



# PUMP COURT

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# AN INTRODUCTION TO ARBITRATION

Imogen Robins



[www.pumpcourtchambers.com](http://www.pumpcourtchambers.com)

# Breakfast Briefing

## The Talk Will Cover

- Introduction to the Institute of Family Law Arbitrators Financial Scheme IFLA(FS)
- The Key sections of the Arbitration Act 1996
- Appointing the arbitrator
- The arbitration hearing
- Applying to the court for an order in the terms of the arbitral award
- Haley v Haley [2020] EWCA Civ 1369, [2021] 2WLR 357 and A v A (Arbitration: Guidance)[2021] EWHC 1889 (Fam)
- Questions

# Introduction to the Institute of Family Law Arbitrators Financial Scheme IFLA(FS)

- Private dispute resolution
- by agreement
- undertaken by a suitably qualified person “arbitrator”
- To resolve financial disputes (there is a children scheme too)
- The arbitrator will make an “award” (Children scheme – “determination”)
- The IFLA scheme’s authority comes from the Arbitration Act 1996 and the Rules
- Not the same as mediation but the arbitrator can refer to mediation
- The benefits – speed of process, choice of arbitrator, a specialist arbitrator, control of the procedure, issues to be arbitrated, confidentiality, availability of the arbitrator, continuity of legal representatives, saving costs, finality (more on this)

# Key Sections of the Arbitration Act 1996

## Section 1 – General Principles

The provisions of this Part are founded on the following principles, and shall be construed accordingly—

- (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.



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## Section 33 - General duty of the tribunal.

(1)The tribunal shall—

(a)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, so as to provide a fair means for the resolution of the matters falling to be determined.

(2)The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it.

## Section 40 - General duty of parties.

(1)The parties shall do all things necessary for the proper and expeditious conduct of the arbitral proceedings.

(2)This includes—

(a)complying without delay with any determination of the tribunal as to procedural or evidential matters, or with any order or directions of the tribunal, and

(b)where appropriate, taking without delay any necessary steps to obtain a decision of the court on a preliminary question of jurisdiction or law (see sections 32 and 45).

The AA 1996 is supplemented by The Rules

**The law of England and Wales applies to all arbitrations under both the financial and family schemes. The parties cannot apply a different law to the arbitration.**

# Appointing the Arbitrator

## i. Points of note:

- Choice of arbitrator
- Availability – short notice to suit the parties
- Choice of venue
- Costs of the arbitration usually shared between the parties
- Written award (will not be released until payment is made)

## ii. How to choose an arbitrator?

- IFLA scheme
- Chambers websites
- Solicitors
- Costs

## iii. How to apply

- Once you have selected an arbitrator, then you send the ARB1FS

ARB1FS an important document – the parties are entering into a binding agreement to arbitrate and neither party may avoid arbitration unless they both agree to do so.



**FAMILY LAW ARBITRATION FINANCIAL SCHEME**  
**FORM ARBIFS – 7<sup>TH</sup> EDITION (EFFECTIVE 11 JANUARY 2021)**  
**APPLICATION FOR FAMILY ARBITRATION, FINANCIAL SCHEME**

1. We, the parties to this application, whose details are set out below, apply to the Institute of Family Law Arbitrators Limited for the nomination and appointment of a sole arbitrator from the Family Arbitration Financial Panel ('the Financial Panel') to resolve the dispute referred to at paragraph 2 below by arbitration in accordance with the Arbitration Act 1996 ('the Act') and the Rules of the Family Law Arbitration Financial Scheme ('the Financial Scheme'):

Applicant's name	
Address	
Telephone	
Mobile	
Email	
Fax	
Represented by*	
Address	
Telephone	
Mobile	
Email	
Fax	



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And:

Respondent's name	
Address	
Telephone	
Mobile	

Email	
Fax	
Represented by*	
Address	
Telephone	
Mobile	
Email	
Fax	

\*Delete as applicable.

Add, if necessary, the names of other parties on a separate sheet.

