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IN THIS ISSUE

The article examines the challenges that parties and (arbitration) courts will face after the Corona crises and – most importantly – the requirements which must be met to resolve conflicts in this exceptional situation. The authors submit deliberately provocative proposals and are looking forward to receiving comments from around the world.

Thinking Ahead: Dispute Resolution after the Corona Crisis

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The Corona crisis is plunging the global economy into a deep crisis. Projects stand still, contracts are not being fulfilled. This will lead to numerous legal disputes. This article examines the challenges facing parties and (arbitration) courts and the requirements, which must be met to resolve conflicts in this exceptional situation. The focus of the contribution is on concrete, deliberately provocative proposals to the parties and their legal departments, to arbitrators and to the legislator on how to bring legal disputes caused by the pandemic to an appropriate solution. The so-called “nudging” techniques to promote amicable dispute resolution play a central role in this context.

I. The Need to Think Ahead

The omnipresent Corona crisis is preventing us from doing much, but not from thinking. Many issues have to be rethought today. This includes how citizens, businesses and the legal system should deal with disputes that will inevitably arise from the Corona crisis. In search for orientation¹, the parties to a dispute and the dispute resolution industry need to plan ahead. The starting point is an assessment what to expect: What are the likely number, magnitude and nature of disputes created by the Corona crisis? From that starting point, follow-up questions arise: Are the existing dispute resolution mechanisms adequate to deal with those disputes? Or does the rather unique situation require us to rethink the dispute resolution

process, at least for Corona-related disputes? These questions are hard to answer. Predictions are daring, not least because they concern the future.² However, not to think about these issues in the face of the pandemic, to bury the head in the sand like an ostrich, is simply negligent. The following analysis is therefore meant to be provocative and hopefully offers food for thought in challenging times.

II. What is going to come: Three Predictions about the Disputes' Landscape after the Corona Crisis

What is the problem we are facing in terms of Corona-related disputes and the corresponding dispute resolution? "*It depends ...*" is the standard, somewhat coward and often-dissatisfying answer from a lawyer. However, rarely has that answer been so much to the point: It depends on the spread of the Corona-virus, it depends on medical answers found to vaccinate against the virus, it depends on the scope and duration of the economic downturn and it depends on the societies' ability to remain stable and peaceful in harsh times. However, all those uncertainties do not free us from making an educated guess on the disputes that will emerge after the Corona crisis and on the challenges created thereby for the dispute resolution process. Here is what a glance into the proverbial crystal ball currently predicts for Corona-related B2B-disputes³:

¹ Linguistically, the term "orientation" has interesting roots: It means "directed towards the orient, the east, where the sun rises every new day". That is quite a comforting thought in these times, isn't it?

² Mark Twain, to whom this proverb is attributed, already knew this.

³ Disputes between business entities and consumers (B2C-disputes) are less likely to increase drastically due to the Corona-crisis. The underlying contracts for those business relationships are often fulfilled within a short period of time and thus less impacted by Corona-driven impediments to performance.

1. There will be a plenitude of disputes

The first prediction is that there will be a plenitude of Corona-related legal disputes.⁴ As of now, legal disputes appear to be a remote concern. We all concentrate on health issues, closely observing the daily statistics of infected and deceased fellow citizens.⁵ Compared to this human tragedy, even the global economic shutdown, followed by an unprecedented downturn, is of secondary importance. Dispute resolution is very low on the agenda of concerned politicians and citizens. That is however going to change. Health issues will ultimately be solved, albeit at immense sacrifices and costs and the economic downturn will ultimately come to a halt, at whatever (low) level. Only then, everybody and every business entity will take stock of its losses and the incurred damage. In view of the magnitude of losses, that will take a while. Then, finally, arguments will start about who has to bear these damages and to what extent. The human brain is wired to search for a culprit who is ultimately responsible for our own calamities and mishaps.⁶ And while everybody will accept the Corona crisis as the archetype of *force majeure events*, that is not going to be the end of the discussion but rather its beginning: Has the Corona crisis eliminated the economic basis for the contract and should, per consequence, the contract be adjusted or even cancelled? Was the main contractor of an infrastructure project allowed to stop work completely and, if so, for what time period? Is the entire project delay attributable to

Corona-related circumstances or only parts of it? Can or must the contractor concentrate his manpower and his resources on projects originally scheduled for the past-Corona period or must he first fulfil obligations under Corona-affected contracts, entailing follow-up delays in the post-Corona projects? For how long must a customer accept a delay in delivery before he can withdraw from the contract? Can the final manufacturer of a product argue to the supplier that his sales market has collapsed because of the crisis and that he no longer needs the supplier's product or at least in much smaller quantities, but still at the same price per unit? Is the buyer of a company allowed to withdraw from the signed but not yet executed sales contract because a fundamental change has occurred, based on a so-called "material adverse change" ("MAC") standard clause⁷ in the SPA? So many questions, so many sources of conflict. Hence, it is a safe guess that the pandemic will lead to a plenitude of legal disputes.

2. Those disputes will not be resolved in bilateral negotiations

The second prediction is that many of those Corona-related disputes will not be solved by amicable negotiations. Disputes typically emerge in three phases, according to the Naming Blaming Claiming Model (NBC Model).⁸ We will see that pattern of emerging disputes also with regard to the Corona crisis: In a first phase, the naming phase, we feel unhappy about a situation and "name" this

⁴ That prediction is shared by Liebscher/Zeyher/Steinbrück, ZIP 2020, p. 852 (864).

⁵ This was at least the situation at the time when this article was finalized, in early May 2020.

⁶ Psychologists call that automatism of our brain external causal attribution.

⁷ Risse/Kästle, M&A und Corporate Finance von A-Z, 3rd ed, 2018, p. 120.

⁸ Risse, Wirtschaftsmediation (2003), p. 16 et seq.

situation as unfair: "My project was delayed and thus, I suffered so high losses due to the Corona crisis; that is unfair." In the second phase, the blaming phase, we search for a possible culprit and blame him to be responsible for our mishap: "The contractor didn't show up at the construction site, only pretending or at least vastly exaggerating Corona-related risks. And that is why the costs of the project exploded." And in the final claiming phase, we approach the chosen culprit and raise a claim: "Contractor, you have to pay me 1 Mio. EUR to compensate for my losses." If the chosen culprit denies responsibility and willingness to satisfy the claim, the dispute is on the table.

Almost all of those disputes are then referred to a first dispute resolution phase, the negotiation phase. In general, the majority of disputes is resolved in this phase. To this end, one may now hope that the Corona crisis will produce a new spirit of cooperation. We all live in the same world. We all suffer from the Corona crisis. And there are more important things than money. So inspired, the conflicting parties could (and should!) resolve differences quickly in constructive settlement talks. That would be sensible. But this is merely a faint hope. Instead, we will probably see a below-average number of disputes being resolved in this negotiation phase. Three psychological factors will drive this unfortunate development:

First, the nature of the described conflicts impedes a quick settlement. The Corona crisis leads to a lose-lose situation for everyone involved. These disputes are not about who wins. The disputes are about who loses less.

Unfortunately, people fight much harder and more persistently to avoid losses than to distribute profits. Psychologists call this "loss aversion". Nobel Prize laureate *Daniel Kahneman* has done in-depth studies on the phenomenon.⁹ In such a scenario, cooperation, foresight and magnanimity are hardly to be expected.

