IMPACT OF THE COVID-19 PANDEMIC ON KEY ECONOMIC AREAS

Kenya

Client Alert

TRIPLEOKLAW ADVOCATES

Dear Client,

Re: Supporting you during the COVID-19 outbreak

Due to the ongoing coronavirus pandemic, we would like to assure our clients and business partners that TripleOKLaw LLP is taking up every measure to comply with international best practice in safeguarding against the spread of the virus. We advise that the following steps have been taken:

1. We are making use of our extensive technological infrastructure to enable flexible working arrangements including remote connectivity for all staff and remain available to attend to any matter, including emergencies that might arise;

2. If you have any pending meeting or wish to schedule a meeting but are uncertain about attending in person, please be assured that arrangements can be made to facilitate such meetings via video or tele-conference;

3. Where necessary, we will facilitate onsite meetings in one of our airy meeting rooms. Sanitizers are set up at every entry and in every meeting area to give you more confidence during your visit. The elevators and stairs are also sanitized periodically to maintain high standards of hygiene;

4. Do follow the WHO workplace guidelines on proper hygiene and social distancing as available here https://www.who.int/docs/default-source/coronaviruse/getting-workplace-ready-for-covid-19.pdf?sfvrsn=359a81e7_6

Knowledge is power and we encourage you to seek information from credible news sources, healthcare providers and the national public health authority for updates.

Yours faithfully,

John M. Ohaga

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Kenya

Client Alert

TRIPLEOKLAW ADVOCATES

March, 2020

THIS THING; THE COVID-19 AND US LAWYERS

Introduction

Since the beginning of the year we have all witnessed the global havoc that Covid-19 Corona Virus has wrecked all over the world. The first explosion of the disease occurred in Wuhan, China in December, 2019. What has followed in the last two months has been a wave of travel bans, states of emergency, mass quarantine, and city lockdowns- all measures aimed at preventing the spread of the pandemic and near collapse of markets. The virus has not only claimed lives, left hospitals' emergency rooms bursting to the brink, but has equally brought majority of businesses to a grinding halt.

The outbreak of the virus has cast a dark shadow upon states around the world with various sectors such as tourism and travel taking serious hits. The situation is fluid and uncertainty still looms on its ramifications as new headlines break daily. Further transmission and evolution of the virus remains difficult to predict. The UK, China and USA stock market has seen the highest decline since the Financial crisis of 2008 the above industries have been greatly affected as has been occasioned as investors are pulling out in large numbers.

It can be said that it is still premature to assess the current impact of the pandemic, but considering its novelty, it is prudent to be cautious and stay on alert. Globally, investors and businesses have adopted a wait-and-see approach.

With Africa getting the latest blow and Kenya recording its first COVID-19 case on 13th March 2020, it disproves the hypothesis that Africans cannot contract the virus.

In this Alert, we highlight the worst hit areas of our economy, which include Contractual obligations, Finance and Technology, Immigration and Dispute Resolution. We however propose possible gains and opportunities that present themselves even amidst all the chaos, and proposed way forward. We hope that you will be able to read and interact with us on how best we can manage this pandemic and emerge even better than before when the dust settles.

A. CORONIZED CONTRACTS: EFFECTS ON COMMERCIAL CONTRACTS

There is a plethora of information from various sources and through several media on the repercussions of the infection on the human body. We will shift our focus and instead look at the aftermath of the virus on businesses with a special focus on the commercial transactions that have kept businesses afloat pre-emergence of the scourge.

Diverse businesses enter into varied commercial transactions daily to meet their business needs and effectively serve their clientele. Most often than not, they are usually for goods, services or something valuable in exchange for a form of remuneration or consideration. At the heart of these transactions, is the commercial contract that contains the terms under which the transaction will be performed to its completion. These contracts are carefully thought out and meticulously drafted to outline in specific the obligation of each party and to contemplate and cushion the parties from foreseeable and sometimes preventable challenges to the contract.

