Articles

Arbitration in family financial proceedings: the IFLA Scheme: Part 1

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There are those who react to relationship breakdown and its aftermath badly, stereotypically the unreconstructed male or the vengeful female but all too often a matching pair and for them conventional litigation offers virtually endless opportunities to prolong, to frustrate and to expend. But most people experiencing relationship breakdown wish their financial dispute to be dealt with as swiftly, cheaply, privately, and with as little acrimony as is possible. For those who wish that dispute to be resolved by an independent third party who will reach a conclusive decision, rather than to engage in a more or less face-to-face but potentially inconclusive negotiation, opting for family arbitration is the only viable alternative to the full-blown court-controlled (and court-dependent) process. Moreover arbitration can have a number of distinct advantages as an alternative to other forms of dispute resolution. Arbitration offers more privacy than conventional court proceedings and allows the parties the dignity of having as much 'ownership' of the progress of what is after all their process. Arbitration is an adaptable process as well able to suit the needs of parties of modest means as of the more, and the most, affluent or celebrated.

This article is intended as an introduction to the innovative IFLA Scheme which utilises arbitration procedures well-established in commercial and other fora to resolve financial disputes upon relationship breakdown. Its techniques are as well adaptable to decide one or more discrete issues as a full-scale no-stone-left-unturned dispute ranging over all available forms of relief. As a financial case proceeds to court an irresoluble issue can emerge which blocks the channel towards sensible settlement: arbitration of such single or preliminary issues may well open up a passage towards an earlier and more agreeable destination than could be achieved via the courts with their existing listing overload. At the other end of the journey, resort to arbitration may prove a satisfactory last port of call when a mediation or a collaborative endeavour looks likely to capsize and founder after running up against what threatens to be a deal-breaking reef.

In order better to describe the potential advantages of arbitration as an optional alternative to conventional court proceedings and as what may be for some disputants their preferred choice, or as an adjunct to other established forms of family dispute resolution, here is an overview of the Scheme which was developed after consultation with the Family Justice Council and other interested bodies. Paragraph 62 of Ryder J's key report *Judicial Proposals for the Modernisation of Family Justice*, published on 28 July 2012, has this, encouragingly, to say about the IFLA Scheme:

> 'The [Money and Property working group of the Family Justice Council] will also be asked to make recommendations about rule and practice direction changes to facilitate

the determination of cases out of court; for example, where the parties have agreed to an arbitration conducted in accordance with the principles of English law by an accredited family arbitrator, including interim directions and whether special arrangements should be made for the expedition of the approval of consent orders to reflect arbitrated decisions.'

This reinforces the fact that senior family judiciary view arbitration as a useful adjunct to the court process. Anticipated Rule and Practice Direction changes to accommodate arbitration as a separate but twin-track dispute resolution process will immeasurably enhance the IFLA Scheme by giving it the stamp of approval from the highest rungs of the family justice ladder. For a succinct 20-step summary as a personal vademecum, or as an informative hand-out for clients, visit www.familyarbitrator.com where other information about and material for use in connection with arbitration are available.

Overview of the Scheme

The Scheme was launched in February 2012 by the Institute of Family Law Arbitrators (IFLA) in association with the Centre for Child and Family Law Reform at London Metropolitan University. IFLA's stakeholders are Resolution, the Family Law Bar Association and the Chartered Institute of Arbitrators (CIArb). IFLA Scheme Arbitrators are trained under the aegis of CIArb and (subject to passing a demanding arbitral award-writing examination) are then accorded Membership (MCIArb). They are thus subject to CIArb's Codes of Conduct and Disciplinary Regulation. To be accepted on the training course candidates must satisfy minimum requirements which effectively restrict admission to specialist family legal practitioners only. The Scheme operates subject to and under the provisions of Part I of the Arbitration Act 1996, and in accordance with IFLA's Arbitration Rules ('the Rules') and references to articles are to the articles of those Rules. These materials (and the application form, ARB1 – see below) can be downloaded from www.FamilyArbitrator.com.

By Art 2.2, the Scheme may be adopted (and, as we shall see, adapted as required) for financial and property disputes arising from marriage and its breakdown (including financial provision on divorce, judicial separation or nullity); civil partnership and its breakdown; co-habitation and its termination; from parenting or between those sharing parental responsibility; and for provision for dependants from a deceased's estate. The Scheme includes but is not limited to claims pursuant to s 17 of the Married Women's Property Act 1882, Part II of the Matrimonial Causes Act 1973, s 2 of the Inheritance (Provision for Family and Dependants) Act 1975, Part III of the Matrimonial and Family Proceedings Act 1984 (financial relief after overseas divorce), Sch 1 to the Children Act 1989, the Trusts of Land and Appointment of Trustees Act 1996, the Civil Partnership Act 2004 (Sch 5, or Sch 7, Pt 1, para 2: financial relief after overseas dissolution); and other civil partnership equivalents where corresponding legislative provision has been made.

