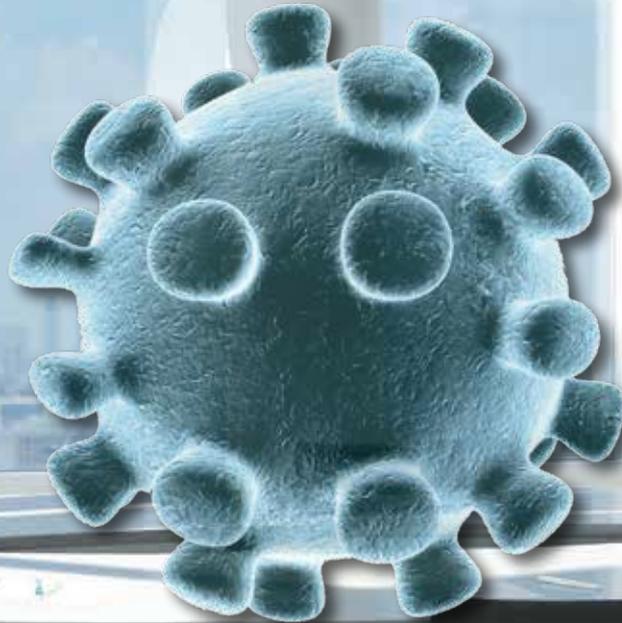


# IPBA Journal

March 2020

No **97**

NEWS & LEGAL UPDATE



INTER-PACIFIC  
BAR ASSOCIATION

# IPBA 2020 SHANGHAI

30th Inter-Pacific Bar Association Annual Meeting & Conference

🕒 18-21 April, 2021

🏠 Shanghai International Convention Center



# IPBA 2020



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## The President's Message

**Francis Xavier**  
President



Dear Friends,

This is not the first time that the IPBA has faced severe disruptions or cataclysmic events. Let's not forget the Tohoku earthquake/tsunami just before the Kyoto/Osaka 2011 Annual Conference; street protests before the 2014 Annual Conference in Hong Kong and aviation disasters just prior to the 2016 Annual Conference in Kuala Lumpur.

But never before have we faced what we are confronting today—an unprecedented viral pandemic that has effectively shut down life and work as we know it, all across the globe.

The IPBA calendar has been inevitably impacted. This year's Shanghai Annual Conference was initially moved from April 2020 to October 2020, and is now further postponed, to April 2021. At this time, the Annual Conference is a 'go'. The leadership will continue to carefully monitor developments over the next few months on this.

The Mid-Year Council Meeting and Regional Conference, originally scheduled for October, was rescheduled to 6–8 June. Our Constitution does require

us to hold the AGM by June this year.

Given the unabated reign of the pandemic, we have taken the decision to cancel the regional conference. IPBA Council Meetings were held on June 6 and 7 via a video conference platform.

We will continue to experience wholesale disruption until the pandemic is quelled, not only to the IPBA calendar, but to our lives. Let us keep a keen finger on the pulses that matter—to ensure that we isolate our elderly folks, that we look after the needs of the people in our societies who are now struggling to survive and to bear uppermost in our minds to be responsible in our individual actions.

Stay strong and safe!

**Francis Xavier**  
President



## The Secretary-General's Message

**Michael Burian**  
Secretary-General



Dear IPBA Members,

In this busy time where our schedules are full of meetings and conference calls, we have to be very selective about how we spend our little spare time. However, joining the IPBA and contributing to its success is one meaningful and rewarding way to do it. The networking opportunities during the conferences and throughout the whole year are extraordinary.

Already, almost one year has passed since I became Secretary-General of the IPBA. Those months have been an enriching experience for me and have given me the opportunity to promote the objectives and interests of our organisation. I can highly recommend the IPBA to anyone and especially to young lawyers who have an aim to find themselves in a group of the best in their field who are working together to create a reliable community. As one of the founding fathers of the IPBA Mark Shklov pointed out: '[the] organisation [will] provide an opportunity for lawyers interested in transnational practice to get together and to get involved with others who share their professional background'.

Our conference year 2020 had a promising start with the New Year's Dinner in the restaurant 'Le Sud' in Paris, France on 24 January 2020, organised by the IPBA Jurisdictional Council Member for France, Frédéric Dal Vecchio.

Unfortunately, as we all know, since then the novel coronavirus has disrupted not only the lives of many people but also the activities of the IPBA.

The IFLR/IPBA Asia M&A Forum 2020 scheduled to take place in early March in Macao was the first event affected by the crisis. We had to postpone this popular event, of which we celebrate the 16th anniversary this year. This is a two-day forum which will revolve around recent

M&A developments in Asia and brings together over 350 industry representatives, key regulators, institutional investors, law firms, and bankers and corporate counsel in the M&A space and is now scheduled to take place online during the week of 15-19 June.

More importantly, the IPBA Annual Meeting and Conference 2020, which was scheduled to take place on 20-23 April 2020 in Shanghai, China, had to be postponed as well. We now look forward to welcoming our members to Shanghai from 18-21 April 2021 instead. Let us hope that the novel coronavirus will no longer interfere with our activities by then.

As we nevertheless have to hold our Annual General Meeting by the end of June, the IPBA has decided to hold a Special Council Meeting and other related meetings on 6 and 7 June, with the Annual General Meeting on 7 June as well.

I hope that all IPBA members and their loved ones are well and unharmed in these unusual times and look forward to resuming our activities once this international health crisis has passed.

**Michael Burian**  
Secretary-General



## Message to the Reader

**John Wilson**

Chair – Publications Committee, IPBA



Dear Reader,

Greetings from Sri Lanka, where we have been under curfew for quite a while. Like most of the other jurisdictions represented among the IPBA membership, I expect that you are all looking forward to relaxation of the quarantine, lockdown and curfew measures that have been imposed.

It is with a heavy heart that I am writing this message to you, not just because of the terribly uncertain times that we are all facing due to COVID-19, but also since this will be my last message to you in my role as Chair of the Publications Committee.

On the other hand, I am delighted to be able to hand over the role and responsibilities to Priti Suri, the Vice-Chair, and know that all will be well with the Journal under her capable leadership.

While I had planned to have my last issue of the Journal themed on law firm management, I have since decided to theme this issue on the legal issues arising out of the COVID-19 pandemic as it impacts so heavily on our entire existence.

Throughout the world, businesses are facing an unprecedented crisis due to the economic upheaval and measures hastily taken by so many governments and, here in Sri Lanka, it is no different. Many organisations, particularly small businesses, are severely affected by this pandemic and business owners and lawyers are faced with taking extremely difficult decisions that will not just affect their businesses and legal practices, but also the lives of their employees and their families.

Needless to say, the thoughts of Priti and I are with all IPBA members who are directly or indirectly affected by this pandemic.

In our legal practices, we are now being called upon to advise on issues connected with concepts such as *force majeure*, employment law issues and medical testing. I hope that the articles in this issue will provide useful insights.

I would like to thank all our authors for their contributions:

James Jiang and Jill Zhao have contributed an article on 'Analysis of Statutory Rights and Obligations of Stakeholders During the Epidemic under PRC laws'.

Arya Tripathy from India for her article on 'COVID-19: A *Force Majeure* Case For Indian Contracts?'

Helen Tung and Jay Yu co-authored an article on '*Force Majeure* and the Coronavirus' (also contributed to by Ifrah George) in which they analyse legal issues around *force majeure* and the coronavirus in the UAE and China.

Our President Jack Li and Sun Chenyi have contributed an article 'Analysis on the Legal Issues of the Impact of the Epidemic Prevention and Control on International Trade, Investment and Consumption—from the Perspective of International Trade Contract Disputes and WTO's Future Development Positioning'.

Finally, I am very pleased to have been provided with a transcript of an interview with the former Attorney General of Malaysia, Tan Sri Tommy Thomas, which Tunku Farik kindly arranged.

I hope that you all can stay safe and healthy and that your lives and legal practices regain as much normality as possible in the coming months.

**John Wilson**

Chair – Publications Committee of the IPBA

<b>IPBA Upcoming Events</b>		
<b>Event</b>	<b>Location</b>	<b>Date</b>
<b>IPBA Annual General Meeting (AGM)</b>		
IPBA Annual General Meeting	Online	June 7, 2020
<b>IPBA Annual Meeting and Conferences</b>		
30th Annual Meeting and Conference	Shanghai, China	April 18-21, 2021
31st Annual Meeting and Conference	Tokyo, Japan	Spring 2022
32nd Annual Meeting and Conference	Dubai, UAE	Spring 2023
<b>IPBA Mid-Year Council Meeting &amp; Regional Conferences</b>		
2020 Mid-Year Council Meeting (IPBA Council Members Only)	Online	Fall 2020
<b>IPBA Events</b>		
IFLR/IPBA Asia M&A Forum 2020	Online	June 15-19, 2020
More details can be found on our web site: <a href="http://www.ipba.org">http://www.ipba.org</a> , or contact the IPBA Secretariat at <a href="mailto:ipba@ipba.org">ipba@ipba.org</a>		

### Addendum

The author's bio for Jose Eduardo T Genilo that appeared on page 30 of the December 2019 edition of this Journal should have read:

Jose Eduardo T Genilo, BSIE, JD, LL.M is a partner in ACCRA Law, Philippines, working extensively in all aspects of IP law. He is an IPO-PHIL Qualified Patent Agent and is a sought-after resource speaker on IP and cyber law. He also lectures on civil and remedial laws.

The IPBA and the publisher would like to express our regret for any confusion or inconvenience caused.

# Comprehensive Analysis of Statutory Rights and Obligations of Stakeholders During the Pandemic Under PRC Laws

This article analyses the major statutory legal rights and obligations of various stakeholders concerning COVID-19 under PRC laws; it provides a comprehensive introduction to China's health and disease control system and puts forward some pragmatic suggestions.



## Introduction

At the time of writing of this article (20 March 2020), the coronavirus pandemic ('COVID-19') has spread worldwide. The WHO has stated that it is not yet possible to say when this pandemic will reach its peak globally.<sup>1</sup> From the beginning of the epidemic, China has implemented a number of measures that have resulted in control of the situation within its borders. During this period, China's health and disease control system played a major role but also revealed some problems. While the various stakeholders concerned with COVID-19 should strictly comply with the PRC laws and regulations that have provided specific rights and obligations during the epidemic period—which has ensured efficient containment of the disease—there are still cases where the laws and regulations could be clearer for such a special situation.

## Medical Institutions

In the PRC, during the epidemic period, medical institutions are empowered to receive support and to take steps to control COVID-19.<sup>2</sup> Medical institutions, (including hospitals, health centres, sanatoriums, out-patient departments, clinics, health posts (rooms), first-aid stations and other medical institutions engaging in disease diagnosis and treatment activities), shall have the right to receive support of money, technology, security assurance etc., in order to deploy preventive and control measures such as quarantine for patients (including both confirmed and suspected patients), pathogen carriers and close contacts, to perform autopsies on the cadavers of patients for examination and to provide online consultation for designated diseases. These statutory rights are intended to allow medical institutions to have access to the necessary medical resources and pathogen information during the special period.

On the other hand, the statutory obligations of medical institutions are quite comprehensive, including obligations to obey arrangements from superior health administrations for fighting epidemics, to report the epidemic status truly and in a timely way, to receive patients with infectious diseases, to maintain sterilisation and harmless treatment, to carry out specific training for health care professionals, to set up special departments or personnel to manage the epidemic prevention and control, to make use of epidemic prevention and control products with due care, to lawfully dispose of medical waste and sewage, and to undertake other special obligations (such as enhanced epidemic

prevention and control measures for children and maternal populations). Where a medical institution fails to comply with the above-mentioned obligations, it is subject to administrative punishment such as monetary fines and/or revocation of licences or even to be pursued for criminal liabilities, if breaking criminal law. Where any personal injury is caused to patients, the medical institution may face civil liabilities and become liable to compensate for damage.

The provisions under PRC laws on the rights and obligations of medical institutions during epidemic periods are relatively scattered and need to be strengthened in a systematic manner. This is to reduce the compliance burden of medical institutions and enable them to devote more energy to epidemic prevention and control. Meanwhile, from the perspective of law enforcement, the protection of medical institutions' capacity to receive patients during the special period shall be taken as the primary consideration and its administrative penalties should be imposed with extra caution, while penalties in respect of certain types of unacceptable behaviour in connection with medical disputes, such as violent injuries caused to health care professionals, should be increased.

## Health Care Professionals

In combating the epidemic, the health care professionals involved mainly include doctors, nurses and technicians in auxiliary diagnosis departments, and medical administrative personnel. Health care professionals have the right to obtain adequate protection, intervention on physical and mental health, special training relevant to the epidemic situation, work-related injury insurance and temporary working subsidies.

In addition to the obligations to provide routine medical treatment, health care professionals shall bear the following special obligations during the epidemic period: reporting to the medical and professional institutions designated by the local health administrations within two hours when infectious diseases or diseases with unknown causes break out; obeying the deployment of the health administrations at or above the county level to participate in the emergency response and medical treatment; refraining from spreading rumours or making false reports on the epidemic status; and refraining from intentionally disclosing private information of patients and related persons.

Whether doctors have the right to report outbreaks remains controversial in China. Seeking a balance between public interest and security of information dissemination is a subject that needs delicate consideration. The government should be particularly prudent in dealing with 'whistle-blowers'. The government should also make its attitude towards such behaviour and ways of dealing with them clear through legislation, especially when it comes to situations that involve professional identities that are of relevancy and supported by certain evidence from the perspective of the public interest.

## Individuals

Individuals can be categorised into ordinary individuals and patients.

In the case of an epidemic, ordinary individuals have the right to obtain information on the epidemic. Ordinary individuals' private personal information shall be inviolable. Compensation shall be made for their property expropriated. Participation in voluntary activities shall be guaranteed by insurance. Deferred resumption of work shall be granted rest and normal wages and they shall be exempted from liability due to *force majeure* if the epidemic prevents them from performing a contract. Meanwhile, ordinary individuals are legally obliged to cooperate in and implement the prevention, control and emergency measures taken by authorities at all levels, to refrain from discriminating against patients and to promptly report any found and suspected cases.

Various localities in China have adopted different emergency blockade measures, such as the lockdown of the city of Wuhan. Some cities have blocked certain roads by measures such as using movable roadblocks or adopting red lights for the whole city in order to restrain the flow of people. However, some of these blockades, which cannot be restored in a short time, may affect the passage of ambulances and the transport of epidemic prevention supplies in emergencies. It is advised that in future legislation the criteria for emergency measures to be taken by different levels of government bodies in response to various outbreaks should be further clarified.

