Arbitration special edition

Introducing a *Review* arbitration special edition

Nadia Beckett *Beckett LLP*

In this issue we set out the detail and the advantages of arbitration, and ask why the process is not gaining more popularity

Family arbitration is now over five years old. It was launched in 2012 by the Institute of Family Law Arbitrators (IFLA) and there are currently over 200 family law arbitrators in England and Wales – all members of the Chartered Institute of Arbitrators. The IFLA Scheme was launched as a collaboration between Resolution, the Family Law Bar Association (FLBA), the Chartered Institute of Arbitrators (CIArb) and the Centre for Child and Family Law Reform (sponsored by The City Law School, City University London).

In 2016 revised IFLA rules were published which enable specified children disputes to be resolved by arbitration. Family arbitration has therefore grown to include the resolution of disputes concerning children in addition to the established areas of matrimonial finance, cohabitation and joint property disputes, as well as finances for children and disputed will and estate claims. On 23 November 2015, the President very helpfully published Practice Guidance for the Financial Scheme. His Practice Guidance for the Children Scheme will be published this year.

"Family arbitration provides a real alternative to mediation and litigation. Arbitration has many benefits, not least that it is quicker, cheaper and more flexible than court proceedings."

There is nothing similar to the IFLA scheme and it has quickly become one of the most admired and respected family arbitration schemes in the world. Family law arbitrators are all highly experienced solicitors, barristers and part-time or retired judges committed to offering a solution to disputes outside of court. We are regulated by the Chartered Institute of Arbitrators and, in this context, we are essentially arbitrators first and family lawyers second.

Following the withdrawal of public funding for all but a very small number of family cases, we have seen a staggering rise in the number of people representing themselves in the family courts in both financial and children cases. This in turn has led to an increase in contested applications as many litigants in person do not obtain legal advice and maintain entrenched positions which make final hearings inevitable. At the same time, the courts are experiencing financial cuts and there is a decline in the number of couples choosing mediation. It is a perfect storm which sees the family court system trying to do more with less.

As we know, the court process can be a daunting, complicated and expensive experience. It can increase conflict and confrontation during an already distressing period. Family arbitration provides a real alternative to mediation and litigation. Arbitration has many benefits, not least of all that it is quicker, cheaper and more flexible than court proceedings.

The parties enjoy consistency of adjudicator throughout the process, together with control of the procedure, confidentiality and, where instructed, keeping the lawyers throughout. Arbitration can follow the same process as court proceedings or be tailor-made to the needs of the individuals and their specific issues.

Arbitration also works well with mediation. Once seized of a matter the court is obliged to look at the case as a whole and this can lead to a great deal of unnecessary expense, delay and conflict. By contrast, parties can refer a single issue to arbitration and this is a quick, efficient and cost-effective way of resolving the dispute. The parties can also give the arbitrator permission to incorporate, within the award or determination, the issues which have been agreed in mediation, thereby ensuring that all issues form part of the arbitration and are binding. Arbitration has the

advantage over mediation in that the arbitrator's award is binding and final.

The IFLA website has a useful guide for practitioners and a separate guide for members of the public, together with details of all qualified arbitrators. The parties are free to choose their own arbitrator but if they cannot do so they can apply to IFLA for the choice to be made for them. Arbitration is an important tool in the litigator's box of tricks. It is a choice that should be offered to all clients and as practitioners we have a duty to discuss arbitration with our clients in the same way that we now routinely discuss mediation and other forms of alternative dispute resolution. The court also has a duty to consider DR and the time is approaching when we may be required to explain to the court why our clients have chosen to litigate rather than arbitrate. This will be an uncomfortable conversation if we have not made our clients aware of this alternative to litigation, particularly if the court adjourns our proceedings for the purposes of DR.

There is no doubt that family arbitration is universally commended by those who have participated in the process whether as clients, lawyers or arbitrators. Clients quickly see the benefits of arbitration and, in my experience, they will almost always prefer it to litigation when given the choice.

I hope you enjoy the following articles written by family law arbitrators, and I thank then all for agreeing to contribute.

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Why choose arbitration?

Margaret Kelly *Josiah-Lake Gardiner*

The IFLA scheme, which Resolution helped to launch, has numerous advantages over the court process

As a family lawyer if arbitration is not yet in your tool kit it should certainly be on your radar. I hope this guide will assist both those who have not yet come across arbitration in their day-to-day practice, and those who have already utilised it.

Arbitration is an age-old method of dispute resolution, which moved into the family law sphere in 2012 for finances and 2016 for private Children Act matters. Since then there have been 182 referrals to arbitration on financial matters and 12 on children matters. A wide range of experienced family lawyers have trained since 2012, including both part-time and retired judges, and there are now 254 trained arbitrators (finance 218, children 76). On qualification as a family arbitrator the lawyer will become a member of the Chartered Institute of Arbitrators.

"A referral to arbitration and a decision on that issue will often unlock the discussions, allowing the parties to return to the table and reach agreement."

The arbitration process has been approved by the courts in the cases of *S v S* [2014] EWHC7 (Fam) and *DB v DLJ* [2016] EWHC 324 (Fam). On 23 November 2015 the President of the Family Division issued 'Practice guidance: Arbitration in the Family Court', which confirmed the court's support for arbitration and converting into orders the awards made. It also attached three template orders for use both during and after arbitration.

It is worth a reminder that the court must consider non-court-based resolution processes at all stages of proceedings, and so should lawyers. We should also consider non-court-based options before proceedings are issued and keep this in mind throughout the process. Arbitration is unique in family law in that it can be used to decide not only all the issues in a case but also one or more discrete issues. This is particularly useful where parties are unable to reach agreement on an issue, and it is effectively blocking further settlement discussions.

