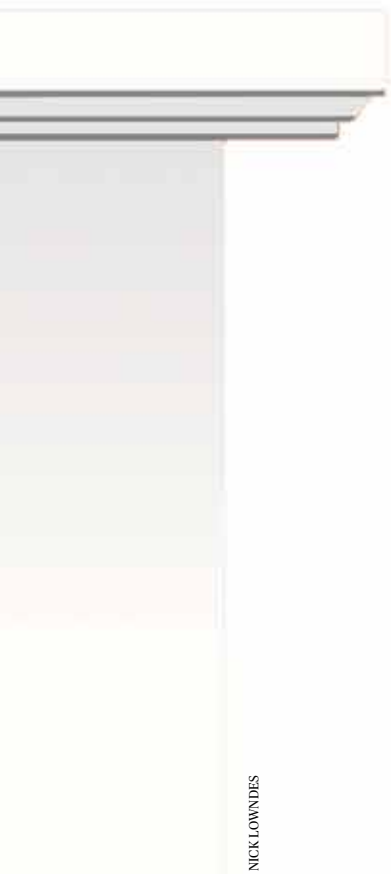
With court systems increasingly under pressure, the use of arbitration in divorce cases is starting to gain momentum across the globe

A decent proposal

By Rima Evans
Illustration: Nick Lowndes



NICK LOWNDES

MONEY and time pressures are bearing down on court systems around the world. This is intensifying the case for arbitration in divorce and family law proceedings.

As experts in family law continue to raise awareness of the benefits of referral to arbitration, it is clear this way of resolving disputes away from the courtroom is reaching a watershed. In some areas, such as in Ontario, Canada and Australia, family law arbitration schemes have been on offer for some years. However, in others, they are being put in place in relatively quick succession, signalling the momentum gathering behind this initiative, but also a clear urgency in meeting demand.

Two years ago, Scotland welcomed an arbitration scheme which was set up by the Family Law Arbitration Group Scotland (Flags). It is also the first anniversary of a new initiative in England and Wales which allows divorcing couples to resolve family law disputes relating to finance or property for the first time (see *The Resolver,* January 2012).

Meanwhile, in British Columbia, Canada, although the concept of family arbitrations is certainly not untested, an overhaul of the 1979 Family Relations Act, effective from this March codifies family law arbitration.

"The use of arbitration in this field is reaching a watershed," according to Rachael Kelsey, arbitrator with Flags and family law specialist based in Edinburgh. "It comes down to public spending and money - and growing pressure on the court system. This seems to be a problem across the globe."

Georgialee Lang MCIArb, arbitrator and attorney in Vancouver, agrees: "There is a whole plethora of problems with the justice system for family law whether that is in Canada, the US, UK, or myriad other countries. The system fosters disharmony and conflict, and there are lengthy delays and outrageous legal fees."

The use of arbitration in this field is growing as governments realise that

family law courts can be "the worst place for couples to resolve their divorce issues," Lang adds.

Meanwhile, on the demand side, Kelsey points out that cultural changes are coming into play, giving the benefits of arbitration added appeal. "There is more of a service culture generally. People are expecting to be told what the timescales are, what the costs are and so on. That's not limited to family law. The world has moved on.

"Arbitration provides a service that the public sector court service does not, and I don't think ever will, provide to clients who are fairly commercially savvy," she says.

Some of the advantages of arbitration include it being less acrimonious than court; being able to choose a date and location of hearing convenient to the parties; having privacy and confidentiality (particularly advantageous for high-profile celebrity couples who wish to keep away from the public eye); the process being much faster, more flexible and often cheaper; and having a choice in who hears the case.

The latter seems to be a significant point since a criticism reported in several countries is that court hearings tend not to be heard by family law specialists. Lang even goes on to say that in her experience: "Insiders know very well that most judges would opt out of family law cases if they had a choice."

On the other hand, under certain family law arbitration schemes, arbitrators undergo rigorous training and have to meet strict criteria, including having a minimum number of years experience in the family law arena.

Beyond the advantages to individuals, these schemes can also bring in savings to the public purse.

The arbitral model for family law in Scotland uses rules that were brought in with the Arbitration (Scotland) Act 2010. It can be used for any family law issue including child matters and the arbitrator's decision is binding.

