable for any additional debts arising as a result of the late declaration.

To provide companies with further relief and the time to find appropriate solutions, the RD suspends the obligation of the board of directors to report bankruptcy in accordance with Article XX.102 of the Belgian Code of economic law until 17 June 2020. This suspension takes effect only if the bankruptcy conditions are the result of the COVID-19 crisis and its consequences, and is in line with similar legal measures in other countries, including Germany and France. Directors can voluntarily close the books during the suspension period.

'Suspicious period' not applicable to new credit

Article XX.112 of the Belgian Code of economic law provides for the option of declaring certain acts performed during the 'suspicious period' unenforceable. Although it is normally assumed that the cessation of payment took place on the day bankruptcy is declared, the cessation of payment time can be brought forward. The receiver can then request that certain acts performed during the 'suspicious period' are declared unenforceable. This discourages lenders from granting credit to distressed companies because the securities they have provided may be declared unenforceable in a subsequent bankruptcy.

The RD explicitly provides that this provision does not apply to new credit and the related securities or payments provided during the suspension period. The purpose of this provision is to encourage the granting of credit to companies while alleviating the creditor's potential liability or exposure in granting the credit. Under these temporary measures, that new credit has not resulted in the debtor's continuity does not create liability for those granting the credit.

Conclusion

The two measures set out above form the cornerstones of the temporary legal framework the Belgian government has put in place to protect companies in difficulty or that might face difficulties as a result of the COVID-19 pandemic. It is yet to be seen whether these measures are sufficient to avoid an economic collapse.

UK competition class actions: Carriage dispute in the FX class actions

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On 6 March 2020, the UK Competition Appeal Tribunal (CAT) handed down a judgment concerning the first carriage dispute under the UK's competition class-action regime. Two competing class actions had been filed seeking losses for the anticompetitive behaviour of banks in the Foreign Exchange (FX) markets. Given the competing class actions, a "carriage dispute" arose as the CAT would not allow both applications to proceed.

Under the UK's competition class-action regime, the CAT holds a "certification hearing" to assess whether proposed claims are appropriate for the class-action procedure. In this case, both applicants requested that the CAT resolve the carriage issue (i.e. choose between the competing applicants) in advance of the full certification hearing. The CAT rejected this approach, deciding that carriage should be determined at the certification hearing.

This is an unhelpful approach for potential applicants under the class-action regime and litigation funders that underwrite these claims. If a claim is likely to fail, a litigation funder would rather know sooner than later and, having incurred a lower expenditure, the funder would want the request to have the carriage resolved at the earliest possible stage. In its ruling, the CAT emphasised that the UK class-action regime is in its infancy and that its decision to have carriage and certification decided in a single hearing represented a cautious approach. As the regime matures, it may therefore be possible to have carriage disputes resolved at an early stage as a discrete issue.

The Collective Proceedings Order regime

In October 2015, the UK introduced a new procedure for bringing collective proceedings for competition law claims – breaches of Articles 101/102 of the Treaty on the Functioning of the European Union (TFEU), or the UK domestic law equivalent. The mechanism allows group claims to be brought on either an opt-in or on an opt-out basis. Opt-in mechanisms have historically been the norm in Europe, where potentially affected persons positively elect to join a claim or otherwise seek a recovery (e.g. by assigning their claim). In contrast, opt-out mechanisms automatically include all members of the proposed class unless and until they elect to leave (i.e. opt-out from) the class. Thus, opt-out class actions are powerful procedural devices for aggregating large claims, particularly where

individual losses are small and insufficiently incentivise affected persons from using an opt-in mechanism.[1]

Where a claim is filed under the new regime, the CAT will hold a "certification hearing" to decide whether to grant a Collective Proceedings Order (CPO). If a CPO is refused then the claim will terminate. The CAT will only grant a CPO if: (a) it is "just and reasonable" to authorise the proposed class representative (the Authorisation Condition);[2] and (b) the claims "raise the same, similar or related issues of fact or law and are suitable to be brought in collective proceedings" (the Eligibility Condition).[3]

Since the introduction of the new class-action mechanism, fewer than ten CPO applications have been filed seeking damages pertaining to a variety of established or alleged competition infringements including the trucks cartel, interchange fees, FX and mobility scooters. The CAT has not yet granted a CPO in any of these claims. On 13 and 14 May 2020, the UK Supreme Court heard arguments in the appeal in *Merricks v MasterCard*. The ruling from the Supreme Court later this year will clarify application of the Eligibility Condition and, in particular, the question of "suitability". The CAT is delaying certification hearings on the other issued CPO applications until the Supreme Court gives its ruling in *Merricks*.

