QUEEN MARY POSTGRADUATE LAW CONFERENCE

2021

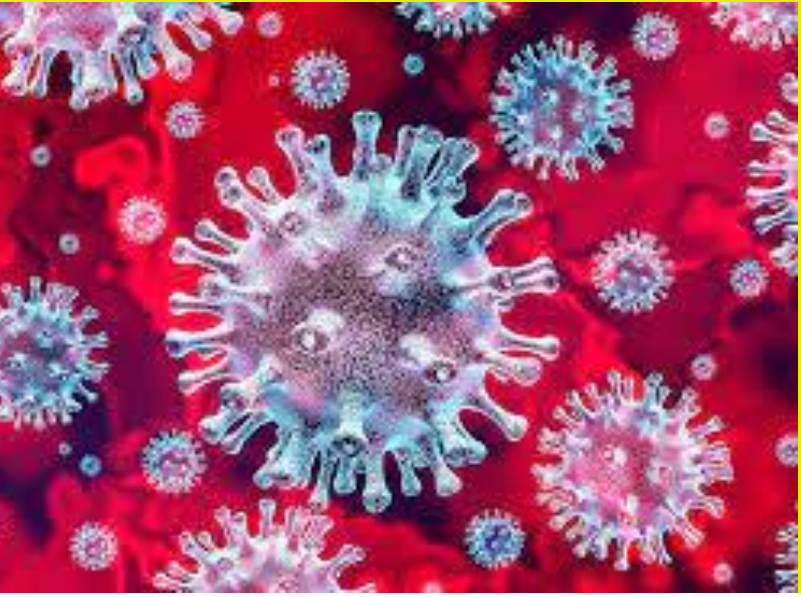
QUEEN MARY
POSTGRADUATE LAW CONFERENCE

Queen Mary
University of London

Centre for Commercial Law Studies

WHAT IS THIS CONFERENCE ABOUT?

The Centre for Commercial Law Studies (CCLS) constitutes a world-renowned centre that fosters the study and research of various legal areas that fall under the broad umbrella of commercial law. Inspired by CCLS' diverse and intensive legal research work, a number of LLM Course Representatives came together and took the initiative to organize the 1st Queen Mary Postgraduate Law Conference. The purpose of this student-led conference is to provide a platform for the law masters students to present (15 minutes) a short research paper before a panel of academics and professionals from the industry, and exchange views on contemporary legal challenges in a friendly environment. In this conference, the postgraduate students take the leading role and develop their critical and analytical thinking through their interaction with the panellists and other attendees.



2021 THEME: 'THE COVID-19 AFTERMATH'

Covid-19 has had a dramatic impact across every industry. Industries like retail and hospitality were challenged while others like life sciences and technology thrived. Workplace culture saw immense alterations giving rise to different employment considerations such as safe working environments. Insurance claims for loss of business skyrocketed and many contractual parties attempted to invoke 'force majeure' clauses. Almost all industries had to find digital solutions for many aspects of their work. Although, governments introduced several measures to mitigate the effects of the pandemic like new restructuring and insolvency regimes and financial support packages, it is unclear which of these changes might be here to stay. The theme of this coference gives the students the opportunity to offer innovative conceptualisations and critical reflections on law and the pandemic and its 'aftermath'.

PROGRAMME

TIME	SESSION	DURATION
10:00 – 10:10	*Welcome Speech*	(10 mins)
<u>STREAM 1:</u> "The Covid-19 Quake: Tectonic Changes on Corporations and Commerce"		
10:10 – 10:30	1st Presentation by Utkarsha Nikam (QMUL) & Feedback	(15 mins) & (5 mins)
10:30 – 10:50	2nd Presentation by Wen Liu (UoB) & Feedback	(15 mins) & (5 mins)
10:50 – 11:10	3rd Presentation by Mateo Garcia Fuentes (QMUL) & Feedback	(15 mins) & (5 mins)
11:10 – 11:15	*Short Break*	(5 mins)
11:15 – 11:35	4th Presentation by Henrich Markus (UCL) & Feedback	(15 mins) & (5 mins)
11:35 – 11:55	5th Presentation by Evans Alexander (UCL) & Feedback	(15 mins) & (5 mins)
11:55 – 12:15	*Roundtable Discussion*	(20 mins)
12:15 – 13:00	*Long Break*	(45 mins)

