

A Guide to the Institute of Family Law Arbitrators' Family Law Arbitration Scheme

*An Introductory Guide for Family
Arbitrators, Judges and Professional
Referrers*

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INTRODUCTION

- 1.1 Welcome to the Guide to the Institute of Family Law Arbitrators' (IFLA) Family Law Arbitration Scheme ('the Scheme'): An Introductory Guide for Family Arbitrators, Judges and Professional Referrers. This Introductory Guide provides an introduction to the Scheme for family arbitrators, judges and professional referrers.
- 1.2 The Guide contains two sections. The first, Family Arbitration in a Nutshell, sets out a working definition of family arbitration, and briefly defines its history and benefits as a means of resolving family law disputes. The second, IFLA Scheme: Family Arbitration Process, provides a step-by-step guide to the family arbitration process, and details the legal framework on which the Scheme is built.
- 1.3 For further information on the Scheme, including that relating to the structure of IFLA, qualification and training, please consult the IFLA website <http://ifla.org.uk/>, the IFLA Rules, <http://ifla.org.uk/cms/wp-content/uploads/2014/02/Rules-2014-3rd-edn-final.pdf> and <http://familyarbitrator.com/>
- 1.4 Of assistance in the preparation of this Guide has been the family law arbitration training course written and presented by Suzanne Kingston and Jonathan Tecks.

FAMILY ARBITRATION IN A NUTSHELL

Definition

- 2.1 Family arbitration is a form of private dispute resolution in which the parties enter into an agreement under which they appoint a suitably qualified person ('a family arbitrator') to adjudicate a dispute and make an award.

- 2.2 Family arbitration is thus akin to court proceedings in that a family arbitrator will produce a decision (an award) after hearing the evidence and each party's case.

- 2.3 The Scheme's effectiveness is derived from the family law of England and Wales, the Arbitration Act 1996, the IFLA Rules, and the agreement to arbitrate (Form ARB1), see 3.7 – 3.14. In principle in family proceedings, the jurisdiction of the court cannot be ousted, but, as with any other agreement to settle a case, the court will only very rarely interfere when invited to implement the settlement. It is clear from a growing number of cases that the court makes no distinction between an arbitrator's award and any other consensual settlement.

- 2.4 Family arbitration is distinct from mediation in the sense that a decision on the substance of the dispute between the parties may be imposed by the family arbitrator or arbitral tribunal. Note that mediation can take place in parallel with an on-going family arbitration: sometimes a family arbitrator may consider mediation would benefit a couple and he may suggest this. Conversely, mediators may recommend family arbitration if it seems clear that a dispute, or one aspect of it, cannot settle in mediation.

Background

2.5 Family arbitration under the IFLA Rules seeks to draw an appropriate balance between allowing parties freedom to determine the procedure for resolution of their dispute, while at the same time maintaining adequate supervision by the court. In particular, the provisions of the IFLA Rules are designed to ensure that family arbitration is founded on genuine agreement, and that the procedure is fair and impartial.

Benefits

2.6 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.

2.7 Key benefits are:

- a. *Speed of the process*: Family arbitration is likely to take significantly less time than contested court proceedings.
- b. *Choice of family arbitrator*: The parties themselves, guided by their lawyers (if they have them), select the person whom they wish to arbitrate their dispute. If the parties are unable to agree, the family arbitrator can be selected by the IFLA Administrator.
- c. *A specialist family arbitrator*: In court proceedings, there is no guarantee that the allotted judge will have specialist knowledge or experience in resolving financial disputes nor be conversant with the often highly complex financial arrangements the parties are seeking to unravel. All disputes can be as fairly and efficiently decided by a family arbitrator as by a judge, and one moreover in whom the parties can have confidence.

