

FLAGS and taking a Family Law case or dispute to Arbitration

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Introduction

For many years arbitration has successfully been used in commercial and employment disputes. However, although you would often see provision for a referral to arbitration in Minutes of Agreement; there was not actually any proper mechanism for arbitration of family law disputes until the Family Law Arbitration Group Scotland (otherwise known as FLAGS) was formed in 2011. Its aims were to devise a set of workable rules to govern arbitrations in accordance with the Arbitration (Scotland) Act 2010; to train family solicitors and advocates as arbitrators in family cases; and to promote arbitration as a form of dispute resolution.

As the Law Society of Scotland now requires solicitors to explain the various forms of dispute resolution options available to their clients, the purpose of today's talk is to give you a better understanding of FLAGS as an organisation, the situations where arbitration could be used, and what is involved in bringing a dispute to arbitration.

The Family Law Arbitration Group Scotland

FLAGS currently has almost 50 members, all of whom have undergone a thorough course of training followed by a written assignment. In order to train as a family law arbitrator one requires to be an advocate with a substantial family practice, or a solicitor accredited by the Law Society of Scotland as a specialist in Family Law.

All FLAGS arbitrations are to be conducted in accordance with the Arbitration (Scotland) Act 2010 and the current edition of the FLAGS Arbitration Rules. The latest edition is the third edition, updated in 2014 and I have included a set of those in the handouts. Some rules are mandatory, others are default rules.

The 2010 Act provides three founding principles for arbitration in Scotland. In conducting any FLAGS arbitration the arbitrator must have regard to these principles. The founding principles are:-

- a) That the object of arbitration is to resolve disputes fairly, impartially and without unnecessary delay or expense.
- b) That parties should be free to agree how to resolve disputes subject only to such safeguards as are necessary in the public interest.

- c) That the Court should not intervene in an arbitration except as provided for in the Act.

The FLAGS Code of Practice

FLAGS members are governed by its Code of Practice for family law arbitrators. The Code of Practice also summarises the manner in which the founding principles in the Act are to be implemented in FLAGS arbitrations.

- **Duty to Act Fairly and Impartially**

The arbitrator must, throughout, treat the parties fairly. This includes giving each party a reasonable opportunity to put his or her case forward and deal with the other party's case. The arbitrator must be impartial and independent.

Before accepting appointment as arbitrator, any individual who has been asked to act as arbitrator has a duty to disclose to the parties any matter that may reasonably be considered relevant when considering whether that individual is impartial and independent. In particular, the arbitrator must not have acted previously for either of the parties to the arbitration, and not have any business, financial or personal connection with either of the parties.

The arbitrator has a duty to disclose any conflict of interest. The duty to disclose to the parties any matter which may reasonably be considered relevant when considering whether the individual is impartial and independent subsists throughout the entire arbitration.

- **Duty to Act without Unnecessary Delay or Expense**

If the arbitrator considers that the parties are, or may be, failing to meet their duty to ensure that the arbitration is conducted without unnecessary delay or expense; he or she must advise the parties of his or her concerns, the possible consequences of a breach of their duty, and give them the opportunity to make representations.

The arbitrator shall give the parties an opportunity to make submissions on the procedure to be followed in the arbitration. Thereafter the arbitrator will determine that procedure.

- **Duty to Conduct the Arbitration within the Designated Parameters**

The arbitrator must ensure that the award deals comprehensively with the issues remitted to arbitration. It is the duty of the arbitrator to arbitrate only on those issues upon which the parties seek resolution in terms of the arbitral remit.

The arbitration shall be conducted in accordance with the Arbitration (Scotland) Act 2010 and shall apply Scots Law. The arbitration shall be conducted by the arbitrator within the scope of the FLAGS arbitration rules in force at the time of the commencement of the arbitration.

- **Duty of Confidentiality**

The arbitration process is private as between the arbitrator, the advisors and the parties to the arbitration. Information relating to the dispute, the arbitral proceedings and the award shall not be disclosed by the arbitrator or the parties other than in the limited circumstances provided for in the FLAGS rules. The arbitrator shall inform the parties of the obligations of confidentiality placed upon them by the FLAGS rules at the outset of the arbitration. The arbitrator must take reasonable steps to prevent unauthorised disclosure of any information relating to the dispute, the arbitral proceedings, and the award by any third party involved in the arbitration. The duty of confidentiality on the part of the arbitrator extends without limit of time after conclusion of the arbitration.