STREAM 2: "The Post-pandemic Horizons of Human Rights and Intellectual Property"		
13:00 – 13:20	6th Presentation by Gemma Biagini (QMUL) & Feedback	(15 mins) & (5 mins)
13:20 – 13:40	7th Presentation by Moran Callum (UCL) & Feedback	(15 mins) & (5 mins)
13:40 – 14:00	8th Presentation by Iris Zhang (UoB) & Feedback	(15 mins) & (5 mins)
14:00 – 14:05	*Short Break*	(5 mins)
14:05 – 14:25	9th Presentation Calum David Browne (QMUL) & Feedback	(15 mins) & (5 mins)
14:25 – 14:45	10th Presentation Hector Martinez (UoK) & Feedback	(15 mins) & (5 mins)
14:45 – 15:05	*Roundtable Discussion*	(20 mins)
15:05 – 15:10	*Closing Remarks*	(5 mins)

STREAM I:

"The Covid-19 Quake: Tectonic Changes on Corporations and Commerce"

PANELLISTS

DR GABRIEL GARI

Gabriel Gari is Reader in International Economic Law and the Director of the LLM in International Economic Law at Queen Mary University of London. He specialises on international trade law, with a focus on trade in services and he regularly works with International Organisations, Government Officials and Industry Associations on trade in services issues. In 2013-14 Gabriel held a visiting scholar position at the Trade in Services and Investment Division of the WTO. Prior to joining Queen Mary, Gabriel practised Employment and Commercial Law and worked for the Uruguayan Supreme Court of Justice.

PROFESSOR CHARLOTTE VILLIERS

Charlotte Villiers is a Professor of Company Law and Corporate Governance at the University of Bristol. She is a qualified solicitor and has previously taught at the Universities of Sheffield and Glasgow and as a Visiting Professor at the University of Oviedo in Spain. Professor Villiers has research interests and expertise in many aspects of corporate law and governance as well as employment law. Her current research projects include company law and sustainability, reporting and due diligence and company law and human rights.

MS VASILIKI KOUKOULIOTI

Vasiliki Koukoulioti is a PhD Researcher at the Centre for Commercial Law Studies, Queen Mary University of London and has been awarded the Microsoft-funded Cloud Legal Project CCLS Studentship for the purpose of pursuing her PhD. Her research focuses on the tax law implications from a corporate income tax point of view of the digitalization of the economy, in general, having a tax policy approach. Prior to joining the Cloud Legal Project she worked as a tax lawyer for tax law firms in Athens, Greece and as a senior tax consultant at PwC Athens, Greece for five years providing tax advice and tax litigation services to multinational enterprises and high net worth individuals.

PRESENTERS

Utkarsha Nikam, QMUL

COVID-19 and Other Unforeseen Events: How They Affect Commercial Contracts

The recent 2019 Novel Corona virus ("COVID-19") outbreak in China and its global spread has brought many business activities to a halt, and the resulting national restrictions have triggered a significant global economic downturn, forcing parties to focus more on their contractual and commercial relationships. The current COVID-19 outbreak has had a significant impact on commercial contracts due to economic downturn, both during the downturn and subsequent recovery. Two months after its outbreak, economies throughout the world have already begun to continue operations and fulfil existing contractual obligations in all areas, such as the automobile industry, real estate, aviation, etc. Aside from the frightening development of COVID-19 throughout the world and the social consequences, many parties engaged into contracts without anticipating the detrimental effect of COVID-19 on their obligations. The laws of English contract interpretation are well-suited to the difficulties raised by the COVID-19 outbreak. Companies sought to minimize their risk through strict reading of existing contracts or having necessary discussions with their contracting parties, and commercial agreements were reviewed on the basis of need. The terminology "force majeure" has become increasingly relevant in the contractual context for firms, and how this term will be understood in the context of the COVID-19 contract is what this paper will focus on the most. In addition, this paper aims to address the immediate concerns that may arise as a result of the pandemic's influence on contract performance and enforcement in the United Kingdom. Furthermore, this paper also examines whether a party might be exempted from performing contractual obligations owing to the COVID-19 epidemic in the lack of an express agreement. owing to the COVID-19 epidemic in the lack of an express agreement.

