

Family Law Finance Arbitration: a new dawn.

1. Arbitration has a long history, or so it would seem from my researches on the internet. In the Old Testament in the First Book of Kings chapter 3 is a description of an arbitration. It was a family dispute between 2 women both of whom lived in the same house and both of whom gave birth to a child, one of which died. Both women claimed the surviving child as their own. The dispute was heard by King Solomon. After listening to each of the women argue their case, he adopted a drastic method of adjudication, with which you will all be familiar. The King then awarded the child to the woman who had entreated him to deliver the child to the other woman and thus spare the child's life. Justice was done, expeditiously you might say.
2. Arbitration was used by Philip 2 of Greece to determine a boundary dispute in c. 330 B.C. In England it is thought that arbitration was being used as early as the 13th century in land and commercial disputes. Over the course of centuries arbitration in this country was developed until it was put on a more modern, statutory basis in the Arbitration Acts 1950, 1975, 1979 and finally in 1996. Thus it seems that arbitration is, and has been for a long time, a much used method of resolving disputes outside the law courts. But what of family law arbitration? By which I mean arbitration applying the secular family law of the state. So far as I know, and I stand to be corrected, it was non-existent.
3. About 10 or so years ago a few brave souls decided to devise an arbitral scheme for family finance law. To begin with it did not get very far. But after much perseverance and hard work a scheme was launched in March 2012; and it is that scheme which I would like to talk to you about this evening. What I propose to do is to outline the important ingredients of the scheme, speak about its strengths and perceived weaknesses, and very briefly touch upon international arbitration.
4. In 2012 the Institute of Family Law Arbitrators ("IFLA"), a company limited by guarantee, was set up with a board of directors chaired by Lord Falconer of Thoroton, a former Lord Chancellor. It is responsible for the implementation and administration of the family law finance

arbitration scheme. The qualified arbitrators, now numbering 130 with more to come, have all been trained in arbitral techniques and have a good working knowledge of the important and relevant parts of the Arbitration Act 1996. Each person so trained and wishing to practise as a family arbitrator must become a member of the Chartered Institute of Arbitrators and thus make him or herself subject to its disciplinary code. Solicitors, barristers, QCs, and retired judges, all of whom are, or were, full-time practising family lawyers, comprise the corps of arbitrators under the scheme. They are therefore real specialists in the field of family finance law.

5. The scheme has been given not only real impetus but also a seal of approval by the English courts. The impetus has been provided by the courts in sanctioning and enforcing agreements between divorcing couples through a number of cases with which I will not weary you, culminating in the seminal case in the Supreme Court of *Radmacher v Granatino* in 2010. There, pre and post nuptial agreements came under the microscope and were emphatically endorsed.
6. The seal of approval was given by the President of the Family Division, Sir James Munby, in a very recent case, *S v S* [2014] EWHC 7 (Fam). In that case the parties had agreed to arbitrate their financial and property disputes under the IFLA scheme. The arbitrator made his award which the parties then presented to the court for its approval and implementation into orders of the court. The President gave his approval and so the award was turned into orders of the court. At para 21 of his judgment he said this:- “Where the consent order which the judge is being asked to approve is founded on an arbitral award under the IFLA Scheme or something similar (and the judge will, of course, need to check that the order does indeed give effect to the arbitral award and is workable) the judge's role will be simple. The judge will not need to play the detective unless something leaps off the page to indicate that something has gone so seriously wrong in the arbitral process as fundamentally to vitiate the arbitral award. Although recognising that the judge is not a rubber stamp, the combination of (a) the fact that the parties have agreed to be bound by the arbitral award, (b) the fact of the arbitral award (which the judge will of course be able to study) and (c) the fact that the parties are putting the matter before the court *by consent*, means that it can only be in the rarest of cases that it will be appropriate for the judge to do other than approve the order. With a process as sophisticated

as that embodied in the IFLA scheme it is difficult to contemplate such a case.”

