

SCLA

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Eric Fiechter, Ken Dai and Jet Deng, Jiong Sheng, Dr Hermann Knott & Dr Fritjof Börner, Fabian Techmann & Marie-Christin Falker, Zhu Yaolong & Lu Hang, Christiane Féral-Schul, Natalia Jara, Olga N. Tsiptse, Federico Antich, Lionel Paraire, Robert Rhodes, Eugenio Loccarini, Liu Yi & Zhou Kaiyuan, Muhammad Arslan, Guiscardo Lovovico Pireni & Munari Cavani, Luciano Inácio de Souza, Alexander Lindemann & Martin Schweikhart

What do China's new
cybersecurity regulations
mean for data protection?

Can thinking machines be held
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02

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ISSUE 02

An Epic Journey: A note from the editor

There is a curve that hope will continue to rise. Of course, around the world we are all hoping and praying that we bring down the virus infection curve. But I'm thinking of the learning curve. The more we learn, the more we know that there is more to learn. 2020 has taught us all a great deal. And helping to put together this publication has taught me a huge deal. For all of us involved its been nothing short of an odyssey. We have climbed a great mountain together and, as with all adventures, bonded and formed a unique community through our work in the process. Labour of course, is the root of both our theories and communities and I am happy that we can present to you a labour of love. Many people deserve thanks for making this issue possible. First of all, my sincere thanks to all our contributors for their work and, not least, their patience and faith in this project. Seungyeon Lee has done an outstanding job on the layout and graphic design single-handedly. I would like to thank my co-editors of our Chinese edition, Jerry Guo and Wei Jianan for making our exchange of ideas and friendship between Chinese and English-speakers possible. Finally, I want you all to know how impressed I am with all the hard work Zhang Tianze puts into this journal and the Swiss Chinese Law Association. He has built a community around this project. He is an entrepreneur, a problem-solver and a pleasure to work with. I do not know what secret skills he uses to juggle so many projects at the same time, but his vision, optimism, happiness and can-do spirit always shines through in everything he does. He is the ranger who guides us on our exciting travels. The best advice I can give you is that if he invites you on this voyage - join in! David Dahlborn, Co-editor.

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Briefing

New Sino-Swiss Restructuring Boutique Launched

In the midst of the current Covid-19 pandemic, former Baker McKenzie and Deloitte practitioner Roger Bischof (罗杰) has co-founded BIRT.



BIRT is already a leading cross-border restructuring boutique focused on special situations and transactions in Switzerland, China and Singapore. This new venture helps major corporations, small and medium sized enterprises and business owners to navigate the complex and challenging situations in Asia and Europe. The firm provides comprehensive legal, financial and strategic management services through an unparalleled multidisciplinary approach. BIRT's holistic client support is based on decades of experience and expertise as well as an extensive local and international network of trusted partners.

It acts with a deep understanding of Chinese and European negotiating cultures and business practices.

BIRT CEO Roger Bischof, who is dually-licensed as a lawyer and certified public accountant, is a founding member of our Swiss Chinese Law Association (SCLA) and a board member of the Swiss Chinese Chamber of Commerce (SwissCham). He is also the chairman of both the Asia Transformation & Turnaround Association (ATTA) and the Swiss Turnaround Association (STA). According to Roger, restructuring is the main priority of many companies in China and Switzerland under the

current circumstances. BIRT's interdisciplinary team consists of a handful of highly qualified professionals, whose combined experience in the restructuring industry represents many decades of expertise during restructuring processes in Switzerland and China. The firm has a unique footprint and considers itself a bridge between Switzerland and China. In Roger's view China is becoming an increasingly sophisticated market. Shanghai and Singapore are developing themselves into major Asian hubs for finance and restructuring. Moreover, following the tensions between the US and China, ties and connections between Europe and Asia will become far more important. Roger says that the Swiss Chinese Law Association (SCLA) plays a significant role in this regard by bringing together attorneys, judges and academics from both China and Switzerland and fostering exchange between their two cultures and legal systems.

BIRT can be found at www.international-restructuring.com

Briefing

When Governments Put Too Much Trust in Clarity

Eric Fiechter

Preconceptions can be found in government legislation. They are the most difficult for lawyers to challenge and get changed, because they are often backed by political decisions and priorities that conflict with what might seem right from the perspective of an objective third party.



Let me discuss just one example of preconceptions affecting the free movement of people across borders. It involves Switzerland – Singapore and China.

Switzerland wants to enforce any restrictions on travel to and from foreign countries without discriminating or favoring any countries. The country is maintaining a highly neutral outlook and sticking, as far as possible, to strict scientific evidence. To do this, Switzerland has issued an ordinance which describes the zones that represent a particular high risk in terms of imported Covid-19 infections ('Ordonnance COVID-19 mesures dans le domaine du transport international de voyageurs du 2 juillet 2020').

The ordinance lists three independent criteria, and it is enough if one of them is met to list a country or zone as high-risk:

1. An objective mathematical formula – more than 60 new infections per 100,000 inhabitants,
2. Unreliable infections figures or other indications of high infection risks,
3. Several instances in the past four weeks infected persons arrived in Switzerland from the area in question.

Based on these criteria Singapore ended up on the list of high-risk countries. This was despite an extremely low community infection rate – often less than ten cases per day and excellent contact tracing. Meanwhile no part of China, for instance, is on that high-risk list, despite recent flare-ups identified in some regions. The reason why Singapore was added to this list despite virtually no risk of infected traveller from there entering Switzerland is due only to the government's policy of aggressively testing all its foreign workers, who live in dormitories. These massive tests revealed more than 400 new cases per day of otherwise often asymptomatic individuals. These foreign workers have caused an average daily infection rate in Singapore of more than 60 new infections per 100,000 inhabitants.

The Swiss ordinance does not permit the mathematical result of the above formula to be adjusted.

Not even with regard to special circumstances, like the fact that the foreign workers did not mingle with locals, which would allow the Swiss government to modify their defined threshold.

Placing Faith in the Politics of Statistics

If a country hits the Swiss mathematical threshold, based on the scientific evidence of contagion rates, it must be consigned to the high-risk list. This is to avoid having to choose between countries on the basis of more subjective elements.

The preconception that the country-wide ratio would adequately reflect the prevailing risk for persons returning to Switzerland from such countries is therefore very difficult to correct. One would need to persuade the government to introduce some flexibility.

But, by doing so, the government would immediately expose itself to pressure from big trading partners to be removed from the list, despite obvious Covid-19 risks.

This example highlights the need for the WHO to get its member countries to agree on what minimal data to collect, how to collect it and how to categorize it. Such standards would make the basic data comparable across the globe, taking into account various countries' different capabilities. It also illustrates the need for states to improve how they collect relevant data and have a common set of figures, to which more information could be added by each country, according to domestic requirements.

This would help remove some erroneous preconceptions or even misconceptions. Such an approach would match Swiss, Chinese, and Singaporean policies of strengthening international organisations perfectly. In the meantime, all a lawyer can do, is to call his government's attention to the obviously erroneous results caused by the present ordinance, hoping that they will correct it. This is critical to reopening global air travel. The Swiss ambassador in Singapore has confirmed that he has personally done the utmost to contribute to facilitated travel between Switzerland and Singapore. Let me, as a lawyer, thank him here for his efforts to correct misconceptions at the state level.

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Cybersecurity Features



Ken Dai and Jet Deng

A

15-Step

Guide to Data Protection, Privacy and Cybersecurity in China

Ever since the PRC Cybersecurity Law (CSL) came into effect on 1 June 2017, China has accelerated its data protection and cybersecurity legislation. Enforcement has gradually been normalised. Meanwhile, the landmark Civil Code – effective as of next year – further strengthens privacy protections from a civil rights perspective. Overall, China is becoming one of the important jurisdictions for data protection and privacy worldwide.

This article gives an overview of data protection, privacy and cybersecurity issues that are common and of concern to enterprises that do business in China. We hope to assist enterprises – especially multinationals – to navigate the increasingly complicated regulatory regime in this field.

Cybersecurity Features

1

Understand the Increasingly Comprehensive Legal Regime

China has no a single, united data protection law. Rather, its data protection framework consists of a patchwork of fragmented rules found across various laws, measures and sector-specific regulations, with certain overlaps. The CSL is the first national law to address privacy protection and data security. However, quite a few uncertainties around how the law will be applied still remain. Moreover, administrative regulations, ministerial rules and national standards have been introduced by authorities to assist the law's implementation. More and more national standards have been introduced, including the Personal Protection Information Security Specification. Such standards are recommended best practice and not legally binding. Nevertheless, law enforcement authorities have leant heavily on such standards to enforce the CSL. Moreover, as the Personal Information Protection Law and the Data Security Law are being formulated, China's data protection legal regime is expected to become increasingly thorough.

2

Comprehensive Regulatory Authorities

Public enforcement in China presents a polycentric landscape since there is no single data protection or cybersecurity agency. Specifically, the four major authorities involved are the Cyberspace Administration of China (CAC), the Ministry of Industry and Information Technology, the Ministry of Public Security and the State Administration for Market Regulations, as well as their local counterparts. In addition, sectoral authorities like the National Health Commission take charge of supervising and administering data protection within their respective fields.

3

App Operation and Privacy Policy

In China, it is necessary to demonstrate a privacy policy in an application if it collects personal information. Since early 2019, CAC and the three other major authorities have engaged in special action ("APP Crackdown") on illegal personal data collection and use by apps. They established a special working group and issued several new guidelines. Currently, enforcement activities against personal information infringement by apps have gradually become normalised and are expected to remain active for the foreseeable future. Thus, multinational companies are advised to ensure their apps are compliant with the relevant laws and guidelines.

4

Multi-Level Protection 2.0

The Multi-Level Protection Scheme requires networks to carry different degrees of protection according to their significance and the severity of the harm caused where they to be damaged. Since 2017 the CSL has mandated that China implement multi-level cybersecurity protections. This has meant unveiled the prelude to "Multi-Level Protection 2.0". Under this scheme, three important national standards came into force in 2019. It is mandatory for network operators to submit to regulators for Multi-Level Protection filing. The relevant enforcement activities against failure to filing are on the increase and should be paid attention to.

5

CIIO Determination

According to the CSL, critical information infrastructure operators (CIIOs) shall be subject to higher cybersecurity requirements and stricter restrictions on cross-border data transfer, compared with general network operators. Meanwhile, the CSL provides that critical information infrastructure (CII) shall refer to networks or systems that involve public communication and information services, energy, transportation, water resources, finance, public services and e-government affairs. They should protect against "damage, dysfunction or data leakage which may severely endanger national security, national economy and the people's livelihood, or public interests". However, as these definitions are quite general, specific rules on CII/CIIO determination are likely to be clarified further in the future.



Cybersecurity Features

6

Data Localisation and Data Cross-border Transfer

Pursuant to Article 37 of the CSL, CIOs bear an obligation of data localisation, under important data and personal information collected and generated during the CIOs' operation in China shall be stored in China. Where such data has to be transferred abroad for business purpose, security assessment shall be conducted pursuant to the relevant rules. Following the CSL, three draft supplementing regulations and guidelines were issued, which expand the applicable scope of security assessment from CIOs to general network operators. But none have yet been finalised. Besides, sectoral restrictions on data exports shall be noted when dealing with special categories of data, such as "human genetic resources".

7

Data Protection Impact and Business Innovation

Similar to the data protection impact assessment and privacy by design under the EU General Data Protection Regulation, China's national standard Personal Information Security Specification (PISS) introduces mechanisms for "personal information security impact assessment" and a "personal information security project". Such mechanisms require enterprises to assess the possible impacts on personal information in advance. They should integrate privacy into their business innovations so that potential privacy risks can be identified and solved at an early stage. Notably, such national standards have no legal force, but reference to it is highly significant in practice.

8

Data Protection Officers and Data Governance

Although the concept of a Data Protection Officer has no identical counterpart in the Chinese law, relevant laws and regulations demand "data security positions". For example, the CSL requires the designation of a "person in charge of network security". Similarly, the Provisions on Children's Online Personal Information Protection requires a "person in charge of children's personal information protection" to be designated. Additionally, the latest PISS, effective as of 1 October 2020, clarifies requirements and criteria for designating a department and personnel responsible for personal information protection as well as their responsibilities.

9

IT Global Procurement and Local Adaption

In terms of global IT procurement, special attention should be paid to the network products and services' server locations as they may involve cross-border data transfers. Furthermore, if a company is a CIO, greater requirements must be followed.

The CSL requires that any purchase of network products and services by CIOs that may impact national security shall be subject to a security review procedure. The Measures on Cybersecurity Review – effective from 1 June 2020 – elaborates the applicable scope, procedure and factors of such cybersecurity reviews.

10

Data Breach and Cybersecurity Incidents Response

The CSL requires network operators to develop an emergency response plan for cybersecurity events. They must respond promptly to security risks such as system bugs, computer viruses, network attacks and intrusions. In the event of a threatened cybersecurity breach, the operator concerned shall immediately initiate the emergency plan and take corresponding remedial actions. They shall also report the event to the relevant competent authority. On this basis, CIOs shall also organise regular cybersecurity emergency response drills. On top of this, a draft CII regulation provides that, the competent authorities of industries and sectors shall establish their warning and information reporting systems and emergency response plans for CIIs. Therefore CIOs will be required to pay attention to the relevant requirements made by the sectoral authorities as well.

11

Sectoral Regulation

The CSL and its supporting regulations are generally applicable to all walks of life. However, different industries may have different degrees of emphasis according to their respective characteristics, especially those handling sensitive information. For example, in health care, pharmaceutical data, medical records and other health care-related data shall be protected according to the relevant department rules. Similarly, finance, education, transportation and other industries have their own sectoral regulations on data protection, which shall be complied to by enterprises in the industries.

12

Criminal Enforcement of Data Protection

Infringing citizens' personal information may incur criminal liabilities. The violating company may be fined and persons directly responsible may be sentenced to up to seven years in prison or given fines and life bans on holding certain critical positions. As such, effective compliance policies should be introduced and implemented to distinguish corporate behaviors from employees' individual behaviors. Besides, Chinese criminal law stipulates "refusing to perform the obligations of information network security management" as a crime under which the failure to perform relevant obligations, such as multi-level protection filing, may lead to fines against the company. Persons directly responsible or in charge may be sentenced to fixed-term imprisonment of not more than three years, detention or public surveillance and fines.

13

Corporate Liabilities and Exposure to Senior Management

Under the CSL, a failure to comply with the relevant data protection and cybersecurity requirements may result in harsh administrative penalties for both companies and directly responsible individuals. Specifically, the violating company may be warned and ordered to make rectifications; have illegal gains confiscated; be subject to suspension of business, website shutdown and/or business license revocations; and be fined up to RMB 1 million (roughly USD 146,200). Furthermore, such penalties will be recorded in the company's credit file and made public.