### 2. The dispute concerns the following issue(s):

(Set these out on a separate sheet if preferred, but as concisely as possible.)

.....

Please complete EITHER paragraph 3(a) OR 3(b) OR paragraph 4 below:

### 3(a) We wish to nominate the following member of the Financial Panel for appointment in this matter:

(This paragraph applies if the parties agree that they would like the matter to be referred to a particular arbitrator and / or have approached a particular arbitrator directly. The appointment will be offered to the nominated arbitrator. If the appointment is not accepted by their first choice of arbitrator the parties may, if they agree, make a second or subsequent choice. Otherwise, it will be offered to another suitable member of the Financial Panel in accordance with paragraph 4 below.)

.....

### 3(b) We wish the Institute of Family Law Arbitrators Limited to select one of the members of the Financial Panel from the agreed shortlist below for appointment in this matter:

(This paragraph applies if the parties have agreed on a shortlist of arbitrators from the Financial Panel any one of whom would be acceptable to them, and wishes IFLA to select one of the arbitrators on the shortlist without reference to any criteria. In this case, IFLA will offer the appointment to one of the shortlisted arbitrators chosen at random. If the appointment is not accepted by the first choice of arbitrator, IFLA will offer the appointment to a second or subsequent shortlisted arbitrator, similarly chosen at random. If none of the shortlisted arbitrators accepts the appointment, IFLA will inform the parties and invite them to submit further agreed names.)

.....

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...

### 4. We wish the Institute of Family Law Arbitrators Limited to nominate a member of the Financial Panel for appointment in this matter:

(This paragraph applies if the parties have not identified a particular arbitrator to whom they wish the matter to be referred. Please set out below the nature of the dispute (insofar as it is not apparent from paragraph 2 above). Please also set out below any preferences as to the arbitrator's qualifications, areas of experience, expertise and / or any other attributes; or as to the geographical location of the arbitration; and any other relevant circumstances.)

.....

5. If court proceedings are current, please identify the nature of the proceedings, in which court they are taking place and what stage they have reached. (Please attach copies of any relevant documents and court orders.)

.....

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.....

...

**We confirm the following:**

- 6.1 We have been advised about and understand the nature and implications of this agreement to arbitrate;
- 6.2 Once the arbitration has started, we will not commence court proceedings or continue existing court proceedings in relation to the same subject matter (and will apply for or consent to a stay of any existing court proceedings, as necessary), unless it

is appropriate to make an application to the court arising out of or in connection with the arbitration, or some relief is required that would not be available in the arbitration;

- 6.3 We have read the current edition of the Rules of the Financial Scheme ('the Rules') and will abide by them. In particular, we understand our obligation to comply with the decisions, directions and orders of the arbitrator and, when required, to make full and complete disclosure relating to our financial circumstances;

6.4 We understand and agree that any award of the arbitrator appointed to determine this dispute will be final and binding on us, subject to any of the following:

- (a) any challenge to the award by any available arbitral process of appeal or review or in accordance with the provisions of Part 1 of the Act;
- (b) insofar as the subject matter of the award requires it to be embodied in a court order (see 6.5 below), any changes which the court making that order may require, or the refusal by the court, where it has jurisdiction to do so, to embody the award or any part of it in a court order;
- (c) insofar as the award provides for continuing payments to be made by one party to another, or to a child or children, a subsequent award or court order reviewing and varying or revoking the provision for continuing payments, and which supersedes an existing award;
- (d) insofar as the award provides for continuing payments to be made by one party to or for the benefit of a child or children, a subsequent assessment by the Child Maintenance Service (or its successor) in relation to the same child or children.

