Court (falling) short? How ADR could work for you.

As the court system continues to adapt to remote working under Covid-19 restrictions, the inevitable limitations and delays which will result from this process may lead an increasing number of litigants to consider and pursue alternative means of resolving their disputes. We consider some of the options below.

Arbitration

Perhaps the most obvious of these alternatives is arbitration. In some fields, dispute resolution by way of arbitration is a statutory requirement (for example, for the purpose of rent review under the Agricultural Holdings Act 1986) but arbitration may also be the subject of agreement. An agreement to arbitrate need not precede a dispute; it is equally possible for parties to agree to arbitrate after a dispute has arisen.

Arbitration shares a number of key attributes with the court system.

- Arbitration is applicable to almost every type of dispute. One obvious exception to this is a claim for possession of residential property; but in general arbitration has, potentially, extremely wide application: dilapidations disputes, nuisance claims, a claim for specific performance of a sale contract, are all amenable to resolution by arbitration.

- An arbitrator, like a judge, is under a duty to act fairly and impartially (a duty enshrined in s.1 of the Arbitration Act 1996).

- An arbitrator has effectively the same procedural tool kit. In particular:

    - An arbitrator will apply the same rules of law as would a court; and – unless parties agree otherwise – the same rules of evidence.

    - An arbitrator has power to make a wide range of procedural orders, including injunctive relief, security for costs and for inspection of property.

    - At the conclusion of the process, an arbitrator can award almost all the same remedies as a court can award (s.48 of the 1996 Act), including a declaration, specific performance, rectification and damages; and an arbitration award is just as binding as a court order. The court will if necessary lend its own enforcement processes in support of the arbitration, to make the award effective.

In other respects, arbitration has real advantages over the court system.

- The parties choose their tribunal. In court, the parties have no say over the judge that they are given; the allocated judge(s) may be neither a specialist in the right

field, nor user friendly; by contrast, parties to an arbitration will have far greater control over their tribunal.

- Arbitration is confidential, with all issues and evidence remaining between the arbitrator and the parties.

- The arbitration process is flexible and adaptable, in each case, to the specific needs of the parties. The general principles on which the Act is founded, set out in s.1 of the 1996 Act, include the statement that "the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest". This flexibility enables the parties to an arbitration to tailor the process not only according to the nature of the dispute – is there a preliminary dispute standing in the way of an agreement, which may be dealt with by arbitration? A legal issue which could be addressed by written submissions? Or a complex factual dispute which necessitates a full oral hearing? - but also according to the parties' timetable, and the depth of their pockets.

It is in these two respects – time and cost effectiveness – that arbitration, when it is successful, holds the greatest attraction over court-based litigation. And so it is that it is these two key objects of arbitration, alongside that of party autonomy, which are set out in s.1(a) of the 1996 Act, that is:

> "to obtain the fair resolution of disputes by an impartial tribunal *without unnecessary delay or expense*".

It is also reflected in the important general duties of a tribunal, set out in s.33 of the 1996 Act. This section provides that:

"(1) The tribunal shall

> (a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and
> (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined."

There has been increasing recognition of the need to focus on the time and cost efficiency of arbitration. This has taken place alongside, or in some respects in advance of, the equivalent recognition in the court system. So, the explicit object of arbitration as stated in the 1996 Act pre-dated the introduction of the first incarnation of the Civil Procedure Rules, with their expanded focus on cost and efficiency, a few years later. The Arbitration Act also provides for cost capping, under s.65, which preceded by some 17 years its equivalent provision in the civil procedure rules (the prospective costs management orders introduced in CPR by Parts 3.12—3.18 in 2013).

Furthermore, the moving of the court service online makes arbitration more attractive in at least three important new respects.

- First, court hearings conducted online remain, as a general rule, public hearings. This raises the possibility that interested third parties who would never have made the daytrip to the Rolls Building might nonetheless be interested in tuning into a hearing from their offices or armchairs. Not all litigants will welcome this new level of public scrutiny. The privacy and confidentiality of arbitration may seem newly attractive.

- Second, online court hearings are, from the perspective of a court user, almost indistinguishable from online arbitration hearings. In both cases, all participants, including the judge and the barristers, participate from their own desks in front of a screen. And the viewer sees the participants in gallery format. So the advantage of being in a court building, that many litigants value, is gone. Since many arbitrators have significant judicial experience as part-time judges, there is a real chance, in the present climate, that litigants would not discern any difference at all between the court experience and the arbitration experience.

- Third, although the response of the judiciary to online working has been impressive, the court service that supports them has not demonstrated the same agility. Communication with court offices and staff has become increasingly challenging. Arbitrators are likely to have a far more efficient and accessible support network, a feature which seems particularly attractive at the moment.

In summary, therefore, we think there are strong reasons for taking a fresh look at arbitration. For those seeking a quick and cost-effective decision from a specialist, the arbitration process has much to recommend it.

