Unlocking dispute resolution beyond lockdown: does arbitration hold the key?

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Impact of CV-19 on Courts: England & Wales

The lead from the senior judiciary – message from the Lord Chief Justice to civil and family judges, 19 March 2020:

“We have an obligation to continue with the work of the courts as a vital public service… The rules in both the civil and family courts are flexible enough to enable telephone and video hearings of almost everything. Any legal impediments will be dealt with. … The default position now in all jurisdictions must be that hearings should be conducted with one, more than one or all participants attending remotely. … [W]e will be using technology to conduct business which even a month ago would have been unthinkable. Final hearings and hearings with contested evidence… will inevitably be conducted using technology. Otherwise, there will be no hearings and access to justice will become a mirage.

Even now we have to be thinking about the inevitable backlogs and delays that are building in the system and will build to an intolerable level if too much court business is simply adjourned…

Listing officers will undoubtedly face significant challenges. To assist them as much as possible, some pragmatic decisions will have to be taken, for example as to classes of non-urgent work that simply cannot be accommodated where the default position will be to remove such work from the list”

Impact of CV-19 on Courts: England & Wales

- The position by May/June:

- Civil Justice Council: *The impact of Covid-19 measures on the civil justice system* (May 2020, published 5 June 2020).

- High number of adjournments, particularly early in lockdown, but precise figures hard to capture (CJC §4.7). Circuits reporting high % cases adjourned.

- Data captured on 486 remote hearings (sample, May 2020)

  - 46.5% took place in London
  - 47.3% concerned cases value £50,000.00 +.

Impact of CV-19 on Courts: England & Wales

- Divide between London and regions. Divide between Senior Courts and other courts (CJC §7.4)
- Commercial Court has maintained majority of listings. PDs 51Y, 51Z, 51ZA
- Situation more mixed looking across jurisdiction as a whole
- Bar Council Survey (May 2020) reported that many civil courts operating at below 50% normal capacity. Western Circuit (April 2020) reported 60% drop off in fees income reflecting collapse of hearings.

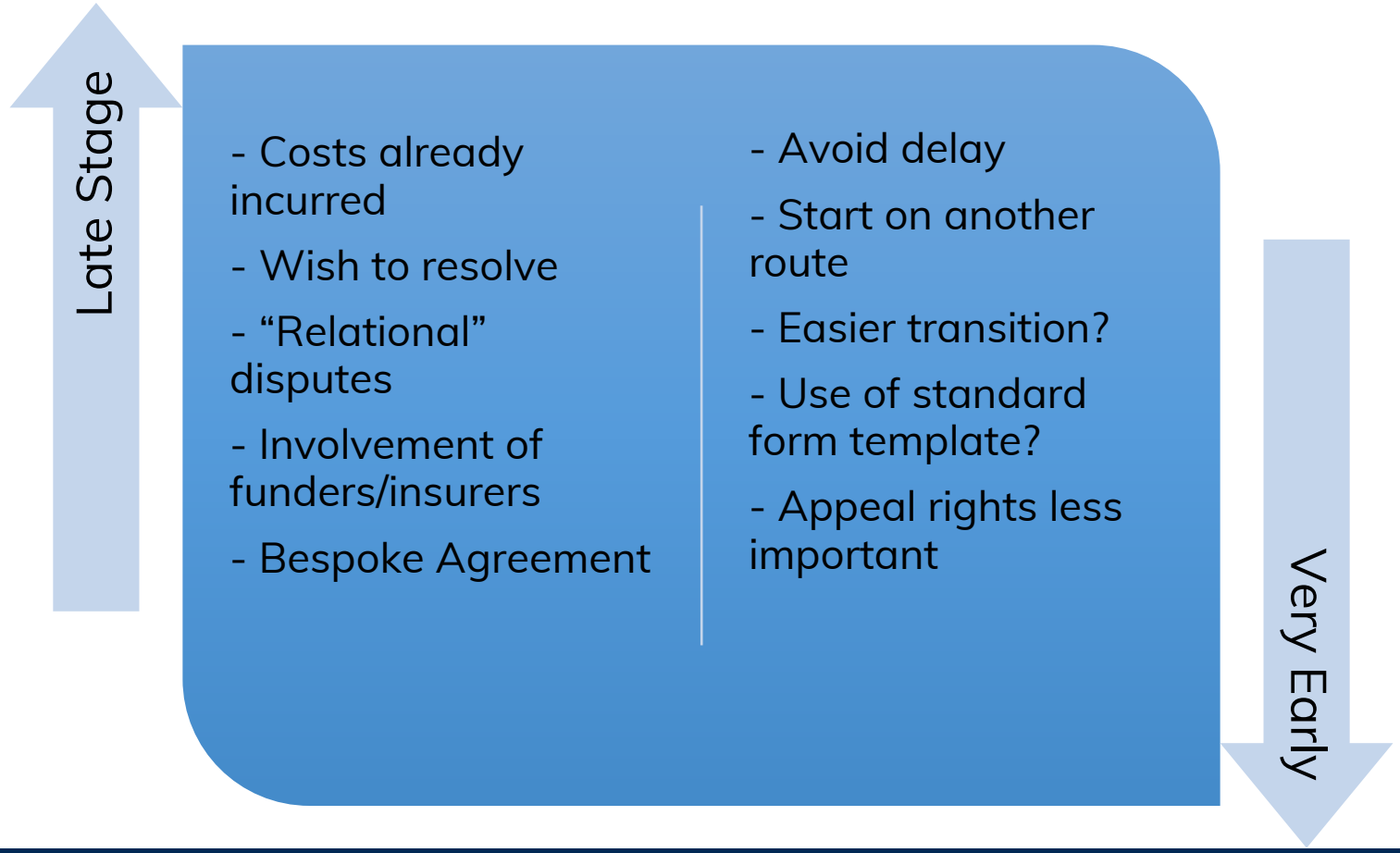
Impact of CV-19 on Courts: England & Wales

