MANAGING THE DARK SIDE OF ARBITRATION

by **Derek Wood QC**

Resolving legal disputes by arbitration rather than by court proceedings has many well-advertised virtues. It provides for due process before an impartial tribunal leading to an enforceable award which is as much binding on the parties as a judgment by the court. If it is a domestic English or Welsh arbitration, the Arbitration Act 1996, in contrast with the increasingly bureaucratic Civil Procedure Rules, empowers arbitrators, sitting alone or in a panel of three, to adopt procedures suited to the circumstances of the parties and the case which are far more flexible and adaptable than are available in court. If it is an international arbitration it will in all probability be conducted under rules or protocols which are equally flexible.

The parties - or an institution on their behalf if they cannot agree - will choose the arbitrator. He or she is likely to be a respected person who is knowledgeable in the area of trade or business from which the dispute arises, and need not be a lawyer. The parties do not have to wait anxiously to find out the name of the judge who is going to try their case, only to be disappointed to find that he or she has no familiarity with the subject-matter - or to be told at the last minute that the case cannot be listed for hearing because of the pressure of other court business.

An arbitrator will be engaged with the case from the start and will be monitoring it throughout. Dates for case management or final hearings can be relied upon. If the case proceeds to an oral hearing, that will take place in private, at a place which suits the parties. Much of the business will be carried on by e-mail or telephone or video link. Ultimately there may be no need for an oral hearing. The tribunal's decision can be made on the basis of documents only, including the parties' written submissions. The rules of court, by contrast, do not permit any case, however much it may turn simply on agreed facts or documents, to proceed without an oral hearing.

Opposing parties who find themselves in arbitration rather than in court are typically there because of an arbitration clause in a contract or similar document requiring them to refer their disputes to this method of resolution. Arbitration agreements regularly appear in standard form contracts. Yet, despite the merits of the process, many express dissatisfaction with it. Those who choose arbitration voluntarily, without a prior arbitration clause in place, are hard to find.

What is the problem? In short, it is time and cost. This is the dark side. Many arbitrations, despite the liberating measures in the 1996 Act, have turned out to be court litigation by another name. The whole laborious process of statements of case, disclosure of documents, expert meetings and exchange of witness statements rumbles on. Among litigation lawyers old habits die hard. And there is the extra mouth to feed: the arbitrator, with his or her fees and expenses. There is no taxpayer-funded judge sitting in taxpayer-funded premises in an arbitration.

Arbitrators' fees are and always have been a conundrum. The principal rival models are hourly rate versus a percentage of the amount in issue. Neither is entirely satisfactory. All experienced lawyers know that there is no correlation between the time it takes to disentangle a dispute and the amount of money at stake. Both systems of charging can lead to high fees.

The arbitration community is bringing forward a new answer to these problems, exploiting the opportunities opened up by the 1996 Act but avoiding the pitfalls: the fast-track fixed-fee arbitration. Falcon Chambers Arbitration service (FCA) has produced a model, focusing on members' expertise in real property disputes, which is not tied to the value in issue and eliminates hourly charges. It offers parties in dispute different options, depending on how much they wish to spend and how quickly they want the dispute resolved.

The eye-catching features are the 20-day and 40-day arbitrations, to be determined, if junior counsel is appointed as arbitrator, for fixed fees of £3,000 and £6,000 respectively. The 20-day arbitration is conducted on documents-only contained in a single bundle of not more than 350 pages, including the parties' submissions. The arbitrator undertakes to use best endeavours to deliver an award within 20 days of receiving the bundle. The 40-day arbitration may involve up to three 350-page bundles, and there may be a hearing.

The 40 days run from delivery of the bundle or the close of the hearing. If Queen's Counsel is appointed the fee will be higher, but nevertheless fixed. An extra fixed fee is payable if the arbitrator has to deliver a separate award on costs.

The system is supported by a simple arbitration agreement entered into by the parties and their selected arbitrator, and by straightforward single-page standard directions, which can be amended to suit the case. Because the 1996 Act applies, party-autonomy predominates, subject to the underlying obligation of the arbitrator under section 33 to ensure a fair and effective disposal of the case; and elaborate protocols and procedural paperwork are dispensed with. There are fail-safe measures which can be taken if it becomes clear, as the case progresses, that the procedure needs to be reviewed.

The model has attracted wide interest. It has the potential to restore the reputation of arbitration as a speedy, cost-effective method of dispute-resolution, incentivising everyone involved in the process to bring cases to an early conclusion at a sensible cost.

Derek Wood is a member of Falcon Chambers, a Fellow of the Chartered Institute of Arbitrators and a Chartered Arbitrator.