6.5 If and so far as the subject matter of the award makes it necessary, we will apply to an appropriate court for an order in the same or similar terms as the award or the relevant part of the award. We will take all reasonably necessary steps to see that such an order is made. (In this context, 'an appropriate court' means a court which has jurisdiction to make a substantive order in the same or similar terms as the award, whether on primary application or on transfer from another division of the court.) However, we understand that the court may have a discretion as to whether, and in what terms, to make an order;

6.6 We understand and agree that although the Rules provide for each party, generally, to bear an equal share of the arbitrator's fees and expenses (see Art.14.4(a)), if any party fails to pay their share, then the arbitrator may initially require payment of the full amount from any other party, leaving it to them to recover from the defaulting party;

6.7 We agree to the arbitration of this dispute in accordance with the Rules of the Financial Scheme.



**IMPORTANT**

Parties should be aware that:

- By signing this form they are entering into a binding agreement to arbitrate (within the meaning of s.6 of the Arbitration Act 1996).
- After signing, neither party may avoid arbitration (unless they both agree to do so). Either party may rely on the arbitration agreement to seek a stay of court proceedings commenced by the other.
- Arbitration is a process whose outcome is generally final.

Signed.....  
(Applicant *or* Applicant's legal representative, for and on behalf of  
Applicant)

Dated.....

Signed.....  
(Respondent *or* Respondent's legal representative, for and on behalf of  
Respondent)

Dated.....



# The Hearing

- i. Preliminary hearing – for disclosure and for the parties to agree the form of the arbitration, for example, paper only, remote, or in person, set a timetable etc
- ii. Experts can be appointed
- iii. The hearing itself is generally more informal but sworn evidence is taken
- iv. The award is delivered in writing after the hearing within a reasonable time. It will state the seat of the arbitration, will be dated and signed by the arbitrator. It will contain sufficient reasons to show why the arbitrator has reached the decisions.
- v. Once the award has been made, the parties then apply to the court for a consent order to be made in the terms of the award.
- vi. The jurisdiction of the court cannot be ousted and in family proceedings the court have control. (More of this below)

# Haley v Haley [2020] EWCA Civ 1369, [2021] 2WLR 357

- i. Pre Haley – Limited grounds to challenge the award under the AA 1996 and evolving case law favoured a narrow approach to challenging an award. AA 1996 section 57 – the slip rule, section 67 - jurisdictional challenge, section 68 – procedural irregularity causing injustice and section 69-error of law.
- ii. Post Haley – *‘the logical approach by which to determine whether the court should decline to make an order in the terms of the award, is by reference to the appeal procedure and approach found in the FPR 2010’[paragraph 73] ‘if the judge decides that the arbitrator’s award was wrong; not seriously or obviously wrong, or so wrong that it leaps of the page, but just wrong.’*
- iii. Good news for arbitration

Covid 19 has created a backlog in the courts and practitioners can be comforted by knowing that a challenge to an arbitral award is on the same basis as in financial remedy litigation.

King LJ

‘...parties must go into arbitration with their eyes open with the understanding that, all other things being equal, the award made at the end of the process will thereafter be incorporated into a consent order.’

# A v A (Arbitration Guidance) [2021]

- The key guidance from Mostyn J on the procedure for challenging an award.  
<https://www.bailii.org/ew/cases/EWHC/Fam/2021/1889.html>
- See the annex in A v A.
- 1. The challenge to a financial remedy arbitral award should be dealt with in the same way, and subject to the same principles, as a financial remedy appeal in the Family Court from a district judge to a circuit judge.
- 2. There is no requirement to make an application under s68 or s69 AA 1996.
- 3. There is no need for a MIAM.
- 4. The application will be “triaged” by a CJ who sits in financial remedies. They will decide if any challenge to the award would be granted leave, if it was an appeal from a DJ. If yes, the case will be heard and listed, and directions given for a hearing. If no, the case will be dismissed, and costs dealt with on the papers.
- 5. If there is a request for allocation to a High Court Judge, sitting as a judge of the Family Court, it will be considered by Mostyn J, or the FDLJ for the circuit.
- 6. A model draft order for use in this situation is added to Order 6.5 of the Compendium.  
<https://www.judiciary.uk/announcements/message-from-mr-justice-mostyn-update-on-standard-order/>