# ENGLAND NEEDS BINDING FAMILY LAW ARBITRATION

## Introduction

This article sets out the case for binding family arbitration in England and Wales. It has informal support from the Institute of Chartered Arbitrators, Solicitors Family Law Association, United Kingdom College of Family Mediators, the Law Society and Family Law Bar Association. It calls for the early introduction of primary legislation to allow arbitrations to bind the family courts. It explains the benefits of arbitration in family proceedings and explains where we have got to in the debate so far. Primarily it seeks to inform the wider profession of the subject and to lead to debate.

The contents of this article have already been discussed with the Lord Chancellors Department.

## What is the background?

Since 1980, family law solicitors have largely cast off their adversarial clothes and become settlement orientated and conciliatory in approach. In some part this was a reaction against the more hostile and adversarial elements of the court based resolution process. In the 1990s there was the growth of family mediation as the therapeutic and resolution benefits were realised by professionals, some clients and by the government which made it central to the Family Law Act 1996. Changes to court procedure including in June 2000 with the introduction of FDRs have reduced the likelihood of final hearings and some of the animosity of court hearings.

However many still seek early resolution outside of court hearings yet cannot resolve by negotiation or mediation. For them family arbitration is an important opportunity. Not the answer for all cases but perhaps for a good number and a crucial middle ground between court and mediation.

In part the need for available binding family arbitration springs directly out of mediation, with its difficulty that mediators cannot advise on or recommend an outcome if the parties themselves cannot reach an agreement. In part it comes from my experience at The Family Law Consortium of several times being asked to do “private judging”, namely to advise a couple together on what would happen at court. In part it comes from the experience of several senior solicitors of approaching another senior member of the profession (often Counsel) to give Early Neutral Evaluation of a complex dispute. There are many other springboard reasons.

This was first considered by me in early 2001 when a shipping lawyer at Clyde and Co explained to me the benefits for his cases of going into arbitration. If it works for shipping law (ships that go bump in the night), why not for us (with clients who also go bump in the night with others)? I investigated further. In conjunction with the Institute of Chartered Arbitrators who have been supportive throughout, we developed at The Family Law Consortium a set of rules and a pilot basis for family arbitration. I then discovered that Australia has just produced binding arbitration from Spring 2002. We follow Australia in many family law initiatives and there is no reason why we cannot follow in the same fashion and bed it into the English culture.

The stumbling block in England is of course the inability to bind the family court by agreement, arbitration or otherwise. It is hoped that legislative change will occur soon. I return to this below. In any event, there is good reason to believe an arbitrated “agreement” will be given considerable weight.

The concept of “agreements” binding the family courts is nothing new. The Home Office’s “Supporting Families” (Nov 1998) proposed binding pre – marriage agreements in certain circumstances. Brussels I allows agreements on forum to bind the court on forum. Private ordering under the Children Act is often paramount and only interfered with exceptionally. The courts are moving to giving much greater

weight to financial agreements.

In part the success of family arbitration depends on the expertise, credibility and ability of the first family arbitrators and professional assistance has been given on this from the arbitration professional organisation, the Institute of Chartered Arbitrators. My colleague, David McHardy and I, as solicitors, mediators and DDJs at the Principal Registry, have already qualified as arbitrators and full members of the Institute who are keen to support this scheme and appoint further suitable specialist family lawyers. We have had our first trial/pilot arbitration to which I refer below. After several informal consultations in the Spring, a few of us have met with the LCD and we hope there will be more progress soon. In any event, having now raised it with them, I want to bring the debate to the profession.

**So what is arbitration?**

General Definition of Civil Arbitration

Arbitration is a procedure for the settlement of disputes, under which the parties agree to be bound by the decision of an arbitrator whose decision is, in general, final and legally binding on both parties. It is governed by both statute law and the common law. The Arbitration Acts 1950 – 1996 form the principal legislation governing arbitration in England and Wales.

The fact that an arbitrator's award is enforceable summarily in the courts makes arbitration a unique alternative to litigation when compared to other means of dispute resolution.