Background to the FX claims

In May 2019, the European Commission ruled that entities in the RBS/NatWest, Citigroup, JPMorgan Chase, Barclays, MUFG and UBS banking groups had breached competition law in the spot FX market for 11 currencies. The banks were fined a total of EUR 1.07bn, with UBS avoiding a fine after having been granted amnesty (whistleblower) status.

On 29 July 2019, the London office of the US law firm Scott+Scott issued an opt-out CPO application on behalf of Michael O'Higgins FX Class Representative Limited. On 11 December 2019, the London office of another US law firm, Hausfeld, filed a competing opt-out application on behalf of Phillip Evans.

Application for determination of the carriage dispute

Like other CPO applications, the CAT has delayed the certification hearing in the FX claims until after the Supreme Court hands down its ruling in Merricks. The FX certification hearing is scheduled for March 2021.

However, the competing applicants in the FX claims requested that the CAT resolve the carriage dispute earlier. Put differently, they requested that the CAT resolve the Authorisation Condition in isolation, with the Eligibility Condition to be resolved at a later date and after the Merricks ruling is handed down. Four of the defendant banks supported this application and the other banks were neutral (i.e. none of the parties objected to this approach). These claims are funded by litigation-funding vehicles and their preference is to resolve this issue sooner rather than later. If a funder is to lose a carriage dispute, they would prefer to do so earlier and at lower costs.

The essential arguments put forward by both applicants for seeking an early resolution of the carriage dispute included:

— it was a discrete matter, capable of being determined as a preliminary issue as done in other common law jurisdictions;

— it would be in the best interests of all parties, including the proposed class members, by saving costs and avoiding confusion among potential class members; and

— it would avoid undermining and/or delaying any potential alternative dispute resolution (ADR) procedure.

The CAT's Ruling

The CAT rejected the applicants' request and decided that the Authorisation Condition and the Eligibility Condition should be considered together at a single certification hearing.

The Canadian approach

The parties referred to Canadian law extensively, acknowledging that while other jurisdictions such as the US and Australia have well-established collective proceedings regimes, the UK procedure was most closely modelled on the Canadian class-action system.

Canada determines carriage disputes in advance of certification hearings (i.e. taking the same approach that the applicants were requesting that the CAT take). The CAT reviewed the factors that the Canadian courts consider when resolving carriage disputes, noting that some of those factors will be given much greater scrutiny at the certification stage and so are treated

1 The scope of the opt-out regime is restricted to natural or legal persons domiciled in the UK, but it is possible for non UK-domiciled persons to "opt-in" to a claim.
2 Competition Act 1998, section 47B(8)(b).
3 Competition Act 1998, section 47B(6).

as "neutral" at the carriage-dispute stage. The reason these points were treated as neutral was because, as a matter of procedure, the Canadian courts had opted to resolve issues of carriage at such an early stage where they had inadequate information on those relevant factors. The CAT described this approach of treating factors relevant to carriage as neutral where determining carriage as bordering "on the irrational".

Costs and efficiency

The CAT recognised that an early carriage hearing would have "potential advantages in saving the cost and time" of the unsuccessful applicant and the respondents. However, the CAT suggested that those advantages might be "overstated" and countered that a single, combined hearing, even with wider scope, was generally "cheaper than two" and more efficient.

Risk to settlement

The applicants contended that uncertainty of carriage could be a block to settlement discussions. The CAT noted that any settlement opportunity would probably "only arise" after certification for trial. In any event, the CAT noted that "section 49B CA 98 provides a procedure for settlement without a CPO having been made".

Interrelationship between Eligibility and Authorisation
Importantly, the CAT held that a carriage dispute could only be regarded as a discrete matter capable of being determined in advance of certification if there was no interplay between the Eligibility Condition and the Authorisation Condition. Having reviewed the statutory and regulatory framework of the UK procedure, the CAT concluded that there "arguably" was interplay and therefore the applicants' preferred approach should be refused. The CAT said that the degree of this interplay was best assessed at the full certification hearing, where evidence on both conditions would be available.