Patients, other than ordinary individuals, have the right to obtain medical treatment and enjoy the right to informed consent, labour security and medical care expenses reimbursement throughout the treatment.

Meanwhile, patients are obligated to actively cooperate in the mandatory medical treatment measures such as epidemic investigation, disease examination, and medical observation and quarantine; and shall not engage in relevant work before cure. Patients who participate in medical insurance in China will have their medical expenditures fully covered by government finance. If a confirmed diagnosis is made while the patient tries to conceal relevant information, not only will the costs be borne by the patient himself, but those who intentionally spread the epidemic are more likely to be charged with crimes of endangering public security.

In addition, private personal information of both ordinary individuals and patients should be protected and the entities that obtain such information should strictly limit the use of relevant information and prohibit the disclosure and publication of such information. Entities violating relevant laws and regulations shall bear the corresponding administrative liability and tort liability.

## Pharmaceutical Companies

During the epidemic, pharmaceutical companies shall have the right to obtain subsidies as well as priority review and approval of new drugs for epidemic prevention and control. Meanwhile, pharmaceutical companies are specially obliged to ensure the drug supply and cooperate with related authorities in allocating drugs. The current situation is that there is no effective drug against COVID-19 on the market; therefore, R&D and approval of new drugs must be completed. In China, R&D and the marketing of drugs must go through four clinical stages, which is overly time consuming to meet the special needs of the moment. Therefore, the PRC laws also have the following special provisions.

### Special Review and Approval Procedures and Conditional Approval Procedures

Since the outbreak of SARS in 2003, the former State Food and Drug Administration ('SFDA', now the National Medical Products Administration, 'NMPA') has issued relevant rules on the special review and approval procedures, specifying the triggering conditions. The 2009 H1N1 swine flu vaccine adopted this procedure and took less than 100 days from its R&D to official approval for the market. The PRC Drug Administration Law, newly revised in 2019, clearly states that 'for drugs used for the treatment of serious life-threatening diseases for which there is no effective treatment, as well as drugs urgently needed in public health, where the drug clinical



Whether doctors have the right to report outbreaks remains controversial in China.

trial has data to prove efficacy and is able to project clinical value, conditional approval may be granted, and the relevant information should be stated in the drug registration certificate.'

**Compassionate Use of Investigational Drugs System**

China has introduced for the first time, in its newly revised PRC Drug Administration Law, the 'compassionate use of investigational drugs', where drugs may be used within the clinical trial organisation on other patients with the same condition upon examination if: (1) the drug itself is undergoing clinical trials; (2) the drug is used for the treatment of serious life-threatening diseases for which there is no effective treatment; (3) from the medical observation, that such drug is beneficial to patients; and (4) the drug complies with ethical principles and patients' informed consent is obtained. For instance, Remdesivir, now a 'compassionate drug', started its clinical trials in Wuhan's hospitals commencing directly with Phase III. However, there is still a lack of clear implementation standards for a 'compassionate drug'. Such regulations on how to define what is 'beneficial to patients', how to operate an 'ethical review', what elements are included in 'informed consent' for example, need to be further refined and perfected.

**Medical Device Companies**

The sudden outbreak of the COVID-19 epidemic has resulted in a worldwide shortage of protective supplies such as masks. Medical device companies have been following higher registration and filing standards in daily production and have assumed the obligation to ensure supply and comply with deployment during the epidemic. To maintain better medical treatment order during the epidemic, PRC laws also have the following special regulations.

**Prohibition of Soaring Prices**

Operators shall not commit any act of driving up prices as prescribed in the Provisions on Administrative Punishment for Illegal Pricing Acts; otherwise, the operator shall bear administrative liabilities and may also bear criminal liabilities if the elements of criminal liability have been established.

**Emergency Review and Approval Procedures**

In 2009, China released the Procedures for Emergency Review and Approval of Medical Devices, authorising the NMPA to decide, under special circumstances and based on the actual circumstances, the time for launching and terminating the procedures. As for

medical masks, a Class II medical device, the medical products administration departments shall, after accepting the application for registration of a medical device for emergency approval, complete the technical review within five days; and after the end of the technical review, complete the administrative approval within three days.

### **The Import of Medical Devices Yet to be Approved in the Domestic Market**

Medical devices that meet the relevant standards of the United States, the European Union, and Japan may, following the rules and requirements promulgated by the NMPA, be imported from overseas in an emergency manner for epidemic prevention purposes. Certificates and inspection reports of overseas marketing authorisation shall be provided and the importers shall make commitments on product quality and safety.

### **The Export of Medical Devices**

Medical devices generally are not categorised as export control items and thus it is legally allowed for export without specific licensing or quota requirements. During the epidemic and till the end of this March, China has never established any trade control measures against export of medical devices (such as medical masks). But medical device exporters are obliged to make their filings or registrations (depending on which category the products belong to) with the competent NMPA. The export medical device products also need to comply with the product standards of the destination countries.

### **Disease Control and Prevention Institutions**

Institutions of disease prevention and control under PRC laws mainly refer to the disease prevention and control centres engaged in disease prevention and control as well as the units engaged in professional activities similar to those of the said institutions, hereinafter referred to as the 'CCDC'. Its main duties shall include collecting and investigating information about the epidemic status of infectious diseases, drawing up and implementing programs for prevention and control of infectious diseases, forecasting, monitoring, analysing and reporting on the epidemic status, conducting laboratory testing of infectious diseases and making the diagnosis and etiological appraisal, controlling the use of preventive

biological products, conducting health education and consultancy and disseminating knowledge about prevention and treatment of infectious diseases.

During the COVID-19 outbreak, the CCDC quickly organised researchers to work overtime on analysing the virus. On 24 January 2020, the CCDC successfully isolated the new coronavirus strain, which has bought enough time for the determination of diagnosis and a treatment plan and the development of a vaccine for COVID-19. On 30 January 2020, the CCDC assigned 20 testing teams, totalling 83 members, to go to 17 prefectures and cities in Hubei Province to support local laboratory testing. The supporting team was recruited from the CCDC and its 17 provincial units, having carried out more than 100,000 laboratory tests within one month by continuous high-intensity work. The CCDC showed rapid response and efficient organisation to the outbreak of COVID-19.

The CCDC showed rapid response and efficient organisation to the outbreak of COVID-19.

However, the CCDC undertakes many important functions related to epidemics and a problem of insufficient power has been exposed during the COVID-19 outbreak. First, notwithstanding that the CCDC has been regulated to follow its clear reporting hierarchy within the system, it has not yet been authorised to release information about the outbreak. Since the outbreak of SARS in 2003, the CCDC had set up and implemented its disease control and prevention information system as from January 2004. Health care professionals in hospitals at all levels of China are legally obliged to upload epidemic cases, including Pneumonia of Unknown Etiology, directly through the CCDC network system. Once uploaded, the CCDC bodies at corresponding levels will immediately receive the report within its governing area. After collecting the case information, the CCDC needs to analyse, and report to the upper CCDC and the administrative departments. However, the final release power goes to the administrative bodies, which cannot guarantee the timeliness of information release. Second, the authorisation scope of the CCDC to perform information gathering and investigation is not clear enough. Further elaboration needs to be made on such issues as to the depth of information investigation, places to enter for investigation and the scope of the information the CCDC is entitled to acquire.

## Health Administrations

The PRC National Health Commission ('NHC') has relatively broad statutory responsibilities. The following supervisory functions granted to the NHC regarding epidemics alone include: epidemic status reporting, preliminary examination and separation of patients, sterilisation and quarantine, personal protection, epidemic response, biological safety, medical waste disposal, air-conditioning and ventilation management and control of public places.

As the supervisor of epidemic prevention and control in China, the NHC has played an outstanding organisational role and made a lot of contributions in relation to COVID-19. For example, on 15 January 2020, before China entered into the status of comprehensive prevention and control, the NHC had already issued the first trial version of the diagnosis and treatment plan for COVID-19. It has been updated and released to the seventh trial version within the last two months, translated and adopted by other countries and is considered as a good reference for other affected countries.

Nevertheless, there are still some controversial issues in the design of relevant systems for better improvement, which are likely to cause inefficient epidemic prevention and control. For example, the administrative level of the authority granted to release outbreaks is too high. Currently, only the State Council and the provincial health commissions (additional authorisation required), have the power to release epidemic information. Reporting through a hierarchical structure may cause a time lag, but the authenticity of the information may be harmed if the release level is too low. It is suggested that the power to release epidemic information can be directly granted to the provincial health commissions and additional authorisation is required if the release is made by administrative bodies at lower levels.

In addition, the current epidemic disclosure mechanism only covers three types of statutory infectious diseases as provided by the PRC Law on Prevention and Treatment of Infectious Diseases and does not apply to any other unknown infectious diseases. COVID-19 has been declared by the NHC as a Category B infectious disease and is treated as Category A for its prevention and control purposes on 20 January 2020 and the NHC has been updating and publishing the information daily ever since. Such practice of the NHC is in line with the epidemic situation disclosure mechanism. On the other

hand, there is another emergency disclosure mechanism established by the PRC Emergency Regulations Regarding Emergent Public Health Incidents, applying to the 'epidemic situation of major infectious diseases and group diseases with unknown causes that break out suddenly and cause or may cause serious damage to the health of the general public.' Such emergency disclosure mechanism shall be taken as a backup disclosure approach, but it has rarely been adopted in practice. Meanwhile, the early warning system for epidemic status should be improved, empowering the specialised units with a close relationship to the epidemic status information (such as the CCDC and medical institutions) to issue early warnings against epidemic outbreaks, to realise information transparency without causing any panic of the general public.

## Notes

<sup>1</sup> On 13 March 2020, Maria Van Kerkhove, who heads the WHO's emerging diseases unit, told a virtual press conference that it was not yet possible to say when the COVID-19 pandemic will peak globally.

<sup>2</sup> See the PRC Law on Prevention and Treatment of Infectious Diseases, the PRC Emergency Response Law, the PRC Administrative Regulations on Medical Institutions and other laws and regulations.



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*The author would like to thank Jill XJ Zhao, Associate, MWE China Law Offices, for her assistance in writing this article.*

# COVID 19: A *Force Majeure* Case For Indian Contracts?

To tackle the COVID-19 outbreak, the Indian Government ordered 40 days national lockdown effective from 25 March 2020 mandating organisations to close operations. The impact felt on business continuity is significant and organisations are evaluating methods to mitigate risks and contain costs. This article analyses the feasibility of invoking *force majeure* clauses, arguing frustration and other available alternatives in an Indian scenario.



## Introduction

From declaration as a pandemic by the World Health Organisation ('WHO') on 11 March 2020 to a rapid decline in global business volume, COVID-19 highlights the imminent threat of a world-wide economic recession, and India Inc is no exception. On 24 March 2020, the Indian Government ordered an initial



nationwide lockdown for 1.3 billion Indians until 14 April 2020, followed by a subsequent order of 14 April 2020 extending the lockdown until 3 May 2020 ('GOI Order'). The GOI Order closes all public and private organisations, unless specifically exempted as an establishment engaged in the provision of essential goods and services.<sup>1</sup> The impact is felt at a fundamental level—commercial and economic activities have been brought to a standstill; manufacturing and service industries have closed; financial and stock markets have witnessed the worst downward spiral; and construction activities have been halted.

In these dire times, organisations are compelled to meticulously assess the multifarious impacts on their stakeholders, devise risk mitigation strategies and, most importantly, reduce costs and contain losses. With disruptions unfolding every hour, entities are likely to default or delay their contract performance. In some cases, the performance could be rendered impossible as well. This grim possibility has required contracting parties to identify legal and contractual mechanisms that can provide a rescue to the situation such parties find themselves in and many organisations have been weighing the feasibility of invoking *force majeure* ('FM') clauses. FM clauses aim at safeguarding a contracting party from incurring liability for default, if such default is caused due to certain events beyond the party's control. The term has a French language origin and means in French 'superior force'. FM generally is understood as an event or effect that can neither be anticipated or controlled, which prevents someone from performing as per agreement.<sup>2</sup>

FM clauses are being closely examined in civil and common law jurisdictions and, in the near future, courts across the globe will be adjudicating contractual disputes around COVID-19 as FM. In the context of this background, this article aims to analyse the feasibility and efficacy of invoking FM in an Indian scenario.

## FM in India

### Overview

The Indian Contract Act 1872 ('Contract Act') does not specifically codify or statutorily recognise FM, although its enforcement is linked with section 56 of the Contract Act dealing with the doctrine of frustration (as explained hereinafter). Nevertheless, parties customarily agree on FM events in their contracts. Its scope, operation and impact are solely dependent on how the clause

is worded and the interpretation of specific facts and circumstances. This is a peculiar characteristic of common law jurisdictions like India, where contracting parties cannot fall back on statutory specifications or a curated list of FM events as found in civil law jurisdictions, such as China and France.

### Kinds of FM Clauses

A variety of FM clauses are found in Indian contracts. Some are worded as open-ended clauses, using 'catch-all' inclusive phrase where the FM will include 'such other events that are beyond parties' control'. This is typically found in commercial contracts between private parties for supply of goods and services or contracts with shorter duration. On the other hand, many prefer a detailed FM clause with an illustrative list of FM events, such as act of God, state of emergency, change of law, natural calamities and disaster, war, insurgency, law and order situation, strikes, government action and political unrest. This approach is generally witnessed in public-private projects, turnkey and longer duration contracts.

### Essentials

Irrespective of how a FM clause is worded or the process that parties must follow upon FM occurrence, jurisprudence settles the fundamentals that will be scrutinised when a party invokes a FM clause.<sup>3</sup> These are:

- the FM event must be expressly agreed in the contract and cannot be implied from the conduct of the parties;
- the FM clause must be narrowly construed bearing in mind the agreement of the parties, the purpose, the contracting circumstances and the language used;
- it will only admit situations which hinder or prevent the party from performing the contract and cannot admit situations where contract performance has become onerous or expensive;
- the event must not have been foreseeable factoring the contract circumstances; and
- the FM event must be outside the reasonable control of parties.