Second, the factual and legal complexity of Corona-related disputes will be immense. Countless factual factors contribute and will contribute to this complexity. Corona-related disputes will not be caused by one single event, they will be multi-causal. Let us take a typical long-term delivery contract in the automotive industry as an example. The Chinese subsidiary of an Italian supplier was already in delay, when the Corona crisis broke out in the Wuhan district. It then could not make up for the delay by otherwise possible acceleration measures. The instructed logistics company delayed shipment further, partly due to closed borders; closed airports excluded airfreight as an alternative option to speed up delivery. On the customer/buyer side, the German-based factory had to be shut down due to the missing parts, but also due to its increasingly understaffed work-force and organizational restrictions imposed on plant operations by the health authorities. When the parts finally arrived, the market for the end product had collapsed. Thus, the parts were no longer needed. At the same time, however, the factory in Wuhan was in full operation and insists on full performance of the contract. How can all those factors be adequately balanced in settlement negotiations to find a fair solution? To make things worse, complexity emerges also on the

⁹ Compare Kahneman, *Thinking, Fast and Slow* (2012),

passim.; Kahneman/Tversky, (1992) *Journal of Risk and Uncertainty* 5 (4), p. 297 et seq.

legal side. The Corona crisis is an unprecedented mega-event and thus no rules or standards exist to permit sound orientation in search for a compromise. Such overall complexity leads to uncertainty. What is required now for successful settlement negotiations is the ability and willingness to decide under uncertainty. But which manager will now be inclined to accept the responsibility for far-reaching and certainly "loss-making" settlement decisions? The intuitively preferred alternative is to get rid of the responsibility. This intuition is reinforced by a perceived threat of being held personally liable for any wrong settlement decision.¹⁰ Hence, the decision to resolve the disputes become the proverbial hot potato which everyone wants to pass on. The preferred option now is to delegate the decision to a judge or arbitrator. As a result, the settlement option is lost.

Third, the backward-looking error or hindsight bias¹¹ will impede an amicable solution of Corona-related disputes. At some point the Corona crisis will be over, hopefully. The parties to the conflict will then have different perceptions of the conflict and the relevance of the Corona crisis. How did the dispute develop and in how far was it actually caused by the Corona crisis? This post-event perception is blurred by the now existing knowledge about the course of the pandemic. Let us all hope that many will then be able to say that the pandemic was not so terrible after all. Our brain tends to remember good things and to delete bad memories which certainly contributes to a happier life. But the decisions causing the damage - such as a decision to shut down a production facility or

to cancel a project - had to be taken in the midst of the pandemic, without this knowledge. The parties to the conflict will, therefore, suffer from mutual distortions of perception. With the benefit of hindsight, some decisions could and should have been made differently. There was fault and negligence involved, wasn't it? Such assessments, wrongly induced by hindsight bias, will stand in the way of an amicable settlement of the dispute.

For all three reasons, there is little hope that Corona-induced legal disputes can be avoided on a large scale. Sometime after the Corona Crisis has ended or has subsided considerably, settlement discussions will start and many of those will finally fail. Disputes will be escalated to the next level. Thousands of disputes will flood the courts.¹²

3. The standard adjudication system is ill-suited for dealing with Corona-related disputes

The third prediction is that the legal and judicial systems are ill-equipped for the wave of Corona claims. That, in itself, is perfectly understandable given the uniqueness of this pandemic. The main problem is not that the courts are and will be overstrained, also caused by the backlog of cases due to cancelled hearings. There are deeper, more profound reasons for the inadequacy of the currently existing dispute resolution process. "Disputes are decided by a neutral judge according to a prescribed normative guideline." - this norm, this decision-making standard, is either a clause in the contract concluded between the parties to the conflict

¹⁰ This is further addressed infra 3.3 a).

¹¹ Cp. Risse NJW 2018, p. 2848 (2850).

¹² Liebscher/Zeyher/Steinbrück ZIP 2020, 852 (864) reach a similar conclusion.

or a rule contained in the applicable black letter law.¹³ The parties to the contract and the legislator regulate scenarios that they expect. However, nobody expected the Corona crisis. For this reason, the body of legal rules serving as decision-making standard for the judge is conceivably weak and certainly not bespoke to the now-encountered disputes. There exists no Corona-clause, neither in any contract nor in any statutory law. The judge will, therefore, have to resort to vague rules, such as "*force majeure*"-clauses in contracts, to "change of circumstances" and "good faith" provisions in statutory codes or even to academic "doctrines of frustration". On such a vague basis, it is difficult to decide quickly and to avoid arbitrary decisions. Further, rather standard legal decision criteria such as the contractual risk hardly apply, simply because the catastrophe affected all people and companies simultaneously, through no fault of their own and beyond their control. Moreover, it gets worse as a judge can only decide on past facts and their consequences. Already the Roman lawyer and *Cicero* observed: "*I am not interested where things are coming from but where they are going to.*" That finding certainly applies to the outcome of Corona-related disputes. What matters is the future, not the past. While it is true that the prescribed legal consequence of some hardship clauses is a future-orientated of the adjustment of the contract that is only the root cause of the next problem: how is a judge supposed to make such adjustment? Furthermore, is a trained lawyer the most competent person to settle such an economic

issue? So many intricate questions, so few straightforward answers.

In addition to all these systematic concerns, there are also structural deficiencies in many judicial systems, which will render the resolution of Corona-related disputes burdensome. Let us take Germany as an example. For five years, the judiciary failed to find a solution to the diesel affair.¹⁴ The parties in Corona-related disputes do not have that much time. Individual parties to a dispute may be expected to wait some (long) time for a judgment, but not an economy as a whole, let alone on a global scale. Projects and contracts must continue, for the benefit of the parties, the employees, customers and tax authorities. Rapid legal certainty is the basis for this. A system of first instance judgements, appeal and revision fails to provide such timely legal certainty. As the proverb goes: justice delayed is justice denied. This must, however, not apply for the coming wave of Corona-related disputes, since those affect entire national economies. None of this is meant to be court bashing; the German justice system is excellent by international standards. It is harder to imagine how the judiciary in Italy or India can master the challenges of a wave of Corona-related lawsuits.

4. Summary: there is a call to action

In all likelihood, countless disputes will emerge as a result of the Corona crisis. Unfortunately, psychological phenomena render it improbable that those disputes will be resolved quickly in bilateral settlement negotiations. In addition, the disputes are too

¹³ In the Anglo-American legal system, case law is to be added to this normative standard.

¹⁴ For an overview see e.g.

https://de.wikipedia.org/wiki/Abgasskandal#Klagen_in_Deutschland (accessed 9 May 2020).

large, too significant in harsh post-Corona times to simply be abandoned. Hence, the disputes will escalate to the next level, the courts. When the disputes reach the courts, systematic and structural problems impede the quick and adequate decision of Corona-related disputes. Disputes resulting from the Corona crisis and the traditional way of judicial dispute resolution appear to be a mismatch. Such mismatch is a catastrophe because a quick and adequate dispute resolution is a precondition for the rebuilding of entire national economies collapsed under the Corona Crisis. Hence, the described development and mismatch cannot be tolerated. There is a call to action for everyone active in the dispute resolution industry to strive for better solutions. Which ones? Well, find some proposals below.

