St.Mary's
FAMILY LAW SPECIALISTS

Arbitration

The NCDR Option that is Unreasonably still treated with Trepidation

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Whilst I often try and write articles about interesting areas of Family Law, this article will be a more blatant advert for the services that can be offered by me and others in St Mary's Chambers for arbitration. If I was writing this article on social media, it would be accompanied by #ad. That is not to say that the information in this article is any less useful or helpful than hopefully my usual musings are, however, I prefix it all with that self-realisation.

I have recently undertaken and passed the training to be both a qualified arbitrator in the financial remedy scheme and the children scheme. This means that I can undertake the wide array of arbitrations in these two areas. I join several other arbitrators at SMC who can undertake arbitrations in both schemes.

The purpose of this article is to explain how arbitration works and how it might assist your clients, predominately because I have found there is a lot less understanding of Arbitration out there than many other forms of NCDR.

What is arbitration?

Arbitration is a form of Non-Court Dispute Resolution (NCDR), however unlike other forms of NCDR it creates a legally binding decision which the clients cannot seek to resile from. It is not like a pFDR or mediation in that it does not involve negotiation. It is instead a privately funded final hearing to determine issues or issues that exist between clients, to create a binding written determination that is legally enforceable as if it had been made within the Family Court. **It is in essence a private judicial system.**

Parties must enter into this legally enforceable outcome by agreement. The parties must both agree to arbitrate their decision, if one does not agree to use arbitration then there cannot be an arbitration. This is a clear distinction from the court process where any party can issue an application at any stage.

The arbitration process formally starts by parties signing an ARB1 that sets out their agreement to enter arbitration. **This document defines the scope of the dispute that they agree that the arbitrator can determine.** The parties are open to agree as many or as few issues to be determined. Again, distinct from the court process the arbitrator is not able to determine issues that are not within this ARB1 or by subsequent agreement. The parties therefore set the limits of their dispute, and these cannot be widened by the arbitrator except via agreement.

The parties can choose an arbitrator to resolve their dispute. Most parties directly approach an arbitrator before signing the ARB1. Many barrister's chambers and solicitor's firms now offer arbitrators to undertake arbitrations. All will have been required to have undertaken several days of training with the Institute of Family Law Arbitrators (IFLA) and met several preliminary requirements including years of practice and judicial references. The qualification also includes a written exam which must be passed before arbitrators can hold themselves out to do arbitrations. There are separate qualifications for the Children Scheme and the Financial Remedy Scheme. The letters of MCIarb show the arbitrator is a member of the Chartered Institute of Arbitrators, however this membership incurs an annual fee and doesn't show any greater level of seniority than a qualified arbitrator who has passed the same course but not paid the fee to the Institute.

The other crucial distinction to the standard court process, is that the parties can broadly agree how their litigation will be concluded. There are a number of mandatory provisions set out within the Arbitration Act, however generally the parties can set the limits of what the arbitrator will determine, when the arbitration is held, where it is held, how the case will be decided, what evidence will be filed, whether there is to be oral evidence and if so, which witnesses will be called. If the parties wanted to have a final hearing that included 15 witnesses for each party, then that is within their discretion. Whilst the arbitrator might query whether this is required, if the parties agree then the arbitrator is bound by this agreement. The parties could agree to have a remote hearing; a case determined on submissions or even without a hearing even taking place.

All arbitrators are required to give a written determination to the case they are determining. This is provided to the parties after the formal hearing and is required to set out the full reasons for reaching whatever decision that they have reached.

The other key element of arbitration is that once it is commenced the parties (and the arbitrator) are legally contracted to complete the arbitration. Unless there is an agreement neither party (nor the arbitrator) can back out of the agreement to arbitrate, except in very limited circumstances. Parties who therefore get 'cold feet' or seek to resile from their agreement will generally be bound to continue their arbitration to a conclusion. Arbitrators can proceed in the absence of engagement by one party, much like the court does.

Scope of Arbitration

In Family Law, arbitrations can either proceed under the Children Scheme or the Financial Remedy scheme. There are different ARB1s that must be signed for each scheme. The scope of each scheme is broad and can be used to determine a wide range of Family Law disputes.