The Scheme does not apply to questions concerning the liberty of individuals, the status either of individuals or of their relationship, the care or parenting of children, and bankruptcy or insolvency, nor can it bind any person or organisation not a party to the arbitration (Art 2.3).

The juridical framework

The Arbitration Act 1996 contains both 'mandatory' and 'non-mandatory' provisions, as to which see s 4(1) and Sch 1. This arrangement is likely to be unfamiliar to many family lawyers but is perhaps self-explanatory, and empowers the parties in relation to their own arbitration to agree to modify or exclude the operation of non-mandatory provisions. The mandatory provisions are however the bedrock, the lowest common denominator of fundamental and immutable provisions, which the parties may not agree to exclude, replace or modify.

Disputes under the Scheme are arbitrated in accordance with Part I of the Act; and regulated, beneath the Act, by the Rules to the extent that they exclude, replace or modify the non-mandatory provisions of the Act; and then within the Rules by any procedural or other provisions agreed between the parties, to

the extent that such agreement excludes, replaces or modifies the non-mandatory provisions of the Act or the Rules (Art 1.3). Think of it as a pyramidal hierarchy, with party autonomy as the bottom but indispensable tier underpinning the edifice.

Section 1 of the Arbitration Act 1996 (the 1996 Act) encapsulates the essence of arbitration as a dispute resolution process. It provides that arbitration pursuant to an arbitration agreement is founded on three principles. These are that:

> '(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;
> (b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest; and
> (c) in matters governed by Part I of the Act, the court should not intervene except as provided by that Part …'

and requires that 'the provisions of this Part . . . shall be construed accordingly.'

This emphasis on party autonomy in s 1(b) has important and it may be crucial resonances for arbitrations in the sphere of family financial disputes: a theme that I will develop in the second part of this article.

These s 1 principles are fundamental, and somewhat analogous to the overriding objectives already familiar from CPR 1998, and now also from Pt 1 of FPR 2010.

Section 33 of the 1996 Act is also a key provision, and defines the three constituents of an arbitrator's general duty in conducting arbitral proceedings, in taking decisions on matters of procedure and evidence, and in the exercise of all other powers conferred on him or her. These are to:

> '(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and
> (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense,

so as to provide a fair means for the resolution of the matters falling to be determined.'

Section 40 of the Act describes the duty of the parties 'to do all things necessary for the proper and expeditious conduct of the arbitral proceedings' to include 'complying without delay with any determination of the tribunal as to procedural or evidential matters, or with any order or directions of the tribunal'.

The interface with the Scheme Rules

These ss 1, 33 and 40 of the 1996 Act are the triangulation points on which arbitration is firmly located. It is within the containing contour they describe that important aspects of the IFLA Scheme are fleshed out both in the arbitration application form (the IFLA Form ARB1) and by the Scheme Rules. The Rules contain just one, albeit a very important additional mandatory requirement in Art 3, that the substance of the dispute is to be arbitrated in accordance with the law of England and Wales (Art 1.3(c)). Thus are outlawed so-called arbitral awards by non-IFLA accredited individuals or organisations (for instance religious tribunals) who or which do not operate within the IFLA Scheme, and whose applicable law may not be the law of England and Wales.

The Scheme establishes what is in effect a pre-selected set of Rules for the application (or not) of the non-mandatory provisions, so as to form a self-contained code for family arbitrations of financial disputes: but even these remain subject in some instances to variation by the parties. The boundary which must not be transgressed is adherence to the provisions of the Act and of its mandatory provisions.

The arbitrator does have some control over the shape of the process once his or her appointment has been confirmed, the point at which the arbitration formally commences: see rr 1.4, 4.5, 9.1. As a general observation, however, one would not expect that an arbitrator's assent (where required) to procedural shifts upon which both parties agreed would be arbitrarily or unreasonably withheld. Thus, subject only to the mandatory provisions of the Arbitration Act 1996 and of Art 3 of the Rules and (once the arbitration has commenced) subject to the agreement of the arbitrator, the parties retain substantial powers to regulate the process.

Submitting a dispute to arbitration

By their Form ARB1 the parties may either seek the appointment of a nominated arbitrator or request IFLA to select an arbitrator from its Family Arbitration Panel (Art 4.3). It is anticipated that those who choose to submit their dispute to arbitration, after discussion with and between their lawyers, will select the arbitrator of their choice rather than leave selection to the IFLA organisers.