The future

The ruling will be unwelcome to litigation funders, who would prefer to limit their expenditure if carriage will ultimately be refused. Having said this, it is worth bearing in mind two practical points.

First, where a claim is potentially high value and meritorious it is likely to attract attention from multiple litigation funders, even if carriage cannot be resolved until a later stage.

Second, the CAT specifically stated that interplay between the Eligibility Condition and the Authorisation Condition was "arguable". A future hearing may determine this point of law and decide that there is no such interplay, which would then open the door to early hearings of carriage disputes in the Canadian style.

This ruling from the CAT brings some clarity on the timing of resolving carriage disputes, but we are in the early stages of the UK's competition class-action procedure and many other questions remain to be resolved through future contested hearings.

[5] Paragraph 42 of the judgment.
[6] Paragraph 54 of the judgment.

Contractors' Liability under PP contracts within the Framework Agreement on Joint Procurement Agreement in Bulgaria

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What is the Framework Agreement on Joint Procurement Agreement to Procure Medical Countermeasures?

In 2010, the European Council asked the European Commission (the Commission) to make arrangements for the joint procurement of vaccines in order to prepare for future pandemics. The result was the Framework Agreement on Joint Procurement Agreement to Procure Medical Countermeasures (the JPA) which, as of May 2020, has been signed by all European Union (EU) Member States, all European Economic Area countries, the United Kingdom, Albania, Montenegro, North Macedonia, Serbia and Bosnia and Herzegovina, and Kosovo (the Signatories).

The JPA is a mechanism that enables participating Signatories, together with the European Commission, to organise procurements for specific 'medical countermeasures', which under the JPA constitute "any medicines, medical devices, other goods or services that are aimed at combating serious cross-border threats to health".

The JPA sets out the practical arrangements governing the joint procurement mechanism, including:

— the management of the framework contracts;

— the conduct of any legal proceedings resulting from the joint procurement procedure or the framework contracts, or from a failure to comply with the JPA; and

— the amicable settlement of any disagreements between contracting parties.

How does procurement under the JPA work?

In the event of a disaster or crisis that directly affects the health and life of the population (such as the current COVID-19 pandemic), each Signatory to the

JPA may participate in new procurement programmes for the acquisition of medical countermeasures. However, being party to a particular procurement programme under the JPA does not preclude Signatories from conducting their own similar or identical domestic procurement programmes in parallel to, and separate and independent from, the programme under the JPA. Similarly, suppliers of products that are the subject of tenders may participate in both JPA and domestic procurement programmes.

Although it is the Signatories who purchase any goods that are provided pursuant to procurement programmes, responsibility for coordinating the programmes lies with the Commission. Following the spread of COVID-19 throughout Europe, the Commission launched four joint procurements for medical equipment and supplies (including personal protective equipment and medical devices). As a result, three framework contracts have been signed for goggles, face shields and masks, and certain Member States have already placed orders for such products.

Contracting under the JPA

Under the JPA, the assignment can be made in the form of a direct contract or a framework contract with the selected contractor/s. Where framework contract are used, the contracting Signatories and the relevant contractor must enter into 'specific contracts' for the supply of specific products. These 'specific contracts' must

— be signed by all parties to the relevant framework contract before the expiry of the same, and

— implemented at least six months after the expiry of the framework contract in question. The provisions of the relevant framework contract continue to apply to any 'specific contracts' even after the expiry of the former.

The law applicable to framework or direct contracts pursuant to the JPA and the competent court for hearing disputes under these contracts will be determined in these contracts.

When a specific direct contract pursuant to the JPA is governed by Bulgarian law, the public procurement, general commercial and contract law provisions of Bulgarian law will apply, including provisions relevant to contractor liability. However, the Bulgarian Parliament has mandated that, until 13 July 2020, certain special provisions of Bulgarian public procurement law will not apply to contracts for the supply of medical countermeasures (such as hygienic materials, disinfectants, personal protective equipment, medical devices etc).

