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Non-court Adjudication: Demystifying Arbitration in Divorce and Separation

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Demystifying Arbitration in Divorce and Separation

At the end of what is now the tenth year in which parties in family financial applications in England and Wales have been able to refer their dispute for adjudication by an arbitrator, and the sixth in which parties to Children Act 1989 applications have been able to do the same, I am still frequently asked “What is the point of going to arbitration?”, or “Why should parties want to pay an arbitrator when the court will decide the application for free?”, or even ““So what is family arbitration all about? How does an arbitration work?”. I hope that this short piece will answer these and other questions, and demystify this (by no means new) option for parties in family disputes to avoid the “traditional” march (or, these days, crawl) through the court system.

A LITTLE GENERAL HISTORY

1. Arbitration has been a much used method of resolving legal (and other) disputes outside the law courts for centuries. Indeed it is believed that arbitration was being regularly used in England as early as the 13th century in land and commercial disputes. Over the course of those centuries, arbitration in this country was developed slowly and incrementally until it was put on a more modern, statutory basis in the Arbitration Acts 1950, 1975, 1979 and finally in 1996.
2. The 1996 Act is entirely self-contained, and has stood the test of time better than many statutes. It has never been substantively amended, no doubt largely because it is founded on the general principles set out in s.1, namely that
 - a) *the object of arbitration is to obtain **the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;***
 - b) ***the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;***
 - c) *in matters governed by this Part **the court should not intervene except as provided by this Part.***
3. There are a few mandatory provisions (summarised in Sch I), but these relate, for example, to the general duties of the tribunal and of the parties and certain means of challenging an award. Everything else is non-mandatory, including most of the procedure, on which parties may agree (or the arbitrator may decide) ad hoc or by adoption of a set of Rules.
4. Thus, to all intents and purposes, the Act simply enshrined in statute the essence of arbitration, namely that parties in disagreement can agree that their dispute will be **resolved** by a third party **of their own choice** – someone “in their field”, who “speaks their language”.

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FAMILY ARBITRATION

5. Family arbitration has been successful in Canada for over 30 years, and in Australia for more than 20. After several years of planning and hard work, in 2012 the Institute of Family Law Arbitrators (“IFLA”) was established here by the Chartered Institute of Arbitrators (CI Arb), the Family Law Bar Association and Resolution, in association with the Centre for Child and Family Law Reform. IFLA administers the Financial Scheme and the Children Scheme, trains arbitrators in arbitral law and practice, and promulgates a set of Rules for each scheme.
6. The arbitration of family disputes has received strong judicial support in a number of reported decisions, from that of the then President of the Family Division in *S v S* [2014] 1 F.L.R. 1257 to that of the Court of Appeal in *Haley v Haley* [2021] 1 F.L.R. 1429 in which, whilst deciding that the court should not “automatically” convert an arbitrator’s award into a court order where one party asserted that it produced an unfair result but should adopt the usual “appeals test” when deciding whether to do so, King LJ made it plain that she was not “*in any way undermining the arbitration process or the fact that the parties have signed the ARB1 FS. On the contrary, parties must go into arbitration with their eyes open with the understanding that, all other things being equal, the award made at the end of the process will thereafter be incorporated into a consent order.*”
7. So, to answer the question “*What is family arbitration all about?*”, it is about parties to a financial remedies or children dispute agreeing that:
 - a) someone else – the arbitrator – should decide the dispute for them; and that
 - b) that arbitrator should be someone they (or their solicitors) trust to be both impartial and knowledgeable about financial remedies or children (as the case may be) law and practice.
8. Arbitration is not mediation, nor a collaborative process of any kind. It is a determination, and a determination (after *Haley*) to which the parties will be held to the same, but to no greater, extent than they would be held to a first instance decision in court. If one party is dissatisfied with the outcome, the procedure for challenging it is (now) set out in *A v A (Arbitration Guidance)* [2021] EWHC 1889 (Fam) (in which Mostyn J, mercifully, “upheld” an award of my own).

WHY SHOULD PARTIES ARBITRATE?