Wen Liu, University of Bristol

The construction of response mechanism to PHEIC in the context of CISG

This article will take an analytical look of the response of international sales of goods contract to the Public Health Emergencies of International Concern (PHEIC) in the context of the Convention on the International Sales of Goods (CISG). The article starts off with a brief summary of historical background of PHEIC and the diverse responses in the international law, and the measures appear in various domestic systems, such as China, United States and United Kingdom, etc. It goes on to focus on the response to the COVID-19 pandemic, the sixth PHEIC, on transnational commercial behaviour under CISG. It will discuss whether COVID-19 can be applicable to the ground of force majeure or hardship to help parties avoid liability, and the inapplicable scenario. It will summarize the current exemption response to the PHEIC under CISG. Avoiding the contract is called by positive response while conversely keeping the contract is the negative response. In the respect of positive response by a party, the article goes on to examine the value of this response on the other party and even the global supply chain. It will consider the scenario that the parties have been restricted by the government in the PHEIC. The article goes on to analyse the relationship between the different responses and the expected goal of CISG under PHEIC in terms of clarifying the expected goal of CISG and the impact of difference responses. It will give a comment on the application of the principle of the autonomy of parties protected by CISG when the PHEIC appears, so as to seek other available responses and construct the legal response mechanism for the international commercial participant.

Mateo Garcia Fuentes, QMUL

Small and medium-sized enterprises in distress scenarios: Should small and medium-sized enterprises benefit from a simplified reorganisation procedure with fewer requirements and/or shorten timeframes?

Insolvency law represents the very essence of commercial law as it has the challenging endeavour to harmonize, in a distressed environment, two of the most competing interests. The collision of creditors' payment expectations together with debtors' lack of payment capacity constitutes the core on which insolvency law is focused on. Dichotomy that becomes even harder to address in the context of small and medium-sized enterprises' ("SMEs") insolvency due to the specific challenges and characteristics of such relevant economic and social players. Small and medium-sized enterprises are the beating heart of nowadays social-economic system. Both nations and international organizations have paid special attention in order to establish frameworks that foster the development of and provide support to SMEs. However, identical efforts have not been observed with regards to the insolvency side of such relevant economic players. Although SMEs are probably the largest users of commercial law, in the vast majority of jurisdictions insolvency regimes do not cater for financially distressed SMEs in a specific manner. In contrast, most jurisdictions provide legal regimes and insolvency procedures that take a "one size fits all" approach to financial distress situations, subjecting an insolvent small shop to exactly the same regime, process and standards applied to the insolvency of large corporations. Consequently, legal frameworks miss to properly address the specific nature, dynamics, characteristics and challenges faced by SMEs. The present research aims to provide a response to the current needs SMEs face in the context of insolvency by focusing on their unique characteristics, nature and key importance. Additionally, based on existing experiences, this paper is also intended to present policy proposals to further assist SMEs during the current and unprecedented times.

Henrich Markus, UCL

Corporate Finance in the Aftermath of Covid – Opportunities for Distressed Businesses through SPACs and PIPEs

