

Chan, Kay K.W. & Ziehe, Katja, 'Will the Covid-19 Crisis Catalyse the Dispute Resolution Movement and Improve Access to Justice?', pages 34-5.

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'Will the Covid-19 Crisis Catalyse the Dispute Resolution Movement and Improve Access to Justice?'

The Covid-19 crisis hit many sectors hard. One of the problems legal professionals faced at the height of the lockdowns during the spring was the closure of courts for all but urgent matters. Courts closed on 27 January in Hong Kong until 3 May and between 13 March and 11 May in Switzerland. Many cases remained unresolved until new court dates were set. The wait to relist court dates added further delays as courts lacked the capacity to deal with their colossal backlog. Compounded with the inherent problem of stretched court resources across many jurisdictions, this new crisis accentuated an age-old problem we face in accessing justice.

One solution to speeding up court access is technology. However, not all jurisdictions are ready to migrate court operations to the internet. For example, Hong Kong courts have a very low rate of technology use. Before the pandemic there was one "technology court" in the High Court and other e-communication capabilities in the lower courts were supported by a portable set of equipment, commonly referred to as "the trolley". Whilst the "trolley approach" is adequate for makeshift adaptations to enable the odd e-case – such as taking overseas witness testimonies – it is inadequate to make up for a total court lockdown.

While the courts were shut, parties were left to their own devices to find solutions. In our view, many negotiations among litigators on immediate case management issues just kicked the can down the road. The immediate effect was to ask clients to wait for the crisis to ease and then rejoin the courts' mammoth listing queues. In Hong Kong a bilingual commercial trial may already have to wait for as long as eighteen months. Some might have to wait two years or longer. Can a dispute wait that long for resolution?

Family professionals have always been ahead of the curve in looking at ways to solve disputes outside the litigation model. Of course a divorce decision requires a court pronouncement in most countries. But there is nothing stopping families from using non-trial methods to resolve their differences before applying to court for the final decree. Family issues are personal, emotionally charged and almost always urgent. As we say: life goes on whether you like it or not. Finding a suitable solution quickly helps families move on and avoid secondary issues stemming from their original disputes.

Depending on the jurisdiction you are in, alternative options could be mediation, collaborative practice or arbitration. In Hong Kong there is also adjudication for family law-related financial disputes.

Swiss courts were much quicker to adopt tech solutions and speed up resolutions. After reopening they have been flooded by unsettled cases. In Switzerland individuals can file at most courts as litigants-in-person. But even families willing to court-negotiate will have to wait for an unknown period of time for their cases to be heard. However, Swiss courts are used to receiving divorce agreements and can handle cases in a single hearing which can be as short as half an hour. Even

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before the pandemic, a remote hearing was possible if, for instance, one party lived abroad and or was unable to travel. The pandemic catapulted Swiss courts into the IT age in a matter of weeks. We believe divorce hearings by phone or video conference will become more frequent in the future.

In Hong Kong legal professionals rethought how best to proceed. We take the view that this is a good opportunity for dispute resolution professionals to further establish themselves in the legal market. Mediation and collaborative practice have a greater flexibility of delivery and a speed which is much needed in times of crisis. Without the constraint of a binary right-or-wrong outcome required in litigation these methods are also more desirable for parties looking to preserve ongoing relationships.

Obviously, recognition by courts of these methods is important for the dispute resolution movement. In Switzerland, lower level courts dealing with divorce cases tend to schedule consensual procedures quicker than litigated cases when a full agreement has already been reached. Lawyers can also seek a remote court hearing for the formalisation of the agreement. We will soon be able to evaluate how, in practice, this has helped the Swiss court system.

Learning from experience in the Swiss Family Court, mediators and collaborative professionals can support families in relationship breakdowns. We would argue that the same applies to other people in conflict too.

Financially, the pandemic is exerting incredible strain on businesses of all sizes. Given that commercial litigation can take years to conclude even without the present delays, we believe that litigation should remain the last choice for businesses to resolve their disputes. In contrast to divorce suits, commercial conflicts usually do not need a court decree to conclude anyway. Companies, businesses, employers, employees and other stakeholders need quick solutions to their disputes so that everyone can move on. Time is money and money is better spent on businesses than in lengthy litigations. Mediators and collaborative professionals can support parties in conflict to find quick, out-of-court solutions while preserving business secrets and saving money. During the ongoing world pandemic, it is not just economical, but the only viable option.

All in all, lawyers should actively consider ways to help clients ease their concerns over court delays. It is our respectful opinion that lawyers have a professional duty to advice on different options to efficiently resolve disputes.

As countries hopefully overcome or manage the Covid-19 crisis, the pressure on our court systems will surface. If dispute resolution professionals and lawyers put their efforts into removing cases from courts by offering their services, we may be able to open a new page in effective access to justice for our next generation. This will push the dispute resolution movement into the post-Covid-19 era.