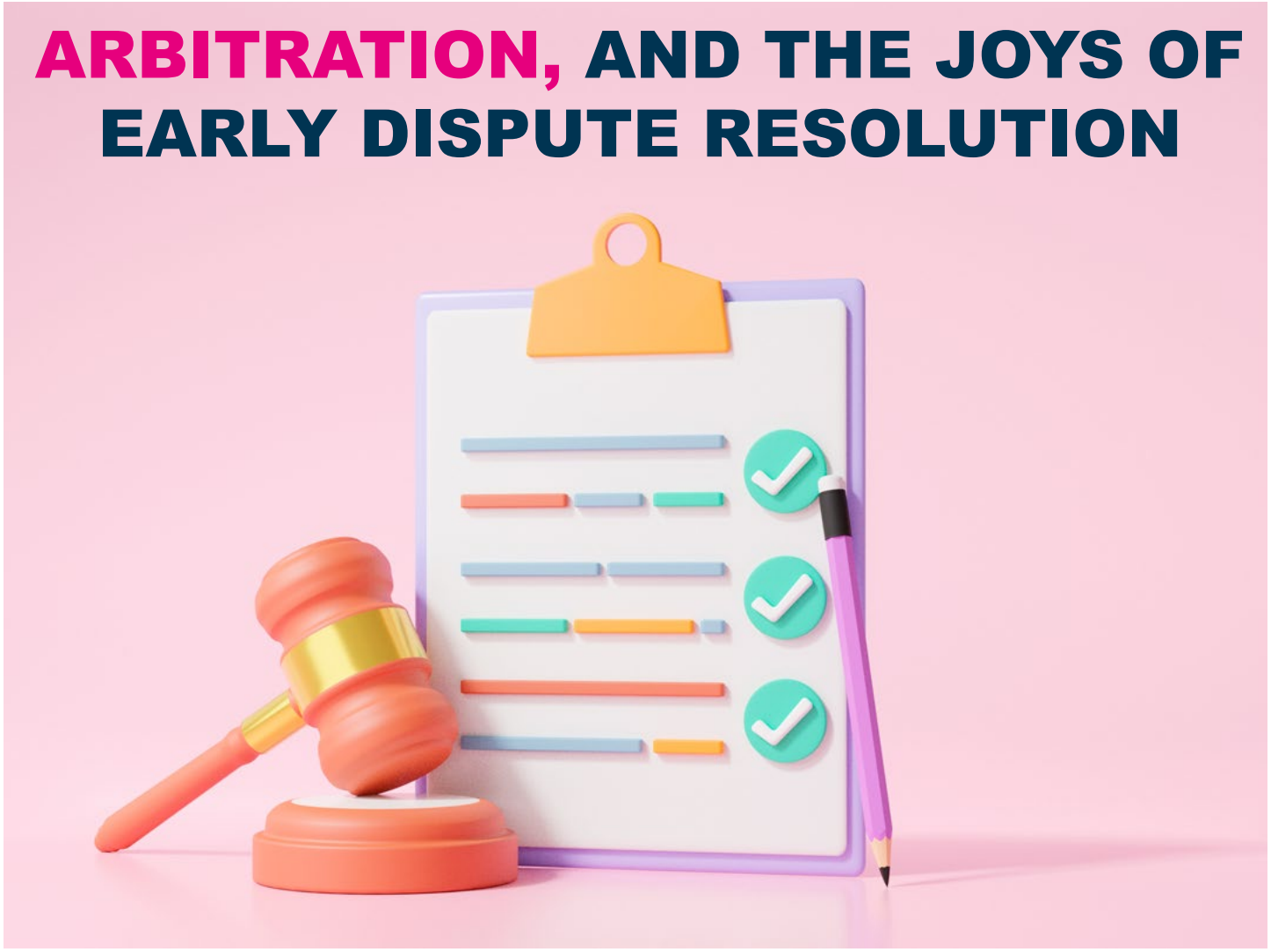
ARBITRATION, AND THE JOYS OF EARLY DISPUTE RESOLUTION



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The courts continue to struggle with a lack of resources, an overload of work and the after-effects of the pandemic. Regularly, hearings for which the parties have waited months and in respect of which they have incurred significant costs are being vacated by courts with little or no notice. Increasing, parties and advisors are looking for other options to court-based resolution of issues such as alternative dispute resolution ('ADR').

ADR takes many forms. This article is concerned with arbitration.

In arbitration, the parties agree to an independent third party (the arbitrator) making a binding decision on the matters in dispute.

