



# Arbitration

**Family arbitration is hitting its stride: the IFLA scheme successfully resolving financial disputes and keeping families out of court has now been extended to children cases. Janet Bazley QC and Gavin Smith explain how it works**

**C**ontrast two very different scenarios. In the first, you turn up at court for a family hearing to find that you are listed in front of a non-specialist judge. He is the third judge to have dealt with your case (so far), and has several other cases in his list. You have no idea when, or even if, you will be reached. Emergency applications may be interposed, thus reducing your allocated time still further. Such is the judge's workload that, despite best endeavours, he has been unable to read more than counsel's case summaries. In these times of budgetary constraint, the court facilities are likely to be basic. You may not even have the privacy of a consultation room, but end up in the public waiting area, lever arch files perched on knee. At regular intervals you are interrupted by the usher wanting to know whether you are ready to see the judge, as he has to leave for a meeting at 4.30pm. The entire process is one that is stressful for clients and lawyers alike.

In the second scenario, the parties themselves nominate, on the basis of specialism, experience and reputation, an independent third party to arbitrate their dispute. She will be the 'judge' from start to finish, so ensuring unbroken judicial continuity. Prior to appointment she may well have offered a free of charge, without commitment, appointment so that she and the parties can meet. Once appointed, she will be available at short notice to determine interlocutory issues by email or conference call. If the final determination is by way of hearing, the parties will send her the papers in good time beforehand. Having read them in advance, she may have queries to put to the parties and their advisers. This may result in issues being narrowed

and thus time saved on the day of the hearing. The hearing itself will take place at a location chosen by the parties (counsel's chambers, solicitors' offices, a commercial conference venue or even a hotel). It will be fixed at their convenience. On the day of the hearing the arbitrator will have no other cases listed. If the parties wish to spend the day negotiating, she will not interfere.

#### **Versatility, speed, privacy – and assessing suitability**

Arbitration has other important advantages. First, it may be used at any stage in a dispute, whether or not litigation has begun, and it dovetails well with other forms of private dispute resolution such as mediation or the collaborative process. Second, speed: an arbitration is likely to conclude much more quickly than court proceedings. This means that the saving in costs that would otherwise be run up in correspondence and updating disclosure will in many cases cover the arbitrator's fee. Finally, the arbitration process is completely private and confidential. There is no possibility of media access at any stage. Papers are held securely in the arbitrator's office, and the President's Guidance of 23 November 2015 provides for the secure handling by the court of applications for consent orders flowing from arbitral awards.

Are there cases which are not suitable for arbitration? Certainly, in money cases, if it is likely that recourse to the court will be needed for orders in support of the arbitration, if serious non disclosure is alleged or if there is a cross-jurisdictional dimension to the dispute, litigation may be the more realistic option. But there is no monetary threshold. Small value financial remedy disputes are ideally suited for a paper-only



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adjudication. Children cases involving serious allegations of the type which require a discrete fact finding hearing are unlikely to be suitable for arbitration.

## **IFLA (Institute of Family Law Arbitrators) scheme**

The IFLA scheme, launched in February 2012 for financial cases, was in July 2016 extended to children cases.

### **How it works for financial disputes**

The financial scheme applies to all forms of financial and property dispute arising from the breakdown of marriage, civil partnership and cohabitation, and to disputes about provision for children and for dependants from a deceased's estate. The process is refreshingly simple. The parties complete a form 'ARB1FS' (agreement to arbitrate), inter alia agreeing in advance to be bound by the arbitrator's award (as far as legally possible) and to make a joint application if necessary to court for a consent order to implement the award (as will be required in a financial remedies dispute).

In the ARB1FS they either nominate an arbitrator or request IFLA to choose one from its panel or a shortlist. In the form they also set out the issue(s) for adjudication, which may range from the narrow, such as the term of a maintenance order, the division of chattels, or the quantum of a pension share, to a full financial remedies dispute. The arbitration formally commences on signature of the arbitrator's terms and conditions. There is no MIAMs requirement (mediation information and assessment meeting). The procedure to be adopted will depend on the issues for arbitration. If the parties are unable to agree then the arbitrator will decide. The IFLA Financial Scheme Rules (which run to a mere 13 pages – contrast the FPR 2010), offer two specimen procedural templates, but there is no obligation to use them. In fact, the only mandatory rule is article 3, which stipulates that the arbitrator must apply the law of England and Wales. Depending

on the issues, the final award may be on papers alone or there may be a hearing. The onerous obligations of the Bundles Practice Direction do not apply, so the parties are free to send the arbitrator as much documentation as they wish (though remember that he is likely to charge extra for reading files of old bank statements). Post-award, there are the (limited) rights of appeal or challenge under the Arbitration Act 1996. Attempts to resile from an award will be dealt with robustly (*S v S (arbitral award: approval)* [2014] 1 WLR 2299; *J v B (family law arbitration: award)* [2016] 1 WLR 3319).

