

**PRESENTATION NOTES FOR THE 28<sup>th</sup> SEPTEMBER 2012  
RESOLUTION CONFERENCE ON DISPUTE RESOLUTION AT ST.  
CATHERINE'S COLLEGE, OXFORD**

***THE RELEVANCE, USE AND AVAILABILITY OF ARBITRATION IN  
RELOCATION AND CHILD CASES, FOR WORKSHOP G<sup>1</sup> FROM  
MICHAEL STERNBERG QC MCI Arb FRSA***

Binding Family Law Arbitration is now finally available in all aspects of financial and property disputes arising from family relationships, including Financial Remedy Applications under Matrimonial Causes Act 1973: Applications under the Inheritance (PFD) Act 1975; Part III applications under the MFPA 1984; Schedule 1 Children Act applications, TOLATA applications, Financial Remedies under the Civil Partnership Act and MWPA 1882 applications. It is not available on pure child care issues as such but that does not mean it is excluded from resolving important ancillary financial issues in relocation cases where the parties have got “stuck”.

The Scheme is governed by the *Arbitration Rules (2012 2<sup>nd</sup> edition)*: the introductory paragraphs set out the background:-

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<sup>1</sup> G. A Dispute Resolution Model For Resolving Children Issues - Dr Mark Berelowitz, consultant child and adolescent psychiatrist and Carole Edwards, psychotherapist, with the DR Group of 4 Paper Buildings. Suggested Level – Intermediate: An interactive, original multi-disciplinary workshop focusing on creating a model for resolving children issues. The model will be cost effective aimed at providing users with an informed and self-determined outcome for their clients, a forum which should assist with resolving other issues and an early resolution of parenting issues relevant to any related financial issues.

- 1.1 The Family Law Arbitration Scheme ('the Scheme') is a scheme under which financial or property disputes with a family background may be resolved by arbitration.
  
- 1.2 **The Scheme is administered and run by the Institute of Family Law Arbitrators Limited ('IFLA'), a company limited by guarantee whose members are the Chartered Institute of Arbitrators ('CI Arb'), Resolution and the Family Law Bar Association ('FLBA').**
  
- 1.3 Disputes referred to the Scheme will be arbitrated in accordance with:
  - (a) The provisions of the Arbitration Act 1996 ('the Act'), both mandatory and non-mandatory;
  
  - (b) These Rules, to the extent that they exclude, replace or modify the non-mandatory provisions of the Act; and
  
  - (c) The agreement of the parties, to the extent that that excludes, replaces or modifies the non-mandatory provisions of the Act or these Rules; except that the parties may not agree to exclude, replace or modify Art.3 (Applicable Law).

### **So what does arbitration mean?**

1. Arbitration is a form of dispute resolution. The parties enter into an agreement under which they appoint a suitably qualified person to adjudicate a dispute and produce a result which will bind them. In England the process of arbitration is governed by the Arbitration Act 1996 ("the Act"), Arbitration has a long history in

many commercial and construction areas Now it is finally available in family disputes under the rules of the IFLA.

### **How does it apply to Family disputes?**

2. In summary the scope of the Scheme covers all financial and property disputes arising from family relationships, including disputes which would be decided under Schedule 1 of the Ch Act 1989. The Scheme does not apply to issues arising or connected with the liberty of individuals; of individual's relationship; the care or parenting of children (as such); bankruptcy or insolvency any person or organisation which is not a party to the arbitration.

### **How does it work?**

3. The first step is for the parties to complete and sign a form called an "*ARB 1*". In this they agree to arbitrate and to adopt the rules of the Scheme and summarise the issues to be arbitrated. They can either nominate an IFLA arbitrator or invite IFLA to select the arbitrator.

It is important to remember that arbitration cannot be forced on a reluctant party. All arbitrations under the Scheme have to go via IFLA which charges a modest administration fee. The parties agree in the form *ARB 1* that the arbitrator's decision will be final and binding and that if necessary they will apply for a court order to give effect to it. After the *ARB1* goes to IFLA the following steps take place:-

1. The appointment is offered to the arbitrator who seeks the parties' agreements to his or her terms.

2. The arbitrator accepts the appointment and the arbitration formally begins.

3. The arbitrator contacts the parties with a view to furthering the conduct of the arbitration, by agreement or otherwise.

4. Often (though not necessarily) there will then be a preliminary meeting to deal with the further conduct of the arbitration. What happens after this will depend on what the parties want. In many cases there will be a final hearing, but arbitration can be entirely a paper exercise. Parties will usually be represented at hearings by solicitors or barristers but that is not essential.

5. The judgement and order made by an arbitrator is known as an award. There can be interim awards as the arbitration proceeds. The parties agree in the form *ARB 1* that the arbitrator's decision will be final and binding and that if necessary they will apply for a court order to give effect to it here, or overseas.