III. Suggestions on how to Tackle the Problem

If the analysis above is correct, we need a quick dispute resolution process to deal with the upcoming wave of Corona-related disputes.

1. Keep the systems running

What matters most is to keep the existing mechanisms of dispute resolution fully operational and running. That applies to both, state courts and institutions administering arbitral proceedings. Evidently, the resolution of Corona-related disputes requires a fallback-mechanism in place to which litigants can turn if all other attempts to settle the dispute have failed. These fallback mechanisms are the

tried and tested court and arbitration proceedings.

To be clear, functioning courts and arbitral institutions do not only prevent chaos and judicial anarchy. The mere existence of working state courts and arbitral institutions has - as the economic analysis of law suggests - an educative and thus conflict-avoiding effect. As long as state courts and arbitral tribunals are functional, parties realize that their dispute will ultimately be resolved. Eventually, justice will be done. Parties then have an incentive to avoid that forum and to seek a cheaper and quicker resolution of their dispute. For Corona-related disputes, it is suggested - and further explained below - that this resolution is a negotiated compromise, simply because it provides quick stability and is future-oriented. To compare: if courts and arbitral tribunal didn't work properly in Corona-times, a party owing money to another party could well speculate on avoiding payment altogether. It is for these reasons that all efforts to ensure and improve the effectiveness of state courts and arbitral institutions are justified.

To this end, state courts and arbitral organizations have done a great job during the past few months. First, they simply worked throughout the crisis.¹⁵ A lawsuit could be filed at any time and was served promptly. The same applied to requests for arbitration. Second, state courts and arbitral institutions did their best to adjust to the new circumstances and realities. In Germany, state courts - notorious for being backward in terms of IT-proneness - rediscovered Sect. 128 a

¹⁵ Sure, court and arbitral hearings were often postponed and thus have created a certain backlog.

But the system as such was always operative: claims were served, arbitrators appointed and injunctive relief granted.

German Code of Civil Procedure (*Zivilprozessordnung*, ZPO) allowing to partly organizing hearings as video conferences. This provision, enacted already in 2002, only now gains significance. The German legislator currently promotes those attempts further.¹⁶ Moreover, arbitral institutions around the world not only consistently informed their customers about their readiness to administer disputes¹⁷ but also furthered attempts to replace personal hearings, which were impossible or not recommendable due to the Corona virus, by video conferences. To this end, protocols were issued providing clear-cut guidelines on how those video-hearings should be administered.¹⁸

The well-deserved applause for state courts and arbitral institutions is not in contradiction to above observation: systematic and structural shortcomings exist which advocate against the use of the traditional adjudication process for resolving Corona-related disputes. To this end, other means of dispute resolution are preferable; those are discussed below.

2. Promote amicable settlements, do so strongly and consider nudging

The fastest way to resolve a controversy is to negotiate a settlement. Speed matters a lot in Corona-related disputes. Since the pandemic affects entire national economies, the

recovery of those economies cannot wait for a plenitude of conflicts to be sorted out first. Nor can an individual business tolerate lengthy court proceedings if it struggles to survive due to the impact of the crisis. This time, quick dispute resolution is not a "nice to have", but an imperative. Negotiated solutions must be on the top of every agenda.

What is more, court decisions are too inflexible, too transfixed to adequately deal with the uniqueness of Corona-related disputes. A judge or arbitrator must decide according to a simple, predetermined rule: $A + B + C = D$. If a contract exists (A) and a party breaches that contract (B) at least negligently (C), that party must pay damages (D). This mandatory fixation of the judgement or award on a predetermined rule avoids arbitrary decisions. That is good. But there is a costly price tag attached to it, namely flexibility. The problem is that the term "Corona" is not a requirement in any legal rule and thus must not be considered by a judge, save under different, murky headings such as "undue hardship" or "*force majeure*". What renders this even worse is that the predetermined legal rule, binding for the judge and arbitrator, almost always prescribes only one consequence: payment of money.

Negotiated solutions are not only quicker but also more flexible. In negotiations, the parties can consider issues which are (now) important

¹⁶ Compare the draft bill of the Federal Government on a Law to Ensure the Functioning of the Labour and Social Justice System during the COVID 19 Epidemic. The draft bill can be found under https://efarbeitsrecht.net/wpcontent/uploads/2020/04/ArbGGAnpassungsgesetz_9April.pdf (accessed 10 May 2020).

¹⁷ Compare e.g. DIS Announcement of Particular Procedural Features for the Administration of

Arbitrations in View of the Covid-19 Pandemic; ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic.

¹⁸ E.g. ICC Guidance Note on the Organisation of Virtual Hearings. See also Seoul Protocol on Video Conferencing in International Arbitration. Some institutions, such as the Stockholm Chamber of Commerce (SCC) even launched platforms for virtual hearings

but have not been translated into contractual clauses or legal requirements. Hence, the parties can find solutions which are more innovative and future-oriented than the standard payment-obligation imposed by a judge or arbitrator. Examples: The negotiated adjustment of a contract or the replacement of an insolvency-triggering payment obligation by in-kind deliveries or the formation of a joint venture to jointly tackle the problems created by the Corona crisis. To be clear: negotiations for a settlement are not per se superior to court decisions or arbitral awards. The widespread enthusiasm for settlements, in particular in the mediation scene, is one-sided and ignores the downsides of a compromise-culture.¹⁹ But with regard to the wave of Corona-related disputes, negotiated solutions are the best option we possess.

The good news is that, as shown above, almost every dispute goes through a negotiation phase. The bad news is that, as also shown above, Corona-related disputes are not prone to negotiated settlements. The solution to the dilemma is "nudging". The term, invented by Nobel Laureate Richard Thaler,²⁰ suggests that parties can be softly enticed to act reasonably (i.e. negotiate settlements of Corona-related disputes) without depriving the parties of their freedom of choice. Therefore, with regard to disputes created by the Corona crisis, the promotion of settlement negotiations through "nudging" techniques appears to be the right way forward.

¹⁹ Risse, in: Eidenmüller (ed), *Alternative Streitbeilegung – Neue Entwicklungen und Strategien zur frühzeitigen Konfliktbewältigung*, 2011, p. 133 et seq.

3. Getting concrete: 3 x 3 nudging proposals

Admittedly, the advice given so far was generic: "Promote amicable settlements". What does that mean in practice and in concrete terms? Well, nudging efforts to promote amicable settlements can be undertaken by three groups, namely by the parties to the dispute/their legal departments, by arbitrators and by the lawmaker. Let us consider concrete, albeit provocative proposals as to what those players in the dispute resolution industry should do to promote settlements as the best solution to Corona-related disputes.

a) *Parties and Legal Departments: Use ADR-techniques*

Parties, in particular their legal departments responsible for dispute resolution can apply various techniques to actively promote and improve settlement talks. The simple plea to the business people "please negotiate a compromise" is unlikely to suffice. Better are the following, pro-active measures:

aa) *Initiate Collaborative Lawmaking*

A legal department may instruct a lawyer or law firm to resolve a dispute, but limit the assignment explicitly to settlement negotiations. Hence, the lawyer or law firm fails if they do not negotiate an amicable solution. The legal department specifically excludes the option that the same lawyer or law firm will be tasked with handling a

²⁰ Compare: Thaler/Sunstein, *Nudge: Improving Decisions about Health, Wealth and Happiness* (2008), passim.

litigation or arbitration if settlement negotiations fail. If the legal department of the opposing party does the same and issues the same instruction, the so established approach to dispute resolution is called "collaborative lawmaking".²¹

The dynamics of this approach are apparent. The only incentive for the engaged lawyers is to settle the dispute. Any other outcome will disappoint the client and certainly not lead to any follow-up business. In addition, the parties invest money in settlement negotiations while the only possible return on investment is a settlement. Otherwise, the fees for the lawyers have been invested in vain (but not for free!). The desire for a positive return on investment will propel the likelihood of a settlement. Moreover, the openly disclosed collaborative lawmaking approach underlines the sincere wish to settle the dispute.