7. In relation to situations where one party seeks to resile from or challenge the arbitrator’s award, at paras 25 and 26 of his judgment he said this:- “Where a party seeks to resile from the arbitral award, the other party's remedy is to apply to the court using the 'notice to show cause' procedure. The court will no doubt adopt an appropriately robust approach, both to the procedure it adopts in dealing with such a challenge and to the test it applies in deciding the outcome. In accordance with the reasoning in cases such as *Xydhias v Xydhias*, the parties will almost invariably forfeit the right to anything other than a most abbreviated hearing; only in highly exceptional circumstances is the court likely to permit anything more than a very abbreviated hearing. 26. Where the attempt to resile is plainly lacking in merit the court may take the view that the appropriate remedy is to proceed without more ado summarily to make an order reflecting the award and, if needs be, providing for its enforcement. Even if there is a need for a somewhat more elaborate hearing, the court will be appropriately robust in defining the issues which are properly in dispute and confining the parties to a hearing which is short and focused. In most such cases the focus is likely to be on whether the party seeking to resile is able to make good one of the limited grounds of challenge or appeal permitted by the Arbitration Act 1996. *If* they can, then so be it. If on the other hand they can *not*, then it may well be that the court will again feel able to proceed without more to make an order reflecting the award and, if needs be, providing for its enforcement.”
8. The President is not going to stand still on the IFLA scheme. In the March edition of Family Law he wrote under his title “View from the President’s chambers: the beginning of the future” about arbitration:- “Following my decision in *S v S....*, I want to move forward as soon as possible on two fronts. Pending more general changes to the Family Procedure Rules in relation to arbitration and other forms of ADR, I am proposing to issue in the near future, for discussion and comment, both a draft rule change to enable relevant applications under the Arbitration Act 1996 to be made in the Family Division and not only, as at present, in the Commercial Court, and also draft Guidance dealing with a number of procedural matters not covered by *S v S*.”
9. I suggest that you cannot have a more emphatic endorsement from the courts than all of that.

10. So what is the scheme? The scheme is to resolve disputes by arbitration which are financial and/or involve property. It does not cover the actual granting of a divorce or matters to do with status, or children disputes such as residence, contact, parental responsibility or other matters to do with the upbringing of children, but it does cover financial disputes under Schedule 1 of the Children Act, 1989 relating to the maintenance of children born to unmarried parents. Next, the scheme shelters under the statutory umbrella of the 1996 Act. You will know that the Act contains important provisions as to the duties of the arbitrator and of the parties to an arbitration as well as other provisions vital to the expeditious and fair procedure for an arbitration. The parties who wish to arbitrate under the scheme, expressly agree that the arbitration will be conducted in accordance with the Act.
11. One very important part of the scheme is that whilst section 46 (1) (a) of the Act, which is non-mandatory, gives the parties the choice of what substantive law the arbitrator should apply, the scheme makes it mandatory for the law of England and Wales to be applied. The parties cannot contract out of that.
12. The final overarching ingredient of the scheme is that the parties are under an obligation to make application to the family courts to turn the award into court orders where it is necessary to do so. Except for one statute, namely The Trusts of Land and Appointment of Trustees Act, 1996, it will not be possible for an award to be turned into an order of the court by the mere registration of the award, for the court itself must exercise the discretion given to it under each of the statutes which the scheme covers.
13. So the scheme covers disputes both in relation to a couple's finances, assets, liabilities and also to property disputes. It specifically covers disputes under certain Acts of Parliament which give financial and property remedies to couples, whether married or not, and whether of the same sex or not, arising out of the breakdown of their relationship. The statutes include the Matrimonial Causes Act 1973 as amended, s. 12 of the Matrimonial and Family Proceedings Act 1984, which provides for financial relief after an overseas divorce, the Civil Partnership Act 2004, Schedule 1 of the Children Act, 1989, the Trusts of Land and

Appointment of Trustees Act, 1996, and the Inheritance (Provision for Family and Dependents) Act, 1975, and no doubt in due course the Marriage (Same Sex Couples) Act, 2013. The scheme does not apply to the liberty of individuals, the status of individuals or of their relationship, the care or parenting of children, bankruptcy or insolvency, and it does not apply to any person or organisation which is not a party to the arbitration. As to the last, if a case involves assets in trusts to which one or both parties are beneficiaries, the trustees can only be made parties to the arbitration with their consent.