Expressly in their Form ARB1 the parties agree to be bound by the arbitrator's written decision (known as an 'award'), subject to: (a) any right of appeal or other available challenge; (b) (insofar as the subject matter of the award requires it to be embodied in a court order) any changes which the court making that order may require; and (c) (in the case of an award of continuing payments) any future award or order varying the award (para 6.4 of ARB1 and Art 13.3).

They also expressly declare and agree (in para 6.3 of the Form) that they have read and will abide by the Rules and that they understand 'our obligation to comply with the decisions, directions and orders of the arbitrator and, when required, to make full and complete disclosure relating to financial circumstances'.

Paragraph 6 of ARB1 therefore repays close attention, and it is critical that the obligations upon the arbitrees that it contains are fully and clearly explained to them by their respective lawyers before they sign up for the process. It will be the practice of some arbitrators that the arbitrator will also reinforce that by explanation to the parties jointly, together and in person, before the Form ARB1 is signed so as to be satisfied that they fully appreciate and accept those obligations and their binding nature.

An embargo or moratorium for court proceedings

Section 9 of the 1996 Act, a mandatory provision, provides for the stay of legal proceedings on application 'to the court in which the proceedings have been brought'. In agreeing to the IFLA Scheme Rules (and

indeed explicitly in their Form ARB1) the parties agree that they will not, while the arbitration is continuing, commence an application to the court (nor continue any subsisting application) relating to the same subject matter, except in connection with and in support of the arbitration or to seek relief that is not available in the arbitration (para 6.2, and 1996 Act, ss 42–45). This resonates with the obligations upon the court to encourage and support alternative forms of dispute resolution to be found in Part 3 of FPR 2010 of which the most salient for present purposes are:

> 3.1.(1) This Part contains the court's powers to encourage the parties to use alternative dispute resolution and to facilitate its use.
> (2) The powers in this Part are subject to any powers given to the court by any other rule or practice direction or by any other enactment or any powers it may otherwise have.
> **Court's duty to consider alternative dispute resolution**
> 3.2. The court must consider, at every stage in proceedings, whether alternative dispute resolution is appropriate.
> **When the court will adjourn proceedings or a hearing in proceedings**
> 3.3.(1) If the court considers that alternative dispute resolution is appropriate, the court may direct that the proceedings, or a hearing in the proceedings, be adjourned for such specified period as it considers appropriate –
> (a) to enable the parties to obtain information and advice about alternative dispute resolution; and
> (b) where the parties agree, to enable alternative dispute resolution to take place.
>
> (2) The court may give directions under this rule on an application or of its own initiative.
> (3) Where the court directs an adjournment under this rule, it will give directions about the timing and method by which the parties must tell the court if any of the issues in the proceedings have been resolved.'

I hope that before long a practice or a PD will be promulgated whereby lodging a consent court application to stay or to adjourn pending financial proceedings to await the outcome of arbitration, accompanied simply by a copy of the parties' signed Form ARB1, should routinely and without attendance trigger the making of the necessary order. Furthermore, if and so far as the subject matter of the award makes it necessary, the parties bind themselves to apply to an appropriate court for an order in the same or similar terms as the award or the relevant part of the award (para 6.5 of Form ARB1 and Art 13.4). As to this see the section on 'Implementing the award' in December's issue's second instalment of this article.

Procedural flexibility

The arbitrator will generally give procedural directions at the outset of the arbitration, and as necessary during its course. Conferences, video-link and Skype calls can be arranged to suit participants' convenience if for any reason a face-to-face meeting is problematical. A checklist, in the form of a schedule of suggested topics, for consideration and exchange by the parties and their advisers in advance of this first 'directions' meeting is freely available from www.FamilyArbitrator.com: of itself it illustrates the wide range of variables which can be built in or added on.

Most arbitrators are likely to encourage email communication on questions that arise during the course of the arbitration, but will be alert to ensure compliance with Art 6.1 which requires any communication between the arbitrator and the other party to be copied to that other party. Arbitrators will also be scrupulous (consistent with the obligation imposed by Art 6.3) that no aspect of a dispute or of the arbitration is discussed with one party or their legal representatives without the participation of the other party and theirs, unless the communication is solely for the purpose of making administrative arrangements.

The procedure adopted will depend on the nature of the issues in dispute which can range from a determination sought on paper alone through to a full hearing with oral evidence and oral or written submissions.

Article 10 ('general procedure') adumbrates one CPR-style procedural

régime, while Art 12 ('alternative procedure') provides for another similar to the familiar FPR Part 9 financial remedy procedure. Those provisions provide alternative default options between which the parties can choose, unless indeed they agree another approach.

