

FAMILY LAW ARBITRATION

Summary

Many couples in relationship disputes need help in resolving their dispute but understandably they don't want to go to court. Sometimes it proves impossible to reach an agreement even with the benefit of a mediator or settlement-orientated solicitors. A decision is needed. Arbitration has considerable merits, including flexibility of resolving disputes, choice and continuity of the arbitrator, speed, confidentiality and other benefits. A new scheme launched in February 2012 has for the first time in England created a body of rules for family arbitration. Over 100 very experienced family lawyers, some with a judicial background, have trained and qualified. In January 2014 it received the support and endorsement of England's most senior family court judge. Family arbitration can be suitable for international disputes. David Hodson was a founder and creator of the English arbitration scheme and one of the first qualified arbitrators.

Introduction

Arbitration is a very common form of resolving disputes in England and across the world. It is frequently chosen or required in consumer disputes. Many multinational companies and governments prefer to arbitrate disputes. It has been commonplace in shipping litigation for many years. It is the process of choice for many litigation lawyers. It has many benefits over court based litigation.

Yet it had never appeared in English family law until the Institute of Family Law Arbitration (IFLA) scheme launched on 22nd February 2012. Following relationship breakdown, arbitration of a financial dispute under the scheme is now conducted under the family arbitration rules, developed specifically by IFLA. The scheme has the backing of the primary family law organisations, the support of the Ministry of Justice and the endorsement of many senior family lawyers including judges. With continued encouragement to use non-court forms of dispute resolution and with public service cuts creating delays, many cases will be referred to arbitration. Many couples find the many benefits of arbitration outweigh almost the only disadvantage, namely the cost of the arbitrator itself.

I was an originator and one of the founders, having first proposed the idea in 2001. The scheme is backed by the Chartered Institute of Arbitrators. They are world leaders in the training and regulation of arbitrators. From the very beginning family law arbitration in England sat firmly within the standards and practice of civil arbitration. In England, Family law arbitration and IFLA arbitrators are regulated in the same way as all other arbitration, under the auspices of the Institute. This rightly gives both lawyers and the public confidence in the Scheme.

From the very beginning, it was the benefits of arbitration which were important.

Benefits of family arbitration

The advantages and benefits of family arbitration include the following:

- Identity of the arbitrator – the arbitrator can be specifically chosen as appropriate for a case and the nature of the dispute, the couple themselves, any distinctive background, for knowledge or experience of the particular aspect of family law or similar. This is in contrast to the relatively arbitrary choice of one of several available judges taken by a court officer on the afternoon before a court hearing the following day.



- Continuity of arbitrator – the arbitrator is involved throughout rather than, as at court, each separate hearing often being before a different judge. Continuity means less wasted costs, more detailed knowledge of the case, consistency of approach and consistency of orders.
- The arbitrator may normally be able to attend an arbitration hearing at a location and time to suit the convenience of the couple. This is the flexibility against a judicial system, and will be important for some people and some disputes. It can take place outside of office hours. The arbitration could take place abroad.
- Many arbitrators use IT, including Skype and other forms of communication, extensively to deal with issues arising and to communicate with the couple and their lawyers.. This can be adapted to benefit the couple as they prefer.
- Each may appear in person or be represented by a lawyer.
- The couple choose their own timetable so they can control the speed of the resolution by agreement or the arbitrator decides what timetable is best. It is not regimented with uniform standard court timetables and other procedures, as for all cases at court. It almost always goes much faster than the court process, which parties prefer and can save costs.
- Privacy and confidentiality – this is important as court hearings or judgments become public. The whole arbitration process is considered private and confidential.
- The Arbitrator can deal with discrete disputed issues or deal with all of the case. The advantage of the former is that the discrete issue in dispute can involve a specific arbitrator for a particularly complex, sensitive, and detailed or specialist element of the case. After this log-jam of a discrete dispute issue is resolved, the remainder of the case can be settled or dealt with through the court process. Arbitration and court resolution can be interchangeable.
- There may be no need for any arbitration hearings. Many arbitrations are all dealt with on paper. This also saves costs.
- The couple control the style of the proceedings, having regard to the nature of the dispute and to their precise needs. This therefore means that proceedings can be much more informal than court hearings. The parties indicate at the beginning the degree of formality or informality they prefer.
- The arbitrator is not bound by all rules of evidence but may inform himself or herself on any matter in any way that he or she considers appropriate.
- The arbitrator may require a person to attend to give evidence and/or produce documents, in accordance with court rules and based on powers in Arbitration Act.
- An arbitration need not be adversarial which the court based system still is at heart; the arbitrator is more of an inquisitor with power to order disclosure of what is particularly needed in a specific case.
- The parties can decide if costs follow the event (e.g. who wins) and if so what is the event, alternatively costs can be shared equally or no order as to costs.