Kelsey concluded the first arbitration under the scheme in Scotland in January. She says: "It is a slow burn process. There are quite a few arbitrations working their way through the system but we never expected to be deluged. It is a new process and people are understandably wary at the moment. It took five to 10 years for people to feel comfortable about mediation.

However, she adds: "We have had an extremely positive response from our judiciary and The Law Society."

The comparison with the experience of

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mediation, which took years to gain momentum, is echoed by Geoff Wilson, Partner at HopgoodGanim and family law specialist in Australia. There, an effective regime for family law arbitration (limited to financial matters such as property settlement, spousal maintenance, financial agreements and bankruptcy issues) with supportive regulations has been in place since 2000. Yet these have not been embraced by practitioners or clients.

Wilson says: "Arbitrators have been trained and there is a ready stock of arbitrators available including recently retired Family Court judges. There is a wait and see mentality with practitioners waiting on the larger family law practices in Australia to run a few arbitrations before venturing into uncharted waters."

A year after its launch in England and Wales, the Family Arbitration Scheme run by the Institute of Family Law Arbitrators (IFLA), and backed by CIArb among others, seems already to be making steady progress. The number of arbitrations has just reached double figures.

Under this initiative, only financial issues arising from a dispute during divorce are covered. Although practitioners report, this is hardly limiting since financial matters constitute the majority of family law disputes.

Suzanne Kingston MCIArb, Partner in the Family Department at Withers LLP, Accredited Arbitrator and one of the teachers of the IFLA scheme said: "I am really pleased that the IFLA scheme is now up and running. It gives clients the opportunity to have another way to resolve their disputes, which is really important particularly in the current economic climate."

Sir Peter Singer MCIArb, an arbitrator with the IFLA scheme and former High Court Family Division Judge is optimistic the scheme will receive "critical mass" and that a big push may be the withdrawal of legal aid for divorce cases this April.

"Come April, when the courts are going to become inundated, people will resort more to arbitration. However its advantages will also become more appreciated as success stories are spread by word of mouth by family law professionals."

What is as yet untested under the IFLA scheme is the fact that, unlike in Scotland, an arbitrator's decision, relating to a financial dispute following divorce, would not be automatically enforceable under the Arbitration Act 1996 in the same way as a purely civil award.

The enforceability of an arbitration agreement during the arbitral proceedings, in the context of a financial dispute following divorce, will depend upon how the courts interpret the applicability of the Arbitration Act 1996 in a family context. Leading lawyers are pushing for statutory reform in this respect.

Rhys Taylor MCIArb specialist family barrister and arbitrator explains that as the Law Commission is currently reviewing matrimonial law and is considering having a law related to the statutory enforceability of pre-nuptial agreements why not consider reform of agreements to arbitrate in the family context?

Taylor, along with Sir Peter Singer, and backed by leading family law experts, authored a submission to the Law Commission "for statutory provision to be made, alongside the Law Commission's recommendations concerning nuptial agreements, for acceptance, encouragement and enforcement of the binding agreement into which disputant parties enter when they opt to submit financial issues to arbitration by accredited and regulated family law expert arbitrators such as those who

HOW ARBITRATION REDUCED 'TIME AND MISERY' FOR CLIENTS

View from the Inside: Family law arbitrator Dennis Sheridan MCIArb describes his experience of the IFLA process

Does this ring a bell? You sit opposite a client whose face gradually lengthens, whose mouth drops and whose eyes widen in dismay and disbelief as you describe how long it takes to bring matrimonial financial issues to a conclusion through the court litigation process.

You have advised of the other ways there are to resolve their case but, no matter how enthusiastically you describe mediation, their response is negative and they comment: my ex-husband/wife will only listen to a judge. You encouragingly mention the collaborative procedure and that sadly, too, is dismissed.

The case itself does not contain a great value in terms of the assets and capital, far more high street than high net worth - but the parties are at loggerheads on all aspects of their marriage and its financial aftermath.

The one thing that your client does not want is for the matter to go on for what might seem to be an interminable period with the prospect of expensive, lengthy and stressful court appearances, most likely before different judges on each occasion. What do you offer?

In a recent case, I was acting for a client in such a situation and I suggested arbitration. After explaining what arbitration meant and how the financial issues between the parties could be dealt with more speedily and with less formality than through the courts, and with a final and binding arbitrator's award as the outcome, the client agreed that I should propose arbitration to the other side's solicitors.