- d. *Control of the procedure:* The parties ‘own’ the procedure to a far greater extent than they can with court proceedings. Together with the family arbitrator, the parties are able to tailor the process to their own needs, and decide whether the process is document only, conducted via telephone, or by face-to-face meetings. The issues may be determined all at once, or sequentially at specified intervals of time, to permit negotiation and settlement of other issues in the interim.
- e. *Selection of issues to be arbitrated:* The parties may decide to appoint a family arbitrator for one or more specific issues.
- f. *Confidentiality:* The family arbitration process is essentially private. The media are not entitled to attend hearings, which will take place at venues agreed by the parties. Only the arbitrator, the parties, their representatives and those they have agreed should attend will be permitted to be there.
- g. *Family arbitrator’s availability:* The appointed family arbitrator alone will deal with the dispute from start to finish. A number of advantages flow from consistency of tribunal:
 - i. The family arbitrator is engaged by the parties with the specific task of resolving their dispute.
 - ii. The family arbitrator will be available to deal promptly with applications for directions and other issues as they arise in the course of proceedings.
 - iii. Meetings can be listed at short notice to suit all participants’ diaries, at a time of day to suit business or family commitments, and at the parties’ preferred venue.
- h. *Keeping their lawyers:* If the parties have instructed lawyers, they are able to, and normally will, retain them throughout the family arbitration process for advice, preparatory work and representation at meetings.
- i. *Defusing landmines:* Family arbitration can be fashioned to obtain a speedy and economical determination of preliminary issues of law or fact or both, thus increasing the likelihood of resolution of the dispute.
- j. *Integration with the court:* A court may refer a matter to family arbitration or be involved if necessary during the family arbitration process to exercise a power not available to a family arbitrator, such as granting an injunction.
- k. *Cost savings:* This ability to streamline and shorten the procedure may well (and in the majority of cases should) lead to significant cost savings.

Costs

- 2.8 In family arbitration there are four main types of cost:
- a. The family arbitrator's fees and expenses. The family arbitrator and the parties will set the level of the family arbitrator's fees by agreement at the outset of the family arbitration. The usual arrangement will be for each of the parties to bear the family arbitrator's fees and expenses in equal shares.
 - b. Venue hire and similar costs. There may be costs involved in hiring a venue for any meetings scheduled as part of the process, or for other similar costs such as the hiring of transcribers. These costs will usually be borne equally.
 - c. Legal costs. These are the costs incurred by each party in engaging lawyers to prepare for and represent them in family arbitration. The usual arrangement will be for each party to bear its own legal costs, and not to make any payment towards the other's legal costs.
 - d. Experts' fees. These costs will usually be borne equally.

IFLA SCHEME: FAMILY ARBITRATION PROCESS

IFLA Scheme

- 3.1 The Scheme was launched in February 2012 and is 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).
- 3.2 The Scheme utilises arbitration procedures well established in the commercial and family arenas – for example, the statutory family arbitration schemes that are in force in Scotland, Australia and certain provinces of Canada.
- 3.3 The Scheme may be adopted for 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 its termination.
 - d. Parenting or those sharing parental responsibility.
 - e. Provision for dependants from a deceased’s estate under the Inheritance (Provision for Family and Dependents) Act 1975.
- 3.4 The Scheme includes, but is not limited to, claims pursuant to:
 - a. S. 17 of the Married Women’s Property Act 1882.
 - b. Part II of the Matrimonial Causes Act 1973.
 - c. S. 2 of the Inheritance (Provision for Family and Dependents) Act 1975.
 - d. Part III of the Matrimonial and Family Proceedings Act 1984 (financial relief after overseas divorce) and the Civil Partnership Act 2004 (Sch. 5, or Sch. 7, Pt. 1, para. 2: financial relief after overseas dissolution).

- e. Sch. 1 to the Children Act 1989.
- f. Trusts of Land and Appointment of Trustees Act 1996.
- g. Other civil partnership equivalents where corresponding legislative provision has been made.

