## What is it like to arbitrate?

### Alexander Chandler, barrister, 1 King’s Bench Walk, offers insights into the arbitration process.

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**View from the arbitrator's chambers**

I was recently appointed to arbitrate in a financial remedy claim. In advance, I'd received a paginated bundle containing the core documents and comprehensive case summaries, so that by the agreed start time of 10.30 I was fully caffeinated and ready to go.

An hour passed; nothing happened. Unlike in court where the judge has the assistance of an usher to provide a running update of what is happening outside the court room (note to practitioners: *never* upset an usher), I couldn't be sure that, while I waited for the parties, the parties weren't in their respective rooms down the corridor, politely waiting to be called in. As it turned out, the parties' discussions were ongoing and neither was yet ready to start.

Further time passed and a request was made to start after lunch. As the parties assembled at 2pm I prepared to deliver the following warnings with as much gravitas as I could muster: "There is a limit to which I can allow further time"; "If agreement is not reached soon, the case shall have to begin"; and "I cannot allocate an endless amount of time to this case at the expense of the other…"

At which point, the penny dropped.

I had no other cases to hear. The pressure that comes with judicial sitting – to get through a list of cases when the available court time is less than

the sum of the time estimates– didn't arise. There was no need to crack the whip to ensure one case seamlessly followed another. The parties were not wasting a public resource and their representatives were not committing the cardinal sin of wasting judicial time. This was the parties' time to spend as they saw fit. As an arbitrator, I was at the parties' beck and call, to assist to the extent (and only to the extent) that the parties required. In taking their time, while I re-read my notes and drank cold coffee, the parties were using the allotted time in such way as they saw fit.

**What is arbitration and who are IFLA?**
In arbitration the parties to a dispute agree to be bound by the decision ("award") of an arbitrator. The three principles of modern arbitration are set out at Section 1 of the Arbitration Act 1996, i.e.

> "(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"

Arbitration is established as the preferred method of resolving international commercial and trade union disputes (e.g. ACAS, i.e. Advisory, Conciliation and Arbitration Service). The Institute of Family Law Arbitrators ("IFLA") was set up in 2012 to administer the Family Law Arbitration Scheme as a form of non-court dispute resolution. The IFLA Arbitration Rules are now in their fourth edition (2015) [1].

**What cases are covered by the IFLA?**
The IFLA scheme currently covers financial and property disputes arising from the breakdown of marriages, civil partnerships and cohabitation; parenting and provision for dependants. Article 2.2 of the 2015 Rules sets out the claims covered, e.g. Matrimonial Causes Act 1973 Part II, Schedule 1 to the Children Act 1989, the Inheritance (Provision for Family and Dependants) Act 1975 and, notably, the Trusts of Land and Appointment of Trustees Act 1996 ('TOLATA') where different considerations will apply (e.g. declarations can be the subject of a Tomlin order submitted to the County Court).

It is intended that the IFLA scheme will be extended to cover private law Children Act disputes.

There is no requirement for parties to be legally represented. McKenzie

friends can advise and assist (Article 4.6) subject to the power of the arbitrator to direct this assistance is brought to an end where it is impeding arbitration or interests of justice (Art. 4.7)

In terms of funding, in ***Rubin v Rubin* [2014] EWHC 611** Mostyn J commented at [13(x)] that a legal services payment order under Section 22ZA of the Matrimonial Causes Act 1973 could be made in order to fund cost of arbitration for the purposes of a claim under that Act.

**Can an arbitral award be binding?** [2]
The central problem with arbitration in family law is that: "…the parties cannot, by agreement, oust the jurisdiction of the court" (***Radmacher v Granatino* [2010] UKSC 42** per Lord Phillips PSC at [2]). Some financial remedy orders, including clean break orders and pension sharing orders require a Family Court order to be effective.

In ***S v S (Financial Remedies: Arbitral Award)* [2014] EWHC 7**, Munby P placed the development of family law arbitration in the following legal context:
(1) The identification of the 'magnetic factor', i.e.

> "[11] …the feature(s) or factor(s) which in a particular case are of 'magnetic importance' in influencing or even determining the outcome… We see this approach, though not the label, carried forward in the fundamental important statement of principle by the Supreme Court in *Granatino v Radmacher*…
>
> > '[75] …The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement"

(2) The increasing emphasis on non-court dispute resolution, as enshrined in FPR 2010 Parts 1.4(f) and 3.3. As Thorpe LJ noted in *Al Khatib v Masry* [2005] 1 FLR 381 per at [17] "…there is no case, however conflicted, which is not potentially open to successful mediation" (read: non-court dispute resolution, including arbitration). Also see the subsequent decision by Mostyn J of ***Mann v Mann* [2014] EWHC 537**: approving the adoption of an order commonly made in civil procedure (*Ungley* Orders and *Jordan* Orders) that where a party has not taken up an offer of non-court dispute resolution, they should file a witness statement explaining their reasons, which can be taken into account on the issue of costs.

