Children arbitration scheme expanded to include leave to remove

12/03/2020

Interview by Geraldine Morris, solicitor and head of Lexis®PSL Family.

Family analysis: Suzanne Kingston, consultant at Mills & Reeve, and Janet Bazley QC, joint head of chambers at 1GC|Family Law, outline changes to the Institute of Family Law Arbitrators (IFLA) children arbitration scheme to include both temporary and permanent relocation to certain foreign jurisdictions and the practicalities that practitioners should be aware of.

What is the background to the changes?

Family arbitration has come a long way since the IFLA launched its financial arbitration scheme in 2012. There has been a steady growth in financial arbitration, and it is now increasingly preferred over the court process for the resolution of many financial disputes. The parties particularly appreciate the benefits of a bespoke process, with the continuity of decision maker and the confidentially it affords. Huge delays in the court process have also had an impact on the take-up of arbitration.

In 2016, the children scheme was launched. From the outset, there was a very strong focus on safeguarding. As part of this, it was agreed that, until the scheme was established and shown to be effective, it would be appropriate to exclude from scope external leave to remove applications. Nearly four years later, the scheme is established and successful. It is supported by family judges (with a suite of arbitration-specific orders available) and recognised as providing the same advantages of the financial scheme in terms of the speed of the process, judicial continuity and confidentiality. The care taken over safeguarding and the requirement that the parties must ensure that they have complied with the safeguarding requirements has meant that there have been no concerns about the fact that Cafcass safeguarding services are not available in arbitration.

What are the details of the changes?

The IFLA has decided to expand the scope of its children scheme to include both temporary and permanent relocation to certain foreign jurisdictions. Careful thought was given to the extent to which scope was intended. Originally it was contemplated that the rules of the children scheme might be amended to allow relocation only to jurisdictions which are signatories to the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980 (the 1980 Hague Convention). However, the 1980 Hague Convention focuses on wrongful removal or retention and is less geared to ensuring an ongoing relationship between a child and the 'left behind' parent post-relocation. By contrast, the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, of 19 October 1996 (the 1996 Hague Convention) provides for 'read across' enforcement of decisions made in England and Wales in the courts of the new place of habitual residence.

A disadvantage of the 1996 Hague Convention is that ratification and accession to it is patchy and does not include the USA. Further, reference to the 1980 Hague Convention remains useful in defining scope as well, of course, where failure to return constitutes a breach of rights of custody under the 1980 Hague Convention, art 3 founds an application for summary return. Accordingly, it was decided to include within scope relocation to jurisdictions which have ratified and acceded to *either* the 1980 Hague Convention or the 1996 Hague Convention. As between members of the EU, however, Brussels II bis (Council Regulation (EC) No 2201/2003) displaces the 1996 Hague Convention. Accordingly, the rules are further amended to include within scope, while the UK remains bound by Brussels II bis, relocation to the jurisdiction of another member of the EU to which Brussels II bis applies.

How will the children arbitration scheme rules change?

The limitations to the scope of the children scheme are covered by Article 2 of the children scheme rules. The 4th edition of the rules, which will give effect to the expansion of scope of the scheme, continues to provide that relocation is outside scope but, by the new art 2.2(a), provides the following exception:

> '… any application for permanent or temporary removal of a child from this jurisdiction except where the proposed relocation is to a jurisdiction or country which has ratified and acceded to the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980 (the 1980 Hague Convention) or the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (the 1996 Hague Convention) and, for so long as the United Kingdom remains bound by the provisions of the Brussels IIA Regulation, to the jurisdiction of another member of the EU to which the Regulation also applies.'

A court order was always considered to be a useful adjunct to a determination in many cases under the children scheme and the existing rules reflect this at art 13.4, ie:

> 'If and so far as the subject matter of the determination makes it necessary, the parties will apply to an appropriate court for an order in the same or similar terms as the determination or the relevant part of the determination or to assist or enable its implementation and will take all reasonably necessary steps to see that such an order is made. In this context, "an appropriate court" means the Family Court or such other court in England and Wales which has jurisdiction to make a substantive order in the same or similar terms as the determination.'

The 4th edition of the rules adds further provision specific to relocation cases by a revised art 13.5, ie that:

> 'Where the subject matter of the dispute includes an issue as to the permanent relocation of any child to any of the jurisdictions identified in Article 2.2(c), the parties to the arbitration and the arbitrator shall identify the steps necessary to give full effect to the terms of the relocation in the proposed jurisdiction including in particular contact to the applicant remaining in the jurisdiction. Such steps may include the appointment of an independent social worker to assist in ascertaining and recording the wishes and feelings of the child concerned by an appropriate finding in the determination. If a determination is made to which [Brussels II bis] applies to the proposed relocation, the arbitrator shall attach to the determination a certificate in the form of and complying with Annexe III to [Brussels II bis].'

IFLA's children scheme arbitrators are excited by this development of the scheme. Relocation, both temporary and permanent, is a single-issue determination, which is ideally suited to arbitration. It is expected that the take-up of arbitration in children cases, which has already seen a steady increase, will rapidly increase further in light of this welcome development.

What are the practicalities that practitioners should be aware of?

It is not difficult to set up an arbitration under either scheme. Arbitration can be suitable both for represented parties and self-representing parties. It can be done by way of face-to-face process or, in a more straightforward case, parties may agree to a determination on the papers only. The parties must complete the relevant form, the ARB1FS for financial arbitrations and the ARB1CS for the Children's Scheme. Both available on IFLA's website. Parties to children arbitrations must also complete a safeguarding questionnaire, provided by the IFLA, and provide safeguarding disclosure (obtainable online). The completed form must be sent to the arbitrator and IFLA and once the arbitrator accepts the arbitration it formally begins.

Parties and their advisers are sometimes nervous of committing to arbitration or unsure whether a case is suitable. Many arbitrators provide a free pre-commitment phone call in order to discuss and agree whether a case is suitable.

One of the most important features of arbitration is that the parties and their lawyers can choose the arbitrator. However, some people feel that if the arbitrator rules against their client, they will be blamed for making the wrong choice. It should be noted however that IFLA can be asked to select an arbitrator from the list of those accredited by them. Alternatively, the parties can choose a list of say three arbitrators and agree that IFLA will select one from the three.

As the court process becomes more lengthy and difficult, arbitration is in the ascendancy and now the amended rules provide for even greater scope. We hope that practitioners will think seriously about arbitration in both financial and children cases, making it clear to their clients the numerous advantages on offer.