Arbitration is moving mainstream

*Duncan Brooks, QEB*

The recent practice guidance on arbitration clarifies a number of points and highlights the growing popularity of this new process option

Imagine a trial where you are guaranteed to be the only case listed before the judge, who has read everything in advance. The judge is keenly aware that they are providing a service, and will be polite and courteous throughout.

The hearing can be flexible, quite possibly without oral evidence. The bundles direction does not apply (unless you want it to), and the decision will be in writing – delivered very promptly after the hearing finishes. You choose where the hearing takes place but it will not take place in a court building. There will be Wi-Fi, good coffee, and a room for each party. The atmosphere is far more convivial and less intimidating for your clients than a court building would be, and the hearing can start or finish when everyone wants it to – it does not have to follow the 10.30am– 4.30pm court pattern.

This is not a dream. Rather, it is a family arbitration.

For a while after the IFLA family arbitration scheme was launched, uptake was relatively low. There were three main concerns:

(a) Would the scheme be effective? Would courts endorse arbitral awards, or would they be tempted to unpick the award and make a different decision?

(b) Would the cost be unjustifiably high?

(c) What if the arbitrator decides against you – would your client hold you accountable for choosing the arbitrator and the binding arbitration route?

There have now been more than 80 arbitrations, with the pace of uptake accelerating. The above concerns have been alleviated. Most solicitors who have conducted an arbitration are very positive about the process and embark on more.

That is not to say that arbitration is suitable for every case. I would not recommend arbitration as the best choice for:

* International forum races (though if English jurisdiction has been secured, it would be a good option).
* Extreme non-disclosure cases where the coercive powers of the court are likely to be required. The court can be asked to make orders in support of an arbitration (eg for disclosure), but if this is likely to be necessary then it is probably sensible to proceed through the courts.
* Cases involving third parties who are joined to the proceedings. The arbitration would not bind them unless they were willing to sign up to the process.

I will now deal with the three concerns set out above.

### Will courts ratify or unpick arbitration awards?

Cuts to legal aid and the court service are being felt. There has been a sharp rise in the number of litigants in person and generally on the demands on the Family Court. So it is perhaps unsurprising that Sir James Munby, President of the Family Division, has endorsed family arbitration in two important pronouncements. The sum of these pronouncements is that it will only be in exceptional circumstances that a party will be permitted to resile from an arbitration award.

In *S v S (Financial remedies: Arbitral award)* [2014] EWHC 7 (Fam), [2014] 1 FLR 1257, the President made it clear that arbitral awards will almost invariably be ratified by the court. If the parties are putting the matter before the court by consent “it can only be in the rarest of cases that it will be appropriate for the judge to do other than approve the order”. Where one party asks the court to depart from the terms of the award:

“The court will no doubt adopt an appropriately robust approach, both to the procedure it adopts in dealing with such a challenge and to the test it applies in deciding the outcome… The parties will almost invariably forfeit the right to anything other than a most abbreviated hearing; only in highly exceptional circumstances is the court likely to permit anything more than a very abbreviated hearing.”

On 23 November 2015 the President issued his Practice Guidance on Arbitration in the Family Court. This is broken down into six sections.

*1. Where court proceedings are pending and an arbitration has commenced*

Where court proceedings are pending and an arbitration has commenced the court should be invited to stay the proceedings pending delivery of the award. Because the parties will have signed the ARB1, which includes agreement that any court proceedings will be stayed, contested applications are likely to be very rare. The court is obliged to enable non-court dispute resolution to take place where the parties agree (r3.3(1)(b) FPR 2010; s9(4) of the Arbitration Act 1996). Stay applications should be considered on paper without a hearing unless there are unusual circumstances indicating a need.

Where an application is made by consent for a court order implementing the award, the parties should lodge form A (if not already issued); form D81; a copy of the award; a copy of the form ARB1; and a draft order following the standard order format. There is no reason why an application should not be considered on paper by a district judge. The court will retain the power to ask questions or to call for a hearing (eg if there are issues with drafting).

