



Conducting FLAGS Arbitrations Remotely – Guidance for Arbitrators

“The object of arbitration is to resolve disputes fairly, impartially and without unnecessary delay or expense” Section 1(a) Arbitration (Scotland) Act 2010

CONTEXT:

FLAGS arbitration is part of the Scottish civil justice system. Although it is a private dispute resolution model, it is governed by the statutory framework in the Arbitration (Scotland) Act 2010, and all FLAGS arbitrations are conducted under the FLAGS Rules, which are the model Rules contained in Schedule One of the Act, supplemented for family law matters. Whilst there is scope for a degree of flexibility and informality which is often absent in litigation, it should not be forgotten that arbitration is a quasi-judicial process, resulting in a legally enforceable award.

One of the great advantages of arbitration as a dispute resolution model is that there is flexibility about how the process is conducted. The model for arbitration under the 2010 Act, and the FLAGS model that was devised thereafter, was designed to allow for the use of technology in a way that was not then possible in the court system. With the advent of the Coronavirus pandemic, the court system will undoubtedly now have to start to embrace new ways of working. One of the positives of FLAGS arbitration at this point, however, is that the structure for remote access is already embedded within our Rules: from the outset it was envisaged that procedural matters could routinely be dealt with over the phone or by video link; that it would be a process that would allow for determination on papers only in suitable matters and, indeed, that in appropriate cases, submissions and parole evidence could be conducted over video link.

Since the pandemic there has been a renewed interest in remote forms of dispute resolution like FLAGS arbitration, and there are many resources readily available which give advice

and practical guidance in relation to best practice when managing matters virtually. The purpose of this Guidance is not to rehearse matters that have been written about widely elsewhere, but rather is to recap and reflect on some of the particular issues that will arise if arbitrators are exclusively dealing with matters remotely. A list of useful resources can be found at the end of this Guidance and will be regularly updated as a resource for our members.

This guidance refers throughout to 'parties', but it is anticipated that the majority of FLAGS arbitrations will involve represented parties, so where appropriate you should read, 'agent' for 'party'/'parties'.

IS THE MATTER SUITABLE FOR FLAGS ARBITRATION?

When approached to act as an arbitrator careful thought should be given to whether the referral is a matter that is appropriate for FLAGS arbitration, and whether it is viable to conduct the arbitration on a remote basis.

Matters that are ideally suited are those where there are no, or few, disputed facts and where the arbitrator is tasked with exercising his or her discretion in applying the law to those agreed facts. This category of cases is most likely to be those that are concerned with the quantum of financial claims- for example, aliment, cohabitation claims and financial provision on divorce. These may well be matters which will be negatively impacted by the pandemic, as they are unlikely to be those prioritised within the court system.

Where there are likely to be disputed facts, FLAGS arbitration (conducted remotely) may still be suitable as a dispute resolution model but such cases require careful thought before an agreement to arbitrate is signed. Potential arbitrators should have in mind that at the Case Management Hearing stage, consideration will have to be given to what the disputed factual issues is and the nature and format of the evidence required to determine the facts. Before appointment as arbitrator is accepted therefore thought should be given to whether the arbitrator will be able to obtain remotely the evidence required to make a determination of the issues.

Remote arbitration requires more careful thought about whether the issues are matters of submission or evidence. Where evidential, can the evidence be submitted in a written format or are there sharp issues of reliability and credibility which mean that parole evidence in person is required? For example, where the issues concern expert, professional valuation evidence, there may well be steps that can be taken to manage matters effectively remotely. Using the Rules and directive case management effectively the arbitrator will be able to require parties to focus and narrow the matters in dispute. The arbitrator can also remit to

a joint expert or where competing experts are required, direct that the experts are to exchange reports and provide a joint note of points of agreement and disagreement and clarifying the underlying reasons for any divergence of views.

There will be some cases, however, particularly child law matters, where there are multiple disputed factual issues and sharp issues of reliability and credibility, which may be less suited to the process. In child law matters thought also requires to given to whether the resources that are available to the arbitrator during the pandemic will be sufficient to allow the statutory requirements to give the child affected by the dispute the opportunity to express a view, and then to have regard to any views so expressed, to be met.

If parole evidence is to heard remotely it should be kept in mind that the determination which follows has the status of a court judgment.

