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Dispute Resolution International
Vol 14 No 2 pp 77–228 October 2020

CONTENTS

International Bar Association's Human Rights Institute

The International Bar Association's Human Rights Institute (IBAHRI), an autonomous and financially independent entity established in 1995, works to promote and protect human rights and the independence of the legal profession worldwide.

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DRI Speedread

A brief overview of the articles in the October 2020 issue of *Dispute Resolution International*

The Global Impact of the Covid-19 Pandemic on Commercial Dispute Resolution in the First Seven Months

Kim M Rooney (pp 83–192)

In 2020, most of the world's countries have had to respond to the severe disruption caused by the Covid-19 pandemic, which emerged in late December 2019 (the 'pandemic'). The pandemic poses enormous health and socio-economic challenges. As of September 2020, it is not known when the pandemic will end; some countries are already experiencing further waves of infection.

Globally, judiciaries and arbitral institutions have been under great pressure to continue operating during the pandemic, notwithstanding the impact of social distancing, restrictions on movement and other measures intended to suppress, if not eliminate, the pandemic. Jurisdictions (and their dispute resolution institutions and other stakeholders) will need to continue to adapt to the pandemic, including determining priorities in light of their available resources (including financial and technological) and how best to address public health concerns; to provide access to justice; and to ensure fair, open, secure, cost-effective and efficient dispute resolution.

This is the first in *Dispute Resolution International*'s series of articles about the issues arising from the pandemic for global dispute resolution and jurisdictions' evolving responses to the pandemic. Twenty-seven arbitration and litigation practitioners from 15 jurisdictions have contributed to this article reviewing the global impact of the pandemic in the first seven months of 2020 on commercial dispute resolution in Australia, Brazil, China, Egypt, England and Wales, Germany, Hong Kong SAR, India, Kenya, Nigeria, Singapore, South Korea, Sweden, the United Arab Emirates and the United States. Additional jurisdictions will be reviewed in later issues.

Valuation of Damages in Light of Covid-19

Matthew Hodgson and Fares Nowak (pp 193–222)

This article analyses the existing law relating to the valuation of damages in contract in light of the Covid-19 pandemic, with a particular focus on events occurring after the termination of contract but before the assessment of damages. Such post-termination events can come in a variety of forms, which can be either purely external (eg, border closures and travel restrictions) or directly related to the parties (eg, cashflow difficulties caused by waning

consumer demand). The difficulties to which they give rise depend on the circumstances of each case and, in particular, the nature of the supervening event, the time of its occurrence and the terms of the parties' contract under which damages are claimed. It will be argued that although the decisions of the House of Lords in *The Golden Victory* and the Supreme Court in *Bunge SA v Nidera BV* will, in many cases, provide a ready answer as to whether post-termination events should be taken into account to reduce, eliminate or increase the amount of recoverable damages, the Covid-19 crisis is likely to highlight several areas of uncertainty in the law.

Editor's Note

In 2020, courts and arbitral institutions around the world have been under enormous pressure to continue operating during the Covid-19 pandemic ('the pandemic'), declared in the first quarter of 2020 after the Covid-19 virus first emerged in late December 2019. Provision of dispute resolution services has had to continue notwithstanding the impact of social distancing, border controls, restrictions on movement and other measures intended to suppress, if not eliminate, the pandemic.

As of September 2020, it is not known when the pandemic will end; some countries are experiencing second and third waves of infection. The pandemic continues to pose huge health, socio-economic and legal challenges, including challenges to provision of access to justice and fair, open and efficient resolution of commercial disputes.

This issue of *Dispute Resolution International* (DRI) focuses on the impact of the pandemic on global litigation, arbitration and associated dispute resolution. It is the first time that a DRI issue has focused on one theme. When the DRI Editorial Board met (online) to discuss the October 2020 issue, the pandemic was already placing great pressure on all involved in the provision and practice of litigation and arbitration around the world. It was clear, even then, that major adaptation would be required during the pandemic to continue to operate effectively.

We hope that the articles in this issue can contribute to our collective knowledge and our ability to contribute to solutions.

The first article is entitled 'The Global Impact of the Covid-19 Pandemic on Commercial Dispute Resolution in the First Seven Months'. Twenty-seven arbitration and litigation practitioners from 15 jurisdictions contributed to this article, which reviews the global impact of the pandemic in the first seven months of 2020 on commercial dispute resolution in Australia, Brazil, China, Egypt, England and Wales, Germany, Hong Kong SAR, India, Kenya, Nigeria, Singapore, South Korea, Sweden, the United Arab Emirates and the United States.

In the 15 jurisdictions reviewed so far, the pandemic has had a greater impact on litigation than on arbitration. As to litigation there has been clear contrast in the speed of jurisdictions' responses to keeping their courts open during the first wave of infection. Some jurisdictions deemed the courts to be essential services that must continue to operate and moved within a few weeks from physical operations to conducting some (if not all) proceedings online. Other jurisdictions largely closed down their courts for extended periods to address health and social distancing concerns.

Over time, courts appear to be adapting to the pandemic environment and finding ways to continue operating. There has been discussion as to whether the courts provide an essential service, how to give the public access to online proceedings (where public access is a fundamental principle of a legal system), whether a physical hearing of witness evidence is an essential feature of justice and how technology can be fairly harnessed to serve the public's interest in access to justice.

By comparison, the impact of the pandemic on arbitration appears to have been to accelerate a move to online proceedings that was already under way, particularly for cross-border arbitration. There are contrasting views as to whether a tribunal has the power to compel parties to participate in online evidentiary hearings and, if it does, whether, and in what circumstances, a tribunal should exercise it; also as to what constitutes the essential elements of affording a reasonable (or full) opportunity to party to present their case and to answer the other party's case. A number of jurisdictions are developing online platforms to provide an alternative to litigation by arbitration, mediation and negotiation for resolution of commercial disputes (particularly low and medium-value disputes).

There does not appear to have been time for dispute resolution services to have increased their use of innovative technology such as artificial intelligence and blockchain. The use of technology by arbitral institutions has focused on the provision of online platforms. There are examples of the existing digital divide among the jurisdictions, whether arising from unequal financial resources, existing infrastructure and/or geographical location.

Legislation enacted in the surveyed jurisdictions has largely focused on public health and control of border issues, which are generally of temporary duration (as appears from Appendix 1 to this article). About half of the 15 jurisdictions surveyed have enacted legislative amendments with regard to statutory time limitations or bars, suspension of payment deadlines and insolvency triggering events, once again of limited duration.

This issue also includes an article entitled 'Valuation of Damages in Light of Covid-19' in which the authors consider some of the legal difficulties that may arise in the future in valuation of damages arising out of the Covid-19 crisis.

These include where parties may invoke force majeure, frustration and similar doctrines to suspend or cancel performance of their contractual obligations. The authors formulate the question lying at the heart of their discussion as being 'under what circumstances will the courts take into account events and circumstances occurring after the breach of contract to reduce, eliminate or increase the amount of damages recoverable by the injured party?'

On behalf of DRI, I thank all who have contributed to this issue as contributors, Editorial Board members, editorial staff and researchers.

This is the first in DRI's series about evolving responses around the world to the provision and practice of commercial dispute resolution during the pandemic. There will continue to be an urgent need for dispute resolution providers, users and practitioners to assess priorities in light of the pandemic, and to work out how best to manage the potential tensions between health concerns, parties' access to justice and available (and unequal) resources, and how best to ensure fair, secure, cost-effective, transparent and efficient commercial dispute resolution. DRI aims to continue to contribute to that discussion, working with contributors from around the world.

Kim M Rooney
Editor, Dispute Resolution International

The Global Impact of the Covid-19 Pandemic on Commercial Dispute Resolution in the First Seven Months

Kim M Rooney, Editor, Dispute Resolution International[1]

Part I: Introduction

In 2020, nearly all the world's countries and jurisdictions had to respond to the severe disruption caused by the Covid-19 pandemic (the 'pandemic'),[2] an infectious disease caused by a newly discovered coronavirus that first emerged in late December 2019.[3] The pandemic poses enormous health and socio-economic challenges for the world. As of September 2020, it is not known when the pandemic will end.

Globally, judiciaries and arbitral institutions have been under great pressure to continue operating during the pandemic, notwithstanding the impact of social distancing, restrictions on movement and other measures intended to suppress, if not eliminate, the pandemic. They will need to continue to adapt to the Pandemic and continually assess their priorities.

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1 The work of 27 contributors is included in this article and its appendices. The contributor/s of each of the summaries in this article are stated in each summary's heading. Appendix 3 lists the names and details for all contributors to the summaries and completed questionnaires for the 15 jurisdictions reviewed.

2 *Countries/areas with reported cases of Coronavirus Disease-2019 (Covid-19) (Last updated on August 2, 2020, 11 am)* www.chp.gov.hk/files/pdf/statistics_of_the_cases_novel_coronavirus_infection_en.pdf accessed 5 August 2020.

3 World Health Organization, 'Timeline of WHO's response to Covid-19 – Last updated 30 June 2020' www.who.int/news-room/detail/29-06-2020-covidtimeline accessed 5 August 2020.

This is the first of a series of articles to be published in *Dispute Resolution International* (DRI) about the profound impact of the pandemic on litigation, arbitration and associated alternative dispute resolution (ADR), including the issues of law, practice, technology, unequal access to financial and technological resources, and public policy that are arising, and how different jurisdictions and institutions responses evolve.

Contributors and approach to preparing the article

Twenty-seven arbitration and litigation practitioners from 15 jurisdictions have contributed to this article reviewing the impact of the pandemic in the first seven months of 2020 on commercial litigation, arbitration and associated ADR in Australia, Brazil, China, Egypt, England and Wales, Germany, Hong Kong SAR, India, Nigeria, Kenya, Singapore, South Korea, Sweden, the United Arab Emirates (UAE) and the United States (the '15 jurisdictions').

Contributors to this article have generally completed a detailed litigation and/or arbitration questionnaire and then prepared a litigation and/or arbitration summary for their jurisdiction; the summaries are published in this article. Extracts from the completed questionnaires appear in the article's two appendices.

DRI's review of the response of jurisdictions to the pandemic is a work in progress. We will include additional jurisdictions in the May 2021 issue of DRI and provide updates as to any relevant developments in the 15 jurisdictions.

Impact of the Pandemic on dispute resolution

To date, the pandemic appears to have had a greater impact on the conduct of litigation proceedings than on arbitration proceedings in the jurisdictions reviewed.

Impact on litigation

Some jurisdictions have deemed the courts to be essential services that must continue to operate, and which must be open to the public even when conducted online. To continue operating, many court systems have had to move from purely physical operations to conducting at least some proceedings by telephone or videoconference online within a few weeks; this has required adaptation by judges, administrators, counsel, parties and witnesses, among others. However, at least during the first wave of the pandemic, other jurisdictions have largely closed down their courts for extended periods to address health and social distancing concerns.

The factors that appear to have impacted upon whether, and to what extent, the conduct of litigation proceedings has been moved online include whether a jurisdiction treats litigation as an essential service, whether its laws clearly provide for online litigation (and if so, what aspects of it, including as to cross-examination of witnesses); whether it is feasible for the public to be given access to online proceedings (where this is a fundamental principle of a jurisdiction's legal system); the extent to which a jurisdiction's judicial practice and procedure included electronic filing and online proceedings before the pandemic; and the financial resources and infrastructure available to a jurisdiction to invest in the necessary information and communications technology (ICT) needed to conduct proceedings online, including in rural areas.

In all the jurisdictions reviewed, the courts have issued practice directions and guidelines for the conduct of litigation during the pandemic.

Impact on arbitration

By comparison, to date the impact of the pandemic on the conduct of arbitration appears primarily to have been to accelerate a move to online proceedings that was already under way before the pandemic in many jurisdictions, particularly for cross-border arbitration. There appear to be differing approaches as to whether parties may be required by a tribunal to participate in online evidentiary hearings (particularly as regards cross-examination of witnesses).

At least two jurisdictions are developing online arbitration platforms to provide an alternative to litigation for the resolution of commercial disputes (particularly low- and medium-value disputes).

All but one of the arbitral institutions that contributors discuss have issued guidelines (or similar) on how to conduct arbitral proceedings during the pandemic, including how to conduct arbitral hearings online.

The laws of some, but not all, of the jurisdictions reviewed appear to allow enforcement of awards rendered in arbitration conducted wholly online.

Common observations

There does not yet appear to have been time for dispute resolution services to have increased their use of innovative technology, such as artificial intelligence and blockchain.

No contributor reported a material increase in the overall cost of conducting proceedings online rather than in physical proceedings.

Legislative responses

Legislation enacted in response to the pandemic in the surveyed jurisdictions has largely focused on public health and control of border issues; these are generally of temporary duration (which may be extended).

Around half of the jurisdictions surveyed have enacted amendments to their laws, including with regard to statutory limitations, time bars, suspension of payment deadlines and insolvency triggering events, once again of limited duration.

Structure of article

After explaining some definitions and terminology used in this article, the rest of this article is structured as follows:

- *Part II* – summaries of litigation and ADR developments for 13 jurisdictions in the Asia Pacific, Europe/the UK, the Middle East and North Africa (MENA), North America, South America and Sub-Saharan Africa.
- *Part III* – summaries of arbitration and ADR developments for 13 jurisdictions in the Asia Pacific, Europe/the UK, MENA, North America, South America and Sub-Saharan Africa.
- *Conclusion*
- *Schedule 1 – : Legislation, Regulations & Orders* which outlines the relevant legislation and regulations issued in response to the Pandemic for the 15 Jurisdictions discussed.
- *Appendix 1: Litigation* which outlines the practice directions and guidelines issued in response to the pandemic for the 13 jurisdictions discussed.[4]
- *Appendix 2: Arbitration* which outlines the arbitral institutions' guidelines issued in response to the pandemic for the 15 jurisdictions discussed.[5]

Definitions used

The terms in English used around the world for proceedings conducted physically include 'in person', 'physically', 'orally' and 'offline'. This article generally uses the terms 'in person' and 'physically' to describe such proceedings.

The terms in English used around the world for online dispute resolution (ODR) include 'online, on-line, on line', 'electronically', 'virtually', 'remote' and 'remotely'. This article primarily uses the term 'online'.

The United Nations Commission on International Trade Law (UNCITRAL)

4 Summaries as to the impact of Covid-19 on litigation in Nigeria and the UAE will be published in the May 2021 edition of DRI.

5 Summaries as to the impact of Covid-19 on arbitration for Nigeria and South Korea will be published in the May 2021 edition of DRI.

Technical Notes on Online Dispute Resolution 2016[6] define ODR at paragraph 24 as 'a mechanism for resolving disputes through the use of electronic communications and other ICT. The process may be implemented differently by different administrators of the process, and may evolve over time.'

Part II: Impact of the pandemic on commercial litigation

As outlined in the introduction, Part II of this article provides summaries of the impact of the pandemic on litigation and associated ADR in the following 13 jurisdictions (the '13 litigation jurisdictions'):

- Asia Pacific: Australia, China, Hong Kong SAR, India, Singapore and South Korea;
- Europe/the UK: England and Wales, Germany and Sweden;
- MENA: Egypt;
- North America: the US;
- South America: Brazil; and
- Sub-Saharan Africa: Kenya.

Appendix 1 outlines the relevant legislation, courts' practice directions and guidelines issued in response to the pandemic in the 13 litigation jurisdictions, and in Nigeria and the UAE.[7]

Asia Pacific

Australia – a common law federal jurisdiction:[8] *Elizabeth Pearson, New South Wales (NSW) Bar Association, Sydney*

Impact of the Pandemic on Australian litigation

The pandemic has prompted unprecedented reliance in Australian courts on ICT, including online platforms and videoconferencing, to ensure the continued delivery of services where in-person hearings and face-to-face interaction have not been possible due to government public health restrictions.

The courts have been considered essential services and continued to operate in all state, territory and Commonwealth jurisdictions, despite a nationwide lockdown lasting several months. However, the way litigation has been conducted has changed substantially.

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6 See www.uncitral.org/pdf/english/texts/odr/V1700382_English_Technical_Notes_on_ODR.pdf accessed 5 August 2020.

7 Abayomi Okubote of Olanywan Ajayi, Nigeria, contributed the completed questionnaire for litigation in Nigeria. Hassan Arab of Al Tamimi & Co, Dubai, UAE, contributed the completed questionnaire for arbitration in the UAE. Summaries for these jurisdictions will be published in the May 2021 issue of DRI.

8 Date at which Australian law is stated: 14 July 2020.

Acceleration of online services

Justice Perram of the Federal Court of Australia observed in May 2020 that he doubted what had been achieved in the courts in terms of technological take-up over the previous eight weeks 'could have been achieved in 10 years under normal circumstances'.[9]

Although practices and procedures have varied across Australia's nine jurisdictions, there has been a clear trend of increased reliance on e-filing and audio-visual link (AVL) hearings, instead of in-person attendance, where possible and in the interests of justice to proceed.

Platforms used to facilitate online hearings vary between courts. Video and telephone appearances and trials have been conducted via platforms including Zoom, Microsoft Teams, Jabber and Cisco Webex. Since March, the NSW Bar Association has published daily a consolidated guide detailing the different processes and protocols in more than 30 NSW and Commonwealth courts and tribunals.[10]

As of July, courts are returning to in-person hearings; however, progress has temporarily halted in Victoria with more stringent health restrictions resuming.

There are currently no online courts.

Document-only proceedings

Victoria's Supreme Court has temporarily been empowered to determine particular proceedings on written submissions.[11]

ADR

ADR serves an important role in promptly resolving matters and assisting courts to manage the disruption to case management caused by the pandemic. Platforms including Zoom and Microsoft Teams have been used to facilitate remote mediation, conciliation and other ADR.

Protocols for online hearings: electronic witnessing and signing

Many courts have developed protocols, in consultation with the legal profession, to govern the conduct of online hearings, including handling

9 Justice Perram, 'Video Justice: Ten Years of Progress for Courts in Eight Weeks', *Australian Financial Review* (Sydney, 14 May 2020) www.afr.com/companies/professional-services/video-justice-ten-years-of-progress-for-courts-in-eight-weeks-20200513-p54spa accessed 5 August 2020.

10 See https://nswbar.asn.au/uploads/pdf-documents/Covid_Court_Guide.pdf accessed 5 August 2020.

11 Covid-19 Omnibus (Emergency Measures) Act 2020 (Vic) https://content.legislation.vic.gov.au/sites/default/files/2020-04/20-011aa%20authorised.pdf accessed 5 August 2020.

e-documents, evidence and cross-examination. These include the High Court of Australia,[12] Federal Court of Australia[13] and NSW Supreme Court.[14] The NSW Bar Association developed a Protocol for Remote Hearings, which has been endorsed by the Chief Justice of NSW.[15]

Electronic witnessing and e-signing of documents have been temporarily allowed;[16] however, there are significant inconsistencies among jurisdictions' approaches.

Costs

The cost of changes to practice and procedure of commercial litigation resulting from the pandemic is difficult to determine presently. Some costs may have been saved due to reduced requirements to travel to physically attend hearings. Conversely, there has been a need to invest in technology and Justice Perram noted that AVL hearings were 20 to 40 per cent slower,[17] resulting in associated costs.

Legislation

Laws relating to evidence and the use of AVL in hearings existed before the pandemic. However, the use of ICT to facilitate online hearings has significantly increased and some jurisdictions have introduced additional provisions.

More than 800 pieces of legislation, orders, directions and regulations have been enacted across Australia's jurisdictions in response to the public health crisis.[18]

Legislation enacted to facilitate the ongoing conduct of matters includes to support safe access to courts (eg, temperature testing on entry) and allow emergency regulation-making powers.

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12 Video Connection Hearings Protocol www.hcourt.gov.au/assets/registry/information/VC_Hearings_Protocol.pdf accessed 5 August 2020.

13 Special Measures Information Note: Appeals and Full Court Hearings www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/smin-3.pdf accessed 5 August 2020.

14 Protocol on Court Operations during Covid-19 www.supremecourt.justice.nsw.gov.au/Documents/Home%20Page/Announcements/Protocol_v4_09_June_2020.pdf accessed 5 August 2020.

15 See https://nswbar.asn.au/uploads/pdf-documents/remote_hearing_protocol.pdf accessed 5 August 2020.

16 See, eg, Corporations (Coronavirus Economic Response) Determination (No 1) 2020 (Cth); Coronavirus Economic Response Omnibus (Measures No 2) Act 2020 (Cth) Sch 5; Electronic Transactions Amendment (Covid-19 Witnessing of Documents) Regulation 2020 (NSW) https://legislation.nsw.gov.au/regulations/2020-169 accessed 5 August 2020.

17 See n 11 above.

18 See www.fedcourt.gov.au/covid19/legislation accessed 5 August 2020.

Although time bars and limitation periods remain in place, some have been temporarily amended.[19] NSW introduced regulation-making powers to suspend or modify time periods during the pandemic.[20]

Commonwealth bankruptcy law has been amended to provide temporary relief, including increasing the debt level required before a creditor can make someone bankrupt from AU$5,000 to AU$20,000.[21]

Australia's National Cabinet issued a Code of Conduct on SME Commercial Leasing Principles during Covid-19,[22] enacted through state and territory law,[23] to impose 'good faith leasing principles' on existing arrangements.

NSW residential tenants financially disadvantaged by the pandemic were afforded temporary protections, including a 60-day pause on eviction notices due to rental arrears.[24]

The Corporations Act 2001 (Cth) was amended to provide directors relief from 'potential personal liability for insolvent trading'.[25]

Reporting deadlines under the Modern Slavery Act 2018 (Cth) have also been extended.[26]

CHINA – A CIVIL LAW JURISDICTION:[27] *GARY GAO, ZHONG LUN, SHANGHAI*

The Chinese court system consists of local people's courts (district or county level), intermediate people's courts, high people's courts and the Supreme Court.

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19 Covid-19 Omnibus (Emergency Measures) Act 2020; Covid-19 Omnibus (Emergency Measures) (Criminal Proceedings and Other Matters) Regulations 2020 https://content.legislation.vic.gov.au/sites/default/files/2020-06/20-045sra%20authorised.pdf accessed 5 August 2020.

20 Covid-19 Legislation Amendment (Emergency Measures – Miscellaneous) Act 2020 (NSW) www.parliament.nsw.gov.au/bill/files/3745/Passed%20by%20both%20Houses.pdf accessed 5 August 2020.

21 Coronavirus Economic Response Package Omnibus Act 2020 (Cth) schedule 12 www.legislation.gov.au/Details/C2020A00022 accessed 5 August 2020.

22 See www.pm.gov.au/sites/default/files/files/national-cabinet-mandatory-code-ofconduct-sme-commercial-leasing-principles.pdf accessed 5 August 2020.

23 See, eg, Retail and Other Commercial Leases (Covid-19) Regulation 2020 (NSW); Covid-19 Omnibus (Emergency Measures) (Commercial Leases & Licences) Regulations 2020 (Vic).

24 Covid-19 Legislation Amendment (Emergency Measures) Act 2020 (NSW) www.legislation.nsw.gov.au/acts/2020-1.pdf accessed 5 August 2020.

25 The Corporations Act 2001 (Cth) http://legislation.gov.au/Details/C2020C00137; 'Directors duties in the context of Covid-19', ASIC https://asic.gov.au/about-asic/news-centre/articles/directors-duties-in-the-context-of-covid-19; Coronavirus Economic Response Package Omnibus Act 2020 (Cth) www.legislation.gov.au/Details/C2020C00139 accessed 5 August 2020.

26 Assistant Minister for Customs, Community Safety and Multicultural Affairs, (Media Release, 28 April 2020) https://minister.homeaffairs.gov.au/jasonwood/Pages/government-extends-reporting-deadlines.aspx accessed 5 August 2020.

27 Date at which Chinese law is stated: 13 July 2020.

Impact of the Pandemic on litigation

China is very lucky to have been able to recover from the pandemic swiftly. The most severe impact of the pandemic upon litigation was mainly between February and May 2020. During that period, the courts opened a channel to hold online hearings for case management conferences, interim relief applications, urgent applications, merit hearings, appeals, witness examinations and so on.

Since the online hearings arranged during the pandemic are an alternative urgent service provided by the court due to the pandemic; it is not a routine service and the cost is covered by the ordinary litigation court fees.

Has the pandemic accelerated the use of (1) ICT and (2) ODR in China?

The pandemic has accelerated the use of (1) ICT and (2) ODR in the PRC. The court system reacted efficiently and speedily to engage third-party technical service providers to offer online litigation platforms. Along with the use of these online platforms, service providers also improved the technical maturity of the platforms according to user feedback. Although court proceedings have returned to normal physical proceedings in the PRC, the advantages of online approaches will give the court system some motivation to consider the implementation of ODR in the future, especially for cases in summary procedures.

Chinese law regarding (1) litigation by ODR; (2) delivery of judgments online; and (3) online enforcement

Chinese laws and regulations expressly permit virtual or non-physical litigation hearings, for example, Article 23 of Circular of the Supreme People's Court on Issuing the Implementing Measures for the Pilot Reform of Civil Proceedings for the Separation of Complicated Cases from Simple Ones (dated 15 January 2020).[28]

28 Art 23 of the Circular of the Supreme People's Court on Issuing the Implementing Measures for the Pilot Reform of Civil Proceedings for the Separation of Complicated Cases from Simple Ones (dated 15 January 2020) stipulates that:

> 'People's courts may adopt online videos to try cases in court, but under any of the following circumstances, an online trial in court shall not apply: 1. both parties explicitly express disagreement on the online trial or one party expresses disagreement on the online trial and has justifiable reasons for such disagreement; 2. both parties do not have the technical conditions and ability to participate in the online trial; 3. it is necessary to find out identities, check the originals and examine physical objects on the spot; or 4. People's courts hold that there are other circumstances that are not suitable for the online trial. If only one party chooses an online trial, the people's court may, according to the case situation, hold the trial with one party being online and the other party offline. For cases where an online trial is adopted, if one of the above circumstances occurs in the course of the trial, the people's courts shall change the trial of the cases to an offline trial. Already completed online trial activities shall have legal effect.'

As for the delivery of judgments online, courts have to physically serve paper judgments to the parties according to Article 87(1) of the Civil Procedure Law.[29] Yet the rules for online courts are special, and hence an online court may serve judgment documents electronically after it has informed parties of their rights and obligations and obtained their consent to electronic service. Where a party raises a request that it needs paper judgment documents, the online court shall provide the paper judgment documents.

Online courts in China

Chinese law provides for online courts as a service associated with physical courts. They are available for courts in Beijing, Guangzhou and Hangzhou.

From the substantive perspective, compared with ordinary physical court proceedings, online courts obey the same substantive laws and regulations. From the procedural perspective, compared with ordinary physical court proceedings, online courts take an online approach to cases, including case registration, service, exchange of evidence, court preparation, hearings and rulings.

Does Chinese law specifically allow 'document-only' litigation?

Chinese law requires first instance cases (including summary procedures) to be heard in court, that is, the court will hold hearings.

'Document-only' litigation occurs in special circumstances provided for certain second instance cases pursuant to Article 169(1) of the Civil Procedure Law.[30]

Does Chinese law require physical or 'in-person' hearings in litigation?

Although Chinese law emphasises that hearings shall be held, it does not mandatorily require in-person hearings. In practice, there are other types of hearing options available, such as online court hearings – see Article 136 of the Civil Procedure Law.[31]

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29 Chinese Civil Procedure Law, Art (87(1), provides that: '[s]ubject to the consent of the person on which a procedural document is to be served, the document may be served by way of facsimile, electronic mail or any other means through which the receipt of the document may be acknowledged, with the exception of judgments, rulings and mediation statements'.

30 Art 169(1) of the Chinese Civil Procedure Law provides: 'During the hearing of an appeal, the people's court of the second instance shall form a collegiate bench for the hearing. Where, upon reviewing the case files, conducting investigations and questioning the parties, no new facts, evidence or reasons are submitted, the collegiate bench may decide not to hold a hearing if it deems unnecessary.'

31 Art 136 of the Chinese Civil Procedure Law, 'When trying a civil case, the people's court shall notify the parties and other participants in the action three days prior to the hearing. If the case is to be tried in public, the names of the parties, the cause of action and the time and place of the hearing shall be publicly announced.'

Legislation enacted concerning the conduct of litigation during the pandemic

A few sets of legislation have been enacted concerning the conduct of litigation during the pandemic, including: (1) Circular of the Supreme People's Court on Strengthening and Regulating Work on Online Litigation during the Period of Prevention and Control of the Novel Coronavirus Pneumonia (Covid-19) Epidemic, dated 14 February 2020; (2) Circular of the Supreme People's Court on Issuing the Guiding Opinions (I) on Several Issues concerning the Proper Trial of Civil Cases Related to the Covid-19 Epidemic According to the Law, dated 16 February 2020; (3) Circular of the Supreme People's Court on Issuing the Guiding Opinions on Several Issues concerning Law-based and Proper Handling of Enforcement Cases Related to the Covid-19 Epidemic, dated 13 May 2020; (4) Circular of the Supreme People's Court on Issuing the Guiding Opinions (II) on Several Issues concerning the Proper Trial of Civil Cases Related to the Covid-19 Epidemic According to the Law, dated 15 May 2020; and (5) Circular of the Supreme People's Court on Issuing the Guiding Opinions (III) on Several Issues concerning the Proper Trial of Civil Cases Related to the Covid-19 Epidemic According to the Law, dated 8 June 2020.

Judicial interpretations

The Supreme Court has issued a few judicial interpretations to address the impact of the pandemic, that is, those listed above.

As for the first instance or international commercial courts in China, they have also announced many implementation rules in this regard. However, these implementation rules are more like practical guidance on the detailed measures taken during the pandemic; they follow the rules from higher courts or the Supreme Court.

Changes to the laws of China arising from the Pandemic

Except for the laws and regulations enacted to specifically address the pandemic in China, there have been no changes to Chinese laws and regulations resulting from or prompted by the pandemic with respect to the rules on time bar periods, limitation periods, default in payment obligations, insolvency and so on.

HONG KONG SAR – A COMMON LAW JURISDICTION:[32] *MATTHEW HODGSON, ALLEN & OVERY, HONG KONG SAR*

The Court of Final Appeal (CFA) is the final appellate court within the Hong Kong court system. Below the CFA is the High Court, which consists of the Court of First Instance and the Court of Appeal.

IMPACT OF THE PANDEMIC

In light of the pandemic, the Hong Kong courts applied a general adjournment period (GAP) from 29 January to 3 May 2020, restricting services and adjourning all proceedings other than certain urgent and essential business. During the GAP, the courts only accepted urgent applications to file originating documents where the limitation period for a cause of action might have expired during the GAP. The courts also heard urgent applications (eg, ex parte injunctions) and handled certain types of bankruptcy-related proceedings during the GAP. Other in-person hearings, such as case management conferences, interim relief applications, trials, appeals and hearings relating to other matters (eg, insolvency), were suspended. In general, procedural deadlines were extended until after the resumption of court business.

During the GAP, most hearings could not take place as scheduled. There was, therefore, an apparent drop in the busyness of judges after the GAP, and parties have generally had to wait longer (approximately a month) for a judge to be available for a hearing. The availability of counsel, witnesses and parties remains much the same for attending remote hearings as it was prior to the GAP, as does the approach to the preparation and production of documents, the length of proceedings, the conduct of hearings, communication among counsel and clients, and the time taken for delivery of decisions. Although parties may have had to incur extra costs to set up videoconferencing facilities (VCF) for remote hearings, the costs of solicitors attending telephone hearings fell because they did not have to travel to the court for in-person hearings. Some solicitors may have felt that presentation of submissions by way of telephone was more relaxed.

ONLINE COURTS, PHYSICAL PROCEEDINGS, DOCUMENT-ONLY PROCEEDINGS AND ENFORCEMENT

Hong Kong law does not expressly provide for litigation by telephone or online enforcement. Prior to the GAP, Practice Direction 29 (PD 29) allowed parties to apply to the court to examine a witness via

32 Date at which Hong Kong law is stated: 17 July 2020.

videoconferencing link in the Technology Court.[33] However, PD 29 does not expressly provide for the conduct of full hearings by video link. In addition, the judiciary has been publishing its decisions and judgments on its website.

Hong Kong law does not recognise online courts as a service associated with physical courts or as dedicated courts in the ordinary course of things. However, there is no express provision in the High Court Ordinance or Rules of the High Court that requires court hearings to be held with physical attendance of parties or their representatives.

Hong Kong law does not specifically allow document-only litigation. However, during the GAP, on-paper disposals were considered suitable for many civil cases not involving live witnesses.

Accelerated use of ICT and ODR

The pandemic has accelerated the use of ICT as the judiciary has permitted parties to submit certain documents by email during the GAP. In addition, an electronic platform for lodging documents with the court called the 'e-Lodgement Platform' was made available for parties and legal representatives to lodge with the court their submissions, authorities, hearing bundles and other documents as the court directed.

As to the use of ODR in *Cyberworks Audio Video Technology Ltd v Mei Ah (HK) Co Ltd* [2020] HKCFI 347,[34] Coleman J took a considered and pragmatic view on the conduct of hearings in civil cases during the GAP after balancing the interests of public health and open administration of justice. The court ordered, on its own motion, a directions hearing by phone in circumstances where the trial had been adjourned due to the GAP. Coleman J ordered the hearing to be conducted by phone, not by videoconferencing, taking the view that VCF are relatively less widely used in the Hong Kong legal profession. Coleman J stressed that it was not in the interest of justice to halt all court work simply because hearings normally require physical attendance, given court hearings can be dealt with by telephone effectively and fairly. This decision confirms the court's flexible approach to its own jurisdiction and the procedural rules of litigation. In *CSFK v HWH* [2020] HKCA 207,[35] the Hong Kong Court of Appeal conducted its first remote hearing in the Technology Court (located

33 See https://legalref.judiciary.hk/lrs/common/pd/pdcontent.jsp?pdn=PD29.htm&lang=EN accessed 5 August 2020.

34 See https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=126927&QS=%2B&TP=JU accessed 5 August 2020.

35 See https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=127353&QS=%2B&TP=JU accessed 5 August 2020.

inside the High Court building). The judges and clerks sat inside the courtroom, while the barristers and solicitors attended by videoconference or telephone conference. The parties had to bear their own costs for using VCF or telephone conferencing facilities. The costs of using VCF in this particular hearing were approximately HK$8,000 (US$1,032) per party.

LEGISLATIVE AMENDMENTS: JUDICIAL GUIDANCE NOTES

The only change to the substantive laws of Hong Kong in response to the pandemic is the exemption provided to qualified legal practitioners of litigation proceedings from complying with mandatory quarantine requirements.[36]

The judiciary has issued various announcements, guidance notes and notifications updating the court arrangements in light of the GAP.[37] The judiciary has issued guidance notes governing the conduct of remote hearings in civil cases. Phase 1 took effect during the GAP and entails using the courts' existing VCF;[38] the guidance notes also envisage the potential use of other technology in the future, provided it is feasible and secure. Phase 1 applied to all interlocutory applications or appeals that could be concluded within two hours. Phase 2 took effect after the GAP and entails expanding the use of remote hearings by video or telephone in civil cases to all levels of civil courts.[39] It also applies to trials as well as civil appeals and interlocutory applications in the Court of Appeal that could be completed within one day. In the Chief Justice's statement of 25 March 2020, he agreed there should be greater use of technology in the judiciary and that 'information technology security issues must be addressed'.[40]

INDIA – A COMMON LAW JURISDICTION:[41] *VIKAS MAHENDRA AND PRERANA REDDY, KEYSTONE PARTNERS, BENGALURU*

THE COURT SYSTEM

The judicial system is a single integrated system comprising the Supreme Court, high courts for each state, trial courts under the control of each high court and specialised tribunals created by statutes. Decisions of the

36 Compulsory Quarantine of Certain Persons Arriving at Hong Kong Regulation (Cap 599C).

37 See www.judiciary.hk/en/court_services_facilities/gap_archive.html JU accessed 5 August 2020.

38 See www.judiciary.hk/doc/en/court_services_facilities/guidance_note_for_remote_hearings_phase1_20200402.pdf JU accessed 5 August 2020.

39 See www.judiciary.hk/doc/en/court_services_facilities/guidance_note_for_remote_hearings_phase2_20200608.pdf JU accessed 5 August 2020.

40 See www.info.gov.hk/gia/general/202003/25/P2020032500594.htm JU accessed 5 August 2020.

41 Date at which Indian law is stated: 21 July 2020.

Supreme Court are binding on all courts and tribunals of the country and decisions of the high courts are binding on all trial courts and tribunals under the jurisdiction of that high court.

Impact of the Pandemic on Indian litigation

Before the pandemic, litigation in India was almost wholly conducted by way of in-person hearings, with some courts hearing between 300–400 cases per day. Virtual hearings, if permitted, were only in exceptional circumstances. All filings were mandatorily to be made physically, in the court premises.

However, the pandemic has forced a shift in this trend. With physical hearings being suspended in courts across the country until further orders and the resultant heavy backlog of cases, the courts have begun to accept electronic filing of new cases and conducting hearings by videoconferencing, albeit for a limited number of matters, on the basis of urgency.

The procedural laws in India do not provide for document-only litigation. Therefore, the closure of courts on account of the pandemic required a paradigm shift in the conduct of proceedings. The need to shift to virtual hearings came with its challenges in the form of a heavy backlog of cases, a lack of infrastructure for videoconferencing, unfamiliarity with the new system and a lack of permanent rules and guidelines to govern virtual hearings.

Since the pandemic, most courts in the country have disallowed the holding of in-person hearings. Even the courts that permit them provide for and encourage the use of videoconferencing for hearings. However, due in part to the poor infrastructure available and the inherent scepticism of lawyers, the courts have shown significant reluctance to shift to virtual hearings and have continued to choose physical hearings and/or adjourning matters, where possible.

There has been a significant shift in the way that hearings have been conducted by the courts during the pandemic: a number of courts have expressed a preference to avoid matters requiring lengthy arguments and as a result a greater percentage of counsel are insisting on filing written arguments to supplement their brief oral arguments. Some high courts have even permitted counsel to submit their arguments by way of a video recording of a set duration to replace/limit the scope of discursive hearings, physically or by videoconferencing. Counsel are also required to mandatorily file requisite documents a few days prior to their hearing so they can be sent to the judges in time for the hearing.