- **Duty of Professional Responsibility**

A FLAGS arbitrator has a duty to maintain membership of the professional body appropriate to their profession, if any. A FLAGS arbitrator therefore has a duty to adhere to the rules of professional conduct appropriate to the organisation of which that arbitrator is a member whether that is the Law Society of Scotland or the Faculty of Advocates. In the event that the FLAGS arbitrator is sanctioned for professional misconduct by any professional organisation of which he or she is a member during the course of an arbitration, this must be disclosed to the parties, their representatives and FLAGS.

- **Duty to Charge Fair and Reasonable Fee**

The arbitrator is only entitled to charge fair and reasonable fees and expenses for the arbitration in accordance with the FLAGS rules. It is the duty of the parties to meet promptly the fees of the arbitrator and the arbitrator may only withhold the award on the non-payment of fees and expenses in accordance with the FLAGS rules.

What Types of Disputes Might be Suited to Arbitration?

Firstly, it is an essential element of the arbitration process that the parties themselves sign up to arbitration. It's not possible to take something to arbitration otherwise, although agreement in principle to go to arbitration in the event of a dispute could have initially been provided for in a Minute of Agreement.

Arbitration cannot deal with matters of status such as divorce, dissolution, paternity, parentage etc.

Otherwise, there really isn't any reason why any type of family dispute which could have been brought to Court could not be determined by arbitration.

We've probably all come across cases which are eminently capable of resolution but for one particular sticking point, and arbitration is probably most suited to disputes over discreet issues such as:-

- The relevant date
- The amount of aliment
- The valuation of a particular asset
- Application of Section 9 principles
- The school which a child should attend
- Medical treatment
- Child Relocation

Child relocation has been one of the most hotly contested areas of child litigation in recent years and given the cost and speed of litigation that is where I see great potential for arbitration in the future.

Getting an Arbitration started

If you have a client whose dispute you believe may be suitable for arbitration and the other party and his agent agree with that, the next step would be to identify the FLAGS member whom you want to appoint to conduct the arbitration. You could make a direct approach to the individual concerned at that stage to check availability.

Arbitral Agreement

Arbitration commences only when both parties have signed the arbitral agreement in Form A and that has been received by the arbitrator (Rule 1). As arbitrations require to be conducted within agreed parameters, you would require to adjust the arbitral agreement with the other solicitor, identifying the matters which are agreed, the matters in dispute, and the matters which the arbitrator requires to determine. The Form A currently in use has been included in your handouts.

Appointment of the Arbitrator

The arbitrator is thereafter appointed either by nomination in the arbitral agreement, by separate agreement between the parties by another person (e.g. the Chair of FLAGS or the Sheriff Principal), or by another method provided for in the agreement. (Rule 2).

It is possible for the tribunal to be made up by more than one arbitrator, although if the agreement is silent on that, it will consist of a sole arbitrator (Rule 5). In my view, since cost to the parties is likely to be one of the motivations for using arbitration in the first place, it's probably quite unlikely that the tribunal would consist of more than one member of FLAGS unless the issues are particularly complex; however, the option is there.

The rules contain various provisions regarding the appointment of the arbitrator in the event of a dispute or conflict of interest.

The arbitrator may be removed by the parties acting jointly (Rule 11) or by the Outer House in certain circumstances (Rules 12-14). The arbitrator may resign with the consent of the parties, with the authorisation of the Outer House, and in other limited circumstances (Rule 15).

Procedure and evidence

One of the founding principles of the 2010 Act is that parties should be free to agree how to resolve disputes.

Accordingly, there is no fixed procedure prescribed in the FLAGS Rules. This means that a FLAGS arbitration is entirely bespoke; and it is for the tribunal to determine the procedure to be followed. (Rule 28(1)).

It is also for the tribunal to determine the admissibility of any evidence, and the relevance of the evidence and weight to be attached; the extent and scope of evidence required; and the scope for instruction of a single expert or experts.

Where the matter to be determined falls within Part 1 of the Children (Scotland) Act 1995, the tribunal has the same duty as the Court to afford a child an opportunity to express his views, and to take account of any views he expresses having regard to the child's age and maturity. Guidance has been issued to FLAGS members on this point.

At the outset of the arbitration the arbitrator may invite parties to make submissions about the issues in dispute and procedure to be followed (Rule 28(3)) and usually fixes a case management meeting or conference call (Rule 28(4)).

Case Management Meeting

At the case management meeting, the arbitrator discusses the issues to be determined with the parties or their representatives; and identifies the evidence or other information required in order to make a decision, and the procedure to be followed. Will written submissions suffice, or is a hearing required? This means that you, as solicitors, would have input into the process to be followed at that stage.

The arbitrator will give directions and set a timetable for further procedure (Rule 28(5)) and can order that affidavit evidence be produced by a particular date; or that expert reports be produced by a particular date; or that witnesses be called to provide parole evidence under oath.

