

Mediation – Don't panic in the Pandemic – be prepared
Colin Manning, Mediator

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The coronavirus pandemic and the current and continuing lockdown imposed by government has led to a number of consequences for the resolution of commercial disputes, and the administration of justice. First is where trials are being adjourned to uncertain dates, currently unable to take place due to the inability or unwillingness of people to attend court. Second is what is going to happen when the lockdown is eased or lifted, and disputes, which have been building up in the normal course, enter the system creating a backlog. Judges are understandably concerned that the courts and arbitral tribunals could face and potentially be overwhelmed by a wave of commercial cases. A number of these disputes will have arisen due to the parties' inability to honour their contractual obligations due to the lockdown with complicated issues of law as to the remedies available.

On the 19th March, in a message from the Lord Chief Justice to judges in the Civil and Family Courts¹, while emphasising that the courts should continue to conduct hearings with participants attending remotely, that would not always be possible, and, he said "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." As part of his remedy he added: "I would urge all, before agreeing to adjourn any hearing to use available time to explore with the parties the possibility for compromise."

At a meeting hosted by the British Institute of International and Comparative Law ("BIICL") on the 7th of April 2020, and attended by Lord Neuberger, Lord Phillips, Sir David Edward and Sir William Blair together with various academics and others, a wide ranging discussion took place concerning the legal and economic effects of the pandemic on commercial

¹ <https://www.judiciary.uk/announcements/coronavirus-covid-19-message-from-the-lord-chief-justice-to-judges-in-the-civil-and-family-courts/>

contracts, nationally and internationally. The meeting had discussed claims where a breach of obligations, triggering default clauses, would be met by the counterparty asserting it was excused from performance because of the consequences of the pandemic. This could happen in contracts in different jurisdictions and/or with different governing laws. On the 27th April the BIICL issued a “Concept Note”² in which it was stated that such problems could “be mitigated by agreement, or by mediation – both of which must be encouraged and will have a crucial role – but there is a risk of a deluge of litigation and arbitration placing a strain on the system of international dispute resolution, and risking the prospect of more constructive solutions and increasing the prospect of uncertainty of outcome”. Indeed, an outcome leaving one party a winner and the other a loser “will not take full account of the market/social contextualisation of the crisis”. Further, observing that in at least one jurisdiction (Singapore) measures had been introduced to give a “breathing space” offering temporary relief where a party’s obligations could not be fulfilled due to the pandemic, the Note commented: “In many jurisdictions, procedural rules already encourage conciliation – can these be developed further to give a breathing space?”

Comments made at and following the meeting by the attending retired judicial “heavyweights” is instructive. Lord Neuberger warned that a headlong rush into litigation could create uncertainty and risk. “The legal world has a duty to the rest of the world to prepare itself.” He stressed that the best policy as the economy begins to reopen is to encourage parties to negotiate rather than focus on their contractual rights, which in any event are going to be uncertain. Sir David Edward, a former Judge of the European Court of Justice, said that “the law cannot insist that parties’ contracts must continue as if nothing has happened, or simply declare that frustration has brought them to an end. If commercial life is to go on, a rational and equitable solution must be found.” And Lord Phillips urged that “parties should consider mediation and conciliation should be encouraged at an early stage of legal proceedings.”

If, as seems likely, there is a risk that the courts will become overwhelmed by a wave of commercial cases, a combination of the number of adjourned cases built up during the lockdown together with a rush of new litigation arising from the pandemic, then there will be lengthy delays to hearings and trials. It must be possible that the judges will have to take practical steps to ease the pressure.

² https://www.biicl.org/documents/10307_legal_considerations_in_mitigating_mass_defaults_wb_final.pdf

One obvious step is to require all parties to engage, or re-engage in some form of ADR, almost certainly mediation, as a condition of bringing or continuing litigation.