If the parties wish to retain confidentiality, the award can be lodged in a sealed envelope marked “not to be opened without the permission of a judge of the Family Court”. The request for the award to be sealed must be made prominently in the covering letter.

If the application for an order in the terms of an award is opposed, then the application should be for notice to show cause why an order in the terms of the award should not be made. There is no requirement to attend a MIAM. The application will usually be heard by a Circuit or High Court judge. The President reiterated his observation in S v S that the court is likely to adopt a robust approach.

*2. “Arbitration claims”*

This is a term of art, which refers to disputes about whether or not the arbitration tribunal was properly constituted, whether there was a valid arbitration agreement, or a request for a declaration that an arbitration does not bind a party. Pursuant to r62 of the CPR, these applications must presently be made to the Commercial Court. However, there should be a request for a transfer to the Family Division made prominently on the form N8 that initiates this type of claim.

*3. Where no court proceedings have been initiated*

* If either party initiates court proceedings whilst the arbitration is proceeding, then the court may stay proceedings pursuant to s9 of the Arbitration Act 1996.
* A consent order cannot usually be made until decree nisi has been pronounced (but see JP v NP [2015] 1 FLR 659). “Status” proceedings will usually be required before the consent order can be made. Otherwise, the procedure set out under 1. above should be followed.
* If the aid of the court is required (eg for disclosure orders or witness summonses) then the claim will need to be made to the Commercial Court with a request for a transfer to the Family Division.

*4. Enforcement*

Some types of arbitral award may be enforced without a court order as a prerequisite (eg a TOLATA dispute). Rule 62 of the CPR and s66 of the Arbitration Act 1996 apply.

*5. Challenging the award under ss67–71 of the Arbitration Act*

There are two possible mechanisms for challenging an award. The first is to ask a court not to make an order in the terms of the arbitral award, because it would be an inappropriate exercise of the court’s discretion to do so. This has been considered under 1. above. The other route is to bring a challenge pursuant to ss67–71. There are very limited grounds, and such challenges are rarely successful

in relation to commercial arbitrations. Any such application should be heard by a High Court judge of the Family Division (after a transfer from the Commercial Court, which is where such challenges must be brought).

*6. Specimen clauses for standard court orders*

These are appended to the Guidance and will not be repeated here.

### Cost

In my experience, arbitrations are no more expensive that court hearings. The first reason is that the arbitration process is more expeditious, because the court’s diary is not involved. This means that months of new developments, correspondence and updating disclosure can be avoided. The second reason is that arbitration hearings are more efficient. Because the arbitrator will have pre-read all of the relevant papers and will be delivering a written award, most hearings will be concluded within a day. This avoids the expense of attending further days of a hearing.

### What if the solicitor carries the can for a decision that goes against their client?

By entering into an arbitration, the parties are choosing a swift and efficient process. They will be asking an experienced professional to make a fair decision, but they are not buying a particular result. If a solicitor has advised their client properly about the ambit of an arbitrator’s (or court’s) discretion, then they should not be criticised if the arbitrator makes a decision that is not perceived as an outright win. The same would be true if the case were to proceed through the courts.

The ARB1 form allows parties to select a specific arbitrator, but if you are worried that doing so may backfire, there are other options. You could ask IFLA to appoint an arbitrator at random from its panel; or provide a list of arbitrators and request IFLA to select one arbitrator at random from that list.

The first option above is similar to the court system, where you will generally not know who your judge is until the day before the final hearing. The second option above is a useful hybrid, because it is possible to select a pool of arbitrators in whom both sides have confidence. The final decision about who will be appointed will be made by IFLA.

### What next?

IFLA has recently announced that the scheme will be extended to private law children disputes. It will not cover public law or abduction cases. IFLA is in the process of training specialist arbitrators, all of whom must be of at least ten years’ post-qualification experience and also have undertaken a minimum of 400 hours’ work on private law children cases in the past year. This will prove an invaluable option for cases where parents cannot agree and need a decision to be made.

*D.Brooks@qeb.co.uk*

*Duncan Brooks has been appointed as an arbitrator in eight cases, and has delivered awards in five (one settled, the other two are ongoing). He has also acted as counsel in arbitrations.*