Cybersecurity Features

Conclusion and Looking Forward

The Covid-19 pandemic has accelerated the digital transformation of most industries. Enterprises may thus face intensive compliance issues regarding data protection. Therefore, we suggest undergoing a comprehensive examination to identify and avoid any potential risks at an early stage. With the future promulgation of the Personal Information Protection Law and the Data Security Law, businesses may face even greater challenges regarding data compliance. It is the time to take China's data privacy and cybersecurity laws more seriously than ever.



14

Big Data and Competition

Data has been recognized as a factor of production at the national level and the idea of data assets is widely accepted. Companies now compete for data assets and the battles over data present legal issues concerning ownership and competition law. Although the relevant laws lag behind, in practice some looming rules have been drawn up to help define the boundary of what can and cannot be done with data assets. These include restrictions on using web crawler technology found in civil litigations. It is expected that the traditional rules under the existing competition laws and regulations will be adjusted and updated to apply to the digital realm in the future.

15

Private Enforcement and Collective Redress

Private litigation is always a powerful weapon for big corporations, not least where data is concerned. In recent years, due to an increasing awareness of the importance of personal information protection, individuals are coming forward to bring cases to the courts. This makes data compliance more pressing than ever before. Notably, public interest litigation (PIL) under the PRC Consumers Interests Protection Law has emerged to seek collective redresses. Although PILs over data protection are still in their infancy in terms of its quantity, it is predicted that their numbers will continue to grow alongside the development of China's data protection regime.

New Chinese Laws and Specifications under Covid-19

Jiong Sheng



In May 2020, China's National People's Congress passed the PRC Civil Code, which introduced new provisions to protect privacy and personal information. About the same time, the new Information Security Technology – Personal Information Security Specification (GB/T 35273-2020; the Specification) was also introduced. When they come into effect on 1 January 2021, both laws will become the foundation for personal information protection in China, where interest in these rights has increased.

Now that more information is being collected and used for the keeping of public safety during the Covid-19 pandemic, the question of how to protect citizens from abuse is also important. The Civil Code and the Specification will provide a new, clearer and more comprehensive structure for such protections. But how will they actually function during the pandemic?



1

Exemptions

But the new law also makes exemptions. In exceptional cases the processing of personal information is not based on the relevant person's authorisation, but the "law and administrative regulation" (Article 1035(1) Civil Code). Article 12 of the PRC Law on Prevention and Treatment of Infectious Diseases, for instance, specifically grants medical institutions and disease control and prevention agencies the power to collect information relating to infectious disease investigation, testing, sampling and treatment. Now during the pandemic, Covid-19 has been categorized as a Class-B Infectious Disease. Therefore, the right to personal information privacy may have to, to some extent, give way to public need.

Yet our understanding is that such collection and use of information must still be carried out within the legal framework. The Civil Code now imposes obligations of information protection on the information collector. This includes non-disclosure of collected personal information, the prevention of information loss and damage (including positive actions for the prevention of such loss) and informing the party when such loss or damage occurs (Article 1038).

Natural persons may also review or copy their personal information and request corrections if any error occurs (Article 1037).

The Specification provides further control measures, such as internal access approval processes, minimum access control mechanisms, encryption and other security measures. Such obligations are borne by all information collectors, including those whose permission is granted by law rather than consent.

Medical institutions and disease control bodies therefore must take necessary measures and meet requirements of the Specification. The use of any collected information must also be confined to the purpose of the collection. Thus, information gathered during the pandemic should only be used for public health purposes and not to be abused by medical institutions.

2

A foundation for the future

Together, the Civil Code and the Specification provide a comprehensive extension to information protection methods and processes. Nevertheless, one difficulty remains; namely, defining the precise scope of what information can be collected, especially during rare public health crises, like Covid-19. Information collection without the person's permission is granted, but it should not mean any information can be collected. The Civil Code stated that the information processing must follow the principles of "legality, legitimacy and necessity". The Specification, meanwhile, provides standards on information collection and gives examples of "personal sensitive information" in Schedule B (including medical information such as medical examination reports, medical history and medication records).

Yet, there still appears to be Variations in how data has been collected. During Covid-19 there has been instances where information collection has been wide in scope and sometimes persons have even be asked to provide information relating to relatives' and close associates' private information.

A clearer definition mechanism is therefore necessary. The Civil Code sets down a basic framework for the recognition and protection of private information as a personal right. The Specification is a national standard setting out the safety requirements for the collection, storage and use of such information. A more detailed and separate privacy and information protection law may be required for the comprehensive protection of these basic rights.

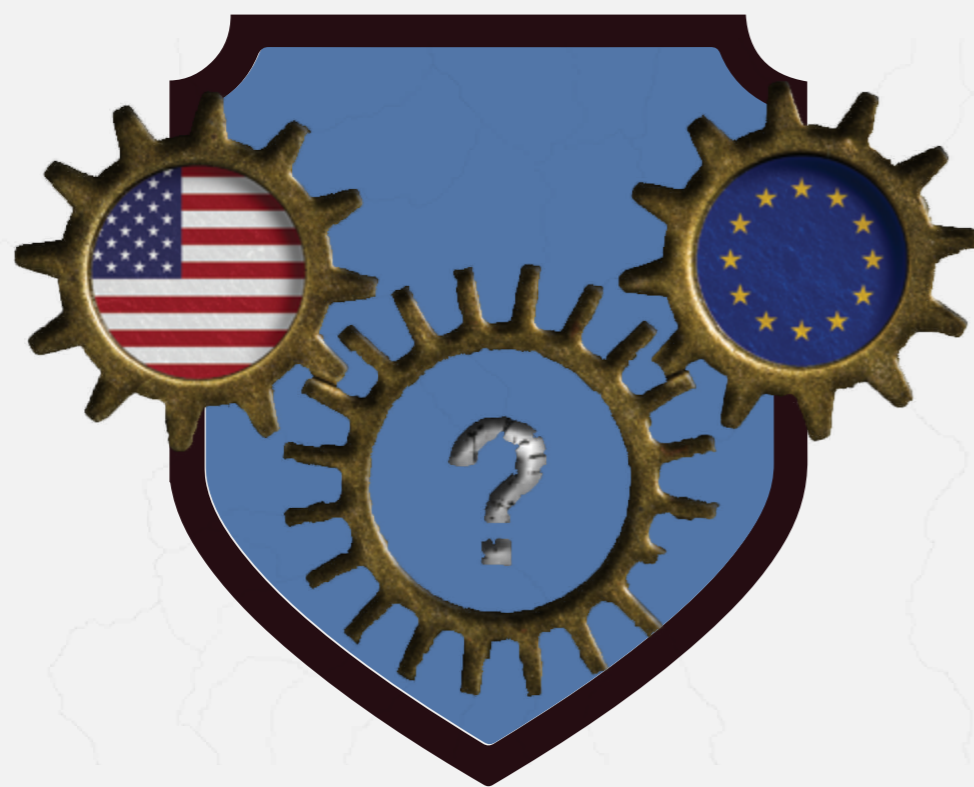
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ECJ Declares Basis for Data Export to The USA Ineffective

Dr Hermann Knott, LL.M. (UPenn)

& Dr Fritjof Börner



The European Court of Justice (ECJ, Case C-311/18) has declared the EU-US agreement on the so-called Privacy Shield invalid. This agreement regulates the conditions for ensuring that the transfer of personal data of EU citizens or residents to the USA meets the requirements of the European Data Protection Regulation (DS-GVO). To this end, US companies must be certified accordingly as recipients of the protected data. As a consequence of the ECJ ruling, the transfer of personal data to the USA lacks its essential legal basis. The ECJ justifies its view with the

inadequate protective measures and legal protection options contained in the Privacy Shield. In particular, this is due to the electronic surveillance measures against foreigners carried out abroad as permitted under US law. The decision was based on procedures initiated by data protection activist Max Schrems against the Irish Data Protection Commissioner. Schrems had lodged a complaint against the transfer of his personal data by Facebook Ireland to its US parent company, Facebook, Inc.. There is another legal basis for data transfer to the USA, namely

the so-called standard contractual clauses. These model clauses are considered by the European Commission (the Executive Body of the European Union) to be appropriate for agreements relating to the export of data. In particular, the standard contractual clauses are agreed with data importers established in third countries which do not provide for data protection in line with EU law. Only 12 countries are currently regarded as so-called safe third countries, whose data protection therefore meets EU standards without further measures.

The USA has not been a safe third country either. Safe Harbour and, from 2016, Privacy Shield were only intergovernmental agreements to bring data protection in the USA into line with the status of a safe third country in relations between parties to these agreements.

In the new decision, the ECJ also comments on the standard contractual clauses. These were included in the agreement between Facebook and Max Schrems. However, they only have an effect in the relationship between the parties to the contract and do not bind the authorities concerned. Among other things, they contain detailed provisions on information that the data importer must provide to the exporter (e.g. on potential government interference) and on the liability of the parties. In principle, the parties must examine the extent of data protection in the importing country. However, the supervisory authorities can also intervene and, if necessary, prohibit the transfer of data.

Depending on the form of data protection in the recipient country, the ECJ considers that additional measures must be taken to bring data protection in the importing country into line with EU standards. Unfortunately, the court does not explain what specifically needs to be done with regard to the USA. In its most recent ruling, the ECJ considered monitoring measures by the US authorities on foreigners to be particularly problematic. It is true that the standard contractual clauses in the agreement between the parties can be supplemented by additional obligations to provide information in the event of control measures by state authorities, provided the importer of the data becomes aware of them. Such cases can then entitle to terminating the contract or to cancelling the data transfer. However, this does not change the fundamental problem. This consists of the fact that, from the EU point of view, unauthorised interference

with data protection can occur, e.g. through surveillance measures. In most cases these cannot be foreseen in advance by the parties to the data transfer agreement.

Only a new agreement between the EU and the US, which takes into account the reservations of the ECJ, can provide a lasting remedy. However, the Commission also intends to present a revision of the standard contract clauses shortly. This should provide clearer guidance to the parties on the aspects which the ECJ has identified as critical.

For cross-border data transfers that take place within groups of companies, binding corporate rules can be considered as a basis of legitimacy. These must be approved in advance by the competent data protection authority. They then form the basis for a lawful data transfer to a non-secure third country. The ECJ ruling does not call into question the validity of such rules.

It is strongly recommended that, as a consequence of this ECJ ruling, companies centrally record and verify all transfers of personal data to non-EEA and non-secure third countries. The limitations expressed by the ECJ on the validity of standard contractual clauses are likely to have implications beyond the specific reference to data transfers to the US. According to the ECJ ruling, the parties to a cross-border data transfer agreement (i.e. both exporter and importer) are obliged to examine whether the obligations and guarantees regulated in the standard contractual clauses are sufficient in the specific case to bring data protection under the law of the recipient of the data into line with EU standards.

Encrypted transmission of data is also possible. However, this form of transfer is not as reliable as one might initially assume. In many cases, the decryption key can be accessed by the supervisory authorities.

This review of the concrete impact of the data protection law of the recipient country to be performed by the entity intending to transfer personal data to non-secure third countries should clarify the following questions:

1

To which relevant countries does the company transfer personal data, i.e. to countries outside the EEA that are not safe third countries?

2

For what reasons can the authorities gain access to relevant personal data under the laws of the data importing country? If the authorities are formally entitled to control personal data for reasons other than the protection of public security, prevention and prosecution of criminal offences, the parties have to define additional safeguards in order to achieve a level of data protection comparable to the EU standard. In this context, the ECJ refers to Section 702 FISA (Federal Law on Interception of Intelligence Services, entered into force in 2008) as a provision which gives rise to the assessment that the level of data protection in the US is below EU standards. Section 702 allows the US federal government to carry out targeted surveillance of foreign persons outside the USA. In doing so, the assistance of providers of electronic communications services can be forced in order to obtain foreign intelligence information. The above legal basis is further strengthened by Executive Order 12333 of 1981, which addressed the same subject and was made on the basis of a predecessor provision to Sec. 702

For data transfer with the USA, in the wake of the ECJ there is considerable uncertainty until a new agreement is concluded to replace the Privacy Shield. However, the EU and the US authorities are already expected to be coordinating their efforts in that direction.



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TECHNOLOGY FEATURES

Innovative Approaches to Blockchain Regulation: The Liechtenstein TVTG

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in Switzerland.*



TECHNOLOGY FEATURES

Although blockchain has existed for over a decade, many companies are only just beginning to understand this technology's potential scope of application and added value. Apart from powering virtual currencies, blockchain facilitates a decentralised storing of data which can help to increase efficiency and transparency in many sectors. As with any innovative technology, it has been surrounded by an aura of uncertainty. This uncertainty can be attributed to a lack of legal provisions regarding the use of its applications.

There currently is no comprehensive EU legal framework that considers all potential blockchain applications. Attempts to regulate blockchain primarily include the fifth anti-money laundering directive (AMLD5). This, however, regulates only some of its applications, namely virtual asset providers such as cryptocurrency exchanges and wallet providers, who offer soft or hardware for storing cryptocurrency. Moreover, the Financial Action Task Force (FATF), an intergovernmental regulatory body that establishes standards to combat illicit financial transactions, has amended Recommendation 15 of its 40+9 anti-money laundering and terrorist financing recommendations to include the regulation of virtual asset providers.



European and Chinese blockchain powerhouses

In recent years, China, Switzerland, and Liechtenstein all have evolved into financial technology (FinTech) and blockchain hotspots.

They have seen numerous domestic start-ups in the sector emerge. Chinese investors looking for blockchain opportunities may be interested in both Switzerland and Liechtenstein because both jurisdictions are welcoming of the technology and facilitate quick and easy company incorporation.

It makes sense to analyse the Swiss and Liechtenstein legal frameworks that regulate the technology.

Moreover, Liechtenstein is the only jurisdiction that has implemented a comprehensive legal framework for existing and future blockchain applications. The Tokens and TT Service Provider Act (TVTG in German) was implemented in October 2019 and took effect on 1 January 2020.

We will demonstrate how the implementation of the TVTG has challenged preconceived ideas of blockchain and game-changing technologies by introducing innovative ideas and approaches to their regulation, thus becoming a trailblazer in the field.

Functioning and Applications of Blockchain

Blockchain is a decentralised public ledger able to record transactions between individuals or companies. The Harvard Business Review defines it formally as “an open, distributed ledger that can record transactions between two parties efficiently and in a verifiable and permanent way”. As the name suggests, it is a chain of blocks, which store information about these peer to peer transactions. The distributed ledger can be accessed by any computer that downloads the blockchain, thereby becoming a so-called node in the chain. Blockchain is therefore highly transparent — the details of all transactions, including peers' usernames, time stamps and transferred sums are recorded for everyone to see. However, at least with regard to cryptocurrencies,

it is usually not possible to connect the username to a user. The technology thus also enables anonymity. Like any innovative technology, blockchain is constantly evolving. Several different kinds of blockchain have emerged from the original design. For instance, whereas the Bitcoin blockchain is decentralised and can be accessed all over the world, other blockchains are controlled by a central entity. The latter is true of the blockchain hosting Facebook's upcoming Libra stablecoin. All Libra nodes are controlled by the Libra Association and are inaccessible to outsiders.