Based on the above, there cannot be an implied right to invoke FM events to substantiate non-performance or delayed performance of a contract. Parties can only



There cannot be an implied right to invoke *force majeure* events to substantiate non-performance or delayed performance of a contract.

resort to a specific FM clause. The FM clause language determines when a party can invoke FM, and often, invocation can result in differences or disputes between parties, highlighting the subjectivity of wording in contractual FM clauses. Alongside the wording, courts will typically construe FM events narrowly factoring in multiple considerations such as foreseeability, availability of alternative methods of contract performance, the ability of parties to reasonably control the event, the intention of the parties and the purpose of the contract. Thus, the analysis is strict, not in isolation, but, rather, FM is difficult to establish since the general sentiment is to require parties to perform.

### Process on FM Occurrence

Apart from defining what is FM, Indian contracts customarily provide the process for notifying FM in a prompt manner to the affected party and the consequences that ensue. The usual consequences agreed between parties include taking mitigation steps, suspension of obligations, extension of the contract duration and termination without default. A common theme of course, is that upon invocation, the non-performing party is exempted from performance and cannot be held liable for damages or associated costs,



unless otherwise agreed elsewhere in the contract. Hence, an establishing FM event to trigger the FM clause will not suffice and the parties must follow allied obligations such as providing timely notice, implementing mitigation steps and taking reasonable measures to perform at the earliest.

### COVID-19 in India Disaster Management Act 2005

Prior to analysing whether COVID-19 can be relied upon as a FM event entitling the contracting parties to remedies, it is important to analyse the legal basis of the GOI Order.

The GOI Order was passed in exercise of the powers conferred upon the Central Government under the Disaster Management Act 2005 ('DM Act'). The DM Act aims at providing effective management of disasters and incidental matters. A 'disaster' is defined as a catastrophe, mishap, calamity or grave occurrence arising from natural or manmade causes or by accident or negligence: (1) which results in substantial loss of life or human suffering or damage to/destruction of property, or damage to/degradation of environment; and (2) is of such nature or magnitude that it is beyond the

copying capacity of the community.<sup>4</sup> Where a disaster has occurred or is likely to occur, the Government is empowered to take such measures as it may deem fit for disaster management.<sup>5</sup> Disaster management includes measures which are necessary for prevention, mitigation, assessing the severity or magnitude of a disaster, reduction of risk or severity of consequences, capacity-building, preparedness to deal with a disaster, taking a prompt response, evacuation, rescue and relief and rehabilitation.<sup>6</sup> Further, the DM Act allows the government to access funds in the National Disaster Response Fund ('NDRF') for disaster management.

### COVID-19 as a Disaster

As can be inferred from the foregoing, the scope of disaster and disaster management is wide and can include an epidemic or pandemic that the government feels is beyond the Indian community's coping ability. Factoring in the novel and extremely contagious nature of COVID-19, combined with the lack of preparedness to mitigate, it is likely that an outbreak will affect millions of Indian citizens and give a major setback to the Indian economy. It implies that the COVID-19 pandemic can be argued to be a disaster or a situation that results in one. Assuming that COVID-19 satisfies the essentials of a disaster, the government can order a complete lockdown of all shops, commercial and industrial establishments, ban travel and trade and restrict an individual's fundamental right to privacy and personal liberty. By invoking the DM Act, the government can tap into NDRF for vamping testing laboratories, establishing quarantine facilities, manufacturing and supplying masks, sanitisers and other essential services.

### COVID-19 as FM in India

In the context of government procurement contracts, the position has been clarified, providing some respite to private entities supplying goods to the government. The Ministry of Finance issued an office memorandum on 19 February 2020 elaborating on the scope of a FM clause under the Government's Manual for Procurement of Goods ('Feb 2020 Memo').<sup>7</sup> The Manual defines FM as 'extraordinary event or circumstance beyond human control' like an act of God, natural claims, war, strikes, riots, crimes, but will not include negligence, wrongdoing or predictable/seasonal rain. It further provides that upon occurrence of FM, no liability shall attribute to either party and the performance shall be suspended for the duration of the FM, provided that the defaulting party gives notice as soon as the FM event occurs. If the

FM event persists after 90 days, either party may terminate the contract without any financial repercussion. Pursuant to the Feb 2020 Memo, the Government clarified that disruption of supply chains due to COVID-19 spread in China or any other country will be covered under a FM clause as a natural calamity. Relying on this, private parties to Government procurement contracts can invoke an FM clause due to COVID-19 and seek suspension for the next 90 days, after which the parties may decide to terminate as per contractual arrangement without any liability or damages.

However, the scenario for private contracts is not straightforward and where a party wants to trigger a FM clause, it must satisfy the requirements as stated above. In such cases, the Feb 2020 Memo will only have a persuasive value facilitating parties to substantiate the occurrence of the FM event, but cannot be considered binding on them. For private contracts, there can be two situations. In the first scenario, let us assume that the FM clause categorically mentions epidemic, pandemic, disaster, lockdown or public health emergency situations. If so be the language, the parties can rely on the WHO's declaration of COVID-19 as a pandemic,<sup>8</sup> the GOI order, the Feb 2020 Memo, other State specific lockdown notifications and the surrounding circumstances such as lack of transportation, manpower and resources, closure of units and disruption in the supply chain to invoke FM clauses. Herein, the degree of judicial scrutiny will be limited, since there is express contractual language to capture the intention of the parties and the resultant contractual non-performance is largely due to operation of law, that is, the GOI Order.

In the second scenario, where the FM clause does not specifically provide for the events as stated above, the parties have to establish the basis for invoking a FM clause. It will be important to prove that a situation like COVID-19 and the resultant lockdown were unforeseen, beyond the reasonable control of the parties and that it has seriously hindered or prevented the party from performing the contract. This will call for an analysis of the COVID-19 impact on the nature of performance obligations and incurring additional expenses or facing hardships will not meet the threshold. The claiming party must establish that there are no alternatives for performance of the contractual obligations. While similar facts such as lack of resources, supply and closure of production units will be relied on in both scenarios, the degree of scrutiny nevertheless will be higher for the latter case.

In a nutshell, for private contracts, as long as parties can prove the essentials of FM invocation in the specific facts of COVID-19, it is extremely likely that they can seek to either extend timeline, suspend or in certain instances, terminate as per contractual agreement, without any liability. But what happens where the contract does not expressly provide for a FM clause?

### Alternatives to FM

Since FM cannot be implied, a contract sans FM clause will be on a different footing. Different options can be evaluated to deal with COVID-19 impact. Parties may choose to rely on other clauses such as material adverse change, operation of law, price escalation and adjustments, limitation of liability and damages clauses to address the situation. They can also discuss and mutually agree to amend the contract. This amendment can be for extension of timelines, sharing of increased costs, changing the scope of performance, suspension for a certain duration or even inclusion of a FM clause that caters to the pandemic situation.

As an alternative to amendment, parties may fall back on the statutory doctrine of frustration. Section 56 of the Contract Act provides for frustration and the accompanying jurisprudence is materially influenced by English and American judgments. Section 56 states that a contract to do an act, which after the contract's conclusion becomes impossible, will be rendered void, provided the promisor had no knowledge, or it was not reasonable for the promisor to know, that performance was impossible. If the promisor had or was reasonably expected to have knowledge, the promisee has a right to seek compensation for any loss incurred due to resultant non-performance. Based on this and court decisions,<sup>9</sup> a contract can be made void if the party claiming frustration is capable of proving the following:

- performance is impossible, that is, the fundamental basis of contract is frustrated as a result of which insisting on performance is futile and unjust factoring in the object and purpose of the contract;
- the object and purpose must be determined through a multi-factoral approach accounting for the parties' knowledge, assumptions and contemplation, risk, possibility of future performance, etc.;
- hardships such as increase in costs or where performance has become onerous will not satisfy

unless it can be proven that they strike at the very basis of the contract;

- impossibility cannot be an outcome of negligence or wilful action/omission of the contracting parties;
- the defaulting party had no knowledge or with exercise of reasonable diligence might not have known of the circumventing event or the likelihood of its occurrence;
- the promisee had no knowledge of the circumventing event; and
- the defaulting party has acted reasonably and performed mitigation steps.

Where a party can satisfy the above essentials, the contract will be void without any financial implications on the parties. Proving frustration is far more difficult than arguing occurrence of a FM event, as the claimant must establish that the nature of the event has fundamentally altered the core of the contract rendering performance meaningless and impossible. For instance, where a contract requires a party to produce and supply certain quantities of indigo and later the government bans production, the contract is frustrated. In the COVID-19 context, the evaluation will be fact specific, but the impact of lockdown which has prohibited operation of organisations can play a significant role in claiming frustration. However, the question will be: has the lockdown made performance of the contract impossible entirely or is the disruption temporary? The answer to this will be influenced by how long the lockdown lasts, further Government action and a call for an overall evaluation of the contract, its timelines and the nature of its obligations. The chances of establishing an impossibility resulting in frustration may have a stronger chance to prevail for time being of the essence contracts or where contracts are for a shorter duration. But, where contracts are continuing in nature, it will be difficult to prove impossibility and consequently, seek frustration, unless the Government takes further action (such as indefinite extension of the lockdown) that adversely affects the contract performance.

## Conclusion

In light of the foregoing, it is absolutely important that organisations revisit their contracts and establish effective communication with their counterparties. It must be

remembered that COVID-19 is first a global human crisis, and then, a business ordeal. Indian courts while adjudicating contractual disputes for non-performance or delayed performance may factor in new circumstances such as human resource health safety, an obligation on the Government to mitigate public health risks and other equitable principles, which otherwise may not have been considered. This may result in a situation where, despite the contractual basis to claim damages, courts adopt a liberal approach and empathise. At this juncture, probably it is best for most businesses to explore less adversarial routes such as mutually amending contracts, as opposed to invoking FM clauses or arguing frustration.

## Notes

<sup>1</sup> Exempted organisations under the GOI Order include: (1) hospitals and related medical establishments, their manufacturing and distribution units such as chemists, ambulance services, diagnosis; (2) shops and e-commerce dealing with essentials such as food, animal fodder, dairy products; (3) banks, insurance offices and ATMs; (4) print and electronic media; (5) telecommunications, internet, broadcasting and cable services; (6) power generation, transmission and distribution units; (7) petrol and gas stations and stores; and (8) transport services for essential goods.

<sup>2</sup> See *Black's Law Dictionary*, 11th edn, p 788.

<sup>3</sup> *Energy Watchdog v Central Electricity Regulatory Commission and Others* (2017) 14 S.C.C. 80.

<sup>4</sup> Disaster Management Act 2005, s 2(d).

<sup>5</sup> *Ibid*, s 6 read along with s 10.

<sup>6</sup> *Ibid*, s 2(e).

<sup>7</sup> Ministry of Finance Office Memorandum No. F. 18/4/2020-PPD, dated 19 February 2020, accessible at <https://doe.gov.in/sites/default/files/Force%20Majeure%20Clause%20-FMC.pdf> (last accessed on 19 April 2020).

<sup>8</sup> See 'WHO Director-General's opening remarks at the media briefing on COVID-19—11 March 2020' available at <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19--11-march-2020> (last accessed on 19 April 2020).

<sup>9</sup> *Satyabrata Ghose v Mugneeram Bangur & Co.* A.I.R. 1954 S.C. 44; *M/s Alopi Parshad & Sons Ltd v Union of India* 1960 (2) S.C.R. 793; *Energy Watchdog vs. CERC* (2017) 14 S.C.C. 80.

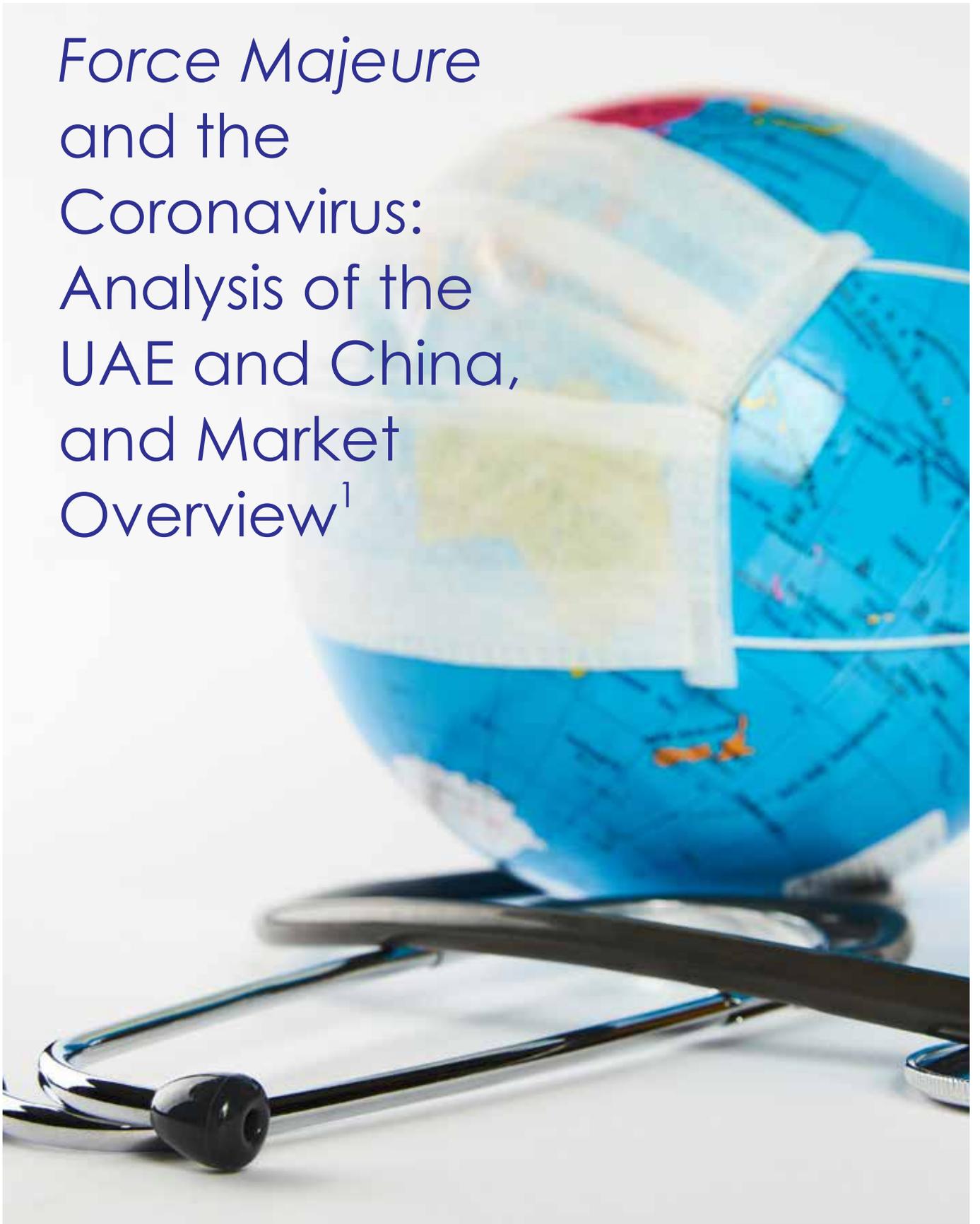


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# *Force Majeure* and the Coronavirus: Analysis of the UAE and China, and Market Overview<sup>1</sup>



## 1. Introduction

As at the time of writing this article, the coronavirus has infected 1,924,679 people and caused 119,718 deaths. In the United Arab Emirates ('UAE'), 4,123 cases have been reported.