Special Purpose Acquisition Companies (SPACs) are highly versatile investment vehicles to provide new funding opportunities for businesses. Widely perceived as an alternative to traditional IPOs, they can also act as an alternative to Private Equity (PE) investments. The first section of this essay will focus on the opportunities SPACs provide for distressed businesses in the aftermath of the Covid pandemic. The principle will be illustrated with reference to the acquisition of American Apparel by Endeavor Corp in 2007. The essay will then assess whether this principle also applies in the current situation and what requirements distressed companies would need to fulfil to qualify for the SPAC route. Private Investments in Public Entities (PIPEs), which are often used in connection with SPACs, have also proved their suitability as standalone rescue capital in the past. Particularly suited to businesses with struggling management, they provide another alternative to PE investments. The second section will therefore explain the principle with reference to two UK PIPEs, the investment by Warburg Pincus in Premier Foods and the recent investment by Lawrence Stoll in Aston Martin. Both SPACs and PIPEs have been around in the US for decades; however, they are unpopular and stigmatised in the UK. Therefore, the final section will discuss how those structures can be popularised and effectively implemented in the UK. The essay concludes that both SPACs and PIPEs can play a significant role for distressed businesses in the aftermath of Covid. The UK regulator has reacted to some difficulties that both structures are facing with the recent UK Listing Review. Whilst this is a step in the right direction and evidences the regulator's awareness of market demand, further measures are needed to facilitate the implementation of these two important instruments of corporate funding for businesses in financial distress.

Alexander Evans, UCL

Mental Health, CSR and the Modern Workplace – fixing a house built on sand

The pandemic has created an environment of great anxiety, uncertainty and stress. While the dominant narrative has, rightly, focused on protecting physical health in the workplace there has been a distinct lack of focus in academia to preventing occupational stress in the workplace. What little scholarship there is no longer reflects the reality of the modern world with the national experiment of remote working, increasing atypical employment, stagnant wages and a socio-political context conducive to stress rather than wellbeing. Further, traditional scholarship has focused on hard-law regulation as opposed to the growing method of corporate regulation: Corporate Social Responsibility (CSR). Hard law measures in this sector have failed in preventing stress, leading it to become the leading cause of workplace absences and exponentially increasing since the start of the pandemic. Over this paper I seek to explore whether CSR mechanisms can ever provide a satisfactory solution to the growing silent mental health epidemic. I argue that the lack of CSR definition hampers the ability of social actors to properly hold corporations to account, meaning contemporary CSR mechanisms can never be adequate to support employee's mental health. The only definition that makes sense is an obligation for the corporation to promote dignity of the individual in relation to corporate power ("Dignity and Power Approach".) Not only does the Dignity and Power Approach fit with conceptions of Labour and Human Rights Law, but this mechanism is the only realistic way in which employee's mental health will be adequately protected. The Health and Safety Executive has proved itself ineffective, statutory reform is unlikely, union power has been broken in the 21st century and common law reform, while desirable, is too radical for the Courts. Scholars must promote the Dignity and Power Approach to adequately hold corporations to account for their supply chains.

STREAM 2:

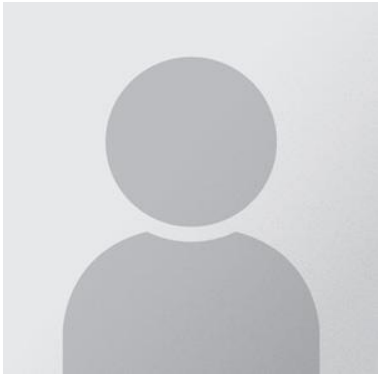
"The Post-pandemic Horizons of Human Rights and Intellectual Property"

PENELLISTS

PROFESSOR VALSAMIS MITSILEGAS

Valsamis Mitsilegas is Professor of European Criminal Law and Global Security, Director of the Criminal Justice Centre and, since 2018, Deputy Dean for Global Engagement (Europe) at Queen Mary University of London. He is also a member of the leadership team of the Queen Mary Global Policy Institute. His research interests and expertise lie, among others, in the fields of European criminal law and security and human rights, including the impact of mass surveillance on privacy. Professor Mitsilegas is a regular adviser to parliaments, governments and EU institutions.

DR YIN HARN LEE



Dr Yin Harn Lee is a Senior Lecturer at the University of Bristol. Her research interests lie in the area of copyright law, with a particular focus on the challenges presented by videogames — an interactive, 'born digital' medium — for copyright law. She is currently completing a monograph on the copyright implications of videogame mods, and is working on a project which seeks to address the legal issues encountered by cultural heritage institutions in preserving and exhibiting older videogames.