If further incentives for the engaged counsels are desired, the parties may remunerate the counsels partly on a success basis, success being exclusively defined as settlement of the dispute. Surprisingly, this is even possible in jurisdictions such as Germany where success fees are considered fishy and often illegal. However, nothing speaks against a fee arrangement in which the counsel earns a relatively low hourly fee plus a so-called "settlement fee" according to the German Statutory Code for Lawyers' Remuneration (*Rechtsanwaltsvergütungsgesetz*, RVG).²²

²¹ Engel, Collaborative Law (2010), passim.; Compare also Engel, ZKM 2010, p. 112 et seq.; see also Steinbrecher/Wagner, in: FAZ-Einspruch v. 6. April 2020.

²² Sec. 2 RVG with No. 1000, 1003 VV RVG.

²³ Details can be found in the statistics compiled by

Critics may say that this is too much an incentive for reaching a settlement. However, the client has the final say on any negotiated compromise. Therefore, the danger of overly settlement-eager attorneys is rather limited.

bb) Agree to mediate

Parties and their legal departments can invest in a mediator to enhance the likelihood of successful settlement negotiations. Mediation is a settlement negotiation administered by a third-party neutral who is a professional negotiator. The secret of success is that this third party neutral distances himself from the material issues of the conflict and thus can concentrate on the negotiation procedure. Surprisingly, too many parties know too little about the techniques of effective negotiation albeit they negotiate on a daily (uninspired) basis. To this end, a mediator can help to structure the negotiations effectively. And mediation works: in Germany, more than 50 % of the court cases are settled,²³ but if that is true, why not settling with the help of a mediator before investing in lengthy and costly court proceedings or arbitrations. Or, to put it more bluntly: all wars are ultimately followed by the negotiation of the peace treaty, so why not negotiate for it right away?²⁴

Mediations, freely agreed upon after a Corona-related dispute emerged, have a high likelihood to succeed, not only due to the abilities of the mediator. The dynamics are

the Federal Office for Statistics (Statistisches Bundesamt) under <https://www.destatis.de/DE/Themen/Staat/Justiz-Rechtspflege/inhalt.html#sprg235918> (accessed 10 May 2020).

²⁴ Risse, NZA 2017, p. 1030 et seq.

simple: if parties agree on a mediation after the dispute has arisen (compared to a mediation clause in a contract when no dispute is apparent), they demonstrate a general willingness to reach a compromise. They invest money in the mediation and the sole possible return on investment is a compromise. Hence, the agreement to mediate serves as a kind of self-fulfilling prophecy for later reaching a settlement. In addition, the mediation hearing - eagerly awaited as a replacement for the parties' day in court - cools down emotions and strengthens the ambition to close the case. For all those reasons, the success of rate of mediations agreed upon after the dispute has arisen is very high. The mediation of Corona-related disputes will not be different.

cc) Avoid "generally ADR-positive, but not in this case"-statements

Collaborative lawmaking and mediation are both ADR-proceedings. While ADR stands for Alternative Dispute Resolution, the acronym is mockingly translated as "Avoiding Disastrous Results".²⁵ Rarely has this coined term held more true than for Corona-related disputes. Court proceedings take too long and are not innovative enough; the likelihood of a disaster is high. An often-observed reason why legal departments avoid collaborative lawmaking and mediation is the following: the techniques are still relatively new and thus must be justified vis-à-vis the management and budget controllers. In addition, the suggestion to undertake a mediation is perceived as a sign of weakness vis-à-vis the

opposing party and - even more importantly - vis-à-vis their own management. "Are you not convinced of our case and thus not completely committed to defending our position?" is the much-feared reaction, a reaction also outside counsel sometimes hear when making respective proposals. As a result, a strange dichotomy exists: while many companies, especially the large players, pay lip-service to all sorts of amicable dispute resolution, the response on a mediation proposal for a concrete case often is: "As a company, we are very fond of and committed to Alternative Dispute Resolution and mediation, but - after careful review - not in this case..."

Please, legal departments around the world, avoid this "not in this case"-statement for Corona-related disputes. The statement has hardly ever been true, but it is simply false for Corona-related disputes. The chances of avoiding disastrous results are high in mediation, the corresponding risks in civil courts and arbitrations are immense. And what are the risks of trying mediation: a few weeks of proceedings at moderate costs. You can almost not afford not to mediate! It might be a good idea to arrange for a company pledge that Corona-related disputes will be mediated first. Organizations such as the *Round Table Mediation und Konfliktmanagement der Deutschen Wirtschaft* (RTMKM)²⁶ or on a more international level the ICC²⁷ and the International Centre for Dispute Resolution ("ICDR")²⁸ are well placed to organize such pledges. Such pledges tend to create a self-binding effect and at least permit to make a

²⁵ Duve, BB Beilage 10/1998, p. 9 et seq.; Engel, Collaborative Lawmaking (2010), p. 52.

²⁶ See <https://www.rtmkm.de/> (accessed on 8 May 2020).

²⁷ See <https://iccwbo.org/dispute-resolution-services/mediation/> (accessed 10 May 2020).

²⁸ See <https://www.icdr.org/> (accessed 10 May 2020).

proposal to mediate with reference to such pledge without losing face.²⁹ In addition, the public pledge may (or should!) contain a binding undertaking that any "generally positive, but not in this case"-excuse and all variations thereof trigger an immediate penalty of EUR 1,000 (per spoken word!).

b) Arbitrators: act as settlement facilitators

Let us switch perspective, from the disputing parties to the arbitration community. The arbitration community should, of course, also support negotiated solutions to Corona-related disputes. To this end, the task of arbitration counsels is particularly difficult because they have to advise their clients to postpone arbitrations for the sake of a "mediation first"-approach. The difficulty lies in the fact that such a proposal is, at first sight, against the own interest of the arbitration counsel who foregoes the chance of a lucrative arbitral battle. However, mediation proceedings also need skilled counsel and grateful clients will ultimately appreciate the candid and altruistic advice given. For arbitrators, the task is much easier: once the dispute has escalated to arbitration, they must simply help the parties to negotiate a settlement. Ok, this is not that simple, but here are some nudging techniques to promote settlements in arbitrations:

aa) Make settlement proposals - avoid settlement paranoia

²⁹ Again: Making a mediation proposal is not a sign of weakness but often perceived as such. Referring to a company policy expressed by a public pledge makes it easier to promote ADR.