There are, however, occurrences that may be unforeseen and still unpreventable. The bedrock of contracts is performance. An integral part of ensuring the sanctity of contracts is preventing such contracts from frustration. An extraneous event that makes a contract legally, physically or commercially impossible to perform is referred to a *'force majeure',* transliterated from French meaning a 'Superior Force'. Often, where force majeure clauses are not written into the contract, they are read in under the doctrine of *Frustration of purpose* and *impracticability.*

A force majeure clause precludes a party to a contract from liability, for any failure of or delay in the performance of the agreement for the period that such failure or delay is beyond reasonable control; materially affects the performance of any obligations under the contract, and could not reasonably have been foreseen or provided against. This does not however apply to general economic conditions or other market effects.

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TRIPLEOKLAW ADVOCATES

Following the confirmation of the first three cases of the virus in Kenya, the president has since ordered the closure of learning institutions and restricted travel to Kenya from all countries with reported Corona cases. Further, only Kenyan citizens or residents are to be allowed into the country provided they self-quarantine or check into a government facility. He also requested the employers to allow employees to work from home except those providing essential services, adoption of cashless transactions to be preferred, avoidance of crowded places and public transportation and limitation on hospitals visits.

In light of this, the big question that now begs is whether the Covid-19 virus qualifies as a force majeure.

The International Chamber of Commerce (ICC) lists what events fall under force majeure. Among others, the ICC Force Majeure Clause 2003, lists in its Section 3, "***act of God, plague, epidemic, natural disaster such as but not limited to violent storm."*** Is the Covid-19 an act of God, plague or epidemic? The World Health Organization recently classified Covid-19 as a global pandemic, which is also an epidemic within the meaning of Section 3. That classification falls squarely within the definition by the ICC and also within common law commercial practice. Given its gravity and spread, the virus is a 'superior force', an epidemic that is beyond the control of any party to a commercial agreement.

Closer Home:

The question as to whether the epidemic has and is affecting the performance of contracts is not in debate. Financial markets have taken a big hit. Listed companies at the NSE in Kenya are also bound to face an unprecedented dip as investors pull out and rethink their stock.

With travel bans taking effect across continents, airlines are recording all time losses. It would be close to absurdity to require an airline to ferry its passengers that had already pre-booked flights to countries with travel bans.

Suppliers have had to cancel their obligations as their business largely rides on distribution. Distribution which has now been affected by the travel ban restricting the import and export of goods and services. Local sourced goods and services have also not been spared as business are now facing a shortage of demand. The closure of schools for instance will leave a supplier with a truck load of goods which are usually consumed by the students when schools are in session. The hospitality industry is also facing a demand shortage as scores of people are avoiding hotels and restaurants and opting for non-physical ways of interacting such as social media. Major contracts are in the trenches.

''In the aftermath of a failed contract due to force majeure, the parties involved must assess the potential financial impact on either of the remedies mentioned. Parties should be careful to further evaluate the force majeure with a view to figuring out the trajectory of the epidemic and when it is likely to end.''

Way Forward

Let us now turn down the volume on the adversity of virus and continue on the fine print. Where a Contract does not have a force majeure clause (and which specifically provides for the conditions on which a party has to be extinguished from liability if and when performance of the contract is rendered impossible), then common rules of commercial practice including the ICC rules shall apply.

It is critical to note that in the prevailing viral conditions, frustration of contracts could be two-pronged.

a) Full-frustration/Non fulfillment- Where a party is unable to fulfill the whole contract

b) Part-frustration/Part fulfillment- Where a party or parties only manage a certain percentage of their contractual obligations.

It calls for the affected parties to give notices and full disclosure to their counterparts the level of frustration they are facing in performance of their obligations under their contracts.

Four remedies are at the disposal of parties to any affected contracts.

1. Suspension of the Contract where feasible.
2. Complete exclusion of liability.
3. Termination of Contract- Where it is completely impossible to obtain performance of a contract, either or both parties may terminate the contract completely or renegotiate accordingly. If for example the supply of goods could be obtained from without an area affected by a travel ban, parties could agree to re-organize performance.
4. Negotiation of the terms of the contract in good faith.