Fortunately, the parties agreed and the arbitration process kicked into action.

We agreed on two arbitrators we would be happy to engage and the Institute of Family Law Arbitrators (IFLA) Form ARB1 was completed, setting out the basic issues and submitted to IFLA. Within days, one of our nominated arbitrators confirmed his agreement to be appointed and an initial meeting was arranged.

The first benefit of the process had already been felt. Up to this point the parties had not been able to agree on anything, and yet here they were agreeing to 'think outside the box' and resolve their financial matters through arbitration.

The proposal to arbitrate also led to a second benefit: the immediate rapport between myself and my opposite number when it came to completing the IFLA Form ARB1 and setting out the issues that we both considered the arbitrator should deal with.

Another benefit was felt at the initial meeting with the arbitrator: there was good communication between solicitors and the atmosphere was therefore friendly.

> **"The relief to the clients was palpable, the pressure and tensions lifted from them"**

At that initial pre-commitment hearing the arbitrator explained to both parties and to the solicitors present what arbitration was all about and how he suggested they should proceed. He also explained the IFLA scheme rules by which the process would be governed. Most importantly he reiterated what we solicitors had already advised: that once they agreed to arbitration and the process was under way, a central part of their agreement was to be bound by the arbitrator's decision which would be final and binding upon them.

During the initial hearing, the parties, who had barely spoken to each other for quite some time, started to engage with each other, making points jointly to the arbitrator. A rapport was clearly building up between them and the arbitrator as well as between the solicitors and the arbitrator. For the first time, the parties were able to look straight at the decision-maker and hear him talk to them as they, in turn, were able to talk to him. They decided quickly that the arbitrator should be appointed.

The preliminary hearing at which fundamentals would be discussed (similar perhaps to a first directions appointment [FDA]) was the next step. The practicalities as to where and when the preliminary hearing should take place were agreed and what should be done meanwhile. In fact the date selected was just two weeks later. In that time, checklists were to be completed and documents exchanged.

The preliminary hearing allowed a full discussion to take place on the issues that had been listed in the Form ARB1 enabling all parties including the arbitrator to prioritise what each was seeking and what was important to each of them. This was a powerful meeting and the clients' confidence grew, encouraged by the very fact of there being continuity of the same arbitrator. Judicial continuity is something we rarely get in court: here was a chance to see how very important it is and what immense assistance and confidence it gives the clients.

At the preliminary hearing's conclusion, directions were given to prepare for the final hearing. The solicitors were asked to provide written submissions by a specific date, which proved a very beneficial exercise. With submissions exchanged, I asked the arbitrator whether he would be agreeable to a variation of his directions allowing the parties to file counter-arguments by a specific date. The arbitrator readily agreed enabling everything to be ready for the final hearing. This was yet another benefit of having the same decision maker throughout the entire process.

Rather than the clients incurring the additional expense of a full oral hearing, with cross-examination, the arbitrator was asked to arrive at his award as a paper-only exercise. By this stage he had the relevant documents, arguments and counter-arguments before him. The relief to the clients was palpable, the pressure and tensions lifted from them – now all they wanted was to have the decision as soon as possible. The detailed award received enabled the clients to get on with their lives.

This arbitration from start to final award took four months. For court, over that same period we would not even have reached first base, the FDA hearing date.

Arbitration certainly reduced the anxiety and the misery for the clients, and disposing of their case so satisfactorily and swiftly leaves me better able to deal with the next matrimonial case that lands at my door.

'Have you heard about the Family Arbitration Scheme?' I shall ask them...

are members of the Chartered Institute of Arbitrators and who offer their services under the IFLA scheme."

Taylor adds: "In a divorce scenario, this would mean there would be a way to automatically enforce the agreement to arbitrate provided there had been legal advice and there had been disclosure. It would provide bespoke provision for family law." A response is expected by the end of the year.

Meanwhile, the new laws in British Columbia (BC) were introduced in 2011 to mitigate growing dissatisfaction with the family justice system and provide an alternative to the courts.

They set out what family law arbitration is, criteria and training required for being an arbitrator and, crucially, that it's to be the preferred method of resolution. The laws will allow arbitration in respect of any family law issue.