Almost any dispute which can be resolved in the courts can be settled by arbitration. Matters not suitable for arbitration are often those requiring certain powers of enforcement e.g. granting injunctions, imposition of a fine or prison sentence

The precise nature and structure of the arbitration will be very much governed by the arbitration agreement. This will include where and when it is to be conducted; the issues to be dealt with; the estimated time required for the arbitration; how it will be conducted (for example exchange of documents and witness statements, scheduling and receiving of expert evidence); the circumstances in which the arbitration may be suspended or terminated; the powers of the arbitrator (e.g. to award costs); whether or not there will be sworn evidence, cross examination, discovery, affidavits, rules of evidence; whether the arbitration will be conducted on the papers, by telephone, by video link or in person etc.

It is now reaching the public realm, as distinct from the purely commercial and corporate. For instance, many consumer contracts now either require or recommend arbitration e.g. holiday disputes. Soon, going into arbitration will be as common place as going to the small claims court for many disputes. So why not family cases?

What are the benefits of family arbitration:

- Identity of the arbitrator – can be chosen by parties as specific and appropriate for a case, the clients, funds available, for knowledge or experience of particular aspect of family law or background. More certainty than of any District Judge who is given the case the night before and "chosen" by the Listings Office.

- Continuity of arbitrator – will be involved throughout so less wasted costs, more detailed knowledge, consistency of approach and orders

- Arbitrator will normally be able to attend the hearing at a location (and time?!) to suit the convenience of the parties

- Parties may appear in person as with mediation or be represented by legal practitioner.
- Parties choose their own timetable so parties can control speed of process by agreement or arbitrator decides as best for the case and issues and parties, and not regimented with uniform standard court timetable procedure as for all cases per court Rules
- Privacy and confidentiality – likely to become an issue if court hearings or judgments become public under rules anticipated following Human Rights Act. Clibbery has given some protection but for how long and how wide? The whole arbitration process would be considered private and confidential
- Arbitrator can deal with discrete issues or all the case – the advantage of former is that can be specific arbitrator for specifically complex or sensitive or detailed or specialist element of case, with the remainder being in the normal court process. Arbitration and court resolution can be inter changeable.
- The parties may control the manner of the proceedings having regard to the nature of the dispute and to their precise needs. So could be less formality of hearing. The parties indicate the degree of formality or informality of the procedure. (However, in some instances the mandatory provisions of the 1996 Arbitration Act may require some minimum procedure.)
- Final arbitration outcome can be on written submissions or oral evidence and oral submissions, as parties chose
- The arbitrator is not bound by all rules of evidence but may inform himself or herself on any matter in any way that he or she considers appropriate.
- The arbitrator may require a person to attend to give evidence and/or produce documents, per court rules and based on powers in Arbitration Act.
- Not adversarial which the ct based system still is at heart; arbitrator is inquisitor with power to order disclosure etc of what is particularly needed in a specific case
- Parties can decide if costs follow event and if so what is the event, including fact of if arbitrator aware of offers; alternatively costs shared equally
- Arbitrations would not affect status of individuals e.g. no attempt to pronounce decrees of divorce.
- Unlike mediation, arbitration imposes an outcome. Many couples in mediation who do not get to an agreed outcome then seek help and guidance from lawyer mediators as to an outcome. Whilst mediator cannot give this, an arbitrator can give independent early guidance.
- In context of med-arb, the mediator may be appointed to help the parties negotiate settlement but in the event of non-settlement the parties can agree that the mediator will give an arbitration award or expert determination. However the consensus of a meeting at the United Kingdom College of Family Mediators was that med-arb should not be introduced initially to avoid confusion of roles. This needs wider debate.
- It is at a cost, unlike ct based system but arguably may save overall due to beneficial factors of arbitration. The costs of an arbitration are primarily time/cost-related and

will depend upon the matters in dispute, the procedure chosen by the parties and their choice of arbitrator.

- It will reduce burden on Court hearings and resources.

- At the end of the arbitration the arbitrator makes an award and provides concise reasons and findings of fact.