B. TOO EXPENSIVE A VIRUS? FINANCIAL IMPACT ON FIRMS AND THE FINANCIAL MARKETS

The Virus has had negative effects on global financial markets and the global economy at large. In a situation where travelling is restricted, trade is automatically disrupted, and businesses underperform and register lower earnings. With reduced corporate earnings, corporations will not be able to pay their debts which will have a toll effect on lenders and to the corporation's operations. Investors are currently digesting the implications of disrupted supply chains, official containment measures and spillovers from the real economy to the financial markets.

The Pandemic is currently affecting the global economy through its financial impact on companies and capital flight from financial markets. This has led to the largest fall of stock prices in the United States of America (**U.S**) since 1987's Black Monday. Earlier in the week the Pandemic's financial effects were further exacerbated by the European Central Bank failing to deliver an expected interest-rate cut. As a result, demand for the dollar is dropping as investors race to pull funds from the U.S. stock market.

Most international indices are nearing bear market territory. This was observed by the decline to at least 20% from the 52% week high as investors bear the burden of processing the lowest corporate earnings as a result of the outbreak of the Virus. The decline in global equity markets and flight from risk has translated into investors selling assets such as high-yield bonds and volatile stocks as they opt to hold government securities particularly US treasuries because of the uncertainty created by the Pandemic. The concern about counterparty risk accelerates the decline and dries up liquidity in financial markets.

Closer Home

The situation has been no different in Kenya. On 9 March 2020, the Nairobi Securities Exchange (NSE) encountered a notable loss. According to the Central Bank of Kenya statistical bulletin, during the first week of January, the NSE market capitalization was at Sh2.6 trillion. Between 7 February 2020 and 13 February 2020, the market capitalization was Sh2.4 trillion. By 11 March 2020, market capitalization closed at Sh2.3 trillion. From the statistics, it is evident that the stock market has been fluctuating amid widespread concerns by foreign investors who have shed off most of their blue-chip stocks. Although the country has not experienced the adverse effects of the epidemic directly, there could be severe spillover effects from international economies in subsequent days.

On the day Kenya announced the first case of the Corona virus, plunges in the stock markets were observed and financial impacts on sectors such as tourism have been felt as most airlines suspended flights to affected regions.

Way Forward

The question then becomes what our local government should do to improve the situation. The State needs to support firms and companies that will be hit by the financial downturn of the outbreak. This can be realized by granting tax breaks to companies seeking to increase their capacity to produce import substitute goods, releasing VAT refunds to assist businesses with managing their cash flow, encouraging banks to give concessionary loans at low rates to facilitate businesses and as well as providing moratoriums on loans that are due, announcing and providing for a Business Stabilization Fund to cushion the impact of the Virus, especially for Small & Medium Enterprises(SME's) and considering a reduction on corporate tax for industries that have been highly affected by the virus such as the aviation industry, or waiving corporate tax for a 3-month period as well as a reduction in payroll tax for the next 3 months for the low income bracket workers. The Central Bank of Kenya should also revise its economic projections for 2020 in the wake of the COVID-19 pandemic.

We however still await with bated breaths to see how the government and key financial institution such as the CBK will choose to handle the financial repercussions of the pandemic.

C. MOVES THAT CAN'T BE MOVED: IMPACT ON IMMIGRATION

As governments escalate efforts to contain the spread of the virus, several aspects of immigration have been sacrificed on public interest grounds. The crisis raises fundamental questions on the status of foreign nationals with temporary permits, visas, student passes and dependent passes.

Most countries have as a matter of necessity, closed their borders and restricted non-essential travel within the domestic sphere. Some, like Spain and Italy have imposed mandatory quarantine to swathes of the population. It is not business as usual in the public and private sector where staff have been forced to work from home to reduce social contact in line with recommendations of the World Health Organization.

> *''The Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, which define status and mandates of representatives of home countries posted abroad, further have a bearing on what personnel of the migrants' country of nationality can do in order to assist their nationals abroad in crises.''*

While there is no express requirement for States to offer automatic immigration support to non-citizens during crises, a number of international legal instruments and frameworks implicitly or explicitly list obligations of States to protect the rights of people who live, work or stay outside their country of nationality. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, provides for a number of rights (e.g. medical care, birth registration, repatriation of remains), which are key during crises.

The Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, which define status and mandates of representatives of home countries posted abroad, further have a bearing on what personnel of the migrants' country of nationality can do in order to assist their nationals abroad in crises. In this regard, most countries have made strict arrangements to allow their nationals to return from COVID-19 affected countries under strict testing and quarantine measures. Other international instruments include the Universal Declaration of Human Rights and the Guiding Principles on Internal Displacement.

Closer Home

Expats and other migrants are particularly vulnerable to the current health crisis due to their immigration status. The Kenya Citizenship and Immigration Act, 2011 (section 56) for instance, empowers the Cabinet Secretary, during occasions of imminent danger or great emergency, and on advice of the Cabinet and National Security Council, to impose certain restrictions on foreign nationals. Such measure include:

(a) the prohibition of foreign nationals from landing in or otherwise entering Kenya either generally or at certain places and imposition of restrictions or conditions on foreign nationals landing or arriving at any port in Kenya;

(b) prohibition of foreign nationals from embarking in or otherwise leaving Kenya either generally or at certain places, and imposition of restrictions and conditions on foreign nationals embarking or about to embark in Kenya;

(c) requiring foreign nationals to reside and remain within certain places within Kenya;

(d) prohibiting foreign nationals from residing or remaining in any areas specified in the order;

(e) imposing penalties on persons who aid or abet any contravention of the order, and imposing such obligations and restrictions on masters of ships or any other persons specified in the order as appear necessary or expedient for giving full effect to the order; or

(f) for any other matters which appear necessary or expedient with relating to the security of the country.

In a press statement dated 14th March 2020, the Kenyan Directorate of Immigration Services published a number of precautionary measures which include rescheduling of passport appointments and the provision of only very urgent foreign national management services. It is likely that more stringent measures will be necessary if the crisis continues.

Way forward

Despite the emergency powers vested in the State as those under the foregoing Kenyan legislation, the COVID-19 crisis presents an opportunity for collaboration among governments to reduce the impact on expats and other migrants. Several global actors have concentrated efforts to curb the virus and support immigration systems. On 25th February 2020, the International Organization for Immigration (IOM) launched a USD 17 Million Plan to help countries address the coronavirus outbreak and in particular, to support:

> *"….a wide range of interventions like cross-border coordination, trainings and simulations for government employees, population mobility mapping exercises, risk communication and community engagement activities, enhanced surveillance, as well as water, sanitation and hygiene services at entry points to support infection prevention and control. "*

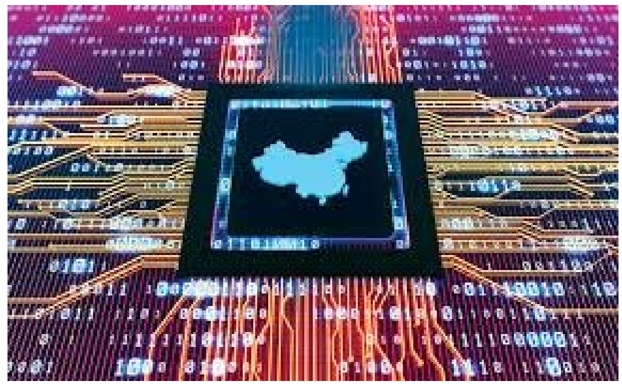
The priority areas highlighted above by the IMO should be addressed at Kenya's immigration points (the border points, airports and passport control centers) to reduce further risks as passengers await screening at border points or transit at airports.

In summary, while the Kenyan government takes emergency measures to protect its citizens during this health crisis, it should also set clear guidelines and procedures at the Immigration Department in order to maintain the continued operations and support to foreign nationals who need to renew their permits, passes and other status documents.

Since most of the immigration services for foreign nationals are integrated in the eFNS online system, the government should be able to come up with creative ways to allow remote registrations to ensure ongoing support to those in need of immigration services.

