

IFLA

Institute of Family Law Arbitrators

A Guide to the Family Law Arbitration Scheme

An Introductory Guide for Family Arbitrators,
Judges and Professional Referrers

Third edition

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Introduction

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 ("the Guide").

This second edition of the Guide includes an introduction to both financial remedy arbitration and children arbitration. It is intended to provide an introduction to the Scheme for family law arbitrators, judges and professional referrers.

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.

For further information on the Scheme, including that relating to the structure of IFLA, qualification and training, please consult the IFLA website www.ifla.org.uk. The Scheme Rules can be found at ifla.org.uk/resources-for-practitioners/.

IFLA is grateful to Suzanne Kingston and Jonathan Tecks whose financial remedy and children family law arbitration course materials have been invaluable in the preparation of the guide. They have been supported recently by Janet Bazley QC who has also provided input to the course materials and the training.

Family arbitration in a nutshell

1. Definition

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 (an “arbitrator”) to adjudicate a dispute and make an award. It can be used to resolve financial disputes and disputes concerning children.

Family arbitration is thus akin to court proceedings in that a family arbitrator will produce a decision after hearing the evidence and each party’s case. In financial cases the decision is called an **award** and in children cases it is called a **determination**.

The Scheme’s authority derives from the Arbitration Act 1996, the Rules, and the agreement to arbitrate. Form ARB1FS is used in financial cases and Form ARB1CS is used in children cases (see 3.8 – 3.14.)

Family arbitration is distinct from mediation in that a decision on the substance of the dispute between the parties may be imposed by the family arbitrator or arbitral tribunal. It is therefore binding upon the parties to the dispute.

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.

2. Background

Arbitration is widely used in commercial disputes. In England and Wales, the domestic framework is provided by the Arbitration Act 1996 ('the Act'). The Act has a number of distinctive features, but is broadly comparable to arbitration legislation and regulation in other European states and the US, and to the United Nations Commission on International Trade Law (UNCITRAL) 'Model Law' which has provided the basis for regulation of arbitration in Scotland and many other parts of the world. International enforcement of arbitration awards is also available under the New York Convention 1958.

The Act 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 courts. In particular, the provisions of the Act are designed to ensure that the arbitration is founded on genuine agreement, and that the procedure is fair and impartial.

In family proceedings the jurisdiction of the court cannot be ousted, but there are a growing number of cases in which the High Court has shown its support for arbitration awards being incorporated into court orders.

Following the introduction of the financial remedy arbitration scheme interest grew as to the possibility of resolving children disputes under the IFLA scheme. After wide and extensive consultation, the IFLA rules have been amended to permit specified children disputes to be included in the Scheme.

3. Benefits of family arbitration

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. Key benefits are:

3.1 Speed of the process

Family arbitration is likely to take significantly less time than contested court proceedings.

3.2 Choice of arbitrator

The parties themselves, guided by their lawyers (if they are represented), select the person they wish to arbitrate their dispute. If the parties are unable to agree, the arbitrator can be selected by IFLA.

3.3 A specialist arbitrator

In court proceedings, there is no guarantee that the appointed judge will have specialist knowledge or experience in resolving disputes concerning children nor be conversant with the often highly complex financial arrangements the parties are seeking to unravel. A family arbitrator is an experienced family lawyer who specializes in financial and/or children disputes. The arbitrator is as competent as a judge would be to fairly and efficiently resolve the dispute and will be selected by the parties themselves or appointed by IFLA at the parties' request.

3.4 Control of the procedure

The parties 'own' the procedure to a far greater extent than is possible with court proceedings. Together with the 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. By the same token the parties can, by agreement, appoint relevant and appropriate experts to assist in the determination of

the dispute.

3.5 Issues to be arbitrated

The parties may decide to appoint a family arbitrator for one or more specific issues. Unlike Court proceedings, there is no need to undergo compulsory mediation information and assessment meetings (MIAMs) before starting arbitration. Furthermore, if the arbitrator is appointed to determine a single issue the **award** or **determination** can include all of the other issues already agreed between the parties to ensure that the parties achieve an outcome which is binding.

3.6 Confidentiality

The family arbitration process is completely private and confidential (subject to the usual exceptions in relation to safeguarding and protection from harm or where there is an over-riding obligation in law to disclose). Meetings take place at a venue of the parties' choice, and there is no possibility of media obtaining access. Papers are held securely in the family arbitrator's office.

3.7 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 including business or family commitments and at their preferred venue.

3.8 Keeping the 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.

3.9 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.