The Institute of Family Law Arbitrations ('IFLA') is a not-for-profit organisation that incorporates a financial (launched 2012) and a children (launched 2016) arbitration scheme. The schemes are in increasing demand: between June 2020 and September 2021, the IFLA financial scheme saw the registration of more than ¼ of all arbitrations that have ever taken place under their scheme.

Arbitration is governed by the Arbitration Act 1996 and rules set out by the IFLA.

The IFLA has provided a list of applications suitable for arbitration. This includes most financial remedy applications (including under the MCA 1973, Schedule 1 of the Children Act 1989) and many Children Act applications (including Section 8 orders).

Parties can engage in arbitration at any stage of financial remedy proceedings (or even before issuing). They may ask an arbitrator to determine everything in dispute or very specific issues only (such as settling the terms of a letter of instruction to an expert per Moor J in **CM v CM** [2019] EWFC 16). The process is hugely flexible.

Where to start?

Parties start arbitration by first submitting to the IFLA signed forms indicating their agreement to arbitrate. This requires the parties to define the scope of the dispute upon which a decision is required, to agree to be bound by the rules of the arbitration and to agree to be bound by the decisions of the arbitrator. In financial proceedings, parties must give full and frank financial disclosure and in children proceedings, they must provide safeguarding information (including a DBS check).

An arbitrator is then selected by the parties. The arbitrator can be selected by IFLA but of course one of the beauties of arbitration is that the parties can pick their tribunal.

Where financial remedy proceedings are ongoing, a stay should be sought. The court is obliged by s9(4) of the Arbitration Act 1996 to grant a stay unless there is an issue with the agreement to arbitrate.

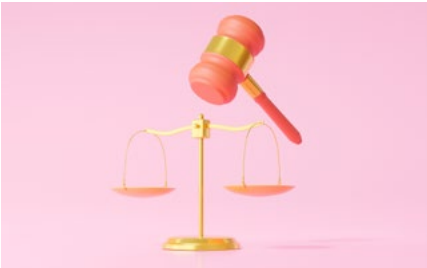
It is possible to seek court orders in support of the arbitration, such as a witness summons, if necessary.

Status of the arbitral award

The decision of the arbitrator (an 'award' in financial proceedings and a 'determination' in children proceedings) is binding. There is no absolute requirement to convert it into a court order, although it is often well-advised to do so and may be necessary to give effect to aspects of the award e.g. a pension sharing order.

To convert the arbitral award into a court order, a consent order should be filed with the court (marked confidential if privacy is an issue). It would be exceptional for a court not to convert a consent application into a court order.

Further guidance on interplay between the courts and arbitration is available in the Practice Guidance (Family Court: Interface with Arbitration) [2015] 1 WLR 59.



Challenging an arbitral award

If one party does not consent, there are extremely limited circumstances in which a court will refuse to make an order including, for example, *Barder* supervening circumstances and (exceptionally) mistake.

If a party seeks to challenge the award as unjust, it was previously understood that the threshold to prevent an arbitral award from being made into a court order was higher than the threshold for an appeal in family proceedings. In **Haley v Haley** [2020] EWCA Civ 1369, the Court of Appeal confirmed that when one party seeks to claim that an arbitral award is unjust, the test to be applied is the same test as appealing a family court decision – i.e. whether the award is 'just wrong'.

In Haley, King LJ suggested that the notice to show cause procedure should be used when a party seeks to challenge an arbitral award. Her guidance has now been supplemented by Mostyn J in **A v A** [2021] EWHC 1889 (Fam).

In A v A, Mostyn J considered himself to hold the same powers in a challenge to an arbitral award as he would have under a normal appeal. He set out detailed guidance (approved by the President of the Family Division) confirming the procedure to be followed by the party seeking to resile from an arbitral award or by the party seeking to convert the award into a consent order to which the other party objects.

In summary:

- **A Form A must be filed (if not already done).**
- **An application for notice to show cause should be made in form D11 using the Part 18 procedure within 21 days of the arbitral award in its current form.**
- **The papers should be placed before a circuit judge authorised to hear financial remedy appeals. This judge will then 'triage' the application without a hearing and decide whether the permission to appeal test has been passed.**
- **If the permission test if not passed, the judge will make the order and likely penalise in costs the party seeking to resile from the arbitral award. If the permission test is passed, directions will be given for an inter partes hearing.**

What next?

The combined effect of *A v A* and *Haley* is to clarify and confirm the status of an arbitral award. This clarification should reassure those considering arbitration. Arbitration is an increasingly popular option in both children and financial remedy disputes. It is a valid and effective avenue of dispute resolution that can be of use to clients and advisors in many cases.

Further information is available on the IFLA website.