³⁰ A good overview is presented by Reeg, in

In most European countries, state court judges can make settlement proposal and they do.³⁰ In Germany, for example, Sec 278 of the Civil Code of Procedure instructs the judge to work at all times towards an amicable resolution of the dispute. In Anglo-American jurisdictions, this approach is unheard of; a judge is considered biased if he or she proposes a settlement.³¹ In international arbitration, the Anglo-American approach has widely prevailed, as it is the case so (too) often. It is commonly accepted that an arbitral tribunal should only assist the parties in finding a settlement if the parties actively express a respective wish or at least expressly consent to a settlement facilitation when asked by the arbitrators. Some arbitral rules are said to impose a strict requirement on the arbitrators that settlement proposals are only permitted if both parties agree. The resulting reality is that arbitrators tend to be very cautious to proactively promote settlement, to put it mildly.

Arbitrators, abandon this reluctance in Corona-related disputes! An arbitral award after two years of intense proceedings is not what the parties and the economy need in the aftermath of the pandemic. To this end, arbitrators are often more free to promote a settlement than they believe. The neglected starting point is the wide discretion arbitral tribunals possess how to run the proceedings. To schedule a settlement conference is hardly an abuse of such discretion, at least not if the arbitration is seated in civil law countries where settlement-friendly court proceedings

Salger/Trittmann (eds.), Internationale Schiedsverfahren (2019), § 18, Rdn. 21 ff.

³¹ Irrespective of this fact, more than 90 % of state court proceedings in the US end with a settlement, compare Heidenberger, RIW 1997, p. 464 et. seq.

are the rule. That is the case in Switzerland and, as shown, in Germany. There is no reason for a settlement paranoia of arbitrators who fear to be challenged the moment they employ the term "settlement". Also under Arbitral Rules, settlement efforts by the arbitral tribunal are often permissible. The new DIS Arbitration Rules state in Art. 26 that the arbitral tribunal "shall, at any stage of the proceedings, seek to encourage a settlement", unless "any party objects thereto". Therefore, the principle is encouragement of a settlement, not to do so is the exception to the rule. The exception "unless any party objects thereto" is widely understood to mean that the arbitral tribunal must ask for approval and the parties must then consent to settlement efforts.³² Why actively confront the parties with that decision? Isn't the proverbial "let sleeping dogs lie"-approach more recommendable? A literal understanding of the quoted rule - paradigmatic for many similar arbitral rules - does not support the restrictive view that approval must be sought. Instead, a party must object and there exists no prerequisite that the arbitral tribunal raises this issue proactively. Unnecessarily asking a question is often tantamount to begging for the wrong answer. Moreover, coming back to the quote of Art. 26 DIS Arbitration Rules: since a raised objection only eradicates the arbitral tribunal's duty to promote settlement ("shall"), such objection does not restrict the

arbitral tribunal's right and discretion to promote a settlement ("can"). Only if both parties object to settlement discussions, the principle of party autonomy ultimately prevails and settlement efforts undertaken by the arbitral tribunal are impermissible. The ICC Rules do not phrase any view on settlement promotion by the Arbitral Tribunal, so that such attempts should be permissible under the wide procedural discretion of the arbitral tribunal.³³ It is only in Appendix IV lit. h (ii) to the ICC Rules that settlement proposals by the arbitral tribunal are addressed, rather restrictively, because the parties' consent appears to be made a precondition for settlement talks and any settlement efforts must not impede the later enforceability of the award.³⁴ Even with those restrictions in mind: a seasoned arbitrator will be able to phrase the offer to assist in settlement discussions in such a manner that a party is likely to respond positively. Such a proactive approach is the right one in Corona-related disputes.

bb) Conduct early case assessment hearings and provide preliminary view

A second technique to promote an early, amicable resolution of the dispute is to schedule an early case assessment hearing. To this end, the arbitral tribunal simply schedules an early hearing right after the first round of submissions³⁵ and enters that date into the

³² Busse, in: Flecke-Giammarco et. al (eds.), The DIS-Arbitration Rules (2020), Art. 26, note 10; Reeg, in: Internationale Schiedsverfahren, § 18 Rdn. 18. Theune, in: Schütze, Institutionelle Schiedsgerichtsbarkeit (2018), Art. 26 DIS-Rules, note 3 et seq.

³³ This already follows from the arbitrator's duty to safeguard the efficiency of the arbitration: Compare Baumann, in: Weigand/Baumann (eds.), Practitioner's

Handbook on International Commercial Arbitration (2019), 16.576 et seq. See also Berger/Jensen, (2017) 40 Fordham Int'l LJ 887, 892 et seq.

³⁴ Reeg, in in Salger/Trittmann (eds.), Internationale Schiedsverfahren, § 18, note 29 et seq.

³⁵ An even more aggressive approach is to schedule a hearing as part of the organizational conference / terms of reference conference. Why not use the time for pleadings by the parties and an initial discussion of

binding procedural calendar. Such scheduling is clearly covered by the arbitral tribunal's discretion of how to run the proceedings - and this technique is reasonable in many proceedings and disputes, not only in Corona-related controversies.³⁶ The first advantage of this technique is that the parties will now "frontload" the proceedings and articulate their arguments immediately instead of tactically holding back an argument for the second submission. Hence, there is hope that the essence of the dispute openly lies on the table when the early case assessment hearing takes place. There, the parties can hold opening statements to explain their view of the case. Thereby, the parties make the important experience of having their day in court. The crucial issue then is whether the arbitral tribunal dares to provide the parties with a preliminary assessment of the case and its life issues. Again, the infamous culture clash between the European and Anglo-American legal tradition comes into play. Lawyers raised in the civil law system will have little problems with an early case assessment by the tribunal, while lawyers from the common law systems will be skeptical since they are not used to it from their home courts. However again, why always follow the common law approach in international arbitration? It is not an abuse of procedural discretion if an arbitral tribunal phrases an early, preliminary view on selected aspects of the case.³⁷ That helps the parties to better structure their second submission - and it helps the parties to start settlement negotiations.

life issues with the arbitral tribunal? Compare Risse, *Arb. Int'l* 2013, p. 453 (456 et seq.)

³⁶ Risse, *Arb. Int'l* 2013, p. 453 (456 et seq.).

³⁷ The newly introduced Prague Rules allow that in Sec. 2.4 lit. e.

Again, many arbitration specialists quickly declare that the parties' consent to an early case assessment is required under arbitral rules.³⁸ Haste makes waste. Let us again take the DIS Arbitration Rules as an example: Article 27.2 and Art. 27.4 compel the arbitral tribunal to hold an early case management conference and to discuss with the parties the measures listed in Annex 3 to the DIS Arbitration Rules. One measure listed there (Annex 3 F) is that the arbitral tribunal provides its preliminary view on the case if both parties agree. However, what if one party agrees and the other does not? The better reasons then advocate for the conclusion that the arbitral tribunal can still provide its preliminary view. First, Annex 3 states that, without consent between the parties, the arbitral tribunal can determine all measures at its discretion, and why should that not include an early case assessment? Secondly, Annex 3 lists measures to be discussed in the early case management conference. The main body of the DIS Arbitration Rules does not require consent between the parties to a preliminary view expressed by the arbitral tribunal. Hence, the arbitral tribunal is free to do so unless both parties object. Only then party autonomy prevails over the tribunal's discretion as to how to run the proceedings.