A referral to arbitration and a decision on that issue will often unlock the discussions, allowing the parties to return to the table and reach agreement. Arbitration is a good choice where parties wish to avoid delay (eg after an unsuccessful FDR). An arbitration taking place shortly thereafter dispenses with the necessity of updating disclosure and the expense of ongoing communication about a myriad of matters.

Arbitration is also ideal where parties require confidentiality.

In the short time that arbitration has been available in family disputes, a myth has grown up that it is only suitable for big-money cases. Nothing could be further from the truth. As a tailor-made process it is almost by definition affordable and in my view will often save costs (both financial and emotional). Each arbitrator will have their own fee structure, but most (if not all) will offer a fixed fee to include the arbitration itself and writing the award/determination.

Another very real advantage is the flexibility of the process, as it can take place at a time and place to suit the convenience of the parties. If the issue(s) in dispute are suitable and the parties agree, the arbitration can even be dealt with on paper. So, if you think that you have a case that might be suitable for arbitration, a good first step would be to look on the IFLA website (*ifla.org.uk*) where you will find a wealth of information on the process as well as details of practicing arbitrators.

The next step will be to discuss arbitration with your client, explaining that entering into the process is voluntary but once the parties have signed up to arbitration by completing, signing and returning the forms to IFLA, the decision of the arbitrator will be binding. If your client wishes to go ahead, you will need to approach your opposite number – who hopefully will be aware of arbitration and its benefits.

As is often the case these days, the other party may not be represented and will need to be informed in a neutral way of the process. I would suggest signposting a litigant-in-person to the IFLA website as a great resource providing non-biased information on arbitration.

Another benefit of arbitration is that the parties can choose the arbitrator. Some practitioners have expressed concern that if they choose the arbitrator and the decision is not favourable to their client, the client might somehow blame them for the outcome of the arbitration. If this is a concern, there are several options available to avoid this. First, IFLA can be asked to select an arbitrator from its list, taking into account the expertise needed and the geographical location of the parties. Secondly, one party can prepare a list of, say, three arbitrators and the other can choose one. Either you or your opposite number might have other ideas on how to choose an arbitrator for your case.

Once an agreement to enter into arbitration is reached, a form is sent to IFLA setting out the issues and confirming that the parties will be bound by the decision. The arbitrator will contact both parties confirming that the appointment is accepted. The parties are now in the arbitration process.

As stated above, the process is very flexible, but what will often happen is that the arbitrator will conduct a management hearing (this will frequently be by phone conference) agreeing directions and what needs to be done to bring the matter to a final hearing and whether the matter should be dealt with on paper or by way of a live final hearing.

"Another very real advantage is the flexibility of the process, as it can take place at a time and place to suit the convenience of the parties. If the issue(s) in dispute are suitable and the parties agree, the arbitration can even be dealt with on paper."

Following the hearing the arbitrator will ask for payment and on receipt will release their award (in a financial case), or determination (children). Where necessary, the parties will lodge a consent order with the court, using the orders attached to the President's guidance of 23 November 2015, together with, where necessary, the standard omnibus orders.

The timeframe for an arbitration is far shorter than taking a matter from form A to a final hearing through the court process. In addition, the date you have been given for a final hearing is fixed and there is no chance of being told that the list is overbooked and your matter will need to be adjourned.

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Arbitration – the creative solution

Clare Thornton *Thornton Jones Solicitors*

What are the types of cases and clients best suited to arbitration? The process is flexible enough to accommodate a great many

Because of its flexibility, arbitration is ideally suited for so many cases and so many separating couples. Here are some examples, both real and fictional, of how creative a solution arbitration can be, not only for types of cases or issues, but also for types of clients.

Types of cases suitable for arbitration

Case	*Reason*
Where disclosure has been completed on a voluntary basis, but no agreement reached.	Why go through the whole process of disclosure again by issuing proceedings? Agree to arbitrate and you can have a final hearing within a month to conclude matters.
Where other DR processes have been attempted but failed.	Again, disclosure will not be an issue in these cases, and all that is required is a quick decision to enable the parties to move forwards with their lives.
Where there is a simple issue to be determined, such as maintenance, where capital has been agreed or is not in issue.	The arbitrator will only deal with the issue put to them in the arbitration, so won't seek to overturn capital or other areas of agreement.
"Small money" cases.	Arbitration can be very cost-effective, particularly if dealt with on paper only. For example, I recently arbitrated over a car worth £10,000. My fees were £250 + VAT each, using paper only.
Cases where a court timetable of usually at least a year is not appropriate.	As the court system grinds slowly to a halt, surely most cases would fall into this category. The majority of my arbitrations have been dealt with from start to finish within one to three months.
ToLATA-type cases where the assets don't justify the cost of a civil application.	I recently carried out a papers-only arbitration on a case involving two properties in joint names of cohabitants where the parties had been negotiating via solicitors and just needed an outcome. Total assets £200,000. Cost for the arbitration was £1,000 + VAT between them.