The virus is spreading quickly and companies are taking precautions to prevent the spread of the disease. Some companies may invoke a *force majeure* event in order to obtain relief from contractual obligations. The main events that are being identified as *force majeure* events are flight suspension, a ban on foreign tourism and a delay in operations.

The question arises as to whether these measures give rise to a *force majeure* event, relieving one or both parties from performing the contractual obligations of such party/parties. In this article, we will discuss what constitutes a *force majeure* event, what actions companies are taking and what measures the UAE has taken to combat this virus.

## 2. Force Majeure in the UAE

### **Force Majeure**

*Force majeure* is an event beyond a party's control, which prevents the party from fulfilling their obligations under a contract. A law providing for *force majeure* through doctrine or contractual provisions can relieve a party from liability for non-performance.

In the UAE, we will consider the laws of the mainland, the Dubai International Financial Centre ('DIFC') and the Abu Dhabi International Financial Centre ('ADGM').

### **Force Majeure Under the UAE Civil Code**

Article 267 of Federal Law No. 5/1985 on the Civil Transactions Law (the 'Civil Code') states:

If a contract is valid and binding, none of the contracting parties may revoke, modify or rescind it except by mutual consent, order of the court, or law.

The Civil Code enables the parties to cease the contract upon mutual consent. However, such a clause must be drafted in line with UAE law.

Article 247 of the Civil Code states:

In bilateral contracts, where the reciprocal obligations are due, each of the contracting

parties shall have the right to abstain from executing his obligation where the other party does not honour his obligation.

A party has the right to withhold performance of its contractual obligations in the event the other party fails to perform its contractual obligations. In this case, neither party has the obligation to perform.

Article 271 of the Civil Code states:

The parties may agree that in case of non-performance of the obligations deriving from the contract, the contract will be deemed to have been *ipso facto* without need to obtain a court order. Such an agreement does not release the parties from the obligation of serving a formal notification, unless the parties agree that such notification is dispensed with.

It would appear that if parties agree to the non-performance, then the court would accept it as such, provided it is served and in writing.

Alternatively, under Article 273 of the Civil Code, an event beyond the control of the parties or that is unforeseeable and that renders the contract impossible to perform may excuse the parties from performance. The Article states:

1. In bilateral contracts, if a *force majeure* arises that makes the performance of the obligation impossible, the corresponding obligation shall be extinguished, and the contract *ipso facto* rescinded.

2. If the impossibility is partial, the consideration for the impossible part shall be extinguished. This shall also apply [to] the provisional impossibility in continuous contracts. In both instances the creditor may rescind the contract provided the debtor has knowledge thereof.

Furthermore, any situation of a public nature, such as a government advising a travel ban, may also empower the parties to terminate the contract. However, the party terminating the contract may have the burden of proving that the circumstances were: (1) unforeseeable; and (2) prevented that party from reasonably fulfilling its obligations in the event.

Many companies have opted to shut down their operations as the coronavirus spreads. The question of whether the spread of coronavirus was foreseeable and whether a party could have taken alternative measures to carry out its obligations under a contract will depend greatly on how the spread of the virus unfolds and the parties' ability to perform within reason.

See Part 5 below for a list of businesses that have been affected by the coronavirus.

There is an important question which arises and that is: to what extent is a party expected to go out of its way to perform its obligation? At this point in the phase of the coronavirus, we can see that there are many government policies and guidances imposed on businesses and individuals, more specifically fines and/or consequences having immediate and more long-term impacts economically and socially. Whether such stringent measures, such as curfews, fines and quarantine can be sustained without causing harm to individuals and companies in terms of social, economic well-being is yet to be assessed.

Article 287 of the Civil Code states:

In the absence of a provision in the law or an agreement to the contrary, a person is not liable for reparation if he proves that the prejudice resulted from a cause beyond his control, such as a heavenly blight, unforeseen circumstances, *force majeure*, the fault of others or of the victim.

In the UAE mainland, in the absence of any other law or agreement, a person will not be held liable for contractual obligations if the circumstances beyond their control prevent performance.

### **Force Majeure in the DIFC**

Article 82(1) of DIFC Law No. 6/2004 states:

Except with respect to a mere obligation to pay, non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.



**The WHO currently does not encourage border closures and travel bans.**

A party may be exempted from performing its contractual obligation if it can prove that the non-performance was due to circumstances beyond its control. This would arguably be the case with the coronavirus in limited circumstances, such as with regard to suspension or cancellation of airlines and shop operations. The WHO currently does not encourage border closures and travel bans. However, many countries are proactively taking measures such as banning flights to and from mainland China or imposing a 14-day quarantine on persons arriving into their respective countries, including nationals. Please see Part 3 below of this article for a more detailed list.

Article 82(2) of DIFC Law No. 6/2004 states:

When the impediment is only temporary, the excuse shall have effect for such period as is reasonable, having regard to the effect of the impediment on performance of the contract.

Thus, if an impediment is temporary, the expected performance and/or commitment may be held off for a reasonable time possible to continue such expected performance and/or delivery.

Article 82(3) of DIFC Law No. 6/2004 states:

The party who fails to perform must give notice to the other party of the impediment and its



effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such non-receipt.

In relation to the third clause, it is reasonable business behaviour to notify parties that it is unable to complete an obligation as soon as the impediment becomes known to that party.

Article 82(4) states:

Nothing in this article prevents a party from exercising a right to terminate the contract or to withhold performance or request interest on money due.

Thus, if a party who otherwise has a right to terminate a contract wishes to do so due to the other party invoking *force majeure*, it will be permitted to do so. The fact that one party has invoked *force majeure* does not cancel any contractual right of the other party to terminate the contract, withhold performance or request interest on money due.

DIFC rules are consistent with the UAE mainland rules and go slightly further to provide guidance on the application of *force majeure* when there is a temporary delay beyond the party's control. The performance of

the obligation affected by the potential *force majeure* event may also be dependent on how long the parties took to notify the delay. In other words, if there is a known timeframe, for example, three months' delay, the party may still be able to perform its obligations rather than cancel performance or delivery, despite the delays.

### **Force Majeure in the ADGM**

The ADGM follows English common law. The guidance in the ADGM Market Infrastructure Rulebook, Article 2.6.2(d) and (f) is:

A Recognised Body must have a business continuity plan that is subject to periodic review and scenario testing, which addresses events posing a significant risk of disrupting operations, including events that could cause a widespread or major disruption. The plan should:

...

(d) contain appropriate emergency rules for *force majeure* events;

...

(f) outline business continuity procedures in respect of its Members and other users of its facilities following disruptive or *force majeure* events.

The ADGM's position is that businesses ought to consider *force majeure* as part of their business continuity plans. Certainly, the onset of the coronavirus has brought much disruption to businesses. The expectation from ADGM would be that businesses plan their risks accordingly. Part 5 below discusses how businesses might plan for the spread of the coronavirus.

## **3. Legal Analysis of Force Majeure in China**

### **The Law of Force Majeure in China**

As the People's Republic of China ('PRC') is a centralised country, the applicable laws in mainland China (for the purpose of this article, excluding Hong Kong, Macau and Taiwan) are uniform and all courts within its territory must review cases in accordance with the laws legislated by the National People's Congress. The rules of *force majeure* are mainly stipulated in the following three laws discussed below:

**(a) General Rules of the Civil Law (2017)**

Article (180) provides that if a person is unable to perform the civil obligation due to *force majeure*, the person shall not bear civil liability. If the law provides otherwise, such provisions shall prevail. *Force majeure* means unforeseeable, unavoidable and insurmountable objective conditions.

**(b) General Principles of Civil Law (1987, amended in 2009)**

Article (107) provides that civil liability shall not be borne for failure to perform a contract or damages to a third party if it is caused by *force majeure*, except as otherwise provided by law. Under Article (153), for the purpose of this Law, '*force majeure*' means unforeseeable, unavoidable and insurmountable objective conditions.

**(c) Contract Law (1999)**

Article (94) provides that either of the parties may terminate the contract under any of the specified circumstances, one of which is where the aim of the contract cannot be attained because of *force majeure*.

Under Article (117), if a contract cannot be fulfilled due to *force majeure*, the obligations may be exempted in whole or in part depending on the impact of the *force majeure*, unless laws provide otherwise. If the *force majeure* occurs after a delayed fulfilment, the obligations of the party concerned may not be exempted. *Force majeure* as used herein means objective situations which cannot be foreseen, avoided or overcome.

Article (118) provides that either party that is unable to fulfil the contract due to *force majeure* shall notify the other party in time in order to reduce losses possibly inflicted to the other party and shall provide evidence thereof within a reasonable period of time.

**(d) In Summary**

The aforementioned provisions can be generalised as follows:

(1) *Force majeure* is a kind of objective situation that is unforeseeable, unavoidable and unpreventable.

(2) A person shall not be liable if losses are caused by *force majeure*.

(3) In a contractual relationship, the obligations of a party may be exempted in whole or in part depending on the impact of the *force majeure*. If the purpose of the contract becomes impossible due to the *force majeure*, either of the parties may terminate the contract. However, the party under the impact of *force majeure* is obligated to give notice to the other party in time to reduce losses and shall provide evidence to prove the impact of the *force majeure*.

**Is There Any Case Law That Can Be Applied in Relation to Coronavirus?**

Since the legal impact of coronavirus has yet to be revealed and considering the procedure and the time period for judgment publication, it is hard at present to find cases directly related to coronavirus. However, there have been other similar situations in China, for instance, during the breakout of SARS in 2002–2003. The judicial practices in those situations provide a good point of reference in regard to the application of *force majeure* laws during an epidemic similar to the current coronavirus situation. Whether SARS (and therefore coronavirus) could come under the exemption of *force majeure* must be considered on a case-by-case basis and, according to our legal research of both SARS and non-SARS cases, the key points on the application of *force majeure* can be analysed having regard to the following matters discussed below:

**(a) Whether the Performance of the Contract Was Directly and Materially Impeded From the Impact of SARS [or, now, Coronavirus]?**

In *Huangping County Middle School v Kunshan Xinnuo Enterprise Management Co Ltd*, the Court held that the School had failed to submit evidence regarding whether the local disease control and prevention authority had issued a suspension suggestion to the School, thus the Court did not uphold the argument that the School should be exempted from breach due to *force majeure*.

In another case, *Huaken International Trading Co Ltd v Shanxi Lunda Meat Industry Co Ltd*, it was held by the Court that there were no traffic blocks or trade restrictions during the period of SARS, thus SARS was not a *force majeure* event that impeded the performance of the delivery obligation.

We can see from these cases that the party under impact must submit evidence such as prohibition or



On 5 February 2020, the WHO and the international community launched a USD675 million preparedness and response plan.

in the Contract Law that if the performance was delayed by the relevant party into the outbreak, it cannot be exempted.

**(c) The Scope of the Impact**

In *J.P.I Travel U.S.A., INC v Changjiang Ship Overseas Travel Corporation* (referred to as 'J.P.I Travel' and 'Changjiang Corporation'), J.P.I Travel chartered a cruise ship from Changjiang Corporation to operate a travel business in the area of the Three Gorges. Shipping was suspended for several months due to the impact of SARS and J.P.I Travel claimed to terminate the rental contract. The Court held that the suspension period only accounted for 45 per cent of the average lease term of the ships and so the scope of the impact was not enough to make the purpose of the contract

quarantine orders from the government in order to prove the performance is directly and materially impeded by *force majeure*.

**(b) The Effective Date of the Contract and the Due Date of Performance**

In *Qufu Branch of Daqing Zhuan Construction Engineering Group Co Ltd v Qufu Construction Engineering Co Ltd*, the meeting minutes concluded by the parties during the SARS period showed that the content that the project was processing during the SARS period and the construction team could only be formed with local people. The Court held that the parties had specific foresight and agreement on the special conditions of SARS and thus the exemption claim could not be favoured.

It was held in *Shenyang New Midtown Real Estate Development Co Ltd v Liu Weidong* that the house sale contract was concluded and signed during the period of SARS and the Development Company should have foreseen that SARS may affect its normal construction and delivery of the house. Thus the claim of *force majeure* was denied.

For the majority of the courts, SARS could only be raised as an exemption if the contract took effect before the outbreak of SARS. Besides, it is specifically provided

impossible, thus J.P.I Travel was not entitled to terminate the contract. However, the liability for breach and a part of the rent could be exempted.

We can see from the aforesaid case that if the contract can be partly performed, only the impeded part may be exempted and the contract can be terminated only if the purpose of the contract becomes impossible due to *force majeure*.

**(d) Whether the Party Impacted Has Fulfilled the Obligation of Notice, Providing Evidence and Avoiding Expansion of Losses**

In *Lin Guibin v Zhongshan China International Travel Service Co Ltd* ('Zhongshan Travel'), Lin Guibin signed up for a tour organised by Zhongshan Travel, one of the scenic spots of which was blocked because of bad weather five days before the departure date. Zhongshan Travel did not give notice to Lin Guibin about the information and changed the tour route without Lin Guibin's consent. Liu Guibin claimed for liquidated damages and Zhongshan Travel raised a plead of *force majeure*. The Court held that Zhongshan Travel should have given notice and consulted Lin Guibin if any *force majeure* event has occurred and failure to do so was a breach of contract and Zhongshan Travel should be liable for the losses.

The aforementioned case shows that the party under impact of *force majeure* shall provide notice to and consult with the other party about the situation and such notice is the premise of the application of the *force majeure* exemption. The Contract Law also requires the party under the impact of *force majeure* to take reasonable measures to prevent further losses.