Mr Adam Smith-Anthony

Adam Smith-Anthony is the Head of the Business & Human Rights practice at Omnia Strategy. He is a qualified solicitor-advocate specialising in public international and human rights law. His broad experience also encompasses employment, intellectual property, consumer and commercial law. Adam has also advised State entities in respect of public international law matters including: international criminal law and international humanitarian law, the UN OHCHR universal periodic review process and human rights treaty bodies.

PRESENTERS

Gemma Biagini, QMUL

Defamation in England and Wales in the Aftermath of Covid-19: What is the Trend in Nature and Numbers?

This paper aims to analyse whether the type and number of defamation cases carried out recently have been affected by the pandemic. With the advent of the myriad of social networks online defamation has increased by leaps and bounds. In the past defamation was carried out by professional journalists but now anyone can become a journalist and without inhibition write defamatory posts on social networks at the click of a button, perhaps with regret the day after but too late to stop the damage being done. As people have been confined to their houses it will be interesting to analyse if this type of homemade journalism has increased or been curtailed. Statistics from the Royal Courts of Justice show that the number of libel cases was on an average 164 a year since 2009 peaking to 265 in 2018 and 323 in 2019 and those against social media are always more common than in the past. The question is: has this trend continued during the pandemic? To answer this, statistics will be examined and an analysis carried out to see what type of libel cases were put forward in 2019 and during the pandemic in 2020 and whether the serious harm concept of the UK Defamation Act 2013 has had an effect on libel cases. A libel case about loss in earnings, Kim v Lee [2021] EWHC 231 (QB), will also be examined to discover if the principle of serious financial harm has been affected by the pandemic and whether the amount of damages awarded to the claimant was lowered since the pandemic would have caused a loss of earnings anyway. Conclusions are made about whether the trend of the increase and the type of defamation cases has been maintained during the pandemic or not.

Moran Callum, UCL

A Right to Derogate? A Critical Approach to the European Court of Human Rights' Interpretation of Art 15(3)

Responding to Covid-19 has required some of the most extensive peacetime curbs on civil liberties in the modern era. While very few of these regulations have been found to breach any human rights instrument, however desirable or otherwise that may be, anecdotal evidence shows that concern with potential judicial reviews limited governments' responses. It is surprising, therefore, that only 9 states chose to derogate under the ECHR. In response to Dr Martin's blog discussing an odd Art 15 judgment, Professor Akande raised the question of whether a state could rely on Art 15 without notification? While the ECtHR has stated that a lack of notification will not necessarily result in nullity, in this article I answer Professor Akande's question in the affirmative, further concluding that a lack of notification must result in nullity. Art 15(3) has received scant critical engagement however the ECtHR has made fundamental errors in its analysis of the provision. In my discussion, I draw upon the work of Hohfeld, Hart, and Raz in analytical jurisprudence to argue that: 1) the ECtHR improperly conflates "nullity" and "sanction", because 2) the court incorrectly interprets Art 15 as duty imposing, rather than power conferring. Interpreting Art 15 as power conferring means that violation of Art 15(3) must result in nullity otherwise Art 15(3) has no reason giving power and cannot function as a legal norm. Further, I will demonstrate that there are also strong normative reasons for adopting my interpretation of Art 15(3). Drawing on Fuller's influential work on the functions of formality requirements I argue that any other interpretation of Art 15(3) would frustrate its valuable purposes. Finally, I will discuss how my proposed interpretation of Art 15(3) may have led to different outcomes in a number of derogation cases.