3.10 Integration with the court

A court may refer a matter to arbitration or be involved if necessary during the arbitration process to exercise a power not available to an arbitrator, such as granting an injunction.

3.11 Cost savings

The ability to streamline the procedure may well (and in the majority of cases should) lead to significant cost savings.

3.12 Finality

The judiciary have made it clear in the recent authorities of *S v S* and *DB v DLJ*¹ that not only will the Courts approve IFLA arbitral awards, they will also uphold them.

¹ [2014] EWHC 7 (Fam) & [2016] EWHC 324 (Fam)

4. 4. Costs of family arbitration

In family arbitration there are four main types of cost:

- 4.1** The family arbitrator's fees and expenses. The family arbitrator and the parties will agree the arbitrator's fees at the beginning 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.
- 4.2** 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.
- 4.3** 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 each other's legal costs.
- 4.4** Experts' fees. These costs will usually be borne equally.

The family arbitration process

5. The IFLA scheme

The Scheme was launched in February 2012 and is a collaboration between Resolution, the Family Law Bar Association (FLBA), the Chartered Institute of Arbitrators (CI Arb) and the Centre for Child and Family Law Reform (sponsored by The City Law School, City University London). In 2016 the revised IFLA rules were published which enable specified children disputes to be resolved by arbitration.

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 Australia and certain provinces of Canada. The Scheme falls into two distinct categories: financial remedy disputes and children disputes.

5.1 Financial Disputes.

The Scheme can be used for the following financial disputes:

- 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 dependents from a deceased's estate under the Inheritance (Provision for Family and Dependents) Act 1975.
- f. S. 17 of the Married Women's Property Act 1882.
- g. Part II of the Matrimonial Causes Act 1973.
- h. S. 2 of the Inheritance (Provision for Family and Dependents) Act 1975.

- i. 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).
- j. Schedule 1 to the Children Act 1989.
- k. Trusts of Land and Appointment of Trustees Act 1996.
- l. Other civil partnership equivalents where corresponding legislative provision has been made.

5.2 Children Disputes.

The Scheme can be used for the following disputes concerning children:

- a. Where and with whom children shall live.
- b. The time spent with each parents.
- c. Arrangements concerning the children's upbringing.
- d. Relocation of children within England and Wales.

5.3 The Scheme does not apply to questions concerning:

- a. The liberty of individuals.
- b. The status either of individuals or of their relationship.
- c. Bankruptcy or insolvency.
- d. Any person or organisation not a party to the arbitration, unless that person or organisation agrees in writing.
- e. The international relocation of children.
- f. Child protection proceedings.

5.4 Further information on the Scheme can be found on the IFLA website www.ifla.org.uk 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 Scheme Rules.
- e.** Access the Forms ARB1FS and ARB1CS.

6. Step-by-step guide to the process

6.1 Preparatory steps

- a.** The parties wish to resolve their financial or child-related differences arising in the context of separation or divorce without resorting to court. The parties may have tried mediation, which has broken down or they may simply prefer arbitration. It is recommended that the parties take legal advice on the implications and consequences of family arbitration.
- b.** The parties, with the assistance of their lawyers if they have legal representation, search for a family arbitrator and establish his or her terms and availability. Each party is free to contact family arbitrators without obligation, provided that the other side is copied into all communications. This helps to preserve the arbitrator's impartiality. Some family arbitrators will offer a free introductory meeting. The parties will need to ensure that their chosen arbitrator is qualified to hear their dispute; some arbitrators will only be able to hear financial disputes, some only children and some will be able to hear both types of dispute.

6.2 The Application

- a.** The parties submit to the IFLA Administrator a Form ARB1FS (in the case of financial disputes) or Form ARB1CS (in the case of children disputes) signed by both parties in which they describe and define the scope of the dispute they agree to arbitrate.
- b.** The preferred way to submit an ARB1FS or ARB1CS is by email to info@ifla.org.uk. Alternatively, it can be submitted by post to IFLA, PO Box 302, Orpington, Kent BR6 8QX.
- c.** In their Forms ARB1FS or ARB1CS the parties expressly agree to be bound by the family arbitrator's written decision subject to:
 - i.** any right of appeal or other available challenge;