Types of clients who could benefit from arbitration	
Client	***Reason***
Clients who simply can't face each other across a table.	Arbitration can be dealt with on paper only so that clients don't need to see each other in a hearing.
Clients who live far apart, or one party lives abroad.	Again, cases can be dealt with on paper or the parties could choose an arbitrator who operates from a mid-point location. Directions can be dealt with by telephone or Skype where necessary.
Clients with disabilities who cannot travel to court.	Arbitrators will travel! Hearings can be conducted anywhere (within reason), even at a client's house if necessary and agreed by parties.
Clients who simply do not want to or can't stick with the court's Monday to Friday 10am-4pm schedule.	Hearings can take place in the evenings or at weekends if agreed with the arbitrator.
Clients who need privacy for whatever reason.	Arbitrations are always held in private and the awards are private. Again, discretion of venue and timing of hearings is also an advantage.
Clients who have taken "positions" from which they cannot or will not move.	Sometimes with the best will in the world clients cannot back down. They just need a decision made quickly by an expert in family law. All IFLA-qualified arbitrators are by definition experienced family law practitioners.

Family arbitration offers a flexible, efficient and cost-effective service for many cases. The arbitrator has the same powers as a high court judge and the awards are legally binding. Above all, from a client's perspective they get a well-thought-through decision from an expert without the stress of a court process and all its well documented inefficiencies. What's not to love?!

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Creating Paths to Family Justice shortlisted for award

The Creating Paths to Family Justice project has been shortlisted by the Economic and Social Research Council for its Outstanding Impact Prize 2018. Creating Paths to Family Justice is a project delivered by the University of Exeter, to which a number of Resolution members have made a significant contribution. We will keep members updated on the project.

The project was an ESRC-funded project looking at out of court family dispute resolution. It drew on research findings to develop best practice in online and offline family mediation and information services. The research built on the outcomes of the Mapping Paths to Family Justice project, which concluded in 2014.

The work was led by Anne Barlow, working with Exeter academic colleagues Jan Ewing and Janet Smithson, and Rosemary Hunter of Queen Mary University, London. The project was a collaboration with partner agencies: Relate, OnePlusOne, Ministry of Justice, Department for Work and Pensions, Family Mediation Council, Resolution and the Children and Family Court Advisory and Support Service.

The arbitration as told by arbitrators

Jeremy Ford, a solicitor-advocate and children's arbitrator at Setfords Solicitors, sat down with Alex Verdan QC and Charles Hale QC, leading silks at 4 Paper Buildings, to discuss their experience of sitting as abitrators where both parties were represented by solicitors and counsel.

JF: Thanks for giving up your time gentlemen. You've both recently sat as arbitrators; could you tell me what the broad issues were during your arbitrations?

AV: The issues for determination were choice of primary school and the consequential child arrangements resulting from the location of the school.

CH: Mine addressed firstly internal relocation and schooling and the consequent child arrangements. There had been previous local authority involvement as social work assessment/reporting officers but the parties agreed that there were no safeguarding issues and they were not pursuing for historic facts to be found.

JF: And how fast was the process from receiving the Arb1?

AV: Less than four weeks.

CH: It was fast. We had a telephone case management conference a few days after receiving the papers. Two weeks later we had a two-day hearing and I delivered my determination seven days after that.

JF: Seven days! That's impressive. Alex, how long did it take you to deliver your determination?

AV: Three days after the hearing.

"I genuinely think arbitration can be bespoke for people of relatively limited means – and tailored to meet them. If they cannot afford, for instance, two days, they can agree one! Many cases can be dealt with in a much shorter, less costly form."

JF: What did you both see as the advantages of the process versus court proceedings?

CH: It was definitely speed and the right level of formality. The parties felt that they had been fully heard and the representatives were very happy with the general "court" experience, which took place at one of the firm's offices.

AV: I would say that the atmosphere was less formal and less tense. The parties felt they had a good hearing.

JF: And what would you say were the disadvantages?

CH: I didn't really see one in mine. There were time pressures for the start of school and the move, so the participants were, I think, extremely relieved to have a decision made, even if it was a binary one.

AV: The only disadvantage is the perception that a determination is not enforceable but in my case the determination was lodged as an order.

JF: I take it the same happened in your case Charles and an order was lodged for sealing?

CH: Yes.

JF: Could you tell me what children's case is suitable for arbitration and what case is not?

AV: All disputes involving child arrangements: contact, shared care, holidays. If there are serious allegations of harm then it wouldn't be suitable.

CH: Yes all, including internal relocation, school choices, name changes, moving contact on to unsupervised. I would add to the unsuitable list cases where there are alleged elements of coercion or a fact finding is required which might need urgent orders.

JF: And practically speaking was there any difference in the way the case was presented than if it had been in court?

CH: Not really. We constructed a court room in the offices belonging to one of the lawyers. It was a little less formal and I was perhaps more directive of the travel of the evidence. I asked questions first and invited questions on areas rather than generally. I also sought clarifications overnight, including from the local authority, which obliged.

AV: No, save that everyone was a bit more informal and we sat around a large table.

JF: Something I hear often, and disagree with, is that arbitration is only available or suited to well-off participants. Does or can the process cater for those with limited means?

CH: I genuinely think it can be bespoke for people of relatively limited means – and tailored to meet them. If they cannot afford, for instance, two days, they can agree one! Many cases can be dealt with in a much shorter, less costly form, if there is a general acceptance of the arbitration route and an understanding that the arbitration will deliver on the issues only.

JF: And whilst it wasn't appropriate in your cases there will be issues which can be decided on a "paper only" basis which would lessen the cost.

AV: Exactly.

JF: Could the application process be easier?

AV: No, the process is very easy.

CH: I have to agree. It's easy. It's just not widely known enough at this stage.

JF: And finally, two questions. What should solicitors or participants have in mind when considering arbitration and what are the advantages for children if their parents utilise arbitration?

CH: It's just a much better environment all round with less stress at the point of hearing – and a hearing by someone who has actually had the time to read and digest all of the papers – concentrating on their issues and no one else's! For children, it's simple, the delay is taken away.