Iris Zhang, University of Bristol

Workplace surveillance and protection of workers' data privacy right in Covid-19

Covid-19 forces more people to work from home and spawned new forms of employee surveillance. Employers can be much easier to monitor employees' activities and behaviour through collecting, controlling, and processing employees' data and personal information through new technologies. Such surveillance can give rise to privacy concerns and challenges for human rights protection if it is excessive or not underpinned by a reasoned and proportionate interest in the workplace. Moreover, many workers maybe not aware of the extent to which they are being tracked or traced by their employer. While we recognize that the analysis of worker data has great potential to improve the overall performance of a company, we believe that such surveillance should observe the principles of data protection and limit to the necessary extent since the protection of data privacy right is related to guarding the worker's fundamental right such as personality, independence, and dignity. This article will analyse how modern workplace surveillance invades worker's data privacy right and what scope of employees' data privacy right should be protected from the human right dimension in the pandemic. It will also be shown that excessive monitoring can result in organizational deviance and misconduct and break the trust between employees and employers, even affecting the long run of enterprises. After that, the existing protection of worker's data privacy right under European Convention on Human Rights (ECHR) and the General Data Protection Regulation (GDPR) will be discussed based on the case law. In the final section, this essay will analyse how to guarantee data privacy security of the employees in the time of Covid-19.

Calum David Browne, QMUL

Does A Post-Brexit and Post-Pandemic UK Need Ad Hoc Legislation/Regulation For Videogames?

During a trying year for most industries, the UK video game industry saw a spending growth of 30%, culminating in a record year, generating £7 billion. This increase of spending, up 29.9% on the previous year, is, primarily, a result of the pandemic. With more people staying at home, more turned to mobile, console and PC gaming to quell the boredom of various UK lockdowns. However, this growth has made apparent how lacklustre the legal framework dealing with gaming truly is. The legal structure behind the gaming industry is in its infancy, with next to no industry specific legislation. At best, the gaming industry has been swept into the ever-growing umbrellas of intellectual property law and software Directives. At worst, the industry is left afloat without meaningful consumer protections. The aim of this paper is to make the case that the UK, post-Brexit, and post-pandemic, needs to be an example to the international community by providing proper regulation for the gaming industry. To achieve this, this paper will carry out an analysis of some key complexities with the current web of regulations dealing with intellectual property laws, privacy rights, data protection, child, and consumer protections. The UK gaming industry has boomed, and this can only be viewed as a good thing. However, without concrete regulations and protections, the UK runs the risk of being left behind in the modern virtual space.

Hector Martinez, University of Kent

Is intellectual property reform which targets imbalances in knowledge and technology viable or are political and economic tensions too strong to deviate the law from the legal "normal"?

The Covid vaccine waiver proposal has begun a temporary hiatus, however discursive, of a twenty-five-year-old regime of intellectual property. Due to the shortages in the global vaccine supply chain, worldwide knowledge and technology deficiencies have been exposed which elicit questions towards the success of TRIPS in bringing real knowledge and technology transfer and development. The legal impact of TRIPS cannot be isolated from the pressures of the political economy as the influence of pharmaceutical giants and the impact of national IP accumulation go hand in hand with the economic trends which flourished in the late twentieth century. Solutions towards the issues highlighted by the Covid-19 crisis may involve a rethinking of the patent bargain itself and increasing transparency and disclosure within patent documents and trade secrets. A reassessing of what real knowledge and technology transfer entail, in particular within developing nations will be analysed considering whether it has been the ''legal normal" impediment which has hindered de-centralised knowledge accumulation or rather political economy tensions. The innovative aspect of patents will be centric to the discussion on technological development, whether it must be modified to allow real technological progress, or in its current state is enough to incentivise innovation. This paper will address whether the current questions sparked by the waiver suitably address knowledge and technology imbalances between countries of the global North and global South, or simply highlight issues which are excessively rigid and unlikely to materialize real change.

JOIN THE CONFERENCE, ENGAGE AND NETWORK WITH THE PAELLISTS AND PRESENTERS!

WHEN?

July 22, 2021 at 10:00 AM (London time)

WHERE?

On Zoom: https://qmul-ac-uk.zoom.us/j/88335673967?pwd=VVkrMzZBK3F0Q0ZlOGROMjNSZlpRZz09

Meeting ID: 883 3567 3967

Passcode: 453919

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