14. Where parties wish to use the IFLA scheme, they agree to be bound by the Rules of the scheme, under which the arbitrator must decide the substance of the dispute only, I repeat only, in accordance with the law of England and Wales. The parties cannot impose on the arbitrator any other law to decide the substance of the dispute. Why is that? Because it is essential that the law applied by the arbitrator is the same as will be applied by the court when it comes to turn the award into orders of the court. Let me again refer you to what the President said in *S v S*. At para 4 he said:- “The Rules contain a mandatory requirement (Articles 1.3(c) and 3) that the arbitrator will decide the substance of the dispute only in accordance with the law of England and Wales. This last point is significant.” So you may think that it is entirely sensible that the law of England and Wales must be applied.
15. Thus let us assume that a husband and wife or unmarried cohabiting partners or parties of the same sex, whose relationship has broken down, want to have their disputes referred to an arbitrator under the IFLA scheme. How do they go about it?
16. The answer to that question is that they, or their lawyers, obtain a form Arb 1 from the website of IFLA. It is that document, which when signed by them, is the means by which the arbitration process is put in motion. It is the arbitration agreement. It sets out, inter alia, the nature of the dispute or disputes to be arbitrated, the name of the chosen arbitrator and in para 6 the parties confirm several vital matters. First, they have been advised and understand the nature and implications of the agreement to arbitrate. Second, once the arbitration has started they will not start court proceedings or if already started they will apply for a stay. Third, they have read the current edition of the IFLA rules and will comply with them. The fourth and fifth confirmations overlap and are at

the core of the scheme. The parties confirm that they understand and agree that any award of the arbitrator will be final and binding subject to any arbitral process of appeal or review or in accordance with Part 1 of the Act, and subject also to any changes that the court, to which an application is made to enforce the award, may require before it makes any orders embodying the award. The parties agree that they will apply to the court for orders to reflect the award, that the court has a discretion as to whether, and in what terms, to make orders and that they, the parties, will take all reasonably necessary steps to see that such orders are made.

17. What critically are they agreeing to? First and foremost, that the award is binding on them, if I may put it like this, whether one or both like the award or not. Second, they, not just one of them but both of them, agree to ask the court to turn the award into orders of the court. Third, although the award will be binding on them, each recognises that the court has a discretion what to do when turning the award into an order or orders of the court. As the President made clear in *S v S*, if orders are sought by consent, they will be made. If there is a challenge to the award, that challenge will be met by the court robustly and summarily.
18. So, the arbitrator's fees are agreed, he accepts the appointment, and the arbitration then formally starts. How is the arbitration conducted?
19. The short answer to that is – in a manner that the parties agree or in default by the decision of the arbitrator – see Rules 9 of the IFLA rules. “The parties are free to agree as to the form of procedure ... and, in particular to adopt a documents-only procedure or some other simplified or expedited procedure.” It will largely depend upon what are the issues in dispute and whether there are facts which require oral and/or written evidence. Rule 10 says that the arbitrator will initially invite the parties to make submissions as to what are the issues and what procedure should be adopted. Those submissions can be made at a meeting, or by telephone or by email or by any other suitable way. Once the issues have been defined, it is likely that the course of the arbitration will be determined, that is to say will it be necessary for the arbitrator to look at the whole case like a family judge or is it sufficient for the arbitrator just to decide a discrete but important issue which may then

lead the parties to settle? And, can it be done on paper or must there be an oral hearing?