This also implies that companies can design their own blockchains, exclusively to run internal operations and store confidential data.

In a corporate environment, blockchain could be used to record steps in a supply chain, which would increase transparency and efficiency. All members of the supply chain would be able to trace the respective goods without delays in communication between individual stops. Another application suggested by the Liechtenstein government is tokenising assets. Tokens are entities on the blockchain that represent a value or right and can be transferred between peers. Thus, ownership rights to certain valuable assets could be translated into a token, saleable and securely transferred via blockchain.

Due to its inherent features, blockchain facilitates secure peer to peer transactions that do not require the involvement of a lawyer, financial intermediary or other trusted third party. It is nearly impossible to hack a blockchain and any changes made would be immediately visible to all users. Accordingly, blockchain transactions could soon become a cost-efficient method of selling and transferring assets, ownership rights, storing data and more. In peer-to-peer transactions, the asset in question could be stored safely in a warehouse or other secure location.

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But its ownership is transferred virtually, significantly reducing theft and fraud risks. Like any innovative technology, blockchain is constantly evolving.

Potential uses include protecting intellectual property (by time-stamping documents an intellectual property at its moment of creation), data collection (allowing pharmaceutical companies to collect patient data in real time) and medical records management (reducing risks of unauthorised access). Opportunities in healthcare include giving patients greater control over their medical care, transparency, low costs and security. For instance, medical records can be shared securely between healthcare providers. In addition, this process will follow strict rules and be used by private pharmaceutical companies. More generally, blockchain technology could be valuable in financial services, mobility, logistics, industry, energy, media and more.

The TVTG

Liechtenstein's TVTG is the world's first comprehensive blockchain legislation. It challenges pre-existing notions of blockchain by considering aspects of its application which have not received appropriate legal attention before. Most individuals seem to mainly associate blockchain with cryptocurrency, which is reflected in regulations around the world. In particular, many legislators have regulated or even outright banned cryptocurrencies such as Bitcoin without paying much attention to other potential applications of blockchain technology.

In addition, data on Bitcoin use in countries like China, which have banned the cryptocurrency, illustrate that banning blockchain applications might have little effect. Peers continue to trade in cryptocurrency regardless, partially due to the blockchain's decentralised design.

It cannot be controlled by a central entity or government. Nodes are scattered all over the globe and the system follows only its own rules, based on mathematical algorithms, and thus can hardly be manipulated.

The TVTG recognises this issue by regulating actors and service providers in the realm of blockchain. The main advantage of the TVTG is that it is designed to maintain its validity far into the future. In particular, it uses the term “TT systems” which stands for “transaction systems based on trustworthy technologies”, rather than “blockchain”. With new technologies a central issue is that any attempt to regulate them quickly become outdated as legislators fail to address technological advances in a timely manner. This creates legal grey areas. Whenever a promising innovative technology is not regulated appropriately, it becomes difficult for companies to benefit from its advantages. Any multinational corporation that intends to venture into blockchain technology will therefore likely consider Liechtenstein an attractive company location. Its law sets out clear rules and guidelines for using blockchain. Moreover, the TVTG discusses an abundance of potential blockchain applications and answers corresponding legal questions.

The Liechtenstein government introduced the term “token economy”, which designates all blockchain. The roles of different actors and service providers in the token economy are defined. These include token generators, the TT key depositary, which stores access keys to tokens on behalf of their customers, the TT Verifying Authority, which ensures that during token transfers, legal regulations are observed and more.

In terms of due diligence obligations to combat organised crime, terrorist financing and money laundering, virtual currencies and payment tokens have raised several questions, especially in the FinTech

industry which is pronounced in Liechtenstein. Generally, due diligence matters are regulated in the Due Diligence Act (“SPG” in German). Since 1 September 2017, exchange offices that trade virtual currencies for cash have fallen within the area of application of the SPG, if the exchanged sum exceeds 1,000 Francs.

In terms of due diligence obligations to combat organised crime, terrorist financing and money laundering, virtual currencies and payment tokens have raised several questions, especially in the FinTech industry which is pronounced in Liechtenstein. Generally, due diligence matters are regulated in the Due Diligence Act (“SPG” in German). Since 1 September 2017, exchange offices that trade virtual currencies for cash have fallen within the area of application of the SPG, if the exchanged sum exceeds 1,000 Francs.

In addition to the SPG, the TVTG defines several due diligence obligations that apply to actors in the token economy. Wherever an existing right is translated into a token, the SPG applies. The Liechtenstein government deliberately proposed due diligence measures that go beyond the scope of European and international standards.



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Although the FATF Recommendations and AMLD5 do not require constant supervision, TVTG measures include a registration system that mandates compliance monitoring with due diligence obligations and checks on market participants' trustworthiness.

Comparison to Swiss Legal Framework

Like Liechtenstein, Switzerland has a generally positive attitude toward blockchain technology. The Swiss Financial Market Authority (FINMA) and the federal government both recognise the economic opportunities it presents. The canton of Zug is particularly welcoming of blockchain and cryptocurrency start-ups. A report covering the Swiss legal framework for blockchain and distributed ledger technology was issued by the Swiss Federal Council in December 2018. A draft law pertaining to distributed ledger technology and blockchain (DLT Draft Law) was published on 22 March 2019 by the Swiss Federal Council.

The DLT Draft Law references three types of tokens: payment tokens ("pure cryptocurrencies", used as a means of payment of money/value transfer), asset tokens (representing assets such as equity claims or debt; analogous to derivatives, equities and bonds), and utility tokens (intended to provide access to a service or application). FINMA introduced these categories within the scope of the guidelines for enquiries regarding the regulatory framework for initial coin offerings.

Under Swiss law, cryptocurrencies do not qualify as legal tender and there is no state-backed Swiss cryptocurrency. However, there are no specific cryptocurrency regulations and cryptocurrency-related activities are not prohibited. Only asset tokens are treated as securities by FINMA and regulated

as such. Tokens that qualify as securities may trigger Swiss securities dealer licence requirements under the Stock Exchange and Securities Trading Act. They could also be covered by trading platform regulations under the Financial Markets Infrastructure Act and prospectus requirements. Several other regulations relating to cryptocurrency asset taxation, promoting and blockchain technology testing have been introduced. As have ownership and licensing requirements, reporting requirements and more. Yet, all these regulations and criteria focus mainly on cryptocurrencies, making them much less comprehensive than the TVTG.



Conclusion

Liechtenstein's TVTG represents a disruptive event for the blockchain and FinTech sectors and for legal experts in Liechtenstein and abroad. In particular, the TVTG challenges pre-existing notions of blockchain and distributed ledger application, which were previously largely assumed to relate solely to cryptocurrencies. Most legal frameworks, such as the AMLD5 and the 40+9 FATF Recommendations, neglect the wide array of other blockchain applications. We can expect that Liechtenstein will continue to expand its FinTech and blockchain sectors. This will attract an abundance of foreign capital, especially from Chinese investors looking

to expand into the European market. The sound legal framework for utilising blockchain technology offers a significant advantage in comparison to other jurisdictions, where companies might have to deal with legal grey areas and uncertainty.

Multinational corporations can profit fully from blockchain's versatility only when there is an international standard in blockchain regulation. Especially during the Covid-19 pandemic, which has many employees working remotely, using blockchain technology to record and share data could be immensely helpful for reducing chaos and delays. Not to mention that blockchain technology is highly secure and cost efficient. Therefore, the TVTG could serve as a blueprint or inspiration for an international legal framework for blockchain regulation.

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China's Digital Signatures: what you need to know about the virtue that Covid turned into a necessity

Zhu Yaolong & Lu Hang

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Social distancing has become a familiar phenomenon world-wide to contain with the spread of Covid-19. Despite increasing number of people being trapped at home economic activities cannot stop. This means contracts and other legally valid documents that might have been signed by hand must now be signed electronically. For many electronic contract signing platforms, we are entering a golden age.

According to the relevant provisions in mainland Chinese contract law the parties can conclude contracts in written, oral and other forms. The written form refers to paper contracts, letters and data messages (including telegraph, tel-ex, fax, electronic data exchanges and e-mail). The validity of digital contracts, meanwhile, lies in the nature of its electronic signature. In what follows, we set out a brief explanation of the legal practice of electronic signatures in the People's Republic of China.

The legal practice of electronic signatures in mainland China: The meaning, validity and scope of electronic signatures



Since 2004, mainland China has had special legislation on electronic signatures under the Electronic Signature Law of the People's Republic of China (ESL). Additionally, the Ministry of Commerce issued the Regulations on Online Contracting Process for Electronic Contracts (Draft for Comments) (ROCPEC) in 2012. Although it has not yet been formally

adopted, it still has certain guiding significance in current legal practice. According to Article 2 of the ESL, electronic signatures referred to and the data contained in the electronic form and attached to the signatory's identity indicate that the signatory approves the content. The signature's essence is data and the full variety of data that can identify the signatory – passwords, secret keys, bank U shields and so on – can be considered part of an electronic signature.

According to Article 14 of the ESL, reliable electronic signatures have the same legal effect as handwritten signatures or stamps. Article 3 stipulates: "For those documents [where] parties agree to use electronic signatures or data messages, their legal effect is not denied solely because the form of electronic signature and data message ... used." Article 3.1 of the ROCPEC also recommends that contracting parties use electronic signatures to conclude contracts. A contract concluded with a reliable electronic signature can thus be established and effective according to Chinese law.

The ESL also stipulates that electronic signatures are not applicable in certain situations, including the suspension of water supply, heating, gas or other public utility services, marriages, adoptions, inheritance and other personal civil matters or situations prescribed by laws and administrative regulations. Therefore, it is prudent to note that electronic signatures are not applicable in establishing legal relationships in these cases.

What makes for a reliable electronic signature?

According to Article 13 of the ESL, an electronic signature that meets the following concurrent conditions is regarded as a reliable electronic signature: (1) The creation data used by the electronic signature belongs exclusively to the signatory; (2) The electronic signature

creation data is controlled only by the signatory at the moment of signing; (3) Any changes to the electronic signature after signing can be traced; (4) Any changes to the content and form of the data message after signing is traceable. Hence, the law establishes three standards for a reliable electronic signature: exclusivity, control and identifiable changes.

At the same time, Article 16 of the ESL also stipulates

“If electronic signatures require third-party certification, the parties should come to the legally established electronic certification service providers to seek certification services.”

In *Zhongwei Company v. Zhang Junying*, case No. (2018) Yu 0103 Min Chu 12194, Chongqing Fumin bank and Zhang Junying signed the personal loan contract online using an electronic signature on the Shenzhen Fadada Network Technology Co., Ltd website. In the court, Fadada provided a certification report of the signing process, clarifying that the digital signatures of all parties in the formation of the e-Loan contract were authentic and not changeable. Fadada also submitted the digital certificate service agreement to prove that it had the right to use the digital certificate products of the Shenzhen CA company, the electronic authentication service provider approved by the Ministry of Industry and Information Technology of the People's Republic of China. Fadada also obtained the password license for the use of electronic authentication services issued by the State Password Administration, and had the right to use commercial passwords in its electronic authentication service system. This chain of evidence was enough to prove that the individual loan contract between Chongqing Fumin bank and Zhang Junying was authentic. Therefore, the court holds that the individual loan contract was the true intention of both parties, and,

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as its content did not violate any laws or regulations, it should be valid. Accordingly, parties who have used a certified electronic signature can request a certification service provider to provide certification report of the signing process. The same is true of qualification documents to prove that the certification service provider's qualifications during a lawsuit. However, the party claiming a signature is valid without adopting the certified electronic signature has a much heavier burden of proof. It must ensure that it has the necessary conditions for storing and presenting the electronic signature, and needs to provide a series of supporting pieces of evidence.

Therefore, to obtain a reliable electronic signature, the fastest and most efficient way is to sign the relevant electronic contract through a qualified third-party electronic certification service platform. There are dozens of electronic certification service providers approved by the Ministry of Industry and Information Technology in mainland China. Furthermore, many platforms use the qualifications of these providers to sign electronic contracts. Signing an electronic contract has never been as simple, fast and cost-effective as it is today.



Proof of the reliability of electronic signatures

According to the provisions of Article 91 of the Interpretation of the Supreme People's Court on the Application of the 'Civil Procedure Law of the People's Republic of China', parties claiming the existence of a legal relationship bear the burden of proof for the basic facts that give rise to the legal relationship. Therefore, the party claiming the establishment of an electronic contract bears the burden of proof for the electronic signature's authenticity.

With respect of enforceability, electronic contracts and paper contracts are the same. Establishing a paper contract requires specific qualified parties to confirm its specific content. The same is true for electronic contracts. This is also reflected in the three characteristics of reliable electronic signatures; the exclusivity of the data produced when the electronic signature is signed determines the specific eligible parties. Likewise, the identifiability of changes to the data message after signing determines the contract's content. As long as these characteristics of reliable electronic signatures are proven then so is the contractual relationship's origin.

If this evidence is insufficient judicial practice has also established auxiliary criteria, including principles of personal behavior, the rules of the evidence chain and the rules of actual performance. The rules of personal behavior are that as long as an operator uses a password to conduct the transaction in the electronic transaction, the transaction is deemed to have been performed by the password holder. The logic here is that transaction passwords holders have strict storage and confidentiality obligations. Leaked passwords caused by an electronic trading system are improbably. Of course, in situations where transaction system's security level is too low and it is hacked, or when

the holder's password is stolen and has been reported in time, personal behavior rules do not apply. With regard to the evidence chain, in cases where the direct evidence is insufficient, the parties should provide as much indirect evidence as possible. This includes various operational traces stored on the Internet and servers that form a chain of interlocking evidence.

Finally, the rules of actual performance are provided by Article 37 of the Contract Law. This is a means of identifying obligations based on what actions the parties have taken after a contract has been concluded but before it is signed or stamped.

In cases where the reliability of the electronic signature is in question, pointing to what parties have done with regard to fulfilling contractual terms and conditions offers further evidence towards proving the establishment of a contract.

According to Article 13 of the ESL, an electronic signature that meets the following concurrent conditions is regarded as a reliable electronic signature: (1) The creation data used by the electronic signature belongs exclusively to the signatory; (2) The electronic signature creation data is controlled only by the signatory at the moment of signing; (3) Any changes to the electronic signature after signing can be traced; (4) Any changes to the content and form of the data message after signing is traceable. Hence, the law establishes three standards for a reliable electronic signature: exclusivity, control and identifiable changes.

The end of ink

As the on-demand Internet industry, powered by smartphones and tablets, matures, paper documents (which, on top of everything, are unfriendly to the environment) will gradually be replaced by electronic contracts. The skillful application of this technology will make us better prepared and adaptable to life in the future.

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Can AI be held accountable for misleading impressions?: Why solving digital gender bias needs humans

Christiane Féral-Schuhl

Following International Women's Day 2020, the French National Bar Council (CNB) gathered fifteen women lawyers, engineers, professors, researchers, programmers and entrepreneurs to seek solutions to gender bias in artificial intelligence algorithms.