Liability of the contractor under public procurement contracts entered into based on the JPA

Under Bulgarian law, the party responsible for providing goods or services under a supply contract for any medical countermeasures signed pursuant to the JPA (referred to in Bulgarian law as the Contractor) may be liable for culpable non-performance of his/her obligations, for delayed performance, or inaccurate or bad performance of the contractual obligations. If the Contractor fails to perform his/her obligation properly, the recipient of the goods/services (referred to under Bulgarian law as the Assignor) will be entitled either to demand performance plus damages for the delay, or damages for non-performance. Should the Assignor seek damages instead of performance, the Contractor may propose instead that he/she perform under the contract and provide compensation for the delay (although this will require that the Assignor still be interested in performance of the contract). Such damages would include (i) the losses suffered, and (ii) the loss of profit to the extent that they are a direct and immediate consequence of the non-performance and could have been foreseen at the time the obligation arose. However, if the Contractor has acted in bad faith, he/she will be liable for all direct and immediate damages.

Where a Contractor is in default of his/her contractual obligations, he/she will be liable to pay damages even if the performance was rendered impossible by a reason for which he would otherwise not have been liable, unless he/she can prove that the Assignor would have suffered the same damage even in the event of a timely performance.

In the event that a Contractor performs his/her obligations but does so late, he/she will be liable for the damage caused to the Assignor and in most cases will be liable to pay the Assignor a contractual penalty. Whether performance is late or not will depend on the circumstances of the underlying contract:

— Where the date for performance of the obligation is fixed, the Contractor will be in default on expiration of the relevant deadline.

— On the other hand, where no date for performance is fixed, the Contractor will be in default should it fail to perform after being invited to do so in writing.

— The amount of the contractual penalty for late performance is usually determined in the contract as a fixed sum per day or month, or as a percentage of the contractual value or of the value of the delayed part of the contract. Therefore, the amount of the contractual penalty is not usually an issue on which evidence is required in commercial disputes (although, of course, evidence will be required to establish the underlying facts).

As well as a contractual penalty, the Contractor may also be liable to provide compensation for any damages caused by him to the Assignor that exceed the amount of the contractual penalty (if applicable). In such cases, the Assignor will be required to adduce evidence of the amount of damage suffered.

In addition to the above, the parties to a contract may also agree that a failure by the Contractor to perform his/her obligations will result him/her being liable to pay a penalty and/or entitle the Assignor to terminate the contract.

However, the Contractor may not be liable if he/she cannot perform an obligation for reasons that are not his/her fault. Moreover, if the Contractor is unable to perform an obligation due to the fault of the Assignor, then the court may reduce any award of damages or exempt the Contractor from liability. Finally, the Contractor will not be liable for damages for losses which the Assignor could have avoided had it conducted appropriate due diligence.

If an amicable solution of contractual disputes is not possible, then a contractual lawsuit may be brought. Under Bulgarian law there are a number of different ways to seek payment of contractual penalties and/or compensation for damages from a Contractor, including through accelerated court procedures for obtaining local law payment order, by obtaining an EU payment order or through ordinary compensation court claim procedures.

Overview of changes to the resolution of disputes arising from the state of emergency around the globe

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After the World Health Organisation announced on 11 March 2020 that the COVID-19 outbreak could be *"characterised as a pandemic"* and called for prevention and preparedness, countries around the globe rapidly declared *States of Emergency.*

Generally, the declaration of a *State of Emergency* is defined as a constitutional resource, giving governments a broader scope in their decision-making power – in some cases, power over their legislative branches – if and when such measures are called for due to the extraordinary circumstances that have put their nationals in peril. Defining what is an "emergency" requires a public policy qualitative analysis, and although there is not a unique answer, it is generally agreed that a state of war, serious public-order instability, a grave natural disaster, and the outbreak of a pandemic, meet the threshold of urgency that would legitimise the declaration of a State of Emergency.

International human rights treatises also acknowledge that governments may invoke emergency powers under extraordinary circumstances. For example, the European Convention on Human Rights (ECHR) provides in Article 15 that *"1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law."*

The constitutional and statutory models of *State of Emergency* powers vary across each jurisdiction. Governments have also used other declarations to contain the spread of COVID-19 and in exercising their extraordinary powers. Spain opted for a *State of Alert* on 14 March 2020, which as of the date of writing has been renewed for the sixth time, until 21 June 2020.

Changes to the resolution of disputes in courts

Despite these variations, a common outcome of the *State of Emergency* declarations around the globe in the current pandemic has been the closing of courts for non-essential matters, and the adjournment of hearings or their modification to a remote format.