Challenges

Due to non-availability of all judges each day and the non-accessibility of case files to many counsel, the courts are taking up restricted matters, often at the stage of arguments. On the other hand, some courts have specifically disallowed listing of matters for final hearing, instead focusing only on hearings requiring urgent interim relief. Recording of evidence by way of videoconferencing was disallowed until recently; however, now that many high courts have formed rules pertaining to recording evidence by videoconferencing, these matters may go on, provided both parties consent. In addition to the limited listing on matters, in most cases courts have only taken up matters for hearing when both counsel are present. Courts have been reluctant to pass adverse orders in the absence of a counsel – even where no legitimate excuse has been provided by the counsel for its absence. As a result, there is often a greater willingness on part of a counsel to be absent when it is not keen to push the matter through.

The progress of cases during the pandemic has been slow, even in matters where the courts have moved to virtual hearings – especially for civil/commercial matters since courts are unwilling to hear matters at all stages. However, due to the lower number of matters being heard, the time taken between hearing and delivery of judgment for those matters has been reduced.

Guidelines to address litigation during the pandemic

There is no Covid-19 specific legislation in India that deals with court litigation. In the absence of such legislation, the conduct of litigation during the pandemic is governed by standard operating procedures issued by the Supreme Court[42] and the high courts from time to time. The Supreme Court[43] and many high courts[44] have also published procedural guidelines to govern electronic filing and hearing of matters, including recording of evidence, by videoconferencing.

42 Supreme Court of India Standard Operating Procedures dated 23 March 2020, 15 April 2020, 16 May 2020, 14 June 2020 and 4 July 2020 https://main.sci.gov.in/notices-circulars accessed 5 August 2020.

43 Supreme Court of India Circulars and Notifications https://main.sci.gov.in/pdf/LU/04072020_153040.pdf; Supreme Court of India, order dated 6 April 2020 in Suo Motu Writ Petition (Civil) No 5/2020 https://main.sci.gov.in/supremecourt/2020/10853/10853_2020_0_1_21588_Judgement_06-Apr-2020.pdf accessed 5 August 2020.

44 High Court of Delhi, 'Videoconferencing Rules, 2020' http://delhihighcourt.nic.in/writereaddata/upload/Notification/NotificationFile_ULDC4UVQWZ9.PDF; High Court of Karnataka, 'Rules for Videoconferencing for Courts, 2020' www.karnatakajudiciary.kar.nic.in/govtNotifications/egazette-vc-rules-2020-v1.pdf accessed 5 August 2020.

Working group to address Covid-19 issues in litigation

Although there is no government or court-appointed body that has specifically been formed to consider the impact of the pandemic on litigation, bodies such as the Niti Aayog (the policy arm of the government) and the E-Courts Committee of the Supreme Court are considering these issues as part of their respective mandates.[45]

Changes to substantive law

The courts and the government have ordered a number of interim protections to various stakeholders, that have been extended from time to time, including: extension of time limits for interim stages during court proceedings until further orders (by notifications of the high courts); extension of limitation periods;[46] circulars permitting banks and financial institutions to refrain from taking legal action for default of loan payments for that period;[47] and making significant changes to the insolvency regime, that is, increasing the threshold for initiating insolvency proceedings[48] and entirely suspending corporate insolvency resolution filing for six months for debt defaults post 25 March 2020 (when the first nationwide lockdown was imposed).[49]

Singapore – a common law jurisdiction:[50] *Tat Lim, Aequitas Law, Singapore*

Changes to the practice and procedure of Singapore commercial litigation and related ADR

Regarding the practice and procedure for filing and the conduct of proceedings before any evidentiary hearing or final determination, in Singapore parties continue to both commence and pursue court proceedings by filing documents electronically using the courts' online case management system (the 'eLitigation system').

45 Press releases dated 7 June 2020 https://pib.gov.in/PressReleasePage.aspx?PRID=1630080 and https://niti.gov.in/catalysing-online-dispute-resolution-india accessed 5 August 2020.

46 The Supreme Court of India, *vide* order dated 23 March 2020 in Suo Motu Writ Petition (Civil) No 3/2020 https://main.sci.gov.in/supremecourt/2020/10787/10787_2020_1_12_21570_Order_23-Mar-2020.pdf accessed 5 August 2020.

47 Covid-19 Regulatory Package by the Reserve Bank of India dated 23 May 2020 https://rbidocs.rbi.org.in/rdocs/notification/PDFs/NT2455D86E6F80D9D4BC29C0DFAA43D76D9A4.PDF accessed 5 August 2020.

48 Ministry of Corporate Affairs Notification dated 28 March 2020 www.mca.gov.in/Ministry/pdf/Notification_28032020.pdf accessed 5 August 2020.

49 Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020 https://ibbi.gov.in//uploads/legalframwork/741059f0d8777f311ec76332ced1e9cf.pdf accessed 5 August 2020.

50 Date at which Singapore's law is stated: 10 July 2020.

The Covid-19 (Temporary Measures) Act 2020 (the 'Act') has allowed court proceedings to be conducted using remote communication technology (eg, teleconference, videoconference and email) such that physical attendance in the courtroom could be minimised or dispensed with.

Videoconference hearings were commonly conducted in the Singapore International Commercial Court (SICC) before the pandemic and have since been extended to trials in suitable cases.

The Supreme Court has issued guidance in its Registrar's Circular No 3 of 27 March 2020: 'For hearings which are to be conducted by video conferencing, telephone conferencing may be available to solicitors, where appropriate. Video conferencing [is] available to litigants in person. Certain matters may be dealt with without hearing oral arguments. Directions may be given by correspondence.'

Evidentiary hearings in Singapore litigation have not been postponed, and have taken place with the help of the technology available.

The costs of using technologies in Singapore litigation have remained nominal and shared between the parties.

Accelerated use of (1) ICT and (2) ODR in Singapore

The pandemic has accelerated the use of ICT and ODR in litigation.

The judges of the High Court have been divided into two separate teams. No judge from the first team will be in physical proximity or in close contact with a judge from the second team to ensure continuity of the judicial system. There have been court proceedings with a bench of three judges, where one judge attends by video link.

A timetable of proceedings has been adapted, and a system of staggered hearings and remote hearings has been adopted.

The most interesting innovation in Singapore's litigation practice and procedure

Since March 2020, in accordance with the Registrar's Circulars, the courts in Singapore have heard essential and urgent matters, with the majority of such hearings using remote communication technologies such as Zoom ('virtual hearings'). Zoom trials have proven effective, although they have raised some unique issues and challenges (eg, some jurisdictions do not allow the taking of evidence of foreign witnesses by video link in Singapore).

All non-essential and non-urgent matters scheduled for hearings before the state courts and the Supreme Court from 7 April 2020 to 4 May 2020 (extended from 5 May 2020 to 1 June 2020) were adjourned.

While the Singapore courts have taken measures to implement social distancing, these measures are an extension of the pre-existing use of

attendance by video link prior to Covid-19. Before Covid-19, the courts had enabled lawyers to make applications by video link. The courts are also used to parties or witnesses appearing in court by video link.

Technology

The SICC is equipped with cutting-edge technology, including evidence and trial management systems such as Opus 2 Magnum (also used in Global Yellow Pages) and Realtime Platform. The merits of these systems have been brought to light during the pandemic.

Singapore's law regarding (1) litigation by telephone or ODR; (2) delivery of judgments online; and/or (3) online enforcement

Singapore's law does not expressly provide for litigation by telephone or ODR, or for the delivery of judgments online or online enforcement. However, in practice, some litigation proceedings have been conducted online, as described above.

Does Singapore's law specifically allow 'document-only' litigation?

Parties to Singapore litigation can elect to apply for a 'Documents-only' civil trial or assessment of damages (an 'assessment'). The types of cases that are designated as documents-only civil trials or assessments and the additional steps and procedures have been set out in the State Courts Practice Directions.

Does Singapore law require physical or in-person hearings in litigation?

Parties to a case are normally required to attend the hearing unless their counsel is mandated to represent them.

Singapore legislation enacted concerning the conduct of litigation

The Act was passed by the Singapore Parliament and commenced on the same day, 7 April 2020.

The courts' procedural rules, circulars or similar to address the impact of the pandemic

At least 15 Registrar's Circulars have been issued by the state courts and the Supreme Court essentially for 'Updates on Measures Relating to Covid-19 (Coronavirus Disease 2019)'.

CHANGES TO SINGAPORE'S LAWS IN RESPONSE TO THE PANDEMIC

The Act extends limitation periods from when a notice of relief is served until the notice ceases to be of effect (whether due to the Act expiring, the notice being withdrawn or an assessor determining that the case is not entitled to relief).[51] Should parties ignore the Act and decide to serve proceedings, substantial rights may be lost. It will not be possible to revive the cause of action if a matter is dismissed by a court or tribunal.

Furthermore, the Act provides temporary relief for financially distressed businesses through increased monetary thresholds for corporate insolvency and a longer time period to satisfy a statutory demand from creditors.

Additionally, late payment charges or increased interest rates shall be incurred by businesses even though their payment obligations may be suspended during the prescribed period.[52]

SOUTH KOREA – A CIVIL LAW JURISDICTION:[53] *INHOE JEONG, KCL, AND JOONGI KIM, YONSEI LAW SCHOOL, SEOUL*

CHANGES TO THE PRACTICE AND PROCEDURE OF COMMERCIAL LITIGATION AND RELATED ADR IN KOREA

The pandemic has not led to much change in the practice or procedure of litigation or ADR. Some restrictions regarding entrance and use of court facilities have been implemented to prevent the spread of Covid-19. Every person has had to have their body temperature checked before entering the court building and anyone without a mask cannot enter. Parties can enter the courtroom only right before their trial and cannot sit next to each other in the audience seats. Some courtrooms have installed acrylic fences between parties, judges and judicial clerks.

51 The period of limitation is extended by virtue of s 5(7) of the Act, which states:

> '(7) Any period of limitation prescribed by any law or in any contract for the taking of an action in relation to the subject inability is extended by a period equal to the period beginning on the date of service by A of the notification for relief in accordance with section 9(1) and ending on the earliest of the following:
>
> (a) the expiry of the prescribed period;
>
> (b) the withdrawal by A of A's notification for relief;
>
> (c) on an application under section 9(2), the making of a determination by the assessor that the case in question is not one to which this section applies.'

52 The obligation to pay interest is stated under s 7A(2) of the Act:

> '7A.—
>
> (1) This section applies to a case mentioned in section 5 where —
>
> (a) the scheduled contract is within a description of contracts prescribed as contracts to which this section applies; and
>
> (b) the subject inability is the inability to pay any money at the time it becomes due and payable, being a time within the prescribed period.
>
> (2) Where the contract requires A to pay B any interest or other charge (however described).'

53 Date at which the law of South Korea is stated: 1 July 2020.

Accelerated use of (1) ICT and (2) ODR in Korea

Both the Korean Civil Procedure Rules under the Civil Procedure Act and the Criminal Procedure Rules under the Criminal Procedure Act state that the examination of witnesses can be conducted via videoconference. The Civil Procedure Rules state that preparatory proceedings, during which the parties and the judge review the issues of the case and plans for pleading and submission of evidence, can be conducted via telecommunication with the consent of the parties.

Some civil courts proceeded with preparatory proceedings via videoconference. There was a case where a court decided to conduct a regular pleading via videoconference upon consent of the parties because an attorney of a party who lived in another city failed to get transport to the court due to the Covid-19 situation. Pursuant to the press report, the parties were satisfied with the proceeding and have decided to proceed with the following pleadings via videoconference.

As to the technology used, an application prepared and managed by the court is used.

Court protocols

As to court protocols, while there is no specific guideline yet, the Supreme Court prepared a draft guideline for video trials (Draft Guidelines for Implementation of Remote Video Trials) and disclosed it on 1 July 2020 for public review. It is likely that it will be issued and effective soon.

However, most courts are pursuing in-person procedures and there have not been any criminal cases that have proceeded with the use of ICT or ODR.

Korean law expressly provides for (1) litigation by telephone or ODR; (2) delivery of judgments online; and/or (3) online enforcement

Korean law does expressly provide for litigation by telephone, ODR, delivery of judgments online and online enforcement as follows:

- Act on Special Cases Concerning Remote Video, Act No 10177. This act is only applicable to procedures in city or county courts, where only limited types of cases can be held.
- Both Korean Civil Procedure Rules and Criminal Procedure Rules state that the interrogation of a witness can be conducted via videoconference.
- The Civil Procedure Rules state that the preparatory date for pleadings may be held via telecommunication. Article 70 of the Rules has been revised as of 1 June 2020, explicitly stating that when it is impractical for the parties to attend trial, a panel of judges may decide to proceed with preparatory proceedings via videoconferencing with the consent of the parties.

Korea provides online courts as a service associated with its physical courts

Korean law does not provide dedicated (standalone) online courts, but only a service associated with physically existing courts.

Does Korean law specifically allow 'document-only' litigation?

Korean law does not specifically allow 'document-only' litigation.

Does Korea require physical or 'in-person hearings' in litigation?

As referred to above, Korean law expressly provides for litigation by telephone, ODR, delivery of judgments online and online enforcement.

Has any legislation been enacted regarding the conduct of litigation?

No legislation has been enacted concerning the conduct of litigation during the pandemic.

Korean court's applicable procedural rules and similar

As explained above, the Supreme Court has prepared guidelines for remote video trials (Draft Guidelines for Implementation of Remote Video Trials), which set out specific procedures for remote interrogation in civil and criminal litigation and preparatory proceedings in civil litigation. The draft has been open for public review since July 2020, and is likely to be issued and become effective soon.

Any changes to substantive Korean laws?

No legislation has been enacted in response to the pandemic.

England and Wales, and Europe

England and Wales – a common law jurisdiction:[54] *Rick Gal, Allen & Overy, London*

Impact of the pandemic on English commercial litigation

English commercial litigation has continued to operate throughout the pandemic.[55] Although there has been a complete transformation towards the use of remote proceedings, the practice and procedure for the conduct of litigation proceedings has, in many respects, remained the same.

54 Date at which the law of England and Wales is stated: 20 July 2020.

55 See the daily/weekly operational summaries that have been issued by HM Courts & Tribunals Service www.gov.uk/guidance/hmcts-weekly-operational-summary-on-courts-and-tribunals-during-coronavirus-covid-19-outbreak accessed 5 August 2020.

Court business initially focused on more urgent applications and hearings.[56] However, once the Business and Property Courts became more familiar with remote hearings, the impetus was to continue with as many hearings as possible. For example, the Commercial Court has reportedly been doing close to 100 per cent of its expected workload.[57]

The Protocol Regarding Remote Hearings dated 26 March 2020 (updated on 31 March 2020) ('March 2020 Protocol') encouraged the court and parties to be more proactive in relation to forthcoming hearings.[58] It stated that the pandemic necessitates the use of remote hearings wherever possible and provided guidance on the conduct of remote hearings.[59] The impact has been clear: there have been very few partly or fully in-person hearings since the end of March 2020 in the Business and Property Courts,[60] with hearings instead taking place remotely.

The decision on whether an application/hearing has gone ahead and, if so, whether it has been partly or fully remote has been a matter for the relevant judge. Judges have considered a variety of factors in deciding whether to proceed virtually[61] and have been guided by the UK government's expectation for the courts to continue to function through the increased use of technology.[62] Nevertheless, if all parties oppose a remotely conducted final hearing, it appears that this has been a strong reason not to proceed with a remote hearing.[63]

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56 See, eg, the High Court Business Contingency Plan for Maintaining Urgent Court Hearings dated 26 March 2020 www.judiciary.uk/wp-content/uploads/2020/03/High-Court.Contingency.final_.26thMarch2020-002.pdf accessed 5 August 2020.

57 Commercial Court User Group Meeting, June Meeting Minutes, 15 June 2020, p 2 www.judiciary.uk/wp-content/uploads/2020/06/CCUG-Minutes-150620.pdf accessed 5 August 2020.

58 'Protocol Regarding Remote Hearings' dated 26 March 2020 (updated 31 March 2020), Judiciary of England and Wales www.judiciary.uk/wp-content/uploads/2020/03/Remote-hearings.Protocol.Civil_.GenerallyApplicableVersion.f-amend-26_03_20-1.pdf accessed 5 August 2020.

59 Including the steps to be taken before and at a remote hearing.

60 One of the few major trials taking place in a hybrid format has been the case of *PCP Capital Partners v Barclays Bank Plc.*

61 See, eg, *Re Blackfriars Ltd* [2020] EWHC 845 (Ch), where the judge rejected an adjournment after considering the health and safety concerns of holding a physical hearing, the technological challenges of holding a remote hearing, the impact of a remote hearing on fairness, the sums involved and the importance of witness evidence. By contrast, an adjournment was allowed in *Conversant v Huawei* [2020] EWHC 728 (Pat) and [2020] EWHC 741 (Pat) because of the need for rigorous witness cross-examination.

62 *Re Blackfriars Ltd* [2020] EWHC 845 (Ch), para 23.

63 Message for Circuit and District Judges sitting in Civil and Family from the Lord Chief Justice, Master of the Rolls and President of the Family Division, 23 March 2020 www.judiciary.uk/wp-content/uploads/2020/04/Message-to-CJJ-and-DJJ-9-April-2020.pdf accessed 5 August 2020.

The concept of open justice is a fundamental principle in the English courts. The March 2020 Protocol directed that remote hearings should, so far as possible, still be public. This has been achieved by various means, including allowing a media representative or interested party to join the remote hearing. However, Practice Direction 51Y ('PD 51Y') provides the court with discretion to direct that hearings can take place in private where it is not practicable for them to be public.[64]

One of the tweaks to court procedure has been in relation to court deadlines. The introduction of Practice Direction 51ZA ('PD 51ZA') has allowed parties to agree to longer extensions to the deadlines that are contained in the Civil Procedure Rules or court orders.[65] It also provides that the court will take into account the impact of the pandemic when considering applications for an extension and adjournments of hearings.[66]

USE OF ADR

There have been some indication that parties have been increasingly negotiating their disputes or attempting to reach a settlement,[67] though less evidence that parties are necessarily turning to softer forms of ADR. The Cabinet Office has issued guidance that encourages parties to negotiate or otherwise to have recourse to an early neutral evaluation or mediation before escalating a dispute to formal proceedings.[68]

THE ACCELERATION OF TECHNOLOGY

On 19 March 2020, the Lord Chief Justice informed judges in the civil and family courts that the default position during the pandemic must be that hearings should be conducted with some or all of the participants attending remotely, and that they would need to prepare to use technology to conduct business in a manner that was previously unthinkable.[69]

64 See www.justice.gov.uk/courts/procedure-rules/civil/rules/part51/practice-direction-51z-stay-of-possession-proceedings,-coronavirus accessed 5 August 2020.

65 PD 51ZA, para 2 www.justice.gov.uk/courts/procedure-rules/civil/rules/practice-direction-51za-extension-of-time-limits-and-clarification-of-practice-direction-51y-coronavirus accessed 5 August 2020.

66 PD 51ZA, para 4.

67 An increase in the settlement rate for this year has been reported. See www.judiciary.uk/wp-content/uploads/2020/06/CCUG-Minutes-150620.pdf accessed 5 August 2020.

68 'Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the Covid-19 emergency' (published by the Cabinet Office on 7 May 2020 and updated 30 June), para 13 www.gov.uk/government/publications/guidance-on-responsible-contractual-behaviour-in-the-performance-and-enforcement-of-contracts-impacted-by-the-covid-19-emergency accessed 5 August 2020.

69 'Coronavirus (Covid-19): Message from the Lord Chief Justice to judges in the Civil and Family Courts', 19 March 2020 www.judiciary.uk/announcements/coronavirus-covid-19-message-from-the-lord-chief-justice-to-judges-in-the-civil-and-family-courts accessed 5 August 2020.

A few days later, the Lord Chief Justice announced that civil hearings would only take place in person if a remote hearing was not possible and if suitable arrangements could be made to ensure the safety of participants. He noted that all efforts were being made to update and add to the technology currently available.[70]

While some courts have remained open, the courts have been using phone, video or other technology to allow as many hearings as possible to take place remotely. It was recently reported that up to 90 per cent of all hearings have used remote technology.[71] Judges have been open to suggestions by the parties as to the most suitable platform, though the preference in the Business and Property Courts has been for Skype for Business.

Electronic filing and electronic bundles

The courts have for some time been using an electronic court file. However, the move to remote hearings has increased the use of electronic hearing bundles by judges and parties. On 20 May 2020, the judiciary published guidance on the use of electronic bundles.[72]

Impact on judiciary, parties, lawyers and witnesses

Many judges have been positive about the move to remote hearings and have opted to proceed remotely even for longer and more demanding hearings.[73] A large number of participants appear to have been broadly content with the remote working of the courts in the circumstances; it has required them to become more tech-savvy.

Although more has been expected from counsel than in normal circumstances,[74] they have adapted and have learnt how to be effective remote advocates and to use electronic bundles. One challenge for lawyers has been how to communicate with the relevant advocate in real time, while challenges for witnesses have included how to retain the formality of court proceedings and how to avoid off-camera indiscretions. Connectivity problems have also been an issue.

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70 'Review of court arrangements due to Covid-19, message from the Lord Chief Justice', 23 March 2020 www.judiciary.uk/announcements/review-of-court-arrangements-due-to-covid-19-message-from-the-lord-chief-justice accessed 5 August 2020.

71 Press release, '10 "Nightingale Courts" unveiled', 19 July 2020 www.gov.uk/government/news/10-nightingale-courts-unveiled accessed 5 August 2020.

72 'General Guidance on PDF Bundles', Courts and Tribunals Judiciary www.judiciary.uk/wp-content/uploads/2020/05/GENERAL-GUIDANCE-ON-PDF-BUNDLES-f1-1.pdf accessed 5 August 2020.

73 See, eg, *Re Blackfriars Ltd* [2020] EWHC 845 (Ch), in which the judge refused an application to adjourn a five-week hearing.

74 *Municipio de Mariana v BHP Group plc (formerly BHP Billiton)* [2020] EWHC 928 (TCC), para 32(iii).

COSTS

The impact of the move to remote proceedings on costs will be case specific, with cost savings and cost increases to be expected.[75] The court has suggested that it may take longer and require more work to achieve a particular result by remote working,[76] which suggests fees may be greater.

LEGISLATION, RULES AND GUIDANCE ENACTED TO ADDRESS THE CONDUCT OF LITIGATION

The Coronavirus Act 2020 was introduced on an emergency basis to deal with the pandemic, with a general expiry date of two years and a six-month parliamentary review. Among other things, it provided clarity as to the courts' power to order online proceedings and to ensure public access to them.[77]

The judiciary and HM's Courts and Tribunals Service (HMCTS) have issued a raft of guidance, protocols and updates in relation to the conduct of remote hearings during the pandemic and the operation of the courts, including the March 2020 Protocol.[78] Guidance has been provided to parties in relation to remote hearings, including on how to join remote hearings[79] and how the HMCTS is using virtual technology.[80]

New practice directions under the Civil Procedure Rules have also been issued to provide clarity on the private/public nature and recording of virtual hearings (PD 51Y), provide for a general stay of proceedings relating to the recovery of the possession of land (PD 51Z) and amend the rules relating to extensions of time (PD 51ZA).[81]

The judiciary has provided its own guidance through court judgments addressing the conduct or standards for remote hearings. For example, the court has held that there is to be a rigorous examination of the possibility of a remote hearing and whether it can achieve justice, which can only be assessed case by case.[82]

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75 Although travel costs may be saved, there may be costs associated with hiring third-party providers to assist with the effective running of a remote hearing.

76 See n 74 above, para 32(vii).

77 See www.legislation.gov.uk/ukpga/2020/7/contents/enacted accessed 5 August 2020.

78 See n 61 above.

79 'How to join telephone and video hearings during coronavirus (Covid-19) outbreak' (published on 8 April 2020 and updated on 10 July 2020), HMCTS www.gov.uk/guidance/how-to-join-telephone-and-video-hearings-during-coronavirus-covid-19-outbreak accessed 5 August 2020.

80 'HMCTS telephone and video hearings during coronavirus outbreak' (published on 18 March 2020 and updated on 30 June 2020), HMCTS www.gov.uk/guidance/hmcts-telephone-and-video-hearings-during-coronavirus-outbreak accessed 5 August 2020.

81 PD 51Y is due to expire on the date the Coronavirus Act ceases to have effect, while PD 51Z and 51ZA will cease to have effect on 30 October 2020.

82 See n 77 above, para 24.

Other relevant changes to the law

The Coronavirus Act 2020 was introduced to deal with various matters other than remote court proceedings, including in relation to public health, employment and investigatory and police powers.[83] Many other regulations and legislation have since been enacted.[84] Notably, in April 2020, a new temporary practice direction on insolvency proceedings came into force.[85] More recently, the Corporate Insolvency and Governance Act 2020 was rushed through parliament in order to provide businesses with flexibility to continue trading.[86]

The Cabinet Office has also issued non-binding guidance requesting parties to act responsibly and fairly in relation to the performance and enforcement of their contracts during the pandemic.[87]

Speed and permanence of change

Many have been surprised by the speed with which the English court system has adapted to virtual working. The transformation from physical to remote hearings, while providing for a small number of cases to continue to be held in person, has led HMCTS and the Lord Chancellor to suggest that more of the English court system has remained functional through lockdown than in most comparable jurisdictions around the world.[88]

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83 See n 80 above.

84 Laws and regulations have been enacted to address, eg, the widening of public powers in relation to health protection, changes to taxation and employment rights and requirements for the conduct of businesses.

85 Temporary Practice Direction Supporting the Insolvency Practice Direction www.judiciary.uk/wp-content/uploads/2020/04/Temporary-IPD-April-2020_.pdf accessed 5 August 2020. It provided, among other things, that unless otherwise ordered all insolvency hearings would be conducted remotely and that matters would be adjourned for relisting based on urgency.

86 See www.legislation.gov.uk/ukpga/2020/12/contents/enacted accessed 5 August 2020.

87 'Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the Covid-19 emergency' www.gov.uk/government/publications/guidance-on-responsible-contractual-behaviour-in-the-performance-and-enforcement-of-contracts-impacted-by-the-covid-19-emergency accessed 5 August 2020. Acting responsibly and fairly in relation to the performance and enforcement of the contract during the pandemic is said to include being reasonable and proportionate in responding to performance issues and enforcing contracts (including dealing with disputes), acting in a spirit of cooperation and aiming to achieve equitable contractual outcomes. The guidance states that an equitable adjustment or accommodation in contractual arrangements impacted by Covid-19 should be considered in preference to a formal dispute.

88 HMCTS, Annual Report and Accounts 2019-20, p 8 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/902301/HMCTS_Annual_Report_and_Accounts_2019-20_WEB.PDF accessed 5 August 2020. See also the Lord Chancellor and Secretary of State for Justice written statement dated 1 July 2020.

The Lord Chief Justice, among others, has indicated that the use of remote hearings will endure once the pandemic has passed. The view of the UK government is that the court system will emerge as more efficient, more dynamic and more resilient following this crisis.[89] HMCTS has said that remote technology will continue to be used and rolled out beyond autumn 2020.[90] However, the judiciary, HMCTS and the UK government are now looking at recovery options to allow the return of some semblance of normal court business.[91]

GERMANY – A CIVIL LAW JURISDICTION:[92] *ANNA MASSER, JANA LOEWER AND CAROLIN HAPP, ALLEN & OVERY, FRANKFURT*

OUTLINE OF THE GERMAN COURT SYSTEM

The German judicial civil system in general has three instances: first instance (local court or regional court); court of appeal (regional court or higher regional court); and court of final appeal (higher regional court or Federal Court of Justice). The amount in dispute and/or the grounds of the dispute are relevant for choosing the competent first instance court.

IMPACT OF THE PANDEMIC ON GERMAN LITIGATION

Regarding the practice and procedure for filing and the conduct of proceedings in Germany, there has been a shift from paper-based submissions to electronic submissions. Also, the correspondence between parties and the court shifted to more electronic correspondence. More online hearings have been conducted, which before the pandemic had rather existed in theory.

Evidentiary hearings were still more likely to be postponed than conducted via videoconference. Courts are cautious and, in light of the easing of the lockdown, will be more likely to proceed in person.

There has been a change in German VAT rates from 19 to 16 per cent, limited to the period from 1 July 2020 to 31 December 2020. Parties that are liable to pay VAT will benefit from this reduced VAT rate.

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89 Government press release dated 1 July 2020 www.gov.uk/government/news/coronavirus-recovery-in-her-majesty-s-court-and-tribunal-service accessed 5 August 2020.

90 Covid-19: Overview of HMCTS response, July 2020 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/896779/HMCTS368_recovery_-_Covid-19-_Overview_of_HMCTS_response_A4L_v3.pdf accessed 5 August 2020.

91 Eg, using buildings on a temporary basis to expand the number of cases that can be heard, reopening existing court buildings and extending operating hours.

92 Date at which German law is stated: 9 July 2020.

Acceleration of use of ICT and ODR in Germany

The pandemic has accelerated the use of ICT and ODR in Germany. The possibility of online hearings and electronic communication was enshrined in law before the beginning of the pandemic; however, online hearings remained a theory. Due to the pandemic, parties and courts now tend to use electronic communication and the possibility of online hearings more often.

Does German law expressly provide for (1) litigation by telephone or ODR; (2) delivery of judgments online; and/or (c) online enforcement?

German law expressly allows for litigation by videoconference and online enforcement. The images and sound of the hearing shall be broadcasted in real time to another location and to the courtroom. It is possible that parties and witnesses are not physically present but participate via videoconference. The judge has to be present in the courtroom and the room must remain accessible to the public. Regarding electronic enforcement, there are stipulations in German law that enable electronic enforcement, so that the court-appointed enforcement officer can start the enforcement procedure without specific paper documents.

Does German law specifically allow 'document-only' litigation?

It is possible to enter into proceedings on claims arising from a deed, in which only documentary evidence may be submitted. Such proceedings are admissible if a claim is brought regarding the payment of a specific amount of money, or the performance of a determined amount of other fungible things that in business dealings are customarily specified by number, measure or weight, or the performance of securities.

Does German law require physical or 'in-person' hearings in litigation?

In general, hearings are conducted with the physical presence of all parties. However, it is possible that parties and witnesses are not physically present but participate via videoconference. In any case, the judge has to be present in the courtroom and the room must remain accessible to the public.

Legislation regarding the conduct of litigation

No legislation has been enacted in Germany concerning the conduct of litigation during the pandemic.

JUDICIARY'S GENERAL RULES IN RESPONSE TO THE PANDEMIC

The German courts did not publish special procedural rules or guidelines regarding litigation. Instead, the courts published general rules regarding distance keeping and access to the courthouse in general.

The Federal Court of Justice (Bundesgerichtshof) published guidelines on its homepage and so did the other courts.

Some individual oral hearings have been cancelled and postponed to ensure public participation and the maintenance of safe distances. For those oral hearings that were/are not cancelled, they continue to be held in public, although in individual cases, registrations must be made in advance. Distance and hygiene rules are in place.

The ministries of justice of the respective states (*Bundesländer*) published guidelines. In those, they suggested limiting scheduled oral hearings to those urgently necessary. Again, those guidelines are rather suggestions regarding distance-keeping.

Any judge may, within the limits of judicial independence, take sessional measures at their discretion, such as a reasonable limitation of the public or the duty to wear mouth/nose protection in their specific hearings. Also, it remains every judge's own decision to cancel and postpone an already scheduled oral hearing.

GERMAN LEGISLATION ARISING FROM THE PANDEMIC

There have been the following changes to the laws of Germany resulting from or stimulated by the pandemic:

- Default in payment obligations: Rent and lease agreements could not be terminated due to rent or lease default in the period between 1 April 2020 and 30 June 2020 if the default resulted from the pandemic. Repayments from a consumer loan agreement in the period between 1 April 2020 and 30 June 2020 were deferred for three months if the consumer could not reasonably pay its loan due to the pandemic and this deferral was not unacceptable to the lender.
- Insolvency: The obligation to file for insolvency according to the German Insolvency Act (Insolvenzordnung or InsO) and the German Civil Code (Bürgerliches Gesetzbuch or BGB) was suspended until 30 September 2020 if the occurrence of insolvency was based on the consequences of the pandemic and there was a prospect of eliminating existing insolvency. This period may be extended by regulation if this seems to be required.
- Other: VAT rates have been reduced from 19 to 16 per cent, limited to the period from 1 July 2020 to 31 December 2020. Parties who are liable to pay VAT will benefit from this reduced rate.

Sweden – a civil law jurisdiction:[93] *Stefan Brocker, Mannheimer Swartling Advokatbyrå, Stockholm*

Outline of the Swedish court system

The judicial system in Sweden consists of three types of courts: the courts of general jurisdiction; the administrative courts; and courts of limited jurisdiction. Of greatest relevance here, the courts of general jurisdiction are divided into three instances: the district courts; the appellate courts; and the Supreme Court.

Changes to the practice and procedure of Swedish commercial litigation and related ADR in response to the Pandemic

Regarding the practice and procedure for filing and the conduct of proceedings before any evidentiary hearing or final determination in Sweden, no changes have been made in legislature or by soft law instruments, such as guidelines. Before the pandemic, both practises were already done virtually, to a large extent.

As to the practice and procedure for conducting evidentiary hearings in Sweden, courts, parties and counsel have more and more opted to use virtual options, such as video or telephone conferences.

As to the cost of any changes to the practice and procedure of commercial litigation resulting from the pandemic in Sweden, the increased use of virtual options entails that primarily counsel need not travel as much, resulting in a decreased cost. On the other side, the technology necessary to conduct meetings virtually sometimes carry a cost.

As to related ADR matters, what has been noted above under this heading applies also with regard to, for example, mediation.

Accelerated use of ICT in Swedish litigation

It is noticeable that while the use of ICT in proceedings before Swedish courts was prevalent before the pandemic, Covid-19 has helped to further increase the interest in it by the courts, parties and counsel.

As to the technology used, including technology standards applied, in Sweden, prior to the pandemic the courts already had certain requirements that had to be met in order for the parties to conduct a hearing or other parts of the proceedings virtually.

As to data security and confidentiality of ICT, the technical requirements applied demand that the technology used is compatible with encrypted communication.

93 Date at which Swedish law is stated: 1 July 2020.

As to court protocols in Sweden, the courts have not changed their handling of cases or similar. However, as a result of the pandemic, the courts have issued guidelines for their interaction with the public. Such guidelines may indirectly encourage parties to conduct meetings before the court virtually.

MOST INTERESTING INNOVATION

The most interesting innovation in practice and procedure resulting from the pandemic has been the increased interest and tolerance for the use of virtual options in conducting hearings as well as other meetings before the courts, as well as meetings between clients, including witnesses, and counsel.

Also in the wake of delays caused in the public courts by the pandemic, several experienced dispute resolution lawyers have established the 'Arbitration Tribunal Alternative' to relieve the courts and to give the parties in dispositive civil cases the opportunity for a quick settlement in online proceedings.

SWEDISH LAW EXPRESSLY PROVIDES FOR (1) LITIGATION BY TELEPHONE OR ODR; (2) DELIVERY OF JUDGMENTS ONLINE; AND/OR (3) ONLINE ENFORCEMENT

Swedish law does expressly provide for litigation by telephone or video, and delivery of judgments online/online enforcement in summary as follows: Pursuant to the Swedish Code of Judicial Procedure (Rättegångsbalken), the chair of the court can decide that a party or a witness may participate through audio or video transmission. The decision to hold a hearing, or any other meeting before the court, virtually is made in each individual case. The chair is to take particular note of circumstances, such as the costs or inconveniences that would arise if the person attending the hearing had to appear in court.

Lastly, the rulings of Swedish common courts were already made available to the parties prior to the pandemic by means of email, besides being available in physical form at the court. Swedish law does not expressly provide for online enforcement.

SWEDEN'S ONLINE COURT SERVICES

The Swedish Code of Judicial Procedure does allow for meetings before the court (eg, hearings) to be conducted virtually. Therefore, in practice, there exists a form of 'online court'. The answers below are given in that context.

From the substantive perspective, proceedings by use of technical aid follow the same rules as physical proceedings. Under Swedish law, there exist no provisions regulating the court's evaluation of evidence or witnesses.

From the procedural perspective, virtual proceedings are not more costly than physical proceedings, as the cost for the court's involvement in

a virtual proceeding is included in the fee for initiating a proceeding in the courts (which is at most SEK 2,800).

However, a virtual proceeding may entail that the cost of travel decreases, while the cost of technical equipment increases. Furthermore, because the courts had issued technical requirements for virtual hearings before the pandemic, and since the technical maturity of the systems used are actively monitored by a designated group at the Swedish courts, the technology used caters well to the needs of the parties.

Does Swedish law specifically allow 'document-only' litigation?

Under Swedish law, 'document-only' litigation may be permissible under certain circumstances, for example, when an oral hearing is not required with respect to the case and if it is not requested by either party. However, it should be noted that the requirement that 'document-only' litigation be suitable with respect to the case usually means that larger disputes, with a great number of legal issues or factual circumstances, must be heard orally.

Swedish law's requirements for physical or 'in-person' hearings in litigation

Under Swedish procedural law, at the outset the attending persons should be physically present in the courtroom. However, as has been described above, the chair may decide that a party or witness may participate by means of audio or video transmission.

No legislation concerning the conduct of Swedish litigation during the pandemic

No such legislation has been passed during the pandemic.

Swedish courts' guidelines concerning the impact of the pandemic

The Swedish courts have issued guidelines centring on how the courts interact with parties, counsel and members to reduce the risk of contagion; they do not concern the conduct of litigation (or the court proceedings in any other types of cases).

No changes to Swedish substantive laws, but increasing insolvency

There have been no express changes to the substantive laws of Sweden in response to the pandemic. However, the economic impact on most sectors of Swedish industry has led to an increased number of companies defaulting on their payment obligations.

The pandemic has also caused an increased number of companies to enter into insolvency proceedings. In April 2020, some 880 companies entered into such proceedings, compared with 667 companies during the same month in 2019, an increase of 32 per cent.

Other observations

While, for a long time, we as a society have hailed the advent of information technology, the pandemic has in my mind made it clear that it can never fully replace the importance of human interaction. The business of litigation is one of trustworthiness as well as trust, and in that regard, nothing beats being in the same room as a witness or judge. I believe that now, as we see even more of the capability of technology, we risk losing that element.