**What is the Government Policy in Relation to Coronavirus in China?**

With the progress of epidemic prevention, the policies applied by the Government of China are being adjusted in a real-time manner. Under the current situation in China, the focus is on prudently promoting the resumption of business and supporting small and medium-sized enterprises ('SMEs').

About 70 per cent of the businesses in China have fully or partly resumed work at this point of time, while some businesses that require public gathering, such as theatres, live performances, exhibitions, training institutions, etc., are still prohibited from operating.

To avoid social problems rising with a large scale of bankruptcies of SMEs, the Chinese Government has issued a series of preferential policies to support SMEs. Among the aforesaid policies, the most supportive ones relate to tax preference, deduction of social security fees, rental relief/support from state owned commercial real estate and providing low interest loans to SMEs. The detailed rules for SMEs to apply the preferential policies are made by local governments on the province level and the policies are updated with rapid frequency.

**4. Action Taken by the UAE Since WHO's Treatment of the Coronavirus as a Public Health Emergency**

**WHO Declarations and Advice**

On 30 January 2020, the second meeting of the Emergency Committee of WHO was convened by the WHO Director-General, Dr Tedros Adhanom Ghebreyesus, under the International Health Regulations ('IHR (2005)'). The Committee gathered and gave advice to the Director-General, who made the final decision to determine the outbreak of the novel coronavirus ('2019-nCov' or 'COVID-19') as a Public Health Emergency of International Concern ('PHEIC').

As of 30 January 2020, representatives of the Ministry of Health of the People's Republic of China reported 7,711

confirmed and 12,167 suspected cases throughout the country. Of the confirmed cases, 1,370 were considered severe, with 170 people having died and 124 people had recovered after being discharged from hospital. Moreover, there had been 83 cases in 18 countries.

The WHO made it clear that it was still possible to stop the virus spreading, provided that countries put measures in place to detect the disease early, isolate and treat cases, trace contacts and promote social distancing measures. The Committee also highlighted the role of the multidisciplinary technical mission to China—involving national and local experts—with a view to reviewing and supporting efforts to investigate the animal source of the outbreak, the clinical spectrum of the disease, the severity of human-to-human transmissions, health care facilities and efforts to control the outbreak.

On 5 February 2020, the WHO and the international community launched a USD675 million preparedness and response plan covering February through April 2020.

The WHO's general advice was as follows:

WHO should continue to use its networks of technical experts to assess how best this outbreak can be contained globally.

WHO should provide intensified support for preparation and response, especially in vulnerable countries and regions.

Measures to ensure rapid development and access to potential vaccines, diagnostics, antiviral medicines and other therapeutics for low- and middle-income countries should be developed.

WHO should continue to provide all necessary technical and operational support to respond to this outbreak, including its extensive networks of partners and collaborating institutions, to implement a comprehensive risk communication strategy, and to allow for the advancement of research and scientific developments in relation to the coronavirus.

WHO should continue to explore the advisability of creating an intermediate level of alert between the binary possibilities of PHEIC or no PHEIC, in a

way that does not require reopening negotiations on the text of the IHR (2005).

WHO should timely review *[sic]* the situation with transparency and update its evidence-based recommendations.

The committee does not recommend any travel or trade restriction.

The WHO's advice in relation to China stated:

Implement a comprehensive risk communication strategy and to inform populations on the development of the outbreak.

Undertake preventive and protection measures for the population and response measures for containment.

Enhance public health measures to contain the current outbreak.

Ensure the resilience of the healthcare system and protect the healthcare workforce.

Enhance surveillance and active case finding across China.

Collaborate with the WHO and its partners to conduct investigations to understand the epidemiology and the evolution of this outbreak and measures to contain it.

Share relevant data on human cases.

Continue to identify the zoonotic source of the outbreak, and particularly the potential for circulation with WHO as soon as it becomes available.

Conduct exit screening at international airports and ports, with the aim of early detection of symptomatic travellers for further evaluation and treatment, while minimizing interference with international traffic.

The WHO's advice to the global community was:

In compliance with article 44 of the IHR (2005), to support each other in the identification of the

source of this new virus, its full potential for human-to-human transmission, preparedness for potential importation of cases and researching and developing necessary treatment.

On 11 March 2020, having seen a growth of cases around the world including countries like Italy, South Korea, Spain and others, the WHO officially announced the COVID -19 a pandemic.

### **Coronavirus Situation and Actions in the UAE**

To better understand the situation in the UAE, we have gathered a summary of statements from leading medical practitioners and organisations set out below:

Dr Adel Al Sisi, Chief Medical Officer of Prime Hospital made two statements:

Our medical staff is well equipped and is screening all patients with a runny nose, fever, and cough to ensure that no case goes undetected.

The emergency department is taking all precautionary measures in detecting a possible case of the coronavirus, especially since there is a potential threat. We are doing a screening on all patients and highly suspect cases—those travelled from the region—are being referred for further screenings from the Central Laboratory. So far, we have had two high susceptible cases, but further tests revealed that those were just Influenza cases.

Dr Zia ur Rahman Shah, Senior Director-Administration, Zulekha Hospital, Dubai said:

Any suspected case will be immediately isolated in negative pressure room, following contact and droplet precautions. Staff at triage are provided with N95 masks, eye protection goggles, impermeable aprons and gloves. Suspected cases will be taken to isolation immediately till this condition is ruled out as per the protocol.

Dr Arun Goyal, Associate Medical Director and Head of Department, Cardiac Surgery with RAK Hospital said:

We also have separate isolation beds for the suspected and proven cases of coronavirus. And as per the ministry guidelines for all the patients visiting the hospital, we take their last 15-day

travel history to ensure preventive measures are in place. The team in our hospital is well prepared to take care of all kinds of cases.

The Ministry of Health and Prevention ('MoHP') advised residents to adhere to general health guidelines. MoHP confirmed that, in coordination with health and all concerned authorities in the country, it had taken 'all necessary precautions in accordance with the scientific recommendations, conditions and standards approved by the World Health Organisation.'

Etihaad Airlines has made the following statement:

Extensive measures have been adopted by medical and aviation authorities in China and the United Arab Emirates, and Etihad Aviation Group is fully compliant with the guidance of the Abu Dhabi Health Authority, the World Health Organisation, the Centre for Disease Control and the International Air Transport Association, and stands ready to take more actions based on informed advice.

As of 5 February 2020, MoHP has launched a coronavirus early warning system to identify patients at high risk of contracting the novel coronavirus. The early warning system is designed to be automated with algorithms that identify a patient that is high-risk, through the Wareed system, which is an electronic healthcare information system.

## 5. Issues Facing Companies

### Considerations

Businesses need to carefully investigate their supply chains where dealings involve China or other countries where there is a risk that the coronavirus may spread, so that they can assess whether and to what extent their operations may be disrupted.

At this time, there are internal and external policies from China and other countries with travel bans, travel restrictions and imposed detentions to minimise the risk of the virus spreading. At the time of writing, other countries like Iran, Italy and South Korea have been significantly affected and there is a question of how competent and capable countries are able to continue doing business as the impact of the coronavirus is seen globally. For example, currently schools are closing for a number of weeks and a number of significant conferences are being

either cancelled or shifted to later in the year, which presumably is disrupting the concept of 'business as usual'. The impact of coronavirus fears on Middle Eastern markets has, however, been severe. The Saudi Stock Exchange's (Tadawul) headline index, the TASI, ended trading on Monday, 3 January 2020 down 1.78 per cent, while Dubai's main index fell 1.16 per cent. Other regional markets followed the trend, with Kuwait's market down 0.97 per cent and the Bahraini market down 0.13 per cent.

One of the most important steps companies should take is to review their contracts to determine what *force majeure* conditions might apply. *Force majeure* provisions are quite broad; therefore, parties must really understand what events could be deemed '*force majeure*' under the contractual terms to determine whether such events could have an influence on suppliers and customers. For instance, the virus itself could be deemed as an epidemic, but what about the measures taken by the government? Would the sudden involvement of the State be relevant?

A party seeking to refer to the *force majeure* provisions in its contract has the burden of proving that there are no other reasonable means for the party to perform its obligations under the contract. The *force majeure* clause must be broad enough to identify what events will be considered as preventing performance.

At the time of writing, it is clear that governments are taking clear action to try and contain and limit COVID-19 through various measures, for instance, from a total lockdown of 21 days in India, lockdowns of certain parts of Italy and closure of all shops, entertainment aside from supermarkets and pharmacies. In the UAE, the shutdown measures commenced with the cleaning of streets, imposing various fines for those not wearing masks and moving outside of curfew periods (for example, 8pm to 6am with permission) and wholesale workforce working from home.

### Impact on Businesses

Overall, it is clear that COVID-19 is having a visible impact on businesses due to limits in travel, cancellation of flights, closure of shops and restrictions primarily aimed at containing the coronavirus. Many businesses are having to suspend, close or require staff to work from home due to government policies and restrictions handed down on very short notice. Some specific examples of effects include those discussed below.

**(a) Finance**

Chinese markets dropped sharply after the extended new year and the Shanghai Composite closed down 7.7 per cent, wiping out nearly USD400 billion in value (WSJ).

**(b) Shipping**

Shipping companies carrying goods from China to the rest of the world are reducing their vessels, causing an impact on the demand for services and disrupting global supply chains. According to the United Nations Conference on Trade and Development, about 80 per cent of the world's trade in goods by volume is carried by sea and China has seven of the world's ten busiest container ports; hence, the impact could be significant. According to Peter Sand, Chief shipping analyst at BIMCO, 'a closure of the world's manufacturing hub impacts container shipping at large, as it is a vital facilitator of the intra-Asian and global supply chains ... and this will affect many industries and limit demand for containerized goods transport'.

**(c) Floating Quarantine**

According to Guy Platter, Secretary General of the International Chamber of Shipping, the shutdown means

that some ships cannot get into Chinese ports, slowing down loading and discharging of goods (CNN).

Such vessels are considered idling in 'floating quarantined zones' and countries like Australia and Singapore are refusing to allow ships that have called in to Chinese ports to enter their own ports until the crew has been declared virus-free. Shipping companies like Maersk, MSC Mediterranean Shipping, Hapag-Lloyd and CMA-CGM have said that they have reduced the number of vessels on routes connecting China and Hong Kong with India, Canada, the United States and West Africa.

From cars to machinery, apparel to consumer goods, industries will be affected far beyond China's economy and the longer the health crisis lasts, the harder it will be to ship goods around the world.

**(d) Cruise Lines**

The following are examples of cruise lines affected:

- Royal Caribbean Cruises cancelled three trips of its China-based cruise liner and warned of further hits if travel curbs continued to the end of February 2020.



The longer the health crisis lasts, the harder it will be to ship goods around the world.

- At least 135 people on board the *Diamond Prince* cruise ship in Yokohama, Japan tested positive for the virus. There were 3,700 people on the vessel.
- The cruise ship *World Dream* was anchored in Hong Kong's port with 3,600 people on board who were cleared to leave the ship on 9 February 2020 after five days in quarantine.
- The *Westerdam* had 2,000 people and was denied entry to ports in Japan, Taiwan and the Philippines. It docked in Cambodia on 13 February 2020 and currently there are no confirmed cases.
- *Anthem of the Seas* docked in New Jersey for an extra two days after four returning passengers were sent to the hospital to be tested for coronavirus (CNN).

**(e) Airlines**

In the Gulf, at the time of writing this article, Qatar Airways, Emirates, Etihad Saudi Arabian Airlines and others have suspended flights to and from China. In the rest of the world, the following airlines have suspended flights to and from China:

- On 5 February 2020, Cathay Pacific asked 27,000 staff members to take three weeks of unpaid leave to cope with the impact of the coronavirus (BBC).
- United, Delta and American Airlines have suspended flights.
- One of the first major Chinese carriers to suspend flights between China and the United States was China Eastern.
- British Airways, Virgin Atlantic, Lufthansa, KLM and Air France, among others.
- Other countries are also suspending flights, for example, in the UAE flights were suspended until 9 April 2020.

**(f) Air Cargo**

Several air cargo companies have either suspended or cancelled their services to and from mainland China until further notice. These include IAG Cargo, the cargo arm of the British Airways parent IAC ('ICAGY') and the German logistics group DHL. While UPS and FedEx

Express ('FDX') continue to fly in and out of China, UPS has seen reduced demand for its services as a result of closures to businesses.

**(g) Automobile and Aircraft Manufacturers**

According to Forbes, many automobile manufacturers have suspended production and limited travel within China, for example:

- VW Group, the largest foreign automaker in China, asked about 3,500 employees in Beijing to work from home through to 17 February 2020.
- Carmaker Hyundai ('HYMTF') has suspended production at its plants in South Korea.
- Jaguar and Land Rover parent Tata Motors anticipates the outbreak will hamper production in China and hit profits.
- Tesla has warned a one to one and a half-week delay in production of its Shanghai built Model 3 cars and this could hurt their March quarter profits after China ordered a shutdown of the factory.
- Ferrari has said that it can offset weakness in China if it is for a few months only and it is more concerned about Hong Kong.
- Toyota Motors shut factories through 9 February 2020.
- According to Bloomberg, Robert Bosch GmbH shut two factories employing a total of 800 people in Wuhan.
- Airbus closed its Tianjin assembly line.

**(h) Crude Oil Prices**

The price of crude oil fell to its lowest level in 12 months (BBC).

**(i) Restaurants**

In relation to restaurants:

- McDonalds closed several hundred of approximately 3,300 outlets in China.
- Starbucks have closed more than half of its approximately 4,300 stores in China and delayed a plan to update its 2020 forecast.

- Burger King closed some of their restaurants.
- Haidilao shut restaurants.

**(j) Technology firms**

In relation technology firms:

Employing 10,000 people in China, Apple closed all their corporate offices, stores and contact centres in China through 9 February (Forbes, WSJ);

- Google and Deere temporarily closed facilities in China.
- Baidu postponed the announcement of its fourth-quarter results.
- Foxconn's shipments to customers, which includes Apple, could be disrupted if the Chinese factory halt extends for a second week.
- LG Display did not close any of its factories in China but warned that the outbreak caused uncertainty for suppliers.
- Samsung Electronics extended closure over the holidays for some factories although declined to comment on the impact.
- Samsung affiliate and battery maker Samsung SDI, which includes Volvo among its customers, warned of a hit to its March quarter earnings.
- For SK Hynix, a chip plant in the eastern city of Wuxi, the outbreak had not disrupted production but that could change if the situation is prolonged.
- AT&S cut its revenue forecast to approximately 7 per cent for the year to 31 March.