The CPR Protocols, both general and specific, call for disputing parties to consider settlement: “Litigation should be a last resort. As part of a relevant pre-action protocol or this Practice Direction, the parties should consider whether negotiation or some other form of ADR might enable them to settle their dispute without commencing proceedings.” “Parties should continue to consider the possibility of reaching a settlement at all times, including after proceedings have been started.”

As the Overriding Objective in the CPR (para 1.4) makes clear: “Active case management includes - encouraging the parties to use an alternative dispute resolution procedure and facilitating the use of such procedure”.

Over the years judges at all levels have encouraged parties to engage in ADR, and mediation in particular, to assist parties to settle disputes, and have imposed sanctions for those unreasonably refusing to engage in mediation.³ This approach has recently been re-emphasised by Mr. Justice Griffiths in *DSN v Blackpool Football Club Limited*⁴.

Mediation is now regarded, and has proved itself, as the most effective form of dispute resolution. An increasing number of mediators have been trained by an increasing number of training providers. Yet, perhaps surprisingly, the take-up of mediation has not grown as fast or as comprehensively as had been anticipated. There are far fewer mediations taking place than one might expect, leading to many trained mediators complaining of lack of work. This has led to a call by some for mediation to be made compulsory. Such calls have, in the main, been resisted including by the judiciary, arguing that one of the key features of mediation is that it is a voluntary process, and any form of compulsion would be self-defeating.

Experienced solicitors and counsel are well aware of the benefits of mediation, and require no pressure or orders from the courts to engage in the process. However, there remains a significant number of practitioners, including at the Bar, who remain resistant. It should be

³ From *Dunnett v Railtrack Plc* (Practice Note) [2002] EWCA (Civ) 303; *Halsey v Milton Keynes General NHS Trust* [2004] EWCA (Civ) 576; *Rolf v De Guerin* [2011] EWCA (Civ) 78; *PGFII SA v OMFS Company 1 Ltd* [2013] EWCA (Civ) 1288

⁴ [2020] EWHC 670 (QB)

clear that the administration of justice and the interests of litigating parties generally are best served by a speedy, cost effective settlement of disputes. That is what mediation provides.

Might fear of the courts being overwhelmed by an anticipated flood of cases, after eventual emergence from lockdown, begin a trend amongst the judiciary to be, at least, more proactive in its encouragement of mediation? This could be achieved perhaps by amendment to the Rules to make mediation mandatory, but, if not to the point of compulsion, at least by making referrals to mediation automatic in all courts. Absent an amendment to the Rules parties would still be able to refuse to mediate, albeit subject to the risk of being made subject to an adverse order as to costs.

Of course, by necessity, the conduct of mediations has changed. Clearly, traditional face to face mediation is not currently possible, at least within our jurisdiction. However, remote “virtual” mediation is beginning to “take off”, anecdotally, with success.

Zoom⁵ has become the preferred platform for online mediation, because of its ability, with the Mediator as “Host”, to re-create the atmosphere of a traditional mediation – including main meeting and secure breakout rooms. In some ways there is greater flexibility in online mediation, as well as cost saving in travel and business costs.

To secure an increase in mediation generally, but in particular to reduce the backlog of cases facing the courts, there is a need for more vigorous support for mediation from the judiciary. The judgment of Mr. Justice Griffiths in *DSN* above is welcome, but parties and their advisers require clear, even trenchant, statements of intent from all levels of the judiciary. An understanding of how Zoom is successfully being used for mediation might also be helpful.

In addition, the Bar must be ready, enthusiastically, to take up the challenge, whether as representatives for the parties, or as barrister mediators. It is important for the Bar to train in and become familiar with the technology, and the Zoom platform in particular, so as to be in a position to take advantage of and be adept in these new processes on behalf of their clients. Barristers must be in a position to give clear and firm advice to their clients of the advantages of mediation in avoiding delays and uncertainty in pursuing their case through the courts when a cheap and effective alternative is readily available.

Whatever happens, I am sure there will be a new store of “war stories” to emerge from remote mediation.

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