The IFLA Financial Scheme rules provide that the **scope of the Financial Scheme** covers financial and property disputes arising from:

a) *marriage and its breakdown (including financial provision on divorce, judicial separation or nullity)*
b) *civil partnership and its breakdown*
c) *co-habitation and the ending of co-habitation*
d) *parenting or those sharing parental responsibility*
e) *provision for dependants from the estate of the deceased.*

It therefore covers claims that are brought under the Matrimonial Causes Act 1973, Children Act Schedule 1, TOLATA 1996, Married Women's Property Act 1882 and the Inheritance (Provision for Family and Dependants) Act 1975. **It therefore covers the full range of disputes that may arise from the breakdown of relationships within this jurisdiction** albeit it cannot cover the care or parenting of children, bankruptcy or the status of relationships.

It is likely that any dispute that arises at the end of a relationship or marriage regarding their property or financial arrangements can be the subject of an arbitration.

The IFLA Children Scheme rules provide that the scope of the Children Scheme is (save for some exceptions):

> *Covers issues between parents (or other persons holding parental responsibility or with a sufficient interest in the child's welfare) which relate to the exercise of parental responsibility or the present or future welfare of the child concerned (including the child's upbringing, present or future living arrangements, contact and education) and extends but is not limited to matters which could be the subject of an application to the Family Court under section 8 of the Children Act 1989.*

In essence the rules allow for arbitrators to determine disputes between parents on any issue that a s8 order could be made, whether that be the living arrangement for a child, what time a child spends with a parent, whether a parent should be prohibited from exercising some form of their parental responsibility or to determine some specific issue relating to a child's care.

The rules prohibit determinations in relation to the inherent jurisdiction, summary return under the Hague Convention, temporary/permanent removal to a non-Hague country or where the parent is themselves a minor. The rules also prohibit any arbitration where a person who has parental responsibility is excluded from the arbitration process.

The biggest limitation of the Children Scheme however is the issue of safeguarding. Arbitration CANNOT be used in cases where there are outstanding issues that relate to safeguarding. It is accepted that this does limit many private law cases from the scope of arbitration, however there are objective reasons for such a limitation. Realistically such cases would not agree to arbitrate, nor do they have a consensus about how the case would progress.

Prior to commencing an arbitration both parties are obliged to provide accurate information about safeguarding and protection within the ARB1CS and a separate Safeguarding Questionnaire. Both parties also must obtain a basic DBS check, which is then provided to the arbitrator. In the alternative to a basic DBS check the parties can send a safeguarding letter prepared by CAFCASS at the outset of a private law case to satisfy the safeguarding check. If the arbitrator is concerned from the outset (or subsequently) that 'there are reasonable grounds to believe that there may be a risk to the physical or emotional safety of any party or to the safeguarding or welfare of any child' then they have a duty to consider whether the arbitration can continue.

The other limitation is that legal aid cannot currently be used in arbitration cases. Parties must either represent themselves or privately fund their own representation. However, given that safeguarding issues are the most common reason for legal aid, it is likely that this will have precluded Arbitration as an option in any event.

Thus, whilst safeguarding provides a limit on the scope of arbitration, in cases where parties produce evidence that there are no safeguarding concerns or satisfy the arbitrator that there are not risks to a child/parties' safety, then the wide ambit of arbitration in Children cases remains a real option for parents to resolve their disputes.

What would the process of an arbitration look like?

Technically Arbitrators are trained to have a preliminary meeting with the clients/lawyers to consider how the case management of the arbitration will take place.

However, in most of these cases there is an obvious route to getting to that final decision. In most cases the legal representatives will be able to agree the exchanging of disclosure and witness statements in advance of a final determination. Legal professionals are experienced with the standard orders required to take a case to trial, and provided these can be agreed the arbitrator can simply adopt these and look to list the final arbitration hearing. There is no different process for arbitration case management. The arbitrator and the other side require the proposals to resolve the case, the statements setting out why those proposals are made together with any exhibits or disclosure that are commonly required in such cases.

The case management is the same as within a set of court proceedings, albeit the parties by agreement can limit the disclosure that they require. Whilst in financial remedy proceedings the court might make standard orders for updating disclosure, the parties could agree to do without this. Equally the parties could agree to have statements that exceed the rules within the relevant practice directions. In most cases there will not need to be a preliminary meeting, unless there are contentious case management directions. Instead, a date for a final hearing can be fixed and worked towards as quickly as the parties can agree.

When there are disputed issues, the arbitrator can determine disputed case management decisions in a way that a court would. That might include what disclosure is required, or when statements could be filed. It also includes the ability to order expert evidence that is necessary to resolve the arbitration proceedings. Within financial remedy cases this could include surveyors, accountants and PODEs whilst within Children Scheme cases this could include instructions of independent social workers, to create the equivalent of a s7 report. The parties can agree to share the costs equally or unequally for such reports, with the arbitrator having the ability to determine in default of agreement.

