RAYDENSOLICITORS

ARBITRATION (FINANCES AND CHILDREN) FREQUENTLY ASKED QUESTIONS

When is Arbitration not suitable?

There are very few cases (or indeed any) which are not suitable for Arbitration. The Arbitrator does have control of the process and, indeed, can be as flexible or more than a High Court Judge could be.

Is Arbitration suitable in Domestic Abuse cases?

In cases of domestic abuse the Arbitrator is capable of deciding how the hearing will be heard and can take such steps as needed to protect one party: for example, have the process conducted with one party on Zoom, or in another room, by video link etc.

Indeed the options open to the Arbitrator are more wide ranging than the court process simply by virtue of the private facilities that are normally utilised in an Arbitration.

Are there other occasions when Arbitration may not be suitable?

The only other area where you may wish to consider where Arbitration is appropriate is if one party has already shown themselves to be a non-discloser. In that situation, the Arbitrator would potentially need to pause the Arbitration while the other party – on the Arbitrators' behalf – approaches the court and sought an Arbitrations directions became court orders to try and force the issue.

What is the average cost for a Children Arbitration and for a Finances Arbitration?

The costs for Arbitration – children or finances – tends to be in the region of £3,500 - £5,000 for a one day Arbitration with refreshers somewhere between £1,500 to £2,000.

For interlocutory steps these are generally charged at the Arbitrators hourly rate and depend on what steps are needed.

Most Arbitrators will hold a pre-commitment meeting with the parties for free.

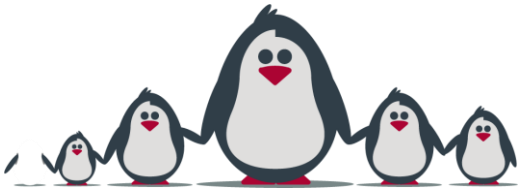
The costs to the parties for their solicitors' time is generally the same as for court.

Where would your Arbitrations take place?

Where the Arbitration takes place is very much down to the parties. The Arbitration can be in person or can be online. If in person, then one of the parties' solicitors may offer the three rooms required to host an Arbitration. If Counsel is also involved, Counsel's Chambers may also offer an Arbitration suite or, alternatively, the parties can agree to hire an appropriate venue.

What are the next steps if an Arbitration decision is made and then one party does not comply with implementing the terms of the decision?

At the end of the Arbitration, once an award is made, that award forms the basis of court orders and the parties file an order (with the award attached) in court. Therefore, if one party defaults, then enforcement takes place in the same way as enforcing a court order, where that order was made by a Judge rather than an Arbitrator.



If an award is made and one party does not assist with the filing of Consent Orders then the other party can do so unilaterally or by way of a Notice to Show Cause Application.

What other resources/literature about Arbitrations would you recommend?

There are a range of materials available. A good guide is the IFLA Guide to Arbitration (https://ifla.org.uk/wp-content/uploads/Public.pdf) which has a helpful overview.

The IFLA website www.ifla.org also contains significant resources and materials to assist both solicitors and parties to understand the Arbitration process.

It is also the case that many Arbitrators will offer a pre-commitment meeting, where the parties can ask general questions about the process (without going into any detail as to the facts and circumstances of their case) so that they can determine for themselves if that Arbitrator is someone they wish to work with and whether they have confidence in the process.

Are solicitors and counsel involved during the Arbitration?

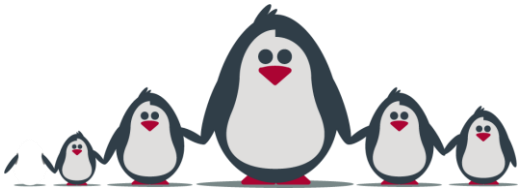
How the parties decide to run the Arbitration is a matter for them. Arbitration is ideal for both litigants in person (ie. the party is not engaging the services of solicitor or counsel to assist with their case) and those who are represented. Our executive Partners and Arbitrators Julian Bremner (Financial Arbitrator) and Emily Watson (Children Arbitrator) have undertaken Arbitrations where there have been parties only (with their solicitors in the background) or parties with their solicitors, or parties with solicitors and Counsel. It is a purely individual decision as to how best to run their case and arguments.

Does the Arbitrator have the same powers to order disclosure from public authorities such as social services and police?

Children cases with safeguarding issues are not generally suitable for Arbitration and would fall outside the scope of the Children Arbitration Scheme – so this is unlikely to arise. However in the unlikely event that there were such a case, Arbitrators have all the powers of a High Court judge in principle, but those powers need to be reflected in an order of the court (hence getting a court order at the conclusion of the proceedings). Arbitrators can make binding interim case-management decision but again they would presumably need to be converted into an order.

If part way through Arbitration a safeguarding issue crops up - presuming it is then automatic to stop and move to proceedings in Court – do proceedings start again and suffer the same delays or is it able to 'jump' into the Court process further on? What if the party/parties do not want to use the Court?