In Corona-related disputes, a preliminary view phrased by the arbitral tribunal is beneficial for fostering meaningful settlement talks. First, a candid assessment done by the

³⁸ See Schardt, *SchiedsVZ* 2019, 28, 33; similar: Trittmann/Schardt, in: Flecke-Giammarco et. al (eds.), *The DIS-Arbitration Rules* (2020), Art. 27, note 62.

tribunal manages the parties' expectations as to the outcome of the proceedings. That applies substance-wise but often also time-wise and cost-wise, e.g. if the tribunal explains that lengthy evidence-taking is to be expected. Second, the candid explanation of the arbitral tribunal that the Corona crisis is not properly dealt with in the contract and in statutory provisions, entailing quite some uncertainty as to the decision-standard, may entice the parties to seek a solution themselves instead of relying on the arbitrators' wisdom. Third, an early case assessment by the tribunal may relive managers and decision-makers of the responsibility felt when making concessions without a reliable risk assessment by a third party. Putting the blame on an arbitral tribunal may thus ease the justification of a settlement vis-à-vis the board or shareholders.

cc) *Give Calderbank-inspired instructions*

A simple and effective "nudging"-technique to promote settlements are Calderbank-inspired instructions to the parties. Here is the technique: in general, arbitral tribunals have some discretion when deciding on the allocation of costs. The prevailing rule is "costs follow the event".³⁹ Nevertheless, most arbitral rules grant the arbitral tribunal discretion to consider other issues as well, in particular, how efficiently the parties handled the proceedings.⁴⁰ In a famous English court

case, entitled "Calderbank"⁴¹ after one of the parties, the court told the parties that it would, when finally allocating the costs, also consider confidential settlement proposals made by a party in the course of the proceedings without initial disclosure to the court. However, a party can then disclose its own settlement proposals in the cost allocation phase. If it then turns out that the entire proceeding could have been avoided or shortened by the acceptance of a reasonable settlement proposal, the declining party is punished with a negative cost award. A simplified example: a party having rejected an early settlement proposal of EUR 1 Mio., must bear the entire costs of the arbitration if the final award is EUR 900.000 only.⁴² That may sound complicated, but it isn't. The underlying idea is to initiate settlement proposals and a "race to reason".⁴³ For a party, it can be beneficial to make a settlement proposal to "hedge" the cost risk, and such cost risk can be significant in a larger arbitration. In addition, when confronted with a settlement proposal, the receiving party might place a counter-proposal to avoid feared disadvantages on the cost side. Suddenly, the parties have started to talk about a settlement parallel to the ongoing arbitral proceeding. Thereby, the route to settlement is paved.

Fearful arbitrators will again respond that innovative features such as Calderbank-inspired instructions cannot be imposed on the parties but require the parties' consent.

³⁹ Compare Baumann, in: Practitioner's Handbook on International Commercial Arbitration (2019), 16.1006. See also ICC Case No. 11670 (2003), ASA Bull. 2004, p. 339.

⁴⁰ Compare e.g. Art. 33.3 DIS-Rules: Art. 38 (5) ICC-Rules. See also Baumann in: Practitioner's Handbook on International Commercial Arbitration (2019), 16.579 and 16.1005 et seq.

⁴¹ Calderbank v Calderbank [1975] 3 All ER 333 (EWCA).

⁴² For a detailed explanation of the use of Calderbank Offers in Arbitral Proceedings see Risse, in: Salger/Trittmann (eds.), International Arbitration (2019), § 26, note 13 et seq.

⁴³ On a „race to reason“ through Final-Offer-Arbitration compare Baumann, GRUR 2018, 145, 152.

Why is that? The arbitral tribunal has wide discretion how to run the proceedings and some discretion how to allocate costs. In sum, this discretion allows Calderbank-inspired instructions. Those are employed for the benefit of the parties. At the same time, the parties remain completely free whether or not to submit a settlement proposal. So where is the downside of this little "nudging"? As long as both parties do not agree that they reject such nudging technique, the arbitral tribunal can proceed. And if the parties agree to rule out Calderbank-proceedings, the arbitral tribunal may cleverly counter whether such an agreement on an important procedural issue is not an indication that the parties can reach agreement on other issues as well.

c) Legislator: encourage negotiations and ease settlement decisions

If neither the parties and their legal departments nor the arbitrators succeed in settling Corona-related disputes, the lawmaker might need to step in. The good news is that governments have already demonstrated a capacity to act and do so swiftly. Corona-related laws ranging in Germany from a Law on the Establishment of an Economic Stabilization Fund to the Act to Mitigate the Consequences of the COVID-19 Pandemic under Civil, Insolvency and Criminal Procedure Law were passed within days.⁴⁴ The lawmakers could go a step further and also address the way Corona-related disputes are addressed. The presumption is that national

economies require a quick resolution of all disputes as a basis for rebuilding the economy. If that holds true, there might also be a call to action for the lawmaker. Here are some possible actions nudging the parties towards negotiating a dispute instead of escalating it to the courts:

aa) Modify the business judgement rule

A first idea worth considering - the modification of the Business Judgment Rule. As outlined above, managers are intuitively reluctant to accept the responsibility for "loss-making" settlement decisions.⁴⁵ But it gets even worse: the psychological aspect is complemented by a true threat, namely liability. Manager, in particular board members, can be held personally liable for "wrong" business decisions, which inflict damage on the company they represent. There has been a trend during the last decades to hold managers financially accountable, partly because their personal liability is covered by D&O insurance. To this end, it is far less risky for a manager to delegate the decision on a dispute to a third party, i.e. a judge or an arbitrator. The assessment of a settlement offer, the weighing of the pros and cons of an amicable solution and the comparison with the BATNA⁴⁶ requires difficult evaluations from the managers. From an ex-post perspective, stakeholders will easily be able to argue errors in this evaluation process. Hence, the manager's liability risk stands in the way of negotiated solutions for Corona-related

⁴⁴ An overview of recent Corona legislation in Germany can be found under https://www.juris.de/jportal/nav/juris_2015/aktuelles/magazin/coronavirus-gesetze.jsp (accessed 10 May 2020).

⁴⁵ See supra II. 2.

⁴⁶ BATNA stands for Best Alternative to a Negotiated Agreement, see Fisher/Ury, Getting to Yes (1991), passim.

disputes. What is needed is to empower managers to accept responsibility for negotiating a compromise.