### **Arbitration in children cases**

The relatively new children's scheme is governed by IFLA's Children Scheme Arbitration Rules 2016 ('the rules'). This scheme has been carefully designed to provide a bespoke way of dealing with children issues, largely or wholly outside the court forum, putting safeguarding and the voice of the child at the centre of the process.

The rules make clear that the scheme extends to all issues relating to the exercise of parental responsibility between parents or others either with parental responsibility or with a sufficient interest in the welfare of a child. This does not limit arbitration to matters which could be the subject of an application to the Family Court under s 8 of the Children Act 1989. However, the rules exclude certain types of case from the scope of the scheme. Cases under the inherent jurisdiction of the High Court are outside the scheme, as are those where a party lacks mental capacity or a child should be a party, and applications for the authorisation of medical treatment which is life-changing or life-threatening. At present also, international relocation cases (whether permanent or temporary) are outside the scheme. Arbitrators are prohibited by the rules from meeting children subject to the arbitration.

As with the financial scheme, the procedure for children arbitrations is designed to be flexible and led by the parties. Much chimes with the financial scheme. It starts off in a similar way, with the parties

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completing a form ARB1CS, the designated form for children arbitrations. An arbitrator who is a member of IFLA's Children Panel will be appointed and the law of England and Wales will be applied. Recognising the importance of safeguarding, the form is adapted to children cases and accompanied by a safeguarding questionnaire. Each party must also submit a basic safeguarding check obtained from Disclosure Scotland ([www.disclosurescotland.co.uk](http://www.disclosurescotland.co.uk)). This organisation holds the same information as the Disclosure and Barring Service and the basic check is the equivalent of that undertaken by Cafcass for cases being dealt with in court under the Child Arrangements Programme.

Most arbitrators will hold a preliminary meeting with the parties (face-to-face or by telephone) to confirm that the matter is suitable for arbitration under the scheme and to agree the process. The arbitration may be dealt with on paper alone, on submissions or with evidence. The parties and the arbitrator will decide how to hear the voice of the child and whether any expert evidence is necessary. In a case where a welfare report would be ordered by the court, it is likely that the parties will jointly instruct an independent social worker to make appropriate enquiries. If a particular safeguarding issue, such as drug or alcohol abuse, is raised, the arbitrator may direct specific testing.

The scheme encourages the parties to reach a compromise and, in an appropriate case, the arbitrator may adjourn the proceedings to enable the parties to attend mediation. If the parties reach agreement during the course of the arbitration, the arbitrator may deliver a consent determination, which reflects their agreement. Similarly, in the event of a need for formal undertakings, or an injunction, the parties may be directed to obtain these from the court.

The determination will be in writing and will be binding. The no order principle applies but, if a court order is considered to be necessary, the parties will be required by the arbitrator to obtain one,

reflecting the terms of his or her decision. The Practice Guidance issued by the President on 23 November 2015 should be followed where a court order is needed.

The parties may agree how the costs of the arbitration will be dealt with but, absent agreement, the arbitrator enjoys a broad discretion as to who should pay the costs.

The children scheme has all the advantages of the financial scheme in terms of flexibility, speed and limiting cost. It is ideal for single-issue cases, such as schooling, as well as for child arrangements generally.

#### The future

Conscious of pressures on the court system, the judiciary has endorsed family arbitration with enthusiasm, notably in *S v S*, where the President stressed the importance of upholding parties' 'autonomous decision' (per *Radmacher v Granatino* [2011] AC 534) to settle their disputes privately and by agreement. Without question, arbitration offers a versatile, swift and effective way of resolving disputes where the parties are unable for whatever reason to arrive at an agreed outcome, and where they wish to avoid the stress, delay and uncertainties involved in going to court. Anecdotally, client and lawyer satisfaction with the process is high. More than 240 practitioners have qualified as IFLA arbitrators.

Arbitration has been the preferred way of resolving most commercial disputes for many years. With the Family Court struggling to manage its workload, the authors envisage arbitration as increasingly providing a more satisfactory way of resolving family disputes. The opportunities for the Bar, both as advocates and arbitrators, are clear. ●



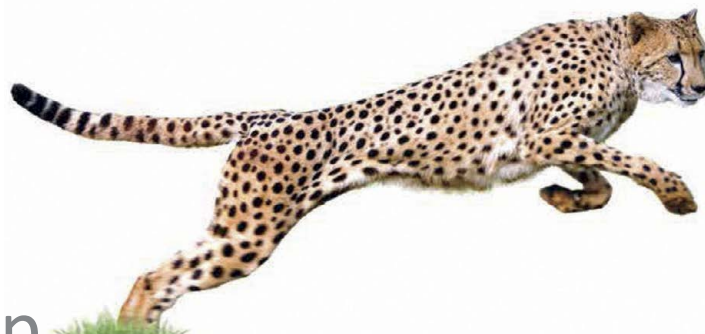
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