AV: I would say that it is a much more civilised process which parties can adapt to suit their case.

CH: Also – the parents don't have to say "we've been to court"!! It is more civilised for all.

Jeremy Ford of Setfords Solicitors in conversation with Alex Verdan QC and Charles Hale QC of 4 Paper Buildings.

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Digging down on the detail

James Pirrie *Family Law in Partnership*

Although there are still not as many family law arbitrations as we would like to see, there are enough now to start to discern some trends

Those of us who have had a chance to use arbitration have different reasons for recommending it, and as so often in family law the advantages and disadvantages depend on the "circumstances of the case". So, with the help of colleagues, set out here are some of those details so that members can see the different ways in which family law arbitration can react to the factual matrix.

The first table on pages 16-17 describes my experience as an arbitrator, the second on pages 18-19 my firm's experience using arbitration. It is apparent from the numbers that we have been less successful in advocating the benefits of the model to our opposite numbers than I would like – and would, in our view, have benefitted the clients.

"I have experienced arbitration as just being a much kinder process – the venue is easier; the environment less stressful; we may not even need a final hearing and even without a hearing, the parties seem to feel better heard than is often the case at court."

Others in this issue of *The Review* have set out in detail the particular advantages of arbitration. But, briefly, I have identified the following benefits, from having seen it from both sides:

- The parties really need a quick answer, to be able to get on with their lives. Arbitration could deliver this in probably three weeks.
- The biggest threat in some cases is the cost of the contested process. Sometimes the parties just can't agree an answer and need one imposed. Arbitration will provide that answer quickly and more cheaply than staying in the contested process until FDR.
- Some cases don't need cross-examination – everything that is needed can be outed by questions and paperwork. By avoiding the cost of a hearing, we can deliver real financial benefits to our clients significantly above the spend on the arbitrator's fees.
- I have experienced arbitration as just being a much kinder process – the venue is easier; the environment less stressful; we may not even need a final hearing and even without a hearing, the parties seem to feel better heard than is often the case at court.
- As will be seen below there are technical cases where we need a judge who is going to really engage with the detail of it. We can agree the sort of person we want as "judge" and we will each be more confident than taking the risk with an uncertain judge in a pressured court list.
- Similarly, there are big cases where we need a "judge" who is prepared to look at more than 350 pages of documents.
- There are cases where management is going to be hard and directions appointments at 72-hours' notice will be a boon.
- There are cases where we can, if our clients want, apply the *Calderbank* regime.

Tips for the process

Arbitrator selection: Falling out over the identity of the person to appoint as arbitrator sells your client short. There are many ways to address impasse. For example, one side proposes six arbitrators for the other to choose one. More sensibly, just getting dates and costs usually provides the answer anyway. Choice of "judge" is usually one of those problems that diminishes in significance as the

Cases as arbitrator

Start date	*Assets and pensions*	*Net income*	*Issues*	*First meeting* (T = tele) (O = oral)	*Hearing* (P = papers) (O = oral)
Mar 2012	A: £80k P: £200k	H: £20k W: uncertain	Labyrinthine complexity with W's pension assets underwriting company investments from which H's income drawn.	O	P
Mar 2014	A: £700k P: £600k	£64k – reducing through ill-health	Terminal illness of 1 party; significant health needs of child; scarcely affordable school fees; tertiary educational issues.	O	P
Jan 2015	A: £850k P: £375k	H: £215k W: insignificant	"Last brick in the arch" within collaboratively agreed parameters.	T	P
Jun 2015	A: £446k	H: £120k W: £21k	Child with special needs – impacts on housing and W's earnings.	O	P
Aug 2015	A: £865k P: £845k	£40k of pension income	Significant complexity around foreign pensions.	O	P
Feb 2016	A: £1.5m P: £700k			O	n/a
Feb 2016	A: £1.2m P: £1.3m	Uncertain		O	P
Dec 2017	A: £1m P: £300k	Insignificant	Full range of MCA claims – impasse over asset allocation (equality agreed).	T	P
Jun 2017	A: £100k P: £80k	H: £70k W: £25k, later unemployed	Full range of MCA claims and dispute over a pet.	T	P

Children arbitration

Jun 2017			(Internal) relocation. Approached in July and as the children needed to settle for the start of the school year, speed was an imperative.	O	P

	Process comments	*Representation*	*Timescale* *(arb1 to award)*	*Estimate of time spent as arbitrator*	*Costs charged* *(ex vat)*
	8 separate directions meetings/calls required to entice disclosure from the parties and secure the needed experts' reports to dispose properly of the matter.	Solicitor (later H in person)	12 May to 26 Mar	30 hrs+	£350
	Hiatus built in for negotiation period. Factual summary prepared to assist the parties focus their submissions.	Solicitors	27 Apr to 1 Sep	25 hours	£1,750
	Hiatus in progress through ill-health bereavement of one party (based abroad).	Collaborative solicitors	8 Mar to 17 Jul	20 hours	£750
	Seemingly a significant peace-making role in first meeting. Each party then very much more onside with the process and disclosure. Thirty-two separate issues requiring resolution during the process.	Solicitors	22 Jun to 20 Oct	25 hours	£2,500
	Party B objected to the award and raised issues under s57 of the Arbitration Act, resulting in a further document confirming the earlier award.	Solicitors (+ shadow counsel 1 party)	28 Sep to 16 Feb (20 weeks)	25 hours	£2,500
	Post orientation meeting, H indicated that he would only sign into arbitration on terms (that W did not accept). Matters did not proceed.	Solicitors	n/a	10 hours	£1,000
	Long in-person first meeting. Foreign property, foreign pension requiring foreign accountancy and pensions guidance delayed progress whilst reports obtained. Multiple properties with disputed valuations.	(A) Solicitor/ Counsel (B) Solicitor	1 Feb to 9 Dec	25 hours	£3,000
	Telephone conference call no initial "directions" meeting. Papers only.	Solicitor	14 Dec to 30 Dec (two weeks)	8 hours	£2,500
	Parties very focused on conduct. Had given no attention to "needs" at all. Directions issued on approximately seven separate occasions.	Solicitor (later H in person)	27 Jul to 11 Jan	23 hours	£2,500
	The process hugely assisted by the clients, each already having enhanced DBS checks. Long first in-person meeting with ISW in attendance. Subsequent ISW-children meeting in arbitrator's offices. ISW report. Submissions combined with statements.	In person. The parties each needed considerable help in identifying the principles of the law that would be engaged.	10 Jul to 3 Aug (three weeks)	30 hours	£2,000