D. TECHNOLOGICAL PAYMENTS FOR THE COVID PAINS: CHALLENGES AND OPPORTUNITIES IN PAYMENTS AND FINTECH

The prevailing pandemic caused by the COVID-19 (CORONAVIRUS) has hardly spared any sector; crippling and hindering the effective provision of goods and more so services, in its deadly wake. The financial industry has not been spared either, with banks and financial institutions being adversely affected by the current circumstances.



However, this enigma presents an opportunity for the Payments industry to leverage on financial technology whilst proactively engaging regulators with regard to mitigating impending pitfalls resulting from adverse effects of Coronavirus.

Regulators will expect firms to take all reasonable steps to continue meeting their obligations and to assess their operational risks, their ability to continue operating and the steps they need to take to serve and support their customers. Sound business continuity plans are a priority for such firms.

To bring this into context, the World Health Organization (WHO) is officially encouraging cashless payments to limit transmission of the virus. As a result, we have seen increased appetite for major uptake in the fintech industry. For instance, South Korea is planning to temporarily ease regulations on fintech in an attempt to jumpstart its economy amid the coronavirus outbreak while China Banking and Insurance Regulatory Commission (CBIRC), confirmed that coronavirus out-break has become one of the major drivers for fin-tech adoption in China.

Closer home

The Central Bank of Kenya, which is Kenya's Payments Systems regulator introduced a raft of emergency measures so as to stabilize the payments industry and facilitate the impending increase in cashless transactions. Among other measures, the CBK in consultation with Payment Service Providers (PSPs) agreed to:

- Remove charges for mobile money transactions for Ksh. 1,000 and below;
- Increase the transaction limit to Ksh. 150,000 and daily transaction limit to Ksh. 300,000;
- Increase the mobile money wallet to Ksh. 300,000; and
- Eliminate charges for transfers between mobile money wallets and bank accounts.

The above is an example on how the regulator and industry players can mitigate potential risks by leveraging the challenges into opportunities. On the tail end, PSPs in Kenya might find themselves in a precarious position given the effect of the Coronavirus will have on its subsisting contracts (**more so technology contracts)** with counterparties. A deliberate emphasis is placed on ***technology contracts*** because it is most likely that Fintech companies operating in the payments landscape host their critical network infrastructure through third party providers based in another jurisdiction. This may mostly be in the form of cloud infrastructure types in the form of:

- Infrastructure as a service (Iaas)
- Platform as a service (Paas)
- Software as a service (Saas)

The services above play a critical role in the backend infrastructure of payments applications which consumers may use on a day to day example.

> ***Consider this scenario:***
>
> ***Bank A in Kenya has a digital banking service which is developed/hosted by a contractual party in France. The bank offers mobile banking through this application to its Kenyan customers locally. In the wake of the crisis Europe is currently facing, Bank A's contractual service provider is unable to meet its obligations to the Bank and thus, its digital banking services are interrupted and thereby adversely affecting the customers in Kenya who are now unable to access their mobile money/e wallets.***

In the above scenario, it can be established the consumer will be adversely be affected by delays and inability to access their assets through mobile banking and thereby occasioning a breach of contract. In this instance, it will be imperative for Bank, Mobile Network Operators and other players involved in the Payments eco-system to undertake risk mapping exercises in order to prepare and mitigate for unavoidable circumstances.

This is partly because, consumers desire for digital banking services will most likely increase, forcing many traditional financial institutions to fast-track digital innovation efforts. As a result, many legacy banks and credit unions may look to fintech firms for assistance in bringing better digital banking solutions to the marketplace. This increase in demand for digital solutions could prove to strain the existing infrastructure in some instances.

Way Forward

In order to mitigate this, we suggest engaging with the counterparties as early as practically possible (normal contract or relationship governance) to negotiate in good faith, identify issues and agree on the way forward aimed at mitigating risks including formulation of appropriate workarounds. For instance, Service Level Agreements terms may need to be revised in the interim. These measures may in addition entail proactively engaging the regulators such as Central Bank of Kenya who regulate payment systems under the National Payment Systems Act and Regulations and the Communications Authority, who regulate MNO’s in Kenya and issue licenses under the Kenya Information and Communications Act.

