

Bargate Murray Disputes Update – the move towards ADR?

As an industry leader in the area of Disputes Resolution, Bargate Murray prides itself on keeping its finger on the pulse of recent developments. In this article our Associate, Hannah Faulkner, explores the effect of the Covid-19 pandemic on dispute resolution.

During the Covid-19 pandemic, the methods in which disputes are managed and resolved has needed to adapt. With the closure of courtrooms, private dispute resolution facilities, and law firm offices, the forum for hearing disputes has switched to online videoconferencing, with both positive and negative consequences.

At the outset of such a change, there were concerns in the industry over the general effectiveness of conducting hearings over videoconferencing. As well as the inevitable IT glitches, there was a fear that the general impact or “feeling” of such proceedings would be affected when shrank down to a small screen. Would it be as easy or affective to follow proceedings from a computer, and would clients suffer from not being physically present with their lawyers?

Both the courts and various ADR institutions have been helpful in their attempts to maintain the status quo.

Although more than half of courts across England have temporarily closed, the decision in **Re Blackfirars Ltd** [2020] EWHC 845 made the court's opinions of adjournments due to Covid-19 clear. In this case, the court refused to adjourn a 5-week hearing for reasons of Covid-19, and instead urged the parties to explore the ways in which the trial could proceed remotely.

Within the court system, hearings have been conducted via videoconferencing, and there are views that this may become the “new way” of working. It does seem that there is not a convincing argument why small hearings need be regularly heard in person in the future. As with many other aspects of working life, people have realised that the changes forced by the Covid-19 lockdown, can prove to bring real efficiencies going forward.

However, whilst the message was “business as usual”, there may still exist the perception that delays in the courts are inevitable due to a rush to list cases after the lockdown is eased. This perception may explain why there is, more than ever, a turn towards Alternative Dispute Resolution (“ADR”).

Within ADR, the use of videoconferencing is not a new concept, where the emphasis is squarely on costs savings and efficiency. The most popular forms of ADR, arbitration and mediation, are private contractual methods of resolving disputes between parties. As such, the parties are largely free to decide in what manner the proceedings are to be conducted, meaning that a great level of flexibility can be achieved through consensus.

This flexibility has allowed parties to more easily postpone hearings, or to agree alternative methods of proceedings, such as via videoconferencing. This can provide a real and tangible benefit to parties in terms of costs savings.

Unlike in litigation, the parties are responsible for paying the expenses for any hearings, such as facility hire fees, travel fees, and the fees of the arbitrator(s) / mediator(s). Therefore, in instances where hearings can be heard remotely, there are costs savings to be had in instances where expensive facilities need to be hired, and all participants need to travel.

This search for costs savings and efficiencies also helps to explain the growing trend of using ADR methods over traditional litigation. Whilst this has been a gradual trend long before Covid-19, the slowing down of the court system may prove to be a factor in the uptake of ADR solutions in 2020, and onwards into the future.

For this reason, our firm predicts that there will be a growing propensity for disputes to proceed under ADR.

In addition to the above factors, a number of notable court decisions in 2020 have helped to push ADR further into the spotlight:

- In **A and B v D and E** [2020] EWCA Civ 409, the Court of Appeal confirmed that section 44(2)(a) of the Arbitration Act 1996 allows the English courts to order a non-party witness resident in England to provide evidence in an arbitration, whether domestic or abroad. This decision assists in bolstering the global nature of arbitration.
- In **SAS Institute Inc v World Programming Ltd** [2020] EWCA Civ 599, the Court of Appeal found that a debt will be situated in England if the debt is owed pursuant to an agreement providing for arbitration in England or the exclusive jurisdiction of the English court, even when subject to foreign court proceedings.
- Within a number of days, the Supreme Court will hear an appeal of **Enka v Chubb** [2020] EWCA Civ 574, where they will consider (i) the correct approach to determining the governing law of an arbitration agreement, and (ii) the proper role of the court in determining whether foreign proceedings give rise to a breach of an agreement to arbitrate. The decision of the Court of Appeal found that a choice of seat within an arbitration agreement contains an agreement by the parties to submit to the jurisdiction of the courts of the seat, regardless of the choice of law within an overriding "main" contract.

Whilst not yet determined, it demonstrates how important it can be to draft a detailed arbitration agreement.

- Most significantly, and on the subject of costs, **Wales (t/a Selective Investment Services) v CBRE Managed Services Ltd & Anor** [2020] EWHC 1050 (Comm), the court cemented the principle that a party to proceedings can be penalised on costs for not engaging in mediation.

In this case, the judge refused to award the successful defendant a proportion of their costs on the basis that they had repeatedly and unreasonably refused to engage in mediation. This highlights the importance of engaging in ADR

Such recent developments point to the English court system confirming the pro-ADR stance and provide more confidence to clients that ADR is a real alternative to traditional litigation.

At Bargate Murray, we have a long and successful history in representing clients in all types of disputes; including litigation, arbitration and mediation. We have vast experience in assisting a range of clients across several jurisdictions, and we pride ourselves on offering a first-class service to all clients.



Hannah Faulkner - Associate

Hannah qualified as an Associate at Bargate Murray in May 2020, specialising in Disputes Resolution. Throughout her time at Bargate Murray, Hannah has gained significant experience in a number of complex dispute resolution matters having been closely involved in multiple high value arbitrations spanning the superyacht and aviation sectors.

Hannah also has experience in mediation, negotiation and tax investigations, and continues to expand her work in High Court litigation.

CONTACT

Bargate Murray
44 Worship Street
London EC2A 2EA
www.bargatemurray.com

T: +44 (0)20 7375 1393

E: yachtgroup@bargatemurray.com

aviationgroup@bargatemurray.com

propertygroup@bargatemurray.com