9. There are many advantages to arbitration compared to the court process. I have already mentioned the first. Whilst arbitration produces a determination just like the court process, it is a determination by someone the parties choose and trust, rather than by a judge “selected”, often at the eleventh hour, by the demands/exigencies of

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the court's diary. I have heard it said that some are wary of choosing their arbitrator lest their award not be to their (or their client's) liking, but parties choose, for example, mediators and private FDR judges regularly and an arbitrator is no different. If the choice is difficult, there is no reason why a shortlist should not be drawn up and an arbitrator picked from it at random or by a third party (or even IFLA).

10. However, if the agony of choice is a disincentive, the parties can simply ask IFLA to choose for them from its substantial cohort of arbitrators. For there are many other advantages still, particularly with the court system as heavily stretched as it currently is, the more so after the recent period of pandemic-related restrictions. They include:
 - a) **Continuity** of tribunal from start to finish.
 - b) **Reliability** – your hearing will not be moved to a different tribunal, or cancelled completely, the day before it is due to start.
 - c) **Time** – your arbitrator has not had four FDRs before them yesterday, and two “mentions” (short appointments) slotted in before your hearing starts today. They have had time to read and to think before any hearing starts, and have time to consider their conclusions once it has finished.
 - d) **Accessibility** of your tribunal – unlike a judge, your arbitrator can be contacted (bilaterally) to decide individual issues (breadth of a questionnaire, letter of instruction, identity of expert, interim applications) as the case proceeds, often on paper but if necessary by a short hearing swiftly convened.
 - e) **Confidentiality** – arbitral proceedings are entirely confidential, with no third party access. In at least two of the cases in which I have acted as arbitrator it was clear to me that a primary concern of the parties (and for very different reasons) was that their disputes should be resolved in private, and they achieved that by choosing arbitration. Of course (subject to the outcome of the current review of the court's approach) a court challenge to the award might open the proceedings to an extent, but an appeal from a court decision may do so already. In arbitration, confidentiality “at first instance” is assured in a way it is not in court.
 - f) **Flexibility**, in almost every sense:
 - i) an arbitration can deal with the whole of a financial or children application, or a discrete element of it. Moor J in *CM v CM* [2019] EWFC 16) could not understand why the parties had not asked an arbitrator to determine the terms of a letter of instruction to a SJE, and why not arbitrate just your first appointment? Or just chattels?
 - ii) the disclosure and other directions can be tailored from the start to the issues at stake;
 - iii) issues can be determined after a live or remote hearing, or on paper;
 - iv) if the parties wish to have a private FDR (with another tribunal, of course) once disclosure is completed, or to put a hold on the arbitration process to permit mediation, they can do so.

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- g) **Speed** – the timetable need only take account of the parties’ (and the arbitrator’s) diaries, so an arbitration, even of the whole of an application, is usually concluded much more quickly than would be the case in court. That does not mean that there is less work involved for the parties or their lawyers, just that there is less “idle time” between hearings.
 - h) **Comfort** – something often forgotten is that an arbitration hearing can, and usually will, take place in much more comfortable surroundings than a court, from the conference facilities to the refreshments. Insofar as it is needed, any technical equipment is also likely to work.
11. These advantages substantially outweigh the fact that parties need to pay their arbitrator. Indeed, the reduction in “idle time”, and therefore in continuing correspondence or even the need to update disclosure, is likely to save as much in costs as the arbitrator charges.
12. Moreover, there is now a positive incentive to arbitrate, as a costs order might be visited upon a party who refuses to consider doing so.

SO HOW DOES ARBITRATION WORK?

13. There is no difficulty in choosing arbitration. The parties simply either
- a) agree the identity of their arbitrator, sign their ARB1 FS (financial) or ARB1 CS (children) nominating him or her and send it to IFLA, or
 - b) sign the relevant ARB1 form asking IFLA to select an arbitrator (on whatever basis, or from a shortlist) for them, and send that.
- IFLA then sends the form to the arbitrator.
14. The arbitrator will send out a copy of his or her terms of engagement (which is a contractual one), and once the parties have accepted those terms (principally as to fees) the arbitration is “up and running”.
15. The ARB1 (FS or CS) sets out the dispute the arbitrator is being asked to resolve, so it is important that all issues on which a determination is sought are recorded (although “all aspects of the parties’ respective financial remedies claims” is sufficient). It also records the parties’ agreement that:
- a) once the arbitration has started, they will not commence court proceedings or continue existing court proceedings in relation to the same subject matter (and will apply for or consent to a stay of any existing court proceedings, as necessary);
 - b) any award of the arbitrator will be final and binding on them, subject to the following:
 - i) any challenge by way of available arbitral process of appeal or review or in accordance with the provisions of Part 1 of the 1996 Act;

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- ii) the refusal of the court to “implement” the award as an order (i.e. on “appeal” per *Haley*, above)
- iii) insofar as the subject matter of the award requires it to be embodied in a court order (see 6.5 below), any changes which the court making that order may require.