MENA

Egypt – a civil law jurisdiction:[94] *Mohamed S Abdel Wahab, Zulficar & Partners Law Firm, Cairo*

Egypt is a civil law jurisdiction and the principles of Sharia law constitute the main source of legislation as per Article 2 of the 2014 Egyptian Constitution as amended in 2019.

The Egyptian judicial system

Regarding the courts' system in Egypt, the Egyptian judiciary is comprised of administrative courts, civil, economic and commercial courts, personal status and family courts, national security courts, labour courts and military courts, as well as other specialised courts and the Supreme Constitutional Court. The Egyptian court system has three tiers: (1) the courts of first instance; (2) courts of appeal; and (3) the Court of Cassation, which sits at the apex of the judiciary. There is also the State Council, which consists of administrative courts vested with the power to decide over administrative disputes.

Decrees passed

While there have been no changes to Egyptian laws as a result of the pandemic, the government has passed a number of decrees to impose measures aimed at mitigating the exposure to the pandemic and controlling its spread. There have also been changes to time-bar periods and procedural deadlines before the courts, where the Minister of Justice issued decisions regarding the postponement of all court hearings and suspension of time limits. To that effect, the Prime Minister issued Decree No 1295 of 2020, dated 29 June 2020 considering the duration from 17 March 2020 until 24 June 2020 as a suspension period for all procedural deadlines, timebar periods and limitation periods (except for time bars related to pre-trial detention and challenging criminal judgments).

94 Date at which Egyptian law is stated: 31 July 2020.

Conduct of hearings

Moreover, all hearings before the State Council (administrative courts) were suspended from 16 to 28 March 2020 by Decree No 206 of 2020 from the President of the State Council. The said decree was extended to 22 April 2020 by Decree No 252 of 2020, dated 12 April.

Thereafter, the Supreme Judicial Council issued Decision No 159 of 2020, dated 13 May 2020, whereby it provided for courts to resume work gradually as of 1 June 2020, taking all precautionary measures imposed by the state, including disinfecting courtrooms, wearing masks being mandatory to enter a courtroom, and restricting access to courtrooms to lawyers and concerned parties to control the number of people present in closed rooms.

Facility options to mitigate losses of businesses and individuals

The government initiated some facilitating options for different sectors in Egypt in order to mitigate some of the losses sustained by these sectors and individuals. Given the impact of the lockdown measures on business, it is now permissible for a merchant who is asked to restructure their business or to declare insolvency to apply for the dismissal of said request on the basis that the failure to pay the due debts was caused by an unforeseen event, that is, the pandemic. The merchant may also claim that the failure to fulfil their due debts – being one of the conditions to request restructuring or declare insolvency – cannot be legally satisfied because such failure to perform was not due to the merchant's imbalanced financial status.

Acceleration of use of ICT and online services

On another note, there has been an acceleration in the use of ICT in light of the physical distancing mandated by the pandemic.

The Court of Cassation has launched a package of online services available to litigants, lawyers and judges that does not require their physical attendance inside courts. Instead, litigants, lawyers and judges may use their mobile phones to access the newly launched website and benefit from online civil and criminal judicial services.

Also, litigants, their lawyers and the public at large can track cases by number and follow the schedule of hearings. Moreover, certain legal principles set by the Court of Cassation are now available online through electronic compilations. There is also an online database of ongoing cases, detailed statements on each appeal, as well as a smart search for all appeals and scheduled hearings. Such services aim at reducing the need for physical visits to courts amid the pandemic.

The said online services provided by the Court of Cassation are in line with the state's plan to digitise and automate court services. The state is currently reviewing a proposed draft law aimed at introducing amendments to the Criminal Procedures Law. The said draft law provides that the competent investigating authority or trial authority may take all or part of the investigations or trial procedures remotely, with the accused, victims, witnesses, experts and civil rights' plaintiffs participating online as deemed necessary by the competent authority.

It is also worth mentioning that prior to the pandemic, the recent Law No 146 of 2019 was enacted to amend Law No 120 of 2008 establishing the Economic Courts. Among the innovative amendments introduced by the 2019 law was the possibility of conducting the proceedings before the Economic Courts electronically. This includes submitting briefs, documents, defences and claims, and so hearings can be conducted remotely. However, no remote or virtual hearings have been held as yet. The present cost for these online services range between EGP 100 (around US$6) to a maximum of EGP 1,000 (around US$60).

CORONAVIRUS CRISIS MANAGEMENT HIGHER COMMITTEE

The Prime Minister constituted the Coronavirus Crisis Management Higher Committee to address all related Covid-19 legislation and decrees. The Committee is presided over by the Prime Minister, with the membership of 15 ministers and the Presidential Adviser of Health and Prevention Affairs. The committee is entrusted with following up on the implementation of the precautionary measures taken by the government to fight Covid-19, and to work out emergency plans to address any situation that might occur during the pandemic. Further, the committee is tasked with issuing official statements to refute rumours related to the pandemic.

North America

US FEDERAL COURTS – A COMMON LAW JURISDICTION:[95] *MEG UTTERBACK, KING & WOOD MALLESONS, NEW YORK*

OUTLINE OF THE US COURT SYSTEM

The US is a common law system. The federal court system has three main levels: district courts (the trial court); circuit courts (the first level of appeal); and the Supreme Court of the US (SCOTUS – the final level of appeal in the federal system). Federal courts hear cases where there is diversity jurisdiction among the parties (eg, a foreign party) and a claim in

95 Date at which US law is stated: 20 July 2020.

excess of a threshold amount. The federal courts also hear: cases involving the constitutionality of laws; cases involving the laws and treaties of US ambassadors and public ministers; disputes between two or more states; admiralty law (also known as maritime law); and bankruptcy cases. This summary addresses changes at the federal courts. Each state has its own state courts handling mostly domestic matters and causes of action arising under specific state legislation.

Impact of the pandemic on federal court litigation in the US

US federal courts around the country have taken measures to cope with the spread of the virus.[96]

These are procedural changes implemented by the US courts and not new legislation. In some instances, the courts have suspended some legislation, for example, the right to speedy trial in criminal cases has been modified in some courts. Any case requiring a jury is continued to a time when the courts can implement effective social distancing measures to allow juries to be empanelled.

In some courts, judges are allowing bench trials and dispositive motions to be heard online, subject to the agreement of the parties. Overall, it seems court litigants are more reluctant to engage in online hearings than parties in arbitration.

Federal Rule of Civil Procedure 43(a) provides that '[f]or good cause and compelling circumstances and with appropriate safeguards, *the court may permit testimony in open court by contemporaneous transmission from a different location* [emphasis added]'. The Advisory Committee Notes, however, state that '[t]he importance of presenting live testimony in court cannot be forgotten' and that contemporaneous transmission 'is permitted only on showing good cause and compelling circumstances'. Accordingly, a court may apply the foregoing and allow remote testimony on a case-by-case basis.

Other than using online platforms for certain hearings, the process remains unchanged. The federal courts had online filing systems and online dockets prior to the pandemic. However, the courts are extending deadlines for some filings. For example, SCOTUS has extended the deadline for filings of petitions for *certiorari* due on or after 19 March 2020 for 150 days from the date of the lower court judgment or the order being appealed.

96 See 'Covid-19 Roundup: Court closures and procedural changes' (24 June 2020) www.thomsonreuters.com/content/dam/ewp-m/documents/thomsonreuters/en/pdf/other/covid-19-roundup-court-closures-continue.pdf accessed 5 August 2020.

ONLINE FILING/DISPENSING WITH PAPER FILING

In many courthouses, in-person filings and drop box or mail filings are being suspended in favour of online filing.

SCOTUS guidance dated 15 April 2020 states that certain categories of documents if filed through the court's electronic filing system, need not be submitted in paper form at all.

IMPACT ON US FEDERAL COURT PROCEDURE

For a comprehensive review of some court ordered changes in response to the pandemic, please refer to the online review of court orders regarding procedural changes in response to the pandemic.[97]

Counsel are still engaged in document production and depositions. Some courts have stayed proceedings where the courts are closed or operating with fewer staff. Most trials on the merits and dispositive motions are continued unless the parties otherwise agree to an online proceeding.

Some courts are continuing with regular service depending on the location and the extent of Covid-19 risk. Most courts in operation are requiring that anyone entering the courthouse wear a mask.

IMPACT ON ADR ASSOCIATED WITH FEDERAL COURT LITIGATION

Court-ordered mediation is often proceeding online, again depending on the court and how the court is managing its response to the pandemic.

USE OF ICT AND SCOPE OF ONLINE HEARINGS

Section 15002 of the Coronavirus Aid, Relief and Economic Security Act (the 'CARES Act') authorises the use of videoconferencing and telephone conferencing, under certain circumstances and with the consent of the defendant, for various criminal case events during the course of the pandemic. Such events include detention hearings, preliminary hearings, waivers of indictment, arraignments, probation and supervised release revocation proceedings, pre-trial release revocation proceedings, misdemeanour pleas and sentencing.

The CARES Act also provides that the authorisation of video and telephone conferencing will end 30 days after the date on which the national emergency ends, or the date when the Judicial Conference finds that the federal courts are no longer materially affected, whichever is earlier.

Federal courts have adopted their own rules pursuant to section 15002; for example, the Eastern District of Pennsylvania published a

97 See www.uscourts.gov/about-federal-courts/court-website-links/court-orders-and-updates-during-covid19-pandemic accessed 5 August 2020.

standing order,[98] and the Court of Appeals for the Federal Circuit issued an advisory that it would hold all oral arguments telephonically during the court's May 2020 session.[99]

Online hearings are available in most courts where the parties agree. The many technology options being used and tested by the judiciary include AT&T Conferencing, Court Call, Skype for Business, Cisco Jabber and Zoom.[100]

Judges and counsel have acclimated to scheduling conferences and motions hearings online. Counsel manage to prepare and depose witnesses remotely. Usually, the court reporting service provides the facility for the online platforms for depositions.

Counsel are still reluctant to agree to online merits hearings that involve witness cross-examination due to the challenges of presenting an effective cross-examination online.

Publication of judgments and enforcement

Judgments are rendered online and noted in the online court dockets. Enforcement matters are being heard if the courts are open and may be heard online if the judge so orders. Delays in enforcement may occur if the third parties involved in the seizure of assets are not available to take the steps ordered by the court.

No specialist online courts or international commercial courts

The US does not have specialist standalone online courts within the judiciary. The US also does not have any international commercial courts within the judiciary.

South America

Brazil – a civil law jurisdiction:[101] *Sergio Nelson Mannheimer and Maria Proença Marinho, Mannheimer, Perez e Lyra Advogados, Rio de Janeiro/São Paulo*

As of August 2020, Brazil was the second-worst affected country in the world by the pandemic, surpassed only by the US.[102] Moreover, it is a wildly diverse country, with different regions, socio-economic backgrounds and, also,

98 See www.justice.gov/usao-edpa/page/file/1268756/download accessed 5 August 2020.

99 See www.cafc.uscourts.gov/sites/default/files/announcements/2020/Notice-May2020CourtSession-04212020.pdf accessed 5 August 2020.

100 See www.uscourts.gov/news/2020/04/08/courts-deliver-justice-virtually-amid-coronavirus-outbreak accessed 5 August 2020.

101 Date at which Brazilian law is stated: 10 July 2020.

102 See https://covid19.who.int accessed 5 August 2020.

Covid-19 infection rates. These differences pose an additional challenge to the fight against Covid-19 and regulation of the functioning of the judiciary during this period.

Legislative changes

As to material law, it is worth mentioning Act No 14.010/2020, which provides for emergency and transitory rules during the pandemic. This act suspends time-bar periods from 10 June 2020 to 30 October 2020, allows for electronic general assemblies and establishes rules for consumer relations and competition legislation, among others. Currently, there is also a bill (No 1397/20) submitted to Congress that regulates insolvency and judicial reorganisations during the pandemic.

Civil law system

Brazil is a civil law jurisdiction. The court system is divided between state courts, federal courts and labour courts, all of which include first instance judges and courts of appeal. The judgments rendered by a court of appeal (both state and federal) may, in limited cases, be submitted to the Superior Court of Justice, which is the country's highest court for federal legislation, and/or the Supreme Court, the country's constitutional court.

As in most civil law jurisdictions, litigation procedure in Brazil is anchored on written submissions and documental evidence. Unless otherwise agreed on by the parties or decided by the judge, every lawsuit has a conciliation hearing at the beginning of the procedure, a hearing for the taking of evidence – especially witness depositions – after the submissions phase, as well as physical judgments by courts of appeal and high courts, with the opportunity for the presentation of oral arguments by counsel.

Impact of the pandemic on Brazilian litigation

In summary, even before the pandemic, online files and submission were already a reality in most of the Brazilian court system, for which reason it rapidly adapted to the challenges posed by the current circumstances. A clear effect of the pandemic is the increase of online hearings and judgments, which were previously almost exclusively held in person as discussed further below. Only time will show if this becomes a new practice or if courts will go back to the way they once were.

Judicial regulations

In view of the pandemic, the majority of courts established specific regulations concerning the conduct of litigation during this period. Although the ordinary

courts have autonomy to define their practices considering local peculiarities, the National Council of Justice has enacted regulations outlining parameters to be followed by all courts. To date, some of the main acts by the National Council of Justice are Act No 52 of 12 March 2020, Resolution No 313 of 19 March 2020, Act No 91 of 22 March 2020, Act No 61 of 31 March 2020, Resolution No 314 of 30 April 2020 and Resolution No 318 of 7 May 2020.

Suspension of procedural deadlines

The National Council of Justice decided to suspend all procedural deadlines from 19 March 2020 to 30 April 2020, with a postponement until 15 May 2020 for cases with physical files. As stated above, each court may, upon authorisation, postpone these suspensions, considering regional circumstances.

Electronic filing and proceedings

Electronic files have been a reality in the Brazilian court system for years. Therefore, even before the pandemic, the majority of lawsuits were already electronic, although physical hearings and judgments were maintained.

Currently, the filing and conduct of proceedings before Brazilian courts is working normally for the majority of cases. This is mainly because most files were already exclusively electronic; submissions are made in a written manner, with electronic signatures; and documents are presented in electronic format. Also, all decisions in proceedings – including interim and emergency measures, as well as decisions on the merits – are delivered in written form and made available to counsel and parties through the court's electronic system.

It should be noted, however, that some courts are still applying suspensions to cases with physical files (normally ongoing cases initiated many years ago), considering the difficulties in access in light of isolation measures.

Online litigation hearings

Regarding hearings, as said above, in-person hearings were the rule before the pandemic. This is currently more flexible and, although each court may apply a different system, most provide the possibility of online hearings, which are becoming increasingly common. As an example, the Supreme Court's Amendment to Internal Rules No 53 of 18 March 2020 and the National Council of Justice Act No 61 of 31 March 2020 expressly allow online hearings.

DEPOSITION OF WITNESSES

It should be noted, however, that hearings for the deposition of witnesses, albeit allowed, are mostly being postponed, considering the difficulties encountered by individuals who do not have the necessary technology available at home. Another reason may be the fear that it is difficult to be sure that no one is communicating with a witness during a hearing.

ONLINE APPELLATE PROCEEDINGS

On the other hand, the courts of appeal and high courts are rapidly adapting to online judgments held via videoconference. An interesting consequence is that this allows counsel based in other cities the opportunity to present their oral arguments to the court, without incurring additional costs, such as travel expenses.

ONLINE PROCEDURAL PROCEEDINGS

Many judges, in all instances, are also making themselves available for appointments with counsel via telephone or the internet, altering the prior consolidated practice of almost solely in-person appointments. Some court statistics even show that the productivity of judges has risen during this period.

Sub-Saharan Africa

KENYA – A COMMON LAW JURISDICTION:[103] *NDANGA KAMAU, NDANGA KAMAU LAW, THE HAGUE, AND BENJAMIN NG'ENO, INDEPENDENT PRACTITIONER, NAIROBI*

The Kenyan superior courts include the Supreme Court,[104] the Court of Appeal,[105] and High Court.[106] Kenyan superior courts also include the Employment and Labour Relations Court, and the Environmental and

103 Date at which the law of the Republic of Kenya is stated: 30 April 2020.

104 The Kenyan Supreme Court has original jurisdiction over presidential petitions and appellate jurisdiction over appeals from the Court of Appeal involving constitutional interpretation, applications or questions having a public interest.

105 The Kenyan Court of Appeal has appellate jurisdiction on matters from the High Court.

106 The Kenyan High Court has both original and appellate jurisdiction from the subordinate courts, commercial claims in excess of KES20m, and jurisdiction to enforce and set aside arbitral awards.

Land Court. The Kenyan subordinate courts include magistrates' courts,[107] district magistrates' courts, Kadhis' courts[108] and children's courts.

Changes to the practice and procedure of commercial litigation and related ADR in Kenya arising from the pandemic

The practice and procedure for filing and conduct of proceedings before evidentiary hearings in Kenya has changed as the judiciary has adopted an e-filing system. However, the practice and procedure for conducting evidentiary hearings has not changed, nor has the cost of the practice and procedure of commercial litigation resulting from the pandemic.

A significant challenge to remote proceedings is the challenge with internet connectivity in some parts of Kenya, especially outside the main urban centres.

The pandemic has accelerated the use of (1) ICT and (2) ODR in Kenya

The pandemic has accelerated the use of ICT in Kenya, and courts have adopted an e-filing system and conducted hearings via video link.

Covid-19 has not yet resulted in a change in the data security or confidentiality framework for ICT. Further, court proceedings are usually public.

No protocol has been established by the courts resulting from the shift to e-filing and hearing by video link. However, in 2018, the judiciary developed an ICT policy which set out a framework for regulating the use of ICT resources by the courts.

The impact of the use of ODR in Kenya on judges' availability has been relatively low. Judges have, however, had to adapt to managing proceedings online, while also recording parties' submissions in writing. The impact of ODR on counsel's availability has been relatively low.

However, in some court stations outside the main urban centres, counsel do not have access to necessary technology for online hearings. Those courts have continued in person, maintaining health regulations and imposing a limit on the number of matters heard. Access to these courts is limited to advocates, in contrast to being open to the general public as before Covid-19.

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107 The Kenyan magistrates' courts are the Chief Magistrate's Court, Senior Principal Magistrate's Court, Principal Magistrate's Court, Senior Resident Magistrate's Courts and Resident Magistrate's Courts.

108 Kadhis' courts are established by the Constitution of Kenya. The Kadhis' Courts Act 1967 (Revised 2012), s 5, sets out the jurisdiction of the Kadhis' courts as follows: 'A Kadhi's court shall have and exercise the following jurisdiction, namely the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion; but nothing in this section shall limit the jurisdiction of the High Court or of any subordinate court in any proceeding which comes before it.'

The impact of the pandemic on witnesses has been relatively high in some cases. Cases requiring the physical presence of witnesses will not proceed. There are also other factors to consider, including access to VCF and travel restrictions where a witness cannot travel to a venue that may have such facilities, for example, counsel's office.

The impact of the pandemic on parties has been relatively high, in some cases. Whereas lawyers in the main urban centres may have access to technology for videoconferencing, the same may not be true for all parties (litigants). Further, in courts outside the main urban areas, access has been limited to advocates, in contrast to being open to the general public as before the pandemic.

The impact on costs has been relatively low. However, the judiciary has had an increase in costs arising from printing submissions that were previously submitted by litigants in hard copies. This cost is being mitigated by using both e-filing and submitting physical copies where necessary.

The impact on the approach to preparation for hearings has been moderate. Although the hearing process remains the same, the use of videoconferencing requires that counsel (or parties) be acquainted with the necessary technology.

The approach to the production of documents, cross-examination and approach to submissions has not changed. While the timetable of proceedings has not changed, the time taken to handle daily proceedings has substantially increased owing to some technological glitches, such as connectivity speeds.

Kenyan law expressly provides for (1) litigation by telephone or ODR; (2) delivery of judgments online; and/or (3) online enforcement

Kenyan courts have issued practice directions that expressly provide for litigation by telephone, ODR – delivery of judgments online – online enforcement by Direction No 19 (Gazette Notice No 3137a, and Practice directions for the protection of judges, judicial officers, judiciary staff, other court users and the general public from the risks associated with the pandemic), issued on 20 March 2020.[109]

Online courts

Kenyan law does not provide for online courts.

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109 Direction No 19 provides that: 'Teleconferencing, videoconferencing and other appropriate technologies: Where practicable and taking into account the prevailing circumstances, the Court may make use of teleconferencing, videoconferencing and other appropriate technologies to dispose of any matter.'

Does Kenyan law (1) require physical or 'in-person' hearings and (2) expressly allow 'document-only' litigation?

Under Kenyan law, physical hearings are required where the examination of witnesses is necessary. Further, as a general rule under the Evidence Act in Kenya, documents must be produced in court by their authors. However, in practice, parties can dispense with this requirement by consenting to admission of the documents.

Kenyan law does not specifically allow 'document-only' litigation.

Legislation relating to conduct of litigation

No legislation has been enacted concerning the conduct of litigation during the pandemic.

Judicial procedural practice notes and similar

The Court of Appeal and the High Court have issued practice notes directing the conduct of court business during the pandemic. These directions provide for conduct of court hearings through video link and directions on electronic filings of cases.[110]

Any changes to the laws of Kenya?

There have been two changes in the laws of Kenya that have been prompted by the pandemic. First the Kenyan government waived court filing fees in commercial disputes where the value of the suit did not exceed KES1m (approximately US$10,000).[111] The Kenyan government also reduced the effective rate of VAT from 16 per cent to 14 per cent.[112] These two pandemic-related legislative changes may result in a (marginal) reduction in the cost of litigation and/or arbitration proceedings.

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110 Kenyan judicial practice notes in response to the Covid-19 pandemic include: (1) 'Practice directions for the protection of judges, judicial officers, judiciary staff, other court users and the general public from the risks associated with the global corona virus pandemic', issued on 20 March 2020; (2) 'Practice notes for the conduct of court business during the global coronavirus pandemic', issued on 21 April 2020; (3) 'Practice note on e-filing of commercial cases to mitigate Covid-19 in the Commercial Justice Sector', issued on 16 March 2020; (4) 'Practice Directions on Electronic Case Management' issued on 4 March 2020; and (5) 'Milimani law courts and Milimani commercial courts court standard operating procedures during Covid-19 pandemic' (undated).

111 See http://kenyalaw.org/kl/fileadmin/pdfdownloads/LegalNotices/2020/LN59_2020.pdf accessed 5 August 2020.

112 See http://kenyalaw.org/kl/fileadmin/pdfdownloads/LegalNotices/2020/LN35_2020.pdf accessed 5 August 2020.

Part III: Impact of the pandemic on commercial arbitration

As outlined in the introduction, Part III of this article provides summaries of the impact of the pandemic on arbitration and associated ADR in the following 13 jurisdictions (the '13 arbitration jurisdictions'):

- Asia Pacific: Australia, China, Hong Kong SAR, India and Singapore;
- Europe/the UK: England and Wales, Germany and Sweden;
- MENA: Egypt and the UAE;
- North America: the US;
- South America: Brazil; and
- Sub-Saharan Africa: Kenya.

Appendix 2 to this article outlines the relevant legislation and regulations, and arbitral institutions' guidelines issued in response to the pandemic for the 13 arbitration jurisdictions, and in Nigeria and Korea.[113]

Asia Pacific

AUSTRALIA – A COMMON LAW JURISDICTION:[114] *JO DELANEY, BAKER & MCKENZIE, SYDNEY*

IMPACT OF THE PANDEMIC ON AUSTRALIAN ARBITRATION

Pre-evidentiary hearings

There have been minimal changes to the practice and procedure for filing and the conduct of arbitration seated in Australia. The filing of a notice of arbitration, submissions and evidence in an arbitration seated in Australia would have been done by email or by e-filing systems prior to the pandemic. For example, the Australian Centre for International Commercial Arbitration (ACICA) has requested new filings made after 19 March 2020 to be through its e-filing system or by email, which includes payment of the filing fees. ACICA is providing a 25 per cent discount on registration fees for cases commenced from 1 May to 31 October 2020.

Evidentiary hearings

Since the pandemic, there has been an accelerated move to virtual hearings in Australia.

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113 Abayomi Okubote of Olanywan Ajayi, Nigeria, contributed the completed questionnaire for litigation in Nigeria. Professor Joongi Kim of Yonsei University, Republic of Korea, contributed the completed questionnaire for litigation in the Republic of Korea. Summaries for these jurisdictions will be published in the May 2021 issue of DRI.

114 Date at which Australian law is stated: 10 July 2020.

Costs

Overall the costs of hearings may decrease. Costs for hiring facilities, travel and accommodation have been saved. Technology costs have increased. For example, the Australian Disputes Centre (ADC) provides an ODR platform ('ADC Virtual') with online rooms for the hearing, including retiring rooms, for a fee.

Related ADR matters

Parties have continued with virtual mediation and expert determination, for example, using ADC Virtual.

Impact of the pandemic on the use of (1) ICT and (2) ODR

The pandemic has accelerated the use of (1) ICT and (2) ODR in arbitration seated in Australia. All hearings are now being conducted virtually, using online platforms such as ADC Virtual and/or Cisco Webex Meeting Rooms.

The technology used largely depends on the parties' agreement. Relevant factors to consider for choosing technology include: the number of arbitrators; the number of counsel, witnesses and experts attending; the extent of cross-examination expected; and the length of the hearing. Parties may agree to use a more expensive but comprehensive service for a longer, complex hearing with extensive cross-examination of witnesses.

Data security and confidentiality

Data security and confidentiality of (1) ICT and (2) ODR are factors that are relevant when considering which option to choose for a virtual hearing. For example, ADC Virtual is specifically designed to address issues of data security and confidentiality.

Arbitral institution rules, guidelines and protocols

ACICA has published a guidance note on online arbitration[115] and a draft protocol order for use in online arbitration.[116] ACICA has also produced an information sheet on 'Managing the Impact of Covid-19: Use of Arbitration to Mitigate Risk'.[117]

115 See https://acica.org.au/wp-content/uploads/2020/05/ACICA-Online-Arbitration-Guidance-Note.pdf accessed 5 August 2020.

116 See https://acica.org.au/wp-content/uploads/2016/08/ACICA-online-ADR-procedural-order.pdf accessed 5 August 2020.

117 See https://acica.org.au/wp-content/uploads/2020/04/Managing-the-Impact-of-Covid-19_Use-of-Arbitration-to-Mitigate-Risk.pdf accessed 5 August 2020.

Conduct of online arbitration

Arbitrators, counsel, witnesses and parties tend to be more available due to less travel time and more flexibility for virtual hearings; there is also less waiting for witnesses. Costs may have decreased. Technology costs replace costs for hearing rooms, travel and other hearing costs. However, legal costs may have increased due to additional preparation time, including discussions, and implementation of technical logistics and arrangements. There may also be additional preparation for submissions and cross-examination as the approach to virtual hearings is different to maximise the use of an online platform.

Document production has been similar as production is already done electronically in Australia (due to the use of e-discovery in court proceedings). Documents will usually be produced by file transfer or through a database system such as Ringtail.

Cross-examination has been similar, although counsel may change their approach to maximise the benefit of the cross-examination process. It may be necessary to agree to a protocol and logistics for cross-examination to ensure that witnesses provide their evidence independently (to the extent that this is possible). Presentations of submissions have been similar in a virtual hearing, with reference to PowerPoint presentations and/or documents by sharing screens. The timetable of proceedings has been similar. In some cases, virtual hearings have replaced in-person hearings. There may be timetabling changes to take account of time zones. For example, the hearing may be spread out over more but shorter days.

Most interesting innovation arising from the pandemic

The most interesting innovation in practice and procedure has been the use of videoconferencing for all hearings, including procedural hearings. Videoconferencing is a more effective form of communication than telephone conference calls.

Does Australian law expressly provide for (1) ODR; (2) delivery of awards online; and/or (3) online enforcement?

Australian law does not expressly provide for ODR/delivery of awards online/online enforcement.

Australian law expressly permits 'document-only' arbitration

Australian law expressly permits 'document-only' arbitration. The International Arbitration Act 1974 (Cth) and state commercial arbitration legislation are based on the UNCITRAL Model Law. Article 24 permits document-only arbitration if agreed by the parties.

Australian law does not require 'in-person' hearings in arbitration

Australian law does not require physical or 'in-person' hearings in arbitration.

No legislation has been enacted in Australia concerning the conduct of arbitration during the pandemic

No legislation has been adopted in Australia that addresses the conduct of arbitration during the pandemic.

Arbitral institutions' procedural rules or similar addressing the impact of the pandemic

ACICA's draft protocol order for online arbitration addresses the technology to be used, costs, transcripts and recordings, logistics of persons attending the virtual hearing and consent of all parties to the order (see above). ACICA's guidance note on online arbitration addresses technology issues, transcribing the hearing, translator (if required), internal communications within a legal team, factors to consider for witnesses and experts, and other logistics relating to the virtual hearing (see above).

Temporary changes to Australian laws arising from the pandemic

While there have been no permanent changes to Australian substantive law arising from the pandemic, there have been some temporary changes relating to:

- leases and tenancy agreements;
- increasing the debt threshold for bankruptcy to AU$20,000;
- the formalities for execution of legal documents, including contracts and affidavits; and
- restrictions on movement of people between states and internationally (differing for each state and territory). Most restrictions include mandatory hotel quarantine.

China – a civil law jurisdiction:[118] *Gary Gao, Zhong Lun, Shanghai*

Changes to the practice and procedure of the conduct of arbitration seated in China

The pandemic provided a great opportunity to promote ODR in China. A common practice has developed to hold online hearings for case management conferences, interim relief applications, urgent applications, merits hearings, witness examinations and so on.

118 Date at which Chinese law is stated: 13 July 2020.

Impact of the pandemic on the use of (1) ICT and (2) ODR

The pandemic has accelerated the use of ICT and ODR in China.

Technology and standards

Because of the pandemic, parties have had to search for steady technical tools to assist in distance communication so that the originally scheduled arbitration timeline is not disturbed. Both a thriving technical service-providing market and a growing number of people using such tools in China have been observed.

Data security and confidentiality of ICT and ODR

Although technical security can be guaranteed to a certain level through continuing development and upgrading, confidentiality is still an open issue. Arbitration participants are under confidentiality obligations. However, in practice, it is difficult to guarantee no unauthorised recording, taping or copying during the use of ODR.

Provision in Chinese law for (1) ODR; (2) delivery of awards online; and/or (3) online enforcement

Chinese law expressly supports ODR in Article 23 of the Circular of the Supreme People's Court on Issuing the Implementing Measures for the Pilot Reform of Civil Proceedings for the Separation of Complicated Cases from Simple Ones (dated 15 January 2020).[119]

However, although an arbitration institution may deliver awards online as a matter of formation and efficiency, the arbitration institution must serve the award in paper form according to Article 87(1) of the Civil Procedure Law.[120]

Chinese law expressly permits 'document-only' arbitration

Chinese law permits document-only arbitration by Article 39 of the Arbitration Law.[121]

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119 It provides that '[p]eople's courts may adopt online videos to try cases in court.'

120 It provides that 'Subject to the consent of the person on which a procedural document is to be served, the document may be served by way of facsimile, electronic mail or any other means through which the receipt of the document may be acknowledged, with the exception of judgments, rulings and mediation statements.'

121 It provides that 'an arbitral tribunal shall hold a tribunal session to hear an arbitration case. If the parties agree not to hold a hearing, the arbitration tribunal may render an award in accordance with the arbitration application, the defence statement and other documents.'

Chinese law does not require physical or 'in-person' hearings

Chinese law does not have mandatory rules for arbitration hearings being held 'in person' due to the party's autonomy in arbitration, endorsed by Article 39 of the Arbitration Law.

Legislation enacted in China concerning the conduct of arbitration during the pandemic

The Notification of the General Office of the Ministry of Human Resources and Social Security on the Proper Handling of Labour Relations during the Prevention and Control of the Pneumonia Epidemic Caused by the New Coronavirus Infection was enacted and came into effect on 24 January 2020. It regulates that if the parties are unable to apply for arbitration of labour and personnel disputes during the statutory limitation period due to the pandemic, the limitation period for arbitration shall be suspended and will continue to run from the date when the cause of the suspension is eliminated. Where the pandemic has made it difficult for the labour and personnel dispute arbitration institutions to hear the case within the statutory time limit, the time limit may also be extended accordingly.

Procedural rules and similar of Chinese-located arbitral institutions that address the impact of the Pandemic on arbitration

Many arbitration institutions located in China have published procedural rules, circulars and guidelines to address the impact of the pandemic. For instance:

- The China International Economic and Trade Arbitration Commission (CIETAC) has issued: (1) 'Promotion of Online Arbitration to Effectively Mitigate the Effects of Covid-19 Pandemic';[122] (2) 'CIETAC launches Guidelines on Proceeding with Arbitration Actively and Properly during the Covid-19 Pandemic (Trial)', dated 28 April 2020;[123] and (3) 'CIETAC Joined the Major International Arbitration Institutions to Initiate Statement of "Arbitration and Covid-19" to Tackle the Pandemic'.[124]
- The Shanghai International Arbitration Centre (SHIAC) has issued a Notification of Work Arrangements for Arbitration during Covid-19 Pandemic Outbreak Prevention and Control Period, dated 28 January 2020.[125]
- The Shenzhen Court of International Arbitration (SCIA) has issued: (1) Notice on Arbitration Services and Related Matters During the Epidemic

122 See www.cietac.org.cn/index.php?m=Article&a=show&id=16917&l=en accessed 5 August 2020.
123 See www.cietac.org.cn/index.php?m=Article&a=show&id=16919&l=en accessed 5 August 2020.
124 See www.cietac.org.cn/index.php?m=Article&a=show&id=16961&l=en accessed 5 August 2020.
125 Chinese version www.shiac.org/SHIAC/news_detail.aspx?id=873 accessed 5 August 2020.

Prevention Period, dated 29 January 2020;[126] (2) Notice on Encouraging the Use of Online Arbitration Service, dated 4 February 2020;[127] and (3) Special Decision on Reduction of Arbitration Fees, dated 6 February 2020.[128]

Were any changes to the laws of China made resulting from, or stimulated by, the Pandemic?

With respect to the rules on time-bar periods, limitation periods, default in payment obligations, insolvency and so on, except for the laws and regulations enacted to specifically address the pandemic in China, there have been no changes to Chinese laws and regulations.

HONG KONG SAR – A COMMON LAW JURISDICTION:[129] *KIM M ROONEY, ARBITRATOR AND BARRISTER, HONG KONG SAR*

Impact of the pandemic on Hong Kong arbitration and ADR

The pandemic has accelerated the move in Hong Kong from physical filing, communications and in-person hearings to conducting these online, building on an existing procedural and legal framework.[130] The use of ICT has also been accelerated. The Arbitration Ordinance Cap 609[131] gives tribunals broad discretion as to how to conduct arbitration, subject to the agreement of the parties.

During the pandemic, arbitrators and counsel have generally been more available. There have been more logistical challenges to arrange for witnesses to appear, particularly where lockdowns apply, or where online services, particularly outside large cities, are not powerful enough to support online hearings. Tribunals have been more involved in developing hearing protocols. Oral submissions are often shorter. There has been no material change to cross-examination of witnesses and document production or to the time taken for delivery of decisions and awards.

The cost of online proceedings depends on the platform used. Commercial online platforms are generally available, for example, Zoom and Microsoft Teams. Parties are increasingly participating in online mediation. The technology used in ODR, including the technology standards applied, largely depends on the agreement of the parties.

126 See www.scia.com.cn/index.php/En/Index/newsdetail/id/3610.html accessed 5 August 2020.
127 See www.scia.com.cn/index.php/En/Index/newsdetail/id/3612.html accessed 5 August 2020.
128 See www.scia.com.cn/index.php/En/Index/newsdetail/id/3614.html accessed 5 August 2020.
129 Date at which Hong Kong law is stated: 14 July 2020.
130 Among other things, Hong Kong law permits electronic signatures: Electronic Transactions Ordinance Cap 553, s 6
131 Hong Kong has a unitary arbitration system. The Arbitration Ordinance is based on the UNCITRAL Model Law on International Commercial Arbitration 2006 (the 'UNCITRAL Model Law'). Section 47 of the Arbitration Ordinance provides that Art 19(1) of the UNCITRAL Model Law concerning 'Determination of rules of procedure' has effect.

Confidentiality and security

Parties are obliged to observe confidentiality obligations under Hong Kong law: see section 18 of the Arbitration Ordinance (Cap 609), Article 14 of the Bill of Rights Ordinance (Cap 383) and Personal Data (Privacy) Ordinance (Cap 486). Effective methods for preventing the unauthorised recording of online proceedings have yet to be developed.

Online service of awards and enforcement

It has been held in Hong Kong that an award is delivered when it is 'made and published' to the parties, that is, when the arbitrator informs the parties that the award has been made and is ready for collection, with or without the prior payment of fees.[132] Hong Kong law does not provide for online enforcement of awards.

'Document-only' arbitration

Hong Kong law expressly permits 'document-only' arbitration pursuant to section 52 of the Arbitration Ordinance, provided that the parties have agreed that no oral hearing shall be held.

'In-person' hearings

Hong Kong law requires a tribunal to hold an 'oral' hearing where requested to do so by a party, save where the parties have agreed that no oral hearing shall be held (section 52 of the Arbitration Ordinance).

Legislation

The Compulsory Quarantine of Certain Persons Arriving at Hong Kong Regulation Cap 599[133] exempts arbitrators, mediators and, potentially, witnesses engaged in eligible mediation and arbitration work in Hong Kong, mainland China, Macau and Taiwan from mandatory quarantines.

132 *Po Fat Construction Co Ltd v The Incorporated Owners of Kin Sang Estate*, HCCT 15/2013, para 9..
133 See www.doj.gov.hk/eng/public/20200519_sjo1.html#_ftn2 accessed 5 August 2020.

Arbitral institutions' publications

The Hong Kong International Arbitration Centre (HKIAC),[134] International Chamber of Commerce (ICC),[135] China International Economic and Trade Arbitration Commission Hong Kong Arbitration Centre (CIETAC HK)[136] and eBRAM International Online Dispute Resolution Centre (eBRAM)[137] have all published Covid-19 guidelines and similar.