A further hearing or hearings may then be assigned in order to deal with the expert evidence/reports, affidavit evidence and parole evidence if appropriate.

The solicitor's role in guiding a client through the arbitration process thereafter is similar to that in the litigation process: assisting and advising the client; preparing affidavits; instructing reports; preparing written submissions; and representing the client at the subsequent hearings, including the examination of any witnesses.

Place of Arbitration

The tribunal may meet anywhere it chooses. (Rule 29). This would probably be canvassed at an early stage so it would for example be possible to convene an arbitration at the office of one of the solicitors if they have conference facilities, or at a local neutral venue hired for that purpose, or possibly at 142 High Street if the arbitrator is a member of the Bar.

Tribunal Directions

The tribunal may give such directions to the parties as it considers appropriate for the purpose of conducting the arbitration; and a party must comply with such a direction within the timescale specified. (Rule 31)

Appointment of clerk, agents or employees

The tribunal may appoint a clerk or other person as it deems fit to assist in conducting the arbitration; although the parties' consent is required if that is likely to result in significant additional expense (Rule 32).

Representation

The parties may be represented by solicitors and/or counsel, or by another suitable named person, if the tribunal agrees that it would be efficient to the administration of justice to allow that. In that event, notice of the representative must be given both to the tribunal and the other party. (Rule 33).

Experts

The tribunal may obtain an expert opinion on any matter arising in the arbitration. (Rule 34(1)). Parties must be given a reasonable opportunity to make representations about written expert opinion; and to hear any oral expert opinion and ask questions of the expert giving it. (Rule 34(2))

The tribunal may order the parties to find caution for the expenses of any expert. If a party fails to comply, the arbitrator may terminate the arbitration and make such order as to expenses as the arbitrator deems fit. (Rule 34(3))

Powers relating to property

These are set out in Rule 35. The tribunal may direct a party to allow inspection of property, or for property to be photographed, or preserved; or for the tribunal, an expert, or another party to take custody of property which a party owns or possesses which is the subject of the arbitration.

The tribunal may also direct that a party allow samples to be taken from property, or allow an experiment to be conducted on such property. I confess that I can't really think of the circumstances in which this would be necessary in a FLAGS arbitration; however the power is there.

The tribunal may also make directions to preserve any document or other evidence which a party possesses or controls.

Oaths or affirmations

The arbitrator shall administer an oath or affirmation to any party or witness where parole evidence is to be given (Rule 36)

Failure to comply

There are various provisions in the rules to deal with failure to comply with directions timeously, failure to attend a hearing; and failure to comply with a direction of the tribunal or the arbitral agreement (Rules 37-39). These include ending the arbitration and making such award (including expenses) as it deems appropriate; proceeding with the arbitration and making an award in the absence of that evidence; directing that a party is not entitled to rely on a particular allegation or material; and drawing adverse inferences from the non – compliance.

Powers of the Court

With the agreement of the parties and the consent of the arbitrator, a referral on a point of law can be made to the Outer House if that is likely to avoid delay and minimise expense (Rules 41 and 42). There are also provisions allowing an application to the court to vary time limits or procedure, to order the attendance of a party or witness, and various other protective powers (Rules 43 – 46).

Awards

At the conclusion of evidence and any further submissions the arbitrator determines the dispute in accordance with the principles of Scots Law (Rule 47). The tribunal may issue a final award; or a provisional, part, interim or draft award; and may make directions as to expenses. The award may order payment of a sum of money, (including damages) and/or payment of interest. The tribunal may withhold its award if any fees or expenses due by the parties have not been paid (Rule 56). An example of a fictitious Form A and a fictitious draft award have been included in your handouts.

Enforcement

A frequently asked question is whether an arbitral award is even enforceable. The answer is – yes it is! More of which later.

Challenging Awards

The Rules permit appeal to the Outer House on limited grounds. The time limit is 28 days. An appeal is only competent where the appellant has exhausted the arbitral process so no appeal may be made against a provisional award (Rule 71). Having checked with SLAB, I was advised that Legal Aid would be available for an appeal.

A party may appeal against the tribunal's award on the ground that the tribunal did not have jurisdiction to make the award (a "jurisdictional appeal") (Rule 67). A party may also appeal on the grounds of a serious irregularity (a "serious irregularity appeal") (Rule 68). The 11 situations which might constitute a serious irregularity appeal are listed in the Rule, so I don't propose to go into those at length here. Finally, a party may appeal to the Outer House on the ground that the tribunal erred on a point of Scots law (a "legal error appeal"). (Rules 69 and 70).

