



Should I have my case dealt with privately? The benefits and pitfalls of private FDRs and Arbitration

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In recent years, more and more couples have chosen to resolve their disputes in private hearings away from court. Two of the most common examples of these alternative methods of resolving disputes are private FDR hearings and arbitration hearings. Both are popular with high-net worth clients. But they are often overlooked and underused in lower to mid-asset cases, where they may also have much to offer.

Private FDR vs court-based FDR

A “*Private FDR*” hearing is a privately funded substitute for the second hearing in the court timetable in financial remedy proceedings, i.e. the “*FDR*” (or Financial Dispute Resolution) hearing.

Whether private or court based, an FDR is a judge-led settlement hearing after the exchange of financial disclosure and once valuation and any other necessary evidence has been obtained. This means that by the time of an FDR, the broad financial landscape should be known and the points in dispute identified.

At an FDR, the judge cannot impose a decision on the parties. Instead, the parties must use their best endeavours to reach a financial settlement through negotiation. The judge assists by providing an indication as to the likely outcome (or its parameters) should the parties fail to settle and the matter proceed to a final hearing (the next stage). The indication should focus the parties’ minds on the risks (and rewards) involved in continuing to a final hearing. In particular, the judge is likely to draw the parties’ attention to the significant legal fees that are likely to be incurred if a resolution is not found.

Negotiations then take place in light of the judge’s indication. The hearing is conducted on a “*without prejudice*” basis such that its contents (including arguments, offers and concessions made) cannot be disclosed at any future hearings. This encourages parties to put their best foot (and offer) forward in order to achieve settlement.

When compared to the court equivalent, a Private FDR has a several advantages.

First, the parties choose the judge. This allows them to choose a financial remedy specialist. This generally means an experienced practitioner (a solicitor, barrister, or a retired judge). By contrast, a court-based FDR must be allocated to one of the available judges sitting on the relevant day. That judge may have little experience, let alone a specialism, in financial remedy proceedings. This can detract from the parties’ confidence in the judge’s substantive indication as to the “*right answer*” in the case. By contrast, where a Private FDR is before an experienced practitioner, both parties (and their

legal advisors) are more likely to respect and adopt the judge's indication in their negotiations, even if that indication is unfavourable.

Second, speed. Without the constraints of court listings and waiting many months for an available hearing date, a Private FDR can have a much shorter lead time (measured in weeks), subject only to the readiness of the case and the availability of legal teams and the proposed judge.

Third, the luxury of time. Choosing a Private FDR hearing buys judicial time in advance of and during the hearing. Long before the covid-19 pandemic, court lists were overburdened, often with multiple FDR (and various other) hearings listed on the same day before a single judge. The pressures of urgent work and other hearings overrunning often substantially limits the court time available and, in many instances, altogether eliminates the possibility of judicial pre-reading and preparation time.

By contrast, a Private FDR affords the judge the time to engage with and analyse the detail of the issues in dispute. This is particularly important where the case involves complex business and other valuations, tax and actuarial reports or competing analyses of pre-acquired or other non-matrimonial wealth. This is more likely to result in a detailed, reasoned, indication bearing greater resemblance to the analysis that would be involved in any final hearing. In addition, with a Private FDR at which the full day is set aside, there is the time and flexibility to seek from the judge such further indications or clarifications as may be necessary to break a deadlock in negotiations or to assist in finalising an agreement.

Fourth, instead of court buildings, Private FDRs are held in private places, such as the offices or chambers of one of the parties' legal representatives. For many clients, a divorce settlement is the biggest financial deal they will do in their lives, warranting the comfort (and refreshments) to make clear and rational decisions with which they may live for many years. Further, although members of the public and media representatives are not permitted to attend a court FDR hearing, a private setting provides greater confidentiality and discretion by avoiding even those photographers who linger behind the court railings to snap attendees and their emotions on entry and exit. Private FDRs will also continue to offer the flexibility of remote hearings long after the covid-19 pandemic. This is of obvious utility to some clients who, due to their overseas location, work and childcare commitments, or preference, might wish for a remote hearing.

Fifth, and partly because of the above advantages, Private FDR hearings appear to have a higher success rate in achieving settlement (some 80-90% of cases). This success rate may also be driven by the signalling of a willingness to negotiate and settle inherent in the very act of committing to a Private FDR. Indeed, clients are increasingly choosing to attend a Private FDR hearing before they have even embarked on court proceedings.

Nonetheless, there are some disadvantages which must be considered.