Although the first ever programmer was a woman, today machines and algorithms are designed mainly by men. In 2020, only 17 percent of workers in the digital sector are female. Only the aeronautics sector attracted a lower proportion of female professionals. To counterbalance this, the CNB also promoted female role models to encourage women to take their place in this field.

In tech, women are at the end of the line. They are sometimes held back by stereotypes of "geeks" – an inevitably male figure wallowing at a computer screen with a box of cold pizza. Not only has this idea of the male tech nerd been proven to be passé, it also excludes the female figure from the digital world.

Artificial intelligence (AI) is often personalised and regarded as responsible and guilty for biases against women. In reality, however, AIs only analyse of our own biases. They express nothing more than the aggregated opinions of their creators. AI can thus reproduce the sexist tendencies of a human resources department to only consider the CVs of male candidates. Google the phrase "company director" and the most common result will be an image of a man wearing a tie. Conversely, search for "cleaning staff" and you'll mainly see women in aprons. Voluntarily or not, algorithm designers tend to stir their own biases into the algorithms they design, and this has sexist consequences. Several types of bias can be encountered.

There are data biases which can have ethnically discriminating consequences. They are expressed, for example, through the automatic recognition of morphological criteria of the face or skin colour. They are a consequence of the fact that AI learning data cannot be representative if learning is based on a single, European standard. The biases of predictive algorithms thus perpetuate the past data which they absorb. Human freedom and initiative would be frozen if legal professionals were to become reliant on such algorithms.

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AI can discriminate blindly. But it is not responsible or guilty. Rather, it amplifies existing biases without any real possibility of rectification. A discriminatory bias is difficult to identify but even harder to repair. This is why we need more women, and people from minority groups, involved in the design of these tools. Their parameters must integrate the richness of our diversity of life and opinions.

Digitalisation transforms society and, while electricity exists, will continue to consume it. The entire economy is supported by the digital. Must every sector become masculinised as it becomes an emerging digital market?

Digital knowledge is masculine. This is true in France. Not everywhere else. In some places, digital is a promising sector for women because it allows them to work from home and can be better adapted to their constraints.

Rectifying gender bias requires finding ways to better integrate women in the business of tech analysis and research. One way could be to intervene at the training stage by making courses more attractive to women. Companies, too, should implement already existing internal organisational means to integrate women into decision-making processes. Diversity of recruitment is a simple measure to apply and contributes

to fairer representation in a corporate structure.

Is it necessary to impose or convince, set up quotas or set up incentive mechanisms? For a long time, the word quota, was understood as the admission of less qualified applicants and made many people grind their teeth.

However, introducing a quota does not prevent performance. Although it may not be the only way, it can achieve quick results. Competitiveness and success should not be gendered. A sector of activity that is not mixed is worrying because it is from diversity that richness is born.

Gender bias has an impact on girls' academic performance. It has been observed that they lose self-confidence from secondary school despite good results in primary school.

An exercise presented as a mathematics problem generates poorer results for girls. When this bias is deconstructed, boys perform less well. Changing course descriptions has an obvious impact. Teacher training is therefore extremely consequential. They have the noble task of accompanying children throughout their education. They must be the first line of defence against inequality. That said, a surprising – perhaps frightening – observation has been made

at a societal level: The higher the general level of equality in a country, the less women engage in digital studies. Conversely, the more countries are based on unequal systems, the less girls and boys live together, the more women move into digital channels. Should this lead us to ask whether co-education is a catalyst for women's inhibitions to enter digital tech?

Ultimately, parents are their children's greatest role models, but they are more difficult to train. Yet they should be informed about the great possibilities for women in of the digital sector to kindle their daughters' interests.

The best devices in the world, if they are blind to gender bias, will reproduce the same old disadvantages for women. From this debate, difficulties, dangers and warnings have emerged. But there is a growing optimism in the awareness and search for solutions in businesses, governments and internationally, where a reflection on AI ethics is underway.

Christiane Féral-Schuhl is president of the French National Bar Council

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Discrimination Is Not Just Human

Natalia Jara

Introduction

The pandemic will leave us with a new perception of the benefits of Artificial Intelligence (AI) technologies for decision making. All over the world people are acknowledging that this technology has been used on a daily basis without their knowledge. But they are also recognising that its implementation has become a necessity to the public interest.

Accordingly, governments and businesses have deployed different types of AI to fight the pandemic. They have improved diagnoses or developed treatments. However, what if someone is banned from public transport because an AI predictive model marks them as a potential source of infection? What if someone is refused health insurance or a mortgage because of a Covid-19 infection? Are results obtained by an AI enough to justify restricting individual freedom?

From a legal perspective, concepts like “discrimination” or “objective” are challenged when AI technology gets involved in decision making. AI-assisted decisions are based on algorithms or maths. This, arguably, gives them some level of objectivity. But their outcomes could nonetheless be discriminatory.



What is artificial Intelligence decision-making?

Artificial Intelligence is defined in the Oxford English Dictionary as “the theory development of computer systems able to perform tasks normally requiring human intelligence, such as visual perception, speech recognition, decision-making, and translation between languages”.

AI uses algorithms to classify, analyse, create profiles or make predictions to perform tasks that normally require human intelligence. This includes selecting employees or students, advertising, evaluating insurance risks, image search analysis and preventing the spread of a pandemic.

Algorithms, in turn, are described by Frederik Zuiderveen Borgesius, professor of law at the Radboud University Institute for Computing and Information Sciences in the Netherlands, as “a documented series of steps which leads to the transformation of some data”.

He calls them “an abstract, formalized description of a computational procedure”. They are instructions that guide the decision-making processes, step by step, to obtain a certain result or solution.

AI and algorithms are thus closely related concepts. An algorithm is the internally coded instructions that allow an AI to work and fulfill its purpose.

With the ease and accuracy that algorithms and AI can organise large amounts of data, this technology could improve any government, organization or individual’s decision-making process. In fact, any social, economic or political decisions that involve a combination of human and AI systems could be considered partially or wholly automatic.

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An algorithm’s true nature

Nevertheless, are these algorithms completely free of prejudice and discrimination? Can we really rely on algorithms or AI to make objective decisions? Are they not just machines that process data with logic and math?

The truth is that many cases around the world have proved that algorithms and AI are not neutral, and free of neither prejudice nor discrimination. There have been algorithms which recognise certain people as “gorillas”. Others display better paid jobs to men than to women or even discard women’s resumes during job applications. In yet another case, people living in dangerous neighborhood have been prevented from paying for express delivery services. These are just a few examples of people being treated differently simply because of their gender or phenotype.

If society wants to rely in this technology to improve the decision-making process, it is necessary to comprehend how these prejudices are transferred to or adopted by algorithms and AI.

Algorithmic and AI Discrimination

In the words of Ramón López de Mántaras, director of the Instituto de Investigación en Inteligencia Artificial-CSIC, in Barcelona: “If the data you learn from is biased (intentionally or not), the algorithm will decide biased”.

Algorithms are simply instructions for a computer procedure. The data that it receives as input could replicate or even amplify a human prejudice or bias. For this reason, AI could perpetuate discriminatory data analysis processes and further predictions that could worsen various existing stereotypes in society.

If so, can the risk of discrimination through fully or partly automatic making-decision processes be reduced or mitigated if the data collecting process is done carefully and correctly?

Experts, like MIT Technology Review writer Karen Hao, say that this is not going to be enough. The algorithm itself could lead to a prejudiced decision if programmed to analyse the data in an “incorrect” or “biased” way. “Historical patterns of discrimination”, Hao argues, are discussed by AI designers since this technology could learn how to think just like a human being. This includes imitating our prejudices or stereotypes.

On the other hand, we should consider that no AI system currently has its own intentionality, yet. So, any biased decision taken in a partial or fully automatic decision-making process that results in discrimination is down to bias in the imputed data or the processing programming. Either way, the intention or bad faith must be related to the programmer or AI system proprietor.

With this in mind, when evaluating an AI system or algorithm, its decisions must be analysed from a legal perspective to identify cases of discrimination.

How do we protect ourselves from AI-driven discrimination?

As we all know, discrimination is prohibited by many treaties and constitutions around the world. But will this be enough to protect and secure equal treatment when decisions are made by an AI system?

Article 7 of the UN’s Universal Declaration of Human Rights reads:

“

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

”

Accordingly, all people are entitled to not suffer any violation of their human rights caused by an AI-driven discriminatory system or algorithm. However, this will depend on the efficiency of each country’s laws or regulations. There are numerous approaches to accomplishing a non-discriminatory automatic algorithm or AI-augmented decision-making process.

On one hand, in the European Union, Article 14 of the European Convention of Human Rights (ECHR) prohibits discrimination by saying:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”.

Furthermore, the ECHR distinguishes between direct and indirect discrimination. Direct discrimination targets a person based on a particular characteristic, such as a ban against people of a certain religion. If discrimination occurs as a result of apparently neutral practice – like a regulation against all head coverings that, by default, prevents observant religious people from applying for a job – it might be considered to be indirect.

Both types of discrimination could be caused by an algorithm or an AI-driven system, especially the indirect type.

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Algorithms and AI systems can unintentionally disadvantage a certain group of people of a particular phenotype, culture or gender, through seemingly neutral criteria, practices or selections. For a recent case illustrating this, see the European Court of Human Rights case ECtHR, *Biao v. Denmark* (Grand Chamber), No. 38590/10, 24 May 2016, paragraphs 91 and 92.

Consequently, current European regulations require that general policies, measures or practices based on algorithms or AI system are analysed and perhaps approved prior to use, since it is unclear whether they might breach discrimination prohibitions.

The American way

On the other hand, considering that the focus in European regulation is not on intentions but on whether a discriminatory decision is made without an objective or reasonable justification, the problem of lack of regulation of “black boxes” will be important. “Black boxes” refer to the internal programming of an AI system. These programs are often kept secret by IT companies, but would need to be transparent to allow a judge to analyse how potentially discriminatory decision were made.

Situations similar to those in the EU will occur on Latin American countries like Argentina, Bolivia, Chile, Ecuador, Mexico, Peru and Uruguay. In most of their constitutions and regulations require equal rights and prohibit discrimination. But discovering whether an unequal treatment was “arbitrary” or “unreasonable” is necessary to find whether a decision or act is discriminatory.

Therefore, in this region, the question of how to make an AI systems’ black box process transparent to justify acts or decisions assisted by an algorithm will be significant.

So will the issue of how to prevent biased data from being processed. Finally, another interesting approach is found in the United States, where “discrimination” in Barron’s Law Dictionary is defined as:

“the unequal treatment of parties who are similarly situated. Federal law prohibits discrimination basis of race, sex, nationality, religion, and age in matters of employment, housing, education, voting rights and access to public facilities. Furthermore, states or any governmental bodies may not engage in any actions which result in discrimination on the grounds of race, sex, nationality, religion or age”.

According to this definition, importance would be placed in the possible engagement in any action that may result in discrimination. In this sense, if any state or governmental body engages or uses a discriminatory AI-driven technology, it would be illegal even though it does not result in an unequal treatment. However, if any private organization uses AI-driven technology, the illegal action will only occur, if the result is discrimination.

Conclusion

Partially or fully automatic making-decision processes assisted by algorithms or AI systems could cause, and even amplify, bias and discrimination. Regulations all over the world will be challenged by the increasing use of this type of technology in decision making. Topics like biased data processing, black box transparency, intentionally discriminatory programs or policies and measures to supervise algorithms or AI technology must be discussed and improved.

This is particularly true since urgent situations, like a worldwide pandemic, drive the use of increasingly intelligent, accurate and faster technology.

Nonetheless, for the moment, government bodies and business which use this technology to ease their decision-making processes will have to design measures to provide transparency of how their algorithms run or justify outcomes in a reasonable way. As we have seen, our human rights are at stake.

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Mediation in Europe

A Short History of Mediation in Greece



Olga N. Tsiptse

30 November 2019

On this date, Greece's Law 4640/2019 was passed. This was almost a decade after the first appearance of the Institution of Mediation in Greece and two years after the country's previous failed effort bring mediation laws in line with EU standards. In the intervening decade significant socio-economic changes had recast Greece through its long economic crisis. But now Greek legislating was finally harmonised with the EU's Directive 2008/52/EC on civil and commercial mediation.

The changes brought about the new mediation law, are milestones in the promotion of a complete system of out-of-court dispute resolution. The structured promotion around the world of this popular institution aims to provide citizens with quick, easy and economic access to dispute resolution. That is important because, until now, citizens have often surrender efforts of claiming their right, having been unable to afford litigation in court. Economically and socially they now face an appropriate alternative.

However, this alternative dispute resolution (ADR) also aims to speed up disputes. This will help to decongest overloaded courts as mediation aspires to resolve cases outside of public chambers of justice.

Hence, the timing was considered appropriate for mediation to move forward last year. After all, European and international trends in best practice have long contributed to promoting ADR.

Before examining the new Law for Mediation, it is necessary to look back and understand what happened over the course of the past ten years. Why did mediation initially face such a strong reaction for so long and how is it seen today?

Ancient history

The EU's Directive 2008/52 /EC, was ratified in Greece with the enactment of Law 3898/2010.

This Law introduced the concept of mediation for the first time, as an alternative way of resolving disputes, domestically and internationally between either individuals or states. Unfortunately, at that time, Mediation could not deliver the expected results, mainly because of the voluntary nature of mediation and a lack of incentives for using ADR.

The tiny number of mediations completed in Greece between 2010 and 2018 demonstrate this. In eight years fewer than fifty cases were concluded in Greece through ADR. There was no desire to use this method, no public awareness and no lawyers or judges willing to consider it. This useful instrument was almost abandoned without a first glance.

Some small changes to the original mediation law occurred. Restrictions on who could be a mediator were loosened, enabling persons without a legal background to take on the role. The small number of cases that went to ADR also began to demonstrate successful outcomes. Academics who examined the institution's applications questioned why it lay dormant for so long, despite the proof of its triumphs. Gradually, lawyers working on investment and commercial cases began to consider it their method of choice.

At the same time courts were overwhelmed by cases. The public justice system slowed down. Even simple civil cases could take two years. Appeal cases even longer.

Like most countries, Greece faced, suffered and has not recovered, from the 2008 financial crisis. This, alongside many other factors, has been exacerbated by foreign capital becoming hesitant to investing in Greece due to its malfunctioning and disordered justice system. A secure solution to this problem had to be found. The culture had to be changed. But this change had already begun.

Teething problems

Since 2017, some private entities have started to increasingly promote mediation. In 2018, Greek legislators tried to transfer an Italian model of mediation to Greek law. Mediation did not have to be completely voluntary, but rather somehow made "mandatory". Of course, Greece could not select a system that would promote mandatory mediation. It was against the constitution to be forced to enter private mediation. The first effort to transform voluntary mediation to "mandatory" was in January 2018 in the form of Article 182 of Law 4512/2018.