Cases using arbitration				
Start date	***Asset base***	***Net income***	***Issues***	***Process comments***
May 2013	£300k	£42k	Alleged domestic abuse, ToLATA, uni support.	Long first meeting; subsequently, papers only; one telephoned directions appointment. Domestic abuse issue resolved by agreement at first meeting with arbitrator's assistance.
Mar 2013	A: £917k P: £900k +	Negligible	MCA (with international elements).	Substantial intake meeting (two hours); then papers only. Statements, submissions, responses. Resulted in the President's judgment *S v S* [2014] EWHC 7
Nov 2015	A: £1.5m P: £350k	H: £42k W: £0	MCA	Highly complex finances taking two days… used court process to FDR. Costs award re non-disclosure.
Dec 2015	A: £300k P: insignificant	H: £75k W: £45k	MCA Short, childless marriage, young-parties case.	Parties elected to disapply PD28(3) and install *Calderbanks*. Oral hearing. Paper submissions re costs.
Apr 2017	–	H: drawing on capital W: £34k	Payer's application for variation of spousal maintenance.	Order provided for variations to be dealt with by arbitration.
Nov 2017	–	–	Recipient's application for variation of spousal maintenance.	Order provided for variations to be dealt with by arbitration.

"I am increasingly a fan of the first meeting. It is the moment when clients see their 'judge' and sense the seriousness and care that they will bring to the case. Doing the directions piece by lawyers on a conference call seems to be a good costs-saver but the economy comes at a price of satisfaction with the overall process."

case gets under way. If truly desperate, Resolution will select and will respond to a request to "select from a shortlist".

Variation cases: If you are using arbitration adopt it early on. The exception might be if you are using the fast track "Chapter V" PD9.18 procedure, which usually offers a first hearing after eight weeks. You might opt into arbitration if that hearing does not provide a conclusion to the case. (Though arbitration from the start may still be the better option, as the Chapter V process comes with the form E2 procedure, which generally offers too little financial information for advice to be given to promote settlement.

Interlocutory stages: Arbitration is very efficient as regards directions and interim matters (such as interim provision legal costs funding). Best seems to be opting in once forms

	Representation/ Arbitrator	***Timescale***		***Costs charged*** *(ex vat)*		***Arbitrator's costs*** *(ex vat)*
		taken	*estimate of court time*	*taken*	*estimate of court spend*	
	Solicitors (later F in person) Oliver Gravell	23 May to 29 Oct (five months)	8 months to FDR	£10.4k	£35k	£2,400
	Solicitors Gavin Smith	6 Jun to 2 Aug (three months)	15 months to FH	£26.5k	£70k	£2,400
	Solicitor and counsel Duncan Brooks	10 Nov to 24 Feb (3.5 months)	FH avoided	£120k	£120k	£7k
	Solicitor and counsel Duncan Brooks	9 Dec to 22 Apr (costs award, 25 Apr) (4.5 months)	Arbitrator's estimate of FH: two to three days	£44k	To FDR £35k To final hearing 70k	£5,000
	Solicitor and counsel Duncan Brooks	4 Apr to 2 Aug (four months)	7 months to FDR	£52k	£80k to FDR	£4,700
	Solicitor and counsel Alex Chandler	29 Nov to 6 Feb (nine weeks)	6 months to FDR	£24k	£40k to FDR	£4,500

E have been exchanged. My colleague Felicity Shedden signs into arbitration before round-table meetings so that everyone knows where they are going if an agreement is not reached – securing agreement to take the step pre-RTM seems easier than doing it post.

First meeting: I am increasingly a fan. It is the moment when clients see their "judge" and sense the seriousness and care that they will bring to the case. Doing the directions piece by lawyers on a conference call seems to be a good costs-saver but the economy comes, I have come to think, at a price of satisfaction with the overall process.

Sign in first: I have offered a model where we fix directions, leaving it to the parties to adopt arbitration afterwards if they want to (ie when they really know what they are buying into). On balance, I think that parties are better served to sign up first – in one case, one party was clearly holding back consent to arbitration as leverage for unfair advantage. (Happily, the other party did not succumb).

Papers only arbitration: This is a fast and efficient option. In the cases I have done there has been nothing that would have come out at a hearing that would have changed the outcome. The costs of the hearing would have had profound effects and been stressful for the clients. Papers-only will usually be a cheaper option than the private FDR.

The other thing we may note is that arbitrator enthusiasm to get cases underway means that many are available at bargain basement rates… Quite why this is not leading to queues around the block is a mystery.