**(k) Hotels:**

In relation to Hotels:

- International chains like The Peninsula Hotels, Hilton, Marriott International, InterContinental Hotels and others are reportedly going to offer free reservation changes or cancellations in China through 8 February 2020.
- Ctrip, which is China's largest online booking

platform, said that more than 300,000 hotels on its platform had agreed to refund bookings between 22 January and 8 February 2020.

**Restricted Travel**

The following jurisdictions have implemented major constraints on travellers or China travel. The reason that these countries are listed is because the Middle East is a hub for global business and certainly many goods are also imported into the UAE. Should the situation in the below countries, among others, deteriorate we may find that the UAE or possibly the Gulf at large will be financially and socially impacted. These constraints are likely to see an indirect impact in the global economy:

- *Australia:* Foreign nationals in China will not be allowed to enter Australia until 14 days after they have left or transited through China. Australian citizens, permanent residents and their families are still able to enter however they are required to isolate themselves for 14 days if they have been to China and currently the Australian Government has advised against any travel to mainland China. Quarantine is anticipated for six months until the end of August 2020.
- *Hong Kong, SAR China:* The city will quarantine anyone arriving from mainland China, including Hong Kong Residents and visitors for 14 days.
- *Japan:* Foreigners who have visited China's Hubei province in the last 14 days have been denied entry from 1 February 2020. Hokkaido has declared a State of Emergency.
- *India:* Anyone travelling to China will be quarantined upon their return and existing visas are no longer valid for any foreign national travelling from China.
- *Indonesia:* There are no longer direct flights to China and Indonesia has suspended visas on arrival for Chinese citizens.
- *New Zealand:* There is a ban on anyone travelling from China (3 February 2020) which lasts up to 14 days. The New Zealand government has also raised the travel advice of 'do not travel' to China to the highest level.

- **Philippines:** The Philippines has imposed a 14-day quarantine for Filipinos coming from China and has temporarily barred travel to China, Hong Kong and Macau.
- **Singapore:** Singapore has blocked entry and transit of people who have trained to mainland China in the previous 14 days as of 1 February 2020, while visas of Chinese citizens to visit Singapore have been suspended.
- **South Korea:** South Korea has barred the entry of foreigners who have visited or stayed in Hubei in the previous 14 days and suspended its no-visa favour for Chinese tourists to Jeju Island. South Korea is currently on alert as South Korea is the most impacted country outside of China.
- **Taiwan:** All Chinese residents, excluding those from Hong Kong and Macau, will be banned from entering Taiwan from 6 February 2020. People who have visited Hong Kong and Macau will be quarantined at home for 14 days.
- **Vietnam:** Vietnam has banned all foreigners who have spent time in China in the previous two weeks from entering Vietnam. It has already quarantined about 900 people.
- **UAE:** Major carriers such as Etihad and Emirates have suspended their flights to China due to the outbreak. For safety measures, the UAE Government also announced that no flights would be permitted save and except for limited travel until 18 April 2020.
- **Saudi Arabia:** Citizens of Saudi Arabia and foreigners living in the country are banned from travelling to China.
- **United Kingdom:** The UK government has recommended British nationals to leave China and advised against all but essential travel to mainland China. The UK has imposed quarantine possibly to end in May 2020.

**One of the most important steps companies should take is to review their contracts to determine what *force majeure* conditions might apply.**

- **United States:** The US has barred entry of foreign nationals who have visited China temporarily. Many States have imposed quarantine.

At the time of writing, many jurisdictions are either denying access to non-nationals, non-residents and/or with work visas. In the UAE, approximately 33,000 resident visa holders are yet to be permitted to enter the country. Many countries are having similar policies especially having seen global rise of contracting COVID-19.

**Longer Term**

It is currently difficult to assess how long the outbreak of the coronavirus is going to last. What is perhaps clearer is that businesses are having longer term impacts on their operations and because of the uncertainty from day-to-day operations, there are many questions as to how the supply chain is impacted, not just in China, but globally.

Moreover, given that China-UAE trade was worth USD11.2 billion in 2019 Q1, the current coronavirus is likely to make its impact felt in Q1 of 2020 with rippling effects and implications for the year (Khaleej Times).

**6. What Should Companies Do?**

As mentioned above, it is currently difficult to assess how long the outbreak of the coronavirus will last there is great uncertainty as to the longer term impacts on businesses' operations and how the supply chain will be impacted in China and also globally. Actions companies can take include:

1. Be aware that some *force majeure* provisions have time constraints for reporting a *force majeure* event and make sure the notice period requirement is met.
2. Analyse contractual and statutory *force majeure* conditions to ascertain whether there has been a *force majeure* event that allows for non-performance of the contractual obligation.
3. In the event of a *force majeure* claim, the affected party should provide as many details as possible to support its claim, including the timing,

the number of parties affected, how the supply chain has been affected and other evidence as deemed appropriate. For instance, in the case of impediments in the supply chain, a party should indicate what reasonable checks were put in place to make sure their facilities were affected in the least way possible.

4. Termination clauses should be read and understood accurately. If a supplier has the right to terminate the contract due to recent events, the buyer should be aware of this right and have back-up arrangements for an alternative supplier who is able to undertake the work. Moreover, buyers should also inform companies and customers accordingly if material or products that have been ordered in bulk may be delayed or halted.

5. Follow appropriate contingency plans and, if there is none, then create one.

## 7. Conclusion

As the situation evolves, the UAE is taking proactive steps, like other countries, in following the situation in China and globally and undertaking measures as necessary to ensure prevention of further spread of the coronavirus.

We have also seen businesses being affected by the coronavirus and it is currently still too early to assess the mid- to long-term economic and social costs and what legal ramifications may result.

However, what is clear is that COVID-19 is bringing people, companies and governments together in a way to work collectively to fight against the coronavirus. Doctors,

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We are pleased to accept articles on interesting legal topics and new legal developments that are happening in your jurisdiction. From time to time, issues of the Journal will be themed. Please send: (1) your article to both **Priti Suri** at p.suri@psalegal.com and **James Jung** at jjung@collaw.ac.nz; (2) a lead paragraph of approximately 50 or 60 words, giving a brief introduction to, or an overview of the article's main theme; (3) a photo with the following specifications (File Format: JPG or TIFF, Resolution: 300dpi and Dimensions: 4cm(w) x 5cm(h)); and (4) your biography of approximately 30 to 50 words.

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nurses and the medical profession are at the frontline of this work. Those that are unable to travel back home due to travel restrictions and/or are quarantined are also put under tremendous stress. It is especially at this time that people can take the opportunity to spend time with their loved ones having to work from home and to take care of one another, not just on the physical side, but also their emotional and mental well-being.

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## Notes

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# Analysis of the Legal Issues of the Impact of Epidemic Prevention and Control on International Trade, Investment and Consumption—From the Perspective of International Trade Contract Disputes and the WTO's Future Development Positioning

This article introduces the legal basis of the "pandemic" coronavirus epidemic in 2019 and a series of related legal issues, such as how to take measures under the framework of international law to reduce the impact of the epidemic and how to properly handle international trade relations during the epidemic.

## Declaration of Coronavirus Pandemic and Its Effect

Since the outbreak of the 2019 Novel Coronavirus ('the epidemic'), the World Health Organization ('WHO') has been assessing the risks every day. On January 30, 2020, the WHO announced that the epidemic is a Public Health Emergency of International Concern ('PHEIC'), and on February 28 raised its global risk level to 'very high'. The legal basis of 'public health emergencies of international concern' is International Health Regulations 2005 ('IHR 2005'). The criteria in the Regulations include: whether the public health impact of the incident is serious; whether the incident is unusual or unexpected; whether there is a serious risk of international spreading; and whether there is a serious risk of restricting international travel or trade, etc.

On March 11, 2020, the WHO announced its assessment that the 2019 Coronavirus ('COVID-19') has the characteristics of a 'Pandemic'. According to the standards in the 'Pandemic Influenza Risk Management: A WHO Guide to Inform and Harmonize National and International Pandemic Preparedness and Response', issued by the WHO in 2017 and currently in use, the WHO divides the influenza pandemic into four global stages: pandemic interval, alert period, pandemic period and transition period, of which the third stage is 'Pandemic'. Pandemic period refers to the period of a global epidemic of human influenza caused by the transmission of new influenza virus subtypes found on the basis of global monitoring. The global risk assessment is mainly based on virology, epidemiology and clinical data. According to the results of global risk assessment, the evolution between the influenza pandemic interval, alert period and pandemic period may occur rapidly or gradually. All of the countries of the world need to respond to this pandemic.

The legal basis for the WHO's declaration of 'pandemic' comes from the provisions of international conventions and is based on the empowerment of the WHO under the 'WHO Constitution' and 'International Health Regulations'. According to the 'International Health Regulations', member States authorise the WHO to provide information and support to affected State parties, carry out public health monitoring, risk assessment, State party assistance, and coordinate international responses to major international public health risks and events. The work of supportive information includes the assessment of the global epidemic risk of

epidemics. Therefore, while the term 'Pandemic' is not directly used in the Constitution and Regulations treaty, the empowerment provides a general legal basis for the WHO to define and assess the pandemic. Without explicit provisions in other WHO documents, the Director-General can also declare that the COVID-19 outbreak has reached a global 'pandemic' level.

According to the Charter of the United Nations and the principles of International Law, a sovereign State has the sovereign right and public obligation to legislate its health policies and implement regulations, while the WHO does not have the power of law enforcement itself, only the responsibility of advice and publication. Therefore, the concept of a declaration of a 'pandemic' is only symbolic. It does not in itself have the mandatory effect of international law, nor will it bring about any substantial prevention and control measures. The Director-General of the WHO, Dr Tedros Adhanom Ghebreyesus, has characterised the global epidemic as a 'Pandemic', which is a clear reminder of the need for all countries to take immediate action to prepare for or substantially strengthen their response measures. However, we can also see that the announcement of the 'Pandemic' has also given a small number of countries the so-called 'reasonable grounds', and in the name of 'implementing public health measures', to actually implement measures such as trade protection and trade discrimination. Based on the framework of the World Trade Organization ('WTO'), the above acts should also be adjusted by referring to relevant WTO rules and regulations, rather than being based on the international health legal framework such as WHO law. This aspect will be considered further below in the analysis of the WTO's future development positioning.

## The Pandemic and Trade Force Majeure

As for international trade, the epidemic has caused the situation that universal international trade contracts cannot be fulfilled on time. According to the United Nations Convention on Contracts for the International Sale of Goods ('CISG' or the 'Convention') and Article 180 of China's General Principles of Civil Law, 'force majeure' refers to unforeseen, unavoidable and insurmountable obstacles (objective situations). Therefore, if the new coronavirus epidemic constitutes an obstacle that the enterprise cannot avoid and cannot overcome, it can be regarded as *force majeure*. Contract law or commercial law in all countries around the world basically stipulates that as long as a *force majeure* situation occurs on one



The legal basis for the WHO's declaration of 'pandemic' comes from the provisions of international conventions.

side of the contract, related contract obligations can be wholly or partly exempted.

However, the use of *force majeure* also has certain conditions. It needs to follow the principles of fairness and honesty, and should not be abused. Article 117 of China's Contract Law stipulates that:

If the contract cannot be performed due to *force majeure*, the liability shall be partially or wholly exempted according to the effects of *force majeure*, except as otherwise provided by law. If *force majeure* occurs after the parties delay in performance, they shall not be exempted from liability.

From this, it can be seen that there must be a causal relationship between the *force majeure* event and the inability to perform the contract, that is, the event of *force majeure* has caused the inability to perform the contract. The 'liability exemption' here, in practice, tends to consider the party affected by *force majeure* to be exempted from liabilities, including performance of the contract and liability for damages.

### International Trade Disputes

Under this situation, enterprises engaged in foreign trade business need to adhere to the principles of fairness, good faith and encouraging transactions and actively notify the counterparty of the contract that the epidemic situation has hindered the performance of the contract. At the same time, both parties should jointly negotiate and take active measures to avoid the expansion of the loss so that the other party can be prepared and minimise their loss, which is helpful to avoid or solve contract disputes. As for the settlement of such disputes, the following points need to be emphasised.

The first point is jurisdiction over disputes and applicable law. In the face of situations where performance of a contract may be impeded, according to the provisions relating to *force majeure*, such as Article 180 of the General Principles of the Civil Law and Article 107 of the Contract Law, when the contract cannot be performed in the normal way due to the epidemic, the question of whether there is a situation of *force majeure* can be argued if the parties seek to claim termination or changes to the contract. However, for some multinational contracts, the issue of applicable

law of the contract needs to be examined first. If Chinese law is applicable to the contract, the relevant *force majeure* provisions mentioned previously can be invoked; but if foreign law is applied, the foreign law needs to be carefully examined and interpreted. For example, there is no way to determine *force majeure* in English law. At this time, the two parties can define the *force majeure* event only if there is a *force majeure* clause in the contract. Most multinational contracts have agreed on jurisdiction over disputes and applicable legal issues. Depending on the agreed applicable law, the relevant basis of *force majeure* should be examined under the corresponding law. In cases where foreign law is not agreed to apply, according to Article 2 of the Law on the Application of Laws on Foreign-Related Civil Relations, the law that has the closest relationship with the foreign-related civil relations shall be applied. In some cases, if the dispute jurisdiction clause agreed by both parties in the contract is invalid, the competent Court shall be confirmed by both parties thereafter separately. According to the determination of the applicable provisions of the law by the competent Court, if a foreign law is applied, it should also be combined with the investigation of the foreign law to finally determine the applicable law.

The second point is the way to resolve contract disputes. The main methods for the settlement of international trade contract disputes are:

1. *Mediation*. Both parties can reach agreement through voluntary negotiation to resolve contract disputes. Through mediation, relevant disputes can be resolved in a timely and thorough manner, the efficiency of case handling can be improved, some unclear facts and responsibilities can be ignored, and mutual understanding and accommodation can be achieved to solve disputes.

2. *Arbitration*. The main advantage of arbitration is that the procedure is simple; it normally takes only one decision to take effect and the evidence requirements are less rigid. The most obvious advantage of arbitration is that in foreign-related arbitrations, arbitral awards are generally enforceable in all countries participating in

international conventions. However, it should be noted that the nature of procedure is less strong than a court judgment and the cost is high.