- ii. any changes which the court making that order may require if the subject matter of the award requires it to be embodied in a court order;
 - iii. in the case of an award of continuing payments any future award or order varying the award.
 - d. The parties also expressly declare and agree that:
 - i. they have read and will abide by the Rules; and
 - ii. that they understand their obligation to comply with the decisions, directions and orders of the family arbitrator; and
 - iii. when required to do so they will make full and complete disclosure relating to financial circumstances.
 - iv. in the case of a children arbitration, that they will make full and complete disclosure in relation to any safeguarding concerns
 - e. Given the above, it is critical that the obligations upon the parties contained in the Forms ARB1FS and ARB1CS 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 this by speaking to the parties together and in person, before the Form ARB1FS or ARB1CS is signed so as to be satisfied that they fully appreciate and accept those obligations and their binding nature.
 - f. In children arbitrations the parties will need to confirm and the arbitrator will need to be assured that there are no safeguarding issues which may require the intervention of statutory authorities in the dispute.
 - g. By the Forms ARB1FS and ARB1CS the parties seek the appointment of their nominated family arbitrator (or they may request IFLA to select a family arbitrator from its panel). In the case where a family arbitrator has been nominated on the Form ARB1FS or ARB1CS but is unable or unwilling to accept

the appointment, the parties will have the option of nominating another family arbitrator.

- h. Where the 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 ARB1FS or ARB1CS 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. In both cases, the IFLA Administrator will forward the Form ARB1FS to the nominated family arbitrator, inviting him or her to become the appointed family arbitrator.
- i. The Nomination Protocol sets out the criteria to be applied to the nomination of a family arbitrator. The criteria will be applied strictly in the following order unless the parties have specific requirements which they have set out on the Forms ARB1FS and ARB1CS. The criteria are as follows:

 - i. 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);
 - ii. the parties' wishes as to qualifications, experience or other attributes of the family arbitrator;
 - iii. the number of appointments received to date (i.e. to 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 Nomination Protocol is available from IFLA on request from info@ifla.org.uk

6.3 Accepting the arbitration

- a. The family arbitrator contacts the parties seeking their agreement to the terms of the appointment. All correspondence between the family arbitrator and one party must be copied to the other party.

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

6.4 The family arbitration process

- a. The family arbitration process will depend on the nature of the parties' dispute and their preferences, and that of the arbitrator, as to procedure. It may be a document-only procedure, or be conducted by telephone and/or face-to-face meetings.
- b. The 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, when these issues can be discussed and he or she will make a decision.
- c. 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.
- d. If there is to be a final meeting it will take place at a date and time agreed between the parties and the family arbitrator.
- e. The family arbitrator's fees must be settled prior to receipt of the award, as requested by the family arbitrator.
- f. The family arbitrator's decision must be committed to writing and delivered promptly. The decision will include written reasons and a formal award.

6.5 The court

- a. The parties have the right to appeal to court on a point of law (unless the parties have agreed to exclude this right). The

parties can also invite the court to set aside the award if there has been a serious irregularity which has resulted or may result in substantial injustice.

- b.** In a financial remedy and children family arbitration there will normally be a requirement to convert the award into a court order.
- c.** In a children family arbitration, consideration needs to be given to the no order principle and whether therefore an order is necessary.
- d.** Once a court order has been made it may then be enforced in the usual way.
- e.** If the family arbitration involves a purely civil claim (for example, under TOLATA 1996) then the parties may apply to court for permission to enforce the award as though it were itself a court judgment or order.

6.6 And Finally

The Rules allow that 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 family arbitration and the award are confidential, and disclosure is permitted only in prescribed circumstances. Media are not admitted to any meetings.

7. Legal framework

- 7.1** 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.
- 7.2** 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 Rules to the extent that they exclude, replace or modify the non-mandatory provisions of the Act; and then within the 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 Rules.
- 7.3** The key provisions of the Act are set out at s.1, s.33 and s.40.
- 7.4** Beneath the mandatory provisions of the Act, important aspects of the Scheme are fleshed out both by the Rules and the Forms ARB1FS and ARB1CS.
- 7.5** The Rules contain one mandatory requirement, that the substance of the dispute is to be arbitrated in accordance with the law of England and Wales.
- 7.6** 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.
- 7.7** In agreeing to the Scheme Rules (which the parties do explicitly in the ARB1FS and ARB1CS) the parties agree that during the arbitration they will not commence an application to the court nor continue any subsisting application relating to the same subject matter. The only exception to this is an application made in connection with and in support of the arbitration or to seek relief

that is not available in the arbitration. As no arbitrator has any powers of enforcement, provision is made in the Act for the parties to apply for court orders in support of the arbitration, such as a witness summons or, if need be, an injunction pending resolution of disputed issues.

Family Law

Arbitration Scheme