In the arbitrations that I have undertaken to date the parties have agreed and obtained expert opinions prior to my involvement. The arbitration therefore has proceeded based on this expert evidence being available, without the need for further determination within the arbitration. However clearly disputed case management issues can still be resolved within the arbitration as they might ordinarily.

The only other notable difference is the need to create a written award/determination for the parties. The parties should be aware that this will need to follow the hearing, and they will not get a resolution on the day. However, they will get a more carefully considered and structured document that they can keep. It will not be the last-minute extemporary judgment at 4.30pm, with the security staff peering through the door to see if the case has finished.

Ultimately it is important to emphasise (in answer to my rhetorical question above) that the process of case management will look very similar to the standard court process, however clearly streamlined and resolved far faster than what might occur in a court.

Advantages of Arbitration

Hopefully if you are still reading this article, you are here to be persuaded as to the advantages of Arbitration for your clients, of which there are many.

Lots of the advantages will be well known to pFDR converts. However, the crucial benefit of arbitration, over other forms of NCDR, is that it creates a binding decision that ends the dispute. In many cases parties can reach a negotiated resolution that both can live with. However often there is ongoing doubt as to whether that negotiated outcome would have been the outcome from a contested hearing. In my experience many clients continue to not be satisfied with what they agreed or think that they agreed more than they should. Also, in the cases that don't settle at FDR there is then the need for a further hearing when negotiation has failed.

Arbitration cuts through all of this. It allows parties, realistically in the same timescales of a pFDR (or alternatively mediation), to get a final binding decision on all matters that are in dispute. It gets to the end of the case without the need to go through all the preliminary steps before it. If you have a case where there is a general view that there is no chance that the case will settle, going straight to Arbitration clearly is in all parties' interests. If there is a genuine view that the other party will not negotiate (all parties believe this to some extent) then Arbitration is the answer.

The other notable advantage in Children Act cases is to avoid the newer mechanism of the 'Child Focused Court'. Specifically, not seeking to give my own opinion on this development, it will inevitably lead to many more cases not being listed to final hearings and thus limiting the prospects of a detailed decision being given. It also could add to delay from the necessary provision of a report.

The other advantages are more commonly known from the development of other forms of NCDR, namely:

- **Choice of Arbitrator:** It is difficult to understate this advantage. Listings in the Family Courts carry a significant degree of risk for all participants. Final hearings have the real risk of being listed before a judge or magistrates who have very limited understanding of the issues that are being determined. Whilst many judges/magistrates have many years of experience in Family cases, many do not. Also, even if they do, then they may have limited experience in complex business valuations, nuptial agreements, Schedule 1 claims, the finer points of TOLATA or CA arguments about internal/external relocations of children. Through Arbitration the parties can select an Arbitrator that they know they can rely upon to understand the issues and come to a fair determination. There is an increasingly wide array of options including many retired senior judges. There is also no chance that the court will email the day prior to the hearing to say that there is no judge available and the case has been adjourned.
- **Quality of decision:** It flows from that which is written above that the quality of the decision maker can be far more assured within Arbitration. Clients can pick someone who is a specialist at what they do, rather than take a significant risk. Further to this the quality of the decision given is often far better. From personal experience a written decision at the end of an arbitration will be better written, better reasoned and more detailed than any extemporary judgment given at the end of a court day. The arbitrator is paid specifically to decide this case and no other. The decision is therefore easier to understand, can be read again and is less likely to be subject to an appeal than an extemporary judgment. It also gives the parties a greater degree of finality that they know someone has properly listened and given a full reasoning as to why they were successful/unsuccessful on a point.
- **Lack of other work:** The arbitrator will only have one case on the day of the final hearing to determine. They won't be worrying about boxwork or short matters. They won't be fielding emails about gatekeeping other urgent cases. They will have read and prepped one case, and one case only, for that day. They also will have had the material for some time and made time available to fully read the papers. It is difficult to underscore how valuable this is to a detailed and fair decision being reached.
- **Speed:** Arbitrations can be listed far quicker than awaiting a date for the final hearing through court. The delay is only created by the availability of the necessary evidence upon which to make that decision and the parties/arbitrators availability. Resolutions of narrow issues could be resolved incredibly quickly, and even more complex issues could be resolved far quicker than a lengthy court process. Arbitrations ultimately allow parties to choose to skip right to the end of the process and have their final hearing without the other preliminary steps if they wish.
- **Flexibility:** As above the final hearing can be undertaken very flexibly. There can be an agreement to have a telephone hearing, a remote hearing or potentially even a hearing out of standard court hours. The parties can be flexible in the arrangements that are reached to help it fit around their time. There can also be direct discussion with the Arbitrator directly about any changes to these arrangements, rather than going through the court office.
- **Comfort:** Arbitrations do not take place in a large court building, with many other people milling around and a lack of any conference facilities. Clients do not have to sit in busy waiting areas or have