3. *Litigation*. Resolving contract disputes through litigation is highly procedural and the effectiveness of judgments is guaranteed by judicial means. However, it should be noted that due to the fact that the effect of the judgements are regional, judgments can be invalid in other countries if foreign-related issues are involved.

4. *Exceptions to the Convention*. In international trade, if the contract signed by both parties expressly stipulates the application of the provisions of the Convention or if there is no clear expression in the contract but both parties are members of the Convention and do not expressly exclude the application of the provisions of the Convention, then after the occurrence of a contract dispute, unless one party unanimously changes the application of the law, then the competent court or arbitration institution should follow the rules of the exemption clause in Article 79 of the Convention to examine whether the new coronavirus epidemic and relevant government control measures constitute an 'impediment' to the affected party's performance of its main contractual obligations so as to 'exempt from liability'. For example, according to Article 79, 'The parties are not responsible for what they can prove if it is because there is something beyond their control, and there is no reason to expect that they can take into account or avoid or overcome its consequences when contracting, resulting in non-performance of their obligations.' Under this provision, a party that fails to perform its obligation must notify the other party of the impact of the obstacle on its ability to perform its obligation or it will be liable for compensation. If all the subjects of the contract are parties to the Convention, the provisions of the Convention shall apply.

The third point is that enterprises should respond to international trade disputes, and it is suggested that enterprises may pay attention to local and industrial support policies related to epidemic response and obtain support from local governments or other institutions. For example, the Shanghai Municipal Government formulated and issued 'Several Policies and Measures

The SPS agreement aims to regulate the possible emergencies that may endanger human life or health in the trade of goods.

to Support the Stable and Healthy Development of Service Enterprises for Epidemic Prevention and Control' ('Shanghai 28 Articles'). Article 27 proposes:

... improving the credit resumption mechanism for enterprises. Actively assist the affected enterprises that have suffered from dishonesty to conduct credit resumption work, and those enterprises that have temporarily lost their income source due to the epidemic situation can submit credit records according to the adjusted repayment arrangements. For dishonesty behaviour such as delayed delivery, delayed loan repayment, and contract overdue caused by participating in the epidemic prevention work, the enterprises will not be included in the untrustworthy list (companies listed herein mostly because of their severe bad business behaviours such as delay and refusing payment, will be deemed untrustworthy and can be restricted in some business). For enterprises affected by the epidemic that cannot perform on time or fail to fulfil international trade contracts, support the Shanghai CCPIT to issue *force majeure* factual evidence.

These policies are undoubtedly very effective measures to help enterprises that are in trouble caused by the epidemic.

For international trade disputes that have occurred, enterprises can seek the help of lawyers and other professional legal practitioners to safeguard the legitimate rights and interests of enterprises. At the same time, enterprises can also seek the support of the legal support platform. On 5 February 2020, the China Council for the Promotion of International Trade ( 'CCPIT') established a comprehensive legal support platform for cross-border trade and investment of enterprises and opened a legal advisory hotline in response to the adverse impact of the epidemic on cross-border trade and the investments of Chinese enterprises. During the epidemic, enterprises can contact the legal support platform through telephone, email and other means to obtain relevant legal support. At the same time, the CCPIT issued a message on 30 January 2020 that the enterprises affected by the epidemic will be issued a certificate of *force majeure*. Although the content of the certificate will not be adopted by an overseas judicial arbitration institution, it will at least be beneficial to the provider of the certificate. The enterprise can

contact the CCPIT to issue the certificate according to actual needs.

### National Trade Disputes

When it comes to national trade disputes, we have to refer to the WTO again. In the package agreement of the WTO, all members reached a consensus on 'Agreement on the Application of Sanitary and Phytosanitary Measures' ('SPS agreement'). In order to prevent sudden and uncontrollable epidemic events caused by trade in goods, members of importing countries are allowed to take temporary and necessary measures.

The SPS agreement aims to regulate the possible emergencies that may endanger human life or health in the trade of goods and it takes the goods themselves as the purpose of coordination and control. Any importing member shall not take excessive measures without sufficient evidence or achieve the implicit purpose of trade protection on this basis; the measures taken must be 'necessary', 'reasonable', 'evidential' and 'limited'. The SPS agreement allows all measures to protect human, animal and plant life or health to be implemented; guides WTO members to formulate, adopt and implement sanitary and phytosanitary measures to minimise their impact on trade; establishes a multi-frame framework composed of rules and disciplines to guide the formulation, adoption and implementation of sanitary and phytosanitary measures; and minimise their adverse impact on trade as much as possible.



Among them, Article 2.1 stipulates that 'members shall have the right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health, provided that such measures are not inconsistent with the relevant provisions of this Agreement'; Article 2.2 states that 'members shall ensure that sanitary and phytosanitary measures shall be based on scientific principles. The measures implemented by each country shall not constitute arbitrary or unreasonable differential treatment or disguised restrictions on international trade.' Therefore, according to the SPS agreement, the importing country can take necessary measures to protect human, animal and plant life or health, but the measures taken should be coordinated with the SPS agreement and be based on scientific principles and should not conflict with the provisions of the SPS agreement. The so-called 'reasonable measures' of a few countries, such as trade protection and restricting the technological development of foreign companies, obviously violate the SPS agreement.

### Role and Development of the WTO

In addition, with the dissolution of the WTO Appellate Body in 2020, the solutions to the 'disputes' between countries will be further tightened. As a part of the WTO dispute settlement mechanism, the Appellate Body of the World Trade Organization ('AB') has the right of 'final adjudication' of trade disputes, so it is known as the 'Supreme Court' of international trade. The 'suspension' will interrupt the hearing of existing and newly submitted disputes, leading to countries relying more on bilateral negotiations to resolve disputes. Such a state could undermine the enforceability of WTO rules in multilateral frameworks and erode the value of WTO commitments.

Therefore, the future development orientation of the WTO is still based on the improvement of the maintenance and governance efficiency of the system construction under the promotion of global integration. In the face of the 'anti-globalisation wave' initiated by some countries, the WTO, as the largest and most important international trade coordination organisation, will continue to play an important role in the future development process in the absence of a better platform. China should actively promote the reform of the WTO, advocate the China plan of 'win-win cooperation' and jointly promote the development of the WTO towards the direction of high standards of win-win cooperation.

Previously, the WHO had pointed out that there was no reason for unnecessary interventions in international travel and trade and it did not recommend restrictions on transfers, trade and flows and called on all countries to make fact-based, coherent decisions. Therefore, WTO members should abide by the rules, respect the authority and professional opinions of the WHO and avoid overreaction and unnecessary trade restrictions. International cooperation against the epidemic is a general trend. In order to work together to overcome the epidemic, the WTO should create convenient conditions for the normal development of international trade. As Tedros Adhanom Ghebreyesus, the WHO Director General has said, 'Whether we call it a pandemic or not, our attitudes and principles remain the same—that is, never give up'.



**Jack Li**  
Founding Partner, Jin Mao Partners

Jack Li (Zhiqiang Li) is the Founding Partner of Jin Mao Partners and is a First-grade lawyer and Arbitrator. Jack commenced legal practice in 1990. He is the President-Elect of the Inter-Pacific Bar Association, 'Shanghai Conference Ambassador' and the Executive Director of the 'Belt and Road' legal Research and Service Center. Since commencing practice, Jack has been awarded 'Model Lawyer in Foreign Service', 'First Outstanding Young Lawyer of Shanghai', 'The 8th Outstanding Youth of Shanghai', 'Outstanding Lawyer of Shanghai' and has won the awards of Second Merit and Third Merit in the judicial administrative system.



**Sun Chenyi**  
Master of Law at East China University

Sun Chenyi, is a Master in law of the East China University of Political Science and Law. Ms Sun has been engaged in various international cases and provides the whole package of legal solutions. Her main practice areas are mergers and acquisitions, outbound investments, corporate and commercial transactions.

# INTERVIEW WITH THE HONOURABLE TAN SRI TOMMY THOMAS, ATTORNEY GENERAL OF MALAYSIA, ON BEHALF OF THE IPBA ON 6 FEBRUARY 2020

Interviewed by Tunku Farik, Senior Partner of Azim, Tunku Farik & Wong and Jurisdictional Council Member for Malaysia at the IPBA.

**Q: Thank you very much for taking time out of your busy schedule for this interview. Could I start by asking you what motivated you to become a lawyer?**

A: Well I suppose I was pretty poor in science and math in secondary school, so I guess the one area that was left was the arts and as I was always strong in the English language and history, I realised that law was probably the best option. Actually, I decided to be a lawyer quite early on, around my O levels, about Form 4 or 5.

**Q: I had a look at your very impressive biodata and I believe that you went to Victoria Institution, one of our great schools in Malaysia. Can you tell us a bit about your early life and education?**

A: I was born and brought up in Kuala Lumpur, which was then part of Selangor and well before the Federal Territory was created. I went to the Pasar Road English School, which was a government primary school, for six years and then I went to the Victoria Institution and studied there until the lower six. The reason I left in the lower six was because of the May 1969 riot and there were doubts about whether one could go abroad. I was planning to go after Form 6 but then I went one year earlier. So, my schooling was in Kuala Lumpur and then I read law at the University of Manchester. Then I came down to London to join the Middle Temple, so that



was the fourth year I was in the United Kingdom. After that I stayed on there because my parents were quite generous. They said OK, you can stay for one more year. I always knew that I would come back to Malaysia and practise, so I thought I will just take a year off and I did a Masters in Politics and International Relations in LSE and then I returned to Kuala Lumpur in 1975.

**Q: And then after that did you go straight into practice?**

A: I went straight into chambering in Skrine in 1975 and was called to the Malaysian Bar in 1976.

**Q: And you were in Skrine for quite some time I remember.**

A: There were two breaks in between. I went to Canada for about two years then I returned to Skrine until 1999 and then in the new millennium I opened up my own small firm.

**Q: You practised there until you were appointed as the current Attorney General of Malaysia?**

A: Yes, that was in June 2018.

**Q: Before you became the Attorney General of Malaysia, we have it on record that you were a very successful barrister and counsel. Would you like to share with us some of your landmark cases from that time before your appointment as Attorney General?**

A: I don't know so much about landmark cases, but I think what I would say is that I was very lucky in that when I started my career in Skrine, and Skrine was probably the first firm that started to specialise between court lawyers and non-court lawyers. We had Stanley Peddie and Peter Mooney as our outstanding barristers and all the younger lawyers could work with them. And they were, in a sense, mentors, not just to me, but to generations of lawyers who were in Skrine at that point in time. So, they were wonderful masters and mentors and I was guided very much by their habits and styles in court work. I enjoyed doing trials from very early on, I think that within six months of being called to the Bar, I was doing trials in the magistrate courts, sessions courts, industrial courts, and then I think my first High Court trial was after a full year. I really enjoyed doing trials and I was still in the thick of doing trials, except for criminal trials, before I was made the Attorney General, which people seem to forget. Throughout my career in the Bar I enjoyed myself in the trial and appeal courts so I really can't point out landmark cases because after you have done one case you forget it and you move on and your barrister's brain then focuses on the next particular subject and then after that you forget it and you move on to the next case. You don't retain it in that sense.

I really enjoyed doing trials and I was still in the thick of doing trials, except for criminal trials, before I was made the Attorney General.

**Q: In your view, what are the most important qualities a good lawyer should possess?**

A: I think the first thing I would say is to have old fashioned values. You have to work very hard, there is no substitute for hard work. Then you should have some determination, imagination and creativity, those kinds of qualities. I think you must always be willing to learn and have an open mind. So I often tell lawyers and members of the public that I really don't know much law, but once the client or somebody tells me the facts, then you are trained in such way to provide an answer. Of course the older you are and the longer you are in practice, you will know what a lawyer's legal responses are to a particular set of facts in order to advise. So basically you have to always be willing to learn. For example, I am now reading some provisions of the Penal Code and the Security Offences (Special Measures) Act 2012, that I am looking at for the first time, but it is absolutely no problem as it is like any other act of Parliament, you can just read it and interpret it at that time and forget it tomorrow.

**Q: So, I presume with your great advocacy skills and court craft, it would have been no problem for you to transition from being a civil lawyer, which you were mainly during the years of your practice, to now more criminal work being the Attorney General?**

A: Well, up to a point. I think that the SRC (SRC International Bhd) trial that I am doing is very much like a corporate commercial trial because it involves banking, company law, commercial transactions, cheques, and all of those things. The differences are the criminal consequences of these transactions and the criminal burden of proof. Otherwise, the underlying transactions are the same. And you have the same amount of documents, so preparing cross-examination is basically going through those documents and trying to cross-examine the witness based on the documents—the contemporaneous documents—so in that regard I would say that there is no difference between the trials that I used to do before and the current trial. But if you were to do a murder case or a rape case, which would be a typical serious crime where there is very unlikely to be any documents, then the skills are totally different. I don't know whether I have those skills because I have always

been doing corporate commercial trials so I would not want to do a murder trial as it is too late to learn; I would not want to cross-examine a witness in a murder trial because I have no experience.

**Q: The SRC trial, as we all know, is based on documents, basically to follow the documentary and money trail, so would I be correct to say that even though the standard of proof is higher, that is, beyond reasonable doubt, as long as you have the documents, it should be an open-and-shut case?**

A: Well, I think the big difference is that for a criminal trial you have to produce all of the original documents and that is why there were so many witnesses and they have produced the actual original evidence, although everybody else has got photostats. Whereas, in civil trials in recent decades, the judge, the witnesses, the plaintiff's lawyers and the defendant's lawyers all are using photostat documents in bundles. Very seldom is it that you need to produce the original, unless there is an allegation of forgery or fraud. So even in the last two or three heavy corporate commercial trials that I did, we never had a single original document, but in the SRC case, because it is a criminal case, you have hundreds of original documents which is one of the reasons why the trial takes a longer period.

**Q: Sometimes the public doesn't understand why it takes so long, although we understand that the Defendant in the SRC case, based on reported cases, is even questioning his own signatures.**

A: But we won't comment on that as it is a pending case.

**Q: You have broken some records in that you are the first non-Malay and non-Muslim to hold the office of the Attorney General of Malaysia since 1963. Before that, the last such Attorney General was Cecil Majella Sheridan who was British. Could you tell us a bit about how this record-breaking feat came about?**

A: I think you have to ask the Prime Minister as, at the end of the day, it was Tun Mahathir's choice because the Attorney General of Malaysia, like most Commonwealth countries, is the chief legal advisor of the government, so you must enjoy the trust and confidence of the Prime Minister, and to some extent the other cabinet ministers, but most of the dealings are with the Prime Minister. The

Prime Minister is really the person who appoints you, although formally it is the Yang DiPertuan Agong (the King of Malaysia) who appoints under the Constitution exercising his constitutional function on the advice of the Prime Minister. Thus, we have to ask the Prime Minister why he appointed me.

