

## KEY CONSIDERATIONS FOR PARTIES AND PRACTITIONERS

### What is family arbitration?

Arbitration is a form of dispute resolution which takes place outside a formal court room. The parties enter into an agreement under which they appoint a suitably qualified person (an arbitrator) to adjudicate a dispute. They agree to be bound by the reasoned written decision in the arbitrator's Award (in a financial case, called a Determination when it relates to children).

### What are IFLA, and the IFLA Schemes?

IFLA and the IFLA Schemes are the result of collaboration between [Resolution](#), the [Family Law Bar Association \(FLBA\)](#), [The Chartered Institute of Arbitrators \(CIArb\)](#) and the [Centre for Child and Family Law Reform \(CCFLR\)](#). The Scheme is operated by the Institute of Family Law Arbitrators (IFLA), a not for profit company, the members of which are [CIArb](#), [Resolution](#) and the [FLBA](#). [CCFLR](#) is also represented on the Board. IFLA is chaired by Lord Falconer.

IFLA has developed its arbitration Schemes to enable parties to resolve family disputes more quickly, cheaply and in a more flexible and less formal setting than a court room.

The IFLA Scheme has two component parts: The Financial Scheme, launched in 2012, and the Children Arbitration Scheme rolled out in 2016. Each Scheme operates under its own Rules (the Rules, accessible on this site), specially designed to meet the particular needs of a family arbitration.

### Who takes the decision?

IFLA Arbitrations are conducted by members of a Panel of trained and accredited arbitrators. There are separate Panels for Financial and Children arbitrations. Some arbitrators are members of both Panels, and thus able to undertake 'all issues' arbitrations in the aftermath of family and relationship breakdown. Panel members are all Members of CIArb, and are listed on the [IFLA website](#).

The administration of the Schemes is managed by Resolution on behalf of IFLA, and the training and regulation of arbitrators are supervised by CIArb.

### The Financial Scheme

In 2012, IFLA launched a Scheme to enable financial family disputes to be resolved by arbitration. As at May 2016 over 100 Awards had been delivered in financial cases. The Scheme has attracted widespread interest, and a high level of judicial support (as evidenced by the President's approach to an Award in *S v S (financial remedies: arbitral award)* [\[2014\] EWHC 7 \(Fam\)](#), [\[2014\] 1 FLR 1257](#) and the decision of Mostyn J in *DB v DLJ (financial provision: arbitral award)* [\[2016\] EWHC 324 \(Fam\)](#)).

In November 2015 the President issued [Practice Guidance and Standard Arbitration Orders](#) which, although they relate to the Financial Scheme, are also in large part relevant and helpful for Child Arbitration participants.

### **What areas does the IFLA Financial Scheme cover?**

Any financial and property disputes arising from family relationships including (but not limited to) disputes under:

- Matrimonial Causes Act 1973
- Inheritance (Provision for Family and Dependents) Act 1975
- Part III Matrimonial Finance and Property Act 1984
- Sch. 1 Children Act 1989
- Trusts of Land and Appointment of Trustees Act 1996
- Civil Partnership Act 2004
- Married Women's Property Act 1882

### **What areas are not covered by the IFLA Financial Scheme?**

- The liberty of individuals
- The status of individuals or of their relationship
- Any arrangements regarding children except for financial arrangements
- Bankruptcy or insolvency
- Welfare benefits
- Jurisdiction or stay cases
- Issues over recognition of a foreign marriage or divorce
- Decisions from Sharia councils and other similar bodies

Arbitrations only bind those who are parties to an arbitration agreement, but arbitrators have no jurisdiction over any other person or organisation.