First, it is often said that a Private FDR is more expensive than its court counterpart. Parties must pay for the appointment of the Private FDR judge, whereas a court judge would be provided at no cost. In a rare case, this cost may not be worth incurring, for example, where one party's intransigence is such that settlement appears impossible. However, in most cases, the additional cost is often outweighed by the emotional strain and months of legal costs that can be avoided by reaching a swift settlement at an effective hearing at an earlier stage. In addition, many more junior practitioners now sit as Private FDR judges. With their competitive fees and considerable experience of the approach that different judges may take at a final hearing, these junior practitioners can offer real value in modest asset cases.

Second, an unsuccessful private FDR hearing will require a short, subsequent, hearing for the court to set a directions timetable for the onwards progression of the case to a final hearing. Accordingly, a perceived benefit of a court FDR is that the (court) judge can hear any disputes as to the directions sought by each party and decide them immediately on that date, whereas a Private FDR judge cannot. However, as indicated above, it is not safe to assume that a court will have time to deal with disputes around directions at the conclusion of an FDR. Further, the court rules now require parties to consider

directions when preparing for any FDR (including a Private FDR). This enables the parties to narrow the issues and to attempt to agree them at, or shortly after, a Private FDR. If an agreement is reached then the court can approve it, often avoiding the need for the further hearing.

Third, once parties commit to a Private FDR, they cannot withdraw without the court's approval. This reduces flexibility for changing dates and minds and puts Private FDRs on the same footing as court-based FDRs.

Arbitration

Whereas a Private FDR is a substitute for a court-based FDR, arbitration can be used as a substitute for almost any court hearing. It is commonly used in place of the final hearing in the court process in both financial disputes and those related to children. The judge is replaced by an "*arbitrator*", who can impose a binding decision, known as an "*award*". These awards can determine interim issues (such as case management) or final ones (concluding the underlying dispute).

Arbitration shares many advantages with Private FDR hearings. The parties choose their arbitrator, often a specialist with time to prepare in detail. If the parties cannot agree on a specific arbitrator, one can be externally appointed. The parties choose the date and venue of the arbitration hearing, with the benefits of speed, convenience and privacy already identified and often lacking in the court process.

Second, the parties can choose what issues should be determined. They can ask the arbitrator to decide everything, or just a specific issue or subset of issues within the broader dispute. For example, an arbitrator could be asked to decide a preliminary issue as to the ownership of assets in financial proceedings or an urgent issue as to children's schooling, whilst the remaining issues are left within the court process. Quicker decisions on discrete contested issues can sometimes unlock and help resolve the broader dispute.

Third, the parties can tailor the process to suit their dispute. Some disputes are best resolved with live evidence and cross-examination at an early stage. Others turn more on legal arguments arising from largely agreed facts and are therefore capable of resolution following written submissions (and without a hearing). The court process is often too rigid to allow for these methods of determining an issue. Further flexibility comes from the willingness of privately paid arbitrators to conduct hearings outside of regular court hours, such as into the evening or on the weekend. Again, this can be especially helpful for parties with unforgiving schedules or split across different time zones. Arbitrators are also more likely to offer additional time in their diaries when a hearing overruns, whereas a court would often lack availability to continue a part-heard hearing for several months.

Against these advantages must be weighed certain disadvantages.

First, the parties must pay the arbitrator's fees. However, an early referral to arbitration, and the streamlined process that follows, can be a more cost-effective mechanism for resolving the dispute in the longer term.

Second, arbitration is a voluntary process. Neither party can be compelled to arbitrate.

Some parties perceive an advantage in dragging out court proceedings, such as to pressure a financially weaker party, or to await a significant valuation or liquidity event. However, because the costs and efficiency savings of arbitration are now well recognised, a mere offer to arbitrate can create costs protection and put an unwilling party under pressure. The courts in financial remedy cases are increasingly willing to penalise parties who unreasonably refuse to arbitrate, principally by imposing costs orders or otherwise making provision for the discharge of the willing party's debts in the substantive resolution of the case. Accordingly, an offer to arbitrate can have strategic value, even if it is unlikely to be accepted, in lower to mid-value cases and in cases in which the issues are narrow and in which the legal costs can quickly become disproportionate to the sums in dispute.

Third, an arbitral award is not necessarily final. The court retains a supervisory jurisdiction and can, in

exceptional circumstances, refuse to convert the arbitral award into a final and binding court order. However, this rarely occurs in practice.

Conclusions

Private FDR and arbitration hearings can have substantial advantages over their court-based equivalents. These benefits carry an initial price tag – namely, the judge or arbitrator's fees – but the price is often worth the financial, emotional, and practical benefits that accompany a quicker resolution of the parties' dispute, particularly in smaller cases where Private FDR and arbitration hearings are currently underused.

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