20. Let me paint this scenario. The parties have been married for some 20 years and have children. They are divorcing. All the modest assets were acquired during the marriage and so, all things being equal, will be split 50/50 between them. But things are not equal. The matrimonial home is not valuable and if sold the net proceeds will not fund the purchase of two homes, one for the wife and one for the husband. The wife does not work and looks after the children. The husband is in employment. They agree that the matrimonial home should be sold but cannot agree how the net proceeds of sale are to be split. The husband wants half, the wife more than half so she and the children can be adequately housed. That is the issue that divides them. They decide to arbitrate because the arbitrator can decide that discrete issue and that discrete issue alone leaving it to the parties to proceed once they have his award.
21. Is there any need in such a scenario for any evidence, and if so, can it be given on paper i.e. brief written statements from each of the parties? And is it necessary for there to be oral submissions by their lawyers or can it be done by way of written submissions? Probably no orality and all on paper.
22. Let me paint another scenario. The husband and wife have substantial assets. The wife has, amongst her assets, a chunk of wealth inherited from her parents during the marriage. The husband has a successful private company, the sale of which will not be realised for several years, let us say 5, after their separation. They agree that, after a marriage of 20 years, the marital assets should be split, all things being equal, 50/50. But things are not all equal. The wife maintains that her inheritance should be "ring fenced" i.e. it should not be taken into account when computing the marital assets. The husband disagrees. Further, the wife says that she should receive 50% of the value of the husband's company when it is sold in 5 years time. The husband says that is unfair because he will be slogging his guts out to build up the value of the company over a critical period of time when the marriage is over. He says she should therefore have a share a great deal less than 50%.

23. Here are 2 discrete issues which after swift adjudication are likely to lead to a rapid settlement of the case. A family court might, I believe, be reluctant to decide these discrete issues as preliminary issues. But if the parties agree on arbitration to decide those 2 issues then arbitration empowers them to do so. Again, the parties can decide, or if not, the arbitrator, how these discrete issues are to be arbitrated – orally or on paper, or a combination.

24. Now, the evidence and submissions are over and the ball is in the arbitrator's court to write the award. Rule 13.1 shows the way. It must be in writing and dated and signed by the arbitrator. It will state the seat of the arbitration i.e. that jurisdiction with which the arbitration has its closest connection. Since the arbitrator must apply English law the seat will be England. The parties are free, if both so choose, to relieve the arbitrator from having to state in the award any reasons why he has reached his decisions. But if, as is most probable, he is asked for reasons, he does not have to produce a script that would be worthy of a judge, let alone a Fellow of All Souls. He is required to give "sufficient reasons to show why [he] has reached the decisions contained in [the award]". The award is not, unlike a judgment of a judge, a document which will be seen by the general public, including solicitors and barristers not engaged in the arbitration. It will not set any precedent, nor may it be quoted in other arbitrations without the permission of the parties. It is a document solely for the eyes of the parties and their legal advisers and its purpose is to tell them, and nobody else, in succinct and logical terms why the arbitrator has come to his conclusions.

25. I would now like, having briefly explained the scheme, to touch upon its advantages and what are said to be its disadvantages.

26. Advantages. I take them in no particular order of importance. First, confidentiality. All the proceedings before the arbitrator are entirely confidential. The media and the public are not admitted. Rule 16 of the scheme makes it abundantly clear that the arbitration and its outcome are confidential. All documents, statements, information and other materials in the arbitration are confidential, as are all transcripts of evidence and/or submissions. I suggest that this is a real bonus for parties who do not relish their family disagreements, whether great or

small, being bandied about in the national or local media. With the family courts now travelling at a gallop towards hearings being heard completely in open court, those couples caught up in a broken relationship who want their disputes adjudicated in private now have that option. Indeed, I have recently learned of a financial case in the Family Division where the judge held the final hearing not only in open court but had all the barristers dressed in their wigs and gowns with he himself dressed in his judicial robes. I comment - in a family finance case? Is this really what 21st century litigants want?

27. But what, you may say, happens then when the award comes to the court for implementation? Will not the parties lose their privacy? Well, look at how the President dealt with the case of S v S. He simply said that he had read the necessary papers and approved the award and consequential orders. In para 22 of the judgment he said he did not propose to go into the details of the case as “why, after all, in case like this should litigants who have chosen the private process of arbitration have their affairs exposed in a public judgment?” So, nobody was any the wiser as to the identity of the parties or the facts of the case. If an award is challenged which necessitates a judgment I am optimistic that the courts will adopt the same approach.
28. Second, flexibility. This arbitral scheme, when compared to litigation, is able to take hold of the core issues to be decided without the necessity to go through the whole gamut of the process currently undertaken in the court system. The parties can submit for arbitration those issues which they see as the stumbling block to the resolution of their financial and property disputes, and, done in a way which they want, not in the way that a judge may feel that he has to impose on them.
29. Third, speed. The court system is, for many family finance litigants, particularly those of modest means, impossibly slow. Of course, priority is rightly given to children cases, particularly those where a local authority takes proceedings in relation to a dysfunctional family or where one party is seeking the summary return of a child to a foreign jurisdiction pursuant to the Hague Convention. And, there is a limited pool of judges. Thus, what can happen is that finance cases may be adjourned almost at the last moment, because the courts are

