



The pandemic has affected businesses across all industries, and the legal world needs to prepare itself so that courts and tribunals are not overwhelmed by commercial cases attributable to Covid-19. To prevent legal gridlock, rational and equitable solutions need to be found for many business arrangements, instead of the law staidly maintaining the status quo, say the writers. ST PHOTO: LIM YAOHUI

Coronavirus: The Great Disruption

The Covid-19 pandemic and the imminent legal epidemic

A slew of legal problems will arise in the months ahead, as contracting parties reassess their business agreements. Global business centres like Singapore need to prepare for this legal tsunami

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For The Straits Times

What's past is often prologue.

History tells us that in times of immense economic stress, disputes and litigation significantly increase. The Covid-19 pandemic – with its unprecedented impact on trade, markets, supply chains and businesses – is likely to give rise to a tsunami of disputes.

We are not alone in highlighting these concerns. Knowledgeable observers elsewhere are also concerned that a legal epidemic will follow in the wake of the current Covid-19 health pandemic.

Covid-19 has affected businesses across all industries. Disputes could arise in almost every contract that has been impacted by the lack of demand, inability to discharge obligations because of broken supply chains or lack of liquidity to finance operations.

While legally sophisticated parties would in their contracts have clauses providing for their rights on the occurrence of unexpected events outside the normal business risk – often called force majeure clauses – many other parties would not have done so.

The legal world needs to prepare itself so that courts and tribunals are not overwhelmed by commercial cases attributable to Covid-19.

To prevent legal gridlock, rational and equitable solutions need to be found for many business arrangements, instead of the law staidly maintaining the status quo.

THE SINGAPORE APPROACH

To its credit, the Singapore Government, like Germany's, has acted quickly to create much needed legal relief for individuals and businesses affected by Covid-19 by passing the Covid-19 (Temporary Measures) Act.

By imposing a moratorium on certain legal actions or – as Minister for Law K. Shanmugam put it, a "legal circuit breaker" – the Act

provides temporary and targeted protection for businesses and individuals who cannot perform particular types of contractual obligations due to Covid-19. The Act therefore gives parties precious "breathing space" to negotiate and resolve their differences, preserving their liquidity.

But, after the legal circuit breaker concludes, Singapore needs to be prepared for a legal epidemic that will pose unique challenges for our legal system.

The Singapore legal system enjoys a high level of efficiency.

The formal courts are complemented by a myriad of alternative dispute resolution mechanisms. Indeed, in the Rule of Law Index 2020 by the World Justice Project, Singapore ranked first in the Asia-Pacific – and sixth in the world – for the effectiveness and efficiency of its civil and criminal justice systems.

However, Covid-19 presents an unprecedented challenge to even the best legal systems. Following the Asian financial crisis and the global financial crisis, the number of disputes increased substantially in mature legal systems. Such disputes are not only commercial in nature. Economic stresses also impact personal lives. Family disputes and abusive relationships increase, and more economic crimes are either uncovered or committed.

This will especially be the case for international financial hubs such as Singapore, Hong Kong, London, Frankfurt and New York. Legal systems will need to manage the resolution of existing cases that have been postponed and process the many new ones that have arisen because of Covid-19. In the absence of preventive measures, the legal system can become overwhelmed by the high number of commercial cases. Non-commercial cases, such as family and criminal matters, may also be impacted if the legal system is unable to cope as a whole.

THE COVID-19 (TEMPORARY RELIEF) ACT

The Covid-19 (Temporary Relief) Act provides necessary interim relief for individuals and businesses affected by the pandemic. The Minister for Law has rightly observed that we should be looking at equity and justice, rather than just the enforcement of strict contractual obligations.

However, as its name suggests, the Act is only a temporary solution to a complex host of problems. First, the Act does not necessarily extinguish any legal actions that parties have against each other. In some cases, the Act preserves the parties' rights to continue legal proceedings once the legal circuit breaker ends.

Second, the Act applies only to limited categories of contracts, which are (a) secured loan agreements to small and medium-sized enterprises, (b) construction contracts and supply contracts, (c) event and tourism-related contracts, (d) hire-purchase and conditional sales agreements and (e) leases and licences of non-residential property.

Thus, contracts which are not covered by the Act – such as residential leases and cross border transactions – may be litigated if differences cannot be resolved.

There are, in our view, two inherent weaknesses of the current legal system that need to be addressed to avert the legal epidemic from Covid-19. The first is the traditional inability of the common law system – which Singapore adopts along with more than a third of other countries – to react quickly to fast-moving crises.

A key characteristic of the common law system is that courts develop the law incrementally, in response to cases that come before them. As such, the common law can over time mould solutions to address different factual problems.

WEAKNESSES IN THE COMMON LAW SYSTEM

This ensures stability and certainty through law developed over decades, if not centuries. However, it is precisely this strength – its deliberative nature – that makes a common law system slower to react to a sudden crisis like Covid-19.

Such unprecedented situations pose problems for the legal and business communities because the highest courts may not have had the opportunity to pronounce the law directly applicable to Covid-19. This creates uncertainty for parties, thus making resolution more difficult.

Coronavirus: The Great Disruption

How will the world change post Covid-19?

Already, the pandemic is upending societies and ways of life, sending countries into lockdowns, triggering recessions and massive job losses.

To make sense of its impact on economies, business, governance and international relations, leading opinion leaders share their views in Coronavirus: The Great Disruption, a special series in The Straits Times Opinion section.