Examples include:

— In England and Wales, the Civil Procedure Rule Committee issued Practice Direction 51Y on 25 March 2020, following the Coronavirus Act 2020, pursuant to which the court can direct hearings to be conducted *"wholly as video or audio proceedings and [when] it is not practicable for the hearing to be broadcast in a court building, the court may direct that the hearing must take place in private where it is necessary to do so to secure the proper administration of justice".*

— In Portugal, judicial activity was limited to non-essential matters with effect from 9 March 2020. Some hearings have resumed from 3 June 2020 with restrictions. For example, hearings of procedural matters that do not involve the examination of witnesses are to be conducted remotely, unless the parties agree otherwise.

— In Colombia, judicial activity for non-essential matters was suspended on 16 March 2020. The filing of documents for all proceedings is increasingly being done using electronic platforms, with the view of resuming activity on 1 July 2020. Hearings, including procedural ones, are to be conducted remotely.

— All hearings at the Court of Justice of the European Union were suspended between 16 March 2020 and 24 May 2020, and replaced with written questions to the parties.

The scope of the global suspensions of judicial activity is increasing, as are the declarations and extensions of *States of Emergency*. This means there will be significant challenges in the resolution of disputes since parties now face limitations on the initiation of proceedings when their claims fall under the scope of non-essential or non-urgent matters, and judicial activity is limited in these jurisdictions. Just as courts in different jurisdictions have limited their judicial activity in a non-uniform approach (including scope and timing), the resumption of their activity will also not occur at the same pace and duration.

The current complex international scenario also places an additional burden on cross-border litigation. This is especially the case where collaborative proceedings are expected from courts in different jurisdictions, such as in the examination of witnesses, and document production in foreign jurisdictions.

But what alternatives do parties have in solving their disputes under the current state of affairs? Alternative Dispute Resolution (ADR) mechanisms, such as mediation and arbitration, should be considered a means of dealing with a limited access to courts. As a matter of fact, where an amicable settlement should be the goal of parties under "normal circumstances", now more than ever parties and counsels should be advocating this.

A resulting "boom" in arbitration?

Parties may also opt for arbitration when resolving their disputes in courts significantly impacted by the *States of Emergency*. The leading arbitral institutions, such as the International Chamber of Commerce, the London Court of International Arbitration, and the Hong Kong International Arbitration Centre, have remained open for business in spite of the *State of Emergency* declarations and court-activity suspensions in the jurisdictions where they are based. An arbitration agreement can be reached *ex-post*, meaning that even disputes currently being litigated before courts (and facing the limitations mentioned above) can be resolved through arbitration with the consent of the parties and a case-by-case analysis of each situation.

It is still too soon to predict whether there will be a "boom" in arbitration as a consequence of the declarations of *States of Emergency* on a global scale. Yet there is factual evidence of the increased use of arbitration as an ADR mechanism. On 8 April 2020, the Singapore International Arbitration Centre (SIAC) released its 2019 Annual Report, which registered a record number of new case filings for the previous year.

The unprecedented circumstances that businesses and legal practitioners currently face may open up the possibility of resolving disputes in ways other than litigation in jurisdictions where the use of ADR has been less widespread. Whether parties and counsels opt for these solutions will depend on the rapidly changing circumstances and the accessibility to ADR around the globe.

COVID-19 triggers rapid development and use of the "Electronic Court" in Ukraine.

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Implementation of the "Electronic court" system, first launched in Ukraine in 2017, and the introduction of online court hearings get a push from the COVID-19 crisis.

Modern technology is developing at an extremely high speed and is being applied in various spheres of our lives, with the legal sphere being no exception. The legal application of technology has been vast – ranging from the mere introduction of various online registries and information systems to the total digitalisation of court proceedings – and now has been fuelled by the COVID-19 pandemic.

