

IFLA

Institute of Family Law Arbitrator

A Guide to the FamilyLaw Arbitration Scheme

An Introductory Guide for Mediators

First Edition

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Introduction

Welcome to the Institute of Family Law Arbitrator's (IFLA) guide for family mediators. This is IFLA's guide to the Family Law Arbitration Scheme ('the 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 (CIArb) and the Centre for Child and Family Law Reform (sponsored by The City Law School, City University London). IFLA is a not-for-profit organization which devised the Scheme. IFLA owns and manages the rules of the Scheme and the appointment of arbitrators, but IFLA arbitrators are members of and regulated by the Chartered Institute of Arbitrators (CIArb).

The IFLA Scheme operates under English law and is the first scheme of its kind in England and Wales. It facilitates the private resolution of family disputes concerning money and property (The Financial Scheme) and children (The Children Scheme).

Family arbitrators resolve the issues before them in a flexible and less formal way than the courts. They do so by applying the laws of England and Wales, and in accordance with rules established by IFLA. The IFLA Scheme Rules have been approved by the President of the Family Division.

For further information on the scheme, including that relating to the structure of IFLA and the qualification and training requirements, please consult the IFLA website www.ifla.org.uk. The rules that apply to the Children Scheme and the Financial Scheme can also be found on the website.

What is Family arbitration?

Arbitration is a form of private dispute resolution in which the couple agree to appoint a qualified family lawyer to act as an “arbitrator” (or private judge) to resolve their dispute. It is a quasi-judicial form of dispute resolution which is contractually binding on the parties. While there is scope for agreement and collaboration, the arbitration process is controlled by the arbitrator and the relevant IFLA scheme rules. Arbitration also retains adversarial elements found in litigation although the parties have more control over the process which can help to reduce conflict.

Arbitration can be used to resolve disputes concerning family finances and children. It can be used to resolve either the entire dispute or a limited number of issues which are preventing the couple from reaching an agreement. The arbitrator’s decision is called an Award (financial disputes) or a Determination (children disputes).

The arbitration process is closer to court proceedings in its structure, than it is to mediation. It is important to understand that unlike mediation, an arbitration award is a solution imposed upon the parties to the dispute. However, this is the method of dispute resolution which the parties have agreed to use. They have chosen an IFLA arbitrator to resolve their issues and in doing so they have:

- a. chosen the arbitrator; and
- b. agreed the arbitrator’s fee and who will pay it; and
- c. agreed the issues to be resolved by the arbitrator; and
- d. agreed, with the arbitrator, the form of the arbitration (on paper or by a court style hearing); and
- e. identified any areas of agreement which they want the arbitrator to include in the award; and
- f. agreed to waive their right to have their dispute resolved through court proceedings; and
- g. agreed to be bound by the arbitrator’s decision.

Once an arbitration is concluded the couple can carry the decision into effect. Sometimes a court order will be necessary, and this is always likely to be the case with financial claims between married or civil partnership couples. The courts have provided a swift and inexpensive route to making those consent orders. Orders are rarely necessary in most disputes concerning children and the decision of the arbitrator can be converted into a parenting plan or agreement.

If one person does not agree with the arbitrator’s decision because it is clearly unfair or fails to address the main issues in the case, the decision can be challenged in the Family Court.

Safeguarding of Children and Domestic Abuse

The Financial Scheme

Allegations of domestic abuse are not a bar to financial arbitration. An arbitrator will refuse to accept an arbitration appointment if he or she is concerned that there is no genuine consent or agreement to arbitrate. The arbitrator also has the power and the means to ensure that the process is fair to everyone involved and this will include special measures for anyone giving evidence or attending meetings with the arbitrator.

The arbitrator does not currently carry out any specific assessment for domestic abuse or safeguarding for financial arbitrations as this is not part of the court process. Arbitration is an alternative to court but largely mirrors the court process.

The Children Scheme

Applicants wishing to use the IFLA Children Scheme are required to complete a safeguarding questionnaire and to obtain a basic DBS check as part of their application and before the arbitrator accepts the appointment.