### **What areas does the Children Arbitration Scheme cover?**

- Generally, any issue between parents or other persons holding parental responsibility or a sufficient interest in a child's present or future welfare
- Where a child should live including shared living arrangements
- Visiting arrangements including holiday time to be spent with a non residential parent
- Education
- Disputes concerning routine medical treatment which is not life-threatening

### **What areas are not covered by the Children Arbitration Scheme?**

- Applications to have a child returned to this jurisdiction (that is to say, England or Wales) from another country
- Applications to remove a child from this jurisdiction, whether permanently or for a temporary period (e.g. for a holiday) to another country, or to regulate cross-border contact arrangements
- Disputes concerning the authorisation or management of life-changing or life-threatening medical treatment
- Any dispute where a person under 18 years old has parental responsibility for the child
- Any case where a party to the proposed arbitration lacks capacity under the Mental Capacity Act 2005

Arbitrations only bind those who are parties to an arbitration agreement, but arbitrators have no jurisdiction over any other person or organisation.

### **What are the benefits of family arbitration?**

The principal benefits of arbitration are:

- Speed

Subject to the arbitrator's availability, the timetable is up to the parties to agree. The parties avoid the risk of a case being adjourned or not finished because of pressure on court time or a judge becoming unavailable. An arbitration is likely to take significantly less time from start to final Award or Determination than the court process.

- Confidentiality

The entire process is protected by strict confidentiality under the Rules of both Schemes.

- Costs

The parties pay the arbitrator's fees, the cost of any venue which is hired, and the cost of a transcription service, if required. However, the ability to limit disclosure and the scope of the dispute, if properly utilised by the parties, should in many cases lead to a net cost saving, since the parties may be able to agree to slim the case down and concentrate on the essential points to be decided.

- Flexibility

Under the Rules of the Schemes the parties and the arbitrator between them have considerable discretion over the procedures they adopt in order to reach a fair result under English Law.

The parties define the scope of their arbitration. In many cases they will want all their differences arbitrated. Alternatively, the arbitration may be limited to agreed issues, leaving room for further negotiation or application to the court. It is permissible for the arbitration to be completed on paper, if the parties agree or the arbitrator so directs, further reducing costs.

The parties in consultation with the arbitrator have complete flexibility as to the time and place of hearings.

- Choice of arbitrator

Parties to an in-court dispute do not have the right to choose their judge, but they do have the right under the Schemes to choose their arbitrator. Knowing that a dispute will be resolved by a selected specialist with appropriate experience will be very attractive to many parties and their advisers. Once appointed, the arbitrator deals with all stages of the case from start to finish.

## **What law applies to an arbitration under the Schemes?**

The law of England and Wales applies to all arbitrations under both Schemes. The arbitrator and the parties cannot agree to apply a different law to the arbitration. Any agreement which seeks to apply a different system of law will not be registered under the two Schemes.

## **How does arbitration fit in with mediation?**

An arbitration resembles court proceedings. An arbitrator will produce a decision, the Award or the Determination, after hearing the evidence and each party's arguments in support of their case. By contrast, a mediator helps a couple reach their own settlement through agreement.

However mediation processes can take place either before or after an arbitration, to the benefit of the parties. Sometimes an arbitrator may consider during the course of the arbitration that mediation would benefit the couple and will then suggest this. A number of arbitrators are also trained mediators and therefore fully understand the benefits of settling through mediation. Conversely, mediators may recommend arbitration as an out-of-court form of resolution if it seems clear that the parties are not going to reach an agreement in mediation.

It is also possible for a mediator to refer a specific part of a dispute to arbitration, in order to resolve a sticking point during the course of a mediation, which may open the door to subsequent agreement, thus facilitating a mediated outcome.

## **How do the IFLA Schemes differ from arrangements made through religious bodies including Sharia councils?**

The Schemes are developed and regulated by IFLA, a not-for-profit company set up by Resolution, FLBA and CI Arb. Arbitrators under the Scheme are subject to the disciplinary code and procedures of CI Arb, the self-regulatory professional body for arbitrators. The IFLA panels of arbitrators consist of specialist and experienced family lawyers specially trained in family arbitration, many having judicial experience.

The arbitration must be conducted in accordance with English family law, thus facilitating enforcement by the courts if necessary. Decisions made in other forums which do not apply IFLA Rules (and in particular the requirement that only English law is applicable) do not have the same advantage.