Thus it can be seen that a significant difference between arbitration and conventional court proceedings is the freedom that the parties enjoy to agree on the process which they wish should apply to the resolution of their dispute. So the parties, prior to the commencement of the arbitration (constituted by the arbitrator's formal acceptance letter), or thereafter with their arbitrator's consent, may adapt and modify procedures to meet their needs and their means and the particular characteristics of the issues they bring for adjudication.

Seeking the assistance of the court in aid of an arbitration

As with tango it takes two to arbitrate (indeed three, for no arbitrator is obliged to accept an appointment – but there the resemblance to adultery ends). However what must perforce commence consensually as to the mode of resolution of a dispute does not always prove to be plain sailing. One party may develop dissatisfaction with how things are panning out, not like the drift the ship seems to be taking, and hope that he or she can bring the voyage to a premature end. But once the arbitration has commenced any party who decides, as a would-be diversionary or even wrecking tactic, to shout '(wo)man overboard' will soon be disabused of the notion that they can so easily bail out and just jump ship with impunity.

I will not deal with this in detail, but if (for instance) an arbitrator has given directions as to disclosure or discovery which a party disregards, then there are two options. The arbitrator may continue notwithstanding, and draw such inferences as may be justified from the refusal to produce documentation, after warning the defaulter via an 'unless' order that that is what he proposes to do. Or the other party may institute an application inviting the court to give similar directions, backed by the additional stimulus and incentive of a warning as to the potentially penal consequences of non-compliance: by binding themselves to abide by the Rules as well as the award the parties will have agreed (Art 8.6) that if one of them fails to comply with a peremptory order made by the arbitrator and another party wishes to apply to the court for an order requiring compliance under s 42 of the 1996 Act (enforcement of peremptory orders of tribunal), the powers of the court under that section are available.

A court can also make orders for the inspection or preservation of property, and make interim injunctions which are outside the scope of an arbitrator's authority. Resort may also be had to the court for an order requiring the attendance of a reluctant witness. These examples (and they are only examples) demonstrate the extent to which the relationship between arbitration and the court process can be both symbiotic and co-operative.

Rule and/or PD changes are desirable (and are under discussion) to clarify that all such applications to the court seeking relief or a remedy under the 1996 Act should come before an appropriate family court. For the time being a combination of s 105 of the Act, the Allocation Rules made thereunder, and (most accessibly) CPR 1998, r 62.3 and para 2 of the Practice Direction to Pt 62 may land you and your Arbitration Claim Form N8 before a tribunal wholly unused to family business (but quite possibly well versed in arbitration law and practice): for the detail consult the White Book, Volume 2.

Pending whatever may be done formally to remedy this situation, your best course may be to ask for transfer to the Family Division. This is envisaged (even if unlikely ever yet to have happened) by virtue of para 6 of the High Court and County Courts (Allocation of Arbitration Proceedings) Order 1996 (SI 1996/3215), which reads:

> 'Nothing in this Order shall prevent the judge in charge of the commercial list (within the meaning of section 62(3) of the Senior Courts Act 1981) from transferring proceedings under the Act to another list, court or Division of the High Court to which he has power to transfer proceedings and, where such

an order is made, the proceedings may be taken in that list, court or Division as the case may be.'

It must be emphasised however that recourse to CPR 1998 Pt 62 et al is only necessary and appropriate for 'arbitration claims' which, as defined by CPR 1998, r 62.2, do not include applications to stay under s 9 of the 1996 Act (discussed above), nor of course applications made to reflect or to give effect to an arbitral award. The latter most commonly will be made in connection with divorce proceedings (but could also be in TOLATA or other proceedings), where the application will either be made in existing (stayed) proceedings, or to conclude with a consent order an application launched for that purpose. It is only when deployment of Arbitration Act powers is sought (either to secure a contested stay, or to seek orders of the court in support of the arbitral process, or to challenge the arbitration under ss 67 to 73 of the Act) that the 'arbitration claims' procedure applies. The latter two of these scenarios are considered in detail in next month's instalment. Commercial experience suggests that successful Arbitration Act challenges will not be commonplace.

The award and costs

Unless the parties agree otherwise or the award is by consent (Art 13.2), the award must be delivered in writing and must contain sufficient reasons to show how and why the arbitrator has reached the decisions contained in it. Unless the parties agree otherwise, there are presumptions that there will be no order for costs inter partes and that the parties will be liable for the arbitrator's fees in equal shares (Art 14.4), but nevertheless the arbitrator is given a discretion to make costs orders which take account of litigation/arbitration conduct (Art 14.5).