In contrast, when the law is clear, parties can often resolve their differences by referring to established principles without having to litigate. While there is obviously room for the highest courts to develop the law in response to Covid-19, these will be narrowly crafted in response to the precise questions raised.

It will also take time for cases to work their way through the system before reaching the highest courts.

The second is the weakness of the law developed by the common law system to deal with contractual issues that are relevant in a pandemic situation.

In the absence of force majeure clauses, the common law allows parties to exit a contract when an unforeseeable event has changed their obligations radically.

When this happens, the contract is said to be "frustrated". However, it is rare for a court in a common law system to rule that a contract is frustrated, allowing the party to exit the contract.

This reluctance comes from the inherent distaste the common law has for relieving a party from its contractual obligations.

There are also no directly applicable Singapore or English decisions.

During the 1918 flu pandemic, the American courts held in a number of cases that increased labour costs caused by the pandemic did not frustrate business contracts.

Separately, the English courts have held that only "astronomical" increases in costs can frustrate a contract.

And this approach has to date been adopted by the Singapore courts. If this line of reasoning were to be rigidly followed, it could be

problematic in the present situation.

Furthermore, even if a contract is found to be frustrated, the courts' ability to adjust the parties' rights and liabilities is fairly limited. The local Frustrated Contracts Act, based on identical English legislation, allows the courts to allocate the losses between the parties, but not to adjust the parties' original contract.

This legislation is underpinned by the deference accorded by the common law to the parties' "freedom to contract", that is, the freedom to enter into any contractual arrangement that will be enforced insofar as it is not illegal or immoral.

Therefore, the relative rigidity of the common law, coupled with the uncertain and limited ways in how it might be applied to deal with a contract affected by Covid-19, may create legal choke points as parties line up for a binding determination.

PREPARING FOR THE LEGAL EPIDEMIC

What might be done to mitigate a legal epidemic flowing from these problems? We propose a three-pronged approach that goes beyond the provision of breathing space.

Legislation beyond the Covid-19 (Temporary Measures) Act

First, rather than wait for the common law's response to the pandemic, Parliament should legislate beyond the Covid-19 (Temporary Measures) Act to empower the courts to deal with commercial disputes directly affected by Covid-19 more flexibly.

From a systemic perspective, such legislation would give the business community immediate certainty and more predictability as well as encourage mediation.

This is important as businesses rebuild for a post-Covid-19 economy. This will also be more efficient than the common law system.

Unlike the courts, which can only deal with particular cases before them, Parliament can enact far-reaching legislation that can anticipate various issues. Such legislation could cover the contracts currently included in the Covid-19 (Temporary Measures) Act as well as a wider range of other commercial contracts. The precise list will have to be carefully based on public policy and considerations of international comity. This should come only after

consultation with affected industries and other stakeholders.

An alternative approach Second, such legislation could draw inspiration from the civil law systems. These systems allow the courts greater latitude in adjusting the parties' rights against each other. This is in turn because these systems recognise good faith as a paramount consideration in their law of contract. Thus, in certain extreme situations, it will no longer be in good faith to bind the parties to the original contract.

For example, the German Civil Code allows the contract to be modified if the parties would not have entered into the contract had they known of the change in circumstances. The affected party may then request for the contract to be modified.

Similarly, the French Civil Code allows a party affected by changed circumstances to plead hardship or "impre vision". This allows a party to a commercial contract to request for the renegotiation or termination of a contract if the changed circumstances have made it excessively burdensome for a party to perform its obligations under the contract.

In contrast, the common law system does not recognise good faith as a paramount consideration in its law of contract.

As such, compared with civil law systems, the common law has traditionally not interfered with the parties' contractual arrangements even when circumstances have changed.

However, this approach needs to be reconsidered from a policy perspective in the light of the unprecedented Covid-19 pandemic for contracts that have been materially affected by it.

Businesses will need all the help they can get to survive the current crisis.

Thus, the law should allow for just and equitable solutions to be found where contractual relationships have been materially affected by Covid-19 and the parties have not spelt out in their contracts how their performances might be excused.

The courts should be empowered to adjust the parties' contract when parties can show that their contractual obligations have been materially affected by Covid-19.

In proposing these measures, we would highlight three further points.

First, while the threshold for invoking such measures should remain high, they should not be insurmountably so. Second, while these measures will affect the parties' contractual rights retroactively, this extraordinary measure can be justified by the unprecedented impact of Covid-19. Third, if parties have already addressed how such an event like Covid-19 is to be dealt with in their contracts through force majeure clauses, then, similar to the approaches taken in the civil law systems, their legitimate expectations must be honoured.

Specialist courts or divisions Third, specialist courts or divisions could be set up to deal with the expected wave of cases from the Covid-19 pandemic.

Such specialist courts will not be new. For example, the Protection from Harassment Act established the Protection from Harassment Courts to provide a "one-stop solution" with expedited processes for harassment victims.

Similarly, the specialist courts established to deal with disputes emanating from Covid-19 can be empowered with dedicated procedural rules to fast-track cases with clear timeliness to be observed by both parties and the courts.

These courts will also have the advantage of generating a consistent set of principles that can not only deal with present cases but serve as a model for other jurisdictions.

OTHER AREAS OF CONCERN

Apart from the contractual problems we have highlighted, other difficult issues can arise in employment law, family disputes and insolvency, just to name a few.

Many of our current processes ought to be reviewed and made simpler, quicker and less costly – all without sacrificing the perception of fairness.

It is no longer good enough that these processes work well in normal circumstances.

If any financial hub can effectively stem this coming legal haemorrhage, it will likely be a united Singapore.

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