Since an arbitration Award or Determination is based on English family law principles it is likely to be similar to the outcome a court might have ordered, and will practically always be recognised and incorporated into a court order when required. Since the Financial Scheme commenced in 2012 it has become clear that IFLA arbitrations have the support of many senior judges and other practitioners of English family law. Reference is repeated to the high level of judicial support evidenced by the President's approach to an Award in *S v S (financial remedies: arbitral award)* [2014] EWHC 7 (Fam), [2014] 1 FLR 1257 and the decision of Mostyn J in *DB v DLJ (financial provision: arbitral award)* [2016] EWHC 324 (Fam).

## **How do I start arbitration under the Schemes?**

The first step is for the parties to complete and submit an application: either a Form ARB1FS for the Financial Scheme, or ARB1CS for the Children Scheme.

Both Forms record the parties' agreement to arbitrate and their acceptance of the Rules of the Scheme, and must be signed by both parties or their legal representatives on their behalf.

In the relevant Form the parties summarise the issues to be arbitrated.

The parties can either nominate an IFLA arbitrator or invite IFLA to nominate the arbitrator. They can agree a short-list but invite IFLA to select at random from the list.

Many arbitrators will at this stage suggest a pre-commitment meeting which enables discussion of the nature of the arbitration process to take place, and an opportunity for prospective participants to meet the arbitrator before deciding whether to proceed with that arbitrator.

The Forms stipulate that the parties agree that the arbitrator's decision will be final and binding and that, if necessary, they will apply for a court order to give effect to it.

### **What happens next?**

After the appropriate Form is submitted to IFLA:

- The appointment is offered to the arbitrator
- The arbitrator seeks the parties' agreement to his or her terms
- The arbitrator accepts the appointment and the arbitration formally begins
- The arbitrator contacts the parties with a view to progressing the arbitration, by agreement or (after listening to each party's point of view) as directed by the arbitrator
- Often (though not necessarily) there will then be a preliminary meeting to deal with the further conduct of the arbitration.

### **What is the procedure in family arbitration?**

Although most cases will follow a similar format there is no fixed or rigid procedure. The arbitrator will invite the parties to put forward their proposals at the outset and the arbitrator will then make directions for the procedural steps in the arbitration. Articles 9 to 12 of each set of Rules provide more details about the likely procedures and the powers of the arbitrator to give directions.

### **Is arbitration possible even if we are currently involved in court proceedings?**

All family court judges are aware of the benefits of arbitration. Recent changes to Rules of Court grant power to adjourn court proceedings for the parties to resolve the dispute through arbitration (as well as mediation and other forms of non-court dispute resolution) without affecting the parties' right to resume the court proceedings if (for instance) mediation fails to resolve the dispute.

But once an arbitration agreement (in either Form ARB1FS or ARB1CS) has been signed by both parties (or their legal representatives on their behalf) the court will normally at the

request of either party impose a stay (that is to say, call a halt) to the court proceedings to await the outcome of the arbitration. Then the arbitration Award or Determination can be incorporated into an order in those proceedings, unless the court has good grounds for requiring its modification or (in what are likely to be very rare circumstances) refusing altogether to do so.

### **How are IFLA arbitrators trained, and what qualifications do they have?**

Training and qualifying as a family law arbitrator is available only to those who satisfy the conditions established by IFLA. All IFLA arbitrators are experienced family lawyers who have successfully completed a training course on family arbitration run by CI Arb, selecting to qualify under the Financial or Children Scheme or both. On successful completion of the relevant course it is also a condition that they become and remain members of CI Arb, the self-regulatory professional body for arbitrators. CI Arb lays down ethical codes for its members and deals with complaints of misconduct through its Professional Conduct Committee.

### **Do I need a lawyer to represent me?**

It is strongly recommended that every prospective participant should take legal advice before entering into an arbitration agreement (ARB1FS or ARB1CS) in order to understand the implications and effect of the arbitration process and of the Award or Determination. When signing the Form ARB1FS or ARB1CS parties are asked to confirm that they have been advised as to the nature and effect of the arbitration agreement.