If the parties in any given case wish to incorporate the *Calderbank* procedure then they may do so. (Although almost consigned to history, its passing lamented by not a few, most readers will recall that this is shorthand for the formerly prevalent practice of making an offer expressed to be 'without prejudice save as to costs': *Calderbank v Calderbank* [1976] Fam 93. Such offers are now normally inadmissible in proceedings for a financial remedy before the courts (FPR 2010, r 28.3(8)). They may still be written within the confidential cloak of an FDR appointment (FPR 2010, r 9(17)); or in the costs phase of proceedings for those 'financial remedy' applications which do not fall within the 'no order as to costs' principle enshrined in ibid. r 28.3: r 28.3(4)(b); see the explanatory commentary thereon in *@eGlance*. But I digress.)

The potential benefits of arbitration

I shall return in next month's instalment to the important topic of how to implement an award. I will also comment on the important linked issues: how great is the risk of a disenchanted arbitree frustrating implementation and upsetting an award by an appeal or challenge brought on one of the very circumscribed grounds afforded by the 1996 Act; or of a recalcitrant party who repents of his (or her) bargain wriggling out of it when it is time to reflect an award's terms in a court order to give them effect. In my view none of these potential get-outs or cop-outs is likely to avail, save in rare and unusual circumstances. But meanwhile on this stall are next set out some of arbitration's potential benefits: they are piled pretty high in those cases and for those clients for which and for whom arbitration may be appropriate.

- *Choice of arbitrator:* A key feature of arbitration is that the parties themselves, guided by their lawyers (if they have them), select the person whom they wish to arbitrate their dispute. By contrast, in the court process judges are allocated to cases and the parties do not have the right to request (or, perish the thought, avoid) a particular judge.
- *Arbitrator's availability:* Also, in the court system (as many will recognise only too well) any number of different judges are likely to be involved at different stages of a case, whilst in arbitration the appointed arbitrator alone will deal with the dispute from start to finish. A number of immeasurable advantages can flow from consistency of tribunal.
  - Pressures on the courts can result in judges not having sufficient time to prepare for hearings in advance.

And parties must come to court not knowing whether their case will start or finish on time or will be reached at all. In arbitration, however, the arbitrator is engaged by the parties with the specific task of resolving their dispute.
  - The arbitrator's continuous involvement means that he or she will set aside time to read the papers and to prepare thoroughly for hearings, and will be available to deal promptly with applications for directions and other issues as they arise in the course of the process.
  - Hearings can be listed at short notice to suit all participants' diaries, at a time of day to suit business or family commitments, and at their preferred venue (which may be abroad if circumstances require it).
- *Selection of issues to be arbitrated*: Arbitration is a very versatile and adaptable process. The parties may decide to appoint an arbitrator to arbitrate one or more specific issues, such as (for example) the valuation of a specific asset, or the nature of a disputed gift or loan, or the beneficial ownership of property, or (in a case involving trusts or private companies) whether property or funds within the trust or company are 'available' to a spouse. It must be recognised, however, that the arbitrator has no power to impose joinder on a stranger to the arbitration agreement, and thus that an arbitral award third parties will only formally bind if they have agreed to become parties to the arbitration. There can be no obligation on them to co-operate in this way.
- *Flexibility of timing*: At one end of the range an arbitrator may be appointed to deal with all the issues involved in a full financial remedy claim resulting from divorce or civil partnership dissolution. The issues may be determined all at once, or sequentially at specified intervals of time to permit negotiation and settlement of the other issues in the interim. Like a judge an arbitrator is obliged (by Arts 17.1 and 17.2) to encourage the parties to consider using other dispute resolution procedures, such as mediation or direct negotiation, in relation to the dispute or a particular aspect of the dispute; and if they agree to do so then to facilitate its use. The arbitrator may then, if appropriate, stay the arbitration or a particular aspect of the arbitration for an appropriate period of time for that purpose.
- At the other end of the scale, the arbitrator may be appointed to deal with all the issues involved in a full financial remedy claim resulting from divorce or civil partnership dissolution.

The remainder of this article will be published in December *Family Law*. To maintain the reader's by now no doubt keenly aroused sense of suspense I will reveal only, in the best traditions of the penny dreadful, that then will be yet more potential advantages of arbitration revealed.

This article has developed from a Chapter contributed by Sir Peter Singer to Unlocking Matrimonial Assets on Divorce *(S Sugar and A Bojarski (Jordans, 3rd edn, 2012). It contains material in part derived from the website http://www.FamilyArbitrator.com which he co-edits with fellow arbitrators Gavin Smith and Rhys Taylor.*