- It is at a cost, unlike the court based system, but arbitration will often save on costs overall due to the beneficial factors of arbitration. The costs are primarily those of the arbitrator and the cost of the venue. These costs can be outweighed by the many benefits.
- At the end of the arbitration the arbitrator makes an award and provides concise reasons and findings of fact. It is agreed that this will be binding. There are prescribed circumstances allowing an appeal into the court system.

How the IFLA Scheme works

Arbitrations invariably commence with an arbitrator being approached by the parties or their lawyers to see if he or she is able to conduct the matter, the likely timescale involved, the costs and any conflicts of interests. The couple must complete an application form, ARB 1.

It covers financial and property disputes arising from family relationships including:

- 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

It does not cover:

- The liberty of individuals
- The status of individuals or of their relationship e.g. divorce decrees
- Arrangements regarding children except for financial arrangements e.g. Sch 1
 - Bankruptcy or insolvency
 - Welfare benefits
 - Jurisdiction or stay cases
 - Recognitions of foreign marriages or divorces
 - Any person or organisation which is not a party to the arbitration

Judges have power to adjourn cases for the purposes of arbitration. This is almost always not prejudicial to the court case. So a couple involved in court proceedings can decide at any stage to resolve a matter, either the complete dispute or a discreet issue, through arbitration.



Arbitration can work alongside mediation. A mediator helps a couple reach their own settlement through agreement. Where this is not possible, an arbitrator will produce an outcome although still not through the court process. Some arbitrators are also mediators and are very aware of the benefits of mediation and an arbitrator may recommend mediation if considered suitable.

At the outset of any arbitration, the arbitrator with the couple and their lawyers agree the procedure to be adopted, the forms to be used including the extent and manner of disclosure and the timetable. This might initially be at a hearing held by the arbitrator however it might be a telephone or Skype conference call or dealt with through e-mail. There is much flexibility.

Although some courts have video facilities, these are more often found with private practice lawyers. Accordingly arbitrators are able to offer more flexible facilities for using video link, especially if the parties are at any distance either from each other or the arbitrator. This is again a flexibility of arbitration. Often courts insist parties attend at hearings in person.

Although parties can represent themselves in arbitration and a number do so, it is essential that each take legal advice before entering into arbitration including the nature and effect of the arbitration agreement, the eventual arbitration award and other aspects.

The costs of the arbitration are in two categories. First, there is the costs of the arbitrator including any venue fee. These will be agreed at the outset. It may be on a time basis or sometimes a fixed fee. The usual arrangement is that the parties bear these fees equally. However the arbitrator has a discretion, if agreed by the parties, to make an award regarding these fees. Secondly, there are the legal costs of the parties, if they are represented. These are the responsibility of each party to their own lawyer. The usual arrangement, as in much of family law, is that each party meets their own legal costs. However there can be an agreement that the arbitrator has power to award costs as considered suitable, take into account offers made and other arrangements.

International Disputes

The IFLA arbitration is only in accordance with English law, although it can take account of foreign law as may occur before a hearing before a High Court judge. An arbitration can take place abroad where the couple may be living and the arbitrator travels to them. As some countries have laws similar to English law, some arbitrators are willing to conduct proceedings according to foreign law but this would fall outside of the IFLA Scheme.

A number of arbitrators are very experienced in international family law matters and accustomed to dealing with cases involving foreign law, so it is anticipated that English arbitrators will be invited to conduct arbitrations abroad. Where the arbitrator has dual qualification e.g. English and Australian family law, then this is ideally suited to a dispute involving different jurisdictions.

The status of the arbitration award

Although there is no statute law, legislation, making family law arbitration awards binding, this is how they will be treated in practice. The President of the Family Division in a landmark decision in January 2014 endorsed and encouraged the use of family arbitration in the IFLA Scheme (see [S v S \(2014\) EWHC 7](#)). Where a consent order is needed after an arbitration, there is a fast track short-circuit process for such orders to be made. Where a party seeks to back out of an arbitration award, the courts will robustly look at the background and good reason will have to be given as to why an order should not be made in the terms of the award. However a party to arbitration can apply to set aside the arbitration award, in essence for no order to be made



in the terms of the award. The grounds are clearly set out in the Arbitration Act 1996. They are not dissimilar to circumstances of an appeal or any other misconduct in the arbitration.

Conclusion

Obviously not all cases are suited to arbitration (and the consent of both parties to go into arbitration is required). Equally, like all new ADR options, it will take time for family arbitration to merge with the legal culture and for practitioners to see it as a viable (and even preferred) option for their clients. However I said in 2002 that I had no doubt that within 5-10 years of the introduction of binding family arbitration, English lawyers will look back and wonder how we got along without it, especially given the ever-increasing complexity of disputes and delay, costs and standardisation of the traditional court processes. With its launch in 2012, I am even more certain that it will quickly form one part, and a vital part, of the family law resolution system.

Please contact David Hodson at iFLG for more details of the Scheme, an application form and any more information. He is available for arbitrations in England and abroad, on discrete issues or an entire case, and decided on paper or actual hearings. He uses technology to make the process easier and quicker.

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