Arbitration retains similarities with court proceedings so representation by a lawyer may be the most effective way to present your case and the legal arguments in its support.

### **What are the powers of the arbitrator?**

Once an arbitrator has been appointed, he or she has wide-ranging powers to make decisions on any case management or substantive issues on which the parties cannot agree. In the absence of agreement, an arbitrator can, for example:

- Rule over what matters are included in the scope of the arbitration
- Determine all case management issues concerning such practical matters as the scope of the written and oral evidence, the extent of disclosure, the need for written submissions and whether an oral hearing is needed. Under the Scheme, both parties are entitled to present their case and deal with the other party's case; this may, or may not, involve a hearing with oral evidence
- Make interim orders including interim maintenance
- Give directions for e.g. the inspection or preservation of property in dispute
- Appoint an expert or assessor as an alternative to directing the parties to engage expert evidence

Unlike a judge, the arbitrator has no power to interview or meet the child or children concerned in a children case. However the arbitrator may agree, or on his or her own initiative direct, the appointment of a suitably qualified independent social worker to see the child or children and to report on their wishes and feelings in the light of their age and maturity, their welfare needs, and what solutions may be in their best interests.

## **What are the costs of a family arbitration? Who is responsible for the costs?**

In an arbitration there are two main types of costs:

- **The arbitrator's fees and expenses**

The arbitrator and the parties will agree the level of the arbitrator's fees (either on an hourly or daily basis, or for an overall fixed fee) by negotiation at the outset of the arbitration.

The usual arrangement will be for the parties to bear the arbitrator's fees and expenses (as well as any fees and expenses payable to IFLA: currently there are none) in equal shares. However, the arbitrator has a discretion under the Rules to order a party to pay more than an equal share (even up to the full amount) if that is appropriate because of the conduct of that party in relation to the arbitration.

- **The legal or other costs of the parties**

These are the costs incurred by a party in engaging lawyers to prepare for and represent them in an arbitration, as well as such costs as the hire of a venue for a hearing. The usual arrangement will be for each party to bear their own legal costs, and not to make any payment towards the other party's legal costs. The costs of a venue (and similar costs) will usually be borne equally. However, the arbitrator has a discretion under the Rules to order a party to pay part or all of the legal or other costs of another party if that is appropriate because of the conduct of that party in relation to the arbitration.

## **Outcomes and their enforcement**

At the conclusion of the process or whenever matters in issue are finally determined, arbitrators will issue an Award or (in children cases) a Determination. The decisions it contains are the arbitral equivalent of a final judgment and (in accordance with the terms agreed at the outset in the relevant Form ARB) are binding as between the parties.

However, English family law does not permit parties a free hand to make their own arrangements for financial and/or property issues or in connection with children on divorce or separation. It follows that an agreement which attempts conclusively to exclude any power of court review is not legally possible, a factor which is specifically acknowledged both in the application Forms and in the Rules of each Scheme.

That said however, an Award or Determination under the Scheme will be the outcome of an impartial adjudication following a recognised process – supported by the Arbitration Act 1966 – whose object is to achieve a fair result.

There is a high degree of probability that Courts will endorse Awards and Determinations made under the IFLA Schemes.

The President of the Family Division, Sir James Munby, has recognised an IFLA arbitration Award in the important decided case *S v S (financial remedies: arbitral award)* [2014] EWHC 7 (Fam), [2014] 1 FLR 1257 which, it can safely be assumed, other judges will follow. In the course of his judgment, the President commended the quality of the IFLA Financial Scheme.

Additionally, if the subject matter or particular provisions of the Award or Determination make it necessary, the parties are bound to apply to the court for an order in the same or similar terms as the Award or Determination (see paras 6.5 of ARB1FS and 8.5 of ARB1CS).

Such an application will in some circumstances be essential to render effective some terms of a Financial Award, for instance an order for a 'clean break' designed conclusively to bring to an end all financial claims between former spouses, or an order relating to private pension arrangements.