3.5 The Scheme does not apply to questions concerning:

- a. The liberty of individuals.
- b. The status either of individuals or of their relationship.
- c. The care or parenting of children.
- d. Bankruptcy or insolvency.
- e. Any person or organisation not a party to the family arbitration, unless that person or organisation agrees in writing.

3.6 Further information on the Scheme can be found on www.ifla.org.uk Here, by navigating through the tabs at the top of the webpage, you can:

- a. Search for a family arbitrator, including background information on each.
- b. Learn more about family arbitration (including FAQs).
- c. Read about IFLA, including qualification for family arbitrators.
- d. Access the IFLA Rules.
- e. Access the Form ARB1.

Step-by-step guide

Preparatory steps

3.7

Step i.

The parties agree to resolve their financial differences arising under any of the headings under **3.4**, above, without resorting to court. It is recommended that the parties take legal advice on the implications and consequences of family arbitration.

Step ii.

The parties, invariably with the assistance of their lawyers, search for a family arbitrator and establish his or her terms and availability. The parties are free to contact family arbitrators without obligation (provided that the other side are copied into all communications, thereby preserving impartiality).

Step iii.

The parties submit a Form ARB1, signed by both parties, in which they describe and define the scope of the dispute they agree to arbitrate, to the IFLA Administrator, at IFLA, PO Box 302, Orpington, Kent BR6 8QX.

...

Note that expressly in their Form ARB1 the parties agree to be bound by the family arbitrator's written decision subject to: (a) any right of appeal or other available challenge; (b) (insofar as the subject matter of the award requires it to be embodied in a court order) any changes which the court making that order may require; and (c) (in the case of an award of continuing payments) any future award or order varying the award.

The parties also expressly declare and agree that they have read and will abide by the IFLA Rules and that they understand their obligation to comply with the decisions, directions and orders of the family arbitrator and, where required, to make full and complete disclosure relating to financial circumstances.

Given the above, it is critical that the obligations upon the arbitrees contained in the Form ARB1 are fully and clearly explained to them by their respective lawyers before they sign up for the process. It will be the practice of some family arbitrators to reinforce that by explanation to the parties jointly, together and in person, before the Form ARB1 is signed so as to be satisfied that they fully appreciate and accept those obligations and their binding nature.

Step iv.

By the Form ARB1, the parties seek the appointment of their nominated family arbitrator.

In the case where a family arbitrator has been nominated on the Form ARB1, but is unable or unwilling to accept the appointment, the parties will have the option of nominating another family arbitrator.

In the case where parties, whether represented or not, wish to use the family arbitration process, but either cannot or have not agreed on a family arbitrator and have requested on their Form ARB1 that a family arbitrator be nominated, and the parties and/or their representatives agree that IFLA should make the nomination, the Nomination Protocol is to be followed.

...

The Nomination Protocol sets out the criteria to be applied to the nomination of a family arbitrator: (1) the family arbitrator whose geographical location (as indicated on his/her website entry) is closest to the location of the parties (or the parties' legal representative of the parties); (2) the parties' wishes as to qualifications, experience or other attributes of the family arbitrator; (3) the number of appointments received to date (i.e. ensure that, where no specific requirements have been requested by the

parties or their representatives, one family arbitrator is not receiving more family arbitration nominations than another). The criteria will be applied strictly in this order unless the parties have specific requirements which they have set out on the Form ARB1.

The Nomination Protocol is available from IFLA on request, info@ifla.org.uk

...

In all cases, the IFLA Administrator will forward the Form ARB1 to the nominated family arbitrator, inviting him or her to become the appointed family arbitrator.

Step v.

The family arbitrator contacts the parties seeking their agreement to the terms of the appointment.

...

Note that all correspondence between the family arbitrator and one party must be copied to the other party.

Step vi.

On agreeing terms, the family arbitrator sends to the parties a formal letter of acceptance, whereupon the family arbitration is deemed to have commenced.

The family arbitration process

Step vii.