(3) The willingness of the High Court to innovate and allow for expedited procedures to endorse agreements reached outside court (in the case of

collaborative law, as set out by Coleridge J in *S v P (Settlement by Collaborative Law Process)* [2008] 2 FLR 2040).

Accordingly while most arbitral awards still need to be put before the Family Court, the court will only interfere in the rarest of cases. Where an arbitral award is placed before the Family Court for approval:

> "[21] …the judge will not need to play the detective unless something leaps off the page to indicate that something has gone so seriously wrong in the arbitral award as fundamentally to vitiate the arbitral award… it can only be in the rarest of cases that it will be appropriate for the judge to do other than approve the order. With a process as sophisticated as that embodied in the IFLA Scheme it is difficult to contemplate such a case."

Where an arbitral award has been made but one party resists the making of a court order in the terms of the award, the correct procedure is for a 'notice to show cause' to be issued, with the following warning in mind:

> "[25] …The court will no doubt adopt an appropriately robust approach, both to the procedure it adopts in dealing with such a challenge and to the test it applies in deciding the outcome. ... The parties will almost invariably forfeit the right to anything other than a most abbreviated hearing… only in highly exceptional circumstances is the court likely to permit anything more than a very abbreviated hearing.

**What are the arbitrator's powers?**
The overriding principle is that only where the parties disagree can the arbitrator determine the issues, in accordance with the following principles:

> "...[to] act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and…(b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense…" (Arbitration Act, s. 33)

The arbitrator's powers are summarised at Articles 7 and 8 of the 2015 Rules and include the appointment of an expert (Art 8.2), requiring the production of information (Art 8.4(a)), making interim ("provisional") orders: (Art. 7.2, Section 39 of the Arbitration Act), making peremptory/ unless orders (Section 42 of the Arbitration Act) and proceeding in the absence of a party in breach (Art. 8.5) and making costs orders that one party may bear larger than equal share (up to full amount) or arbitrator's fees and expenses and/ or legal or other costs of another party (Art. 14.5) – with the starting presumption of no order as to costs.

**What are the benefits of arbitration?**

1) Flexibility and autonomy
The parties agree what issues are put to the arbitrator, and the method. Articles 9.1 and 9.2 of the 2015 Rules provide that "…the parties are free to agree as to the form of procedure… [only] if there is no such agreement [shall] the arbitrator… have the widest possible discretion to adopt procedures suitable to the circumstances of the particular case". Article 12 of the 2015 Rules sets out the default position, the "alternative procedure" which provides for the Form E or Form E1 to be exchanged within 56 days of the arbitrator's appointment etc.

In some cases, parties will require an arbitrator to hear evidence and write an award, to resolve issues that are not capable of settlement, within a shorter time frame than is available at court. In other cases, the parties may require issues to be determined on submissions or on paper. In TOLATA claims (which come within the IFLA Arbitration Rules 2015, para 2.2(f)), a declaration may be sought in relation to beneficial ownership, without the civil costs rules (see 2015 Rules, para. 14.4(b) – "unless otherwise agreed by the parties", the presumptive rule is no order as to costs).

Arbitration can throw up some unexpected procedural issues: since the parties had co-signed the 'ARB 1' application form, who should be regarded as the lead party (i.e. who should present their case first)? How should they address the arbitrator? On these, as with most issues in arbitration, the answer is provided by Section 34 of the Arbitration Act 1996: *"It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter"* – subject to the reservation of a few mandatory provisions (Schedule 1, Arbitration Act 1996). In an arbitration before me, the parties agreed to apply the convention of the wife being the lead party and to address me as if I was sitting in the capacity of a deputy district judge ("sir"), as opposed to my preferred denomination ("your grace").

2) Avoidance of delay
Arbitration has been described by Frances Gibb in The Times as the 'Bupa Option', where parties can avoid the delays of an increasingly under-funded and overwhelmed court system by, in effect, going private and seeking the arbitrator's determination within a timescale of their choosing.

