

## Family Arbitration Overview

Arbitration is a type of private dispute resolution, in which the parties select an independent and impartial arbitrator to resolve their dispute. Crucially, they agree in advance that the arbitrator's decision (called an 'Award') will be binding on them.

Arbitration has had a long and successful history in commercial and other civil cases. However, it is only since 2012 that it has been available for the resolution of financial and property disputes with a family background, under a scheme established by the Institute of Family Law Arbitrators (IFLA), a body formed by the Chartered Institute of Arbitrators (CI Arb), the Family Law Bar Association and Resolution (representing specialist family law barristers and solicitors respectively).

The family arbitration scheme is governed by the [Arbitration Act 1996](#) and [IFLA's Arbitration Rules \(2014, 3rd edition\)](#). A summary of family arbitration procedure may be viewed [here](#). The application form requesting appointment of an arbitrator is called ARB1 and may be completed and printed out [here](#).

Most people experiencing relationship breakdown wish their financial dispute to be dealt with as swiftly, cheaply, privately, and with as little acrimony, as possible. For those who wish their dispute to be resolved by an independent third party, yet seek to have as much 'ownership' of the process as possible, opting for family arbitration can have a number of distinct advantages compared with going to court:

- 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 it is not possible for the parties to request a particular judge. Also, while in the court system a number of different judges are likely to be involved at different stages of a case, in an arbitration the appointed arbitrator alone will deal with the dispute from start to finish. Another factor is that pressures on the court system mean that judges often do not have time to prepare for hearings in advance, and that parties come to court not knowing whether their case will start or finish on time, or will be reached at all. In an arbitration, however, 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 that may arise in the course of the arbitration.
- Selection of issues to be arbitrated: arbitration is a very versatile process. The parties may decide to appoint an arbitrator to arbitrate one or more specific issues, such as, for example, which of them should keep the family home, or whether there should be a 'clean break'. At the other end of the scale, the arbitrator may be appointed to deal with a full financial remedy claim resulting from divorce or civil partnership dissolution.
- Speed of the process: from start to finish the arbitration process is likely to take less time than contested court proceedings, and the timetable can more easily be tailored to suit the parties' convenience.
- Keeping the lawyers: if (as is recommended) the parties have instructed lawyers, they retain them throughout the arbitration process for advice, preparatory work and representation at hearings. There is nothing to stop parties representing themselves in an arbitration, but, if they do, it is strongly recommended that they take legal advice beforehand.
- Control of the procedure: the parties 'own' the procedure to a far greater extent than in court proceedings. For instance, they can agree that the arbitrator should make his or her award based on consideration of the

paperwork alone (which may be suitable where the issues are narrow) or that there should be a court-style hearing. If they opt for a hearing, they can decide in advance whether the arbitrator is to hear oral evidence or just submissions. This ability to streamline the procedure may well lead to significant savings of time and costs.

- Complete confidentiality: the arbitration process is completely private. Hearings take place at a venue of the parties' choice, and there is no possibility of media access at any stage. Papers are held securely in the arbitrator's office.

How the arbitrator's Award is implemented will vary, depending on the nature of the dispute. If it is one where the court has a supervisory role (as it does, for instance, in financial remedy cases on divorce and on claims for financial provision for children), the parties will generally apply to the court for an order confirming the terms of the Award. Following the landmark case of *S v S* (see below), only in very rare cases will it be appropriate for a judge make a different order, given the parties' agreement at the outset to be bound by the Award.

Where on other hand the court does not have a supervisory role (as for instance where the dispute involves property claims between unmarried couples) the Award may be enforced, with leave of the court, as though it were a court judgment or order.

The scope of the family arbitration scheme is wide. It applies to 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 the ending of co-habitation; parenting or those sharing parental responsibility; and provision for dependants from the estate of the deceased. The scheme includes (but is not limited to) claims which would come within the following statutes: Married Women's Property Act 1882, section 17; Matrimonial Causes Act 1973, Part II; Inheritance (Provision for Family and Dependants) Act 1975; Matrimonial and Family Proceedings Act 1984, section 12 (financial relief after overseas divorce); Children Act 1989, Sched 1; Trusts of Land and Appointment of Trustees Act 1996; and Civil Partnership Act 2004 Sched 5, or Sched 7, Part 1, para 2 (financial relief after overseas dissolution).

In January 2014 the IFLA scheme received powerful endorsement from the most senior family judge, President of the Family Division Sir James Munby. In his judgment in the case of [S v S](#), Sir James stressed the importance of upholding a couple's 'autonomous decision' to settle their dispute privately and by agreement. He ruled that the fact that the couple have themselves decided to submit to arbitration should be seen as the 'magnetic factor' in such cases, and that 'in the absence of very compelling countervailing factor(s) the arbitral award should be determinative of the order the court makes'. Sir James went on to give useful guidance to judges who are presented with applications for consent orders arising from arbitration. He stated that, while the role of a judge is not to be a 'rubber stamp', only in the rarest of cases will it be appropriate for the judge to do other than approve the order that the parties are seeking, based on the arbitration award. Likewise, in cases where one party is dissatisfied with the award and refuses to apply for a consent order, he warned that the court will take an appropriately robust approach. It can thus be assumed that, following *S v S*, an order will be made in the terms of the Award unless one of the parties can show very strong reasons indeed why the Award should not be upheld.