Key concerns would include:

- **extensions of time** should be granted (and/or delay penalties waived) by the regulator to factor any project delays that may occur beyond the reasonable control of the supplier, and which cannot be mitigated by the customer.
- **Reporting and disclosure obligations;** Identify where disruption could affect ability to comply with regulatory reporting or disclosure obligations, especially where reporting is not wholly automated or is dependent on availability of staff or third parties. Develop a communication strategy for keeping regulators appropriately updated.
- **Mutual aid arrangements;** Consider whether to discuss mutual aid arrangements with other firms to facilitate continued customer service in the event of severe disruption.
- **Determine whether disengagement services** are to be provided following any termination so as to provide for a proper and orderly transition of the services to another supplier.
- **Frustration and/or Force Majeure of Service Level Agreements** should be a major mitigating factor provided the PSP is able to provide alternatives within turnaround times.
- **change control process** can be used to cover any additional costs that may arise (for example, by virtue of the supplier having to provide support on site, or engage personnel from a higher cost jurisdiction where the lower-cost offshoring location is affected by government restrictions on the movement of people).
- **provision of services remotely**, particularly in cases where supplier personnel cannot leave their homes or are being refused entry by immigration authorities in the country where the customer’s premises are located. Very often, technology contracts specify levels of onsite and offshore/remote resources to be used. If so, these need to be reassessed in light of any restrictions.
- Develop a client communication strategy to ensure that clients are kept appropriately updated, particularly if there may be delays or interruptions in service.

> *“we suggest engaging with the counterparties party as soon as practically possible (normal contract or relationship governance) to identify issues and agree options to deal with any risks including appropriate workarounds. These measures may in addition entail proactively engaging the regulators such as Central Bank of Kenya who regulate payment systems under the National Payment Systems Act and Regulations and the Communications Authority, who regulate MNO’s in Kenya and issue licences under the Kenya*

E. DISPUTES DESPITE AND THE DISPUTE AGAINST THE VIRUS: IMPACTS ON DISPUTE RESOLUTION

Globally, the virus has caused disruption to international arbitration practice in China, South Korea, Japan, Singapore, elsewhere in Asia and, now, increasingly in Europe, the US and the rest of the world. Very recently is the virus now disrupting the balance of Arbitration and dispute resolution generally in Africa. Apart from quarantines, travel to and from parts of Asia and Italy has been banned or curtailed by governments.

The virus is increasingly affecting international arbitration in regions that had limited exposure to the contagion before. In a period of three weeks, a small outbreak in Italy has escalated to a growing concern throughout Europe. In the past months, tribunals in the US and Canada have been struggling to manage hearings without witnesses from China. Now the US is dealing with its own outbreaks, particularly in Washington State, California, and New York.

This has also not been without dramatic turn of events. For instance, the move by ISIS to suspend all terrorist attacks due to the wake of the pandemic, and the cease fire by USA and Iran due to the now common global enemy.

Closer home

Back at home, courts have not been spared either! In just one weekend, the effects of the virus have been felt throughout the entire nation. On Sunday the 15th of March, The National Council for the Administration of Justice met at the Supreme Court, Nairobi, on March 15, 2020 to deliberate on the implications of the announcement by the Ministry of Health that the first case of COVID-19 (Coronavirus) has been confirmed in the country. Even before that dust settled, the cases confirmed in Kenya rose to 3.

Recognizing the critical need to protect members of staff as well as the public from infection and to prevent the spread of the disease the Council issued a 12-point directive on the administration and contingency management plan to mitigate Covid-19 in Kenya's justice sector. We feel that these directives are relevant as they directly impact the way we do business in the dispute resolution space.

In compliance with the directive issued by the National Emergency and Response Committee, court activities shall be scaled down throughout the country. Additionally, all appeals, hearings and mentions in Criminal and Civil cases in all courts are suspended with immediate effect while all execution proceedings are also suspended during the two weeks.

