

# Early Neutral Evaluation and Arbitration: A Flexible Approach

- Duncan Brooks
- Tristan Harvey
- Morgan Sirikanda

Resolution DR Conference October 2019

# Aims

- Help you to understand how arbitration and ENE work in practice and can help to solve problems
- Consider where ENE and arbitration could be used more effectively
- Not a law lecture. Won't go through the law and rules in detail, but will cover a few essentials

# Structure

- Basics: what are ENE and Arbitration and when are they used?
- Arbitration:
- when and when not to arbitrate
- Children scheme considerations
- Selecting an arbitrator and practical issues
- Private FDR/ENEs
- Preliminary hearing demonstration

# Basics - ENE

- An evaluator listens to both parties' approaches and then provides an early neutral evaluation of the likely outcome if it were to go to court
- Non-binding. Indicative only
- Private FDRs are now commonplace in financial claims. ENE is increasingly popular for child arrangements issues
- Allows each party to feel heard and to have a neutral solution presented to them. Offers a strong platform for compromise
- Evaluation is based on how a court would approach matters. Can be flexible about other options

# Basics - Arbitration

- The parties appoint an arbitrator, who will make a binding decision
- Can be in relation to a single issue or an entire dispute
- IFLA rules provide a default procedure (similar to court procedure but streamlined). However, the parties can agree a different procedure (which would bind the arbitrator if agreed before the appointment), and the arbitrator has power to impose a different procedure if appropriate
- Can break an impasse
- But the default is that the parties give evidence, make submissions, and a written award follows
- The decision is binding
- It is an option that works well with other DR methods

# What can you arbitrate?

- Financial remedy proceedings (inc MWPA; CA sch 1 and Part 3 claims)
- ToLATA claims (probably don't need a court order to enforce, but NB ARB1FS). I(PFD)A claims
- Private law children

# What can't you arbitrate

- Status of relationship
- Insolvency
- Third party involvement (unless by agreement)
- Non English-law
- Children cases: international relocation; public law; life saving treatment cases; abduction; party lacking capacity; where child is a party
- However, ENE remains an effective and efficient option for most disputes

# When and When Not to Arbitrate

- **Good for:**
  - most cases (certainly not just big money). All-issue financial arbitrations are the norm
  - Single issue (paper only?)
    - valuations/chattels
    - holiday arrangements
  - Reduced issue, eg variation of maintenance, overnight staying contact
  - Drafting issues, eg shareholders' agreements etc...
- Can arbitrate before or after issuing court proceedings

# When and When not to Arbitrate

- **Not advisable where:**
  - International jurisdiction races (unless jurisdiction has been seized)
  - Injunctions/court peremptory orders required
  - likely to want/need to appeal
- *NB safeguarding and welfare considerations in children arbitrations*

# Bear in mind:

- ARB1FS; ARB1CS
- Be specific about what you want. If agree ambit/directions before appointing arbitrator, arbitrator is bound by that. If don't, arbitrator has a very free hand (eg can direct no evidence, no hearing and paper submissions only)
- Rules. Arbitration Act 1996; IFLA Rules. Default is basically Form E etc.... NB some areas where no rules (eg no set rules of evidence; no rules re: expert evidence).
- Thus far, most arbitrators will stick to FPR/CPR or adapt slightly. Award needs to be approved by Court.
- Costs: starting point is no order. NB if ToLATA claim

# Children Scheme considerations

- Safeguarding considerations
  - Rules largely based on the principle of self declaration
  - Safeguarding Questionnaire; Basic Disclosure from Disclosure Scotland; any report from CAFCASS/LA/similar agency
  - ISWs by agreement or by arbitrator's direction
  - Has the arbitrator got the power to do what you need?
- Arbitrator prohibited from meeting the child
- Parallel cases

# Selecting Arbitrator

- Wide pool (250 or so). Retired judges, barristers, solicitors.
- Some qualified just for financial disputes, some just for children, some for both.
- Over 230 financial arbitrations. Children started in July 2016
- Default is 1 arbitrator. Can have more.
- Can agree arbitrator or a pool of arbitrators with IFLA to select
- Considerations:
  - Can selection backfire? Really shouldn't. Cf court lottery
  - Track record. Who would you trust to decide (fellow solicitor; barrister; judge)?

# Private FDRs/Early Neutral Evaluation

- When Appropriate:
  - pre-issue (why issue at all?)
  - Post-issue of court proceedings
  - Within arbitration: optional - pros and cons below
- Selecting and appointing an evaluator
- The appointment:
  - Timings (best results are when indication is given by lunchtime to allow for negotiation)
  - Room layout: Court vs round-table

# Be Creative

Freedom to be creative.

- Disclosure: What is actually necessary? And in what format?
- Evidence: Oral evidence needed at all? On what topics?
- Experts: Can be less restrictive
- Two stage process? Eg computation before distribution (allows time for settlement if valuation issues)

# The Hearing

- Time estimate:
  - arbitrator will have pre-read.
  - Written Award.
  - Can squeeze a lot more in (eg 4 day trial in 2 days)
- Venue
- Recording?
- Bundles: No PD27A!
- Evidence: Sworn?
- Dispute about housing needs: Concurrent evidence?

# The Award/Determination

- ‘Award’ in FR cases. ‘Determination’ in CA cases.
- In writing unless otherwise agreed
- Two parts to it:
  - Narrative reasons (like a judgment)
  - Award (like an order)
- Need to address costs and drafting points (including undertakings) before the Award is finalised
- Can issue Award in draft and have debate after decision. Alternatively two Awards (inevitable delay)
- Embargo/draft Award
- What to do with it. Court order and standard terms
- Appeals?

# Private FDRs/Early Neutral Evaluation

- Pros
  - Agreed expert for early neutral evaluation
  - Yours for the day
  - On top of papers
  - Away from court atmosphere – very significant for clients
  - Flexibility: timings; who may speak; who is in the room and when
  - Can reduce delay in court timetable; can convene one very quickly (eg if late cancellation by the court)
- Cons
  - Paying for the evaluator/chair - extra layer of cost.
  - Is the case going to settle? If definitely not, what does this add? Adjournments can lead to greater delay (extra diary to consider)

# ENE: What to Expect

1. An evaluator who has read the papers before the appointment starts and who appears keen to engage with the case and the detail.
2. A “Neutral Evaluation”, not:
  - “There is force in both your arguments and it is hard to say. Go outside and try and settle”; or
  - simply splitting the difference

The more precise the indication, the more helpful to the parties/advocates (though there are different schools of thought about this)

3. A reasoned and polite indication. People are more likely to listen if the indication is reasoned and delivered in a balanced way rather than an intemperate “shot from the hip”.

# Be Creative

- Breaking down the silos between different DR strands
- Use of ENE within mediation
- Use of ENE within collaborative process e.g. at 5-way meeting
- Use of arbitration as impasse breaker in mediation or following round-table meeting
- Med-Arb