Lang says: "People have been doing arbitration, but this law brings in tight rules and controls. What is of real significance is that its been given credibility by the law saying that arbitration is the preferred method of resolution."

A long-standing criticism of arbitration across the board is that while, in theory, it should be cost effective, in practice, it can rack up huge costs. The fact, too, that an arbitrator charges a fee while a judge in court proceedings is free does raise the question whether the process is a realistic option for the less wealthy.

Lang says that in BC this has been a worry. "People have been arbitrating already here and, to date, it's been used more by high net worth individuals," Lang admits. "But, I believe, there will be a concerted effort here to make it affordable to those on lower incomes. There are ways to do that by tailoring the arbitration so it's cost-effective, such as, for example, limiting the hearing time."

In the UK, the IFLA scheme has been represented by the British press as an option for the super rich bickering over big-money divorce settlements and who want to maintain privacy. Yet this is a distorted view of what is actually happening on the ground.

Singer says: "I'm aware of several low-value arbitrations dealt with by local solicitors that would otherwise have been dealt with at local county court level. Not by any stretch of the imagination are these big-money cases."

Anecdotally, the experience in Australia to date, though limited, has been that the majority of arbitration cases have been undertaken in modest financial cases under legal aid programmes.

Kelsey agrees this is not just a route for the wealthy, pointing out that the scheme in Scotland has caught the eye of the Scottish Legal Aid Board.

"It is in discussion with Flags about what kind of charging structure could be put in place and what kind of cases could be referred to arbitration. The obvious cases are the simple, straight forward ones.

"If the legal aid board think there is merit in this it will hugely take off," says Kelsey.

Mediation and negotiation has long been a tool to help embattled divorcing couples. But the value of arbitration is clearly gaining currency around the world.

ARBITRATION IN THE COURTS

Several key legal cases have served to underline the important role arbitration can play in family law cases, writes Suzanne Kingston who spearheaded family law arbitration in England and Wales

W v M [2012] EWHC 1679 (Fam)

This dealt with a Trust of Land and Appointment of Trustees Act 1996. The case involved confidentiality and whether or not the proceedings should be anonymised. Mostyn J concluded: "Where parties are agreed that their case should be afforded total privacy there is a very simple solution: they sign an arbitration agreement. Arbitration has long been available in proceedings such as these. Recently arbitration has also become available in financial remedy proceedings by virtue of the much to be welcomed scheme promoted by the Institute of Family Law Arbitrators. In those proceedings also privacy can now be guaranteed." It is to be welcomed that such a senior judge endorses the IFLA scheme and arbitration more generally.

T v T [2012] EWHC 3462 (Fam)

The case concerned an American couple who, before their marriage in the US, entered into a premarital agreement containing an arbitration clause. Their married life was mainly lived in England and their marriage broke down while they were living there. The husband started divorce proceedings in the US and the wife in England. The wife declined to embark on the arbitration process prescribed by the premarital agreement claiming that she was not bound by any part of it. The husband started proceedings in the US to compel her to do so. The wife then sought an injunction in England to restrain the husband from proceeding with that application.

The application for an injunction was refused by Nicholas Francis QC . His judgment has many points of interest including the finding that the arbitration clause was not void on the basis that it ousted the jurisdiction of the court.

Francis also considered the separability of the arbitration clause.

This case not only shows how important arbitration is becoming as a method of dispute resolution but that it has wide-ranging implications for the drafting of arbitration clauses in various documents to include prenuptial agreements.

AI v MT [2013] EWHC 100 (Fam)

In this case the court (Baker J) approved an arbitration process before a Rabbi in New York under the auspices of the Beth Din to determine all issues following the breakdown of the marriage of an international couple. The issues involved were child abduction, contact, residence, finances and obtaining a get, but the court kept strict control of the process so as not to oust the jurisdiction of the English Court and to protect the welfare of the children involved. Having ordered foreign law evidence and evidence relating to the Beth Din arbitration, Baker J was satisfied that it was in the parties' interests (and that of the children) for the process to go ahead.

A carefully crafted "safe harbour" order was approved by Baker J which made it possible for the arbitration process to go ahead in New York, but preserved the overriding role of the English Court to determine issues. In his judgment, Baker J makes explicit reference to the Family Proceedings Rules 2010 promotion of ADR (Rule 1.4) and Family Law Arbitration Scheme.