Arbitration – a Practical View from the Coal-face

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At the beginning of 2015, we represented two clients; a husband and a wife, both of whom had their financial remedy applications dealt with by way of a final arbitration, rather than a final Court hearing.

Our experiences of them were so benign that we thought it of interest to share some of our thoughts about the process and what in particular went well.

From the outset, our clients were put at ease by the more informal nature of the arbitration process. The arbitrations took place in counsel's chambers. There were no queues to join, no airport-style security to get through and no confiscation of bottles of perfume or aftershave. Comfortable rooms were quickly found by friendly clerks who were on hand to assist.

We could have discussions without being distracted by interspersed tannoy announcements and being alarmed by the disappearance of the South Korean interpreter who was much needed on the first floor of the Central Family Court.

There was no need to journey to the sixth floor of the Central Family Court for refreshment only to find that the solitary water machine was empty, for bottled water was in plentiful supply.

There was no risk of adjournment due to other cases over-running or scheduling difficulties and we didn't get bumped down the list by an urgently interposed case or two. Our arbitrators were ready, just as soon as we were.

The arbitrator sat on one side of a long table, facing counsel and their clients and solicitors on the other side of the table.

The arbitrators were polite and (professionally) friendly. They had the benefit of sufficient time and a manageable caseload. They were relaxed and keen to ensure a civilised spirit. The mood was light enough that occasional jokes could be made and laughter shared. It was a far cry from the fraught Court room, where you can sometimes cut the atmosphere with a knife and demolish a packet of Polos in twenty minutes to defuse tension.

The arbitration process was neat and efficient. Our clients' cases were heard six to nine months earlier than if they had been heard in Court. A full arbitration Award was delivered within five working days of the end of each arbitration. Draft orders were drawn up in the usual way and presented to the Court. In both cases, the arbitrators were asked to clarify certain aspects of their Awards. In both cases the arbitrator did so, in writing, within forty-eight hours.

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The arbitration process was also less regimented and more user-friendly. If you wanted to include 351 pages in your bundle, or produce three bundles instead of one, you could have agreed to do so. You could tailor the rules to your case, rather than tailoring your case to the rules.

There was no risk of media intrusion, and our clients enjoyed a gold standard of confidentiality, which is of increasing importance to our clients.

Although our clients had to pay the arbitrators for their service, the stream-lining of the process certainly saved them money which they would otherwise have spent if they pursued the more conventional court process. By having their cases heard six to nine months earlier, they saved the significant cost of six – nine months' worth of correspondence etc, which would not have made it into the Court bundle in any case. The efficiency of the process also meant that we needed fewer days for the arbitration, than we would have needed for a final Court hearing, which saved our clients further time and money and freed up the family courts to help others in need.

As for the costs of the arbitration, it is a "market" and there are lots of trained arbitrators who want to fill their diaries. At this stage in its evolution, there must be good opportunities to negotiate with the arbitrator or his clerk about fees, if your client considers that is sensible. Arbitration is a tailored and bespoke service, but it can save your client money.

As lawyers, we can of course agree that our children disputes are arbitrated rather than litigated. Although arbitration has not yet (officially) been a solution which is available for cases regarding child arrangements, we are aware of several cases which have used this process. Sir Peter Singer is leading an inquiry into the extension of arbitration to children matters. There is bound to be a positive outcome. The practice is already up and running in Scotland and has really taken off.

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Of course not every case will be appropriate for arbitration, for example, types of non-disclosure, enforcement issues etc. and there are many aspects which need to be carefully thought through, for example, in relation to the involvement of independent social workers in children arbitrations.

Arbitration is no more a panacea for family issues than collaborative law, or its much more popular sister, co-operative law. Ways will be found to increase its popularity. Hodge Jones and Allen have recently launched a new scheme, whereby the solicitors, arbitrator and barristers agree in advance to charge the clients pre-determined fees regardless of how complex the case turns out to be. This move away from hourly charge-out rates, towards fixed fees, will provide clients with greater certainty regarding their legal bills and encourage clients to consider family arbitration in place of more conventional routes.

Arbitration is fast becoming an essential component of the family lawyer's toolkit.