Changes to the laws of Hong Kong

There have been no changes to the laws of Hong Kong resulting from the pandemic, save for health-related border controls and social distancing requirements.

Innovation in response to the Pandemic

In mid-2020, eBRAM was funded by the Hong Kong Department of Justice to provide an online platform for speedy and cost-effective resolution (by online negotiation, mediation and arbitration) of disputes arising from the pandemic, involving claims of HK$500,000 (approximately US$64,500) or less where at least one party is from Hong Kong. The cost to each party of participating is HK$200 (or approximately US$26).

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134 HKIAC: (1) Press release 'HKIAC Measures and Service Continuity during Covid-19', dated 27 March 2020 www.hkiac.org/news/hkiac-service-continuity-during-covid-19; (2) 'Precautionary measures at HKIAC in response to Covid-19' www.hkiac.org/content/precautionary-measures-hkiac-response-covid-19; (3) Press release 'HKIAC Guidelines for Virtual Hearings', dated 15 May 2020 www.hkiac.org/news/hkiac-guidelines-virtual-hearings; (4) HKIAC Guidelines for Virtual Hearings (last updated 14 May 2020) www.hkiac.org/sites/default/files/ck_filebrowser/HKIAC%20 Guidelines%20for%20 Virtual%20Hearings_2.pdf; and (5) Joint Statement of Arbitral Institutions on 17 April 2020 https://iccwbo.org/content/uploads/sites/3/2020/04/covid19-joint-statement.pdf accessed 5 August 2020.

135 ICC: (1) 'ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the Covid-19 Pandemic', dated 9 April 2020 https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf; (2) 'Urgent Covid-19 message to DRS community', dated 17 March 2020 https://iccwbo.org/media-wall/news-speeches/covid-19-urgent-communication-to-drs-users-arbitrators-and-other-neutrals; and (3) Joint Statement of Arbitral Institutions on 17 April 2020 https://iccwbo.org/content/uploads/sites/3/2020/04/covid19-joint-statement.pd accessed 5 August 2020.

136 CIETAC HK: (1) 'Update on Hearings Arrangement at CIETAC Hong Kong Arbitration Centre', dated 1 February 2020 www.cietachk.org/portal/newsPage.do?pagePath=\en_US\news\47c3fb37ae218b7f001&type=centre accessed 5 October 2020; and (2) 'Update on Current Case Administration at CIETAC Hong Kong Arbitration Centre', dated 5 February 2020 www.cietachk.org/portal/newsPage.do?pagePath=\en_US\ news\47c3fb37af6eaa7f001&type=centre accessed 5 August 2020.

137 eBRAM: (1) Covid-19 ODR Scheme www.ebram.org/covid_19_odr.htm; and (2) eBRAM Draft Rules for the Covid-19 ODR Scheme www.ebram.org/download/Covid-19+Rules+(draft).pdf accessed 5 August 2020.

India – a common law jurisdiction:[138] *Vikas Mahendra and Prerana Reddy, Keystone Partners, Bengaluru*

Impact of the pandemic on Indian arbitration

Prior to the pandemic, virtual hearings of arbitral proceedings were available to arbitration seated in India, but not often preferred. Most parties and arbitrators were inclined to conduct proceedings 'in person' especially for larger arbitration involving high stakes and complex legal issues. There was an emerging trend of several standalone institutions providing virtual hearing facilities and encouraging their use for low-complexity arbitration, but these were still very much in their infancy. However, the severe restrictions in place during the pandemic have forced many arbitrators to explore virtual facilities to conduct their arbitral proceedings.

Online arbitration permitted

The Arbitration and Conciliation Act 1996[139] (the 'Arbitration Act') does not place any bar on the mode or platform on which arbitral proceedings are to be conducted.[140] Arbitral tribunals are given a wide range of discretion to conduct arbitral proceedings on any platform, with the consent of the parties. The Arbitration Act, read with the Information Technology Act 2000, permits conduct of the entire arbitration proceedings, including the rendering of the award, virtually.

Freezing of the limitation period for arbitration

However, as arbitrators and parties alike grapple to adapt to the changing practice, the Supreme Court has frozen the limitation period pertaining to all arbitration proceedings from 15 March 2020 until further orders.[141]

Institutions providing ADR by ODR

Several standalone ODR services are available that provide and encourage online mediation, including the Centre for Online Resolution of Disputes (CORD),[142] Centre for Advanced Mediation Practice (CAMP),[143]

138 Date at which Indian law is stated: 21 July 2020.

139 Arbitration and Conciliation Act 1996 http://legislative.gov.in/sites/default/files/A1996-26.pdf accessed 21 July 2020.

140 *Ibid*, s 19 of the Arbitration and Conciliation Act, 1996.

141 Order dated 23 March 2020 in Suo Motu Writ Petition (Civil) 3/2020, Supreme Court of India https://main.sci.gov.in/supremecourt/2020/10787/10787_2020_1_12_21570_Order_23-Mar-2020.pdf accessed 21 July 2020.

142 See https://resolveoncord.com/#/home accessed 21 July 2020.

143 See https://campmediation.in accessed 21 July 2020.

Indian Dispute Resolution Centre (IDRC),[144] Sama,[145] Presolv 360[146] and ADResNow.[147] In light of the obvious challenges to conducting physical hearings during the pandemic, more people are opting for online resolutions of their disputes. Further, with an increasing number of laws mandating pre-litigation mediation, and mediation-specific legislation expected shortly, parties are also starting to explore mediation and negotiation. A number of ODR services are starting to cater to this demand as well.

Confidentiality and security

Section 42A of the Arbitration Act makes it mandatory for the arbitrator, arbitral institution and parties to an arbitration agreement to maintain confidentiality of the arbitral proceeding. Online, different platforms provide different methods of ensuring this. Some adopt strict access controls and permissions to protect confidentiality. The platforms also do not usually allow parties to record proceedings on the platform. However, broader limitations on recording and taping are usually left to the arbitral tribunal to impose.

Online service of awards and enforcement

In exercise of their powers of discretion under the Arbitration Act, the arbitrator or tribunal may supply its orders to the parties by email. Section 31(1) of the Arbitration Act provides that an arbitral award is to be made in writing and signed by the members of the arbitral tribunal. However, in an online arbitration, the procedures under the Information Technology Act will also have to be complied with. Therefore, in order to authenticate an award served upon the parties online, the members of the arbitral tribunal may place their digital signature on the award, so as to have the same effect as a paper signature.[148]

'Document-only' arbitration

Section 24 of the Arbitration Act allows the arbitral tribunal, subject to agreement between the parties, to decide whether to hold oral hearings for the presentation of evidence or to put forth arguments or whether the proceedings shall be conducted on a document-only basis. Notably,

144 See www.theidrc.com accessed 21 July 2020.
145 See www.sama.live/about-us.php accessed 21 July 2020.
146 See www.presolv360.com accessed 21 July 2020.
147 See www.adresnow.com accessed 21 July 2020.
148 Information Technology Act 2000, ss 3 and 5 https://meity.gov.in/content/digital-signature accessed 21 July 2020.

document-only arbitration is the default for 'Fast-Track Arbitration' pursuant to section 29B of the Arbitration Act.

'In-person' hearings

The Arbitration Act does not require a physical or 'in-person' hearing. However, arbitrators are inclined to conducting arbitral proceedings in person as a matter of practice.

Legislation

There has been no Covid-19 legislation or other legislative changes during the pandemic with respect to the arbitration regime in India. However, most arbitral proceedings have shifted to an online platform, presently, as an ad hoc arrangement.

Arbitration institutions' publications

The Delhi International Arbitration Centre has published a 'Guidance Note for Conducting Arbitration Proceedings by Video Conference', with effect from 8 June 2020,[149] and Maharashtra National Law University (MNLU) Mumbai's Centre for Arbitration and Research has published 'Virtual Arbitrations in India: A Practical Guide'.[150]

Changes to the laws of India

There have been no amendments to the Arbitration Act in India on account of the challenges faced due to the pandemic. A number of proposals are presently being mooted and press releases have been put out by the central government's policy arm. It is expected that legislation of this nature will be passed in the coming months.

Working group

There is no government or court-appointed body that has been specifically formed or appointed to consider the impact of the pandemic on arbitration. However, the Niti Aayog, the policy arm of the government, is considering these issues as part of its respective larger mandate.[151]

149 Delhi International Arbitration Centre, 'Guidance Note for Conducting Arbitration Proceedings by Video Conference' http://dacdelhi.org/DataFiles/CMS/file/guidancenote.pdf accessed 21 July 2020.

150 Centre for Arbitration and Research, MNLU Mumbai, 'Virtual Arbitration in India: A Practical Guide', http://mnlumumbai.edu.in/pdf/Virtual%20Arbitration%20in%20India,%20CAR%20MNLU%20Mumbai.pdf accessed 21 July 2020.

151 Press releases dated 7 June 2020 https://niti.gov.in/catalysing-online-dispute-resolution-india and https://pib.gov.in/PressReleasePage.aspx?PRID=1630080 accessed 21 July 2020.

SINGAPORE – A COMMON LAW JURISDICTION:[152] *TAT LIM, AEQUITAS LAW, SINGAPORE*

Changes to the practice and procedure of commercial arbitration and related ADR in Singapore

Regarding the practice and procedure for filing and the conduct of proceedings before any evidentiary hearing or final determination, in Singapore the Covid-19 (Temporary Measures) Act 2020 (the 'Act') foresees that if served with a notice for relief, the counterparty is prohibited from commencing or continuing any court or arbitral proceedings against a party to the contract, a guarantor or surety, or the issuer of a related performance bond, if applicable. The counterparty is also prohibited from any action to enforce a court judgment, arbitral award or adjudication under the Security of Payment Act. There are additional reliefs for specific contracts under the Act.

Filing a Notice of Arbitration can be done by a party by email. The Singapore International Arbitration Centre (SIAC) has collaborated with other major arbitration centres to increase the use of virtual evidentiary hearings. There has been no change to the Schedule of Fees of SIAC.

The pandemic has accelerated the use of (1) ICT and (2) ODR in Singapore

The pandemic has accelerated the use of (1) ICT and (2) ODR in Singapore in both arbitration and ADR, such as mediation.

Arbitration

There were restrictions on physical attendance during the Circuit Breaker Period from 7 April to 4 May (extended to 1 June) 2020 (mandated by the Act). During this time arbitration proceedings could not be conducted at Maxwell Chambers, Singapore's arbitration hearing centre.

While SIAC currently does not offer any VCF that can be used for hearings, parties may use Maxwell Chambers' virtual hearing 'room' via BlueJeans, the videoconferencing software.

While using VCF, the person who has received a stay home notice (SHN) or a quarantine order (QO) needs to ensure that the arrangements made for videoconferencing are not in violation of the SHN or QO.

Mediation

In mediation, the Singapore International Mediation Centre (SIMC) adopted a Covid-19 Protocol for businesses to resolve their disputes during

152 Date at which Singapore's law is stated: 28 July 2020.

the pandemic. It can complement Covid-19-related legislation anywhere; for example, businesses under the Act can mediate at any time to resolve their disputes, even after an Assessor's Determination.

Proponents of ODR have argued that mediating disputes online may be faster and easier, and in conformity to the terms of the Singapore Mediation Convention (SMC). Mediation settlement agreements have been signed by the parties electronically, and by hand with the agreement sent to the parties and the mediator, without invalidating the agreements. The main challenge has been finding adequate time for hearings with participants located in various countries.

Does Singapore expressly provide for (1) ODR; (2) delivery of awards online; and/or (3) online enforcement?

While Singapore law does not expressly provide for ODR, the delivery of awards online or online enforcement, in practice awards have been delivered online.

Does Singapore law expressly permit 'document-only' arbitration

SIAC allows parties to agree to 'document-only' arbitration pursuant to Rule 5: Expedited Procedure of the SIAC Rules.[153] Rule 5.2.c provides that: 'The Tribunal may, in consultation with the parties, decide if the dispute is to be decided on the basis of documentary evidence only, or if a hearing is required for the examination of any witness and expert witness as well as for any oral argument.'

Does Singapore law require physical or in-person hearings in arbitration

Article 24(1) of the Model Law provides that an arbitral tribunal has discretion to decide whether to hold oral hearings, subject to the parties' agreement. In practice, oral hearings are usually held unless the parties opt to proceed with arbitration on a document-only basis. SIAC Rules provide that the tribunal shall, unless the parties have agreed on document-only arbitration, hold a hearing for the presentation of evidence or oral submissions, or both, on the merits of the dispute, including, without limitation, any issue as to jurisdiction.

No legislation enacted in Singapore concerning the conduct of arbitration during the pandemic

No legislation has been enacted in Singapore concerning the conduct of arbitration during the pandemic.

153 *Arbitration Rules of the Singapore International Arbitration Centre SIAC Rules 6th Edition, 1 August 2016* www.siac.org.sg/our-rules/rules/siac-rules-2016 accessed 5 August 2020.

SIAC's procedural rules, circulars and similar addressing the impact of the Pandemic

On 28 May 2020, SIAC published its Guidelines on Covid-19 Measures.

Parties are also free to adopt:

- the Chartered Institute of Arbitrators ('CIArb') Guidance Note on Remote Dispute Resolution Proceedings;[154]
- Seoul Protocol on Videoconferencing in International Arbitration released by the KCAB on 18 April 2020;[155] and
- ICC International Court of Arbitration's 9 April 2020 Guidance Note on Possible Measures Aimed at Mitigating the Effects of the Covid-19 Pandemic.[156]

Changes to Singapore's laws in response to the Pandemic

The Act was passed by the Singapore Parliament and commenced on the same day, 7 April 2020.

The Act extends limitation periods from when a notice of relief is served until the notice ceases to be of effect, whether due to the Act expiring, the notice being withdrawn or an assessor determining that the case is not entitled to relief. Should parties ignore the Act and decide to serve proceedings, substantial rights may be lost. It will not be possible to revive the cause of action if a matter is dismissed by a court or tribunal.

Furthermore, the Act provides temporary relief for financially distressed businesses through increased monetary thresholds for corporate insolvency and a longer time to satisfy a statutory demand from creditors.

Additionally, late payment charges or increased interest rates shall be incurred by businesses even though their payment obligations may be suspended during the prescribed period.[157]

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154 CIArb's Guidance Note on Remote Dispute Resolution Proceedings www.ciarb.org/media/8967/remote-hearings-guidance-note.pdf accessed 5 August 2020.

155 Seoul Protocol www.kcabinternational.or.kr/user/Board/comm_notice_view.do?BBS_NO=548&BD_NO=169&CURRENT_MENU_CODE=MENU0025&TOP_MENU_CODE=MENU002420200730DRICovid19globalDR ImpactConsolidated.doc accessed 5 August 2020.

156 ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the Covid-19 Pandemic 9 April 2020 https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf accessed 5 August 2020.

157 See n 56 above.

England and Wales, and Europe

ENGLAND AND WALES – A COMMON LAW JURISDICTION:[158] *MARK CLARKE AND VIV THIEN, WHITE & CASE, LONDON*

IMPACT OF THE PANDEMIC ON ENGLISH ARBITRATION AND ADR

Arbitration

Prior to the pandemic, virtual hearings and electronic filings were available to arbitration seated in England and Wales. Although most filings are electronic and procedural conferences are commonly conducted remotely, the traditional common law preference for face-to-face cross-examination meant that, prior to the pandemic, substantive hearings were typically held in person. However, the prospect of long (and uncertain) adjournments caused by the pandemic has, for the time being, displaced this preference, with parties now embracing the use of virtual hearings, even in cases involving lengthy and complex cross-examination of witnesses or experts.

Under the Arbitration Act 1996 (the 'Act'), tribunals have a wide procedural discretion.[159] In exercising their discretion, tribunals have to strike a balance between the duties set out in section 33(1) of the Act, on the one hand, giving each party a reasonable opportunity to present its case, while on the other, adopting procedures suitable for the case that avoid unnecessary expense or delay.[160] Failure to strike the right balance could result in an award being susceptible to challenge under section 68 of the Act for serious procedural irregularity. Helpfully, the English courts: (1) consider that video evidence is not restricted to exceptional circumstances;[161] and (2) generally support tribunals' procedural discretion by setting a high bar for successful section 68 challenges.[162]

As a result of the travel restrictions imposed in light of the pandemic, arbitrators and counsel to some extent have better availability than might otherwise have been the case. However, where participants are located in multiple jurisdictions, the breadth of time zones can limit the length of virtual hearings, resulting in additional hearing days

158 Date at which the law of England and Wales is stated: 15 August 2020.

159 S 34(1) of the Act provides that '[i]t shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter.'

160 S 33(1) of the Act provides as follows: '[t]he tribunal shall – (a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.'

161 See, eg, *Ian McGlinn v Waltham Contractors Ltd* [2006] EWHC 2322 (TCC) 11, 12; following the approach of the UKHL in *Polanski v Condé Nast Publications Ltd* [2005] 1 WLR 637.

162 See, eg, Francis Russell, *Russell on Arbitration* (24th edn, Sweet & Maxwell 2015) 8-085.

being needed. Setting up a framework for virtual hearings also requires substantial engagement by counsel and the tribunal to agree protocols to mitigate the impact of technical difficulties. This means that any cost savings from avoided travel may be offset by the heavier administrative burden of preparing for electronic hearings.

Arbitral institutions have also taken steps to facilitate parties' access to arbitration remotely: the London Court of International Arbitration (LCIA) has been fully accessible throughout the pandemic, allowing for all new cases to be commenced electronically (without the need for paper copies), payments to be received online and correspondence to be handled almost exclusively by email.[163] In addition, the LCIA Arbitration Rules 2020, effective from 1 October 2020, now require electronic submission of the Request for Arbitration[164] and the Response,[165] and the express prior written approval of the Registrar is required to submit either of these documents by any other means.[166] Further, any written communication must now be transmitted via email or other recordable electronic means unless the tribunal, or the Registrar prior to the tribunal's constitution, directs otherwise.

ADR

With respect to ADR, institutions such as the Centre for Effective Dispute Resolution (CEDR) have been actively promoting online mediation,[167] and some commentators are predicting that such mediation will 'come into [its] own' as a result of the pandemic.[168] In addition, the LCIA's Mediation Rules 2020 also now designate electronic communications as the default approach and grant mediators discretion to determine whether to hold virtual or in-person mediation.[169] The UK government has also issued guidance encouraging parties to deal with disputes through ADR during the pandemic.[170]

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163 'LCIA Services Update: Covid-19' (LCIA, 18 March 2020) www.lcia.org/lcia-services-update-covid-19.aspx accessed 16 July 2020.

164 LCIA Arbitration Rules 2020, Art 1.3.

165 *Ibid*, Art 2.3.

166 *Ibid*, Art 4.1.

167 *Ibid*.

168 Adrian Lifley, 'Dispute Resolution and Covid-19: Resolving Commercial Disputes through Remote Mediation' (Lexology, 8 April 2020) www.lexology.com/library/detail.aspx?g=ea7e8450-ee4e-490a-b21e-0ec1ce37c933 accessed 15 July 2020.

169 LCIA Mediation Rules 2020, Arts 1.2, 2.2, 3.1, 3.2, 6.2 and 8.3.

170 Cabinet Office, 'Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the Covid-19 emergency' (UK government, 7 May 2020) para 17 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/883737/_Covid-19_and_Responsible_Contractual_Behaviour__web_final___7_May_.pdf accessed 15 July 2020.

Confidentiality and security

Although the Act does not address confidentiality, English law has long implied a duty to maintain the confidentiality of arbitration on its participants.[171] Maintaining confidentiality and data security should be paramount among counsel's concerns in preparing for virtual hearings and considering platform service providers.[172] In addition, the LCIA Arbitration Rules 2020 specifically address data protection and confidentiality. The new Article 30A.4 requires the tribunal to consult with the parties (and potentially the LCIA) at an early stage of the arbitration on whether it should order specific information security measures and any means to address personal data processing 'in light of applicable data protection or equivalent legislation'.

Online service of awards and enforcement

Absent parties' agreement to the contrary, electronic notification of awards is permitted under section 55 of the Act. The LCIA has confirmed that in the current pandemic, almost all awards will be transmitted electronically to parties until its physical office has reopened.[173] Article 26.6 of the LCIA Arbitration Rules 2020 provides that an award may be signed electronically unless the parties agree or the tribunal or LCIA Court directs otherwise. Consistent with this, Article 26.7 mandates that awards shall be delivered electronically unless it is not possible to do so or if any party requests otherwise. A notable development in the LCIA Arbitration Rules 2020 is that, in the event of any disparity between the electronic and paper forms of an award, the electronic version now prevails.[174]

'Document-only' arbitration

Consistent with the wide procedural discretion afforded to tribunals under the Act and, in particular, section 34(2)(h) of the same, subject to the parties agreeing otherwise, arbitration may proceed without oral submissions or evidence, on a document-only basis.

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171 See n 165 above, 5-124.

172 See, eg, Protocol for Online Case Management in International Arbitration (Working Group on LegalTech Adoption in International Arbitration, July 2020), para 59(i) (Data Privacy/Security) and Annex 4 (Platform provider data security and privacy questions) https://sites-herbertsmithfreehills.vuturevx.com/20/21553/landing-pages/platforms-protocol---working-group-on-legaltech-in-international-arbitration-consultation-draft-01072020.pdf accessed 15 July 2020.

173 See n 166 above.

174 LCIA Arbitration Rules 2020, Art 26.7. This is in contrast to Art 26.7 of the LCIA Rules 2014 where the paper form of the award would prevail in the event of inconsistency.

'In-person' hearings

The Act does not require tribunals to hold 'in-person' hearings, although, as noted above, prior to the pandemic participants generally preferred to conduct substantive hearings in-person.

Article 19.1 of both the 2014 and 2020 versions of the LCIA Arbitration Rules provides that unless the parties have agreed to document-only arbitration, any party has a right to an oral hearing before the tribunal. Both the 2014 and 2020 versions of Article 19.2 make clear that, upon the direction of the tribunal, such a hearing may be conducted virtually. The revised Article 19.2 refines this further by specifying that the hearing may be conducted 'in person, or virtually by conference call, videoconference or using other communications technology with participants in one or more geographical places (or in a combined form)'.

Legislation

From 8 June 2020, the UK government imposed a mandatory 14-day period of self-isolation for travellers arriving in the UK, unless they arrive from certain countries covered by the travel corridor exemption.[175] Participants in the arbitral process are not exempt from the self-isolation period.[176]

Arbitration institutions' publications

The LCIA,[177] International Dispute Resolution Centre (IDRC),[178] London

175 This list is regularly updated. 'Coronavirus (Covid-19): Travel Corridors' (UK government, 3 July 2020, updated 11 July 2020) www.gov.uk/guidance/coronavirus-covid-19-travel-corridors#arrival-in-the-uk accessed 15 July 2020.

176 'Coronavirus (Covid-19): Travellers Exempt from Border Rules in the UK' (UK government, updated 10 July 2020) www.gov.uk/government/publications/coronavirus-covid-19-travellers-exempt-from-uk-border-rules/coronavirus-covid-19-travellers-exempt-from-uk-border-rules accessed 15 July 2020.

177 LCIA Notes for Arbitrators (LCIA, nd) www.lcia.org/adr-services/lcia-notes-for-arbitrators.aspx#6.4%20Meetings%20and%20hearings accessed 15 July 2020, para 33. 'Covid-19 Update: Recalibrating and Resilience – LCIA Continues to Deliver the Highest Quality Services for Users' (LCIA, 14 May 2020) www.lcia.org/News/covid-19-update-recalibrating-and-resilience-lcia-continues-to.aspx accessed 15 July 2020. Updates to the LCIA Arbitration Rules and the LCIA Mediation Rules (2020), (LCIA, nd) www.lcia.org/lcia-rules-update-2020.aspx accessed 15 August 2020.

178 'IDRC continues closely to monitor the coronavirus emergency' (IDRC, 23 June 2020) www.idrc.co.uk/news-and-events/news/coronavirus-(covid-19)-updated.aspx accessed 15 July 2020. The IDRC has also published an addendum relating to Covid-19 in its Terms and Conditions. See 'IDRC Terms and Conditions (effective 1 July 2020),' (IDRC, 1 July 2020) www.idrc.co.uk/terms-and-conditions.aspx#IDRC accessed 15 July 2020.

Maritime Arbitrators Association (LMAA),[179] CIArb[180] and ICC[181] have all published guidance and regular updates relating to proceedings during the pandemic.

Changes to the laws of England and Wales

Neither the Coronavirus Act 2020 nor UK government regulations amend the Act or other existing English arbitration law.

Germany – a civil law jurisdiction:[182] *Anna Masser, Jana Loewer and Carolin Happ, Allen & Overy, Frankfurt*

Impact of the pandemic on practice and procedure of commercial arbitration and related ADR in Germany

Pre-evidentiary hearings

Case management conferences and procedural hearings were regularly conducted via telephone or videoconference prior to the pandemic. This practice has further increased.

Evidentiary hearings

As regards evidentiary hearings for arbitration seated in Germany, (urgent) hearings have taken place online. Where possible, tribunals tend to postpone an evidentiary hearing. This is true, in particular, where the parties do not agree to an online merits hearing. While it can be argued that the tribunal's power to organise the proceedings as it deems fit encompasses the power to order an online hearing at its discretion, there are some voices of concern that an award might be prone to challenge if one party does not agree to an online hearing.

Where online hearings have been conducted, the experience has been rather positive and they have been held without major limitations.

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179 Guidelines for the Conduct of Virtual and Semi-Virtual Hearings (LMAA, 9 July 2020) www.lmaa.org.uk/uploads/documents/LMAA%20Guidelines%20for%20Virtual%20Hearings%20V1.pdf accessed 15 July 2020.

180 Guidance Note on Remote Dispute Resolution Proceedings (CIArb, 2020) www.ciarb.org/media/8967/remote-hearings-guidance-note.pdf accessed 15 July 2020.

181 'ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the Covid-19 Pandemic' (ICC, 9 April 2020) https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf accessed 15 July 2020. 'Urgent Covid-19 Message to DRS Community' (ICC, 17 March 2020) https://iccwbo.org/media-wall/news-speeches/covid-19-urgent-communication-to-drs-users-arbitrators-and-other-neutrals accessed 15 July 2020.

182 Date at which German law is stated: 9 July 2020.

Change in German VAT rates

There has been a change in German VAT rates from 19 to 16 per cent, limited to the period from 1 July 2020 to 31 December 2020. Parties who are liable to pay VAT to arbitrators will benefit from this reduced VAT rate.

Impact of the pandemic on the use of (1) ICT and (2) ODR in Germany

Before the pandemic, electronic transmission to the German Arbitration Institute (Deutsche Institution für Schiedsgerichtsbarkeit or DIS) was already foreseen as the standard procedure. Now, the DIS in addition requests that parties refrain from transmissions by mail or courier. The DIS Rules, however, still require parties to file a hard copy of the Request for Arbitration for the other parties, the DIS refrains from requesting a hard copy for itself and the electronic transmission of the Request for Arbitration suffices for the commencement of the arbitration.

Does German law expressly provide for (1) ODR; (2) delivery of awards online; and/or (3) online enforcement?

German law does not provide for ODR or online enforcement. Tribunals have ordered that merits hearings go ahead online where the parties agree or where the tribunal held to have the discretion to so order even if one party does not agree.

German law does not expressly provide for delivery of awards online. The DIS will carry out the notification of the award in electronic form, provided that all parties agree.

Does German law expressly permit 'document-only' arbitration

Under Article 29 of the DIS Rules, an oral hearing has to take place at the request of one of the parties unless all the parties have agreed not to hold oral hearings. In expedited proceedings, an oral hearing may be dispensed with if all parties so agree. An oral hearing has to take place if the parties agree upon holding one. In all other cases (no agreement not to hold and no agreement to hold), the tribunal has discretion to rule on the basis of documents only.

Does German law require physical or 'in-person' hearings and if so, please describe?

A physical hearing is not required for arbitration seated in Germany – it is within the tribunal's power to organise the proceedings as it deems fit to also provide for an online hearing. However, some voices are of the opinion that in the case in which a tribunal orders an online hearing in spite of one party requesting a physical one, this might lead to a violation

of the right to be heard and an award might be prone to challenge. There is no jurisprudence on this issue.

Has any legislation been enacted in Germany concerning the conduct of arbitration during the pandemic?

No such legislation has been enacted during the pandemic.

Has any arbitral institution located in Germany published any procedural rules, circulars or guidelines to address the impact of the Pandemic on arbitration?

The DIS published an Announcement of Particular Procedural Features for the Administration of Arbitrations in View of the Covid-19 Pandemic, dated 31 March 2020, updated on 1 July 2020. This announcement addresses the available services, encourages electronic communication, reduces the necessity of hard copies and provides for automatic extensions of time limits based upon the pandemic. Also, it announces the VAT reduction from 19 to 16 per cent.

Changes to the laws of Germany made resulting from or stimulated by the pandemic

The following changes have been made to German laws as a result of the pandemic:

- Default in payment obligations: rent and lease agreements cannot be terminated due to rent or lease default in the period between 1 April and 30 June 2020 if the default resulted from the pandemic. Repayments from a consumer loan agreement in the period between 1 April and 30 June 2020 were deferred for three months, if the consumer could not reasonably pay its loan due to the pandemic and this deferral was not unacceptable to the lender.
- Insolvency: the obligation to file for insolvency is suspended until 30 September 2020 if the occurrence of insolvency is based on the consequences of the pandemic and there is a prospect of eliminating existing insolvency. This period may be extended by regulation if this seems to be required.
- 'Other': VAT rates are reduced from 19 to 16 per cent, limited to the period from 1 July 2020 to 31 December 2020.

SWEDEN – A CIVIL LAW JURISDICTION:[183] *STEFAN BROCKER, MANNHEIMER SWARTLING ADVOKATBYRÅ, STOCKHOLM*

Changes to the practice and procedure of Swedish commercial arbitration and related ADR

Regarding the practice and procedure for filing and the conduct of proceedings before any evidentiary hearing or final determination in Sweden, the impact of the pandemic has been noticeable in the use of electronic filing; proceedings leading up to a hearing and the final award have to an even greater extent been carried out by means of Skype or similar services.

As to the practice and procedure for conducting evidentiary hearings in Sweden, it is noticeable that parties have more and more opted for virtual options to conduct hearings.

As to the cost of any changes to the practice and procedure of commercial arbitration resulting from the pandemic in Sweden, the cost of travel has gone down, while at the same time many virtual alternatives to a physical hearing carry a cost.

Accelerated use of ICT in Swedish arbitration and its impact

It is clear that the situation with the pandemic has not only increased the number of online services available but, most importantly, has also increased the willingness of parties to use such services.

As to the technology used, including technology standards applied, there has been no change involving mandatory standards or similar. However, as the need and interest has increased, more sophisticated technical solutions have been presented.

As to data security and confidentiality of ICT, the increased interest has meant that more sophisticated options have become available. In such more advanced options, parties can opt for greater security during the proceedings.

As to arbitral institution rules, guidelines and protocols, the Stockholm Chamber of Commerce (SCC) has issued a statement urging parties to keep in mind the option of a virtual hearing, and it has also issued guidelines specifically for conducting such a hearing.

The impact of the use of ICT in Sweden is as follows:

- arbitrators: they have become more open to conducting hearings virtually, even at times urging parties to keep such alternatives in mind;
- counsel: most clearly, their work of preparing proceedings has become somewhat easier, as travel to meet witnesses, the client and to the hearing itself is no longer necessary at all times;

183 Date at which Swedish law is stated: 1 July 2020.

- witnesses: a person giving testimony has had to be prepared through a virtual meeting, which is perhaps the most noticeable change, as the giving of testimony at a hearing is focused on more than merely the spoken word;
- parties: as with witnesses, representatives for the client have increasingly realised that it is not necessary to hold an in-person meeting in all situations;
- costs: as noted above, overall costs have sunk as the need for in-person meetings has gone down; indeed, clients have realised that meetings, to a large extent, can be carried out virtually;
- approach to preparation: it is done virtually, to a larger extent;
- approach to production of documents: this is unchanged;
- approach to submissions: this is unchanged, save that to an even greater extent these have been filed by means of virtual options;
- timetable of proceedings: technology has given the parties, but even more so, arbitral tribunals, a way to keep to the timetable in a time where physical meetings are not possible; and
- approach to cross-examination: this has likely changed. It is more difficult to cross-examine a witness not appearing in person. My feeling is that counsel have been more reluctant than before to cross-examine witnesses and, as a result, witnesses more frequently than before have not been called at the hearing but replaced in their entirety by written witness statements. This, in turn, has led to a speedier process, which is preferable. However, it has also led to a process that relies, to a larger extent, on written documents and, to a lesser extent, on the principle of an oral hearing.

Most interesting innovation

The most interesting innovation in practice and procedure arising from the pandemic has been the more advanced options for virtual hearings. For example, in a joint initiative to support online proceedings during the pandemic, the SCC and Thomson Reuters have offered the SCC Platform to ad hoc arbitration free of charge for any ad hoc arbitration commenced during the Covid-19 outbreak. Any ad hoc arbitration registered by 31 December 2020 will have all fees waived in relation to the use of the platform.

Also, in the wake of delays caused in public courts by the pandemic, several experienced dispute resolution lawyers have established the 'Arbitration Tribunal Alternative' to relieve the courts and to give the parties in dispositive civil cases an opportunity for quick settlement in online proceedings.

Does Swedish law expressly provide for (1) ODR; (2) delivery of awards online; and/or (3) online enforcement?

The Swedish Arbitration Act (Lag om Skiljeförfarande or the 'Act') contains no provisions regarding ODR. Instead, it is up to the parties to decide the form of the proceeding; although, Section 24 of the Act provides that an oral hearing rather than document-only litigation is to be conducted if a party requires it and if the parties have not agreed otherwise.

Furthermore, while the Act does provide that the award be made available to the parties immediately, it is a requirement that can be fulfilled by sending it to the parties. In practice, it is very common that the award is sent by email to the parties, or that it is made available by means of a virtual data room.

Swedish law does not provide for online enforcement.

Does Swedish law expressly permit 'document-only' arbitration

Under the Swedish Arbitration Act, the parties may decide that the arbitral tribunal is to decide the case merely on the written material. However, if the parties have not agreed otherwise, and a party demands an oral hearing, such a hearing must be held. It should thereto be noted that the provision under the Act is non-mandatory and may be amended by the parties' agreement.

Does Swedish law require physical or in-person hearings

As has been described above, the Swedish Arbitration Act contains a provision stating that an oral hearing is to be conducted in some cases. It does not state if such an oral hearing as required by it must be physical; in Swedish legal literature, most writers are of the opinion that a videoconference is sufficient to satisfy the requirements of the act. Either way, the parties are free to agree to a virtual hearing.

No legislation concerning the conduct of arbitration during the pandemic

No laws have been enacted in Sweden concerning the conduct of arbitration during the pandemic.

SCC's procedural guidelines in response to the pandemic

In response to the pandemic, the SCC has issued guidelines. In summary, the SCC urges parties to keep in mind the alternative of a virtual hearing, reminding them that proceedings are expected to be carried out as planned. Further, the guidelines stress that there are no changes in how proceedings under the SCC Rules are managed.

No substantive changes to Swedish laws

There have been no express changes to the substantive laws of Sweden in response to the pandemic.

However, the impact of the pandemic on the economy of most sectors of Swedish industry has led to an increased number of companies defaulting on their payment obligations.

The pandemic has also caused an increased number of companies to enter into insolvency proceedings. In April 2020, some 880 companies entered into such proceedings, compared to 667 companies during the same month in 2019; an increase of 32 per cent.

Other observations

While the pandemic has shown the possibilities of technology in arbitral proceedings, it has also shown that not all meetings in person may be replaced with virtual meetings, for example, meetings with witnesses.

MENA

Egypt – a civil law jurisdiction:[184] *Mohamed S Abdel Wahab, Zulficar & Partners Law Firm, Cairo*

Egypt is a civil law jurisdiction and the principles of Islamic Sharia constitute the main source of legislation as per Article 2 of the 2014 Egyptian Constitution as amended in 2019.

Impact of the pandemic on practice and procedure of commercial arbitration and related ADR in Egypt

At the outset, there were no significant changes to the practice and procedure of commercial arbitration in Egypt resulting from the pandemic, other than an accelerated access to and use of ICT, especially with respect to virtual hearings. However, owing to the measures taken by the Egyptian state during the pandemic, there has been postponement of hearings and changes made to procedural timetables to the extent warranted in the circumstances. Many arbitration users opted to proceed with their ongoing arbitration cases in the most efficient manner within available (permissible) means and tools.

184 Date at which Egyptian law is stated: 30 July 2020.

Has any legislation been enacted in Egypt concerning the conduct of arbitration during the pandemic?

No legislation has been enacted in Egypt concerning the conduct of arbitration during the pandemic.

Publication of guidance notes by the Cairo Regional Centre for International Commercial Arbitration (CRCICA) to address the impact of the pandemic on arbitration administered under the auspices of the CRCICA in Egypt

Despite the absence of new or specific Covid-19 legislation in relation to arbitration, the leading dispute resolution institution in Egypt, the Cairo Regional Centre for International Commercial Arbitration (CRCICA), has adopted some measures and adapted some of its services in response to the pandemic by offering guidance notes to arbitration users to ensure smooth administration of ongoing proceedings and the filing of new cases.

The CRCICA strongly recommended and encouraged arbitration users to file notices of arbitration, written submissions and exhibits online via email and, to the extent possible, to hold hearings online (in reference to Articles 17.1 and 28.4 of the CRCICA Arbitration Rules granting such authority and possibility to arbitral tribunals). In this respect, physical hearings at the CRCICA premises have been suspended from 20 March until 30 May 2020, that is, during the period of closure of the CRCICA premises. From 31 May 2020, some physical in-person hearings have been held at the CRCICA premises with a minimum number of participants depending on the hearing facilities in use, to ensure safety and physical distancing.

Does Egyptian law expressly provide for (1) ODR; (2) document-only arbitration; and/or (3) physical hearings?

Under Egyptian law, there are no specific regulations or requirements in relation to online proceedings other than the already existing requirements under the Egyptian Arbitration Law No 27 of 1994[185] (EAL) or the applicable institutional arbitration rules.