### **Why choose arbitration at all?**

8. There are many advantages to arbitration. The parties choose the arbitrator. He / She will sit promptly at a time and place convenient to the parties. The arbitration is conducted in private. Only English law can be applied. However, the flexibility of arbitration procedure is a very attractive feature. The way of providing written statements of case, disclosure, witness Statements and/or expert evidence can all be agreed, including, if desired, Forms E. Disclosure can be limited by agreement or direction. The parties decide the ambit of the arbitration. In some cases they will want the entire dispute arbitrated. In others, there may be a large measure of agreement but one or a few intractable areas of disagreement.

Importantly, arbitration can also be effected “on paper“without a hearing, which will produce a swift and cheap result. The arbitration can take place at any time and anywhere; before or after proceedings have begun. It can be used to resolve a discrete issue or issues which may be holding up a settlement.

### **What about costs?**

9. The IFLA Scheme provides that subject to (a) prior agreement and (b) the arbitrator’s overriding discretion, the normal rule will be no order for costs. However, the parties can agree any costs rules which they like – e.g. that Calderbank letters could be taken into account. And the arbitrator has discretion to depart from the no order starting point on the basis of the conduct of a party in relation to the arbitration.

In many cases there will be a significant saving of overall legal costs. Of course the parties have to pay the arbitrator’s fees, the cost of any venue which is hired, and the cost of a transcription service, if required. However the ability to limit disclosure and the ambit of the dispute, and the potentially huge saving of time will in many cases lead to a net cost saving.

### **What is the status of the Award?**

10. The Arbitration Act 1996 provides that an award is enforceable with permission of the court in the same manner as a judgement; and that when leave is given a judgment may be entered in the terms of the award.

Under the New York Convention arbitral awards are readily enforceable internationally. An award under the Scheme is final and binding subject to review

or appeal. If an award provides for continuing payments it can be subject to a further award or court order: plainly there has to be scope for variation.

A family law arbitral award will in the author's view be wholly binding on the parties and be enforced by the Family Division, subject to the very narrow statutory avenues of appeal which exist under the Arbitration Act 1996 (s67 AA – challenge to the jurisdiction of the arbitrator and hence the validity of the award) (s68 AA – serious irregularity in the proceedings) (s69 AA with leave of the CA on a point of law).

Whilst no case has yet reached the CA for an authoritative ruling on if the award is fully enforceable in the QBD or FD, it is the informal view of significant Lords Justices of Appeal, High Court Judges and at least one Supreme Court Justice that subject to subject to the very narrow statutory avenues of appeal which exist under the Arbitration Act 1996 an arbitral award will be watertight and achieve a significantly higher invulnerability to being interfered with by a court than an agreement made at an FDR and approved by the Court. Indeed one High Court Judge has requested that an arbitral award should be fast tracked in the same way that a collaborative law agreement may be.

### **Arbitration as part of dispute resolution in relocation cases:**

As we know binding family law arbitration is not available in pure family child care issues such as residence, contact and relocation. However it is expressly available in respect of issues under schedule 1 of the Ch Act 1989; TOLATA 1996 and all financial remedies in Part II of the MCA 1973 (See rule 2.2 of the second edition of the Family Law Arbitration Rules 2012 effective 20 March 2012).

Accordingly as part of this case study Arbitration could come into its own if say a relocation were agreed but no agreement could be reached via mediation or via a collaborative process on vital ancillary money and property issues, in advance of an overall agreement between the parties (or adjudication) on all financial remedy issues and divorce or judicial separation..

It might as we know take many months if not over a year to get an adjudication on disputed FR and property issues through the court system, which could hold up the relocation if not fatally delay it. Arbitration could save the day in such a situation.

Arbitration on remaining disputed money and property issues as it is hoped now self evident could by contrast take place fairly quickly indeed (and in a matter of weeks) on for example the following type of issues:

1. The cost of a home overseas and how that might be funded (rental or purchase with or without borrowing).
2. The kitting out of a home overseas if appropriate and what chattels could be taken and what left behind?
3. The level of child support / school fees for the children overseas.
4. Interim spousal maintenance, if appropriate; quantum and duration.
5. The costs of contact, such as who would pay for airfares to and from England; in which class the children flew and who would pay the costs of an accompanying adult if that was desired.

## Conclusion:

Accordingly family law arbitration contains a very useful way of dealing with money / property disputes related to children issues quickly, cheaply and confidentially where the existence of those issues and the parties' initial intractability threatens to derail otherwise agreed major matters affecting children. Its existence and its clear major advantages over a court process should always be remembered by the wise children law practitioner.

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