The obligation consisted following: Before an in-court discussion, the parties were obliged to try to resolve their dispute through mediation. If the parties could not pass that phase, the penalty was that the claim would be considered to be inadmissible and the claimant would lose the case for typical reasons. Furthermore, Article 182 would have been limited to cases such as those involving intangible assets, car damage, certain family disputes, patients' compensation claims against doctors, financial disputes and similar.

Although Article 182 was a groundbreaking innovation, it faced fierce opposition. Among the thunderous arguments against it from lawyers and judges was the conclusion that mandatory mediation contradicted to the spirit of voluntarism that should inform ADR. Furthermore, critics noted that compulsory mediation jeopardised the justice system by risking its privatisation and by drawing cases away from public courts. Finally, it breached Article 20 Paragraph 1 of the Greek Constitution, which asserts that "everyone has the right to be provided with legal protection by the courts...".

Proponents of Article 182 argued that mandatory mediation was constitutional and did not violate the principle of free court access.

After all it would only require an attempted mediation, which could lower costs. Yet, the strong reactions against the Article finally led to its rapid downfall.



Necessity becomes the mother of invention

Change arrived after the general election of 7 July 2019. The new government immediately passed fresh mediation legislation, which is in force today. Mediation Law 4640/2019, was approved unanimously, even by the administrative session of the Supreme Court.

The realisation had sunk in that we live in a globalised world, where individuals and businesses move fast and time is precious. These great expectations brought their pressure to bear even on the field of justice. Disputes had to be resolved in the shortest possible time, at the lowest possible cost. Greece, had to become a competitive state, and provide every additional incentive to investors to grace its shores.

What the new Mediation Law means in practice

In Greece mediators must be accredited by the Ministry of Justice. That requires them to participate to an eighty-hour course and pass oral and written exams, both at their training agency and the justice ministry. No legal background is necessary but candidates must retain a degree of higher education. Mediators who pass their

exams receive a registration number and are listed in a Ministry catalogue. They can then be selected for any civil, commercial or other mediation. Mediators must attend to lifelong mediation training programs every three years. There are two kinds of mediation. Firstly, voluntary mediation can be applied to any civil or commercial case, apart those which cannot be mediated. Secondly, there is mandatory First Attempt Session Mediation. The latter compulsory variety is limited to one initial session with a mediator and is used only for family cases (with the exception of marital disputes that cannot be mediated), claims disputes involving more than €30,000 and contractual disputes where contracts include a valid mediation clause.

After a successful dispute resolution, a Minute of Successful Resolution is drawn up. It can be submitted by any party to the Registrar of the Court of First Instance, at the place of the dispute, alongside the low mediation procedure expenses and a small fee of €50 their registration. Under Article 904 of the Greek Procedural Code the parties then hold an Enforceable Title.

The mediation procedure is described in Articles 5-7 of Law 4640/2019. Certain written requirements must be performed, without the parties could be forced to litigate if the mediation is unsuccessful. If the parties cannot agree on a mediator the Ministry of Justice's Central Committee will appoint one. Procedures are required to be swift to reduce costs.

The decisive factor: A qualified mediator

Mediation relies entirely upon having a qualified and capable mediator. Their finely honed mediation techniques – updated with new training every three years – are called upon to communicate effectively with warring parties. In Greece the mediator does not guide the parties, nor propose solution, at least not unless asked to by the parties.

Rather they listen to the parties, observe them, show sympathy and help them to realise their real problems, which are often overshadowed by various factors, such as selfishness. A good mediator helps the parties see their real interest, severing them from their imagined positions. Education and experience are essential for a qualified mediator. As is concentration, dedication, skillful communication, immediacy, neutrality and objectivity. How a mediator manages every dispute's distinctive features and chooses which skills to deploy is what marks their approach as unique and distinctive.

Of course, no mediation is ever the same with another. Even when both the mediator and the parties are the same developments and outcomes can vary tremendously. Like many games of chess between two players, every game is different.

The mediator in Plato's cave

The mediator performs the role of the "philosopher" in Plato's story of the cave. As Socrates might have said, had he been alive today: Imagine a group of people, who have lived their entire lives chained to the wall of a cave. All they can see is an empty wall in front of them. These people will behold only shadows, formed by objects passing behind them and believe that what they see is reality. They will never know the object moving behind them, only its shadow. The Mediator is called upon to untie these individuals from their bonds so that they realise that they have been looking only at the shadows; that the shadow was simply the image of the object itself. These chains are the parties' positions. And their positions are not their true interests! The only person able to make them realise this is the mediator.



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Mediation in Europe

All roads lead to Rome:
How mediation became a turning
point for Chinese trade in Italy

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Introduction

International trade is reeling from the shock of the Covid-19 pandemic. While it is hard to foresee the exact date when the world will (if ever) regain its pre-Covid condition, many business people are coping with the present restraints of our new normal.

Wise entrepreneurs are aware of the importance of active listening while doing business, especially during hard times. They are conscious that behind every danger hides an opportunity and this is particularly true in times of crisis.

If international trade is to prosper, international businesses need to proceed in an efficient and effective manner. Likewise, if states really want to retain market shares for their corporations and attract foreign investments they need to secure and maintain a friendly environment for business. They need to provide settings conducive to stable commercial relationships and predictable outcomes for stipulated agreements.

Speaking of trade, Italy has been an attractive venue in a variety of areas. This is not new as the country has been working hard in recent years to improve its attractiveness to foreign investors, as also witnessed by the World Bank Group's 2020 Doing Business indicators. Notably, Italy this year reached first place in its "Trading Across Borders" ranking. However, Italy is still struggling to climb the ladder,

away from the lower mid-table position that currently sees her at 122nd place in the corresponding "Enforcing Contracts" indicator.

The reasons for these mixed results are generally a) the excessively slow pace of the Italian judiciary, whether at trial level or higher; b) the costs associated with litigation, in terms of court costs and legal fees, and c) the uncertainty inherent in most dispute-resolution systems that invite the losing party to appeal.

The Belt and Road initiative prefers mediation

In complex transnational business transactions country risk is a variable that is usually taken into account from the start. Carefully drafted contracts will call for arbitration venues as the preferred alternative to litigation in public courts. Of course, this can be criticised for not being flawless option either and increasingly complex arbitrations can, in Tom Stipanovich's words, resemble that of a "new Litigation".

Mediation is, therefore, a more attractive way of handling business disputes. Its attraction lies in its voluntary nature, the reasonably short amount of time it requires and the confidentiality it provides.

That is most likely why mediation was selected from the start as a preferred method of dispute

resolution in Euro-Asian trade under the Belt and Road (BnR) initiative. In particular, it might in this context also help preserve business relationships, which may be considered to be of value in and of itself. Although some sceptics have raised concerns over the implication of the government's attitude, Italy has enthusiastically embraced the business vision behind the BnR Initiative. But are Italian business and the country's legal landscape ready to welcome this new opportunity for growth? More to the point: is Italian mediation a mature dispute-resolution process?

Avoiding an overly simplistic answer is not an easy task. Nevertheless, to begin a description I provide an outlook on the Italian model of mediation and its legal landscape. This is followed by a statistical overview and a focused analysis of the significant role held that mediation played in Italy's c2B disputes. I end on a brief comment about the country's attitude towards the Singapore Convention, which, since the BnR initiative launched, is the most remarkable legal instrument affecting mediation in international trade.

The legal basis for Italian mediation

On 20 March 2010 Italy took the big step towards enacting Legislative Decree 4 March 2010 n. 28. The decree was a legal instrument that would embrace mediation to

reduce the judiciary's heavy workload and promote a sustainable approach civil and commercial dispute resolution. Italy was thus the first EU state to adopt the union's Directive 52/2008. These legal provisions drew much attention from lawyers and largely considered mediation as mandatory and a condition in certain cases for accessing court litigation. Following a ruling of the Constitutional Court in December 2012 these mandatory mediation provisions were ruled unconstitutional. Thus in 2013, Law Decree 21st June 2013 n. 69 rebooted mediation by reformulating its purpose and scope. Parties to a dispute in one of the topics listed in the new Decree's Article 5 were now required to apply to participate in an information session with a professional mediator – a so-called "first meeting".

During a "first meeting" the mediator clarifies the mediation's role and modalities to the parties and invites the parties and their lawyers – whose presence is required by law – to decide if they want to participate in a mediation proceeding. If so, the mediator proceeds accordingly.

However, the degree of commitment required in the "first meeting" during the semi-mandatory stage mandated under the Mediation Law remains debatable. Based on the diversity of the judicial decisions on the matter so far, it is still unclear, if the parties themselves must be personally present or if they can appoint a proxy. It is also unclear whether they are expected to engage in some kind of good-faith negotiation or if their presence is merely a formality. This issue is far from a technicality. Since this "first meeting" is the only mandatory part of the mediation process and involves tens of thousands of cases throughout the country annually, the judiciary's reactions to the parties' conduct and their counsels in these situations may well shape the future of mediation in Italy. Another way to promote mediation among litigants which has been in effect since 2013

is court-ordered mediation. In this case trial judges have the power to issue an order to undertake mediation while the case is halted for a three-month period. Notably, the power granted to some judges to strike out a case should the parties do not comply with this mediation order is still subject to great debate within the legal community. Although the impact of such measures on the judiciary's case load could be significant, at present only a few local courts have adopted this approach.

Italian mediators are required to hold a bachelor's degree in any subject or be member of a professional association, complete a fifty-hour training course on theory and practice of mediation with a four-hour final test and commit to continuous education.

Although the Ministry of Justice is required to monitor the nationwide development of mediation proceedings complete and accurate statistical data remain elusive after ten years on. A full picture of Italian mediation thus remains sketchy.

Statistics

Nevertheless, the following statistics from the Italian Ministry of Justice in 2019 are noteworthy:

Only about ten percent of ordinary litigation cases turn to mandatory mediation;

Where the summoned parties accepted an invitation to mediate, 46.3 percent of mediations reached an agreement in 2019;

In the same year, the acceptance rate of invitations to mediate was 49.2 percent;

The percentage of mediation cases to reach an agreement was thus 28.6;

It is fair to assume that each agreement reached through mediation equals one less case filed in court;

Because the recorded number of requests for mediation in 2016 was 147,691 we might assume that mediation procedures decrease the number of lawsuits in that year by some 42,000.

The second objective of the Law on Mediation – to promote a sustainable approach to dispute resolution in civil and commercial matters – in this light, appears to be quite far off. As shown by the available statistics, voluntary mediation accounts for a very small portion of the overall proceedings activated.

It should be noted, however, that Italy has a long tradition of using, either formally or informally, mediation, conciliation and third-party intervention to help disputants prevent or avoid conflict. The Chambers of Commerce have been for decades been among the few promoters and providers of alternative dispute resolution tools. Both companies and citizens have benefited from conciliation services and several of the best trained and most esteemed Italian mediators today started their careers in courses provided by the Chambers of Commerce. Finally, thanks to mediation fruitful inroads have been made in disputes between individuals and public utility companies, like telecommunication, power and water providers.

The Singapore Convention

In closing, a word on Italy and the Singapore Convention. Italy has shown an interest in the works of the United Nations Commission on International Trade Law (UNCITRAL) Working Group II on dispute resolution, which produced the Singapore Mediation Convention. At its 51st session on 26 June 2018 UNCITRAL approved the final drafts of the Convention on the Enforcement of International Settlement Agreements. It also issued a corresponding revision of the 2002 Model Law on International Commercial Conciliation (now renamed Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018). This concluded three years of vigorous debate, conducted by 85 member states and 35 international governmental and non-governmental organisations.

The convention was opened for signatures by all states in Singapore in August 2019 and will enter into force on 12 September 2020.

Some potential issues may arise when confronting internal rules on the value of mediated agreements and their possible enforcement outside of Italy. See for instance Article 6 of the EU Directive 2008/52/EC regarding certain aspects of mediation in civil and commercial matters regarding the “enforceability of agreements resulting from mediation”. Notably, Article 6 of Directive 2008/52/EC resembles Article 5 of the Singapore Convention. For an early comment on this topic to continue the conversation, I can recommend Ming Liao’s post ‘Singapore Convention Series’ on the Kluwer Mediation Blog from 12 April 2020.

It is still too early to foresee whether Italy will become a signatory to the convention, either directly or indirectly through the European Union. However, it may be expected that, given the convention’s focus on the execution of the mediated settlement agreements, which is a now well-established subject in domestic mediation.



ONLINE MEDIATION

Will Social Mediation Become A Victim Of Covid-19?

Lionel Paraire, Galion Société d’Avocats, Paris



Admittedly, even before the Covid-19 outbreak, the constraint of geographical distance could discourage mediation as a means of dispute resolution. This is unfortunate, since prolonged conflicts can hamstring organisations, causing anxiety, absenteeism and declining performance and productivity. Mediation, of course, invites feuding parties to discuss their issues in a constructive manner, assisted by a third party mediator. It facilitates sharing perceptions on the disagreements to dispel any misunderstandings and better understand how the conflict arose and escalated. By offering space to release long-suppressed emotions, mediation eases participants’ pressure enough to seek ways to jointly end their dispute. But is it possible to duly perform mediation tasks

remotely using video conferencing?

Absolutely, provided that the mediation is adapted to our new tools at each step of the process.

Step 1: Set the scene

Mediation on a virtual platform has a clear advantage over physical meetings with respect to organisation. There is no need to look for an available meeting room or to worry about meeting dates. A virtual room is available for the participants whenever they wish and mediation can be organised very quickly.

Sessions can be shorter but more frequent without disorganising any

schedules. The participants will then be able to join from their workplace or from home, with all the comforts they need. For the mediator, if the organisation is also simpler, they will obviously have to master the videoconferencing technology and test it early enough to avoid any problems.

Step 2: Welcome the participants

Welcoming the participants is especially important in virtual mediation because it creates a reconciliatory climate and brings the participants closer to one another.

This proximity enables the mediator to finely perceive the emerging mood and adapt the inclusion phase to this perception. Virtual communications may be interpreted as colder than face-to-face speech. Physical mediation certainly has an edge over digital in this regard. However, to compensate for this, the mediator can dedicate more time to the presentation of the participants allowing each in turn, including the mediator, to introduce themselves, express their state of mind and get to know each other. Virtual mediation has another slight advantage over face-to-face mediation in that the mediator can see their own image on the screen. This helps to ensure that one's face and presentation are as welcoming as possible.

Step 3: Validate the discussions framework

When commencing mediation, the mediator should state the rules that everyone shall observe. This ensures that they are understood and accepted.

They should cover confidentiality of the discussions, taking breaks, private conversations, conditions for each participant to address the meeting, mediator's attitude and so on. At this stage, everyone is, in principle, attentive, whether in physically or virtually. Whatever the case, the rules of the game should not change. However, a virtual meeting requires some additions, notably regarding confidentiality by insisting on the strict prohibition on recording the meeting and making sure that no third party is concealed off camera. These points should be specified in the mediation agreement.