It is interesting to note that the EAL grants the parties to an arbitration the freedom to determine the conduct of their proceedings, whether by choosing institutional arbitration rules or leaving it in the hands of the arbitral tribunal (Article 25). The EAL expressly provides that the arbitral tribunal may proceed on a 'document-only basis' provided the parties have not agreed otherwise (Article 33). However, if one party requests a hearing, the arbitral tribunal is expected to order one, if so warranted or justified.

185 Egyptian Arbitration Law No 27 of 1994 was issued on 18 April 1994.

Furthermore, the EAL does not provide for a specific manner of conducting hearings, whether online (virtual) or offline (physical). Accordingly, the absence of prohibition to conduct online hearings suffices to enable arbitral tribunals to proceed with an online hearing upon consultation of the parties and after careful consideration of the applicable procedural rules and insofar as the circumstances of the case so warrant.

Impact of the Pandemic on the use of (1) ICT; (2) ODR in Egypt; and (3) conduct of evidentiary hearings

Hitherto, and strictly speaking, no ODR services are on offer in Egypt, no technology specific standards are enacted and no specific data security mechanisms are announced.

While there are still no protocols adopted in Egypt for virtual hearings, the Africa Arbitration Academy Protocol on Virtual Hearings as well as the ICC Guidance Note on the Possible Measures Aimed at Mitigating the Effects of the Pandemic have been flagged as useful texts to consider and apply with respect to the standards and options available to parties, counsel and arbitrators.

In practice, arbitral tribunals are either proceeding: (1) with online hearings; (2) on a document-only basis; (3) with hybrid forms of hearings (physical and virtual or remote); or (4) with a postponement of the hearing until it is physically possible to meet in person.

However, it has been noticed that during the pandemic, participants in an arbitration have been more available owing to the curfew and lockdown measures, which has facilitated the scheduling of virtual arbitration hearings, and most submissions and filings have been made electronically.

As to witnesses and experts, there is no specific requirement for physical presence of both; it is possible to cross-examine witnesses or experts via videoconferencing tools and online platforms. When proceeding with online hearings, the following has been noticed: (1) counsel have proceeded with more focused oral advocacy and cross-examination of witnesses and experts; (2) counsel have made informed choices as to who they wish to cross-examine; and (3) the duration of hearings and cross-examination have been reduced.

Impact on costs

As to the costs of arbitration, these are usually calculated as agreed with the parties in ad hoc proceedings or in accordance with costs schedules included in institutional rules. However, expenses for online hearings have been reduced, to some extent, owing to the absence of travel costs and any hard copy bundle-related costs.

Does Egyptian law permit (1) electronic delivery of awards and/or (2) online enforcement?

The delivery of arbitral awards was slightly delayed during times of lockdown and curfew periods as arbitral awards must be authenticated and cannot be issued or delivered electronically. In the same vein, there are no online enforcement procedures for arbitral awards.

Establishment of ODR services in Egypt

To conclude, it is worth noting that currently there are no specific platforms exclusively offering ODR services in Egypt. However, the Egyptian state is inclined towards creating dedicated ODR services. This has been illustrated by the establishment of the new Egyptian Centre for Voluntary Arbitration and Settlement of Non-Banking Financial Disputes (before the pandemic), which is expected to offer specialised ODR services for financial non-banking disputes arising between partners and shareholders in relation to capital market transactions.

UAE – A HYBRID LEGAL SYSTEM:[186] *HASSAN ARAB, AL TAMIMI & CO, DUBAI*

The UAE has a hybrid legal system. The onshore UAE courts, both at federal and local Emirate levels, follow the civil law tradition, while the Dubai International Financial Centre (DIFC) and Abu Dhabi Global Market (ADGM) courts in the UAE follow the common law tradition.

Impact of the pandemic on dispute resolution in the UAE

Courts

The pandemic has undoubtedly accelerated the use of ICT in the UAE as a result of restrictions on movement. In this regard, the Dubai courts issued Resolution No 30/2020[187] for the postponement of all court hearings at cassation, appeal and first instance from 22 March 2020 to 16 April 2020. All hearings and the filing of new cases are to be conducted electronically. The Abu Dhabi courts issued an administrative decision[188] and provided that all court procedures, court hearings and notary public ratifications shall be done through electronic means, including the filling of new cases.

Arbitration and ADR

This unprecedented global pandemic has had an impact on the manner in which arbitral proceedings, as well as other forms of ADR, have been

186 Date at which UAE law is stated: July 2020.
187 The Dubai Courts by Resolution No (30) of 2020 issued on 17 March 2020.
188 Administrative decision No 61 for 2020.

conducted in the UAE. Such an impact has resulted in having these proceedings conducted for the most part in virtual form.

In line with the measures adopted by the UAE government's efforts to circumvent the spread and impact of Covid-19, the arbitration institutions in the UAE adopted measures and issued press releases and guidance notes to arbitration users to warrant and safeguard the smooth operation of the conduct of the ongoing proceedings and commencement of new proceedings.

Arbitral institutions' publications

Regionally and locally, the DIFC–LCIA Arbitration Centre (DIFC–LCIA) Notice[189] on temporary office closure as precautionary measures during the pandemic urged arbitration users to file all correspondences and written submissions with respect to the pending proceedings, new requests for mediation or arbitration and emergency proceedings to be made electronically.

The Dubai International Arbitration Centre (DIAC) issued a press release [190] on measures during the pandemic, which provided that any new requests for arbitration, including supporting documents, should only be filed electronically and submitted through the institution's website, and any case-related documents in ongoing cases should be submitted by email only.

At the international level, the International Court of Arbitration of the ICC, which has its MENA regional representative office in Abu Dhabi, issued a Guidance Note on Possible Measures aimed at Mitigating the Effects of the Covid-19 Pandemic[191] dated 9 April 2020, which addresses issues relating to the efficiency of arbitral procedure, electronic service, electronic notification of the award, and means and protocol on virtual hearings.

Most of the arbitral institutions in the UAE remained fully operational during the pandemic and all filings and new requests were submitted.

Impact of the pandemic on the use of ODR

Arbitrators and counsel remained generally available during the pandemic. There have been more logistical challenges to arrange for witnesses to appear, particularly during the lockdown, as a result of logistical issues, including accessibility to reliable connection points. There are no material changes regarding the techniques for cross-examination of witnesses and

189 DIFC–LCIA Arbitration Centre Notice dated 8 April 2020.

190 Dubai International Arbitration Centre Press Release dated 26 March 2020.

191 International Court of Arbitration of the ICC Guidance Note dated 9 April 2020 https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possiblemeasures-mitigating-effects-covid-19-english.pdf accessed 5 August 2020.

production of documents. The hearing by the arbitral tribunal is mostly conducted through ODR mechanisms, including virtual hearings, and the use of ICT has been accelerated in the UAE.

'In-person' hearings and 'document-only' arbitration under the UAE Arbitration Law

Pursuant to Article 33 of UAE Federal Law No 6 of 2018 on Arbitration (the 'UAE Arbitration Law') regulates the conduct of hearings as well as arbitration proceedings conducted on a document-only basis. Article 33(2) of the UAE Arbitration Law provides that arbitral tribunals shall decide whether to hold oral hearings for the presentation of evidence or whether the proceedings shall be conducted on the basis of documents and other materials, provided that parties have not agreed otherwise.[192] The arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party. The UAE Arbitration Law expressly provides that hearings may be held through modern means of communication without the physical presence of the parties at the hearing. The arbitral tribunal shall give the parties sufficient advance notice of any hearings.

Online service of awards and enforcement

Under the UAE Arbitration Law, the arbitral tribunals shall notify the parties of the award by communicating to each party, an original or a copy of the arbitral award within 15 days from the date of issue of the award (Article 44). Hard copy delivery of the award is taking more time during lockdown as a result of restrictions on movement.

There is no provision for the online enforcement of awards under the Arbitration Law that is a matter regulated under the civil procedures framework.

Impact on costs

While, generally, virtual proceedings tend to be more cost effective, the costs of online proceedings depend on the technology used and charges imposed by institutions (if any) and third-party service providers. The majority of online platforms in the UAE are operated by third-party providers; however, it is noteworthy that these platforms should comply with international standards. Certain online platforms are not available in the UAE.

Confidentiality

Parties are obliged to observe confidentiality obligations under UAE Arbitration law and applicable arbitration rules. Article 33 of the UAE

192 Art 19.1 of the DIFC-LCIA Arbitration Rules 2016; Art 25.6 of the Sharjah International Commercial Arbitration Centre Rules provides for document-only arbitration.

Arbitration Law states that arbitral hearings shall be held in camera unless the parties agree otherwise. Arbitrators' awards are confidential and cannot be published in whole or in part except with the written consent of the parties (Article 48).[193]

Legislative framework and protocols

While there have been no changes to the legislative framework of arbitration in the UAE resulting from the pandemic, there have been protocols issued at both the local and regional level by arbitration centres relating to safety measures and guidelines to ensure the smooth operation of the conduct of the ongoing proceedings and filing of new cases.

North America

US – a common law jurisdiction:[194] *Meg Utterback, King & Wood Mallesons, New York*

The 50 US states each have distinct laws; federal law governs many national and international matters to the extent that such matters are within the federal government's powers delegated in the US Constitution.

The impact of the Pandemic on arbitration in the US and ADR

The US has been one of the hardest-hit countries in terms of the number of cases and deaths associated with the pandemic. The executive branch of the federal government elected early in the pandemic to push the bulk of the response to the pandemic to the states to manage. Despite regular and frequent cooperation among some state governors, the effect has been an uncoordinated response that has varied widely from state to state, and even city to city.

Many courts, such as the state courts in New York, limited their operations for a period to only essential filings. By contrast, arbitral institutions moved swiftly to online platforms, including online merits hearings where both parties agreed. Most of the institutions already had robust online filing systems, and tribunals were already accustomed to remote or virtual meetings for administrative matters and non-dispositive motions. In response to the pandemic, dispositive motions, temporary restraining orders (TROs), requests for preliminary injunctions and even merits hearings have moved online.

193 Art 30 of the DIFC–LCIA Arbitration Rules 2016; Art 41 of DIAC Arbitration Rules provides for confidentiality.

194 Date at which US law is stated: 10 July 2020.

For the most part, counsel and clients seem to be acquiescing to online hearings. The institutions have issued online protocols that are then further refined by individual tribunals before the hearing. The guidance provided seeks to ensure the integrity of witness testimony and the process for presenting evidence at hearing. In US arbitration proceedings, the use of depositions is more common than the submission of witness statements. Depositions are taken remotely, usually following document production.

At hearing, there has been no material change to the proceedings arising from being online. Direct and cross-examination are more challenging online due to the limitations of technology, and accommodations are made to address the challenges of the online platform, for example, allowing more time between the question and answer to allow the other side to object.

Commercially available online platforms are generally used, for example, Zoom and Microsoft Teams. The institutions seem to prefer that the parties arrange the facility through court reporting services. Parties pay special attention to the number of connections and the availability of virtual breakout rooms when considering which court reporting service to use.

Tribunals meet virtually to discuss the case and reach a decision. Awards seem to be issued in a timely manner, with the drafting process largely unchanged.

Online mediation is also growing in popularity. Due to the economic stress placed on many disputants by the pandemic, mediation has become a cheaper alternative to finding a resolution for parties that find the costs of arbitration too daunting.

Confidentiality and security

The Federal Arbitration Act, 9 USC ss 1–16, does not contain an express confidentiality requirement for arbitration. Institutions such as the American Arbitration Association (AAA) and JAMS both have rules that empower the tribunal to determine what matters must be kept confidential (AAA Commercial Arbitration Rules, Rule 23; JAMS Comprehensive Arbitration Rules and Procedures, Rule 26(b)). Both institutions also require that the privacy of the hearings be maintained by the arbitrators and the institution and that only those with a direct interest in the proceedings may attend (AAA Commercial Rule 25; JAMS Rule 26(a)).

For purposes of the hearing, the parties and the tribunal decide if and how the proceedings may be recorded, whether by video or only by stenographic means.

Online service of awards and enforcement

Electronic delivery of the award to the parties was standard even before the pandemic.

Recognition and enforcement proceedings are submitted to a court in the state where the losing party has assets. The courts in the states, federal and state, have adopted varying approaches to managing their dockets during the pandemic. Some courthouses have closed entirely, some are open for essential matters only and others remain in full operation. If a court has adopted online proceedings for civil matters, the courts may hear matters relating to enforcement. Depending on the nature of the asset and the courts and authorities involved in the process, the actual enforcement and seizure may be delayed.

Document-only arbitration

The institutions offer expedited proceedings. For example, the AAA allows proceedings on documents where no party's claim exceeds US$25,000, exclusive of interest, fees and costs (AAA Commercial Rule E-6). JAMS has a set of Streamlined Arbitration Rules and Procedures where no claim exceeds US$250,000, exclusive of interest, fees and costs. Under both institutions' rules, the parties must agree to proceed based on written submissions only (AAA Commercial Rule E-6; JAMS Streamlined Rule 18).

In-person hearings

In-person hearings are not mandated by the Federal Arbitration Act or the institutional rules. The institutions have adopted online merits hearings. An online hearing will not be set if one or both parties object to it. Many of the institutions are planning to reopen in the autumn if they can manage the complexities of social distancing and other protections against the spread of the pandemic. It remains to be seen when in-person hearings will again return. Parties, counsel and arbitrators are acclimating to online platforms, and, for costs and logistical reasons, some arbitration may continue to be heard through online platforms rather than returning to physical hearing rooms.

Legislation

No specific arbitration-related legislation has been issued on the national level as a result of the pandemic. Many states have adopted rules that require quarantining for two weeks after travelling from one state to another.

Arbitral institutions' publications

The major arbitral institutions operating in the US are the AAA, JAMS, the International Institution for Conflict Prevention and Resolution (CPR)

and the ICC. Each has published Covid-19 pandemic guidelines, which can be found as follows:

- AAA: https://go.adr.org/covid-19-resource.html?utm_source=website&utm_medium=featurebox&utm_campaign=website_covid19-resource-adr&_ga=2.227919389.1622464339.1595873589-552712897.1579561215 [accessed 22 September 2020];
- JAMS: www.jamsadr.com/online [accessed 22 September 2020];
- CPR: www.cpradr.org/resource-center/protocols-guidelines/model-procedure-order-remote-video-arbitration-proceedings [accessed 22 September 2020]
- ICC: https://iccwbo.org/media-wall/news-speeches/covid-19-urgent-communication-to-drs-users-arbitrators-and-other-neutrals [accessed 22 September 2020].

South America

BRAZIL – A CIVIL LAW JURISDICTION: [195] *LAURA HELENA PINHEIRO DE OLIVIERA, LP CONSULTORIA, AND SERGIO NELSON, MANNHEIMER, PEREZ E LYRA ADVOGADOS, RIO DE JANEIRO/SÃO PAULO*

As of August 2020, Brazil is the second-most affected country in the world by the pandemic, surpassed only by the US.[196] With its continental size, Brazil is witness to different Covid-19 infection rates, leading to different approaches by the regional authorities on the rules for quarantine. This brings challenges to the functioning of the arbitration institutions during this period.

Brazil is a civil law jurisdiction. For further information on the Brazilian court system, please refer to the Brazilian litigation article.

Changes to Brazilian laws resulting from, or stimulated by, the Pandemic

According to Article 3 of Law No 14.010/2020, which provides for emergency and transitory rules for the period of the pandemic, time-bar periods were suspended from 10 June 2020 to 30 October 2020. Also, there is a bill of law (No 1.397/20) regarding the regulation of insolvency and judicial reorganisation during the pandemic currently being examined by the Brazilian Congress.

Has Brazil enacted legislation concerning the conduct of arbitration during the pandemic?

Brazil has not enacted any specific changes to the Arbitration Law because of the pandemic.

195 Date at which Brazilian law is stated: 10 July 2020.
196 See https://covid19.who.int accessed 5 August 2020.

Does Brazilian law allow 'document-only' arbitration

In general, arbitration procedures in Brazil are anchored on written submission and documental evidence. Although the Brazilian Arbitration Law does not expressly provide for a 'document-only' arbitration, the parties may agree to apply this concept to their procedure.

Impact of the Pandemic on the use of (1) ICT and (2) ODR in arbitration seated in Brazil: costs

In spite of the Brazilian Arbitration Law being silent as to the use of ICT, electronic submission of files and online hearings are allowed, but not obligatory, even though the same are already consolidated practice in this jurisdiction.

The costs involved in having the procedure carried out online will mostly depend on the technology agreed by the parties to be used to such effect, but using it certainly lowers the cost of travel expenses for all parties involved in the procedure.

Arbitral institutions' rules and similar

Most of the main arbitration institutions in Brazil have enacted various acts addressing the impact of the pandemic on proceedings. Major examples are the resolutions[197] put into practice by Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada (Centro de Arbitragem e Mediação Brasil-Canadá or 'CAM-CCBC'), Brazilian Centre for Mediation and Arbitration (Centro Brasileiro de Mediação e Arbitragem (CBMA)), Chamber of Conciliation, Mediation and Arbitration (Câmara de Conciliação, Mediação e Arbitragem (or CIESP/FIESP)) and Chamber of Commercial Mediation and Arbitration – Brazil (Câmara de Mediação e Arbitragem Empresarial – Brasil or 'CAMARB').

As the pandemic is still evolving, we are sure that new resolutions will be enacted in order to cater for any new needs and challenges that may arise during this period. For the sake of consistency, the CAM-CCBC and CBMA's regulations will be used in this article whenever applicable.

Changes to the practice and procedure of the conduct of arbitration in Brazil

Filings

As required by arbitration institutions in Brazil, all filings should now be

197 Please refer to CAM-CCBC's Resolutions No 39/2020 (16 March 2020) and 40/2020 (2 April 2020); CBMA's Resolution No 01/2020 (16 March 2020); FIESP's Resolution Nos 01/2020 (16 March 2020) and 02/2020 (25 March 2020); and CAMARB's Resolution Nos 08/2020 (17 March 2020), 09/2020 (31 March 2020), 10/2020 (14 April 2020) and 13/2020 (22 May 2020).

made via email. The CAM-CCBC has organised an e-document repository, to which all submissions and documents should be uploaded. Online filings, electronic services and electronic notices to the parties are all allowed in Brazil. Any and all notices to the parties shall also be made via email.

Hearings

As of 10 July 2020 all physical hearings were suspended. However, each arbitral tribunal may, on a case-by-case basis, decide on whether to hold online hearings or wait to have a physical hearing. In Brazil, online hearings may be conducted by audio or videoconference, and how to proceed will depend on the arbitral tribunal and the parties' agreement.

Availability of arbitrators, counsel and witnesses

From the start of the pandemic, practitioners have not noticed any changes to the availability of arbitrators, counsel or witnesses. The presentation of submission and the production of documents are currently mostly made in electronic form.

Encouragement of online hearings

One change noticed is that many arbitral tribunals are presently encouraging online hearings. The standard before the pandemic was to use this possibility mainly for the execution of the Terms of Reference.

No impact on time

All this has not been perceived to have impacted negatively on the time taken for the delivery of the decision award.

Online mediation in Brazil

As to the possibility of online mediation, Rio de Janeiro State Court has recently published a resolution allowing for online mediation related to insolvency and judicial reorganisation proceedings. On 17 April 2020, São Paulo State Court published Resolution No 11/20, which establishes a project for online mediation for corporate disputes. The first Brazilian online mediation institution, Mediação On Line,[198] has made its conciliation and mediation platform available at no cost to all bodies of the judiciary in Brazil due to the pandemic. Surfing this wave of online need to resolve conflict, the São Paulo Lawyers Association (Associação de Advogados de São Paulo or AASP),[199] launched its platform for mediation online at the

198 See www.mediacaonline.com accessed 5 August 2020.
199 See www.aasp.org.br accessed 5 August 2020.

beginning of July 2020.

The future

As seen above, even before the pandemic, arbitral procedures carried out in Brazil were already substantially using online tools to fulfil their purpose. Of course, new paths are being discovered and followed, which may lead to more permanent changes to how arbitral procedures look in the future. It seems that some improvements that bring swiftness and easiness to the parties will for sure become the new normal in Brazilian arbitration.

Sub-Saharan Africa

Kenya – a common law jurisdiction:[200] *Ndanga Kamau, Ndanga Kamau Law, The Hague, and Benjamin Ng'eno, Independent Practitioner, Nairobi*

Have there been any changes to the practice and procedure of commercial arbitration and related ADR resulting from the pandemic?

There has been no material change to the practice and procedure for filing and conducting proceedings before any evidentiary hearing or final determination, or for conducting evidentiary hearings in Kenya.

Impact on costs

There has been no material change to the cost of the practice and procedure of commercial arbitration resulting from the pandemic in Kenya, except the elimination of expenses that would otherwise have been incurred for travel and physical hearing facilities.

Has the pandemic accelerated the use of (1) ICT and (2) ODR in Kenya?

The pandemic has accelerated the use of ICT, notably electronic submissions and videoconferencing.

Tribunals, parties and counsel have made use of videoconferencing for case management conferences and evidentiary hearings.

No specific technology standards have been developed or applied. As to data security and confidentiality of (1) ICT and (2) ODR, no specific protocols or standards have been developed or implemented.

Arbitration institutions, rules and similar

200 Date at which the law of Kenya is stated: 30 April 2020.

As to arbitral institution rules, guidelines and protocols, there have been no changes arising from the pandemic.

Impact of the use of ODR in Kenya where used

The impact of ODR in Kenya in cases where parties and tribunals have opted for them is as follows:

- arbitrators: significant impact as tribunals have had to adapt to remote hearings, remote case management conferences, remote deliberations and electronic documents;
- counsel: significant impact as they have had to adapt to remote hearings and filing electronic documents in a context where paper submissions have been the norm;
- witnesses: significant impact as they have had to adapt to giving testimony and being examined remotely;
- parties: significant impact as they have had to adjust to remote proceedings, including limited access to counsel;
- costs: relatively low impact, except where parties, counsel and tribunals have had to acquire equipment to participate in remote hearings;
- approach to preparation: moderate impact as counsel and parties have had to adapt to remote meetings and consultations;
- approach to production of documents: unchanged;
- approach to cross-examination: unchanged;
- approach to submissions: unchanged; and
- timetable of proceedings: moderate impact. The availability of ODR has meant that the arbitral process need not be delayed where remote hearings are agreed or ordered. However, challenges with internet connectivity have had an impact on the smooth running of proceedings.

Does the law of Kenya expressly provide for (1) ODR; (2) delivery of awards online; and/or (3) online enforcement?

The Arbitration Act 1995 (Kenya) does not expressly provide for ODR, delivery of awards online or online enforcement.

Does Kenyan law expressly permit 'document-only' arbitration

Subject to the agreement of parties, section 25(1) of the Arbitration Act, 1995 allows the tribunal to proceed on a document-only basis.

Does Kenyan law require physical or 'in-person' hearings in arbitration

Under Kenyan law an 'in-person' hearing is not mandatory if parties agree that no oral hearing shall be held.

Has any legislation been enacted in Kenya concerning the conduct of arbitration during the pandemic?

There have been no changes to the laws of Kenya concerning the conduct of arbitration during the pandemic.

Were any changes to the laws of Kenya made resulting from the Pandemic?

There have been two changes in the laws of Kenya that have been prompted by the pandemic. First, the Kenyan government waived court filing fees in commercial disputes where the value of the suit does not exceed KES1m (approx. US$10,000).[201] The Kenyan government also reduced the effective rate of VAT from 16 per cent to 14 per cent.[202] These two pandemic-related legislative changes may result in a (marginal) cost reduction of litigation or arbitration proceedings.

Conclusion

As observed in the introduction to this article, as of September 2020, the pandemic has already had a great impact on litigation globally, causing many jurisdictions to conduct proceedings online at least in part, for the first time, and accelerated the use of online proceedings in arbitration and mediation. As of September 2020, the pandemic continues; it is not clear that its impact has peaked nor the extent to which there will be subsequent waves of infection.

Dispute resolution systems will need to continue to adapt and assess their priorities in responding to the pandemic and how best to manage the potential tension between health concerns, parties' access to justice, public access generally and ensuring due process, among other issues. It may be that such adaptation will include an accelerated use of innovative technology, such as artificial intelligence and blockchain, where available resources permit this. There may be a continuing and growing divergence in the extent to which various jurisdictions regard in-person or physical proceedings as being an indispensable aspect of at least part of the conduct of dispute resolution. These are among the issues that DRI will explore in its May 2021 issue.

201 See http://kenyalaw.org/kl/fileadmin/pdfdownloads/LegalNotices/2020/LN59_2020.pdf accessed 5 August 2020.

202 See http://kenyalaw.org/kl/fileadmin/pdfdownloads/LegalNotices/2020/LN35_2020.pdf accessed 5 August 2020.

Schedule 1: Substantive and temporary laws and regulations during the pandemic

Schedule 1 outlines the substantive and temporary laws and regulations passed during the pandemic in the 15 jurisdictions discussed.

Jurisdiction	Substantive and temporary law and regulations during the pandemic (excluding extension/suspension of limitation periods, time bars and deadlines applicable to dispute resolution)	Legislation, regulations and orders
Asia Pacific		
Australia	In all 542 pieces of legislation, orders, directions and regulation in force as at 4 June, 2020, including 175 at a federal level, as to: (1) public health and border control measures and quarantine; (2) bankruptcy threshold increases and debt protection; (3) commercial leases' default relief; (4) directors' relief from potential personal liability for insolvent trading; (5) regulation of electronic witnessing and signing of documents; and (6) reporting deadlines extension under Modern Slavery Act 2018 (Cth)	See the Federal Court of Australia's register of legislative changes[1]
China	Health, tax and quarantine measures	The State Council, National Health Commission, Ministry of Finance, State Taxation Administration and many public organs have issued various laws, regulations and circulars to shed light on the guidance in the fields of health, tax, quarantine measures, etc since the outbreak of the pandemic[2]
Hong Kong SAR	Regulations regarding mandatory quarantine requirements and other health and border measures	Compulsory Quarantine of Certain Persons Arriving at Hong Kong Regulation (Cap 599C)[3]

1 See www.fedcourt.gov.au/covid19/legislation accessed 17 August 2020.

2 Announcement on Relevant Individual Income Tax Policies in Support of Prevention and Control of the Pneumonia Outbreak Caused by Novel Coronavirus, dated 6 February 2020, Chinese version www.gov.cn/zhengce/zhengceku/2020-02/07/content_5475535.htm accessed 30 September 2020; Circular on Effectively Safeguarding the Safety of Medical Personnel and Maintaining Sound Medical Order during the Period for Prevention and Control of Novel Coronavirus Pneumonia (Covid-19), dated 7 February 2020, Chinese version www.gov.cn/zhengce/zhengceku/2020-02/08/content_5476128 .htm accessed 30 September 2020; and Circular of the Joint Prevention and Control Mechanism of the State Council for Covid-19 on Issuing the Guidelines for Epidemic Prevention and Control Measures during the Resumption of Work and Production at Enterprises and Public Institutions dated 21 February 2020, Chinese version www.gov.cn/zhengce/content/2020-02/22/content_5482025.htm accessed 17 August 2020.

3 See www.elegislation.gov.hk/hk/cap599C?xpid=ID_1581054136480_022 accessed 17 August 2020.

Jurisdiction	Substantive and temporary law and regulations during the pandemic (excluding extension/suspension of limitation periods, time bars and deadlines applicable to dispute resolution)	Legislation, regulations and orders
India	Circulars permitting banks and financial institutions to refrain from commencing action for default of loan payments	Covid-19 Regulatory Package by the Reserve Bank of India, dated 23 May 2020[4]
	Raising the threshold amount for initiating insolvency proceeding	Ministry of Corporate Affairs Notification, dated 28 March 2020[5]
	Suspending corporate insolvency resolution filing for six months for debt defaults	Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020[6]
Singapore	Relief for financially distressed businesses including: (1) increased monetary thresholds for corporate insolvency; and (2) extended time period to satisfy a creditor's statutory demand	Article 23, Covid-19 (Temporary Measures) Act 2020 (Singapore)[7]
South Korea	Not applicable	
England and Wales, and Europe		
England and Wales	Measures widening public powers in relation to: (1) the court's ability to order remote proceedings; (2) health protection; (3) changes to taxation and employment rights; (4) requirements for the conduct of businesses; and (5) investigatory and police powers. Following the Coronavirus Act 2020, many regulations have been made to adjust public powers as necessary, such as regulations that place further restrictions on gatherings in certain parts of the North of England	Coronavirus Act 2020[8] Many regulations, eg, the Health Protection (Coronavirus, Restrictions on Gatherings) (North of England) Regulations 2020[9]

4 See https://rbidocs.rbi.org.in/rdocs/notification/PDFs/NT2455D86E6F80D9D4BC29C0DFAA43D76D9A4.PDF accessed 17 August 2020.

5 See www.mca.gov.in/Ministry/pdf/Notification_28032020.pdf accessed 17 August 2020.

6 See https://ibbi.gov.in//uploads/legalframwork/741059f0d8777f311ec76332ced1e9cf.pdf accessed 17 August 2020.

7 Covid-19 (Temporary Measures) Act 2020, Art 23, Modifications to Insolvency, Restructuring and Dissolution Act 2018 https://sso.agc.gov.sg/Act/COVID19TMA2020#pr23-; Covid-19 (Temporary Measures) Act 2020, Art 21, Modifications to Insolvency, Restructuring and Dissolution Act 2018 https://sso.agc.gov.sg/Act/COVID19TMA2020#pr23- accessed 17 August 2020.

8 See www.legislation.gov.uk/ukpga/2020/7/contents/enacted accessed 17 August 2020.

9 Came into force on 5 August 2020 www.legislation.gov.uk/ukpga/2020/7/contents/enacted accessed 17 August 2020.

Jurisdiction	Substantive and temporary law and regulations during the pandemic (excluding extension/suspension of limitation periods, time bars and deadlines applicable to dispute resolution)	Legislation, regulations and orders
	Measures to provide businesses with flexibility to continue trading, such as the introduction of a moratorium to give companies breathing space from their creditors while they seek a rescue	Corporate Insolvency and Governance Act 2020[10]
	Cabinet Office guidance on responsible contractual behaviour during the pandemic	Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the Covid-19 emergency[11]
Germany	Legislative amendments to provide for: (1) debtor's right to defer payments in prescribed circumstances; (2) deferral of repayments of a consumer loan agreement where non-payment due to the pandemic; and (3) suspension of termination of rent and lease agreements for defaults resulting from the pandemic	Section 240 of the Introductory Act to the German Civil Code (Einführungsgesetz zum Bürgerlichen Gesetzbuch or EGBGB) as amended[12]
	Suspension of obligation to file for insolvency according to the German Insolvency Act (InsO) and the German Civil Code (BGB) if the occurrence of insolvency is based on the consequences of the Pandemic and there is a prospect of eliminating existing insolvency	Section 1, sentence 1, of the Covid-19 Insolvency Suspension Act[13]
	Reduction of VAT rates	Second Act on the Implementation of Tax Aid Measures to Overcome the Corona Crisis (Second Corona Tax Assistance Act)[14]
Sweden	Not applicable	
MENA		
Egypt	Facilitating options for different sectors in Egypt in order to mitigate some of the losses sustained by these sectors/individuals. These include permissibility for insolvency relief, upon the merchant's application for dismissal of a request to declare insolvency or restructure their business, resulting from their inability to pay due to the pandemic	Not applicable
UAE	Not applicable	It is expected that an amendment will be made to the bankruptcy law

10 See www.legislation.gov.uk/ukpga/2020/12/contents/enacted accessed 17 August 2020.

11 Published 7 May 2020; updated 30 June 2020; www.gov.uk/government/publications/guidance-on-responsible-contractual-behaviour-in-the-performance-and-enforcement-of-contracts-impacted-by-the-covid-19-emergency accessed 17 August 2020.

12 See www.gesetze-im-internet.de/bgbeg/BJNR006049896.html#BJNR006049896BJNG030206360 accessed 17 August 2020.

13 See www.gesetze-im-internet.de/covinsag/BJNR056910020.html accessed 17 August 2020.

14 See www.bundesfinanzministerium.de/Content/DE/Gesetzestexte/Gesetze_Gesetzesvorhaben/Abteilungen/Abteilung_IV/19_Legislaturperiode/Gesetze_Verordnungen/2020-06-30-Zweites-Corona-Steuerhilfegesetz/4-Verkuendetes-Gesetz.pdf?__blob=publicationFile&v=3 accessed 17 August 2020.

Jurisdiction	Substantive and temporary law and regulations during the pandemic (excluding extension/suspension of limitation periods, time bars and deadlines applicable to dispute resolution)	Legislation, regulations and orders
North America		
United States	Relief for small businesses (where eligible) for business loans used to cover payroll costs, mortgages, utilities and rent costs, Student loan relief	Coronavirus Aid, Relief and Economic Security Act[15]
	Consumer protection measures with respect to foreclosure and collection of civil and criminal debt at a federal and state level	Various legislation, such as CARES Act Relief for Federal Student Loan, Borrowers: CARES Act section 3513 and NY Banking Law section 9-x[16]
	Most states have adopted some form of eviction forbearance for renters	Executive Order on Fighting the Spread of Covid-19 by Providing Assistance to Renters and Homeowners (8 August 2020) New York Covid Rent Relief Programme[17]
South America		
Brazil	Insolvency related bill regarding the regulation of insolvency and judicial reorganisation during the pandemic	Bill (No 1397/20) submitted to Congress
Sub-Saharan Africa		
Kenya	The government reduced the effective rate of VAT from 16% to 14%	Kenya Gazette Supplement No 30 Legal Notice No 35 of 2020[18]
Nigeria	Relief measures affecting payment obligations under Central Bank of Nigeria (CBN) backed facilities including moratorium on payment of principal and reduction of interest rate, Permission given to commercial banks to consider implementation of similar measures	Circular of the CBN dated 16 March 2020[19]

15 See www.govtrack.us/congress/bills/116/hr748/text accessed 17 August 2020.

16 For a detailed list and links to consumer protection legislation, see https://library.nclc.org/major-consumer-protections-announced-response-covid-19 accessed 17 August 2020.

17 See https://library.nclc.org/major-consumer-protections-announced-response-covid-19 accessed 17 August 2020.

18 Issued pursuant to the Value Added Tax Act No 35 of 2013 on 26 March 2020 by Ukur Yatani, Cabinet Secretary for the National Treasury and Planning http://kenyalaw.org/kl/fileadmin/pdfdownloads/LegalNotices/2020/LN35_2020.pdf accessed 17 August 2020.

19 See www.cbn.gov.ng/Out/2020/FPRD/CBN%20POLICY%20MEASURES%20IN%20RESPONSE%20TO%20COVID-19%20OUTBREAK%20AND%20SPILLOVERS.pdf accessed 17 August 2020.

Appendix 1: Litigation

Appendix 1 below outlines the legislation and regulations, court practice directions and guidelines issued in response to the pandemic for litigation and associated ADR in Australia, Brazil, China, Egypt, England and Wales, Germany, Hong Kong SAR, India, Kenya, Nigeria, Singapore, South Korea, Sweden, the UAE and the US.

The information in Appendix 1 has been extracted from the completed questionnaires and summaries submitted by contributors to this article in July 2020.

Jurisdiction	Topics (litigation measures responsive to the pandemic)	Law, regulations and court rules, circulars or guidelines re litigation
Asia Pacific		
Australia	Australian first instance and apex courts have issued procedural rules, protocols and similar to: support safe access to the courts; provide for the safe conduct of civil and criminal trials, both jury trials and judge alone; facilitate further reliance on audio and audiovisual links; and allow broad regulation-making powers.	For details on Commonwealth, state and territory courts please see the websites of courts, bars and law societies, eg, Commonwealth and NSW,[1] Victoria,[2] Queensland,[3] South Australia,[4] Western Australia,[5] Tasmania,[6] Australian Capital Territory[7] and the Northern Territory.[8]

1 New South Wales Bar Association, *Consolidated COVID-19 Guide: Information for Attending Court* https://nswbar.asn.au/uploads/pdf-documents/COVID_Court_Guide.pdf accessed 17 August 2020.

2 The Victorian Bar Incorporated, *Consolidated Guide to Victorian and Commonwealth Courts and Tribunal Responses to COVID-19* www.vicbar.com.au/sites/default/files/Victorian%20Bar's%20Consolidated%20Guide%20to%20Vic%20and%20Cth%20Court%20Responses%20to%20Covid-19%20-%2020200408.pdf accessed 17 August 2020.

3 Bar Association of Queensland, 'COVID-19 Resources' www.qldbar.asn.au/general-news/1037 accessed 17 August 2020.

4 Law Society of South Australia, 'COVID-19 Resources' www.lawsocietysa.asn.au/Public/Lawyers/Practitioner_Support/COVID-19_Resources_page.aspx accessed 17 August 2020.

5 Law Society of Western Australia, COVID-19 Information and Resources www.lawsocietywa.asn.au/covid-19-information-and-resources accessed 17 August 2020.

6 The Law Society of Tasmania, 'COVID-19 State Courts and Tribunals resources' https://lst.org.au/practice-resources/covid-19/state-courts-and-tribunals accessed 17 August 2020.

7 ACT Law Society, 'Coronavirus update for the ACT legal profession' www.actlawsociety.asn.au/article/coronavirus-update-for-the-act-legal-profession accessed 17 August 2020.

8 The Law Society NT, 'COVID-19 outbreak updates' https://lawsocietynt.asn.au/about-lsnt/news-covid-19-updates.html accessed 17 August 2020.