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A note to "the other side"

Julian Bremner *Rayden Solicitors*

Solicitors recommending arbitration to their clients often face a block from the other party's representative. So here's a comprehensive checklist of the arguments in favour…

You are going to have to forgive me if my zeal for family law arbitration come across as somewhat evangelical and "born again". Having been interested in this process option and then having had the opportunity to participate in arbitration, it is safe to say that I am a slightly fanatical convert.

Simply put: it amazes me that more practitioners are not using this valuable and effective process to bring a swift, cost-effective resolution to those cases where a third-party determination of the issues is the only way of resolving a party's dispute. In circumstances where mediation or solicitor negotiation has failed (or is at least unlikely to be successful) parties should be steered towards arbitration, rather than litigation, as its benefits over the court process are numerous and, most importantly of all, it ultimately leads to higher client satisfaction.

Generally speaking, I have little difficulty in convincing my clients to consider arbitration as an option but have noticed that the resistance to this process seems to come from a solicitor acting for their former partners. In this article I am hoping to set out for those solicitors who are reluctant to engage in arbitration some ideas and comments as to why they should perhaps reconsider.

When

I do not necessarily see arbitration as an "outset" option. Arbitration is ideal when the parties have explored the other DR options open to them and have found that they have not been able to resolve the issues between them. So a couple that moves down the mediation path and has several sessions of mediation, but is unable to resolve matters, should consider arbitration as a next step as opposed to litigation; particularly if they reached accord as to some, but not all, points. Similarly, those parties who are engaged in solicitor negotiation but have been unable to resolve matters should consider moving to the arbitration forum.

If parties have mediated, or have enjoyed solicitor negotiation, they have reached a certain level of disclosure, interrogatory and discussions. There may even be some common ground between them as to certain issues – but settlement is obstructed on the basis that they cannot agree some remaining issues between them. In these sorts of circumstances it is time to consider the arbitration option.

In a case that I have recently arbitrated, the parties, who were implacably hostile, nonetheless moved forward with solicitor arbitration, exchanged forms E, exchanged replies to questionnaires and engaged in solicitor-led without-prejudice negotiations, but were so apart as to the structure of settlement they were unable to resolve issues. By moving to arbitration those parties at that point could capitalise on the work (and costs) that they had already undertaken – rather than reinventing the wheel through the court process.

Time

I think this particular issue is key to consider with your client: particularly if there have been pre-discussions, be they through mediation or solicitor negotiation. If the parties have already been in negotiation and those negotiations have failed then, starting by way of form A sets the parties down a potential 18-month to two-year track to resolution of their issues (on the assumption that they will find their way to final hearing).

Conversely, arbitration can be fixed to the parties' respective diaries and start from the point which they have reached on a voluntary basis. My most recent arbitration took two months from the point the parties realised that arbitration was for them.

Most parties will quite happily pay a premium (but see my comments below) to resolve matters quickly. Most parties, particularly in hostile situations, need to be released from their marriage and financial discussions as soon as they are able to, so that they can get on with their lives and stop needing to relate to each other. The alternative to a timely and bespoke arbitration is to stagger your way through the court process, with fixtures that do not necessarily suit and engender delay.

Also to be considered is the avoidance of "side issues". The problem with the delays between the various stages of the

court process is that parties who are arguing often find other smaller issues to argue about on the way through. Simply put, the length of time between first appointment to FDR etc, or FDR to final hearing, means that issues arise which the parties, already looking for outlets of their displeasure, can escalate into satellite issues where there need not be – generally at disproportionate cost.

By choosing arbitration and thus a swift timeline, the waste of time and costs on side issues is a problem negated.

"As the arbitrator pre-prepares, the hearing time is shorter as it's more directive. Anecdotally, the experience is that a two-day final hearing in court is a one-day arbitration, and so on and so forth."

Fixtures

I do not need to dwell terribly heavily on the crumbling and broken court system. All practitioners are now well used to the random allocation of hearings. In my local area the courts that I regularly visit (how I miss the PRFD!) have started "reserve bookings" and "block bookings". For those who haven't had this joy, it means that if you are allocated on the reserve list you are given a date and time for your hearing, but warned that you will not be advised until the day before as to whether it is effective. You can imagine the difficulty that causes not only in terms of preparation but counsel's brief fees etc.

Block bookings are a particular frustration. By way of explanation, I currently have a matter which is listed for a one-day final hearing. I have been provided three dates for that hearing and the one-day hearing could occur at any point over these three days (or not at all). I am not going to be notified until the day before as to when my hearing is going to be effective or if it is going to be effective at all.

Whilst I understand that these new listings may suit the courts, it is hardly convenient to the parties and creates difficulties in terms of brief fees, preparation etc.

Generally speaking, in your first arbitration telephone call (normally considered part of the overall fee and not separately charged for) the parties and the arbitrator fix the timetable and necessary directions (SJE reports etc) to suit their respective diaries. So you will know your next stage in the arbitration process is going to be effective and you will know you are not going to end up wasting your client's time and money.

Also to be considered is that other scourge of the court system: the "hanging around factor". In arbitration, your fixture starts when scheduled. You do not arrive at your arbitration at 9.00 in the morning and only get to see the arbitrator by three or four in the afternoon, having hung around all day waiting, making increasingly desperate small talk with your client, at their cost. This benefits not only your poor client but also the practitioners involved.

Costs

There is no disguising that hiring your arbitrator costs. As Margaret Kelly said in her introduction, different arbitrators obviously charge different rates, but what seems quite common is one fee for one lever arch with a supplementary fee for each further lever arch bundle.