The family arbitration process will depend on the nature of the parties' dispute, as well as their preferences, and those of the family arbitrator, as to procedure. It may be a document-only process, or be conducted by telephone and/or face-to-face meetings.

The IFLA Rules describe two primary types of procedure: a "general procedure", and an "alternative procedure". Unless the parties have decided in advance which procedure will apply, the family arbitrator will generally conduct a case management conference, either by telephone or in person, at the start of the family arbitration, where these issues can be discussed and a decision taken.

During the course of the family arbitration, any further procedural decisions will be taken by the family arbitrator after consultation with both parties. Agreement on procedural matters reached between the parties will require the family arbitrator's consent. The family arbitrator has the widest possible discretion to adopt procedures to suit the circumstances of the case.

Step viii.

If there is to be a final meeting, it will take place at a date, time and venue agreed between the parties and the family arbitrator.

Step ix.

The family arbitrator's fees must be settled prior to receipt of the award, as requested by the family arbitrator.

Step x.

The family arbitrator's decision must be committed to writing and delivered promptly. The decision will include written reasons and a formal award.

The court

Step xi.

The parties have the right to appeal to court on a point of law (unless the parties have agreed to exclude that right). Also, the parties can invite the court to set aside the award if there has been a serious irregularity which has resulted, or may result, in substantial injustice.

Step xii.

In a financial-remedy family arbitration, there will normally be a requirement to convert the award into a court order. Once a court order has been made, it may then be enforced in the usual way.

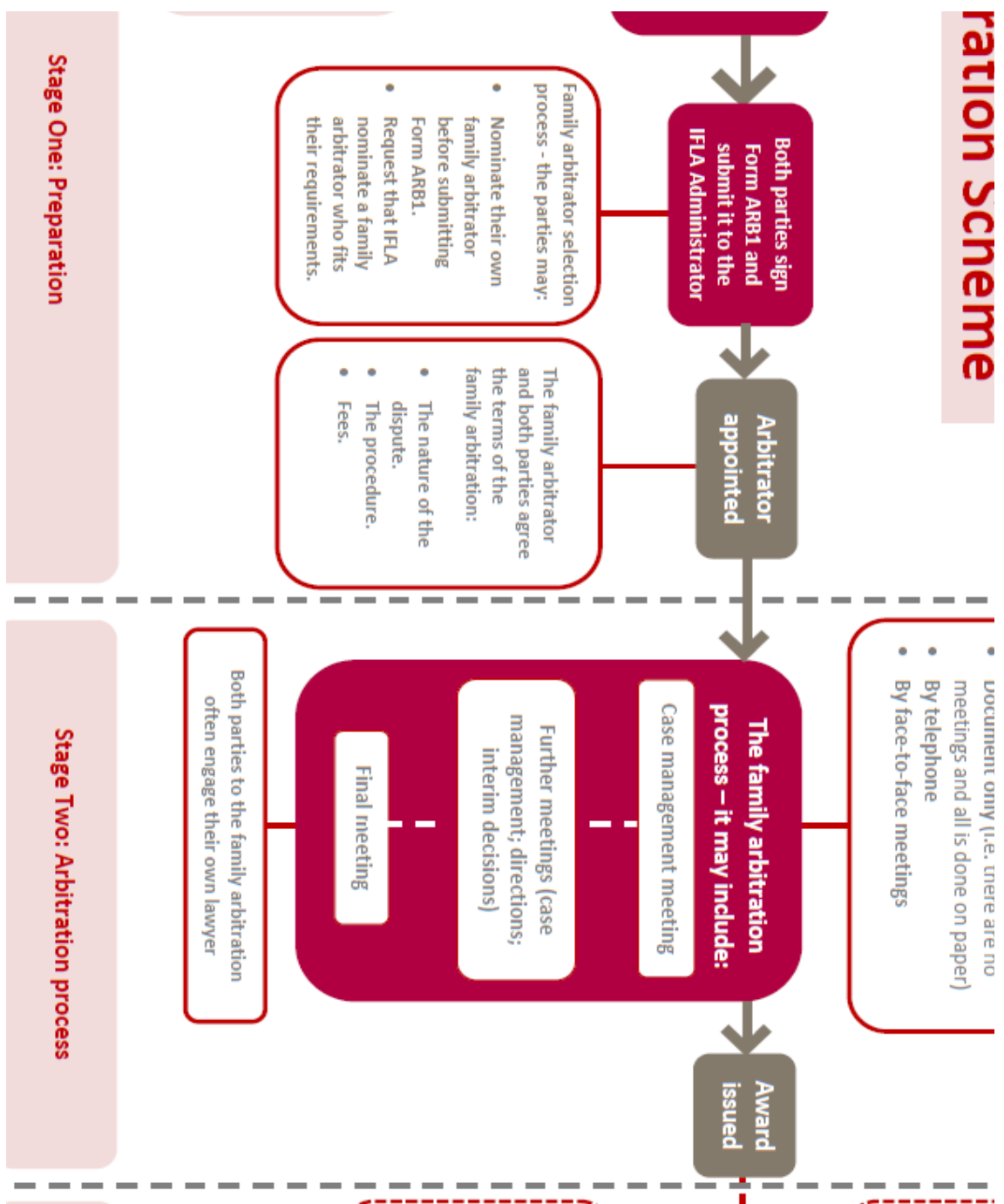
If the family arbitration involves a purely civil claim (for example, under TOLATA 1996), the parties may apply to court for permission to enforce the award as though it were itself a court judgment or order.