Depending on the type of appeal, the Outer House may confirm the award; vary the award (or part of it); order the tribunal to reconsider the award (or part of it); or set the award (or part of it) aside.

Further appeal to the Inner House is only possible with the leave of the Outer House and on quite limited grounds. The Inner House's decision is final.

Barriers to Arbitration – What's stopping you?

I will try to cover a few common anxieties in relation to arbitration but obviously this isn't an exhaustive list.

- **I am not a member of FLAGS.**
Only the arbitrator requires to be a member of FLAGS. If there is an agreement to arbitrate, all that is required is two competent solicitors.
- **I do not know how to get one started.**
Hopefully my previous comments have alleviated some of those fears. It is reasonably straightforward. If both parties agree that arbitration is an appropriate course the next step is to adjust the terms of the Form A and appoint an arbitrator who will then take ownership of the timetable.
- **I am worried I will be blamed for choosing an arbitrator who finds against my client.**
While an understandable anxiety, this is probably no different than two solicitors agreeing which child welfare reporter should be appointed; or instructing an expert, or counsel.

As I said previously the arbitrator has a duty to be impartial and to disclose any conflict of interest. Given the expertise of FLAGS members, it would also be possible to identify an arbitrator not only with particular expertise in family law, but in a particular field.

- **I know the Sheriff Court rules and I don't like to be out of my comfort zone.**
If you are able to use the Sheriff Court rules you will be able to use the FLAGS rules. The case management meeting is nothing to be worried about. There is actually much more flexibility in a bespoke process such as arbitration to allow for things like holidays or other pressing commitments while still fulfilling the duty to ensure a determination without unnecessary delay.
- **I don't understand what the costs will be.**
The hourly or daily rate of the arbitrator will be agreed in advance. In fact, because the arbitrator's costs are transparent from the outset, there are unlikely to be any unforeseen expenses apart from expert reports, for which competitive quotes can be obtained. Additional outlays such as Court fees are avoided, so costs should compare favourably with those of litigation.

Because there are only the number of hearings, and the evidence and expert reports identified at the outset, it is very unlikely that the costs would escalate. Arbitration has the added benefit of avoiding the situation where everyone has prepared and turns up at Court only to find that the case has to be rescheduled due to lack of Court time.

Legal Aid is not available for arbitration yet.

- **What if it goes wrong?**
As explained previously, there are provisions for removal of the arbitrator in certain circumstances; and a party may appeal to the Outer House against the arbitrator's award on the ground that the tribunal did not have jurisdiction to make the award; or on the ground of a serious irregularity; or legal error.

Where the Outer House or, as the case may be, the Inner House upholds that appeal, it may order the tribunal to reconsider its award or part of it.

- **How would it be enforceable?**

Registration in the Books of Council and Session

Because the arbitral agreement is a contract, if that is registered the arbitral award can also be registered in the Books of Council & Session for preservation and execution if it needs to be enforced.

This is provided for in Clause 4.6 in the Form A, and also Section 12 (5) of the Arbitration (Scotland) Act 2010.

Arbitration (Scotland) Act 2010

Section 11 (1)(a) provides that an arbitral award will be final and binding on the parties (but not any third parties).

That does not apply to provisional awards, which would include part awards, interim awards or draft awards (Section 11 (4)).

Importantly, Section 12(1) provides that the Court (Sheriff Court or Outer House) may, on application by any party, order that a tribunal's award be enforced as if it were an extract registered decree bearing a warrant for execution granted by the Court.

No such order may be made if the award is under appeal or review, or if the tribunal had no jurisdiction to make the award.

New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (and section 18-22 of the 2010 Act)

Makes provision for recognition and enforcement of arbitral awards internationally.

Conclusion

It has to be acknowledged that limited use has been made of arbitration since its inception; but as we appear to be moving ever closer to the day when no Legal Aid will be available in family disputes at all, I hope that situation will change.

There's no need to be scared of arbitration – as I said, once there is an agreement to arbitrate, all that is required is two competent solicitors!

I hope that this talk has given you an insight into another form of dispute resolution available to family lawyers and has alleviated some of your concerns about using the process.

If there is a particular area of dispute which is preventing general progress I would urge you to consider arbitration.

There is a lot of further information available on the FLAGS website; and if any of you have any queries about whether a particular issue could be successfully arbitrated upon, the availability of a particular arbitrator, or the likely costs, the current Chair, Alasdair Loudon, or any of our members will be delighted to assist.

Finally, any opinions expressed are my personal views and may not be those of other members of FLAGS or the Committee.

Karen Gailey
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