That said, I suggest that focusing on the cost of the arbitrator is the wrong angle to take because there are a series of savings that are to be made which more than negate the cost of your arbitrator and the other attendant costs (potentially the venue hire etc) and these are:

- The speed at which your arbitration happens means that a lot of the side issues that occur between court fixtures are avoided.
- The matter is dealt with as fixed – so your client does not end up paying for those uncomfortable hours when you are actually not doing anything productive but having to engage in chitchat whilst waiting for your tribunal.
- As the process is bespoke, you don't waste costs preparing unnecessary standard documents.
- As the arbitrator pre-prepares, the hearing time is shorter as it's more directive. Anecdotally, the experience is that a two-day final hearing in court is a one-day arbitration, and so on and so forth.
- You obtain written judgment within an agreed time frame, saving costs and time on potential disputes as to the drafting of an order.
- If the issues are suitably discrete, you can apply on the papers and avoid hearing costs altogether.

Tribunal

One of the key benefits I think arbitration has over the courts system is the ability to choose your arbitrator. Simply put, you can make sure that the parties are provided with a selection of arbitrators who are specialists in that particular area of law and are going to be able to help with full knowledge of the law. Given the state of the court system, this is not a benefit to be ignored.

In my own practice I have come across, repeatedly, the issue of arriving at a court hearing only to discover that the tribunal does not have the skills to help the parties. For example, an FDR in which there were complicated arguments of law attaching to the parties' finances meant that both counsel had prepared very careful notes. Unfortunately, the

allocated deputy district judge had a day-to-day practice in planning law. At least the DDJ had the courtesy to call counsel in and explain to them that she did not understand either of their notes and offered to re-fix the FDR. Of course, by that time, the parties had already spent quite a bit of money.

So whilst I am not criticising the DDJs – who do the very best job that they can – their lack of expertise in the area can hinder resolution and sound guidance in a case that by definition needs it.

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Another benefit of choosing the expert, at least on the arbitrations I have been on, is you will arrive for your hearing to see that the arbitrator has a fully tabbed-up trial bundle and has taken the opportunity to well and truly prepare for that hearing. They know the case. They have already perhaps formed preliminary views on the case and this means that the hearing can be directed and focus on live issues only. It also helps the timing. The last arbitration I went on lasted from 10am until 3.30pm. There is no doubt in my mind that had I been fixing that through the court process I would have needed to list it for two days. So my client made a saving of a full day's refresher fee and my own time of being in court for what would have been a second day.

There is a variety of arbitrators available depending on whether you have a financial or child matter. Barristers have been very quick to qualify and there are some very well-known names acting as arbitrators. It should not be an issue for one party to put forward three names and the other party to select one.

There are also solicitor arbitrators available and I think it would be wise for other solicitors to consider them seriously. After all, I am sure I am not alone when I say that over the years fewer and fewer of my cases go to litigation as I am able to settle them with sensible negotiation with likeminded solicitors acting for the other party. I do this day in and day out, so to a certain extent many solicitors have a much better "feel" as to what a settlement will look like for a certain type of factual situation that does not necessarily include a tricky point of law. Solicitors are probably more used to crafting settlements than barristers, who only see a fraction of the work that comes through the solicitor's door. This being the case, consideration should be given to selecting a solicitor arbitrator on the basis of their pragmatic knowledge.

Directions and hearing

Generally speaking, most arbitrators hold a telephone directions appointment with all parties. This is used to set down a timetable through to the final hearing and to fix dates convenient for everyone. It also deals with any "first appointment" style issues that need to be resolved. This can include interlocutory, appointment of experts etc.

Your arbitrator is available by email and telephone if, during the course of preparation for the hearing, an issue arises in which further adjudication as to an interim step needs to be made. By way of example, in an arbitration I dealt with the pension-sharing report came in and raised an issue which had not been contemplated by either party in the first telephone call and the parties were at loggerheads about what to do about this information. The parties simply put their respective positions in an email to the arbitrator who, overnight, sent an email back setting out what was to occur. Simple.

The hearing was how it should be. As the arbitrator knows the case, all the explanatory steps counsel normally need to take are avoided. The arbitrator can be directive and move straight to the issue they want to hear about.

It is much more relaxed. Counsel and arbitrator are more able to have a dialogue (without court flourishes) to explore what needs to be discussed. The arbitration can be as court-like or court-lite as requested. Thus the needless formality that makes court so daunting can be lessened.

Evidence can be more practical. When dealing with the question of housing particulars, the arbitrator can, for example, hear evidence from both parties at the same time as to the one property or the other. Much more useful.

Client satisfaction

We have all seen the disappointment on the client's face when they realise that the court process has its issues and that the tribunal does not have a grasp on their particular case. Despite explaining beforehand that they will not be the only case listed, that a first appointment judge is unlikely to have read anything (and you are lucky if an FDR judge has) this is still saddening for them. Even more distressing is the realisation that, at a final hearing, a perfect stranger, who may or may not have read in, is going to make a decision that they may or may not like.

To take one experience (see my client's comments that I set out below), selecting her arbitrator gave my client a feeling of involvement in her case that she otherwise would not have had – despite the final decision being out of her hands. There was a selection of arbitrators put forward to her, and she could look at their web profiles and choose for herself who she thought might be best for her case. It also meant she had an investment in this process that would have

otherwise been denied to her, so even had the arbitrator decided against her she would have known that this person was not completely removed from her.

I think this ability to still retain some control over your life at a time where otherwise someone is going to make decisions that fundamentally affect you into the future cannot be underestimated.