Arbitrators need to be able to control the remote process in an authoritative manner, ensuring that the necessary gravitas and solemnity are maintained. It is important to be familiar with, and proficient in, the use of the IT platform used. Enquiries will need to be made before the appointment is accepted that the parties are content with the platform proposed and the methods the tribunal will deploy, for example, using waiting rooms (or not); the provision for agents to take instructions privately, and whether, by what means, and by whom recording is to be used (or not).

THE ARBITRATOR'S ROLE:

The arbitrator's role is to make a determination on the specific dispute remitted (and only that). At all times keep in mind the duties in Rule 24, being the need to:

- be impartial and independent,
- treat the parties fairly, and
- conduct the arbitration without necessary delay, and without incurring unnecessary expense

The arbitrator is to determine the procedure to be followed in the arbitration [Rule 28].

The procedure can, and should, be tailored to the particular matter. The critical thing is for everyone involved in the process to be thinking early on about what evidence is going to be required, and how to use the flexibility of the FLAGS arbitration process to ensure that relevant evidence is obtained without undue delay or expense.

The first case management meeting should be used to remind parties of their duty of confidentiality in terms of Rule 26(3), and then to enable both parties to submit their respective views as to the nature of the dispute, the issues, what agreement, if any exists,

how they propose to deal with procedure and timetabling and any other matters that they regard as relevant.

The parties may not agree on the procedure they propose, or, indeed, the arbitrator may take a different view from both parties- for example, parties may be advocating for a papers only process to be fixed at the outset, whereas the arbitrator may take the view that the possibility of a remote parole hearing needs to be retained, pending further work being done to narrow the matters in dispute and setting the process for fact-finding.

Agents and counsel are now used to working with case management rules within the court process and many of the same tools are used when determining procedure within an arbitration. Arbitrators will be open to taking good practice from other areas of law and jurisdictions, if that will assist (for example one can look at Rules 4.10-4.19 of Part 4 of the [Fatal Accident Inquiry Rules](#) which deal with agreeing information and expert witnesses; [Parts 22](#) and [25](#) of the Family Procedure Rules in England and Wales which deal with evidence and experts and [Practice Direction 27A](#) which deals with court bundles). The arbitrator should be focused on what he or she can do to avoid undue delay and unnecessary expense, to limit the matters in dispute and to get the necessary, relevant evidence.

In advance of the second Case Management Hearing ideally the parties will have lodged an agreed statement of facts or joint minute. Parties should be in a position to address the tribunal regarding the issues that they say the arbitrator will need to determine and, if there are insufficient agreed facts, how they say that that fact-finding exercise should be carried out. The arbitrator will want to be addressed on the scope, format and timescale for the production of evidence. Depending on the complexity of the matter, and the extent to which there are agreed facts or further procedure required, at this Case Management Hearing the tribunal may fix a date to lodge written submissions (or hear submissions) on the law, and the materiality and weight to be attached to the evidence. The parties' views on the format and length of those submissions should be considered.

While certain procedure and timetabling may be directed orally during a case management hearing by conference call or video link, this will often benefit from more careful reflection on the submissions made, before issuing a written determination regulating the next procedural and timetabling steps. This should be carefully drafted, as with any interlocutor in a court process, bearing in mind that there are consequences for the parties if they fail to comply with the terms of the direction.

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RESOURCES:

It goes without saying that these resources should be used wisely and thoughtfully- they are from other jurisdictions, in other contexts and often from the perspective of advocates, not decision makers.

1. The Remote Access Family Court by Lord Justice MacDonald published by the Courts and Tribunals Service in England and Wales <https://www.judiciary.uk/wp-content/uploads/2020/04/The-Remote-Access-Family-Court-Version-4-Final-16.04.20.pdf>
2. Guidance for Participants at Remote Supreme Court Hearings published by the Irish Courts Service <https://beta.courts.ie/news/guidance-participants-remote-supreme-court-hearings-23042020>
3. The Inns of Court Collage of Advocacy Principles of Remote Advocacy <https://www.icca.ac.uk/principles-for-remote-advocacy-2/>
4. [Video Conferencing Guidelines for Lawyers in Johnson County, Kansas District Court](#)
5. Administrative Law Bar Association Guidance to Advocates on Remote Hearings - May 2020 <https://adminlaw.org.uk/wp-content/uploads/ALBA-Remote-Hearings-Guidance-May-2020-Final.pdf>
6. A Local Authority v Mother [2020] EWHC 1086 (Fam), Lieven J judgment proceeding with lay evidence remotely <https://www.bailii.org/ew/cases/EWHC/Fam/2020/1086.html>
7. [IFLA Remote Hearings Guide published 12th June 2020](#)