overworked, and in some courts adjourned not just once but several times. Generally speaking as to duration of cases in the Family Division of the High Court, if a case is started on 1 January in year one it is unlikely that the date for the FDR (early neutral evaluation) will be given before the end of year one. If the case does not settle at or shortly after the FDR, then the hearing date is unlikely to be before the end of year 2, and, if the case is complex, well after that.

30. Compare that to what can happen under the IFLA scheme. I have done some informal research by asking several arbitrators their experience of the time taken for the completion of arbitrations, from the date of their appointment to the date of the delivery of the award. I can therefore speak of 11 concluded arbitrations of some 26, started but not all concluded, to date. One, S v S, was completed from the date of the appointment of the arbitrator to the delivery of the his award in 5 months. Apart from that case the longest period of time was 8 months and the shortest period was 4 weeks. So far as the one taking only 4 weeks, it involved discrete disputes which were at the very core of the financial and property problems of the divorcing couple. Five days after the appointment of the arbitrator an oral hearing took place in which the parties' lawyers argued the discrete issues without evidence. They sent in supplementary written submissions shortly after. Then no more than one month after the arbitrator's appointment the award, having been vetted by the lawyers for typos etc., was delivered to the parties.
31. I venture to suggest that such speed, whether of 8 months or 4 weeks is quite unattainable in our court system.
32. Fourth, the arbitrator. Once he or she is selected and accepts appointment, the arbitrator must see the arbitration through to its conclusion. There is no chopping and changing of the adjudicator as is all too prevalent in the court system. In the court system although a judge may start to deal with a case at an early stage and even "reserve" it to himself, there is absolutely no guarantee that he will actually try the case. But in arbitration there is that guarantee. Further, the parties to an arbitration select the "judge". They are thus given the opportunity, denied in the court system, of choosing the person in whom they and their advisers have confidence.

33. Let me now turn to what I call the perceived disadvantages and I will suggest that in reality there are none. Again, like the advantages I take them in no particular order of importance.
34. First, expense. It is said “the judge is free, the arbitrator must be paid”. The second part is true, the first part is only partially true. Litigants must pay court fees. Furthermore, if the present government has its way, litigants in the commercial court will be charged a daily fee set at a level which is designed to make a profit. I can well see that happening in the family court system for wealthy couples who choose to litigate their disputes in the courts. But the better answer to the criticism of expense is that if parties engage in arbitration and get their award through quickly the saving in legal fees that would be otherwise expended whilst the case grinds through the court system to trial, will, I suggest, more than offset the cost of employing an arbitrator.
35. Second, it is said “arbitration is only for the rich”. By which I assume is meant that only the rich can afford to pay an arbitrator. Not so. There are 130, with more to come, qualified arbitrators and amongst them are a large number who are prepared to, and have done so, take on arbitrations in cases of very modest means and tailor their fees accordingly. In any event, no doubt the choice of arbitrator will be influenced by the fees he proposes to charge and the parties can shop around.
36. Third, I have heard the following as to why some lawyers will not advise their client to consider arbitration. It goes as follows. “If I advise my client to choose X as the arbitrator (and he is appointed) but he then goes against my client in the award I will get the blame. If, by contrast, I let a judge (whom I cannot choose) decide the dispute and he goes against my client, well, he gets the blame, not me”. Can I gently chide those lawyers who feel that way? You spend your professional lives making choices e.g. which counsel and/or expert to instruct and whether to advise your client to fight or settle, for which, if you make the “wrong” choice you may get the blame. Consider this- is it not better for you and your client that you should have the opportunity together with the other side, to choose the “judge” in whom you have confidence, as opposed to the situation in the court system where there is no choice

