FORUM NON-CONVENIENT? TRY ARBITRATION

Jonathan Karas Q.C. and Oliver Radley-Gardner consider the advantage of arbitration in the context of the Covid-19 crisis

As matters stand, the Courts and Tribunals are moving quickly to adapt to the current Covid-19 epidemic by issuing practice directions and rule amendments intended to allow hearings by video, or decisions with hearings dispensed with altogether.

On the one hand, however great the effort, we are seeing delays within the system. Not all Courts remain open, and not all business is equally urgent in the eyes of the Court. On the other hand, the courts where cases are fixed for hearing are reluctant to adjourn even substantial trials despite the substantial logistical difficulties and try to adopt the approach of "business as usual": see, for instance, *In the matter of Blackfriars Ltd* [2020] EWHC 845. Even where parties agree to adjourn a case, it cannot be guaranteed that a fixture will be broken.

So, the question then arises whether there is another way to resolve parties' differences which may be speedier and more convenient for the parties. One obvious route is arbitration of disputes outside the Court system. This not only frees up Court resources; it also gives the parties access to specialist justice with agreed rules of engagement, before a Tribunal that does not have to have regard to any other users of the system, constraints of listing, onerous practice directions, costs and case management hearings, and so on. Some aspects of video hearings – like the swearing of witnesses – remains as yet untested in full.

Those disadvantages do not apply to arbitrations by agreement. The parties are free to determine the procedural rules under which they operate, and have a decision-maker whose undivided attention they enjoy. Of course, there are downsides – the arbitrator is not tax-payer funded (but is a guaranteed specialist if selected properly), and care has to be taken to choose the right arbitral process to match the dispute – from paper arbitrations through to a full "live" hearing conducted either online or (if the Government guidance is relaxed) with appropriate social distancing. Further, the price for this bespoke service is a limited right of appeal on the grounds set out in the Arbitration Act 1996.

The arbitration route means that parties can expect a fixed and agreed hearing date for resolution of their dispute, without being made to wait in the uncertain queue which is building in the Civil Courts, and which was a problem even before this pandemic came knocking at our doors. It may even become advisable for parties in pending proceedings to seek to agree to resolve their differences by arbitration – indeed this can be seen to be done now in unopposed (or no longer opposed) renewals under the Landlord and Tenant Act 1954, with parties preferring a specially selected arbitrator, especially if it means otherwise taking their chances before the First Tier Tribunal under the pilot scheme presently in operation. Indeed, if courts take a "business as usual approach" and insist on a timetable which the parties do not find convenient, we see no reason why proceedings in Court should not be stayed in *Tomlin* order form with the parties agreeing that the dispute be referred to arbitration and a more convenient timetable for resolution of the dispute set.

However, this requires a confidence in arbitration, and a preparedness to enter into post-dispute agreements for arbitration, which are not second nature in real estate litigation. It might be that present circumstances, and finite resources, mean that this cultural antipathy needs to be shed.