It is not automatic. If at any time after acceptance of the appointment but before a final determination is made, 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 child, it is the Arbitrator's duty to assess whether the Arbitration may safely continue. If the Arbitrator believes that a child or any party has suffered or is likely to suffer significant harm, the Arbitrator has a duty to communicate their concerns to the local authority or appropriate government agency. In either case, this is likely to take matters out of the parties' hands and result in court proceedings which would normally then start from scratch (unless there are already proceedings underway which the parties have paused to arbitrate).



What's the difference between Arbitration and using a private FDR Judge?

There is quite a distinct difference between Arbitration and Private FDR (Financial Dispute Resolution). Private FDR is a without prejudice private process. Whilst the Private FDR Judge, hired by the parties, is doing their level best to help bring a resolution as to the case, they are not in a position, if that resolution does not happen through negotiation, to do anything about it.

Whereas, the Arbitrator does not hear without prejudice materials and views the case much like a Judge at a Final Hearing. At the end of the day, the Arbitrator will make a formal and binding determination on the parties.

This is why quite a lot of Arbitrations also include a Private FDR where the Arbitrator and Private FDR Judge are completely separate individuals.

What are the pros/cons of a PFDR v Arbitration?

The pros and cons between Private FDR and Arbitration are much the same as they are between Private FDR and Court.

Private FDR is normally an extremely powerful process and it has a very high success rate. However, if the parties are not able to reach an agreement and the Private FDR Judge is not able to breach the gap between them, then the Private FDR has failed, and the parties need to continue in the court process or – if they have chosen to have a Private FDR outside of any form of process – commence proceedings in one way or another.

The Arbitrator, who does not hear without prejudice materials, will make a binding determination after hearing all the evidence of the parties and deciding for themselves as to the appropriate outcome of the case.

So the processes are really quite distinct.

Our suggestion, if you are not in court proceedings, is to ensure that the parties agree to a valid Arbitration (and indeed ensure that that Arbitration is binding) prior to holding Private FDR, so that if the Private FDR is not successful, they can move swiftly to a final hearing with an Arbitrator.

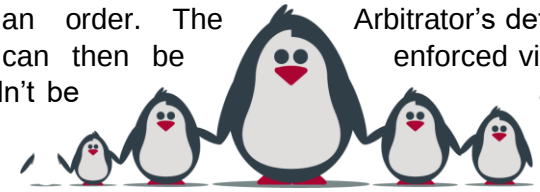
How can clients be persuaded that the Arbitrator has a similar standing to that of a Judge in Court?

There are, of course, a variety of judgments coming out of the High Court now which expressly set out the courts' confidence in Arbitration (and Arbitrators) and the process. Arbitrators and senior members of the profession (both Barristers and Solicitors) have undertaken a rigorous training programme to qualify.

The Arbitrator does have all the powers of High Court Judge (and to that regard generally more options available than the District Judge that most parties find themselves before).

If there is no Order in children cases, how can it be enforced if there is a breach of the agreed terms?

There will normally be an order. The Arbitrator's determination is converted into a binding final order which can then be enforced via the courts in the usual way. The only reason there wouldn't be an order would be if the



Arbitrator decided that the no order principle applied and no order was necessary, which would be on the basis of the same law a judge could potentially make the same decision but would be highly unusual in contested court proceedings or Arbitration.

How keen are Arbitrators to award costs in children act disputes?
The general principle is that the Arbitrator cannot normally make a determination regarding costs unless agreed in advance by the parties. If there is "litigation" conduct (within the Arbitration) then the Arbitrator may make costs orders accordingly.

Like in the Court process, in Children Arbitrations is there an opportunity for the child to meet the Arbitrator? (in age-appropriate cases)
No. The Arbitrator is not allowed to meet with the child at any stage.

When Arbitration has commenced by agreement, how do Arbitrators deal with parties who may disagree upon the appointment of a certain ISW (Independent Social Worker)?
The Arbitrator can decide the point as a case management decision.

Would you recommend that parties have legal representation prior to Arbitration or is this a route parties can take without solicitors to avoid those fees as well? i.e. can both parties be unrepresented?
This is very much a matter for the parties.

It does help parties to have had some advice. It also can help parties to have their solicitors in the background working with them to prepare the requisite documentation (Section 25 statements for example). Parties are always benefited by having some legal advice so that they can focus their case on what is relevant pursuant to the law as opposed to what a litigant in person might think is relevant but to which the court/Arbitrator will not really have regard.

So if the parties are particularly cost conscious, then they can undertake an Arbitration without having any solicitor in the background and they will not be disadvantaged. Equally, they can have solicitor or indeed a Barrister if that is what they would prefer.

What if clients require an interpreter. How would that work?
The Arbitrator has control of the process and how any hearings are undertaken, so it would be a matter of confirming with the Arbitrator that an interpreter is required. The party requesting the interpreter would need to ensure they were suitably qualified (in the same way they need to be for court) and settle the costs.

Can parties opt out of Arbitration part way through the process and revert back to court?
Once the Arbitration is elected by both parties and they have filed form ARB1FS (finances) or ARB1CS (children) the process is binding upon both parties and they cannot opt out and return to court. In children's matters it may be that a perfectly valid Arbitration is created and is binding on the parties, but a safeguarding issue later arises which would make Arbitration inappropriate and at that point the Arbitrator may cease the Arbitration and return the parties to court.