In terms of operations within courts, the Council directed that Courts would continue to handle certificates of urgency and taking plea for serious cases although during there will be no open court appearances. All conferences, workshops, colloquia and training programmes are suspended until further notice.

An ad-hoc Inter-Agency Committee was also established to liaise with the National committee and advise the Council on further precautionary measures on an ongoing basis. These directives are to be reviewed from time to time taking into account the prevailing circumstance as they arise.

Undeniably, this has significantly affected dispute resolution. What's worse, the coronavirus will not stop disputes from arising and, in fact, may actually give rise to more disputes. Force majeure clauses are alive and well in commercial contracts, even if they were perhaps not expressly crafted for viruses, instead focusing on issues related to weather, terrorism and natural disasters. This has been adequately addressed above.

Way forward

We are particularly concerned at how institutions, arbitrators, mediators, lawyers and parties can deal with this new reality so that the world of commercial dispute resolution keeps humming along and resolving disputes and managing those that may arise.

In terms of Arbitrations, we would propose that Arbitrators, when crafting their procedures, orders and directions for a case, should give more consideration to the need for, and benefits of, mechanisms to create efficiencies and minimize in-person or inter-party interactions. In addition, we should leverage on technology such as teleconferencing and video conferencing in taking evidences if at all this has to be done. to keep the business running.

To highlight how other jurisdictions have already embraced this, we consider the case of *Re Cyberworks Audio Video Technology Ltd*. Here the High Court decided that it can, as part of its case management powers and of its own volition, order that a directions hearing take place by means of a telephone conference without the physical presence in court of the parties or their legal representatives. The court's decision is set against the background of the extraordinary measures adopted in Hong Kong to combat the coronavirus public health emergency. These measures include the closure of the courts from 29 January 2020 (immediately after the Chinese New Year holiday) to 22 March 2020 (on current estimates), save for urgent and essential court business. The decision is welcome and hardly surprising. It makes use of old technology at the time of a serious public health situation and provides a catalyst for the courts in Hong Kong to embrace new technology going forward. There are some plans afoot in this regard which need to be prioritized.

In a decision that evidences pragmatism and common sense, the court decided that it could give directions by way of a telephone conference hearing and it did so on or about 25 January 2020. The judge was physically in his courtroom and the parties' legal representatives dialed in and listened just as if they had been physically present. The entire conversation was recorded on the court recording system just as it would been had the legal representatives been physically present.

The court gave detailed written reasons for its decision. These included:

- there was no express provision in the court rules which required court hearings to be held with the physical attendance of the parties or their legal representatives.
- the underlying objectives of the court rules and the courts' case management powers justified the use of telephone attendance.
- in other jurisdictions, such as England and Wales, provisions existed for telephone conference hearings and video conferencing.

The following passages from the court's decision sum up its reasoning:

> *It cannot be in the interests of the administration of justice, or the maintenance of the rule of law in Hong Kong, for all work in the civil courts effectively to come to a halt simply because hearings normally require the kind of physical attendance which health considerations point against, where numerous court hearings can effectively, cost-effectively, expeditiously and fairly be dealt with over the telephone. (I ignore for present purposes the possibility of disposal on the papers.) Leaving aside the question of costs, there are clear benefits from conducting telephone hearings so as to continue management and disposal of cases, if circumstances would otherwise prevent that from happening.*

Even as we take all these measures, we think that the most important thing is that people should remain calm. And even while the mortality rate of the virus is relatively low, we still should do our best to ensure that we do our best in containing it. In the end, we shall overcome, and we will look back. And perhaps we will smile for we will realize that this was the push we needed to get online dispute resolution figured out, fit for purpose and fully functioning. What if the way we handle disputes will forever change? Would that be such a bad thing? Perhaps we will learn from this shared worldwide historical experience so that when it passes, we will not revert to our past practices.

"In the end, we shall overcome, and we will look back. And perhaps we will smile for we will realize that this was the push we needed to get online dispute resolution figured out, fit for purpose and fully functioning. What if the way we handle disputes will forever change? Would that be such a bad thing?"