Step 4: Progress of the discussions

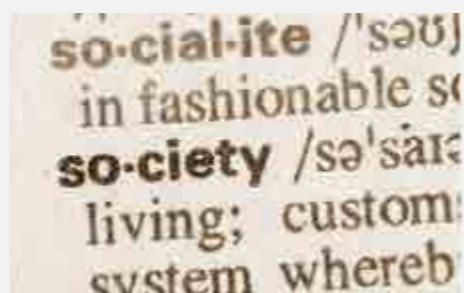
During mediation, the mediator facilitates the participants' speaking time and makes sure that everyone listens to the other speakers. In virtual mediation, the lack of a face-to-face presence may help participants to speak more easily. Not having to face an antagonist can help to overcome any purely physical rejection or delays caused by proximity. In face-to-face mediation, participants are fully aware of the other side's presence. For the mediator, it is obviously easier to reframe the discussions while physically at the center of a debate. Some of the natural moves used by mediators – placing a hand on the table or standing up – cannot be made in a videoconference. To compensate for this, the mediator will have to speak more regularly, ask questions and check the participants' degree of attention to the others. Mediators may also use text messages to regain control over the debates.

Step 5: Concluding the meeting

Before the end of the meeting give the participants time to express themselves. What was the meeting like for them? What was positive or difficult? What are their expectations for the future? If the mediation is not over, the parties shall arrange the next meeting. In this respect, virtual mediation does not change anything. The mediator shall be able to gather their feelings from the participants about this type of communication in order to make further improvements.

In sum

Video conference mediation has developed quickly due to the pandemic movement restrictions, and should continue to evolve. Remote mediation has several advantages. The absence of physical contact or an imposed place can, in itself, help defuse the conflict. The process is also easier to organise. There are no travel expenses, no transport time and no venues to select. It could thus help make social mediation more accessible. Video-conference requires a few adaptations, but nothing that cannot be overcome. We can safely bet that face-to-face mediation and remote mediation will coexist smoothly in the future.



ONLINE MEDIATION

Remote Arbitration: is it the future?

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The Covid-19 pandemic has had a huge impact on the world of dispute resolution, whether litigation, mediation or arbitration. Since the global shutdown, international arbitration hearings have had to be conducted online rather than in person. Whether you call it 'virtual', 'remote' or 'online', it comes to the same thing: all parties involved attend through one of the many platforms available on the internet, such as Zoom, Teams or BlueJeans.

Many arbitral institutions have issued protocols or updated their rules to help make remote arbitration (including electronic rather than 'wet ink' signature) the norm.

There is considerable discussion whether remote arbitration will replace physical meetings once the

pandemic is over. Remote arbitration has several advantages; the most striking being cost. The main cost benefits are:

- The huge saving in airline fares and hotel expenses for all parties involved in international arbitration.
- The saving in travelling time.
- The saving in printing, with almost everything done electronically.

The result of this is that fixed hearing dates are likely to be arranged more quickly. Various platforms have a shared screen function, and showing the relevant document on screen will make for more efficient hearings.

Online hearings generally have one, agreed, electronic bundle, which saves time.

The Kaplan Opening – named after the distinguished arbitrator, Neil Kaplan CBE, QC, SBS – is a hearing after the first round of written submissions and witness statements, but before the substantive hearing. It enables counsel to outline their respective positions to the tribunal, thus helping the tribunal in its preparation, and can result in a shorter main hearing. A platform like Zoom makes this session more attractive to the parties because of the savings from not having to travel. It also makes it easier for the tribunal to meet and discuss the case before the main hearing (the so-called "Reed Retreat").

Online arbitration is also likely to make submissions more focussed, cross-examination shorter, and hearings quicker.

What are the downsides?

There are, however, significant disadvantages to online arbitration. The first is the cyber-security risk of online hearings. It is essential that access to the hearings be controlled, and that the storage and transmission of personal data be limited.

To this end, it is vital to consider the platform's terms and conditions. Parties will have to be careful with the use of breakout rooms.

Recently, a High Court judge in London was embarrassed when she made a disparaging comment about one of the parties to a case before her, wrongly thinking that her microphone was switched off. Another disadvantage to online hearings is the cross-examination of witnesses, whether expert or factual. That is because it is difficult to assess a witness's body language when all you can see is their face.

There is also the risk of a witness being coached by someone in the same room, or receiving information by email or messaging. That risk can, however, be mitigated by a neutral person in the witness's room, or by a 360 degree camera and a mirror behind the witness, as well as the witness having an empty desk.

Nonetheless, online cross-examination deprives the cross-examiner of seeing the effect on both the tribunal and the opposing lawyers of points made in cross-examination. Furthermore, technological disruption might adversely affect what might otherwise be powerful cross-examination. In any event, online cross-examination via an interpreter can cause problems.

There are various technical matters

that need to be dealt with for online hearings.

Thus parties will need multiple screens: one to see the other parties or witnesses, one for the document bundle, and one for the transcript. There will need to be testing sessions, and backup facilities in case of a technological failure. Teams must have ways of communicating with each other: if a lay client is in one country, a solicitor is in another, and lead counsel is in a third, they will need something like WhatsApp to be able to communicate. Participants will have to speak clearly, and avoid over-speaking. Non-active participants will need to remember to mute themselves.

Most people who arbitrate online find it much more exhausting than being in a room. For that reason, daily hearings will have to be shorter, and will need regular breaks.

Tribunals will also have to be careful that one side is not at a disadvantage because of its country's weaker technology, such as narrower broadband width. Moreover, differing time zones will have to be taken into consideration. One side might complain that it has not had a fair hearing if the arbitral hearing times are late at night where it is, as opposed to mid-morning for the other side.

There might be problems of enforceability of awards resulting from online hearings where one party opposes such a hearing and wants a physical hearing. But that is a topic for another day.

In summary, online arbitral hearings are likely to be particularly helpful in short hearings. In long hearings, they do have advantages but here significant disadvantages also stand out.



Foreign Nationals Working In the People's Republic of China During Covid-19: The impact of special immigration policies

Eugenio Loccarini

In principle, foreigners are allowed to work and reside in the People's Republic of China (PRC; different regulations apply in Hong Kong SAR and Macao SAR) subject to obtaining a working and residence permit issued by the State Administration of Foreign Expert Affairs (SAFEA). While the permit is valid a foreigner may enter and exit the country without restrictions.

Permits are issued under a score-based system whereby applicants are granted a score based on a combination of several requirements. Assessment criteria including age, education, profession, salary, home state, Chinese language knowledge and awards issued by qualified international institutions (for migrants with specific skills).

Special Immigration Policies

Due to the global Covid-19 pandemic, the PRC Ministry of Foreign Affairs, in line with practices of other countries, issued the 'PRC National Immigration Administration Announcement on the Temporary Suspension of Entry by Foreign Nationals Holding Valid Chinese Visas or Residence Permits'. It took effect on 28 March 2020 and temporarily suspending the entry of all foreign nationals to of PRC. Work and residence permits issued before 28 March 2020 were blocked. As a consequence, any foreigners holding

(i) family reunification visas, (ii) permits issued for work or study, (iii) APEC business travel cards or (iv) other special visa-free and/or transit policies (e.g. Hainan 30-days visa free) were unable to enter the PRC after this date.

The announcement and other related implementing regulations further provided some exceptions. The right to enter China was limited to the following categories: (i) diplomats, (ii) holders of courtesy visa, (iii) holders of C visas (air crew), (iv) humanitarian visa holders, (v) travelers with Foreign Permanent Resident ID Card or c.d. Chinese green cards and

(vi) holders of New Visas issued by the overseas PRC Embassy/Consulates after 28 March 2020. These categories were limited to urgent and mandatory business or essential work.

Following to the Announcement, applicants for these latter New Visas had to designate a sponsor – a legal entity established under PRC law. This could be their employer, another company or organisation depending on their reason for visiting or returning to China. Applications should be filed under the name of the sponsor to the highest level of People's Government Foreign Affairs Office (FAO),

generally at province or autonomous municipality level (i.e. Beijing, Shanghai, Tianjin and Chongqing), for the issuance of a so-called PU Invitation Letter.

Acquiring a PU Letter

PU Letters are official invitation letters, addressed to an overseas PRC embassy or consulate stating the full name, date of birth and passport number of up to five applicants.

The applicant's reasons for visiting China, their number of entries, the validity period of each entrance and destinations are also required, as is the name of the relevant overseas PRC embassy or consulate that will process the application. Upon submission, the applicant can obtain an M-type (business) visa with a single entry and valid for between thirty and 180 days. It is also possible to receive Z-type work visas or other permits, subject to specific conditions.

The data requirements and policies for requesting PU letters are not regulated in the Ministry of Foreign Affairs's announcement or other national regulations. Thus, provinces and autonomous municipalities received broad discretionary and interpretational powers for assessing applications, and requirements may vary on a case-by-case basis.

Based on our experience, common requirements that may ease the issuance of a PU Letter are the following:

- (i) the amount of taxes above a certain amount paid by the designated sponsor during the previous year (ranging from CNY 1 million in Shanghai up to CNY 10 million in Beijing);
- (ii) the sponsor's turnover (Fortune 500 companies are privileged for such purposes);
- (iii) an applicant's existing type A permit;

(iv) executive positions in local government (legal representatives, general managers, etc.) held by the applicant;

(v) the applicant's proven difficulty in carrying out work-related tasks and responsibilities outside of China;

(vi) participation on key governmental projects (for example the 2022 Winter Olympic Games, Space projects, etc.),

(vii) employment on businesses relating to manufacturing and trading Covid-19 related products (like face masks or vaccines) and other essential industries.

Upon satisfying of the necessary requirements, applicants may be granted a PU Letter and can apply for the New Visa at an overseas PRC embassy or consulate.

The procedures for New Visa applications and for returning to China are not standardised and subject to several frequent changes. Therefore, the procedures listed below have been simplified and, when detailed, draw on the author's personal experience in obtaining a PU letter and New Visa in mid-July for travelling from Milan to Tianjin in July 2020. This journey via a chartered flight was organised by the Italian embassy in China and the China-Italy Chamber of Commerce.

As a rule of thumb, there are two options for returning to China after receiving a PU Letter: Normal track and fast track. The latter is governed by special intergovernmental agreements between certain countries and PRC, which have established the so-called "green channel procedures" for charter flights. Initially this covered only South Korea and Germany, but, later extended other states, including Italy. These were ad hoc agreements to facilitate the return of foreign visa holders blocked from China.

The normal track

The application via the normal track includes the following steps:

I. application for the PU Letter issued by the FAO;

II. application for the New Visa at the overseas PRC embassy or consulate, as indicated in the PU Letter. This required the presentation of an airline reservation and, in the case of accompanying dependent family members, legalised marriage certificates or birth certificates;

III. issue of a negative report on the nucleic acid RNA examination through the swab test according to PRC standards (i.e. a Covid test) within 120 hours before departure to China and, in certain countries, validation of the negative report at the overseas PRC embassy or consulate;

IV. completion of a customs declaration within twelve hours prior to flying to the PRC and issue of a PRC Customs QR code;

V. upon arrival in the PRC, a further Covid test at the destination airport;

VI. Fourteen consecutive days' isolation and quarantine with active surveillance by the medical staff in charge at a centralised facility (in rare cases a place of residence in some cities only);

VII. a new Covid test at the quarantine facility;

VIII. registration via the Health Code System at one's city of residence and receipt of a green QR code to enable travel to the destination by planes, rail or public or private transport, according to the so-called colour-coded health system (green, yellow or red). A green code is mandatory for free movement within the PRC.



The fast track

Applications via the fast-track lane include:

I. an additional Covid test before the issue of the New Visa;

II. the optional benefit of a "closed circuit quarantine" between home and office, which should allow a quarantine in a hotel for up to three days and, after a fresh negative Covid test, travel to the final destination by a private vehicle and commute from home from to work for the following fourteen days in a private vehicle.

Based on our experience the fast-track mode is in practice hardly applicable. The designated destination airports in the PRC are usually not in the same province as the governmental authorities which issued the PU Letter. In our experience, responses from PRC provinces and municipalities have differed in the past months, ranging from more flexible approaches in the southern provinces to more rigid approaches in the north, especially in Shandong Province and Beijing.

Entry and exit

Upon returning to the PRC and completing of all the stages of the normal or fast-track entry procedures foreigners shall promptly assess the validity of their permits issued before 28 March 2020 with the local immigration authorities to ensure their reactivation while in the country. Foreigners are encouraged to renew work or residence permits before expiration. The suspension measures do not apply to the right of work and reside as such, merely the right of using permits to enter into PRC.

Leaving the PRC while the temporary suspension measures are still in force will automatically result in the need to repeat the whole entry process. This includes applying for a new PU Letter and quarantine upon returning to China. At least until the new policies introduced in

March are revoked.

Recent changes

A new announcement – 'Notice on facilitation of visa application for foreigners holding valid Chinese Residence Permits' – was disclosed on 11 August 2020 on the official websites of Chinese embassies in several European countries. It detailed that citizens of certain European countries (including Italy and Switzerland) holding valid residence permit for work or private or family affairs shall be allowed to apply for a visa directly at a PRC embassy or consulate without an invitation letter and free of charge. However, at the time of writing the content and scope of this announcement is uncertain. We may assume that holders of resident permits shall be discharged from the obligation to apply for a PU Letter according to the New Visa policies. In other cases PU Letters remain mandatory.

Foreign nationals who are blocked outside PRC due to the aforementioned entry restrictions and thus were forced to physically reside for a prolonged time (normally longer than 183 days) in a jurisdiction other than PRC, should also consider certain potential tax issues connected with the concept of tax residency and related risks of double taxation.

In principle, international organisations such as the OECD already published Guidelines in April for incentivizing the member countries (including almost all European ones, but not PRC) to introduce tax emergency measures aiming at favoring those natural individuals who cannot return to countries which, due to a pandemic, have issued entry bans thus preventing the return to their country of residence.

Recently, Chinese authorities have issued an update of the policies by allowing the holders of valid residence permits to enter China without PU letter and without

applying for a new visa. The policy adjustment has been in force since 28 September.

Conclusion

The suspension of the right of work and residence visa holders to enter China and the complex procedures for returning and quarantine are among the severest measures enforced by the PRC towards foreigners.

Based on our experience the fast-track mode is in practice hardly applicable. The designated destination airports in the PRC are usually not in the same province as the governmental authorities which issued the PU Letter. In our experience, responses from PRC provinces and municipalities have differed in the past months, ranging from more flexible approaches in the southern provinces to more rigid approaches in the north, especially in Shandong Province and Beijing.

Given the absence of an expiration date and other countries' failure to slow the pandemic worldwide, it is difficult to predict when the announcement made in March and its related immigration policies will be repealed. It is reasonable to assume that the PRC will be able to introduce more flexible requirements for PU Letters to applicants in countries where the pandemic is mostly under control. This would facilitate the participation at internationally recognised trade fairs in the PRC, like the 2020 Shanghai International Import Expo. At the time of writing, this event has not yet been cancelled. The latest announcement in August represents a first step and evidence of the PRC's intention to amend its immigration policies. The aim is likely to aligning regulations with those European countries that did not close their borders to foreign residents.

