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Arbitration in the time of Coronavirus: should Tribunals suspend proceedings?

The global pandemic has caused many of the 'normal' facets of life to come to an abrupt standstill. The legal world is, of course, not immune to the effects of coronavirus and dispute resolution has been impacted.

The concept of a claimant '*having their day in court*' brings with it the picture of the claimant sitting physically in the hearing-room with their legal advisors to their side, their opponent opposite and the Judge/Tribunal on the bench. In a time of social distancing that is simply not possible.

The English Courts have rightly received praise for their use of technology, including the conduct of remote hearings, to ensure that litigation proceeds as best as possible. Indeed, the Coronavirus Act 2020 allows for the livestreaming of remote hearings to ensure open access to justice. Litigation through the English Court system continues in spite of the global pandemic.

But what of arbitration?

The use of technology has been embraced by arbitral panels and a number of institutions have issued guidance in this respect. But the conduct of hearings is not the only issue arising from coronavirus. Restrictions on physical meetings make the process of taking evidence from factual witnesses more difficult. The same is true for counsel teams in the drafting of submissions. The review of hard copy documents either not retrieved from archives and/or laying in a client's office means that the disclosure process cannot be completed with 100% certainty that everything has been reviewed and provided to the other side. Of course, these difficulties are also encountered in court-based litigation, but whereas courts can issue (and have issued) strong orders and guidance with which non-compliance brings with it potentially serious repercussions, arbitration is a consensual process dictated by both the parties and the Tribunal. While these practical difficulties are by and large being addressed sensibly by those conducting arbitration, invariably parties with an interest in dragging out the arbitral process will seek to use any opportunity to do so; coronavirus represents such an opening, but do these procedural difficulties justify a suspension of the entire arbitral process?

Unjustified applications to delay/ suspend proceedings as a result of Coronavirus

Arbitral timetables are carefully crafted with a view to the availability of the Tribunal, counsel and the parties to the proceedings. They are often very lean with little room for amendment other than for modest extension requests. Hearings are often organised many months in advance and locked into calendars. Given the number of interested actors in an arbitration, the golden rule is that any amendment to the arbitral timetable ought not to impact upon the hearing dates. The suspension of arbitral proceedings will often require the vacation of hearing dates (the same is of course true of court hearings, although parties often appear less keen to apply to judges to vacate hearing dates). Given how busy counsel and arbitrators tend to be, the reorganisation of (a potentially lengthy) hearing can cause a delay of many months or even years.

Significant amendments to an arbitral timetable necessitate an application to the Tribunal. Such applications require justification for the directions sought; the more drastic the directions, the stronger the justification required. An arbitral tribunal ought always to assess any application on its merits and, of course, coronavirus could well have a very significant impact upon the proceedings, for example if a key witness and/or a member of the tribunal was to fall ill with COVID-19. Depending upon the circumstances, and the stage of the arbitration, an application to suspend the arbitration as a result could well be justified.

However, applications based only upon the practical difficulties encountered in respect of the taking of evidence, drafting of submissions, disclosure review and/ or remote hearings should be viewed with scepticism by Tribunals. These issues certainly make the process of arbitration harder, but not impossible. Arbitral institutions have worked hard to ensure that, as a rule, arbitration can and does continue throughout this unprecedented period and, in most cases, practical difficulties ought to be resolvable by Tribunals and the parties. These practical difficulties should not cause an entire arbitration to grind to a halt.

Does the rejection of such an application place an eventual Award at risk?

Applications for the suspension of arbitral hearings as a result of the global pandemic may include reference by the applicant to '*not being treated fairly*' and/ or being deprived of '*an opportunity to present its case*' if a suspension is not granted. Such sign-posting will not be lost on Tribunals.

Most institutional arbitration rules make reference to a Tribunal's duty to treat the parties fairly and provide them with a reasonable/full opportunity to present their respective cases (see for example ICC Rules, Article 22(4); LCIA Rules Article 14.4(i)). From an English law perspective, such provisions mirror largely the Arbitration Act 1996, S.33(1)(a). The failure of a Tribunal seated in England & Wales to accord with this duty enables a party to challenge the enforcement of an award before the English Courts on the basis of a serious irregularity (Arbitration Act 1996 S.68(2)(a)).

While one should not dismiss such an implicit threat, it is important to remember that it is rare for such challenges to succeed before the English courts. Indeed, between 2015 and 2017 the English Commercial Court considered 112 challenges to arbitral awards based upon S.68; only one was successful. The reason for this could be explained in part by the English Court system's pro-arbitration stance, but also by the fact that in order to succeed the party seeking to challenge the award is required to show that the alleged serious irregularity has caused or will cause it *substantial injustice*. In the context of applications to delay and/or suspend arbitral proceedings due to coronavirus, one would expect such substantial injustice to have been identified by the applicant and raised before the Tribunal in the application; if genuine the application ought to have been successful. If genuine yet ignored by the Tribunal, there is likely to be justification in the award being successfully challenged.

However, the vast majority of Tribunals are experienced at assessing whether directions will significantly impair one party and will generally do their utmost to avoid making directions which will have this effect. Accordingly, Tribunals seated in England & Wales ought properly to trust their judgement and reject unmeritorious applications to suspend proceedings based on coronavirus in the knowledge that a challenge in the courts is unlikely to succeed.

Of course, the approach taken by the courts of the seat in relation to a challenge to the award may be different to the approach taken in the jurisdiction in which the award is to be enforced under the New York Convention 1958. The New York Convention 1958, Article V(1)(b) provides that recognition and enforcement of an award may be refused by a competent authority (ie foreign court) where it is proved that the challenging party was '*... unable to present its case*'. It is possible to imagine a party using the global pandemic as a reason as to why it was allegedly '*unable to present its case*' and therefore to challenge enforcement of the award (to the extent the provisions of New York Convention 1958, Article V have been transposed into domestic legislation). While it is difficult to predict how a particular jurisdiction would view such a challenge, numerous courts within different jurisdictions have interpreted Article V(1)(b) narrowly and required a high standard of proof in order to find that the challenging party was, in fact, unable to present its case. In addition, one would also hope that the chances of such a challenge succeeding would be limited in circumstances where a Tribunal had previously given careful consideration to an application to suspend and considered such a measure unjustified.

Conclusion

The global pandemic is causing and will continue to cause significant hardship, with the majority of the countries having some form of lockdown that could impact upon arbitral proceedings. However, with an uncertain timescale as to when such measures will be lifted, it is critical that the world continues to operate as best as possible. Dispute resolution is no exception. While clearly cases of genuine hardship will necessitate delay to some arbitrations, it is important that Tribunals do not allow this period to be seized upon by parties who have an interest in simply delaying the course of arbitration in the hope of putting off a potentially unfavourable award.

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