Mediation

Similarly, the coronavirus episode may well lead to an increase in the uptake of mediation. Many believe that a large number of commercial disputes are bubbling in the pipeline, covering much uncharted territory, including a tenant's liability to pay rent in the current circumstances and a range of valuation disputes.

Since Dunnett v Railtrack Plc [2002] EWCA Civ 303, it has been arguable, as with other forms of ADR, that an unreasonable refusal to mediate may lead to adverse costs sanctions or an ADR order from the court. In recent years, the courts have repeatedly stressed that the parties are obliged to make reasonable efforts to settle and to engage constructively in any settlement process. Notwithstanding this, our experience remains that in many disputes only passing thought is given to mediation or other forms of ADR: sometimes for good reason, other times less so.

Since the court service is likely to remain under considerable pressure for the foreseeable future, it may be that judges start to place increased pressure on parties to engage with ADR, particularly mediation.

Furthermore, this may be very much in the best interests of the parties. Not just because of the potential speed of resolution of the dispute, and savings in time and costs that a successful mediation may bring, but also because of the greater flexibility for the parties to agree an outcome outside the range of outcomes that the court might order.

We and our colleagues have already participated in online mediations, and they are certainly manageable and in some ways less exhausting than the face-to-face model.

The potential for increased emphasis on mediation over the coming months was articulated by Lord Neuberger, former President of the Supreme Court, on the BBC's Today Programme earlier this week, when he said:

> "We have to be ready for an avalanche of cases. It may be that they won't come … but we have to be ready. And I think that the legal world owes a duty to the rest of the world to prepare itself for a large number of cases, which may clog up the system and may sometimes lead to unsatisfactory results, and which we can perhaps improve by putting forward some suggestions … One thing that immediately comes to mind is that instead of going to court and having an expensive and uncertain piece of litigation, parties may be sensible to consider mediation, a sort of organized settlement discussion, trying to come to an amicable arrangement, which may not be an outcome which the law would provide but may be a practical, sensible arrangement which can be arrived at quickly".

So we can expect to see more judicial pressure to consider mediation as the year progresses.

Early Neutral Evaluation

Finally, we turn to Early Neutral Evaluation ("ENE"). Long established in the family courts, this is now being promoted in other civil jurisdictions too, including the Chancery Division, TCC and Commercial Court.

ENE is a form of alternative dispute resolution in which a neutral third party (often a judge) provides the disputing parties with a non-binding assessment of the merits of the dispute. Like mediation, the aim of the process is to assist settlement discussions by encouraging parties to appraise their cases realistically. ENE can be conducted on paper or with the use of a short hearing/meeting. Both the process and outcome are confidential. A judge who conducts an ENE can have no further involvement in the case.

As a general rule, the more authoritative the evaluator, the more likely it is that their assessment will carry weight with the parties.

Since 2015, CPR 3.1(2)(m) has expressly provided that the court's management powers include "hearing an Early Neutral Evaluation with the aim of helping the parties settle the case". The notes to the White Book suggest that ENE can be imposed by the court against the will of the parties, but in the Chancery Division and TCC it is only ordered with their agreement.

Guidance and model directions can be found at paragraph 18.7 of the Chancery Guide and Section 7.5 of the TCC Guide. Parties seeking the appointment of a High Court judge as an evaluator should apply for a direction as to the suitability of the case for ENE. This can be done through a separate application or at a CMC. Factors that will be taken into account include the potential saving of court time and the significance and importance of the issues in dispute.

Alternatively, ENE can be undertaken by an experienced practitioner, in which case it is governed by an ENE agreement in much the same way as an arbitration would be. As with the identity of the evaluator, the parties have complete discretion in deciding the procedure for the process (provided that they agree this prior to the appointment of the evaluator).

The potential advantages of ENE are that it may:

- clarify particular strengths and weaknesses of the parties' cases;
- result in a clearer opinion (or better "reality testing") than mediation;
- lead to a speedier resolution of the dispute and thus save costs.

The potential disadvantages of ENE are that:

- it is not suitable for all cases: it works better for narrow points of law than for multi-faceted complex claims;
- there is a risk that if the format and expectations are not carefully managed, the process may seem superficial, thus reducing confidence in the outcome;
- an assessment which is strongly supportive of one party's position may in fact hinder negotiations rather than promote them;
- litigants may regard an unsuccessful ENE as a waste of time and costs.

It seems likely that in most property cases, parties will continue to prefer mediation over ENE. However, if as expected, the courts start to place more emphasis on ADR as a means of easing coronavirus-related pressures on the court system, there may well be cases where ENE is a more attractive option than mediation. For example, disputes raising issues of construction or in an area of law where there are conflicting authorities. In high-value cases of this nature, the opinion of a high-level judge may prove an invaluable tool in the settlement process.

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