Eugenio Loccarini is senior manager at Pirola Advisory China

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Feature

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WHO WE ARE

Kubas Kos Gałkowski provides legal services to Chinese entrepreneurs investing in Poland. The China Desk team are specialists possessing both education and experience in the scope of cooperation with China.

Our expertise allows us to understand the specifics of the business and legal culture of the countries and to ensure versatile legal assistance.

Kubas Kos Gałkowski is a founding member of the Belt and Road International Lawyers Association and a member of the Elite Global Law Alliance.

Kubas Kos Gałkowski's Partners have actively participated in works aimed at drafting new legal acts and collaborating with the Polish Government, Parliament and President since 2009.

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Cross-border Insolvency During Covid: crisis and opportunity

Liu Yi and Zhou Kaiyuan

Liu Yi is a senior partner at Shanghai Everbright Law Firm. Zhou Kaiyuan is an assistant lawyer at Shanghai Everbright Law Firm.

The Covid-19 epidemic and associated quarantine measures have caused unprecedented damage to the global economy and many industries have been forced to close. To mention just a few examples: On 2 March, Japan's Luminous Cruising Co. filed for bankruptcy. Whiting Petroleum followed suit on 1 April. On 11 April, Burger King New Zealand was placed in receivership. No exemptions were made to Virgin Australia, who declared that they are seeking bankruptcy protection on 21 April. Around the world, hotels, restaurants and the entire aviation industry have been crippled.

As a result of globalisation, cross-border insolvency cases during bankruptcies have become increasingly important. As China is the world's largest manufacturer and the second-largest economy, it is crucial that the country be able to play a good role in the field of cross-border insolvency. This participation will help determine China's future power and global position.

Cross-border Insolvency in the People's Republic of China

Currently, the legal source of generally accepted worldwide cross-border insolvency is the UNCITRAL Model Law on Cross-Border Insolvency (hereinafter, the Model Law). Its purpose is to help states align their insolvency laws with an international standard that can provide a fairer framework for

cross-border in cross-border insolvency cases. As Jianli Song has argued in The Supreme People's Court of China journal The People's Judicature, this means seeking common ground while reserving differences. In addition to the Model Law, certain regions have reached agreements relating to cross-border insolvency. For example, the American Law Institute has published "ALI's Principle of Cooperation" to deal with cross-border insolvency cases within NAFTA (The US, Mexico and Canada).

The EU, in turn, passed the "European Insolvency Regulation" in 2015 and established a data sharing mechanism. Globalisation has increased interaction between all types of economies making the development of cross-border insolvency a general trend. Yet, it is a tendency that can progress only through cooperation among all countries.

China is neither a member of the Model Law, nor a participant in any international multilateral treaties

related to cross-border insolvency. However, Article 5 of the Enterprise Bankruptcy Law of the People's Republic of China (Enterprise Bankruptcy Law) provides corresponding regulations. The relevant paragraph reads:

“The procedures for bankruptcy which have been initiated according to the present Law shall have binding force over the assets of the relevant debtor beyond the territory of the People's Republic of China. Where any legally effective judgment or ruling made by a foreign court involves any debtor's assets within the territory of the People's Republic of China and if the debtor applies with or requests the people's court to confirm or enforce it, the people's court shall, according to the relevant international treaties that China has concluded or acceded to or according to the principles of reciprocity, conduct an examination thereon and, when believing that it does not violate the basic principles of the laws of the People's Republic of China, does not damage the sovereignty, safety or social public interests of the state, does not damage the legitimate rights and interests of the debtors within the territory of the People's Republic of China, grant confirmation and permission for enforcement.

What needs to be pointed out is that according to Article 5, Chinese courts would only recognise and enforce foreign cases that already have a legal effect.

However, in reality, this article would largely restrict creditors' rights. Normally, the time between a court accepting a case and a debtor being adjudicated as bankrupt, is lengthy. If a Chinese court does not enforce any additional remedies, the debtor is highly likely to be transferred and their assets hidden. As Yuanyuan Huang argued in the Law Review of Wuhan University in 2018, multilateral cooperation would lose its meaning in such an event. Currently, China's judicial authorities, academics and practitioners are conducting in-depth research and studies of cross-border

insolvency. It has also been included in the legislative program. On 28 August 2018, Liu Guixiang, a member of the judicial committee of the Supreme People's Court, mentioned at the 3rd China-Singapore Legal and Judicial Roundtable that the Supreme People's Court is now actively promoting the revision of the Enterprise Bankruptcy Law. It would encourage, Wenxin Qiao reported in the People's Court Daily the following day, “standardised and refined regulations with regards to cross-border insolvency jurisdiction, the status and treatment of foreign insolvency representatives and creditors, the conditions and methods of providing judicial assistance to foreign insolvency proceedings, etc.”

On December 27th, 2019, the Supreme People's Court released the document “Opinions on the People's Courts Further Providing Judicial Services and Guarantees for the Construction of the ‘Belt and Road’”.

Article 31 of the document mentions a need to “[i]mprove the cross-border insolvency coordination mechanism, explore the application of the main insolvency procedures and the center of the main interest system, and protect the rights of creditors and investors in accordance with the law.”

Benefits to debtors and creditors

The cross-border insolvency system protects debtors. Generally, enterprises that can apply for cross-border insolvency have a mature operating system, a complete supply system and rich management experience. During the pandemic, most of them applied for bankruptcy because of the cracks in their cash flow and capital. At this moment, a cross-border insolvency system might be the last chance for a debtor. This is because bankruptcy liquidation not only means the end of the enterprise, but also, an opportunity save the enterprise through rebirth. For instance, an enterprise could enter bankruptcy reorganising procedures to

introduce investors, integrate excess inventory and eventual commence resurrection. It can also use bankruptcy conciliation procedures to reach a settlement with the creditors to stay alive. Multinational companies often have the potential to reorganise and reconcile, making the future market foreseeable.

Furthermore, cross-border insolvency systems protects creditors. Take mainland China as an example: in strict accordance to Article 5 of the Enterprise Bankruptcy Law, before extraterritorial bankruptcy procedures commence, debtors could find ample time to transfer and hide their assets.

In this case it would make Article 5 useless and creditors' rights cannot be guaranteed effectively. In contrast, during the bankruptcy liquidation case of CEFC Shanghai International Group Limited on 18 December 2019 ([2020] HKCFI 167), the High Court of the Hong Kong Special Administrative Region ordered that the liquidation and protected Hong Kong assets involved be recognised and that creditors be protected pending enforcement. From this example, we can tell that only a mature cross-border insolvency system with coordination and cooperation among countries can maximize the protection of creditors' interests.

Finally, a cross-border insolvency system helps maintain and rebuild economic order. The market exit mechanism is an important indicator for evaluating the “business environment”. The market exit mechanism is an important indicator for evaluating the “business environment”. During Covid-19 the truth is that certain multinational corporations might not be able to survive. Without a complete market rescue mechanism and unless countries hold a positive attitude towards cooperation, the hit to domestic and global economies would be harder than necessary.

Even though its domestic outbreak is under control, China, as a major manufacturing country, has still seen considerable foreign trade orders cancelled due to other states' quarantine measures. A large number of factories are shutting down and workers cannot go back to work. This is also likely to be a factor of social instability. Therefore, it is urgent to improve cross-border insolvency regulations and strengthen international cooperation.

Developing cross-border insolvency during Covid-19

Many multinational companies have applied for bankruptcy protection since the start of the pandemic. However, every coin has two sides and cross-border insolvency may usher in development opportunities. As the second largest economy in the world, China must take a major role and responsibility relative to its power. Mainland China's legislation on cross-border insolvency is not yet perfect. Despite being a relatively closed and conservative society, it has, nevertheless, sent positive signals in recent years. The field of cross-border insolvency needs legislative improvement and the sudden pandemic has made it particularly urgent.

I propose that in the field of cross-border insolvency, China can introduce a “center of the main interest” system to primarily conduct bankruptcy proceedings in geographical proximity to the debtor's regular administration of their interests.

This would broaden the standards for mainland China to recognise and execute extraterritorial insolvency procedures and this will encourage mainland China to achieve a good cooperative relationship with other countries and regions. What is more, China could also learn from the EU's cross-border insolvency rules and establish an information-sharing mechanism for bankrupt companies among countries along the Belt and Road project.

Conclusion

The pandemic might be under control for a short period of time but the bankruptcies it has caused for large numbers of multinational companies will reverberate for several years, alongside their long-term impact on the economy. China can minimise losses only by adhering to an open attitude, speeding up legislative reforms in the field of cross-border insolvency and assisting and cooperating with other countries and regions. China should turn this crisis into an opportunity.



Recovering From The Pandemic Through Responsible Contractual Behavior

Muhammad Arslan

In the second wave of the Covid-19 pandemic we are still seeing an unprecedented closure of personal and commercial activities, causing unparalleled vagaries in global economic conditions.

Is there light at the end of the tunnel? Perhaps, if we believe the UK government. A non-statutory guidance note it published in May regarding “Responsible Contractual Behavior in Performance and Enforcement of Contracts Impacted by the COVID-19 Emergency” aimed to encourage responsible behavior in the administration of existing contracts.

In my opinion, Pakistan’s federal and provincial governments should follow suit. They should officially issue similar non-statutory guidance in their national response to the Covid-19 slump because contractual arrangements are the mainstay of the country’s economy. By all odds, contracts ensure that the economy provides jobs, goods and services to enhance and maintain national infrastructure. Such guidance or policy will assist in ensuring uniformity in the contractual behavior of parties and will significantly contribute towards protecting businesses (especially small and medium sized enterprises), supply chains and jobs. Irresponsible behavior will reduce employment and impair the economic recovery.

The pandemic’s consequences are far-reaching and have gone beyond spreading disease. In Pakistan, it is being feared that millions of people may be pushed below the poverty line due to financial constraints caused by the pandemic. A UN study in June on Pakistan’s situation recommends a five-pronged response including “protecting jobs, supporting small- and medium-sized

enterprises, and shoring up the most vulnerable workers through economic recovery programs”.

Securing the economic base

The Pakistani government also realised it well ahead of time that the most at-risk people were already living in poverty. This includes citizens from the deprived class and other marginalised groups whose lives, livelihoods, sustenance and access to amenities are the least secure. A large number of people in these groups make their living from the construction sector, directly or indirectly.

Now that businesses are re-opening and we can ascertain the post-Covid conditions of global and local markets, it is essential that parties to existing contracts in the private and public sector act with a responsible contractual behavior. In particular, government organisations should put a greater emphasis on this approach in managing existing contracts which are materially affected by Covid-19.

The responsible behavior may include:

1. Officially recognising the Covid-19 pandemic as “force majeure” unless it is already defined in specific contracts.
2. Making timely payments under current contracts for certified payments and amounts due.

3. Fairly evaluating and expediting settlements of claims for damages including time extension claims and compensation for increased cost or price escalations.

4. Accepting justifications for impaired performance, specifically in respect of deadlines, the nature and scope of contracted goods, works and services or making amendments to contracts or initiating variations where needed.

A responsibility to be radical

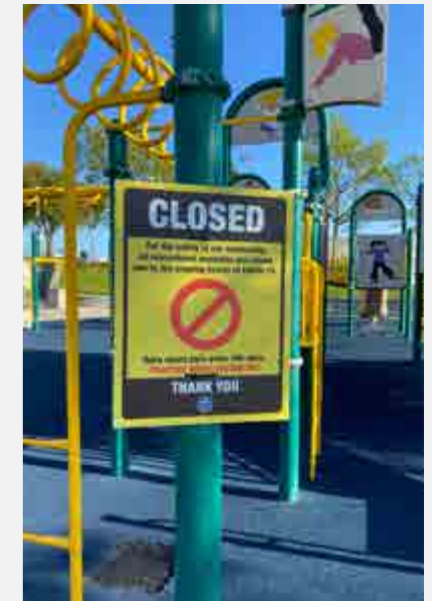
To achieve practical, fair and equitable contractual outcomes it would be highly befitting to consider the factors such as: the likely impact on the other party, the availability of financial resources, the protection of public health and the wider national interest. An organization or individual exhibiting responsible contractual behavior would be expected to carefully examine all aspects, ground realities, and the direct or indirect effects of Covid-19 prior to:

1. Calling bonds or guarantees and taking measures to sanction delays and contractual breaches.
2. Triggering clauses in relation to breached contracts or pushing opposing parties towards default or termination.
3. Pushing on disputes through arbitration or litigation.



The construction industry, particularly projects managed by the public sector, has an even greater responsibility in this regard. Public sector employers are major drivers of the industry. However, the fear of culpability may compel them to stick to routine work-practices by following tried and tested norms.

It is this author’s considered opinion that a radical approach in terms of “responsible contractual behavior” would assist in overcoming the otherwise irreparable aftermaths of Covid-19. If this situation is properly mitigated, normality will soon resume and we will see economic growth restart for the development of the country.



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Italian Lease Agreements during Covid-19: *Where does force majeure not apply?*

**Guiscardo Lodovico Pireni
& Munari Cavani**

Commercial lease agreements have not been spared the knock-on effects of the pandemic.

Following containment measures by Italy's government and regional presidents, many traders and entrepreneurs were forced to suspend their activities for substantial time periods. They have suffered significant economic losses.

Since the lockdown began, one of the most important issues was to understand how to regulate commercial lease agreements and how to rebalance the tenant-landlord relationship during the epidemiological emergency.

It seems intuitive that many tenants (traders or retailers) who entered into a lease agreement prior to the epidemic are now in a serious crisis. Not only are they facing economic losses resulting from the epidemiological emergency.

But the law and the legislature have also failed to take effective measures to regulate existing lease agreements between private individuals.

On 17 March 2020 the Italian legislature passed Decree-Law no. 18, granting tenants a tax credit equal to sixty percent of the lease for shops or stores. However, this left out all buildings designated for laboratories, offices, or warehouses.

In Italy, leases for commercial use are governed by law 392/1978. Tenants, regardless of the provisions in the lease agreement, may terminate their lease at any time with at least six months' notice if a serious emergency arises.

However, this provision is not particularly appropriate during the pandemic. Tenant will often have no interest in terminating their

contractual relationships definitively. Rather they will seek

The strictly tax-related nature of this intervention certainly did not solve the problem in its entirety. It became necessary to identify rules of the legal system (both in the Italian Civil Code and in special laws) that could help tenants or, at least, limit an excessive number of lawsuits over lease agreements.

From the perspective of the Italian Civil Code, which also regulates lease relationships, there might be a different solution to the risk of defaulting.

Firstly, the landlord has an obligation to ensure that the property is handed over to the tenant in a good state of maintenance, and to keep it suitable for the use for which it has been leased.