The family arbitrator does not have the benefit of a CAFCASS report and where necessary will direct the instruction of an Independent Social Worker or other expert such as a Child Inclusive Mediator.

The safeguarding of children and adults is provided for within the Scheme Rules. Article 17 of the Children Scheme Rules places a continuing obligation on the parties to provide (before and during the arbitration):

- a. accurate information regarding safeguarding and protection from harm; and
- b. to disclose any report prepared by CAFCASS or any local authority children's services department or similar agency in relation to the welfare or safeguarding of any child who is the subject of the proposed arbitration; and
- c. to disclose fully and completely to the arbitrator and to every other party any fact, matter, or document in their knowledge, possession or control which is or appears to be relevant to the physical or emotional safety of any other party or to the safeguarding or welfare of any child the subject of the proceedings, or to a decision by the arbitrator under Art.17.2.1.

If at any time before or during the arbitration the arbitrator forms the view 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, it is the arbitrator's duty to consider

whether the arbitration may safely continue. If the arbitrator concludes that the dispute is no longer suitable for arbitration under the Children Scheme, then he or she must terminate the proceedings. The arbitrator must also inform IFLA of a decision to decline an appointment or to terminate an arbitration on safeguarding or welfare grounds.

Furthermore, if at any time during the arbitration the arbitrator becomes aware of any matters which lead him or her reasonably to believe that a child or any party has suffered or is likely to suffer significant harm it is the arbitrator's duty to communicate his or her concerns as soon as possible to the relevant local authority or appropriate government agency and (if appropriate) without prior intimation to any party of an intention so to do.

Family arbitration and mediation working together.

Arbitration can take place in conjunction with mediation. If the arbitrator considers that mediation would benefit a couple, he or she may direct this as part of the arbitration. Conversely, a mediator may recommend family arbitration if it seems clear that a problem, or one aspect of it, cannot be resolved in mediation.

Mediation can break down because the couple can't agree a single issue such as periodical payments or a pension sharing order or where the children will be spending their time. This is where arbitration and mediation can work well together.

Single issue arbitration: The couple can agree to refer a single issue to arbitration, and this is a quick, efficient, and cost-effective way of resolving the problem. They can also give the arbitrator permission to incorporate, within the award or determination, the issues which have been agreed in mediation thereby ensuring that all issues form part of the arbitration and are binding.

Arbitration as a safety valve: An early agreement to arbitrate unresolved issues prevents the weaponization of mediation by the threat of litigation.

Arbitration as a facilitator: The arbitrator can be brought in during the mediation to help with any issues which are preventing progress in the mediation. A mediator can call upon an arbitrator to give an early neutral evaluation. In this role the arbitrator would provide guidance rather than act as an adjudicator and his or her decision would not be binding. This allows couples to retain the autonomy that mediation provides whilst also enjoying one of the key benefits of family litigation the FDR or Financial Dispute Resolution Appointment.

Mediation, Family Arbitration, and the Certainty Project

The benefits of closely integrating mediation and arbitration are demonstrated by the Certainty Project, a triage approach to family law bringing together Resolution compliant solicitors, barristers, mediators & arbitrators in a one stop solution facilitated by the IFLA arbitration scheme. All the professionals involved are taken from a panel of experts who actively adhere to Resolution's code of conduct and who take a collaborative approach – a problem solving approach for the benefit of the family.

If the couple agree to engage the Certainty Project, they must sign an agreement to arbitrate at the outset. This appoints the arbitrator and ensures that the case is diverted from the court arena. The first step is for the arbitrator to direct the exchange of financial disclosure and any experts' reports. The couple are also directed to attend mediation and the arbitration is suspended until this has taken place. If the mediation results in an agreement on all issues the mediation report is sent to the arbitrator who prepares the award. This is then converted into a consent order in the usual way.

If all or any issues are not resolved the report identifies them and the problem is referred to the arbitrator who may give further directions after consulting and agreeing these with the couple. The problem is then set down for an arbitration which may be dealt with on paper or at a hearing. Again, the couple agree this with the arbitrator.