COVID-19 has dramatically changed the world and lives of millions of people, often for the worse. However, it has provided a great push towards the digitalisation of life, and in particular, court proceedings in Ukraine. The process of "judicial digitalisation" in Ukraine formally started in 2017. Several new procedural codes entered into force, which contained provisions establishing a platform called the "Electronic Court". Prior to these changes, various useful legal digital tools were already in place (e.g. search platforms, an online court-decision registry, a platform for monitoring and obtaining information regarding court proceedings, etc.). However, the Electronic Court was a truly big step forward into the technological future, even though its full implementation was conditioned on other factors. For example, implementation of the system was noticeably slowed by a lack of proactivity from the respective government bodies and institutions in charge of the process. For more than two years, this platform operated in a trial mode. There was no clarity whether the documents submitted via this platform would be considered by a specific judge as being equivalent to a paper one. As a result, participants of court proceedings were reluctant to use the Electronic Court and basically ignored it, preferring to submit everything in hardcopy. Attitudes changed when our world faced the COVID-19 crisis and Ukraine went into quarantine. The necessity then arose of finding a way to provide the means and tools to ensure that health security was maintained while not violating the right to a fair trial. This is when the justice system turned to the newly introduced Electronic Court platform. The current health crisis and measures related to the pandemic forced responsible government officials to take action to implement fully the Electronic Court and trigger its widespread use across the courts of Ukraine (with some limited exceptions). The State Judicial Administration even issued its decision on the implementation of the system after a short deliberation.

Of course, the original purpose of the platform was not related to dealing with a pandemic. The ultimate goal of the system was to make court proceedings paperless

and to have each and every court document available in electronic form. It was designed to ensure that all participants in a case (including the court) have the option of obtaining and submitting documents electronically. Provisions allowing parties to submit documents in paper form remained in the procedural legislation, but if a party submitted its initial claim in electronic form, it was allowed to submit a paper document only after receiving permission from the court.

In order to submit documents in electronic form, participants in the proceedings need to be registered on the system and indicate the email where all notifications and documents related to the case can be sent. Importantly, the system also requires an electronic signature, which is used to identify the person who has registered and to electronically sign any documents submitted to the court. Attorneys, notaries, insolvency and enforcement officers, experts and representatives of governmental bodies are obliged to register their emails with the system while all other participants in the court proceedings may choose to do so on a voluntary basis. As mentioned above, the start of the Electronic Court's full operation was always conditional on certain regulations being adopted and the technical capability of the courts to switch to the use of electronic documents. However, even though quarantine forced the parties, courts and government to act faster and more proactively in regard to using the platform, the system is still not fully implemented and the courts are not obliged to admit and accept documents filed via the system. Judges and their assistants also appear reluctant to let parties to a case familiarise themselves with it and obtain access to case materials through the platform. It seems that they are simply not sure how to do this in a way that meets all of the regulatory requirements and ensures adherence to all procedural rules and rights of case participants. Since they are not yet obliged to do so and the platform is still in trial mode, judges may refuse motions submitted to them electronically.

Another important part of the digitalisation of court proceedings is participation in court hearings remotely using videoconferencing tools. Once quarantine was imposed and access to the courts restricted, the issue of allowing parties to participate in the court hearings remotely was a crucial one for the judiciary. As a result, parliament passed amendments to the procedural codes allowing participants in court proceedings to take part in hearings using their own technical devices.

Participating remotely was also allowed previously, but it was limited to attending the court room of another court. Now parties may participate from anywhere if they meet all procedural requirements.

Further regulations regarding remote participation in hearings have been issued. These regulations state that a party should notify the court five days prior to a hearing if it plans to take part in that hearing via videoconference. Also, it was defined that a court hearing may be carried out by videoconference only by using special software called "EasyCon" and not by using any other available tools.

While this tool is widely used by the courts, there are still outstanding issues regarding its implementation, mostly related to technical problems of establishing a connection to the courts. The legal issue here is that according to the aforementioned regulations, the party that files a motion on remote participation in a hearing takes on all the risks related to issues surrounding the quality of the connection. This means that if the connection fails, the case may be considered in the party's absence, which is a very significant risk, even more so in cases of high importance.

Despite all the obstacles and issues arising during the implementation of the Electronic Court and remote court hearings, these tools should be fully operational in the next few months and they represent the future of court proceedings in Ukraine. In fact, the Head of the Cassation Administrative Court of the Supreme Court stated that the possibility to participate in court hearings remotely will remain in effect after the end of quarantine, which is further evidence that we are moving in the right direction.

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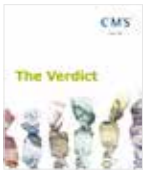

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