**Qualification of Family Arbitrators:**

I suggest arbitrators must be:

* Legal practitioners who must be SFLA Accredited Family Law specialists or FLBA equivalent
* Be a qualified or trained mediator. (I regard this as important. Arbitration is not mediation but mediation training and especially mediation experience gives huge insights into the dynamic of the parties which would hugely help an arbitration.)
* Have a judicial qualification and training
* Have completed specialist arbitration training/qualification with The Institute of Chartered Arbitrators (being put in place).
* Be on a list kept by the accrediting body.

An arbitrator is independent, impartial and selected by the parties or on their behalf by an appointing authority, e.g. The Chartered Institute of Arbitrators. (I would like to consider if this could be subcontracted to an arm of the SFLA/FLBA etc.) Arbitrators are appointed on the basis of their arbitral/technical expertise, reputation and experience in the field of activity from which the dispute stems.

**Progress**

After taking soundings of a couple of senior family lawyers in the autumn and then hosting two meetings of other senior family law solicitors in central London, there was clear support but on the basis that it was binding. There was an anxiety that it would otherwise falter in the same way a very commendable scheme by the FLBA did a few years ago.

The LCD was approached and they met a few of us in early July. They seemed very sympathetic and supportive and more may be known in the coming months. They were keen to learn more of the Australian experience and I can supply more details to any wanting to know about this. They were also of the initial view that it should not include child disputes on introduction. Although not yet fully convinced, I can see some sense of this. It would be therefore for finance cases, forum issues, defended divorces, cohabitation cases and similar. Views on the initial limitation would be welcome.

In the meantime, my colleague, David McHardy, and I have undertaken a pilot arbitration. The couple had been unsuccessful in mediation (not in our practice). They knew our pilot was not binding but agreed to adhere to our award. The couple were mediation process committed but it was a difficult case which had (unsurprisingly on the facts) got stuck. They were illiquid capital rich and income poor. David and I obtained orthodox disclosure – another reason why mediation must use the portable Form E – and at the end of the second session (90 minutes each following mediation practice), we gave a reserved award. We learned a lot and will no doubt do it better next time! It was a lot like sitting at court but the informality and the ability to write the rules and timetable and procedure to fit the needs of the particular couple and their dispute was stunning. If we had had any doubts before, we were persuaded.

The Chartered Institute of Arbitrators remain keen to support us in family law as we look at how it would work. I have agreed with them that we will refer to it as “family arbitration” to ensure there is no confusion in the minds of the public or legal profession that it is in any way binding as yet.

Of course there are the arbitrators costs, unlike court, but I am sure that payment made for speed, flexibility, certainty of arbitrator etc will make it a justifiable expense for some. Until it is binding in law, the LSC are unlikely to be interested. But it fits very well into the philosophy of FAINS.

Conclusion

Some of the perceived primary advantages of family arbitration are:

* The selection of decision maker.
* The direct, continuous involvement of decision maker.
* Flexibility and individual choice of adjudication process.
* Privacy and confidentiality.
* Avoidance of court delays and standardisation.
* Use for discrete issues of case
* Speed.
* Saving of court resources.

There are disadvantages such as the private cost of the arbitrator.

Obviously not all cases will be suited to arbitration (and the consent of both parties to go into arbitration is required).

Equally, like all new ADR options, it will take time for family arbitration to merge with the legal culture and for practitioners to see it as a viable (and even preferred) option for some of their clients and some of their cases some of the time. (Unlike mediation which started in family law, arbitration is well established and growing in other areas of litigation and often the resolution process of choice of experienced litigation lawyers.) It is one extra ADR tool in the family lawyer's resolution toolbag.

I share the feeling expressed by Ian Kennedy of the Australian experience namely that in 5-10 years English lawyers will look back and wonder how we got along without it, especially given the ever-increasing complexity of disputes, longer delays, higher costs and standardisation of the traditional Court processes.

I welcome responses on dh@davidhodson.com and debate but with a view to early primary legalisation to introduce binding family arbitration.

David Hodson
dh@davidhodson.com