whatsoever and where the allocated judge's qualities and experience to decide the particular disputes in question, may be variable i.e. from the very good through to the indifferent to those judges who have little or no experience of hearing financial remedy cases? And, to be able to choose the "judge" who is guaranteed to see the arbitration through all its phases to the very end. But can I suggest a solution to your worries? You could do one of 3 things. First, both parties could ask an experienced arbitrator to make the choice, rather like the President of the RICS does. Second, each party can submit to the other a list of 3 or 4 names and if there is one name common to both lists, then that person is nominated as the arbitrator. Third, one party serves a list of 3 names, the other deletes one, the first party can delete one, leaving the final name as the nominated arbitrator.

37. Fourth it is said "if the award is binding that means there is no right of appeal", the inference being that in the court system there is. Not so. No appeal in England and Wales from a decision of a family judge can be brought without the permission of the judge or the Court of Appeal. But, leaving that point to one side, let us be realistic. If an arbitrator makes an award which is "off the wall" i.e. wrong in principle or perverse, no family court is going to turn such an award into court orders if one party were to challenge the award. And it will not do so for the very reason that it retains its discretion under the various Acts of Parliament whether to make the orders or not.

38. Fifth it is said "awards are not enforceable or at the very least are at risk of being tinkered with by the courts". I suggest the President's decision in *S v S* has laid that red herring to rest.

39. Sixth, it may be said that "if all arbitrations are confidential then no award can be cited in another arbitration, thus creating the risk of inconsistent awards being made". I accept that an award in one arbitration cannot be cited in another, at any rate without the express consent of both parties in the first arbitration. This is inherent in the system of arbitration where the principle of confidentiality prevails. So there is indeed the risk of inconsistency. But it is more apparent than real. In family finance cases, the inconsistency is likely to arise not by reason of the discretion given to tribunals under English law to

determine the fair outcome, but by one arbitrator making a decision which is wholly outside the wide parameters of that discretion. That can be cured by the court. And just because two arbitrators may differ on roughly the same set of facts as to outcome does not under English family law mean that one is right and the other is wrong. It is only if one arbitrator makes an award which is indeed outside the wide ambit of the discretion given to the tribunal under English law, so that it can be said that the award is wrong in principle or perverse, that the court is likely to uphold a challenge to it by the dissatisfied party. In that way the courts will be able to keep an eye on the arbitral process.

40. Seventh it is said “the law cannot be developed in an arbitration”. That may be so. But the vast majority of family cases involve the application of existing principles to the facts of the particular case. For those very small number of cases where the law may need developing, then they can remain in the court system.

41. International arbitration. I believe that the IFLA scheme, suitably adapted to meet the laws of, and be enforceable in, places outside England, could be exported. I have particularly in mind those countries whose family finance law is very similar to ours, for example The Cayman Islands, The Channel Islands, Gibraltar, and Hong Kong. This is very much in its infancy. Thus all I can really say is “watch this space”.

42. We are fortunate in this country to have a good legal and judicial system. But it is under immense strain. Resources are constantly being cut or withdrawn. This leads to rigidity, delay, and expense. There is a lack of freedom in the court system for individuals to determine how they themselves would like their differences to be settled. Here for the first time is an arbitral scheme, governed by English law, which empowers couples, suffering a terminal breakdown in their relationship, to opt to have their financial and property disputes adjudicated in the way that suits them best. If they want publicity, the courts will oblige. If, on the other hand, they want privacy, arbitration will provide it. If they want speed, flexibility, and one “judge” (and a specialist at that) to take their case through from beginning to end, then arbitration provides all of that. In my estimation the advantages so outweigh what are said, very inaccurately, to be disadvantages, that I confidently predict that within

the near future family finance arbitration will complement the court system just as private medicine complements the National Health Service.

43. A final thought, I think approval of the IFLA scheme would unhesitatingly have been given by King Solomon.

[This talk was given by Sir Hugh Bennett M.C.I.Arb to the London Branch of the Chartered Institute of Arbitrators following its AGM on 30 April 2014.]