Other

As set out under the IFLA Rules, in certain circumstances the family arbitrator may terminate the family arbitration before it has been concluded, or the parties may agree to do so.

It is a distinguishing feature of the process that both the family arbitration and the award are confidential, with disclosure permitted only in prescribed circumstances.

Media are not entitled to attend any meetings.



Legal Framework

- 3.8 The Arbitration Act 1996 contains both ‘mandatory’ and ‘non-mandatory’ provisions. The mandatory provisions are fundamental and immutable provisions which the parties may not agree to exclude, replace or modify. The non-mandatory provisions may be modified or excluded by agreement of the parties.
- 3.9 Disputes under the Scheme are arbitrated on the basis of a pyramidal hierarchy. The Scheme provides for disputes to be arbitrated in accordance with Part I of the Act; and regulated, beneath the Act, by the IFLA Rules to the extent that they exclude, replace or modify the non-mandatory provisions of the Act; and then within the IFLA Rules by any procedural or other provisions agreed between the parties, to the extent that such agreement excludes, replaces or modifies the non-mandatory provisions of the Act or the IFLA Rules.
- 3.10 The key provisions of the Act are set out at sections 1, 33 and 40 of the Act.

The IFLA Rules

- 3.11 Beneath the mandatory provisions of the Act, important aspects of the Scheme are fleshed out both by the IFLA Rules and the Form ARB1.
- 3.12 The IFLA Rules contain one mandatory requirement, that the substance of the dispute is to be arbitrated in accordance with the law of England and Wales.
- 3.13 Subject to this mandatory requirement, and those of the Act, the parties retain substantial powers to regulate the process. The Scheme establishes what is in effect a pre-selected set of rules for the application of the non-mandatory provisions, so as to

form a self-contained code for family arbitrations of financial disputes: but even these remain subject, in some instances, to variation by the parties.

An embargo or moratorium for court proceedings

3.14 In agreeing to the IFLA Rules (and indeed explicitly in their Form ARB1), the parties agree that they will not, while the family arbitration is continuing, commence an application to the court (nor continue any subsisting application) relating to the same subject matter, except in connection with and in support of the family arbitration or to seek relief that is not available in the family arbitration. As the family arbitrator has no powers of enforcement, provision is made in the Act for the parties to apply for court orders in support of the family arbitration, such as a witness summons or, if need be, an injunction pending resolution of disputed issues.