The landlords must also guarantee the tenant's peaceful enjoyment. It follows that during the emergency period landlords may not breach these stipulations. Since March, an attempt has therefore been made to recover these general rules on agreements and obligations in order to remedy the tenant-landlord relationship, with the aim of restoring a degree of fairness.

Article 1218 of the Italian Civil Code provides that debtors (in this case tenants, who pay the lease fees) who fail to fulfil the performance is required to pay damages, unless the non-execution or delay was caused by circumstances beyond their control.

The Italian legislature has tried to contain the effects that a strict application of the law would have produced. It stated, in Decree Law no. 18 on 17 March 2020, that compliance with the governmental contagion containment measures must always be assessed for the purposes of excluding, pursuant to and for the purposes of articles 1218 and 1223 of the Italian Civil Code, the debtor's liability. This also applies with regard to the application of any disqualification or penalties connected with delayed or omitted fulfilment.

That said, it cannot be stated that the tenant is exempted, for this reason only, from fulfilling their obligation, since the provisions of the decree merely invite the judicial authorities to consider the context of any contractual breach.

Consequently the only solution for the debtor is demonstrating how punctual performance was impossible for reasons beyond their control.

Indeed, this might turn our thought to force majeure and hardship. Both principles exclude the debtor's liability and would allow the termination of the agreement (assuming that the tenant has a real interest in dissolving the entire agreement).

However, Italian case-law does not generally recognise economic failure as sufficient to consider an obligation impossible to perform since is a subjective condition. For instance, consider a multinational company with thousands of shops all over the world. If, for example, a single store in Italy had to remain closed due to government provisions, it certainly cannot be said that the company is unable to pay its lease. It would still have income streams from the rest of the world. Therefore, for the tenant, impossibility does not necessarily concern their ability to pay.

Another solution has to be found for the small retailer with only one retail outlet. Intuitively, their only source of income is a single activity carried out in Italy. This problem is still waiting for a solution which, on the one hand, can restore fairness and contractual equity and, on the other, does not encourage legal.

Currently, the available remedy with the greatest guarantee of success is a private renegotiation between tenant and landlord. This process should take into account the principles of fairness and good faith that should always inform contracts and their fulfillment.



Guiscardo Lodovico Pireni



Munari Cavani



Compliance: Ensuring a safe haven for business

There's an old saying: smooth seas never made a good sailor. The past months have undoubtedly brought one of the biggest global challenges our generation ever faced. In the corporate context, going from an environment that was almost one hundred percent face-to-face to one hundred percent virtual threw employees and senior management in deep waters. Crucially, we need to understand how these changes have affected the companies' compliance environment.

New Compliance Risks

During the pandemic, companies need all hands on deck to reassess new risks they face and measure the impact of changes to regulations. For example, Brazil's federal public administration temporarily relaxed the rules on the acquisition of goods to fight Covid-19. Federal Law No. 13,979/2020 waived the bidding requirement for procurement of health goods, services and supplies for coping with the emergency. This increased the risk of fraud in public procurement. Another law – Federal Decree No. 9,764/2019 – on the acceptance of donations by the Brazilian Federal Public Administration created situations that might potentially invite corruption.

However, companies that empowered their compliance departments and honored their compliance program during the pandemic managed to make substantial donations to the public administration. These

companies were able to successfully contribute to fighting the novel coronavirus at a crucial time.

Compliance Program Management

The pandemic forced companies to trim their sails and adopt to working from home. Compliance departments had to while continuing to manage their compliance program.

This migration to a remote environment alone brought several challenges for companies used to performing its internal controls on paper. Especially if they previously relied on staff working in close proximity to each other and keeping records in hard copies at the company's headquarters.

Without an integrated system for a given compliance procedure raises the risk of losing relevant information in emails, messages, and calls.

If there are no automated commands compliance programs also lose efficiency will also be put at risk as internal flows risk jamming.

Internal communication

Company used to communicate their compliance program through offices, plants and facilities needed to redesign its means of keeping employees informed. Many companies migrated events and training sessions to a virtual environment, which required even more creativity to maintain the audience's attention.

It has been essential to make clear that company rules would not change despite a home-working environment. It was up to top management and compliance departments to send a loud and clear message that the pandemic's impact on business did not justify ethical breaches.

Such measures intended to prevent employees from feeling pressured to act wrongfully for the sake of productivity. While working from home it is vital to ensure that employees refrain from defrauding the company's accounting or conspiring with competitors. Companies also emphasized that offering undue advantages to public officials, suppliers or customers to secure contracts, sales or prices is also forbidden.

Cybersecurity is another critical area. The risks of internal fraud, cyber-attacks and data leaks have increased. The sudden migration to virtual work environments has created opportunities for malicious people to exploit weaknesses in companies' systems.

Docking in a Safe Harbor

The pandemic is a real stress test for compliance programs and their response capacity. It has been a sink or swim situation. If a year ago, there were doubts about the relevance of a well-structured compliance department for the survival of companies in an increasingly unpredictable market, no-one can deny their importance today. If six months ago, companies questioned whether the compliance program would be up to the challenges; today the answer is self-evident.

The companies that, even before the crisis, gradually invested in their compliance programs – qualifying their teams, structuring integrated and automated systems and promoting their – values were more prepared to face new challenges. In fact, companies with an internal ethical culture were able to act as lighthouses to guide employees on what to do during hardship. Each crisis that rocks the boat brings an opportunity, and the pandemic certainly was a big lesson to everyone.

The way companies acted during the pandemic will be evaluated by shareholders, authorities and stakeholders.

The way companies acted during the pandemic will be evaluated by shareholders, authorities and stakeholders. Irregularities, during the crisis, in addition to the inevitable and unwanted legal consequences, will result in reputational damage to the companies and business partners.

It was also an excellent opportunity for compliance departments to show employees that they support them and to demonstrate to senior management how strategic they are for the company's future.

Companies have reinforced their policies on the topic to remind employees of the best practices for circulating internal documents and information under the correct level of confidentiality. Moreover, employees have had to reaffirm their duty not to share competitively sensitive information or secrets while working from home.

Reporting Channel Management

In Brazil, during the pandemic, the volume of ethics-related complaints received by businesses increased by thirty percent. About half were related to the labour issues and questions regarding the end of working from home.

The data signal that a well-designed and implemented integrity mechanism favors employees helping the company to curb misconduct and indicates the investments in prevention paid off. It also shows that social distancing has not diminished people's confidence in the company's ability to investigate complaints. Investigations could not stop and leave the whistleblower high and dry. It was up to compliance departments to adjust the protocols for collecting data and conducting interviews to do it remotely and online.



**Luciano Inácio
de Souza**

Luciano Inácio de Souza is a partner and Ana Flávia Pereira is an associate at Cescon Barriau Flesch Barreto Advogados. The views expressed in this article do not necessarily reflect the views of Cescon Barriau or its clients.

The Swiss Chinese Law Review



The Swiss Chinese Law Review has interviewed two experts in the field of securitisation. Alexander Lindemann and Martin Schweikhart from Lindemann Law in Zurich have structured numerous securitisations over the course of their careers and gave us answers to some of the most common questions on this topic.

Securitisation is a strong trend in asset management that cannot be denied, according to Schweikhart and Lindemann. Securitisations have increased in demand over the recent years. Many asset managers have explored and are considering securitisations to address specific needs in handling with certain assets. In Switzerland in particular a number of small, new and innovative providers have begun offering such services.

Swiss Chinense Law Review

Alexander, Martin, thanks for taking the time to talk to us. Our first question is: what is a securitisation?

Alexander Lindemann

A securitisation vehicle is simply a company with the purpose of holding valuable asset and issue debt securities against these assets that represent their performance. The idea of a securitisation is simple. It is a way to hold assets that may be cumbersome to hold directly, such as non securitised loans and other debt, or difficult to transfer, like property or non-listed equity, in a transferable, bankable security.

Swiss Chinense Law Review

Thanks, that sounds simple. But what are the risks to investors?

Martin Schweikhart

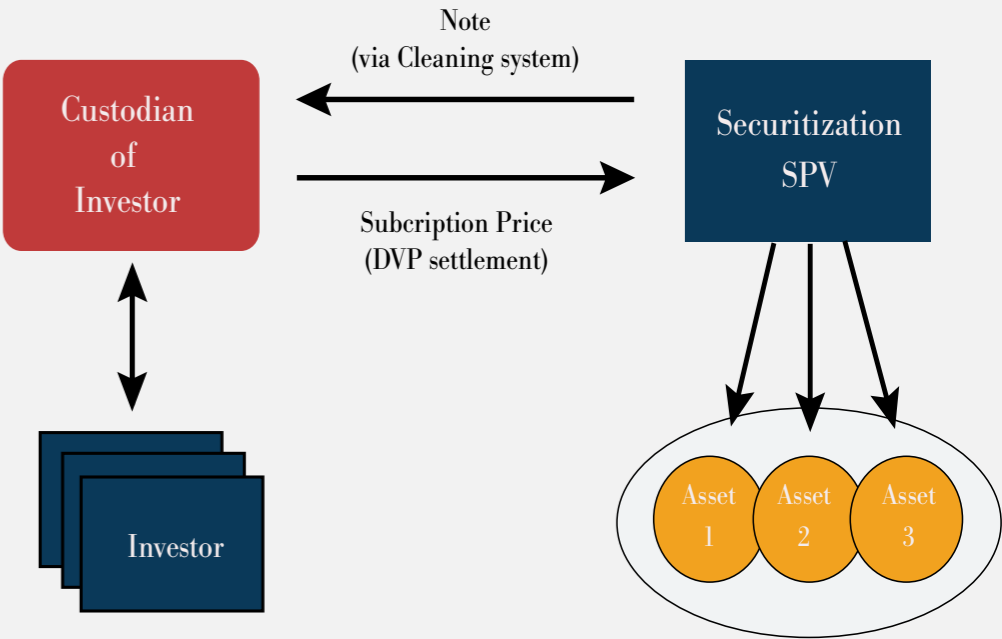
By creating a company solely for such purpose there is no credit risk on the issuer. However, fraud and operational risks remain. A careful selection of service providers and a diligent legal set up is key to minimise these risks. Pledge arrangements on the assets are also possible.

Many securitisation vehicles are umbrella structures and may face the risk of cross contamination.

Some jurisdictions provide vehicles which offer segregation by law. However, a residual risk remains as some courts outside the jurisdiction of the securitisation vehicle may not accept such segregation. And the reputational risk remains in any case. Cash returns from the securitised assets, such as rent, interest, royalties or capital repayment, will usually be passed on to the holders of the Notes.

Swiss Chinense Law Review

SCLR: We have actually added a simplified structural overview of a securitisation vehicle to illustrate how it works:



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What can I securitise?

Martin Schweikhart

In principle any asset. The most common are property, receivables, loans and equity. Less common and more difficult to structure are art or physical assets such as machinery, warehouse goods, cars and, in some instances, also immaterial assets like intellectual property rights or trademarks. However securitisation vehicles have limits, so some “exotic” assets may only make sense in very specific setups.

Swiss Chinense Law Review

What are the advantages of securitisation?

Alexander Lindemann

Assets that are difficult to invest in, like loans, receivables or non-listed equity, can be acquired by the securitisation vehicle. Investment paperwork needs to be done only once the end investors, who acquire the Notes issued by the securitisation vehicle, receive bankable, transferable securities which can be subscribed and settled via a clearing system by any bank. Hence the end investor can hold the Note (and indirectly the acquired asset) via its bank and receives account statements and usual reporting. It also allows the pooling of several investors who alone would not be able to participate in the securitised asset.

Martin Schweikhart

I would add that in the case of investments that are cumbersome to transfer such as property, the Notes issued by a securitisation vehicle offer a simple transfer bank to bank via the clearing system. An asset or wealth manager can also include potential fees for services provided in the vehicle, where such fees are deducted directly from the securitisation vehicle and no contract with the end client is required.

Swiss Chinense Law Review

What about costs compared to a fund?

Alexander Lindemann

Securitisation vehicles are cheaper than funds. Since they stand outside fund regulations they can also hold a wider range of assets. This also allows an efficient way of white-labelling for asset managers who prefer their own brand.

Swiss Chinense Law Review

And can such Notes be listed?

Martin Schweikhart

Notes can be listed on a reputable Stock Exchange, quite common here in Vienna, but other also exchanges offer that service.

Swiss Chinense Law Review

And what about the distribution framework?

Alexander Lindemann

Notes have a special sales regime. In the EU Notes worth above €125,000 can be sold relatively freely. In Switzerland Notes, provided that they are structured carefully, do not qualify as collective investments schemes and can be distributed under different rules.

Swiss Chinense Law Review

Many market participants are currently considering alternative, innovative settlement solutions outside the traditional clearing systems. Could you tell us about that?

Alexander Lindemann

A very innovative add-on is the option to “tokenise” the Note and prepare for future alternative settlement options.

Swiss Chinense Law Review

And is there a tax consideration that drives clients to consider securitisations?

Martin Schweikhart

Generally the purpose of a securitisation vehicle is to be tax neutral. However, in a wealth management context, securitisation may allow for tax-efficient asset transfers while still maintaining the control or income streams over them or the efficient split of assets between different persons.

Swiss Chinense Law Review

Where are securitisation vehicles located?

Alexander Lindemann

The choice of location is key as clients will depend on a suitable service provider infrastructure and tax regime. Offshore jurisdictions such as Cayman Island or Channel Island (Guernsey in particular) are common. But recently onshore jurisdictions such as Liechtenstein or Malta have gained more and more popularity. The best choice from our point of view is currently Luxembourg as it offers an excellent reputation, service providers and a solid legal and tax framework within the EU.

Martin Schweikhart

At the end the choice of jurisdiction is also driven by the investor’s location. An investor in Asia may choose different jurisdictions than a European one. At the end it is a question of the assets to be securitised and the individual goal of an investor.

Swiss Chinense Law Review

Are there other key factors to consider?

Alexander Lindemann

The key question from our point of view is to carefully analyse the requirements and goals that need to be achieved. Securitised assets and the reason why a securitisation is chosen are very diverse. A one-fits-all approach like some providers claim will not deliver the optimal result. In some cases securitisations may not even be the right format. A private fund format or a holding company may be more suitable in some instances.

Martin Schweikhart

I would add that securitisation is not a standard product. It is a very tailor-made setup that requires careful consideration and experience. Depending on the goal and target market, the choice of jurisdictions is key too. Not all jurisdictions offer the same benefits. This is due to the fact that each asset is different as well as the client’s goals. We see providers in the market that claim “individual” solutions that however always use structure and set of documents. We at Lindemann Law do not believe this can offer the optimal solution for the goal set.

Alexander Lindemann

We also believe that risks and suitability of underlying assets need to be carefully benchmarked versus the target investors. A securitisation can and is often misused to sell assets to investors for whom such assets are not suitable. By no means should securitisation be used to “re-tailise” assets that are not suited for retail investors.

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Thanks a lot for the interview. We will pass your contacts to our readers to get in touch if they want to find out more.

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