How could the legislator help? The answer is evident: Adapt the statutory framework for manager liability in a manner that fear of personal consequences does not block amicable settlements. The legal system must accept that risky decisions are now, in the Corona crisis, needed for quick dispute resolution, in the interest of single businesses but also in the interest of entire national economies. Speed and peace matter more than utmost accuracy in safeguarding a management decision. Let us look at a particularly relevant provision in German law, again paradigmatic for many other national laws, which the legislature could modify in the context of the present crisis: Sec. 93 Stock Corporation Act and the underlying Business Judgement Rule. Board members must exercise the diligence care of prudent managers in fulfilling their duties. That sounds reasonable but has its pitfalls. The law accepts that managers sometimes must make risky decisions and that this alone, when resulting in a damage, should not trigger personal liability. Hence, personal liability is excluded if the board member has made an entrepreneurial decision and acted based on the basis of adequate information and in the best interests of the company.⁴⁷ This concept, commonly known as the *Business Judgement Rule* ("BJR"), is in one form or another part of many legal systems.⁴⁸ The BJR thus exempts managers from liability under defined conditions, namely if they (1) have made a

business decision (2) in good faith, (3) without egoistic interests or extraneous influences (4) for the benefit of the company and (5) on the basis of appropriate information. The problem: All of these five conditions must be met to exclude personal liability - and all of these five conditions are open to interpretation! The sheer complexity of Corona-related disputes makes it difficult to accurately assess the situation. It is very easy to overlook an important aspect. The argument is then quickly made that the manager should have collected more information before approving a compromise that costs its company real money - and that in post-Corona times when cash flow is of prime importance. Moreover, since there are no Corona-clauses in contracts and black letter laws, it is difficult to assess what a judge would decide. In sum: The quick settlement of Corona-related disputes creates a paradise for litigators who search for and argue "negligent behavior" by the manager. Realizing this threat, board member may be - for purely personal reasons - well advised to stay away from settlement negotiations.

The legislator could now "nudge" managers to assume this responsibility for negotiating settlements by explicitly reducing the manager's liability risk under the Business Judgement Rule. There are various ways to achieve that objective: First, the legislator could codify that, in Corona-related disputes, an amicable settlement that has been concluded to prevent a lengthy court battle is deemed to be in the best interest of the company. Managers would then benefit from

⁴⁷ Sec. 93 para. 1, 2nd sentence.

⁴⁸ The Business Judgment Rule was initially a case-law derived doctrine. The Rule therefore exists in most common-law countries, such as the United States (see

Gimbel v. Signal Cos., 316 A.2d 599, 608 (Del. Ch. 1974), Canada, Australia and in the UK (see Companies Act 2006 section 172).

the refutable presumption to have acted in the best interest of the company. That alone would provide some comfort and reduce liability risks significantly. Second, the legislator could adapt the provision governing the burden of proof. As a rule, the manager bears the burden of proof that he or she has exercised due care.⁴⁹ Why not shift this burden of proof to the claimant, i.e. the company, with regard to the responsibility for settling of Corona-related disputes? Third, it could be stipulated that, when deciding on Corona-related disputes, managers are only liable up to three times their yearly salary unless they have acted with gross negligence. Hence, there are many solutions to the same problem. In the alternative, the lawmaker could stipulate that "not seriously evaluating and pursuing settlement options in Corona-related disputes" does qualify as a breach of the Business Judgement Rule. The "nudging" would then not be a reward (mitigate liability risks) but a threat (increase liability risks). However, that might be a step too far.

The discussed modifications could easily be implemented as may be inferred, again by way of example, from the *Act to mitigate the consequences of the COVID-19 Pandemic under Civil, Insolvency and Criminal Procedure Law*.⁵⁰ In the same way as the lawmaker has taken account of the fact that annual general meetings and shareholders' meetings cannot be held in times of pandemic, it could provide

that managers attend to their duties when resolving Corona-related disputes amicably.

bb) Subsidize the search for amicable settlements

Among the oldest nudging techniques are state subsidies. If the state desires a certain action, it promises the parties a financial contribution.⁵¹ That is the logic behind a buyer's premium, strongly demanded by the German automotive industry to reanimate car sales after the Corona crisis.⁵² Now, if amicable settlements are to the benefit of the entire national economy, as demonstrated above, then it makes perfect sense to subsidize the respective endeavors, be it the negotiation for such a compromise or the compromise itself. Let us look to possible options.

An easy, straightforward nudging subsidy would be the reimbursement of dispute resolution costs, either for the process of settlement negotiations or for the result, namely an actual settlement reached. In the first alternative, the government could undertake to pay in full or in part the attorneys involved in an explicitly agreed collaborative lawmaking process. That would render the entire process cost free and thus entice legal departments to give it a try. The same applies to a mediator paid by the state. The second alternative would mean that the

⁴⁹ Sec. 93 para. 2, 2nd sentence German Stock Corporation Act.

⁵⁰ Act dated 27 March 2020 (BGBl. I, S. 569) can be found under https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/Bgbl_Corona-Pandemie_EN.pdf;jsessionid=C7AAAC07C2CAE4115795EDB8451797DC.2_cid297?_blob=publicationFile&v=2 (accessed 9 May 2020).

⁵¹ Some people call this "bribing", but that is bad-mouthing.

⁵² Compare

<https://www.ndr.de/nachrichten/niedersachsen/Autogipfel-Entscheidung-zu-Kaufpraemie-bis-Juni,autogipfel112.html>

(accessed 10 May 2020).

state only disburses the subsidy if the parties actually reach a settlement. An actual compromise would then entail a cost free dispute resolution process. In this success driven scenario, the state could extend the subsidy also to arbitrators' fees if the arbitrators succeed in assisting the parties in reaching a settlement. And, to come back to a proposal discussed above, which party would earnestly reject a proposal by the arbitral tribunal to assist in settlement negotiations, if such rejection would mean to forego any hope for respective subsidies? Greed, and be that one for a state subsidy, is quite a strong stimulus. There is no reason to believe that this would not work in settlement negotiations.

Once the idea is accepted that state subsidies for settling Corona-related disputes make sense, one can easily embark on more daring thoughts. The state could pay a bonus if the parties reach a settlement. The state could calculate such a bonus in line with saved court fees, namely as a bonus for not using the public infrastructure (i.e. the court system). Is that too daring to be considered? Again: The German state is considering paying a bonus for the purchase of a new car, a subsidy directly benefitting the (rather rich) automotive industry. Compared thereto, a bonus for preventing year-long disputes, saving financial means otherwise spent on courts, judges or arbitrators seems equally reasonable, at least equally reasonable.

If all this is not daring enough: The state could empower specially qualified mediators, e.g. judges with mediation training, to grant further state subsidies in the course of a mediation and thus contribute to the ultimate "Corona- settlement"-package as a third

party. In the alternative, or in addition, tax law could step in: Many of the companies that are now in distress have made profits in recent years. This fact could now be used to grant tax breaks to those companies that settle their Corona-related disputes. How could this be achieved? The legislator could allow a loss carryback for ADR costs or maybe even for amounts waived by a company as part of an amicable settlement. Such a loss carryback could be applicable to either corporation, income or trade tax and extend five years into the past. As a consequence, settling parties obtain an immediate tax refund – i.e. liquidity – in return for the amicable settlement. The latter is no longer innovative or daring, you think, but simply preposterous? Well, at least you have thought through this proposal to form this opinion. Thus, ok, we rest our case. For the time being.

cc) Ultima ratio: provide tailor-made laws for dealing with Corona-related disputes

The ultimate nudging technique for promoting settlement is to change the substantive law, thus resolving specific legal topics related to the Corona crisis. Then the parties know what the outcome of litigation would look like. In a best-case scenario, a dispute will not even emerge. In the alternative, the parties will listen to the lawmaker now instead of listening to a judge in two years time. Such legal certainty would have an accelerating effect on any settlement negotiation.