Jurisdiction	Topics (litigation measures responsive to the pandemic)	Law, regulations and court rules, circulars or guidelines re litigation
China	Various legislation or similar, including the Supreme People's Court's judicial interpretations.	The Supreme People's Court issued five circulars between 14 February 2020 and 8 June 2020.[9]
	Extension of time period of action, subject to the court's approval.	Article VII of the Circular of the Supreme People's Court on Issuing the Guiding Opinions (I) on Several Issues concerning the Proper Trial of Civil Cases Related to the Covid-19 Epidemic According to the Law.[10]
	Chinese first instance and international commercial courts' practical guidance on the measures to the Pandemic.	These follow the rules from higher courts or the Chinese Supreme Court.[11]

9 Circular of the Supreme People's Court on Strengthening and Regulating Work on Online Litigation during the Period of Prevention and Control of the Novel Coronavirus Pneumonia (Covid-19) Epidemic (14 February 2020), Chinese version www.court.gov.cn/fabu-xiangqing-220071.html accessed 17 August 2020; Circular of the Supreme People's Court on Issuing the Guiding Opinions (I) on Several Issues concerning the Proper Trial of Civil Cases Related to the Covid-19 Epidemic According to the Law, 16 April 2020, Chinese version www.court.gov.cn/fabu-xiangqing-226241.html accessed 17 August 2020; Circular of the Supreme People's Court on Issuing the Guiding Opinions on Several Issues concerning Law-based and Proper Handling of Enforcement Cases Related to the Covid-19 Epidemic (13 May 2020), Chinese version www.court.gov.cn/fabu-xiangqing-229541.html accessed 17 August 2020; Circular of the Supreme People's Court on Issuing the Guiding Opinions (II) on Several Issues concerning the Proper Trial of Civil Cases Related to the Covid-19 Epidemic According to the Law (15 May 2020), Chinese version www.court.gov.cn/fabu-xiangqing-230181.html accessed 17 August 2020; and Circular of the Supreme People's Court on Issuing the Guiding Opinions (III) on Several Issues concerning the Proper Trial of Civil Cases Related to the Covid-19 Epidemic According to the Law (8 June 2020), Chinese version www.court.gov.cn/fabu-xiangqing-236501.html accessed 17 August 2020.

10 Chinese version www.court.gov.cn/fabu-xiangqing-226241.html accessed 17 August 2020.

11 Eg, the Baoding Intermediate Court has issued the Suggestions on the Implementation of Judicial Guarantee for Enterprises to Resume Work and Production during the Epidemic Prevention and Control Period, Chinese version http://bdzy.hebeicourt.gov.cn/public/detail.php?id=7727 accessed 17 August 2020, in line with the principles in the Circular of the Supreme People's Court on Issuing the Guiding Opinions on Several Issues Concerning Trial of Cases on Disputes over Civil and Commercial Contracts in the Current Situation. Chinese version www.court.gov.cn/fabu-xiangqing-396.html accessed 17 August 2020.

Jurisdiction	Topics (litigation measures responsive to the pandemic)	Law, regulations and court rules, circulars or guidelines re litigation
Hong Kong SAR	The Hong Kong judiciary announced a general adjournment period (GAP), which started on 29 January 2020 and ended on 3 May 2020. It has issued various announcements and similar,[12] including as to the conduct of remote hearings in civil cases.[13]	The Hong Kong judiciary has published more than 40 announcements, guidance notes notifications (containing procedural rules) as of 10 August 2020.[14]
India	Extension of limitation periods for all litigation proceedings and extension of time limits for interim stages.	The Supreme Court of India, vide order dated 23 March 2020 in Suo Motu Writ Petition (Civil) No 3/2020.[15]
	Supreme Court of India's Operating Procedures during the Pandemic.	Supreme Court of India: Standard Operating Procedures, dated 23 March 2020, 15 April 2020, 16 May 2020 and 14 June 2020.
	The Supreme Court of India, and many states' high courts have procedural guidelines to govern electronic filing and hearing of matters, including recording of evidence, by videoconferencing.	Eg, Supreme Court of India Circulars and Notifications;[16] Supreme Court of India, order dated 6 April 2020 in Suo Motu Writ Petition (Civil) No 5/2020;[17] Supreme Court, Guidelines on Functioning of Courts through Videoconferencing during Covid-19 pandemic', dated 6 April 2020;[18] High Court of Karnataka, Rules for Videoconferencing for Courts, 2020;[19] and High Court of Delhi, Videoconferencing Rules, 2020.[20]
	Standard operating procedures for various state courts.	The number of state courts' operating procedures are several, with most high courts and various district courts setting out court-specific procedures.[21]

12 See www.judiciary.hk/en/court_services_facilities/gap_archive.html accessed 17 August 2020.

13 See www.judiciary.hk/en/court_services_facilities/gap_remote_hearing.html accessed 17 August 2020.

14 See www.info.gov.hk/gia/general/202003/25/P2020032500594.htm accessed 17 August 2020. See also www.judiciary.hk/en/court_services_facilities/gap_archive.html and www.judiciary.hk/en/court_services_facilities/gap_announcement.html accessed 17 August 2020.

15 See https://main.sci.gov.in/supremecourt/2020/10787/10787_2020_1_12_21570_Order_23-Mar-2020.pdf accessed 17 August 2020.

16 See https://main.sci.gov.in/pdf/LU/04072020_153040.pdf accessed 17 August 2020.

17 See https://main.sci.gov.in/supremecourt/2020/10853/10853_2020_0_1_21588_Judgement_06-Apr-2020.pdf accessed 17 August 2020.

18 *Ibid.*

19 See www.karnatakajudiciary.kar.nic.in/govtNotifications/egazette-vc-rules-2020-v1.pdf accessed 17 August 2020.

20 See http://delhihighcourt.nic.in/writereaddata/upload/Notification/NotificationFile_ULDC4UVQWZ9.PDF accessed 17 August 2020.

21 See, eg, http://delhihighcourt.nic.in/writereaddata/Upload/PublicNotices/PublicNotice_7ZU2RMCKBLG.PDF;http://tshc.gov.in/documents/admin_2_2020_04_18_21_04_46.pdf and https://karnatakajudiciary.kar.nic.in/noticeBoard/new-sop-hck-24072020-v4.pdf accessed 17 August 2020.

Jurisdiction	Topics (litigation measures responsive to the pandemic)	Law, regulations and court rules, circulars or guidelines re litigation
Singapore	All non-essential and non-urgent matters scheduled for hearings before the state courts and the Supreme Court form 7 April 2020 to 4 May 2020 (extended from 5 May 2020 to 1 June 2020) were adjourned.	Covid-19 Advisory by the State Courts of Singapore: Adjournment of Non-Essential and Non-Urgent Matters From 5 May to 1 June 2020.[22]
	Limitation periods for commencing actions temporarily suspended.	Article 5, the Covid-19 (Temporary Measures) Act 2020 (Singapore).[23]
	Registrar's Circulars regarding the conduct of essential and urgent matters to address the impact of the pandemic on litigation, including use of technology.	The Singapore Courts issued 14 guidelines and circulars between March and June 2020.[24]
	Pilot Asynchronous Court Dispute Resolution hearing by email for all hearings excluding mediation sessions for civil cases and Magistrate's Complaints since 16 March 2020.	Introduced by the state courts.[25]

22 Covid-19 Advisory by the State Courts of Singapore: Adjournment of Non-Essential and Non-Urgent Matters from 5 May to 1 June 2020 www.statecourts.gov.sg/cws/NewsAndEvents/Pages/COVID-19-Advisory-Adjournment-of-Non-Essential-and-Non-Urgent-matters-from-5-May-to-1-June-2020.aspx accessed 17 August 2020.

23 Covid-19 (Temporary Measures) Act 2020, Division 2, Relief measures, Art 5, Temporary relief from actions for inability to perform scheduled contract https://sso.agc.gov.sg/Act/COVID19TMA2020#pr5- accessed 17 August 2020.

24 See, eg, Guidelines by the State Courts of Singapore on Video Conferencing via Zoom (civil cases) www.statecourts.gov.sg/cws/CivilCase/Pages/VidConfZoom.aspx accessed 17 August 2020; Registrar's Circular No 5 of 2020 in the State Courts of the Republic of Singapore, Information on Measures and Other Matters Relating to Covid-19 (Coronavirus Disease 2019) for Court Users and Visitors to the State Courts www.statecourts.gov.sg/cws/Resources/Documents/RC%205%20of%202020.pdf accessed 17 August 2020; Guide by the Supreme Court on the Use of Video Conferencing and Telephone Conferencing and Video Conferencing for Hearings before the Duty Registrar www.supremecourt.gov.sg/docs/default-source/default-document-library/2020-03-27—guide-to-telephone-conferencing-and-video-conferencing11082d0c2d8042478a9434c23af6fdac.pdf accessed 17 August 2020; Registrar's Circular No 3 of 2020 in the Supreme Court of Singapore, Information on Measures and Other Matters Relating to Covid-19 (Coronavirus Disease 2019) for Court Users and Visitors to the Supreme Court www.supremecourt.gov.sg/docs/default-source/module-document/registrarcircular/rc-3-2020—information-on-measures-and-other-matters-relating-to-covid-19-for-court-users-and-visitors-to-the-supreme-court.pdf accessed 17 August 2020; and Registrar's Circular No 8 of 2020 in the Supreme Court of the Republic of Singapore, Court Dress for Open Court Proceedings Conducted Through Live Video or Live Television Link www.supremecourt.gov.sg/docs/default-source/module-document/registrarcircular/rc-8-2020—court-dress-for-open-court-proceedings-conducted-through-live-video-or-live-television-link.pdf accessed 17 August 2020.

25 Registrar's Circular No 2 of 2020 – Updates on Measures Relating to Covid-19 from 7 April to 4 May 2020.

Jurisdiction	Topics (litigation measures responsive to the pandemic)	Law, regulations and court rules, circulars or guidelines re litigation
South Korea	Guidelines for video trials setting out specific procedures for remote interrogation in all litigation and preparatory proceedings in civil litigation.	Korean Supreme Court's Guidelines for Implementation of Remote Video Trials 20 July 2020.[26]
England and Wales, and Europe		
England and Wales	Legislation regarding the courts' power to order online proceedings and to ensure public access to them.	Coronavirus Act 2020[27]
	Discretion of the court to direct that hearings can take place in private in certain circumstances.	Practice Directions 51Y.[28] The England and Wales judiciary and the Courts and Tribunals Service have issued guidance and protocols in relation to the conduct of remote hearing and use of technology and electronic bundles.[29] The England and Wales judiciary has also provided guidance through court judgments addressing the conduct or standards for remote hearings.[30]

26 See www.scourt.go.kr/portal/cboard/rlaw/RLawViewAction.work?pageIndex=1&searchOption=&seqnum=A347DF9F6359C3B8492585AE00334319&gubun=300&searchWord= accessed 17 August 2020.

27 See www.legislation.gov.uk/ukpga/2020/7/contents/enacted accessed 17 August 2020.

28 See www.justice.gov.uk/courts/procedure-rules/civil/rules/part51/practice-direction-51z-stay-of-possession-proceedings,-coronavirus accessed 17 August 2020.

29 Protocol Regarding Remote Hearings (published 26 March 2020, updated 31 March 2020), Judiciary of England and Wales www.judiciary.uk/wp-content/uploads/2020/03/Remote-hearings.Protocol.Civil_.GenerallyApplicableVersion.f-amend-26_03_20-1.pdf accessed 17 August 2020; HMCTS, 'How to join telephone and video hearings during coronavirus (COVID-19) outbreak' (published 8 April 2020, updated 10 July 2020) www.gov.uk/guidance/how-to-join-telephone-and-video-hearings-during-coronavirus-covid-19-outbreak accessed 17 August 2020; HMCTS, 'HMCTS telephone and video hearings during coronavirus outbreak' (published 18 March 2020, updated 30 June 2020) www.gov.uk/guidance/hmcts-telephone-and-video-hearings-during-coronavirus-outbreak accessed 17 August 2020) Courts and Tribunals Judiciary, 'General Guidance on PDF Bundles' www.judiciary.uk/wp-content/uploads/2020/05/GENERAL-GUIDANCE-ON-PDF-BUNDLES-f1-1.pdf accessed 17 August 2020.

30 *Municipio de Mariana v BHP Group plc (formerly BHP Billiton)* [2020] EWHC 928 (TCC), para 24.

Jurisdiction	Topics (litigation measures responsive to the pandemic)	Law, regulations and court rules, circulars or guidelines re litigation
	Temporary Practice Directions under the Civil Procedure Rules have been issued to provide clarity on the private/public nature and recording of virtual hearings, provide for a general stay of proceedings relating to the recovery of the possession of land and amend the rules relating to extensions of time.	Practice Direction 51Y.[31] Practice Direction 51Z.[32] Practice Direction 51ZA.[33]
	All insolvency hearings to be conducted remotely unless otherwise ordered; cancellation and adjournment of insolvency hearings subject to relisting.	Temporary Practice Direction Supporting the Insolvency Practice Direction.[34]
Germany	The courts published general rules regarding distance keeping, access to the courthouse in general and adjournment.	Each court published its own guidelines, eg, see the guidelines published by the German Federal Court of Justice (Bundesgerichtshof) regarding accessing the courthouse.[35] The ministries of law of the respective states (Bundesländer) published guidelines addressing similar issues.[36]
	The government of Schleswig-Holstein drafted an Epidemic Courts Act (not published), which is supposed to apply to all German jurisdictions, except the constitutional jurisdiction. This draft has not been introduced to the Federal Council (Bundesrat), yet.	Media coverage regarding suggested/ drafted Epidemic Courts Act.[37]

31 See https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part51/practice-direction-51y-video-or-audio-hearings-during-coronavirus-pandemic accessed 17 August 2020.

32 See www.justice.gov.uk/courts/procedure-rules/civil/rules/part51/practice-direction-51z-stay-of-possession-proceedings,-coronavirus accessed 17 August 2020.

33 See www.justice.gov.uk/courts/procedure-rules/civil/rules/practice-direction-51za-extension-of-time-limits-and-clarification-of-practice-direction-51y-coronavirus accessed 17 August 2020.

34 See www.judiciary.uk/wp-content/uploads/2020/04/Temporary-IPD-April-2020_.pdf accessed 17 August 2020.

35 See www.bundesgerichtshof.de/DE/Service/Besucherdienst/besucherdienst_node.html accessed 17 August 2020.

36 Eg, see the ministries of North Rhine Westphalia www.justiz.nrw/JM/ministerium/corona/gerichte_sta/index.php accessed 30 September 2020; Hesse: https://justizministerium.hessen.de/presse/pressemitteilung/beitrag-der-hessischen-gerichte-und-staatsanwaltschaften-zur-bekaempfung-der-ausbreitung-des accessed 30 September 2020; and Bavaria: www.justiz.bayern.de/service/corona accessed 17 August 2020.

37 See www.lto.de/recht/justiz/j/justiz-corona-gerichte-epidemie-gesetz-entwurf-video-verhandlung-prozess-schutz-richter accessed 17 August 2020.

Jurisdiction	Topics (litigation measures responsive to the pandemic)	Law, regulations and court rules, circulars or guidelines re litigation
Sweden	The Swedish courts have issued general guidelines in response to the pandemic, suggesting maintenance of safety distances in courts, and other health and safety measures and avoiding unnecessary visits to courts. Swedish courts have offered the possibility to let parties or witnesses participate through video transmission prior to the pandemic. Relevant technical requirements can be found on the websites of the Swedish courts.	Eg, see the website of the Swedish Courts.[38]
MENA		
Egypt	Suspension of limitation periods, time bar periods and procedural deadlines, except for time bars related to pre-trial detention and challenging criminal judgments.	Decree No 1295 of 2020, dated 29 June 2020.
	Minister of Justice Decision in relation to the postponement of all court hearings for two weeks. Decrees issued by the President of the State Council, as extended, to suspend all administrative hearings in the State Council for the prescribed period. Decision of the Supreme Judicial Council on the gradual resumption of court service and precautionary health measures.	Decision by the Minister of Justice, dated 14 March 2020.[39] Decree No 206 of 2020 issued by the President of the State Council, extended by Decree No 252 of 2020, dated 12 April 2020.[40] Decision No 159 of 2020 of the Supreme Judicial Council, dated 13 May 2020.[41]
	Court of Cassation's package of online judicial services and website, including electronic compilation of legal principles and database of ongoing cases, available to litigants, lawyers and judges, and accessible by mobile phone.	Court of Cassation official website.[42]
	[Law enacted prior to the Pandemic to allow conduct of the proceedings before the Economic Courts electronically].	[Law No 146 of 2019 enacted to amend Law No 120 of 2008].
UAE	Dubai Court Decisions of continuation of court services, regulation of virtual hearings of all court cases and remote communication on all matters related to court appointed experts, case management office and enforcement of judgments	Dubai Courts Decision No 33 of 2020. Federal Judiciary Decision No 5 of 2020.

38 Regarding guidelines issued by the Swedish Courts, see www.domstol.se/information-med-anledning-av-coronavirus accessed 17 August 2020. Regarding relevant technical requirements for parties and witnesses participating via video transmission in Swedish Courts, see www.domstol.se/om-sveriges-domstolar/for-professionella-aktorer/video konferens accessed 17 August 2020.

39 See http://alamiria.com/ar-eg/archiving-service/Pages/decision-details.aspx?decisionID=163680 accessed 17 August 2020.

40 See http://gate.ahram.org.eg/News/2395070.aspx accessed 17 August 2020.

41 See https://economyplusme.com/35748 accessed 17 August 2020.

42 See www.cc.gov.eg accessed 17 August 2020.

Jurisdiction	Topics (litigation measures responsive to the pandemic)	Law, regulations and court rules, circulars or guidelines re litigation
North America		
US	Section 15002 of the CARES Act authorises the use of video teleconferencing and telephone conferencing for various criminal cases in particular circumstances. Federal courts have adopted their own rules pursuant to section 15002 of CARES Act, eg, Court of Appeals for the Federal Circuit Advisory providing that all oral arguments telephonically during the Court's May 2020 session.	The CARES Act.[43] Eg, Standing Order published by the Eastern District of Pennsylvania;[44] Advisory issued by Court of Appeals for the Federal Circuit.[45]
	Federal courts generally suspended in-person court proceedings until the end of May, with such restrictions being slowing lifted since June 2020. US federal courts' measures, procedural rules and orders in response to the pandemic are on electronic filing of court documents, electronic service and telephone/online hearings, among other things.	For details see Covid-19 Roundup: Court closures and procedural changes;[46] and Court Orders and Updates During Covid-19 Pandemic.[47] The Supreme Court of the US has made nine announcements, guidance and orders in response to the pandemic to 30 May 2020.[48]

43 See www.whitehouse.gov/presidential-actions/executive-order-fighting-spread-covid-19-providing-assistance-renters-homeowners and https://hcr.ny.gov/RRP accessed 17 August 2020.

44 See www.justice.gov/usao-edpa/page/file/1268756/download accessed 17 August 2020.

45 See www.cafc.uscourts.gov/sites/default/files/announcements/2020/Notice-May2020CourtSession-04212020.pdf accessed 17 August 2020.

46 See www.thomsonreuters.com/content/dam/ewp-m/documents/thomsonreuters/en/pdf/other/covid-19-roundup-court-closures-continue.pdf accessed 17 August 2020.

47 See www.uscourts.gov/about-federal-courts/court-website-links/court-orders-and-updates-during-covid19-pandemic accessed 17 August 2020.

48 See www.supremecourt.gov/announcements/COVID-19.aspx accessed 17 August 2020.

Jurisdiction	Topics (litigation measures responsive to the pandemic)	Law, regulations and court rules, circulars or guidelines re litigation
South America		
Brazil	The Brazilian Superior Court of Justice, state and federal courts have published regulations including as to online hearings.	Brazilian Superior Court of Justice, state and federal courts.[49]
	A number of acts and resolutions were also issued by the National Council of Justice addressing the conduct of litigation during the pandemic. Suspension of procedural deadlines by the National Council of Justice during the period from 19 March to 30 April 2020 (for cases with electronic files) and to 15 May 2020 (for cases with physical files). Each regional court may postpone these suspensions considering regional circumstances.	National Council of Justice Acts and resolutions.[50]
	Suspension of time-bar periods during the period from 10 June to 30 October 2020.	Article 3 of Act No 14.010/2020.[51]

49 Resolution No 663 of 12 March 2020 www.stf.jus.br/arquivo/cms/noticiaPresidenciaStf/anexo/resoluc__a__o_663.pdf.pdf.pdf accessed 30 September 2020; Amendment to Internal Rules No 53 of 18 March 2020 www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/Emenda53.pdf accessed 30 September 2020; Resolution No 670 of 23 March 2020 www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/Resolucao670.pdf accessed 30 September 2020; and Resolution 672 of 26 March 2020 www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/Resolucao672.pdf accessed 17 August 2020.

50 Act No 52 of 12 March 2020 https://atos.cnj.jus.br/files/original222922202003125e6ab7c2e37fb.pdf accessed 30 September 2020; Resolution No 313 of 19 March 2020 https://atos.cnj.jus.br/files/compilado162516202005065eb2e4ec55d06.pdf accessed 30 September 2020; Act No 91 of 22 March 2020 https://static.poder360.com.br/2020/03/CNJ-integra-provimento-91-22mar2020.pdf accessed 30 September 2020; Act No 61 of 31 March 2020 https://atos.cnj.jus.br/files/original221645202004015e8512cda293a.pdf>accessed30September2020;ResolutionNo314of20April2020https://atos.cnj.jus.br/files/original071045202004285ea7d6f57c82e.pdf accessed 30 September 2020; and Resolution No 318 of 7 May 2020 https://atos.cnj.jus.br/files/original165735202005095eb6e0ffbda3a.pdf accessed 17 August 2020.

51 Act No 14.010 of 10 June 2020 www.planalto.gov.br/ccivil_03/_ato2019-2022/2020/lei/L14010.htm accessed 17 August 2020.

Jurisdiction	Topics (litigation measures responsive to the pandemic)	Law, regulations and court rules, circulars or guidelines re litigation
Sub-Saharan Africa		
Kenya	The Kenyan Court of Appeal and the High Court have issued practice notes, practice directions and notices on electronic signatures, filing and service, and use of technology and virtual hearings. The Kenyan judiciary has adopted an e-filing system. The government of Kenya waived court filing fees in commercial disputes where the value of the suit does not exceed KES 1m (approximately US$10,000).	Practice Notes for the conduct of Court business during the global Coronavirus Pandemic.[52] Practice directions for the protection of Judges, Judicial Officers, Judiciary Staff, other Court users and the General Public from the risks associated with the global corona virus Pandemic.[53] Practice note on E-filing of commercial cases to mitigate Covid-19 in the Commercial Justice Sector.[54] Practice Directions on Electronic Case Management.[55] Public Notice to all Litigants and Advocates, Milimani Law Courts and Milimani Commercial courts, Court Standard Operating Procedures during Covid-19 Pandemic.[56] Kenya Gazette Supplement No 48. Legal Notice No 59 of 2020.[57]

52 Issued pursuant to s 13 (2) (a) and (b) of the Court of Appeal (Organisation and Administration) Act, No 28 of 2015 on 21 April 2020 by Justice William Ouko, President, Court of Appeal http://kenyalaw.org/kl/index.php?id=10327 accessed 17 August 2020.

53 Gazette Notice No 3137 issued 20 March 2020 http://kenyalaw.org/kl/index.php?id=10310 accessed 17 August 2020.

54 Issued 16 March 2020 www.kenyalaw.org/kl/fileadmin/pdfdownloads/Practice-note-on-E-filing-of-commercial-cases-to-mitigate-COVID%E2%80%9319-in-the-Commercial-Justice-Sector.pdf accessed 17 August 2020.

55 Gazette Notice No 2357 of 2020 issued 4 March 2020 http://kenyalaw.org/kl/index.php?id=10211 accessed 17 August 2020.

56 See www.kenyalaw.org/kl/fileadmin/pdfdownloads/Court-Processes-During-The-Upscaling-Of-Court-Service-At-Milimani-Law-Courts.Pdf accessed 17 August 2020.

57 Issued pursuant to the Public Finance Management Act No 18 of 2012 on 20 April 2020 by Ukur Yatani, Cabinet Secretary for the National Treasury and Planning http://kenyalaw.org/kl/fileadmin/pdfdownloads/LegalNotices/2020/LN59_2020.pdf accessed 17 August 2020.

Jurisdiction	Topics (litigation measures responsive to the pandemic)	Law, regulations and court rules, circulars or guidelines re litigation
Nigeria	Physical hearings have been suspended save for urgent and time-bound cases, as may be determined by the court. Nigerian court guidelines etc provide for electronic filing, signature, service and notice, and virtual hearings. Decisions of some courts can also be found online.	The various Nigerian courts have released guidelines, circulars and directions for proceedings during the pandemic.[58]
	Suspension of penalty for failure to comply with a procedural deadline.	Eg, Paragraph 5 of the Covid-19 Practice Directions 2020 issued by the Chief Judge, High Court of the Federal Capital Territory.

58 Eg, National Judicial Council, Guidelines for Court Sittings and Related Matters in the Covid-19 Period issued by the National Judicial Council [the highest regulatory body in the Nigerian Judiciary] on 6 May 2020 https://njc.gov.ng/30/news-details accessed 17 August 2020; Federal High Court of Nigeria Practice Directions 2020 for the Covid-19 Period issued by the Federal High Court of Nigeria on 18 May 2020 https://thenigerialawyer.com/wp-content/uploads/2020/05/PRACTICE-DIRECTION-2020-FOR-COVID190001y.pdf accessed 17 August 2020; National Industrial Court of Nigeria Practice Directions and Guidelines for Court Sitting of 2020 issued by the National Industrial Court on 13 May 2020 https://nicnadr.gov.ng/images/nicn-practice-direction.pdf accessed 17 August 2020; High Court of Lagos State, Lagos State Judiciary Remote Hearing of Cases (Covid-19 Pandemic Period) Practice Direction 1 issued on 4 May 2020 and Lagos State Judiciary Remote Hearing of Cases (Covid-19 Pandemic Period) Practice Direction 2 issued on 15 May 2020 by the High Court of Lagos State https://lagosjudiciary.gov.ng/index.html accessed 17 August 2020; and Circular Ref No: NJC/CIR/HOC/II/629 dated 20 March 2020 and Circular Ref No: NJC/CIR/HOC/II/631 dated 23 March 2020, issued by the Chief Justice of Nigeria.

Appendix 2: Arbitration

Appendix 2 outlines the relevant legislation and regulations, and arbitral institutions' guidelines for arbitration and associated ADR issued in response to the pandemic in Australia, Brazil, China Egypt, England and Wales, Germany, Hong Kong SAR, India, Kenya, Nigeria, Singapore, South Korea, Sweden, the UAE and the US.

The information in Appendix 2 has been extracted from the completed questionnaires and summaries submitted by contributors to this article in July 2020.

Jurisdiction	Legislation/ institution	Updates, new measures, rules, protocols, guidelines and circulars
Asia Pacific		
Australia	Australian Centre for International Commercial Arbitration (ACICA)	ACICA Online Arbitration Guidance Note, undated[1] Draft Procedural Order for Use of Online Dispute Resolution Technologies in ACICA Rules Arbitrations, undated[2] Managing the Impact of Covid-19: Use of Arbitration to Mitigate Risk, undated[3] Important Information for ACICA Users – COVID-19 Update, undated[4]
	Australian Disputes Centre (ADC)	Webpage titled Australian Disputes Centre Virtual undated[5]

1 See https://acica.org.au/wp-content/uploads/2020/05/ACICA-Online-Arbitration-Guidance-Note.pdf accessed 17 August 2020.

2 See https://acica.org.au/wp-content/uploads/2016/08/ACICA-online-ADR-procedural-order.pdf accessed 17 August 2020.

3 See https://acica.org.au/wp-content/uploads/2020/04/Managing-the-Impact-of-COVID-19_Use-of-Arbitration-to-Mitigate-Risk.pdf accessed 17 August 2020.

4 See https://acica.org.au/important-information-for-acica-users accessed 17 August 2020.

5 See www.disputescentre.com.au/adc-virtual accessed 17 August 2020.

Jurisdiction	Legislation/ institution	Updates, new measures, rules, protocols, guidelines and circulars
China	Suspension of limitation period for arbitration in labour disputes	Notification of the General Office of the Ministry of Human Resources and Social Security on the Proper Handling of Labor Relations during the Prevention and Control of the Pneumonia Epidemic Caused by the New Coronavirus Infection, dated 24 January 2020
	China International Economic and Trade Arbitration Commission (CIETAC)	Press release – Promotion of Online Arbitration to Effectively Mitigate the Effects of Covid-19 Pandemic-CIETAC Released the Guidelines on Proceeding with Arbitration Actively and Properly during the Covid-19 Pandemic (Trial), dated 28 April 2020[6] Press release – CIETAC launches Guidelines on Proceeding with Arbitration Actively and Properly during the Covid-19 Pandemic (Trial), dated 28 April 2020[7] Press release – Joint Voice of the Main International Arbitration Institutions: Strengthen Cooperation and Coordination, Actively Tackle the Pandemic – CIETAC Joined the Major International Arbitration Institutions to Initiate Statement of 'Arbitration and Covid-19' to Tackle the Pandemic, dated 14 May 2020[8]
	Beijing Arbitration Commission (BAC)	Guidelines – Working Guidelines on Online Hearings of the Beijing Arbitration Commission/Beijing International Arbitration Centre (For Trial Implementation), dated 22 May 2020[9]
	Shanghai International Arbitration Centre (SHIAC)	Notice – Notification of Work Arrangements for Arbitration during Covid-19 Pandemic Outbreak Prevention and Control Period, dated 28 January 2020[10]
	Shenzhen Court of International Arbitration (SCIA)	Notice – Notice on Arbitration Services and Related Matters During the Epidemic Prevention Period, dated 29 January 2020[11] Notice – Notice on Encouraging the Use of Online Arbitration Service, dated 4 February 2020[12] Notice – Special Decision on Reduction of Arbitration Fees, dated 6 February 2020[13]

6 See www.cietac.org.cn/index.php?m=Article&a=show&id=16917&l=en accessed 17 August 2020.
7 See www.cietac.org.cn/index.php?m=Article&a=show&id=16919&l=en accessed 17 August 2020.
8 See www.cietac.org.cn/index.php?m=Article&a=show&id=16961&l=en accessed 17 August 2020.
9 See www.bjac.org.cn/english/news/view?id=3717 accessed 17 August 2020.
10 Chinese version www.shiac.org/SHIAC/news_detail.aspx?id=873 accessed 17 August 2020.
11 See www.scia.com.cn/index.php/En/Index/newsdetail/id/3610.html accessed 17 August 2020.
12 See www.scia.com.cn/index.php/En/Index/newsdetail/id/3612.html accessed 17 August 2020.
13 See www.scia.com.cn/index.php/En/Index/newsdetail/id/3614.html accessed 17 August 2020.

Jurisdiction	Legislation/ institution	Updates, new measures, rules, protocols, guidelines and circulars
Hong Kong SAR	Hong Kong International Arbitration Centre (HKIAC)	Press release – HKIAC Measures and Service Continuity during COVID-19, dated 27 March 2020[14] Precautionary measures at HKIAC in response to Covid-19[15] Press Release – HKIAC Guidelines for Virtual Hearings, dated 15 May 2020[16] HKIAC Guidelines For Virtual Hearings, last updated 14 May 2020[17] Joint Statement of Arbitral Institutions, dated 17 April 2020[18]
	International Chambers of Commerce (ICC)	ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the Covid-19 Pandemic, dated 9 April 2020[19] Urgent Covid-19 message to DRS community, dated 17 March 2020[20] Joint Statement of Arbitral Institutions, dated 17 April 2020[21]
	China International Economic and Trade Arbitration Commission Hong Kong Arbitration Centre (CIETAC HK)	Update on Hearings Arrangement at CIETAC HK, dated 1 February 2020[22] Update on Current Case Administration at CIETAC HK, dated 5 February 2020[23]
	eBRAM International Online Dispute Resolution Centre (eBRAM)	eBRAM Rules for the Covid-19 ODR Scheme[24]
India	Delhi International Arbitration Centre	Guidance Note for Conducting Arbitration Proceedings by Video Conference, wef 8 June 2020[25]
	Maharashtra National Law University Mumbai's Centre for Arbitration and Research	Virtual Arbitrations in India, A Practical Guide[26]

14 See www.hkiac.org/news/hkiac-service-continuity-during-covid-19 accessed 17 August 2020.
15 See www.hkiac.org/content/precautionary-measures-hkiac-response-covid-19 accessed 17 August 2020.
16 See www.hkiac.org/news/hkiac-guidelines-virtual-hearings accessed 17 August 2020.
17 See www.hkiac.org/sites/default/files/ck_filebrowser/HKIAC%20Guidelines%20for%20Virtual%20Hearings_2.pdf accessed 17 August 2020.
18 See https://iccwbo.org/content/uploads/sites/3/2020/04/covid19-joint-statement.pdf accessed 17 August 2020.
19 See https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf accessed 17 August 2020.
20 See https://iccwbo.org/media-wall/news-speeches/covid-19-urgent-communication-to-drs-users-arbitrators-and-other-neutrals accessed 17 August 2020.
21 See https://iccwbo.org/content/uploads/sites/3/2020/04/covid19-joint-statement.pdf accessed 17 August 2020.
22 See www.cietachk.org/portal/newsPage.do?pagePath=\en_US\news\47c3fb37ae218b7f001&type=center accessed 17 August 2020.
23 See www.cietachk.org/portal/newsPage.do?pagePath=\en_US\news\47c3fb37af6eaa7f001&type=center accessed 17 August 2020.
24 See www.ebram.org/download/Covid-19+Rules+(draft).pdf accessed 17 August 2020.
25 See http://dacdelhi.org/DataFiles/CMS/file/guidancenote.pdf accessed 17 August 2020.
26 See http://mnlumumbai.edu.in/pdf/Virtual%20Arbitration%20in%20India,%20CAR%20MNLU%20Mumbai.pdf accessed 21 July 2020.

Jurisdiction	Legislation/ institution	Updates, new measures, rules, protocols, guidelines and circulars
Singapore	Maxwell Chambers	Guidelines – Precautionary measures in response to Novel Coronavirus (Covid-19) outbreak, undated[27]
	Singapore International Arbitration Centre (SIAC)	Maxwell Chambers offers virtual ADR hearing solutions[28] Guidelines 28 May 2020[29]
South Korea	Korean Commercial Arbitration Board (KCAB)	Announcement on COVID-19 Information, dated 16 March 2020[30] Joint Statement on Arbitration and Covid-19 (with CRCICA, DIS, ICC, ICSID, LCIA, MCA, HKIAC, SCC, SIAC, VIAC, IFCAI), dated 16 April 2020[31]

27 See www.maxwellchambers.com/2020/02/13/precautionary-measures-in-response-to-novel-coronavirus-outbreak accessed 1 October 2020; see also www.maxwellchambers.com/2020/06/24/hybrid-and-virtual-hearings accessed 17 August 2020.

28 See www.maxwellchambers.com/2020/02/18/maxwell-chambers-offers-virtual-adr-hearing-solutions accessed 17 August 2020.

29 See https://siac.org.sg/images/stories/press_release/2020/ANNOUNCEMENT%20COVID-19%20MEASURES%20AT%20SIAC.pdf accessed 17 August 2020.

30 See Announcement section www.kcabinternational.or.kr [announcement section] accessed 17 August 2020.

31 See New section www.kcabinternational.or.kr [news section] accessed 17 August 2020.

Jurisdiction	Legislation/ institution	Updates, new measures, rules, protocols, guidelines and circulars
England and Wales, and Europe		
England and Wales	London Court of International Arbitration (LCIA)	LCIA Notes for Arbitrators, undated[32] Covid-19 Update: Recalibrating and Resilience – LCIA Continues to Deliver the Highest Quality Services for Users, dated 14 May 2020[33] LCIA Services Update: Covid-19, dated 18 March 2020[34] LCIA Arbitration Rules 2020, effective 1 October 2020[35]
	International Dispute Resolution Centre (IDRC)	IDRC continues closely to monitor the coronavirus emergency, dated 23 June 2020[36] Addendum relating to Covid-19 in IDRC Terms and Conditions (effective 1 July 2020), dated 1 July 2020[37]
	London Maritime Arbitrators Association (LMAA)	Guidelines for the Conduct of Virtual and Semi-Virtual Hearings, dated 9 July 2020[38]
	Chartered Institute of Arbitrators (CIArb)	Guidance Note on Remote Dispute Resolution Proceedings, 2020[39]
	ICC	See above in Hong Kong section.
Germany	German Arbitration Institute (DIS)	Announcement of Particular Procedural Features for the Administration of Arbitrations in View of the Covid-19 Pandemic, dated 31 March 2020, updated 1 July 2020[40]

32 See www.lcia.org/adr-services/lcia-notes-for-arbitrators.aspx#6.4%20Meetings%20and%20hearings accessed 15 July 2020, para 33.

33 See www.lcia.org/News/covid-19-update-recalibrating-and-resilience-lcia-continues-to.aspx accessed 15 July 2020.

34 See www.lcia.org/lcia-services-update-covid-19.aspx accessed 16 July 2020.

35 LCIA Arbitration Rules 2020 www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx accessed 15 August 2020.

36 See www.idrc.co.uk/news-and-events/news/coronavirus-(covid-19)-updated.aspx accessed 15 July 2020.

37 See www.idrc.co.uk/terms-and-conditions.aspx#IDRC accessed 15 July 2020.

38 See www.lmaa.org.uk/uploads/documents/LMAA%20Guidelines%20for%20Virtual%20Hearings%20V1.pdf accessed 15 July 2020.

39 See www.ciarb.org/media/8967/remote-hearings-guidance-note.pdf accessed 15 July 2020.

40 See www.disarb.org/files/veranstaltungen/608/Second%20Edition%20-%20DIS%20Announcement%20Particular%20Procedural%20Features%20Covid-19.pdf accessed 17 August 2020.

Jurisdiction	Legislation/ institution	Updates, new measures, rules, protocols, guidelines and circulars
Sweden	Arbitration Institute of the Stockholm Chamber of Commerce (SCC)	Joint initiative between the SCC and Thomson Reuters to offer the SCC Platform to ad hoc arbitrations for free for prescribed period, updated 23 April 2020[41] SCC's Covid-19: Information and guidance in SCC arbitrations, updated 27 March 2020[42] Covid-19: How the SCC is responding, last updated 18 March 2020[43] SCC refers parties to a 'Checklist on Holding Hearings in COVID 19 Times' published by Delos, an arbitration institute based in London[44] Stockholm International Hearing Centre's launch of a virtual platform for digital hearings[45]
MENA		
Egypt	Cairo Regional Centre for International Commercial Arbitration (CRCICA)	CRCICA's Response to Covid-19 Situation: Message to Users, dated 20 March 2020 Update: CRCICA Further Measures and Services during Covid 19, dated 31 March 2020 Update: CRCICA Further Measures and Services during Covid-19, dated 10 April 2020 Update: Covid-19 measures during the month of Ramadan, dated 25 April 2020 Update: CRCICA Further Measures and Services during Covid-19, dated 30 May 2020
UAE	DIFC-LCIA Arbitration Centre	Notice on temporary office closure, dated 8 April 2020
	ICC	See above in Hong Kong section
	Dubai International Arbitration Centre	Press release – Measures during Covid-19, dated 26 March 2020[46]

41 See https://sccinstitute.com/scc-platform/ad-hoc-platform accessed 17 August 2020.

42 See https://sccinstitute.com/about-the-scc/news/2020/covid-19-information-and-guidance-in-scc-arbitrations accessed 17 August 2020.