3) Confidentiality
Arbitration is private and confidential, and remains confidential where the award is submitted to court for its approval. In the recent **President's Guidance of 23 November 2015** at [14]

> "Parties anxious to preserve the privacy and to maintain the confidentiality of the award should lodge that document in a sealed envelope, clearly marked with the name and number of the case and the words "**Arbitration Award: Confidential**". The award will remain on the court file but should be placed in an envelope clearly marked as above, plus "**not to be opened without the permission of a judge of the Family Court**." The request for the award to be sealed once the order has been approved should be made prominently in the covering letter".

The only caveat to the issue of confidentiality is that it is unclear how confidentiality can be guaranteed where a party seeks to resile from an award, leading to a 'notice to show cause' hearing. This is likely to be a matter for the trial judge, to weigh the interests of open justice against the intention that an arbitration should be conducted in private.

4) Choice of arbitrator and continuity
However, one might add, select your arbitrator carefully: unlike litigation, there will be 'judicial continuity' in an arbitration.

5) Relief from sanctions.
In arbitration the parties can to a large extent set their own procedure, and avoid the potential sanctions that may arise from breaching, for example, PD27A in relation to the court bundle. As Mostyn J noted in ***J v J* [2014] EWHC 3654** at [53]: "I would remark that if parties wish to have a trial with numerous bundles then it is open to them to enter into an arbitration agreement which specifically allows for that."

It may be particularly attractive where a TOLATA/ cohabitee claim is being arbitrated, for the parties to avoid the post-Jackson civil litigation (costs budgeting, strict compliance with deadlines etc.), and the civil costs rules (see presumption of no order as to costs at Art. 14.4).

**What are the potential disadvantages?**

1) Cost
Parties who choose to arbitrate face the additional costs of the arbitrator whereas (for the time being), there are no court fees save for the issue fees. However, this cost will in many cases be offset by avoiding the costs involved in lengthy litigation, where the parties can decide what issues the arbitrator shall decide.

2) Fewer coercive powers
The arbitrator has no power to injunct (Art 7.2) or commit (Art. 7.3) and cannot accept undertakings – instead an award can recite a schedule of agreements. The arbitrator has no jurisdiction over non-parties without their consent, and it is not possible to join a party against their will (cf.

FPR 9.26B). In such cases, an application can be made to the court requiring a party to comply (S. 42 Arbitration Act; Art 8.6) or inviting the court to make an injunction (S. 44(2) Arbitration Act).

3) Incompatibility with FDR procedure
While the parties may decide on whatever procedure they like, a FDR is not normally compatible with an arbitration. Hence the standard arbitration directions at Art. 12 provide, instead of a FDR, for a meeting to "…review progress, address outstanding issues and consider what further directions are necessary" instead of FDR (Art 12.7).

4) What if you don't like the way the arbitration is going?
The aggrieved party has no right to call the proceedings to a halt – indeed the parties have, by signing the ARB1, expressly agreed to abide by the IFLA Arbitration Rules and agreed that the Award is final and binding (save for certain circumstances). However, parties acting jointly can bring the arbitration to an end (Art 15.2 (d)), and the arbitrator may terminate the arbitration if he considers the dispute is no longer suitable for arbitration (Art. 15.2(a)).

Summary: What is it like to arbitrate?
In the arbitration described above, at 4pm I was informed that the time had been used productively to the extent that a concluded agreement had been reached. By 5pm this had been drafted as an Agreed Award which I was happy to sign and approve.

This arbitration had been successful, not because of the ingenuity of the arbitrator (my involvement had been limited to making some suggestions on procedure, such as the adoption of *Calderbank* offers in respect of costs) but, as far as I could see, because the parties had benefitted from the autonomy offered by arbitration, without the pressure of time, in a civilised environment (where each side had their own conference room) and the availability of an arbitrator who could give his undivided attention to assisting when the parties wanted, and only to the extent that they required.

Having now heard a number of arbitrations, my abiding impression is, there's a lot of waiting, wondering what's going on in the adjoining rooms without the assistance of an usher (doubling as a spy). I recalled the words of Charlie Watts of the Rolling Stones, when he was asked what it had been like to be the drummer of the Stones for 25 years (this was in 1989):

*"Well, it was like, work for five years,*
*The rest of it was spent hanging around".*

While arbitration isn't for every case, it can be much to the parties' advantage having a tribunal hanging around for the parties (as opposed to parties hanging around for the court) – which will be the experience of every case that has been block listed at 10am in the Financial Remedies Unit at the Central Family Court.

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[1] http://www.familyarbitrator.com/wp-content/uploads/IFLA_2015_rules_annotated.pdf

[2] NB This section refers to financial remedy claims where the court's approval is required. It is not necessary where the nature of the claim is a claim under TOLATA where the parties are at liberty to register the Award (cf. conclusion of TOLATA claim by a *Tomlin* order).