The ARB1 CS also provides for the provision of safeguarding information.

16. In terms of the rules and the process, these will come as no surprise to anyone involved with court proceedings, save that they permit of much more flexibility. In an ordinary case, the IFLA procedural rules at their most restrictive mirror the FPR (with directions appointments, disclosure questionnaires etc), but are rarely adhered to slavishly, and with minimal restrictions the parties can, subject to the arbitrator’s approval, freely agree the form of procedure to be adopted. An arbitrator can appoint an expert or an assessor and can direct the parties to engage with the expert(s).
17. The parties can settle their case (or part of it) at any time. If they wish, the arbitrator will produce a “consent award” recording the settlement.
18. Assuming the hearing of the arbitration proceeds, again there are no surprises. Unless otherwise agreed or directed, the parties give/call their evidence; their lawyers make submissions; the arbitrator determines the issue(s). It is a fairly formal process, treated just as a court hearing. The only difference between court and arbitration here is that there will be no *ex tempore* (i.e. immediate, oral) judgment. The arbitrator must produce a written award, setting out their determination of the application(s) and their reasons.

WHAT ABOUT THE COURT?

19. In accordance with the fundamental principles of the 1996 Act, the court has little involvement, but in support of the arbitration:
 - a) It can enforce an arbitrator’s peremptory order (against, for example, a party who fails to provide disclosure that has been ordered);
 - b) It can enforce the attendance of a reluctant witness at an arbitration hearing;
 - c) It can make orders (for inspection, photographing, preservation etc) relating to property which is the subject of the proceedings.
20. Unless the court is “actively” involved in this way by the parties or the arbitrator, however, the arbitration is entirely self-contained. My own experience as arbitrator, in fact, suggests that such involvement is likely to be rare. The parties have chosen the route of arbitration, and so are invested in it. They tend to comply with directions and the like.

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21. Finally, as emphasised in *Haley*, since only the court can enforceably determine a financial remedies claim (and in any event, only a court can order a “clean break” or make a pension sharing order and some orders in relation to children), the ARB1 records the parties’ agreement, if necessary, to ask the court at the conclusion of the process to make an order reflecting the arbitrator’s award.

SO WHY NOT ARBITRATE?

22. There is nothing mysterious or scary about arbitration. As solicitor, counsel, or party to the proceedings the experience is much like that in court in principle, but much better than that in all practical respects, as I have heard from everyone I have spoken to after they have been involved in an arbitration.
23. As King LJ said in *Haley*, *“There is a common misconception that the use of arbitration, as an alternative to the court process in financial remedy cases, is the purview only of the rich who seek privacy away from the courts and the eyes of the media. If that was ever the position, it is no more.”* There are qualified arbitrators of all seniorities and all levels of fees (we have a total of 11 in my chambers alone across financial and children matters), and as with any private engagement the proportionate candidate can be found.

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Christopher is Joint Head of Chambers at 1 King's Bench Walk and he specialises in divorce and matrimonial finance in disputes between high net worth parties. He was one of the earliest to qualify as a financial scheme arbitrator and is highly sought after as a tribunal in private FDRs both in the UK and offshore, and as an arbitrator in complex financial cases.

He has a wealth of experience dealing with complexities involving corporate and other businesses and/or complex remuneration packages, as well as with cases involving offshore and onshore trust and other asset-holding structures. Many, if not most, of his cases involve international and cross-border aspects, either substantively or in relation to enforcement.

Recognised as "*An excellent advocate and negotiator with an extremely good bedside manner*", he has been top ranked over many years in both Chambers and Partners' and Legal 500's Guide to the Bar.