**Q: As an active member of the Bar, I can say personally that we are all very proud of you that as a fellow member of the Bar you have managed to attain the highest public office of Attorney General, which is the highest office in respect of a public serving legal official.**

A: Thank you.

**Q: I believe that after your appointment there were a lot of detractors who have petitioned for your removal based on your record. Are you able to tell us a bit about that or comment on it?**

A: Well, I seldom have really read the online stuff which is very much the online complaint mechanism or critical audience. So that has been there prior to my appointment, since my appointment and until today. I am now 20 months in the job there is still a segment of people who complained and criticise my appointment. But it passes by because I do not follow the online commentary that much, have not reacted to it and I basically ignore and disregard it. I have always have said that if you believe in free speech you must tolerate criticism and not take any action against anybody. That is also part of the new Malaysia. I don't know whether all the criticisers would be so broad-minded, but this is part of the new Government's philosophy. The Prime Minister is very supportive of opening up space to air views and likewise is subject to all kinds of criticism and he does not take any action on anybody. When you open up such space you get arrows flung at you, but you have to smile and move on.

**Q: You have now set in motion the prosecution of the former Malaysian Prime Minister, Najib Razak, for corruption, are you able to give us some insights into the challenges you face in mounting the prosecution and other challenges in general as the Attorney General of Malaysia?**

A: I think that so far as the prosecution is concerned, it is a commentary on why the previous Barisan and UMNO-led Government lost the election. I think that in the last

five years before its defeat, there were so many financial scandals, 1MDB being the most notorious, but you have Tabung Haji, Felda, MARA, and so many others. There was an accumulation of cases built up, but because the wrongdoers were in power, like a company where the directors are fraudulently controlling the company, you can't do anything about it until they are removed. When the GE ('General Election') 14 occurred, there was a new government coming in with a clean slate and with the mandate to prosecute. There were many cases to look into and all of these misconducts, if I could use that neutral term, took place before 2018. For eight to ten years nothing was done, so there was an influx of cases that had to be investigated. So once the new government came in, we told the MACC and the police to investigate, which they did, resulting in all the IPs ('investigation papers'). As you know, they investigate, we don't investigate. When they finish, they give us the investigation papers and then we decide whether to charge. So, as I speak, they are opening 27 white collar corruption crimes, which are going on simultaneously, which put strains on our resources. And each case needs about three to four people. Of course, some of them we doubled up, but we are really at full capacity. All of these 27 cases occurred some time ago. And then I think the MACC is going to be giving us more. I would not say that there are many challenges, it is just about getting enough people and sending them to court and getting witnesses. The number of cases is the challenge.

**Q: I also noticed that for the first time in a long time, members of the Bar have been appointed as *ad hoc* prosecutors to help in prosecuting as well.**

A: Unfortunately, that has been a subject of criticism, both from outside and some also internally. But I should point out that I appointed Sulaiman very early on, but he dropped out due to his health. So we only have two people, Sithambaram and Gopal Sri Ram. Sri Ram has two or three cases, Sithambaram just one. Out of the 27 cases I mentioned, 23 or 24 cases are done solely by our officers. But the one that has the most public interest and the most scrutiny, which is the SRC case and the other is Tanore, most of the former Prime Minister cases are being done by Sri Ram. And of course, Sri Ram and Sithambaram are among Malaysia's leading criminal lawyers, so there is no apology needed to have appointed them. And don't forget that our DPPs (deputy public prosecutors) also learn by working under them and become better prosecutors.

**Q: Do you think that by appointment of the new head of the Malaysian Anti-Corruption Commission, Latheefa Koya, who was also a member of the Bar, will there be even more prosecutions to come?**

A: Latheefa Koya, who during her days at the Bar was very strong on anti-corruption and was a principled and courageous lawyer, I am sure has brought those qualities to the office of head of the Malaysian Anti-Corruption Commission (MACC). She is of course the director and with a few lawyers guiding the investigation. There is no doubt in my mind that with Latheefa Koya as the director there would be far more investigations and then hopefully IPs resulting in prosecutions. So yes, she would be quite tough.

**Q: Now, in line with the new government and obviously the appointment of yourself as the Attorney General, Latheefa Koya as the head of the Malaysian Anti-Corruption Commission, and a few other prominent members of the Bar like Syed Zaid Albar as Chairman of the Securities Commission and Azhar Harun as Chairman of the Elections Commission, what is your personal view on the future of Malaysia in light of all of these new appointments?**

A: I think it is all relative, Malaysians have such high standards and demands. Too much expectations. They have forgotten how much has happened in the last 20 months since the new government took office. In two recent international indices or tables, one on corruption and the other on democracy, Malaysia was shooting up in both cases about ten points in one and a half years. All the foreign diplomats I meet, and I meet a lot of members of the diplomatic corps, are full of praise for the steps that Malaysians have taken in the democratic space, on civil liberties, freedom, less corruption and all of these things. Because they have a perspective, coming from their respective countries, and they have travelled around and seen Malaysia, they are in a better position to compare. But of course you can do much more, there is no doubt about that, but I think we have certainly started on the road to reform. And of course there is three years more to go for the Government.

**Q: So hopefully the Government can live up to most of its promises in respect of corruption.**

A: I think that it can. I hope that the acts, bills, and parliamentary law reform can be achieved in the next two to three years.



Putrajaya, Malaysia: Attorney General's Chambers

**Q: Apart of prosecution, obviously the Attorney General is also active in respect of law reform, new bills and legislation. That is important for our country as well.**

A: Yes.

**Q: As this interview will be published the IPBA Journal, do you have any specific message for IPBA members?**

A: I would say that the members of the IPBA would be generally corporate commercial or transactional lawyers who will be representing the great trading companies and multi-nationals of their countries. As such, they have direct connections with their clients and they should tell their clients that Malaysia is really open for business and that is transparent accountability, such that a former Prime Minister of the country, who was the most powerful person with unbelievable power, within two months of being defeated at the ballot box in a fair election can be brought before the criminal courts and face prosecution and trials which are still ongoing. No one can ever say that he is not getting justice by trial and he can appeal and there are very few countries where a former Prime Minister has been charged in an ordinary court of the land and under the ordinary criminal law. So

if he can be prosecuted, then basically anybody can. And so, if you are going to engage in corrupt acts, then you do so at your peril. This can only enhance investment and certainty in the Malaysian economy. In that sense, the true application of the rule of law is that it really does apply to anyone and everybody is vulnerable to being charged if they commit a wrongful act. Investors should be assured that if their investment is threatened or contracts are broken, then Malaysia is a safe place to pursue those claims.

**Note to the reader:** This interview was conducted on 6 February 2020. In the time prior to publishing, the Government in Malaysia changed on 1 March 2020 as a result of which Mr Thomas was replaced by Mr Idrus Harun, who was appointed on 6 March 2020.

# IPBA New Members

## December 2019 - February 2020

We are pleased to introduce our new IPBA members who joined our association from December 2019 to February 2020. Please welcome them to our organisation and kindly introduce yourself at the next IPBA conference.

<b>Australia</b> , Pamela Jack <i>MinterEllison</i>	<b>France</b> , Hugo Winckler <i>EVERGREEN LAWYERS</i>
<b>Brazil</b> , Lucas Bueno <i>Demarest Advogados</i>	<b>France</b> , Yanchao Wu <i>EVERGREEN LAWYERS</i>
<b>Brazil</b> , Rafael Gagliardi <i>Demarest Advogados</i>	<b>Hong Kong</b> , David Lamb <i>Conyers Dill &amp; Pearman</i>
<b>Brazil</b> , Stephen O'Sullivan <i>MATTOS FILHO ADVOGADOS</i>	<b>India</b> , Rishi Anand <i>DSK Legal</i>
<b>Brazil</b> , Jun Zhang <i>Demarest Advogados</i>	<b>India</b> , Indranil Ghosh <i>Chambers of Rajan &amp; Indraneel</i>
<b>China</b> , Ke Hu <i>Jingtian &amp; Gongcheng</i>	<b>India</b> , Kripa Kathuria <i>PHOENIX LEGAL</i>
<b>China</b> , Seita Kinoshita <i>Nishimura &amp; Asahi</i>	<b>India</b> , Promod Nair <i>Arista Chambers</i>
<b>China</b> , Henry Lee <i>Diamond Legal &amp; Partners</i>	<b>India</b> , Janmejay Rai <i>August Legal</i>
<b>China</b> , Charlie Lu <i>Shanghai KingTham Law Firm</i>	<b>India</b> , Gubbi S Subba Rao <i>Dr Gubbi's House of Justice</i>
<b>China</b> , Takashi Nomura <i>Nishimura &amp; Asahi Shanghai Representative Office</i>	<b>India</b> , Ahetesham Ahmed Thaver <i>ALMT Legal</i>
<b>China</b> , Philip Nicholas <i>Rohlik Debevoise &amp; Plimpton, Shanghai Representative Office</i>	<b>Italy</b> , Sharon Reilly <i>Reilly &amp; Tesoro Employment Law Firm</i>
<b>China</b> , Yuanyuan Wu <i>East &amp; Concord Partners</i>	<b>Italy</b> , Ruggero Rubino Sammartano <i>LawFed Studio Legale BRSA</i>
<b>China</b> , (Jason) Tzi-Sheng Wu <i>Justus Law Offices</i>	<b>Italy</b> , Francesca Maria Zanasi <i>I.F.L. INTERNATIONAL FAMILY LAW FIRM</i>
<b>China</b> , Luo Xuehong <i>Hui Ye Law Firm</i>	<b>Japan</b> , Takashi Hirose <i>Miyake &amp; Partners</i>
<b>China</b> , Zhezheng Zhu <i>Hui Ye Law Firm</i>	<b>Japan</b> , Yusuke Mizuno <i>Nishimura &amp; Asahi</i>
<b>France</b> , Motohiro Maeda <i>Three Crowns LLP</i>	<b>Malaysia</b> , Farah Jaafar-Crossby <i>Labuan IBFC INC</i>

<b>Malaysia</b> , Tracy Wong <i>Christopher &amp; Lee Ong</i>	<b>Thailand</b> , Chatchawat Kriengsuntikul <i>Mazars (Thailand) Ltd.</i>
<b>Myanmar</b> , Yusuke Yukawa <i>Nishimura &amp; Asahi</i>	<b>Thailand</b> , Ivy Liu Watson <i>Farley &amp; Williams (Thailand) Ltd</i>
<b>Nigeria</b> , Abiodun Olushola <i>ShepherdBrún LP</i>	<b>United Arab Emirates</b> , Merline Dsouza <i>Al Suwaidi and Company, Advocates and Legal Consultants</i>
<b>Pakistan</b> , Tanya Muzaffar <i>Vellani &amp; Vellani</i>	<b>United Kingdom</b> , Amber Liu <i>Burges Salmon LLP</i>
<b>Pakistan</b> , Asad Vellani <i>Vellani &amp; Vellani</i>	<b>United States</b> , Gregory Casas <i>Greenberg Traurig</i>
<b>Philippines</b> , Richelle Josephine Juanbe <i>Law Firm of Juanbe, Bartolo, and Associates (JOANNA LAW OFFICE)</i>	<b>United States</b> , Cedric Chao <i>Chao ADR, PC</i>
<b>Philippines</b> , Patricia Tysmans-Clemente <i>Angara Abello Concepcion Regala &amp; Cruz Law Offices</i>	<b>United States</b> , Beau Jackson <i>Husch Blackwell LLP</i>
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<b>Russia</b> , Ilya Bolotnov <i>Pepeliaev Group</i>	<b>United States</b> , L. Scott Oliver <i>Greenberg Traurig</i>
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<b>Sri Lanka</b> , Rajarathnam Selvaksandan <i>Varners</i>	<b>Vietnam</b> , Tin Duong <i>Duong Luat Investment Consultancy</i>
<b>Thailand</b> , Arunotai Ditsabanchong <i>Diamondlaw Co.,Ltd.</i>	<b>Vietnam</b> , Lan Nguyen <i>Private Law Firm</i>

## Members' Notes

### Dr Paula Kemp, The Netherlands



Dr. Paula Kemp LL.M., has been an Attorney at Law since 2011 and received her PhD from Leiden University on 23 January 2020. Her research focused on enforced performance of commercial sales contracts in the Netherlands, Singapore and China and to what extent the domestic solutions are capable of dealing with enforcement issues in cross-border sales transactions. The insights deriving from this research allows contracting parties to lower transaction costs through more effective negotiations. Paula published her findings and practical recommendations in her book *Enforced Performance of Commercial Sales Contracts in the Netherlands, Singapore and China* (Eleven International Publishing, 2020).

### Kenji Kawahigashi, Japan



About a decade ago Japan was hit by the 3.11 earthquake and tsunami. In the same year, I attended the IPBA Annual Conference held in Kyoto, Japan. Notwithstanding concerns about radioactive contamination, which were baseless and expanded by rumors, many non-Japanese IPBA members kindly came to Japan from around the globe. Their visits to the Kyoto conference made us, the Japanese members, quite encouraged. Due to the coronavirus problem, the Shanghai conference has been re-scheduled. A reunion at the same conference is now scheduled in October where we will show our gratitude to the members in the region and further strengthen the friendship among all members.

## Join the Inter-Pacific Bar Association

Since its humble beginnings in 1991 at a conference that drew more than 500 lawyers from around the world to Tokyo, the IPBA has blossomed to become the foremost commercial lawyer association with a focus on the Asia-Pacific Region. Benefits of joining IPBA include the opportunity to publish articles in this IPBA Journal; access to online and printed membership directories; and valuable networking opportunities at our Annual Meeting and Conference as well as 10 regional conferences throughout the year. Members can join up to three of the 24 committees focused on various of commercial law practice areas, from banking and finance, to insurance, to employment and immigration law, and more. We welcome lawyers from law firms as well as in-house counsel. IPBA's spirit of camaraderie ensures that our members from over 65 jurisdictions become friends as well as colleagues who stay in close touch with each other through IPBA events, committee activities, and social network platforms. To find out more or to join us, visit the IPBA website at [ipba@ipba.org](mailto:ipba@ipba.org).





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