hushed conversations in corridors. Most chambers (certainly SMC) offer parties a bespoke arrangement for Arbitration hearings. They occur in air-conditioned offices, with individual secured conference rooms and even the offer of lunch included within the cost. The comfort of arbitration is a world away from that which is commonly seen in even the nicest of court buildings.

- **Scope:** I have set out the breadth of the scope for Arbitration above. It is incredibly broad and can be used to resolve any array of disputes. It is difficult to comprehend many issues (save for safeguarding) that fall outside of the scope.

The key limiting factor is that of cost. I would urge those reading however to not be immediately put off by the potential for cost for the following reasons:

- **The cost is not as significant as may be thought:** Readers are encouraged to enquire as to the actual costs of arbitration. There is now an array of different arbitrators available and the costs for a one-day arbitration and written decision are not as extensive as you may think. There are wide ranges of costs depending on the seniority of the arbitrator (or their choice of fee). From personal experience the costs are often not that different to the cost of instructing counsel for the client.
- **The speed of proceedings often limits costs:** The longer cases go on the more that costs increase. The endless response to emails, the issues that arise organically as cases progress and the need to go through different stages of a court process all add to cost. Often the sooner cases can be resolved not only are costs saved, but also the emotional cost of cases is lessened. It is likely that an arbitration will save parties legal costs rather than increase them. It also gets parties to a resolution quicker which may limit mortgage costs, MPS orders or get a party to have overnight contact faster than awaiting a final hearing.
- **The cost can be divided in a way that the parties agree:** The costs of the arbitration need not be split equally between the parties. One party can pay more or all the costs of the arbitration. Clearly the mechanism of funding will not impact on the outcome of the Arbitration as it doesn't with the funding of pFDRs or any other form of NCDR.
- **The quality of the decision/arbitrator may limit future costs:** A quality written decision will likely limit the risk of a successful appeal. Whilst arbitration awards are capable of appeal it is likely that the decision given in a written decision will be more likely to be robust enough to not be appealed against or withstand any appeal process. The case therefore reaches finality far quicker with a reduced risk of costs.
- **Costs only arise for work already done:** Whilst some cancelation fees may occur, depending on the time of the cancellation, agreed orders should not lead to the incurring of the entirety of the fee.

Conclusions

Hopefully readers are now more aware of the option of arbitration than they may have been prior to reading this article. The widespread development of pFDRs is now baked into the legal system, and it is inevitable that private DRAs may soon follow. However, many lawyers remain cautious about recommending arbitration as they have not had an arbitrated case previously. Hopefully readers can see that any such caution is misplaced.

Having been involved in arbitrations as a barrister I would highly recommend them, but equally as an arbitrator as well. Inevitably (as I recognise at the beginning of this article) there is some personal benefit in me holding that view, however genuinely the positives are significant, and it continues to surprise me that more cases are not being arbitrated.

The scope of the decisions that can be resolved are significant and almost all financial remedy disputes can be resolved through arbitration. The availability of the Children Scheme is more limited because of safeguarding, but despite these all-other cases are suitable for arbitration.

I would recommend Arbitration for almost all Family Law disputes and the benefits only increase the greater the strain applied to the court system. Arbitration is particularly advantageous when the issues are more complex. Issues involving complex points of law, difficult welfare balances (such as internal/external relocations), nuptial agreements, business valuations or arguments on trusts.

The fundamental advantage of selecting a competent experienced arbitrator is almost always worth the additional cost within litigation. Far too often as counsel I have been left disappointed by the quality of the tribunal to make decisions, or the lack of understanding that has been had on a key issue. The impact on the clients must be far more significant. This advantage coupled with the benefits of a written decision; the speed and flexibility of arrangements only underscores the potential benefits for all clients who can afford the costs of the arbitration option. If all of this doesn't make the point, surely the advantage of not having to leave the building to get lunch does.

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