43 See https://sccinstitute.com/about-the-scc/news/2020/covid-19-how-the-scc-is-responding accessed 17 August 2020.

44 See https://delosdr.org/index.php/2020/03/12/checklist-on-holding-hearings-in-times-of-covid-19 accessed 17 August 2020.

45 See https://sccinstitute.se/om-scc/nyheter/2020/stockholm-international-hearing-centre-launches-platform-for-virtual-hearings accessed 17 August 2020.

46 See www.diac.ae/idias/resource/Saved.pdf accessed 17 August 2020.

Jurisdiction	Legislation/ institution	Updates, new measures, rules, protocols, guidelines and circulars
North America		
US [Federal]	American Arbitration Association (AAA)	(Various) Guidelines for holding virtual arbitration proceedings[47] Best Practices Guide for maintaining Cybersecurity and Privacy[48]
	International Institute for Conflict Prevention and Resolution (CPR)	ADR in the time of Covid-19[49]
	ICC	See above in Hong Kong section
	JAMS	JAMS Videoconference Guide[50] Virtual ADR & Security – Frequently Asked Questions[51]
South America		
Brazil	Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada (CAM-CCBC)	Administrative Resolution No 39/2020, dated 16 March 2020 and Administrative Resolution No 40/2020, dated 2 April 2020[52]
	Brazilian Centre for Mediation and Arbitration (CBMA)	Resolution No 01/2020, dated 16 March 2020[53]
	Chamber of Conciliation, Mediation and Arbitration (CIESP/FIESP)	Resolution No 01/2020, dated 16 March 2020[54] Resolution No 02/2020, dated 25 March 2020[55]

47 See https://go.adr.org/covid-19-virtual-hearings.html accessed 17 August 2020.

48 See www.adr.org/sites/default/files/document_repository/AAA258_Best_Practices_Cybersecurity_Privacy.pdf accessed 17 August 2020.

49 See www.cpradr.org/resource-center/adr-in-the-time-of-covid-19 accessed 17 August 2020.

50 See www.jamsadr.com/pdf-viewer.aspx?pdf=/files/Uploads/Documents/JAMS-Videoconference-Guide.pdf accessed 17 August 2020.

51 See www.jamsadr.com/faq-virtual-adr accessed 17 August 2020.

52 Resolution No 39/2020 of 16 March 2020 https://ccbc.org.br/cam-ccbc-centro-arbitragem-mediacao/en/ar-39-2020; Resolution No 40/2020 of 02 April 2020 https://ccbc.org.br/cam-ccbc-centro-arbitragem-mediacao/en/ar-40-2020 accessed 17 August 2020.

53 Resolution No 01/2020 of 16 March 2020: www.cbma.com.br/arquivos/anexos/Resolu%C3%A7%C3%A3o_CBMA_n%C2%BA_1.2020_-_Funcionamento%20do%20CBMA%20-%20covid%20-19.pdf accessed 17 August 2020.

54 Resolution No 01/2020 of 16 March 2020 www.camaradearbitragemsp.com.br/pt/res/docs/arbitragem/Resolucao_da_Presidencia_1_de_2020.pdf accessed 17 August 2020.

55 Resolution No 02/2020 of 25 March 2020 www.camaradearbitragemsp.com.br/pt/res/docs/2020_26_03_Resolucao2-Covid-19-Bicolunada.pdf accessed 17 August 2020.

Jurisdiction	Legislation/ institution	Updates, new measures, rules, protocols, guidelines and circulars
	Chamber of Commercial Mediation and Arbitration - Brazil (CAMARB)	Administrative Resolution No 08/2020, dated 17 March 2020[56] Administrative Resolution No 09/2020, dated 31 March 2020[57] Administrative Resolution No 10/2020, dated 14 April 2020[58] Administrative Resolution No 13/2020, dated 22 May 2020[59]
Sub-Saharan Africa		
Kenya	Not applicable	
Nigeria	CIArb	See above in England & Wales section
	ICC	See above in Hong Kong section
	Lagos Court of Arbitration (LCA)	Note on Remote Hearings – Covid-19 Update
	Africa Arbitration Academy	Protocol on Virtual Hearings in Africa: April 2020[60]
	Lagos Chamber of Commerce International Arbitration Centre (LACIAC)	Working with Covid-19 ADR Initiative to provide online dispute resolution[61]

56 Administrative Resolution No 08/2020 (17 March 2020) http://camarb.com.br/dispute-board-drb-ou-junta-de-consultores/resolucoes-administrativas/resolucao-administrativa-n-08-20/ accessed 17 August 2020.

57 Administrative Resolution No 09/2020 (31 March 2020) http://camarb.com.br/arbitragem/resolucoes-administrativas/resolucao-administrativa-n-09-20 accessed 17 August 2020.

58 Administrative Resolution No 10/2020 (14 April 2020) http://camarb.com.br/arbitragem/resolucoes-administrativas/resolucao-administrativa-n-10-20 accessed 17 August 2020.

59 Administrative Resolution No 13/2020 (22 May 2020) http://camarb.com.br/arbitragem/resolucoes-administrativas/resolucao-administrativa-n-13-20 accessed 17 August 2020.

60 See www.africaarbitrationacademy.org/protocol-virtual-hearings accessed 17 August 2020.

61 See http://cadri.org.ng accessed 17 August 2020.

Appendix 3

Dispute Resolution International is most grateful to the following contributors to this article who have gathered together the information to complete the questionnaires, extracts of which are in Appendices 1 and 2, and/or who compiled the summaries appearing in this article.

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Valuation of Damages in Light of Covid-19

Matthew Hodgson and Fares Nowak*

Introduction

The Covid-19 crisis has caused disruption to trade and commerce on a global scale. As restrictions on movement and social distancing have affected transport, travel and labour supply, the financial impact of the pandemic has been felt by commercial actors around the world and sparked fears of a spike in credit defaults and bankruptcies.[1] At the same time, contract parties have increasingly sought to rely on force majeure, frustration and similar doctrines to suspend or cancel performance of their contractual obligations.[2]

The increased reliance by commercial parties on provisions allowing them to withdraw from their contractual commitments is an early indication that the economic repercussions of Covid-19 may lead to a proliferation

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1 Jamie Smyth, Don Weinland, John Reed and Primrose Riordan, 'Coronavirus Threatens $32tn of Asia Corporate Debt' *Financial Times* (London, 23 March 2020) www.ft.com/content/c1788404-6a64-11ea-800d-da70cff6e4d3 accessed 5 July 2020; and Stephen Morris, George Parker and Daniel Thomas, 'UK Banks Warn 40%–50% of 'Bounce Back' Borrowers Will Default' *Financial Times* (London, 1 June 2020) www.ft.com/content/c1788404-6a64-11ea-800d-da70cff6e4d3 accessed 5 July 2020.

2 See, eg, Sun Yu and Xinning Liu, 'China Issues Record Number of Force Majeure Certificates' *Financial Times* (Beijing, 28 February 2020) www.ft.com/content/bca84ad8-5860-11ea-a528-dd0f971febbc accessed 5 July 2020.

of commercial disputes.[3] This, in turn, suggests that another area of the law may soon assume greater importance – namely, the law of damages in contract. The aim of this article is to address some of the legal difficulties that may arise over the months and years to come.

To this end, several breach-of-contract scenarios will be considered that could, conceivably, arise out of the Covid-19 crisis. Common to these scenarios is the following fact pattern: one party (the defaulting party) commits a breach of contract (whether actual or anticipatory), for which the other party (the injured, or non-defaulting, party) is, in principle, entitled to recover damages. The defaulting party subsequently seeks to rely on certain contingencies materialising *after* the breach of contract but *before* the date of the assessment of damages, arguing that their effect is to reduce the amount of damages recoverable by the injured party. The question that lies at the heart of the discussion can then be expressed in relatively simple terms, as follows: *under what circumstances will the courts take into account events and circumstances occurring after the breach of contract to reduce, eliminate or increase the amount of damages recoverable by the injured party?*

In order to set the scene for the discussion, section 2 of this article contains a brief outline of the current state of the law in relation to the time of the assessment of damages. The 'breach date' rule will be introduced, whereby damages should be assessed at the time of breach or of acceptance of a repudiation, followed by a brief summary of the decisions of the House of Lords in *The Golden Victory*,[4] and of the Supreme Court in *Bunge SA v Nidera BV*.[5] The section concludes with a brief summary of the position under Hong Kong and Singapore law, respectively.

Section 3 considers the particular challenges that the Covid-19 crisis may present with respect to the valuation of damages in the law of contract. The key issue that arises concerns the impact on the assessment of damages of events occurring after the contract has been terminated, but before damages are assessed. Such post-termination events can come in a variety of forms and their occurrence can affect the assessment of damages in different ways, depending on the particular circumstances of each case. In the interest of clarity, the various scenarios that may come to the fore in the wake of Covid-19, and the way in which they may have a bearing on the valuation of damages, will be grouped under three headings:

3 See, to this effect, Jane Croft, 'Business Urged to Avoid 'Destructive' Covid-19 Disputes' *Financial Times* (London, May 2020) www.ft.com/content/733a2729-6fd8-4b7a-b0c9-62c593adb289 accessed 5 July 2020, noting concerns that Covid-19 'will trigger a flood of lawsuits against struggling businesses' and citing UK Government guidance warning against the destructive effects of a 'plethora of disputes'.

4 *Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] 2 AC 353.

5 *Bunge SA v Nidera BV (formerly Nidera Handelscompagnie BV)* [2015] Bus LR 987.

1. post-termination events that would have led to termination of the contract had it remained effective – this will be the case, for instance, where it is argued that a supervening event would have triggered a material adverse change or force majeure event;
2. post-termination events that would not have led to termination but would nonetheless have been capable of affecting the value of the parties' respective rights under the contract (eg, through the realisation of a trading profit by a party in connection with the subject matter of the terminated contract); and
3. post-termination events that would not have occurred but for the termination of contract itself (eg, in the form of consequential losses suffered by the non-defaulting party).

While not strictly speaking a separate category of post-termination event in its own right, particular difficulties arise from post-termination events falling outside the parties' contemplation altogether – regardless of which of the above categories they would otherwise fall into – which will therefore also be considered in this section.

From the range of possible scenarios falling within each of these categories, it will be seen that although the principle laid down in *The Golden Victory* and affirmed in *Bunge v Nidera* may in certain circumstances be relevant and applicable, the pandemic highlights several areas of uncertainty in the law.

Valuation of damages in contract: a brief summary

The 'breach date rule'

The starting point under English contract law is the general rule that damages for breach of contract are assessed as at the time of breach[6] (or, in the case of anticipatory breach, the time of its acceptance).[7] This is referred to as the 'breach date rule'.[8] The breach date rule is not absolute,[9] however, and as the courts have subjected it to an increasing number of exceptions over time,[10] they have also adopted different formulations to describe the circumstances in which departure from the prima facie position could be justified.

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6 Hugh Beale, *Chitty on Contracts* (33rd edn, Sweet & Maxwell 2018), paras 26-015 and 26-096; *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443, 468.

7 Eg, see n 4 above, para 57.

8 *Ibid*, para 71.

9 See *Johnson v Agnew* [1980] AC 367, 400–401. See also *Radford v De Froberville* [1977] 1 WLR 1262, 1285, where Oliver J noted that the breach date rule 'is not a universal principle'.

10 See Guenter Treitel, 'Assessment of Damages for Wrongful Repudiation' (2007) 123 Law Quarterly Review 9, 15; see n 4 above, para 33.

> This position has not escaped criticism. It has been observed that:
> '[t]he formulae put forward for departing from the breach date rule are hopelessly vague. According to three leading House of Lords decisions, the breach date rule may be departed from "if to follow it would give rise to injustice", "where it is necessary in order adequately to compensate the plaintiff", or where it is "necessary or just to do so in order to give effect to the compensatory principle". And so, on the conventional approach, judges are presented with an apparently unguided discretion which rests on unspecified concepts of justice and compensation.'[11]

Notwithstanding its perceived shortcomings, the breach date rule remains intact. In *Ageas (UK) Ltd v Kwik-Fit (GB) Ltd*,[12] Popplewell J (as he then was) reiterated the 'prima facie rule' that 'damages are to be assessed at the date of breach and that only events which have occurred at that date can be taken into account'.[13] At the same time, the judge recognised that departure from the prima facie position could be justified where this was necessary to reflect the overriding compensatory principle.[14]

Intuitive though the breach date rule may seem, it is now clear that one category of cases in which courts will depart from the prima facie position is where it must yield to the so-called *compensatory principle*. This refers to the principle that the object of damages is to put the injured party in the same financial position as if the contract had been performed. It has been variably described in the cases as a 'fundamental principle of the common law',[15] an 'uncontroversial proposition',[16] and a principle 'which has been enunciated and applied times without number and is not in doubt'.[17]

The centrality of the compensatory principle to the assessment of damages was highlighted in *The Golden Victory* and *Bunge v Nidera* cases, which merit closer attention.

The Golden Victory

The Golden Victory followed two earlier authorities that addressed the question of whether, for the purposes of assessing recoverable damages, courts may have regard to events occurring after the breach of contract.

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11 Andrew Dyson and Adam Kramer, 'There Is No "Breach Date Rule": Mitigation, Difference in Value and Date of Assessment' (2014) 130 Law Quarterly Review 259, 261. The three House of Lords decisions are, respectively, *Johnson v Agnew* (see n 9 above), *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254 and see n 4 above.

12 [2014] EWHC 2178 (QB).

13 *Ibid*, para 37.

14 *Ibid*, paras 30, 35 and 37.

15 See n 5 above, para 14.

16 See n 12 above, para 30.

17 See n 4 above, para 9; see also para 32.

The first of these authorities was *The Mihalis Angelos.*[18] The case concerned a charterparty, which contained a provision entitling the charterers to cancel the charter if the ship failed to arrive at the loading port by the agreed date. Three days before the agreed date, it was no longer possible for the ship to reach its destination in time. The charterers purported to cancel the contract. The shipowners treated this as a repudiation of the charterparty, which they accepted, and claimed damages. On appeal, the Court of Appeal held that the owners were entitled to nominal damages only. Megaw LJ expressed the ratio of the decision in the following terms: 'If the contractual rights which [the injured party] has lost were capable by the terms of the contract of being rendered either less valuable or valueless in certain events, and if it can be shown that those events were, at the date of acceptance of the repudiation, predestined to happen, then in my view *the damages which he can recover are not more than the true value, if any, of the rights which he has lost, having regard to those predestined events*'[19] [emphasis added].

A similar issue arose in *The Seaflower.*[20] At an initial hearing, it was held that the charterers had repudiated the charterparty during the charter term. The owners sought damages for the remainder of the charter period. Having found that it was 'inevitable' that the charterparty would have come to an end before its due date (on the basis that the shipowners could not have obtained certain contractually mandated approvals), the judge held that their entitlement to damages was limited to the period up until the date on which the contract would have ended.[21]

In *The Golden Victory*, the House of Lords was called upon to decide whether a supervening event that occurred after the breach of contract should be taken into account to reduce the amount of damages recoverable by the non-defaulting party. The supervening event, however, was neither 'predestined' (like the failure of *The Mihalis Angelos* to arrive at the loading port punctually) nor 'inevitable' (as was the case of the owners' inability to obtain the requisite approvals in *The Seaflower*).

The Golden Victory also concerned a charterparty. In December 2001, the charterers repudiated the seven-year charterparty, and the repudiation was accepted by the owners. At the time, the charter had approximately four years left to run. The charterparty contained a provision (loosely described by their Lordships as the 'war clause') that allowed both the charterers and the owners to cancel the charter if war or hostilities should break out between two or more of a number of countries, including the

18 *Maredelanto Cia Naviera SA v Bergbau-Handel GmbH (The Mihalis Angelos)* [1971] 1 QB 164.
19 *Ibid*, 210.
20 *BS&N Ltd (BVI) v Micado Shipping Ltd (Malta) (The Seaflower) (No.2)* [2000] 2 Lloyd's Rep 37.
21 *Ibid*, 44–45.

United States, the United Kingdom and Iraq. In March 2003, the Second Gulf War broke out. It was common ground that the charterers would have exercised their right under the war clause to terminate the charterparty had it remained in force.

During arbitration proceedings, the charterers contended (among other things) that the outbreak of the war placed a temporal limit on the owners' entitlement to damages, with the result that damages were recoverable up until March 2003 only. The owners argued that they were entitled to be compensated on the basis that the charterparty would have continued to run for the entire length of its nominal term. The arbitrator favoured the owners' position but, feeling constrained by authority, reluctantly found in favour of the charterers.

The owners appealed against the award under section 69 of the Arbitration Act 1996. On appeal, the arbitrator's decision was upheld at first instance, before the Court of Appeal, and eventually, by a majority of 3:2, by the House of Lords. Delivering the leading speech for the majority, Lord Scott held that: '[i]f a contract for performance over a period has come to an end by reason of a repudiatory breach but might, if it had remained on foot, have terminated early on the occurrence of a particular event, the chance of that event happening must, it is agreed, be taken into account in an assessment of the damages payable for the breach. *And if it is certain that the event will happen, the damages must be assessed on that footing*'[22] [emphasis added].

Going further, his Lordship considered that to award the owners damages for the period following the frustrating event (namely, the outbreak of war) would offend the overriding compensatory principle based on which contractual damages must be assessed, and on this basis dismissed the appeal.[23]

Lords Bingham and Walker dissented, emphasising in particular the importance of certainty and predictability in commercial transactions.[24] The argument did not sway the majority, however. In the words of Lord Scott, 'considerations of certainty and finality have in this case to yield to the greater importance of achieving an accurate assessment of the damages based on the loss actually incurred'.[25]

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22 See n 4 above, para 9.

23 *Ibid*, paras 35 and 38.

24 *Ibid*, paras 22 and 39.

25 *Ibid*, para 63. Reaching a similar conclusion, Lord Scott stated (at para 38) that '[c]ertainty is a desideratum and a very important one, particularly in commercial contracts. But it is not a principle and must give way to principle… Be that as it may, the compensatory principle that must underlie awards of contractual damages is, in my opinion, clear and requires the appeal in the case to be dismissed.'

Bunge v Nidera

The decisions of the Court of Appeal and of the majority of the House of Lords attracted some criticism.[26] In particular, it was doubted whether the principle laid down by the House of Lords could apply to an anticipatory breach rather than an actual breach of contract.[27]

Nonetheless, *The Golden Victory* was affirmed by a unanimous Supreme Court in *Bunge v Nidera*.

The background facts, insofar as relevant to the present discussion, are broadly analogous to those in *The Golden Victory*. The dispute in this case centred on a contract for a one-off sale of Russian milling wheat. The contract provided a one-week delivery period, and incorporated the terms of the Grain and Feed Trade Association (GAFTA) 49 standard form sale contract. Among other things, GAFTA 49 included a provision (referred to in the judgment as the 'prohibition clause') whereby the contract would be automatically cancelled in the event that a prohibition on export was imposed in the country of origin of the goods.

Less than three weeks before the contractual delivery period was to commence, the Russian government announced an export ban on agricultural products. Following the introduction of the ban, the sellers wrote to the buyers, declaring the contract cancelled. This was treated as a repudiation by the buyers, which they accepted. The matter proceeded to arbitration before GAFTA's first tier tribunal. In relation to damages, the sellers' case was that even if there had been a wrongful repudiation of the contract, the buyers had suffered no loss on the basis that the export ban remained in place throughout the delivery period.

Having found that the sellers' premature cancellation of the contract amounted to a repudiation, the first tier tribunal nonetheless declined to make a substantial damages award, as it considered the contract would in any event have come to an end at the time for delivery. The GAFTA board of appeal overturned the tribunal's decision on damages, instead awarding the buyers the full amount of their claim. The sellers sought and obtained leave to appeal against the award of the GAFTA appeal board under section 69 of

26 See, eg, n 10 above, Treitel; Michael Mustill, 'The Golden Victory – Some Reflections' (2008) 124 Law Quarterly Review 569; Brian Coote, 'Breach, Anticipatory Breach, or the Breach Anticipated?' (2007) 123 Law Quarterly Review 503.

27 See Mustill (n 26 above), 584, expressing the view that, in relation to anticipatory breaches, it is 'inevitable that the valuation of the lost rights should be performed as at the date of the acceptance'. See also Coote (n 26 above), 505. More recently, however, both *The Golden Victory* and *Bunge v Nidera* have been regarded as instances of anticipatory breach by renunciation: see *Classic Maritime Inc v Limbungan Makmur Sdn Bhd* [2019] Bus LR 2854, para 80; *McGregor on Damages* (2nd supp, 20th edn, Sweet & Maxwell 2017), para 10-126.

the Arbitration Act 1996. Their appeal was dismissed at first instance and by the Court of Appeal.

However, the Supreme Court allowed the appeal and awarded the buyers nominal damages in the amount of US$5. The decision of their Lordships confirmed two points that had previously been in doubt:

1. that the principle laid down in *The Golden Victory* applied to an anticipatory breach; and
2. that despite dicta in *The Golden Victory* suggesting the contrary,[28] the compensatory principle applied to contracts for the sale of a single cargo (or 'one-off sales') just as it did to instalment contracts (eg, those for the supply of goods or services over a period of time).[29]

Lord Sumption took the view that while the majority of the House of Lords in *The Golden Victory* were valuing the contractual services that would have been performed had the contract not been repudiated, the minority were valuing the contract itself, assessed at the time it was terminated and adjusted to account for possible or probable outcomes. His lordship preferred the view of the majority.[30] He went on to hold that:

> '*[t]here is no principled reason why, in order to determine the value of the contractual performance which has been lost by the repudiation, one should not consider what would have happened if the repudiation had not occurred.* On the contrary, this seems to be fundamental to any assessment of damages designed to compensate the injured party for the consequences of the breach [...] Commercial certainty is undoubtedly important, although its significance will inevitably vary from one contract to another. But it can rarely be thought to justify an award of substantial damages to someone who has not suffered any'[31] [emphasis added].

Lord Toulson, likewise disagreeing with the minority position in *The Golden Victory*, which required the courts to assess the likelihood as at the time of repudiation of future contingencies, stated that he could see: 'no virtue in such circumstances in the court attempting some form of retrospective assessment of prospective risk when the answer is known. To do so would run counter to the fundamental compensatory principle.'[32]

A separate question that the Supreme Court had to decide concerned a damages clause in the sale contract. The clause provided that in the event of a default by either party, the damages payable would be 'based on' the difference between the contract price and the market price or value of the

28 See n 4 above, paras 34–35.
29 See n 5 above, paras 22, 36 and 87.
30 *Ibid*, para 21.
31 *Ibid*, para 23.
32 *Ibid*, para 86.

goods at the relevant time. Relying on this clause, the buyers argued that it set a minimum level of damages recoverable for breach of contract.

Rejecting the buyers' argument, the Supreme Court held that the damages provision was neither sufficiently comprehensive nor sufficiently clear to be regarded as a 'complete code' on damages. As the clause did not exclude the consideration of post-breach events, it therefore did not exclude the principle identified in *The Golden Victory*.[33]

The position under Hong Kong and Singapore law

Decisions of the House of Lords and Supreme Court are traditionally persuasive if not authoritative in Hong Kong[34] and Singapore,[35] and the courts of both jurisdictions have been receptive of the principle elaborated in *The Golden Victory* and affirmed in *Bunge v Nidera*. However, the principle has not yet been applied by the highest appellate courts – the Court of Final Appeal (CFA) in Hong Kong and the Court of Appeal in Singapore.

Hong Kong

In Hong Kong, *The Golden Victory* was initially followed by the Court of First Instance (CFI) in *Chinluck Properties v Casil Clearing*.[36] The case concerned the failure by a lender to advance the full amounts due by it under a loan agreement, and the relevant post-breach event was 'the Asian Financial Crisis and all that went with it', which would have entitled the lender to demand repayment of the loan.[37] At the time of the decision, *The Golden Victory* had not yet come before the House of Lords, and so the CFI relied on the judgment of Lord Mance in the English Court of Appeal.

33 *Ibid*, paras 27, 31–32, 36 and 61–62.

34 Art 84 of the Basic Law of Hong Kong provides that the courts 'may refer to precedents of other common law jurisdictions'. Referring to this provision, the Court of Final Appeal in *Solicitor (24/07) v Law Society of Hong Kong* [2008] 2 HKLRD 576 considered (at paras 16–17) that it was 'of the greatest importance that the courts in Hong Kong should continue to derive assistance for overseas jurisprudence', and that decisions of the Privy Council and the House of Lords should be 'treated with great respect'. Similarly, the Hong Kong Court of Appeal observed in *SMM v TWM (Child: Relocation)* [2010] 4 HKLRD 37, at para 25, that '[a]fter 1997, the English authorities are no longer binding in Hong Kong but they remain persuasive authorities'.

35 In *AAG v Estate of AAH* [2010] 1 SLR 769, at para 15, the Singapore Court of Appeal noted (in the context of a Singaporean statute that had adopted provisions of an English Act) that 'while the Singapore courts are not bound by the previous English decisions, those decisions are undoubtedly of strong persuasive authority'. To similar effect, the High Court in *Tay Kim Kuan v Public Prosecutor* [2001] 2 SLR(R) 876 stated, at para 10, that it was 'a trite proposition that English cases, while useful and sometimes even highly persuasive, are not technically binding on Singapore'. (Note, however, that on the facts of the case, the court considered reliance on English case law to be misguided.) See also *Loh Siew Keng v Seng Huat Construction Pte Ltd* [1998] SGHC 197, para 221.

36 *Chinluck Properties Ltd & v Casil Clearing Ltd* [2006] HKEC 2328.

37 *Ibid*, paras 33 and 35.

The decision of the House of Lords was applied by the Hong Kong Court of Appeal in *Hong Jing Co Ltd v Zhuhai Kwok Yuen Investment Co Ltd* (in the context of damages for loss of a chance),[38] where the court considered that *The Golden Victory* 'clearly… is a most persuasive authority to be considered'.[39]

The defaulting party subsequently applied to the CFA for leave to appeal on two questions of law, including 'whether in assessing damages for loss of a chance the Court is entitled to take into account its knowledge of what had subsequently occurred'. The CFA noted that the Court of Appeal had considered this question to have been sufficiently clarified in *The Golden Victory*, but nonetheless went on to uphold the defendant's application, on the basis that the ground was 'reasonably arguable'.[40] The dispute did not proceed to the CFA.

While it is possible that the CFA reached its decision on the basis that the question before it concerned the assessment of damages *for loss of a chance*,[41] this is not obvious from the judgment, and as such it may be premature to treat the question as having been settled under Hong Kong law. Further, more recent cases have been less clearly supportive of the application of *The Golden Victory* in Hong Kong. On at least two occasions, courts have relied on dicta of Lord Bingham (who together with Lord Walker formed the minority in *The Golden Victory*) for the proposition that it was possible in *exceptional* circumstances to depart from the breach date rule.[42] In addition, it has been acknowledged by the CFI that *Bunge v Nidera* involved unusual facts.[43] In view of the more recent case law, it remains to be seen whether the rationale of *The Golden Victory* and *Bunge v Nidera* will continue to receive the support of the Hong Kong courts.

SINGAPORE

In Singapore, both *The Golden Victory* and *Bunge v Nidera* have been considered and, to some extent, relied on, though neither decision has

38 [2013] 1 HKLRD 441, paras 90.4 and 96.1.

39 See *Hong Jing Co Ltd v Zhuhai Kwok Yuen Investment Co Ltd* [2012] HKEC 1774, para 3.2(3) (an application for leave to appeal following the Court of Appeal's substantive decision in the proceedings).

40 *Hong Jing Co Ltd v Zhuhai Kwok Yuen Investment Co Ltd* [2013] HKEC 505, paras 9 and 12–13.

41 In the Court of Appeal, Cheung JA had observed that *McGregor on Damages* considered it 'inappropriate to rely on the Bwllfa principle in assessing lost chance', but felt supported in its decision by authorities: see n 40 above, paras 90.3–90.4.

42 See *Huge Treasure Ltd v Jadespring Ltd* [2015] HKEC 212, para 22; *Li Li Hong v Kilmorey International Holdings Ltd* [2020] HKCFI 372, para 54.

43 *Volly Best Investment Ltd v Joinland Holdings Ltd* [2018] HKCFI 1191, para 31. Note, however, that the court was determining what date to use for the assessment of market price, and as such was concerned with Lord Toulson's observations on post-termination market movements at para 80, see n 5 above.

been unequivocally endorsed by the courts in relation to the consideration of post-breach events for the purposes of assessing damages.

In *Swiss Singapore Overseas Enterprises Pte Ltd v Exim Rajathi India Pvt Ltd*, the High Court appeared to consider *The Golden Victory* to be applicable in principle, but declined to apply it on the facts of the case.[44] Noting that the circumstances of *The Golden Victory* were 'very different', the High Court distinguished the decision of the House of Lords on the basis that the case before it concerned a one-off sale and delivery, and – unlike *The Golden Victory* – the contract did not contain a specific provision that provided for early termination on the occurrence of certain events.[45] As has been seen, however, at least the first of these reasons was eventually rejected by the English Supreme Court in *Bunge v Nidera* as a ground for refusing to take into account post-termination events in the assessment of damages.

The Golden Victory was subsequently also relied on by the High Court in *Out of the Box Pte Ltd v Wanin Industries Pte Ltd*.[46] Strictly speaking, the court's reliance on *The Golden Victory* was *obiter*: the court was engaged in the characterisation of a loss allegedly suffered by the plaintiff (ie, the loss of advertising expenses where the product to be advertised ceased to exist), but felt fortified in its conclusion by the decision of the House of Lords.

Following *Swiss Singapore Overseas Enterprises*, both *The Golden Victory* and *Bunge v Nidera* have been applied by the Singapore courts, albeit not on the question of whether recoverable damages should be reduced to reflect the materialisation of contingencies after termination of contract.[47]

In *The 'STX Mumbai'*, the Singapore Court of Appeal finally approved both English decisions.[48] Again, however, the relevant passages of the judgment constitute *obiter* observations; specifically, the High Court was considering whether the doctrine of anticipatory breach could apply in cases involving an executed, as opposed to executory, contract. Nevertheless, it is reasonably clear from the line of cases outlined above that the Singapore courts are prepared in principle to give effect to *The Golden Victory* and *Bunge v Nidera* in appropriate cases.

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44 [2010] 1 SLR 573, para 78.

45 *Ibid.*

46 [2011] SGHC 226, para 21.

47 See *Tembusu Growth Fund Ltd v ACTAtek, Inc* [2018] 4 SLR 1213, para 59 (on mitigation); *Quoine Pte Ltd v B2C2 Ltd* [2020] SGCA(I) 2, para 184 (on certainty in contract). An exception to this is the decision of the District Court in *Sanjeev Sharma v Heng Kiak Wa (trading as Allbest Motoring (formerly known as S-Speed Motoring))* [2017] SGDC 116, para 18.

48 *The 'STX Mumbai' and another matter* [2015] 5 SLR 1, para 69.

Specific issues relating to the valuation of damages in light of Covid-19

Preliminary observations

With the backing of the House of Lords and a unanimous Supreme Court, the principle laid down in *The Golden Victory* and affirmed in *Bunge v Nidera* is now settled law in England.[49] However, there remains some uncertainty as to the range of circumstances in which the principle will be applied by the courts. In this regard, it has been observed that:

> '[t]he position at which we have arrived, therefore, is that although some cases have treated the approach in *The Mihalis Angelos*, *The Golden Victory* and *Bunge SA v Nidera BV* as a general principle, not confined to anticipatory breach, other cases have effectively distinguished that trio on the basis that they concern anticipatory breach; in other cases, the usual measure of damages should not be discounted merely because the performance for which the claimant contracted might not have been provided for reasons other than the claimant's breach.'[50]

The question of whether an event occurring after a breach of contract will be taken into account in the valuation of damages will therefore be likely to continue to create fertile ground for argument. Against the background of tumultuous stock markets, central bank rate cuts, falling commodity prices and international travel grinding to a near complete halt, the importance of this question is likely to increase in the aftermath of the Covid-19 pandemic. This section considers some of the legal issues that parties may encounter with respect to damages.

These legal issues are likely to be as relevant to Hong Kong and Singapore law as they are to English law: as seen above, *The Golden Victory* and *Bunge v Nidera* have, in one way or another, been followed by the courts in both jurisdictions. Further, the valuation of contract damages in both Hong Kong and Singapore follows the overarching compensatory principle.[51] While it remains to be seen to what extent the courts are ready to consider the impact of post-termination events on the valuation of damages, it is likely that at least some of the issues

49 This is not to say that the decisions in *The Golden Victory* and *Bunge v Nidera* have gone without criticism. In particular, it has been argued that both cases in fact misapplied the compensatory principle, which as seen has been a key factor in the reasoning of the courts: see Victor Goldberg, 'After the Golden Victory: Still Lost At Sea', Columbia Law and Economics Working Paper No 523 (2016). Nevertheless, both cases are now firmly established under English law.

50 *McGregor on Damages* (see n 27 above), para 10-126.

51 See, eg, *Volly Best Investment Ltd v Joinland* (see n 43 above), para 17; *Northern Elevator Manufacturing Sdn Bhd v United Engineers (Singapore) Pte Ltd* [2004] 2 SLR(R) 494.

discussed below may fall to be considered in similar form by the Hong Kong and Singapore courts.

It is also important to appreciate that Covid-19 may be relevant to a discussion on damages in more than one way. In the most straightforward of circumstances, the contract may have come to a premature end before the outbreak of the Covid-19, with the outbreak of the pandemic (or its economic fallout) constituting a supervening event for the purposes of assessing damages. Equally possible, however, is a scenario in which the pandemic or its impact on a party caused the early termination of the contract, and a party contends that subsequent events – say, the imposition of travel restrictions – should be taken into account in the assessment of damages.

Supervening events, in turn, may also come in a variety of forms. For instance, measures aimed at curbing the spread of coronavirus (eg, travel restrictions) could give rise to impossibility of performance; the financial impact of Covid-19 could affect the ability of a party to comply with its contractual obligations; or the outbreak of the pandemic could trigger a termination event under the contract, to name but a few examples.

In each case, the analysis must of course start with the terms of the contract itself, which have to be carefully read and construed in light of the factual and commercial context of the transaction. With this in mind, we turn to consider different scenarios that may arise with respect to the assessment of damages in light of the pandemic. For convenience, these scenarios are categorised under three separate headings.

Post-termination[52] events that would have led to termination

The first category concerns cases where the defaulting party, having breached the contract, argues that the damages recoverable by the injured party should be reduced to reflect contingencies that, had the contract remained afoot, would have brought it to an end in any event.

52 As a matter of legal principle, most of the issues discussed in this article do not turn on whether the initial breach of contract led to the termination of the contract: the question is, simply, whether events occurring after the accrual of the cause of action should be taken into account in assessing damages. However, as most of the case law on this issue concerns cases where the contract came to an end as a result of the breach, reference is made to 'post-termination events' as a matter of convenience.

MATERIAL ADVERSE CHANGE AND FORCE MAJEURE

The first question that falls to be considered is whether a defaulting party can rely on the notional[53] occurrence of a material adverse change[54] (MAC) or force majeure event to argue that the now terminated contract would have come to an end prematurely.

In *The Golden Victory* and *Bunge v Nidera*, it was either common ground, or had been established in the lower courts, that the supervening event – namely, the outbreak of war and the imposition of an export ban on agricultural products – would have caused the premature termination of the contract.[55] The question is more complex in a situation where a party seeks to invoke an MAC or force majeure provision in the terminated contract.

In the context of Covid-19, it is entirely conceivable that pandemic-related restrictions could entitle a party to invoke an MAC or force majeure provision under contract.[56] Whether an MAC or force majeure clause has been triggered, however, may not be obvious and depends on the specific drafting of the clause in question. In order to determine whether an MAC or force majeure event has occurred, a court would therefore invariably have to engage in an exercise of contractual construction in order to ascertain the objective meaning of the relevant provision in its documentary, factual and commercial context.[57] By extension, to determine whether an MAC or force majeure event *would have* arisen some time after a repudiatory breach requires the same interpretative exercise, albeit by reference to the hypothetical scenario that the terminated contract had remained in force.

This is not of itself unusual. Even in cases such as *The Golden Victory* and *Bunge v Nidera* the courts would, in principle, have to ascertain whether a supervening event would indeed have produced the effects contended for

53 'Notional', because at the time of the supervening event, the contract would *ex hypothesi* have been terminated.

54 We refer here to a category of contract clauses that allow a party to terminate the contract, or call a default, on the occurrence of specified events that affect another party's ability to perform its contractual obligations while meeting a certain 'materiality' threshold. In a financing context, a distinction is typically drawn between 'material adverse effect' (which describes the requisite degree of materiality), and 'material adverse change' (which typically refers to any event or circumstance that has, or is believed to have, a material adverse effect). No such distinction is drawn for the purposes of the present discussion.

55 See n 4 above, para 28, and n 5 above, paras 52–53.

56 See British Institute of International and Comparative Law, *'Breathing space': Concept Note 2 on the Effect of the 2020 Pandemic on Commercial Contracts* (May 2020) www.biicl.org/documents/10320_concept_note_2_final_1.pdf accessed 5 July 2020, paras 41 and 62.