- Backlog (as per the Lord Chief Justice's warning in March) predicted by CJC

- Contributing factors:
  - Adjournments with knock-on delay
  - CV-19 related disputes predicted
  - Temporary "suppression" of cases: parties waiting to file
  - Delays due to remote working taking longer

  CJC suggests need for a working group to address backlog – alternative strategies, including consideration of other forms of dispute resolution for certain types of cases.

Optimal Point?



The submission agreement (1)

- Choice of seat: might be somewhere other than where the litigation was proceeding.
  - Note that curial law may be different from substantive law of the contract. If this is the case, special consideration should be given to (i) composition of arbitration tribunal and (ii) language of the arbitration.

- Institution: if any
  - Pros/cons of institutional vs. ad hoc arrangements.
  - Institutional - pre-existing rules, facilitation of appointments, pre-set pricing models.
  - Ad hoc - greater flexibility, tailoring to pre-existing dispute

- Appointment method
  - Institutional - appointment-only or with applicable rules
  - Ad hoc arrangements

The submission agreement (2)

- Commencement of arbitration:
  - Is the “ritual dance” of formal notice and response necessary/desirable?
  - “Relation back” date for limitation purposes

- E-working
  - Facilitation of e-working: comparison of institutional rules
  - Remote hearings: challenges and opportunities
  - Ensure enforceability of the Award: consider whether any “target” jurisdictions for enforcement may have relevant limitations or restrictions

The submission agreement (3)

- Prevent duplication:
  - Proceedings to date (pleadings, witness statements, etc) to stand as documents in the arbitration
  - Give effect to procedural orders made in the litigation, so far as practicable. Court directions won't always translate directly to arbitration.

- Late stage submission - controlling amendments and minimize delaying or repleading of case. How to tie down late "regime change" while ensuring fairness?

Late regime change: firm but fair

- The tribunal shall hold an initial procedural hearing within 21 days of its constitution to give any further directions necessary to enable completion of the arbitral proceedings, including fixing a date for the final hearing.
- A party may not amend or supplement a statement of case served in the Court Proceedings without the permission of the tribunal.
- Any application by a party for a direction (a) to amend or supplement a statement of case, or (b) the effect of which is that the arbitral proceedings are conducted in a manner differing materially from that contemplated by an order made in the Court Proceedings, must be made no later than the initial procedural hearing.
- The tribunal may not make any such direction, on an application by a party or on its own initiative, otherwise than at, or in consequence of, that hearing, unless there is a compelling reason to do so.

Confidentiality:

- Confidentiality is the starting point in arbitration
- Public openness and transparency is the starting point in court
- Push/pull factors for parties
- Possible to waive confidentiality in arbitration with agreement
- Possible to publish arbitration awards but in anonymised form

Costs:

- Standard position (unless agreed otherwise) loser pays winners costs
- No need for Precedent H or costs budgeting restrictions
- Possible to replicate court costs regime to an extent
- But cf. eg. third party costs orders – courts have powers that arbitral tribunal do not

A one-stop shop for costs

- For the purpose of the power of the tribunal under section 61 of the 1996 Act to allocate the costs of the arbitration as between the Parties, and notwithstanding Article 40.2 of the UNCITRAL Rules, the legal or other costs incurred by a Party in the Court Proceedings to date shall be recoverable costs in the arbitration to the same extent as they could be made the subject as an order for costs in the Court Proceedings.

- In determining the allocation of costs as between the parties, and in quantifying the recoverable costs so allocated, the tribunal:

  a. [OPTIONAL, notwithstanding Article 48.1 of the UNCITRAL Rules, shall apply the same principles as would have been applied by the court in the Court Proceedings, and]

  b. In relation to any costs recoverable by virtue of the preceding paragraph, shall so far as possible give effect to any order for costs made in the Court Proceedings to date, and shall treat any order reserving costs to the trial judge as an order reserving costs to the tribunal.

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