In some more detail: Legal uncertainty renders it difficult to reach an amicable solution. At least this is true in cases where the parties are primarily guided by the probable prospects of success when

attempting to settle their dispute. It is particularly difficult in Corona-related disputes to predict the outcome of a given case. As outlined above, the decisions will depend on the interpretation of vague legal notions, such as "force majeure", "change of circumstances", or "good faith". Not only are the contractual and statutory legal requirements diffuse. For the time being, not even much case-law exists which could fill these undefined legal concepts with life. The likely outcome of this legal situation: Myriads of lawyers will draft extensive and costly memoranda, speculating about how courts will decide. Then, lower courts followed by appellate courts will address these issues, most probably with diverging results further fuelling the academic debate. Finally, maybe in five years from now, the highest courts of the country will decide and only then the legal situation will be clear. All those costs, all this time could be avoided if the lawmaker were to decide certain issues yet, on the spot.

A good example of this "nudging"-technique was the decision of the German emergency legislation to mitigate the effects of the Corona crisis,⁵³ which included a statute outlawing the termination of certain lease contracts for a period of six months, if the lessee could not pay the rent due to Corona-reasons.⁵⁴ Regardless of whether this law is good or bad, it ended discussions on whether non-payment of the lease was temporarily excused due to force-majeure. Similar effects could be produced by a more comprehensive Corona Act. Such Act would provide guidance to parties and attorneys on how the existing vague legal concepts are to be applied on

Corona-related disputes. The legislator could, for example, exclude the right of a buyer of a company to withdraw from an executed share purchase agreement for reason of material adverse change. The available legal remedy could be limited to an adjustment of the purchase price, not exceeding 3 % per months between the time of signing and closing. Does this prevent a dispute? No, of course not. But by ruling out an extreme option, such law eliminates complexity and legal uncertainty and thus facilitates the way towards a settlement. A second example: The legislator could prescribe that delay-related contractual penalties and liquidated damage clauses be reduced to a maximum of 50 % of the original amount, if the majority of the delay falls into Corona-times. In the following, there is less money to disagree upon and that again eases a settlement. Taking complexity out of the equation can be a powerful tool to promote settlement.

IV. Finally: A story of hope, followed by a warning ... and then an appeal

There is hope, there is a warning and there is a chance:

1. A Glimpse of Hope: The Story of the Y2K-Problem

The predictions made do not foreshadow bright, conflict-free post Corona-times, at least not in the courts. Quite the contrary. Nevertheless, there is some hope. To this end, legal history contains a striking and illustrative example. The elderly (or let's say: more experienced) readers might recall the

of the COVID-19 Pandemic under Civil, Insolvency and Criminal Procedure Law amending Art. 240 § 2 EGBGB.

⁵³ A good overview is presented by Liebscher/Zeyher/Steinbrück, ZIP 2020, p. 852 et seq.

⁵⁴ See Art. 5 of the Act to Mitigate the Consequences

(in)famous Y2K-problem.⁵⁵ In the late 90ies, experts⁵⁶ predicted that computer systems would collapse around the world at the end of the millennium, resulting in a digital Armageddon. That was not an apocalyptic prophecy but a scientific assessment, and thus a very credible and feared scenario. The theory was that, once the internal clock of the computer would switch to the new year 2000, the two-digit calendar system in most computers would indicate the year "00", a date no computer or software program could process. The expected result: An automatic shutdown of all computers and computerized systems - and there were already quite a few of these in 2000. Law firms around the world were engaged to deal with the expected monster wave of Y2K-disputes. And then, on January 1, 2000: Nothing happened! The tidal wave of Y2K-disputes turned out to be an illusion, a hardly discernable shiver in the everyday ocean of dispute resolution. It might well be that Corona-related disputes will share the same fate. Let us all hope so.

2. A warning: Don't overreact

Yes, this article deliberately makes provocative proposals. There is an urgent need to evaluate the current situation: How does the Corona crisis affect the dispute resolution landscape? What are suitable measures to deal with the challenges ahead? But making respective proposals is not tantamount to promoting those proposals, let alone agreeing to them. In times of crisis, there is always the overreaching tendency to

act, to do something, instead of staying passive. Be warned, that is not always the right reaction. Nothing illustrates this better than the goalkeeper/penalty-phenomenon. In soccer, a penalty kick is a crisis for any goalkeeper, a state of extreme stress. Research around the world now demonstrates that professional goalkeepers tend to act, namely to jump into one corner of the goal. At least they did something, to prevent a goal, didn't they? Well, the same research demonstrates, that the far better action would have been to simply stay immobile, not to move. More penalty kicks would be saved this way. This is known, in psychology as "action bias", translated: if the dispute resolution industry discusses the reaction to the Corona crisis, at it must do, diligence is required and haste must be avoided. Sappy sentences such as "This is an extreme time and extreme times require extreme measures" sound compelling, but they must not substitute profound analysis. Every measure comes with a price tag, which might well be too high in some instances.

3. An appeal: Stay innovative

The Chinese have the same character for risk and chance. For them, risk and chance are just two sides of the same medal. Certainly, the Corona-crisis has created enormous risks for people, businesses and economies. Maybe those very risks and the triggered need for risk-mitigation measures are also a chance for true and meaningful innovations. This may also apply to the dispute resolution industry.

⁵⁵ Also called "Millennium-Bug", for a summary Compare https://en.wikipedia.org/wiki/Year_2000_problem (accessed 10 May 2020).

⁵⁶ Which experts?, you may ask. And rightly so! The

term "expert" is truly fascinating. Everyone can call him- or herself an expert, but nevertheless any verbal reference to such "experts" renders a statement more credible.

Innovations, e.g. to increase efficiency in arbitral proceedings, have been a patient topic of arbitration conferences around the world. But let us be candid: The actual chance, the innovation was rather minimal during the past two decades. Now, we realize that drastic changes, forced on us by the Corona crisis, are manageable and not necessarily evil, but good.

A simple example is arbitral hearings conducted via video conferences. If everybody agrees,⁵⁷ they are an option. And in practice, those video conferences work reasonably well and they reduce time and costs. Video conferences are certainly not the preferable way to conduct a hearing, but they are doable and an alternative. The typical "Yes, but..."-objections to this approach are muted in the wake of the pandemic.

It is simply not the time for worryguts and hypochondriacs. We try things out, experiment a little and are suddenly innovative. That is a good development. This

spirit is worth to be kept. It may be essential for the dispute resolution industry to keep that spirit. Ken Feinberg, probably the most prominent mediator on the globe, recently said: *"One thing I have learnt over the last 40 years with mass disasters: the rule is some sort of creative resolution mechanism rather than resorting to the courtroom, judges, juries and trials."*⁵⁸ The Corona crisis certainly is a mass disaster and creative resolution mechanisms are desirable. Maybe, ten years from now, we will remember the Corona crisis as the great inspiration and kick-off for innovation in the dispute resolution industry. So, let us stay innovative. And if this article does stir up a respective discussion, it will have achieved its objective.

⁵⁷ That is still necessary under most arbitral rules, according to which a personal hearing can only be abandoned if both parties agree, cp. Art. 29 DIS Arbitration Rules.

⁵⁸ Quoted in Financial Times of 5 May 2020, <https://www.ft.com/content/48d230ae-8df5-11ea-9e12-0d4655dbd44f> (accessed 9 May 2020).

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