57 See, eg, *Grupo Hotelero Urvasco SA v Carey Value Added SL (formerly Losan Hotels World Value Added I SL)* [2013] EWHC 1039 (Comm), where the court acknowledged (at para 364) that MAC clauses should be interpreted in accordance with the usual rules of contract interpretation. As to the general approach to contractual construction, see *Chartbrook v Persimmon* [2009] 1 AC 1101, para 14; *Arnold v Britton* [2015] AC 1619, para 15.

by the defaulting party. However, the difficulty is exacerbated where the defaulting party purports to rely on an MAC or force majeure clause (as opposed to a 'war clause' or 'prohibition clause'). Recognising that parties seeking to invoke an MAC clause face no simple task, the High Court noted in *Grupo Hotelero Urvasco SA v Carey Value Added SL* that: 'there is little case law, perhaps reflecting the fact that… the interpretation of such provisions may be uncertain, proof of breach difficult, and the consequences of wrongful invocation by the lender severe, both in terms of reputation, and legal liability to the borrower'.[58]

A further complication is that the way in which MAC and force majeure clauses have been applied by the courts does not readily lend itself to an assessment in the abstract, and yet this is exactly what is required in circumstances where the underlying contract is no longer intact. This can be illustrated by reference to two examples:

1. In order to successfully invoke force majeure, a party must demonstrate that it has taken all reasonable steps to avoid its operation or mitigate its results.[59] Under normal circumstances, this serves as an additional hurdle to reliance on force majeure. Where, by contrast, the contract was no longer effective at the time the alleged force majeure event materialised, it is hard to see how this requirement can operate. To hold nonetheless that the contract *would* have come to an end would be to give the defaulting party the benefit of the doubt, by assuming that it would have satisfied its duty to mitigate. However, as will be discussed below, this is precisely the approach that courts appear to have adopted in the aftermath of *The Golden Victory*.
2. With respect to MAC clauses, it has been held by a Delaware court that such provisions should be construed as applying to events that 'substantially threaten the overall earnings potential' of a party 'in a durationally significant manner'.[60] A defaulting party may rely on this formulation of the test to argue that, had the contract remained alive, the overall earnings potential of the injured party would have been affected by the Covid-19 outbreak in such a way as to trigger an MAC event. The difficulty with this, however, is that the injured party may well be worse off financially – and hence, the impact of the pandemic on its earnings potential may be particularly severe – precisely *because* of the premature termination of contract.

Ultimately, whether a court called upon to assess a damages claim would be prepared to entertain submissions on these and similar issues – and if so,

58 [2013] EWHC 1039 (Comm), para 343.

59 *Channel Island Ferries Ltd v Sealink UK Ltd* [1988] 1 Lloyd's Rep 323, 327.

60 *IBP Inc v Tyson Foods Inc* 789 A2d 14(Del Ch 2001) 65.

how it would resolve them – remains to be seen. What is clear is that the principle established in *The Golden Victory*, taken to its extreme, would require the courts to engage in detailed contractual analysis in relation to hypothetical legal questions.

On the other hand, it is arguable that similar issues could arise on the approach favoured by the minority in *The Golden Victory*. Lord Bingham accepted that 'the value of a contract in the market may be reduced if terminable on an event which the market judges to be likely, but not certain'.[61] One could, for instance, imagine a defaulting party arguing that the occurrence of a certain event was likely at the time of breach, and that its eventual materialisation would have triggered a force majeure event. Here, too, the court would be required to face the unenviable task of applying (or disapplying) concrete legal requirements in a hypothetical scenario.

Crucially, however, the approach of the majority in *The Golden Victory* means that an injured party may now have to come to terms with a reduction in its damages claim on account of events which – when the breach occurred and put an end to the contractual venture – it perceived as neither certain nor likely[62] and quite possibly did not perceive at all.[63] This approach also means that the timing of the legal proceedings will have an effect on damages, and delays in the claim may increase or reduce the recoverable sums substantially. This, of course, is not conducive to certainty: if the legal principles outlined above are difficult to deal with at the time of assessment of damages, that difficulty increases significantly at the time of breach if the application of those principles depends on the materialisation of unlikely events.

Breach by the non-defaulting party

This section addresses the question of whether a defaulting party that has committed an (actual) breach of contract can rely on a hypothetical breach by the injured party in order to reduce the amount of damages payable by the defaulting party.

To state the question in this way is counterintuitive at first sight: surely it would lie ill in the mouth of a defaulting party to argue that the injured party *would* have breached the contract if the defaulting party itself had not? At the same time, to reflect the supervening breach of contract by the injured party appears to be the result mandated by a strict application of

61 See n 4 above, para 22.

62 In *The Golden Victory*, at para 77, Lord Brown considered that the outbreak of war at the time of the repudiation had a 'less than a 50% prospect'.

63 On the question of whether it is necessary for a future contingency to have been in the contemplation of the parties at the time of the breach, see 'Post-termination events outside the parties' contemplation' below.

the compensatory principle: if but for the breach of contract the injured party would not have been in a position to perform its side of the bargain, leading the contract to end before its term, then allowing the injured party to recover damages for the period after the notional breach would entitle it to windfall damages.

The issue assumes particular importance in the context of the Covid-19 crisis. Few sectors and industries have remained unscathed by the economic and financial consequences of the pandemic. As such, it is conceivable that sometime after the breach of contract (and, possibly, as a result of it) the injured party encounters financial difficulties of a degree that would have led it to run foul of its own obligations if the contract had remained afoot.

Reviewing the Court of Appeal's decision in *The Golden Victory*, Professor Treitel specifically contemplated a scenario where the injured party would have failed to perform obligations of its own after the repudiation of contract was accepted. Observing that on acceptance of the repudiation the injured party would be released from its primary obligation to perform, he concluded that: 'The victim's inability to perform after acceptance of the repudiation therefore cannot amount to a breach by the victim and so cannot, even if it would have been a repudiatory breach, had it occurred before the acceptance, provide an ex post facto justification for the repudiation.'[64]

Six years after *The Golden Victory* was decided by the House of Lords, *The Glory Wealth* turned on this very question.[65] The parties had entered into a contract of affreightment for the transport of six coal cargoes annually over a period of three years. An arbitration panel found that the charterers had repudiated the contract and the owners had accepted the repudiation. The charterers argued that as a result of a collapse in the freight market the financial position of the owners had deteriorated such that even if the charterers had performed their obligations, the owners would have failed to provide the required vessels for the last two shipments in the second year of the contract, and for all shipments in the third year.

Applying *The Golden Victory*, Teare J found in favour of the charterers on the issue of damages. In arriving at his conclusion, he gave full effect to the compensatory principle, by holding that:

> 'The innocent party is claiming damages and therefore the burden lies on that party to prove its loss. *That requires it to show that, had there been no repudiation, the innocent party would have been able to perform his obligations under the contract.* If the court were to assume that the innocent party would have been able to perform, rather than to consider what was likely

64 See n 10 above, Treitel, 12.

65 *Flame SA v Glory Wealth Shipping Pte Ltd (The Glory Wealth)* [2014] QB 1080.

> to have happened in the event that there had been no repudiation, the court might well put the innocent party in a better position than he would have been in had the contract been performed… *When assessing what the innocent party would have earned had the contract been performed the court must assume that the party in breach has performed his obligations*'[66] [emphasis added].

The Glory Wealth has been criticised on a number grounds. In particular, it has been noted that Teare J's decision did not address situations in which there was a possibility only of the injured party not performing its obligations (which non-performance, in any event, could only ever be hypothetical), nor cases where the victim's financial difficulty was partly caused by the breach of contract itself.[67] Further, it has been argued that the possible non-performance by one of the parties could have been addressed contractually, for instance, by granting the other party the right to withhold performance of its own obligations.[68]

A noteworthy aspect of *The Glory Wealth* is the assumption that the party in breach would have performed its own obligations under the contract. On one view, this gives the defaulting party the benefit of the doubt in circumstances where the innocent party does not have the same benefit. For instance, it does not matter that the defaulting party would itself have been in similar financial difficulties (as may well be the case in the context of the Covid-19 pandemic) or would have fallen foul of its obligations repeatedly before the injured party at last breached its own. What matters is simply whether the injured party would have been able to uphold its own end of the bargain, by delivering on its contractual promise.

Nonetheless, *The Glory Wealth* appeared to receive the support of Lord Sumption in *Bunge v Nidera*. While not referring to *The Glory Wealth*, his Lordship seemed to see the inability by the injured party to perform its own contractual obligations as an example of a post-termination event that may be taken into account in reduction of damages.[69] At least for the time being, it is therefore likely that a (hypothetical) post-termination breach by the non-defaulting party would be taken into account in the assessment of damages.

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66 *Ibid*, para 85.

67 Edwin Peel, 'Desideratum or Principle: The "Compensatory Principle" Revisited' (2015) 131 Law Quarterly Review 29, 33.

68 Goldberg (see n 50 above), 7–8.

69 See n 5 above, para 16. See also David McLauchlan, 'Repudiatory Breach, Prospective Inability and *The Golden Victory*' [2014] 7 JBL 530, 550.

Post-termination events that would not have led to termination, but would have altered the value of the parties' rights under the contract

This is the second class of contingencies that could affect the valuation of damages for breach of contract. By contrast to the first category, the post-termination events considered below would not necessarily have resulted in the termination of the contract if it had remained effective, but would nonetheless have been capable of affecting the value of the parties' respective rights under the contract.

Fluctuation in market prices

As indicated at the outset of this article, the disruption to global markets caused by the Covid-19 crisis has been far-reaching, affecting virtually all major asset classes and giving rise to one of the most tumultuous periods of stock market trading on record.[70] If a breach of contract has occurred during or before this period of heightened volatility, depending on the time of breach, it is possible that the value of the contract goods or services may have undergone a substantial change between the time of breach and the date of assessment of damages. This raises the obvious question of whether such changes in market price can be taken into account for the purposes of assessing damages.

It has been said that this is a little explored area of the law on damages, and one that can give rise to difficulties.[71] Nevertheless, in the context of damages for breach of contract, it is clear that the normal measure of damages is based on the market value of the contractual property or services at the time of the breach (although there may be exceptions to the general rule, notably where a buyer of goods has made an advance payment of the purchase price).[72] Put differently, the amount of damages recoverable by the injured party is generally not liable to be increased on account of fluctuations in market price.

The general rule that changes in market price are disregarded when damages are assessed has not been affected by the decisions in *The Golden Victory* and *Bunge v Nidera*. In *The Golden Victory*, Lord Brown explained the position thus: '[w]hen market movement can be eliminated from the

70 See Philip Georgiadis, Tommy Stubbington, Joe Rennison, Eva Szalay, Steve Johnson, 'How Coronavirus Tore Through Global Markets in the First Quarter' *Financial Times* (London, 1 April 2020) www.ft.com/content/5f631cce-f75a-41d3-8f62-cff2fe83e90a accessed 5 July 2020; Robin Wigglesworth, 'The Week the World Changed: How a Markets Wobble Turned to Mayhem' *Financial Times* (London, 14 March 2020) www.ft.com/content/86f7f914-6536-11ea-b3f3-fe4680ea68b5 accessed 5 July 2020.

71 *McGregor on Damages* (see n 27 above), paras 20-001, 20-002 and 20-006.

72 *Ibid*, paras 20-002, 20-004 and 20-006.

assessment of damages… it should be (by the breach date rule). But not history; the court need not shut its mind to that.'[73]

In *Bunge v Nidera*, Lord Sumption expressed the same point by distinguishing between two potential questions:

> 'The first question is: assuming that there is an available market, *as at what date is the market price to be determined for the purpose of assessing damages? It is clear that once that date is determined, any subsequent change in the market price is irrelevant…* The second question is: in what if any circumstances will it be relevant to take account of contingencies (other than a change in the market price) if subsequent events show that they would have reduced the value of performance, perhaps to nothing, even without the defaulter's renunciation?'[74] [emphasis added].

With respect to the first question, his Lordship went on to state that where there was an available market for the contract goods, the injured party's duty to mitigate its loss required it to enter into a substitute contract as soon as is reasonable following termination. As such, the relevant market price will generally be determined by reference to the price under the substitute contract.[75]

The upshot of the distinction drawn by their Lordships is that while certain post-termination events relating to the Covid-19 crisis may, in principle, be taken into account to increase or reduce the amount of recoverable damages – such as the imposition of travel restrictions, or the unavailability of specific goods – price fluctuations caused by the pandemic will not produce the same result. However, this is not to say that changes in market price will never be relevant to an assessment of damages; in particular, market movements may lead the injured party to make consequential gains, or incur consequential losses, following the breach of contract. This will be considered in the following section.

BENEFIT PROCURED BY THE NON-DEFAULTING PARTY

Despite the devastating impact of the pandemic on businesses globally, its negative effects have not been universal. Certain industries and market actors have stood to benefit from the new way of life brought about by Covid-19, ranging from Big Tech and biotechnology companies to producers

73 See n 4 above, para 84.

74 See n 5 above, para 16; see also para 80, per Lord Toulson ('The guilty party is not liable to the innocent party for the adverse effect of market changes after the innocent party has had a free choice whether to re-enter the market, nor is the innocent party required to give credit to the guilty party for any subsequent market movement in favour of the innocent party. The speculation which way the market will go is the speculation of the claimant.').

75 *Ibid*, para 17.

of essential consumer goods.[76] Given the asymmetry in the commercial effects produced by Covid-19, it is possible that a non-defaulting party may achieve a trading profit or similar benefit in connection with the subject matter of a terminated contract (but otherwise than by way of mitigation),[77] after the contract has come to an end but before damages are assessed. The question is whether such a post-termination profit or benefit can be taken into account to *reduce* the amount of recoverable damages.

A suitable starting point is the analysis of Professor Treitel, to which reference has been made in preceding sections. With a view to the judgment of the Court of Appeal in *The Golden Victory*, he observed that it might be relevant 'in determining the scope of the decision, that [the war clause] dealt with an event wholly beyond the control of both parties to the contract'.[78]

Professor Treitel was commenting on the fact that Lord Mance had described the uncertainty involved in the war clause as being 'inherent' in the contract.[79] While this formulation was subsequently approved by the Supreme Court in *Bunge v Nidera*,[80] the question of whether post-termination events within the control of a party can be taken into account to reduce recoverable damages does not appear to have been answered by the courts.

Nevertheless, a similar point arises from the first instance decisions in *Ageas (UK) Ltd v Kwik-Fit (GB) Ltd*[81] and *Hut Group Ltd v Nobahar-Cookson*.[82] Each case involved a breach of warranty under a share purchase agreement:

76 See, eg, Robin Wigglesworth, 'How Big Tech Got Even Bigger in the Covid-19 era' *Financial Times* (Oslo, 1 May 2020) www.ft.com/content/d2e09235-b28e-438d-9b55-0e6bab7ac8ec accessed 5 July 2020; Primrose Riordan, 'Biotech Stock Soars on Debut as Coronavirus Fuels Investor Boom' *Financial Times* (Hong Kong, 24 April 2020) www.ft.com/content/ff9eda04-2d50-4dac-af5f-a8878d6aaa80 accessed 5 July 2020; Alistair Gray, 'Dollar Stores Emerge as Winners from Coronavirus Crisis' *Financial Times* (28 May 2020) www.ft.com/content/a72365ef-69ac-41c8-8f54-f9762c65a7ec accessed 5 July 2020; Richard Henderson, 'Consumers Boost Shares of Coronavirus Essentials' *Financial Times* (New York, 6 March 2020) www.ft.com/content/842ea58c-5f34-11ea-8033-fa40a0d65a98 accessed 5 July 2020.

77 For the relevance of post-termination acts amounting to mitigation, see 'Post-termination events that would not have occurred but for the termination' below. No question of mitigation arose in the cases discussed in this section. The question therefore is whether even absent mitigation, post-termination benefits obtained by the injured party can be taken into account in assessing damages by virtue of the compensatory principle.

78 Treitel (see n 10 above), 14.

79 See *Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2006] 1 WLR 533, para 23.

80 See n 5 above, para 23.

81 [2014] EWHC 2178 (QB).

82 [2014] EWHC 3842 (QB).

- In *Ageas v Kwik-Fit*, the breach resulted from an overstatement of the target company's profits and assets due to its accounting treatment of certain bad debts. By the time damages fell to be assessed, it appeared that the actual bad debt figures had turned out to be lower than initially anticipated. The defaulting party relied on this to argue that the damages payable by it should be reduced to reflect this outcome.
- In *Hut Group v Nobahar-Cookson*, the relevant breach concerned a warranty concerning the management accounts of the claimant (as the claimant had issued shares in itself in part consideration for the sale purchase), to which adjustments subsequently had to be made. The claimant contended that the damages recoverable by the defendant should be reduced in light of certain matters occurring following the breach date.[83]

In both cases, the court rejected the argument that the subsequent events relied on by the defaulting party ought to be taken into account to reduce or eliminate the damages recoverable by the injured party, on the ground that those subsequent events were incidences of the *contractual allocation of risk*. In *Ageas v Kwik-Fit*, Popplewell J (as he then was) held that:

> '*…it is important to keep firmly in mind any contractual allocation of risk made by the parties*… It is not therefore sufficient merely that there is a future contingency which plays a part in the assessment. It is necessary to examine whether the eventuation of that contingency represents a risk which has been allocated by the parties as one which should fall on one or other of them. *If the benefit or detriment of the contingency eventuating is a risk which has been allocated to the buyer, it is not appropriate to deprive him of any benefit which in fact ensues*: it is inherent in the bargain that the buyer should receive such benefit'[84] [emphasis added].

Popplewell J went on to find that the supervening event – namely, the level of bad debt – was inextricably tied to the way in which the injured party managed the target company following its acquisition and the external influences on its success, and was subject to the same allocation of risk.[85] Applying the same principle, Blair J found in *Hut Group v Nobahar-Cookson* that following the execution of the share purchase agreement, 'the outcome of all contingencies were risks conferred on the [defendant], which was entitled to the benefits if the business did well'.[86]

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83 What those matters included is not entirely clear. In essence, the claimant appeared to argue that the defendant stood to benefit from the proceeds of any future initial public offering (IPO) of the claimant: *ibid*, paras 213–214.

84 See n 12 above, para 38.

85 *Ibid*, paras 52–53.

86 See n 4 above, para 218.

The contractual allocation of risk might not always reflect whether the matters to which the risk relates are within the parties' control. Nevertheless, the direct upshot of *Ageas v Kwik-Fit* and *Hut Group v Nobahar-Cookson* is that the mere fact that a party achieves certain benefits after the breach of contract and before the assessment of damages does *not* necessarily lead to a reduction in recoverable damages. Instead, this will depend on whether the realisation of a given benefit is a risk that can be said to have been allocated to that party under the contract – if it is, then the measure of damages recoverable by the injured party will be unaffected by the materialisation of the contingency represented by that benefit.

Going back to the scenario outlined at the beginning of this section, it therefore appears that a non-defaulting party may well be entitled to retain the post-breach benefits successfully procured by it during the Covid-19 crisis, provided, however, that the benefit in question corresponds to a risk allocated to the non-defaulting party under the contract. This, in turn, depends on the meaning of the relevant contract terms, objectively understood.

Post-termination events that would not have occurred but for the termination

The third category of post-termination events concerns contingencies that would not have materialised if the contract had not been terminated, and which have affected the amount of the losses suffered by the injured party. This will generally be the case where the injured party has suffered consequential losses as a result of the breach or has realised a profit because of an opportunity to engage in a new activity that would not have arisen but for the breach. In the former case, the supervening event would increase the amount of recoverable damages;[87] in the latter case, it would reduce or eliminate the amount of recoverable damages.

At first sight, there is no principled reason why post-termination events of the kind described above should not be taken into account. On the contrary, the compensatory principle requires the injured party 'so far as money can do it to be placed in the same situation with respect to damages as if the contract had been performed',[88] and if but for the breach, the relevant profit or loss would not have arisen, then it should prima facie be reflected in a damages award.

However, the position is less straightforward than first appears. Crucially, each of the scenarios outlined at the beginning of this section involves

87 As a matter of principle, there are no conceptual difficulties in applying *The Golden Victory* and *Bunge v Nidera* to award an injured party a larger sum by way of damages than it would otherwise have been able to recover. The possibility itself was acknowledged by Lord Brown, see n 4 above, para 84.

88 See n 5 above, para 14, citing *Robinson v Harman* (1848) 1 Exch 850, 855.

the application of ordinary principles of contract law – namely, causation, remoteness and mitigation:

- For damages to be recoverable in respect of a particular loss, it must be shown that there is a *causal connection* between the breach of contract and the injured party's loss. The courts tend to adopt a common sense approach to the question of whether causation is made out, and it has been said that the breach must be the 'effective' or 'dominant' cause of the loss.[89]
- Further, the recoverability of damages is subject to rules on *remoteness*. A particular loss will be too remote unless it was within the parties' reasonable contemplation when they entered into the contract, and the defaulting party can reasonably be regarded as having assumed responsibility for loss of that kind.[90]
- Conversely, not all benefits realised by an injured party following a breach will operate in *mitigation* of damages. For a particular benefit to be used in reduction of damages, there must be a 'sufficiently close link' between the benefit and the breach.[91]

As a matter of general contract law, these principles condition the award of damages to the injured party – namely, through an identification of the losses incurred by the injured party that are recoverable, and a reduction or increase (as applicable) on account of mitigation.

The interplay between the compensatory principle and the principles outlined above came to the fore in *The MTM Hong Kong*.[92] Following the repudiation of a charterparty by the charterers, the owners fixed a substitute charter. The substitute charter was completed several weeks after the original charter would have come to an end. This prevented the vessel from undertaking two subsequent voyages. As a result, the owners claimed lost profits in respect of both the original contract voyage and the two missed voyages. The charterers, in turn, argued that no damages should be recoverable beyond the date on which the original charter would have been completed.

The arbitrators found in favour of the owners, and this was upheld on appeal by the High Court. Having recalled the compensatory principle,

89 *Galoo Ltd v Bright Grahame Murray* [1994] 1 WLR 1360, 1374–1375; see n 6 above, para 26-066.

90 *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2009] 1 AC 61; see n 6 above, paras 26-121 and 26-137.

91 This means that the benefit must have been caused either by the breach of contract or by a successful act of mitigation: see *Fulton Shipping Inc of Panama v Globalia Business Travel SAU (formerly Travelplan SAU) of Spain* [2017] 1 WLR 2581, para 30.

92 *Louis Dreyfus Commodities Suisse SA v MT Maritime Management BV (The MTM Hong Kong)* [2015] 2 CLC 508.

Males J held that: 'there is in general no reason why such loss [ie, something different from loss of the profit which would have been obtained from performance of the repudiated charter] should not be recoverable in damages in addition to damages for loss of the profit from performing the charter, *subject of course to the principles of causation, mitigation and remoteness. On the contrary, failure to award such damages would be contrary to the compensatory principle*'[93] [emphasis added].

On remoteness specifically, Males J considered that there were no findings in the arbitral award to suggest 'that the loss suffered was beyond the reasonable contemplation of the parties'. There was therefore no basis on which to conclude that the charterers had not assumed responsibility for the loss of the owners.[94]

Although the decision in *The MTM Hong Kong* has been criticised for not conducting the remoteness analysis more comprehensively,[95] the case illustrates the limits of the compensatory principle as applied in *The Golden Victory*.

Another illustration of this point is the decision of the High Court in *The Elbrus*,[96] the essential facts of which are analogous to those of *The MTM Hong Kong*. Rather than a loss of profit, this case concerned a *benefit* that the owners obtained by entering into a substitute charterparty at a higher rate than the original charterparty, following its repudiation by the charterers. Once again, the judge acknowledged the compensatory principle.[97] Noting that the owners had secured a benefit as a result of acting in mitigation of their loss (which benefit would not have been conferred on them but for the repudiation of the original charterparty),[98] Teare J held that '[t]he law, in particular the principles relating to mitigation of loss, permits the tribunal to take account of benefits obtained by the Owners as a result of action taken to mitigate their loss'.[99]

The *MTM Hong Kong* and *The Elbrus* usefully highlight that notwithstanding *The Golden Victory* and *Bunge v Nidera*, the measure of damages for breach of contract must depend on established principles of causation, remoteness and mitigation. As pointed out by Professor Treitel, supervening events that reduce the loss suffered

93 *Ibid*, para 61.

94 *Ibid*, paras 74–76.

95 Yihan Goh and Man Yip, 'Unpacking the Compensatory Principle: Causation, Mitigation, Certainty of Loss and Remoteness: *The MTM Hong Kong*' [2016] Lloyd's Maritime and Commercial Law Quarterly 33; see also Elizabeth Blackburn, 'Damaging Revelations: Compensation and Giving Credit Where Credit Is Due' [2017] Lloyd's Maritime and Commercial Law Quarterly 482, 492.

96 *Dalwood Marine Co v Nordana Line SA* [2010] 1 CLC 1 (Comm).

97 *Ibid*, para 32.

98 *Ibid*, paras 33 and 39.

99 *Ibid*, para 45.

by the injured party 'are by no means invariably taken into account in reducing his recoverable damages'.[100]

These cases therefore illustrate that the damages recoverable by a non-defaulting party for breach of contract will not be reduced or increased solely by virtue of the fact that a supervening event has occurred, as the question of whether a supervening event should be taken into account in the assessment of damages is separate to the question of whether a particular loss is of a kind that is recoverable by the injured party.[101] This is evident in cases involving a claim by the injured party for consequential damages (as in *The MTM Hong Kong*), as well as where the injured party can be said to have obtained a benefit as a result of action to mitigate its loss (as in *The Elbrus*).[102]

This, however, gives rise to another important question: assuming a loss suffered by the injured party is recoverable in principle, are there nonetheless any limits on the range of supervening events that will be admissible on an assessment of damages? We now turn to consider this question.

Post-termination events outside the parties' contemplation

In contrast to the previous sections, this section is not concerned with a specific category of post-termination events. Instead, the focus is on those supervening events that do not fit neatly into the parties' contractual risk allocation scheme,[103] and which until their occurrence fell outside the contemplation and control of the parties.

In the context of the Covid-19 crisis, it is likely that a substantial number of cases would fall under this heading. During the first half of 2020, the number of pandemic-related restrictions has grown rapidly, in step with the fast pace at which the pandemic has been spreading. In early June 2020, the extent of the restrictive measures implemented around the world would have been barely conceivable at the start of the year.

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100 Treitel (see n 10 above), 11.

101 This is made clear, eg, in n 5 above, para 17, where Lord Sumption treated the operation of the duty to mitigate as affecting the first of the two questions he identified (namely, 'at what date is the market price to be determined for the purpose of assessing damages?'), rather than the separate question of when it would be appropriate to take into account post-breach events.

102 It is therefore important to appreciate why the principles of causation, remoteness and mitigation were not discussed in the previous sections of this article: the reason is not that these principles would have been inapplicable to particular damages claims, or categories of loss. Rather, in the scenarios considered above, it was assumed that the injured party would have been entitled to recover damages for its loss, subject to the materialisation of a future contingency. *Ex hypothesi*, there were no questions of lack of causation or remoteness, or a failure to mitigate.

103 As to which, see 'Benefit procured by the non-defaulting party' above.

In both *The Golden Victory* and *Bunge v Nidera*, the supervening event on which the defaulting party sought to rely was of a kind specifically contemplated under the contract – namely, the outbreak of war between specified countries (in *The Golden Victory*), and the imposition of a prohibition on exports in the country of origin of the goods (in *Bunge v Nidera*). Further, in both cases the supervening event was, at the time of breach, regarded as a possibility.[104]

Perhaps as a result of these circumstances, the reasoning of the judges in *The Golden Victory* and *Bunge v Nidera* appears to be based – at least in part – on the assumption that the contract was subject to one or more identifiable (albeit uncertain) contingencies, which were or could have been in the parties' contemplation.[105]

However, this raises the important question of whether the approach laid down by their Lordships is limited to cases where the supervening event was reasonably in the contemplation of the parties, either at the time they entered into the contract (ie, if it was specifically catered for on the face of the agreement) or at the time of breach (ie, if as a matter of fact the likelihood of the event occurring was more than *de minimis*). Put differently, is the principle in *The Golden Victory* and *Bunge v Nidera* applicable in circumstances where, at the time of breach of contract, the supervening event was outside the parties' contemplation, and its occurrence therefore unexpected?

It is easy to see why this question is material in the context of the Covid-19 pandemic: so long as a contract was terminated before the outbreak of the pandemic, a defaulting party would be likely to struggle to argue that the extent of its impact was in the parties' contemplation at or before the time of termination.

Whether their Lordships did in fact intend to distinguish between supervening events that can be said to have been contemplated by the parties, and those that are entirely unexpected, is unclear. On the one hand, their reliance on the compensatory principle tends to suggest that it mattered not whether the supervening event was of a kind that could have been in the parties' contemplation: in the words of Lord Scott, 'the damages should represent the value of the contractual benefits of which the claimant had been deprived by the breach of contract, no less but also no more'.[106]

On the other hand, there are several indications that their Lordships were specifically concerned with supervening events that either were considered

104 See n 4 above, paras 54 and 73 (reproducing the findings of the arbitrator to the effect that 'at 17 December 2001, a reasonably well-informed person would have considered war (or large-scale hostilities) between the United States/United Kingdom and Iraq merely a possibility'); see n 5 above, para 85.

105 See, eg, the analyses of Lord Carswell (at paras 59 and 64) and Lord Scott (at paras 74–78), see n 4 above.

106 See n 4 above, para 36.

to be at least possible at the time of breach, or alternatively, constituted an uncertainty 'inherent' in the contract that conditioned the parties' respective rights under it. The following examples illustrate this point:

- Lord Scott himself appeared to draw a distinction between circumstances where there is 'nothing to suggest' that the expected benefit of the contract would not have accrued had the contract remained on foot, and those where there was 'a real possibility that an event would happen terminating the contract, or in some way reducing the contractual benefit' to the injured party.[107]
- In the same case, Lord Carswell considered a submission made on behalf of the charterers to the effect that: 'Where there is a suspensive condition such as a war clause, however, the duration of the charter *was always uncertain*, depending on a contingency of the occurrence of an event which was *by definition within the contemplation of the parties*'[108] [emphasis added].

  His Lordship considered the decisions in *The Mihalis Angelos* and *The Seaflower*, and went on to acknowledge that: '[t]he duration of the charter may in a case such as the present be affected by the contingency of the occurrence of an event *which is in the contemplation of the parties and catered for in the terms of the charterparty*'[109] [emphasis added].
- Approving the judgment of Lord Mance *The Golden Victory*, Lord Sumption in *Bunge v Nidera* observed that: 'the degree of uncertainty involved in that case was no greater than the *uncertainty inherent in the contract itself*. The parties' obligations were always defeasible in the uncertain event of war, just as their obligations under the contract presently in issue *were always defeasible in the uncertain event of an export embargo*'[110] [emphasis added].
- Also in *Bunge v Nidera*, Lord Toulson held that: '[t]he fundamental compensatory principle makes it axiomatic that any method of assessment of damages *must reflect the nature of the bargain which the innocent party has lost as a result of the repudiation*. In this case the bargain was subject to a high risk of cancellation'[111] [emphasis added].
- In so doing, his Lordship appeared to suggest that the correct measure of damages is the value of the contract at the time of breach, reduced to reflect subsequent events *which at that time were perceived to be at risk of occurring*.

As indicated above, it is not possible to extrapolate from the above illustrations a firm conclusion as to what approach to the valuation of damages their Lordships had in mind. However, it is instructive that similar suggestions as to the intended scope of the *The Golden Victory* have been raised in the past:

107 *Ibid*.
108 *Ibid*, para 59.
109 *Ibid*, para 64.
110 See n 5 above, para 23.
111 *Ibid*, para 85.

- Professor Treitel – who was described in *Bunge v Nidera* as the most comprehensive and influential critic of *The Golden Victory*[112] – questioned whether the Court of Appeal[113] in that case had left open the possibility of a different outcome if there had not been a 'significant prospect' of war.[114]
- In *Swiss Singapore Overseas Enterprises*, the Singapore Court of Appeal declined to apply *The Golden Victory* on the facts of the case, on the basis (among other things) that the contract before the House of Lords 'contained a specific provision providing for early termination on the occurrence of certain events'.[115]

Assuming for the sake of argument that a distinction can be drawn between supervening events that were in the parties' contemplation and those that were not, an injured party may potentially resist a reduction of its recoverable damages if, on the facts, the outbreak of the Covid-19 pandemic (or restrictions imposed to contain its spread) was not in the parties' contemplation at the time of the breach. Whether this is the case would depend on at least two factors:

1. *The terms of the MAC or force majeure provision*. It is not uncommon for force majeure provisions to refer expressly to the outbreak of disease, or a pandemic. By contrast, MAC clauses do not typically contain similar references, and in some cases may not be limited to specific causes.[116] Provisions of the former kind would more readily lend themselves to the argument that damages should be reduced.
2. *The time of the breach of contract*. In addition, the timing of the breach may be critical to the question of whether a supervening event can be said to have been in the contemplation of the parties. At the start of the Covid-19 crisis, few would have had in contemplation the disruptions to international trade and commerce that would soon occur. On the other hand, the position might be different if at the time of the breach, travel restrictions had begun to be imposed, particularly those that would prevent performance of the contract, the only contingency being whether the restrictions would be lifted in time for performance. The latter scenario is akin to the situation of the parties in *Bunge v Nidera*.

112 *Ibid*, para 23.

113 Professor Treitel specifically relied on the observation made by Lord Mance to the effect that the possibility of war could be disregarded if, eg, 'damages were being assessed during the original charter period on the basis that there was no significant prospect' of war: *The Golden Victory* (CA) (see n 81 above), para 23. As noted, Lord Sumption in *Bunge v Nidera* approved Lord Mance's judgment to the effect that the supervening event at issue was an uncertainty inherent in the contract.

114 See n 10 above, Treitel, 17.

115 See n 44 above, para 78.

116 See, eg, the standard form leveraged facilities agreement of the Loan Market Association, which provides at clause 29.19 (Material adverse change) that an Event of Default will arise if '[a]ny event or circumstance occurs which the Majority Lenders reasonably believe has or is reasonably likely to have a Material Adverse Effect'.

Conclusion

In view of the far-reaching disruption to global trade and commerce caused by the Covid-19 crisis, it is likely that the coming months and years will see an increase in commercial disputes between parties affected by the pandemic. As more parties encounter liquidity issues and contracts are terminated before the expiry of their terms, the law of contract damages will assume particular importance. Against this background, it is important that commercial parties are able to form accurate estimates of the amount of damages they can expect to recover for breach of contract. The question of the extent to which events occurring after the commission of a breach of contract may be taken into account in the valuation of damages is likely to be contested.

The discussion in this article demonstrates that, although the principle laid down in *The Golden Victory* and affirmed in *Bunge v Nidera* is settled law in England (and has received at least some support in Hong Kong and Singapore), there remain some uncertainties regarding its operation in practice. While in many cases application of the principles is unlikely to be problematic, the Covid-19 pandemic is likely to expose some of the difficulties explored above. In particular, it remains to be seen: (1) how courts will approach the argument that the pandemic would have triggered an MAC or force majeure clause under the terminated contract had termination not occurred; and (2) whether they will be prepared to apply the principle in *The Golden Victory* in cases where the relevant post-termination event was not within the parties' contemplation at the time of breach.

BOOK REVIEW

Setting Up in Business as a Mediator (2nd Edition)
Stephen Walker
Bloomsbury Professional Ltd (2020)
ISBN 9781526511324
408pp
£85 (paperback)

This is the second edition of Stephen Walker's book. The first edition was published in 2015.

This book is especially timely given the current spotlight on the use of mediation to resolve conflicts. As the title depicts, this is a book for anyone wishing to start or develop a practice as a mediator. The book deals with the business aspects of starting, developing and maintaining a commercial mediation practice.

The author is a civil and commercial mediator who has mediated more than 350 fee paying civil and commercial cases with a settlement rate of more than 90 per cent. In his profile, Walker mentioned having attended many mediations as a representative, and on three occasions, as a party. In 1984, he set up his own specialist litigation practice, Bray Walker, in London. After merging the firm, he left full-time practice as a solicitor in 2011 and became an independent civil and commercial mediator. Walker is dual accredited in the United Kingdom and United States through ADR Group and the International Academy of Dispute Resolution, and listed in Chambers 2015 Ranking of Mediators as a leading individual.

The book is an easy read, filled with examples, anecdotes and data relating to the business aspects of starting and developing a mediation practice. The information presented is UK-centric but remains relevant to practitioners in jurisdictions where the dispute resolution landscape and legal system are similar to those of the UK.

I found five broad themes in the book.

In the first three chapters, Walker provides introductory information on familiar themes, such as entry barriers, trends, mediation training and accreditation. Chapters 4–13 contain chunky information on the application of marketing concepts to mediation practice. There are two chapters dealing with the use of social media and websites. Chapters 12 and 13 discuss sales strategy and how a mediator should pitch and sell their services. Chapters 14–16 extend the discussion on sales and marketing to the use of social media, and touch on the roles of mentors, coaches and

support groups, and the use of online dispute resolution for mediation. The final chapters 17–20 drill down to the nuts and bolts of mediation practice, relating to money, administration and documentation.

The second edition also provides a new Appendix 5, which contains template correspondence that a mediator can use to jumpstart their practice. Five template emails/letters provide helpful guides on convening to the close of the mediation.

This is an unpretentious book that provides simple business concepts contextualised to the practice of mediation. The content of the book is drawn from the author's experience, his interactions with mediators and a collation of common sense principles. The book does not provide a formula or model for a mediator to develop a successful practice. Its draw is in the guidance, checklists, tips, action plans, self-audits, templates, scripts and anecdotes provided to a practitioner seeking to market, sell, brand, promote and pitch their services in the UK.

This is a book mainly for the UK practitioner. However, its nuggets of wisdom should prove equally instructive to a non-UK-based practitioner wishing to build a mediation business.

Tat Lim
Aequitas Law LLP, Singapore

Index

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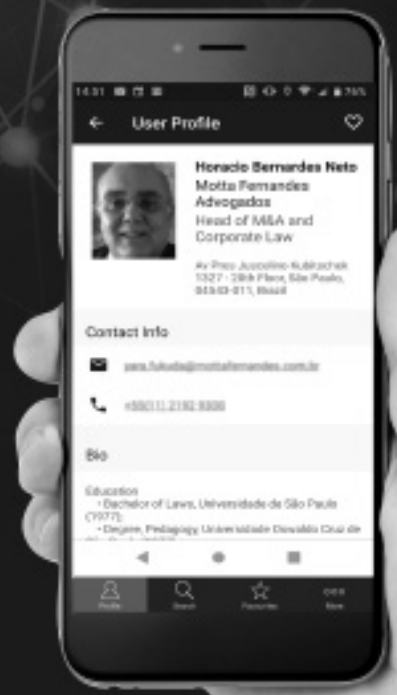

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