This is what my client had to say about arbitration:

> "Having never divorced before I have nothing to compare against, save to say that my now ex-husband during this process has consistently been extremely combative, argumentative, unreasonable and prone to procrastinate.
>
> With mediation not even getting to a second meeting due to his stance, I was facing two options – go to court or choose arbitration. Neither seemed attractive as I was always hopeful of a more traditional resolution, but arbitration seemed like the lesser of two evils by a very long way. Key for me is that my legal team and I had the opportunity to review, vet and then recommend the arbitrator who would be responsible for the case in advance, as well as the fact that it didn't seem quite as foreboding a process as going into a court room and all the negativity that that comes with. In this sense I felt more prepared and relaxed for some of what faced me on the day.
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> As for the day itself, it is a nerve-wracking experience as so much rides on it, but because the arbitrator doesn't make a decision on the day – or at least not publicly – one is left with a sense that the result of the arbitration is a far more considered opinion than a knee-jerk reaction I would have had from a judge in court.
>
> The other factors which are in its favour are that arbitration is a far quicker process than going through the court process as well as cheaper. Both of these have to be of huge benefit!"

Summary

I do not understand why more people are not arbitrating, given its benefits. It does let you choose an expert to make a final determination in a timely and cost-effective way, enabling the parties to move forward with their life sooner rather than later and at the same time avoiding the frustrations, costs and delay of the court process.

I have heard people say that arbitration seems to be only for the wealthy, but that simply cannot be the case. Any client who is moving through the court process should be able to consider arbitration as an option for them – particularly given that it will ultimately be cheaper than litigation.

Finally, the client satisfaction reported for arbitration is high and, ultimately, client satisfaction (though a difficult time) is something we all strive for.

While the government should supply a fit-for-purpose court service, the fact of the matter is that it does not, and it is in our clients' best interests for us as solicitors to provide them with a working alternative.

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Financial arbitration agreements – looking to the future

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How do parties go about agreeing that future disputes will be dealt with by arbitration?

The type of arbitration agreement most often encountered by family finance practitioners is the IFLA financial scheme's ARB1FS. That is the form prescribed for the initiation of the arbitration process for money and property disputes falling within the scope of the scheme, as defined by article 2 of the Scheme Rules.

The purpose of the ARB1FS agreement is to facilitate the arbitration of a present dispute. Agreements to arbitrate future disputes are of course commonplace in commercial and other civil fields. Indeed, an arbitration agreement is defined by section 6(1) of the Arbitration Act 1996 as:

> "… an agreement to submit to arbitration *present or future disputes* (whether they are contractual or not)." [emphasis supplied]

In *S v S* [2014] EWHC 7 (Fam) the President of the Family Division, Sir James Munby, gave strong judicial endorsement to arbitration under the IFLA scheme as a means of out-of-court dispute resolution. The dispute with which he was concerned was a present dispute. I suggest, however, that the principles in *S v S* apply with equal force to agreements to arbitrate future disputes.

"The dispute with which Sir James Munby was concerned was a present dispute. I suggest, however, that the principles in S v S *apply with equal force to agreements to arbitrate future disputes. Anecdotally, it seems that such 'future dispute' agreements, whether contained in court orders or nuptial agreements, are becoming increasingly common."*

Anecdotally, it seems that such "future dispute" agreements, whether contained in court orders or nuptial agreements, are becoming increasingly common. That is unsurprising, as it is clear that the arbitration process offers the same benefits irrespective of whether the dispute is present or future.

Suitability

What specific future financial disputes might be suited to arbitration? In a case where there has been a final order, parties could, by means of a recital, agree to refer to arbitration any issue arising as to the implementation of the order, either specifically (such as in relation to the mechanics of an order for sale) or generally. Where there are orders for spousal or child maintenance, parties could agree that any future variation application is to be arbitrated rather than litigated. They could agree to submit to arbitration the division of chattels, in the event that the issue remained unresolved by agreement by a certain date.

Alternatively, and more generally, the recital could simply record the parties' agreement that any dispute arising out of or in connection with the order be referred to arbitration.

Drafting the agreement

What form should a "future dispute" agreement take? The Arbitration Act simply states that arbitration agreements under the Act (and thus under the IFLA scheme) should be in writing (section 5). The following is offered as a sample recital to a court order in a financial remedy case:

> **Agreement to refer to arbitration**
> The parties agree to refer to arbitration any future dispute between them [which arises out of or is in connection with this order] [in relation to the implementation of [paragraph X of] this order] [in relation to the variation of paragraph Y of this order] [in relation to chattels] and which falls within the scope of the IFLA financial scheme.
>
> The following provisions shall apply:
>
> (a) The arbitration shall be conducted under and the parties shall be bound by the IFLA financial scheme rules in force at the date of the commencement of the arbitration;
>
> (b) The arbitrator to be appointed shall be [AB if available] [agreed if possible];
>
> (c) If within fourteen days after one party has served on the other party a written request to agree to the appointment of an arbitrator the parties fail to reach agreement on the appointment, the arbitrator shall be appointed by IFLA under article 4.3.3 of the IFLA financial scheme rules (5th edition 2016, or the corresponding provision then in force);
>
> (d) This agreement is an arbitration agreement for the purpose of section 6 of the Arbitration Act 1996.

Given the parties' agreement to be bound by the IFLA rules, it is suggested that, once the status of the dispute has moved from "future" to "present", a form ARB1FS should be completed in the normal way, in accordance with article 4.1.

The specimen recital above may be adapted for use in pre-nuptial, post-nuptial and separation agreements. It is suggested that in such cases the scope of the arbitration agreement could extend to future disputes relating to the existence, validity, termination or breach of the nuptial agreement itself, and that any challenge to the validity or effectiveness of an arbitration clause would fall to be determined on established *Radmacher* principles.

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