Arbitration: the IFLA Scheme

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3.19 In February 2012 a new route to financial settlement was announced by the Chartered Institute of Arbitrators (CIArb): Arbitration has become an available option as an alternative to the forensic process, mediation or collaborative law arrangements.

3.20 **Arbitration** is introduced to ***@eGlance*** with a new section (to be found in **Support Material**), containing a succinct guide to the process and to the potential advantages both for clients and for those instructed by them, including a tabular Procedural Guide. A fuller description of the process is to be found in a two-part article by Sir Peter Singer in the November and December 2012 issues of Jordan's *Family Law*, which can be accessed via the 'Key Information' tab on the homepage at www.familyarbitrator.com. Also reproduced (with the permission of the Institute of Family Law Arbitrators) are the current (as at December 2013) **IFLA Scheme Rules** and the **Arbitration Agreement (Form ARB1)**, the latter as a Word template file which can be completed on-screen.

3.20.1 *[**@eGlance** Update January 2014]* IFLA has published (online only, but downloadable at ifla.org.uk and on the FamilyArbitrator website) two guides:

- Introductory Guide for Public
- Introductory Guide for Practitioners

3.21 The Arbitration Panel List, identifying those qualified by virtue of their training and Membership of CIArb, is to be found at ifla.org.uk, or by calling the IFLA Administrator on +44 (0)1689 820272.

3.22 The initial list will expand as more family finance practitioners qualify and become Members of CIArb (MCIArbs).

3.23 A set of informative FAQs is also to be found on the IFLA website. Further extensive explanatory materials for both lawyers and clients contemplating the arbitration option are freely available at http://www.FamilyArbitrator.com.

3.24 Arbitration depends for its efficacy upon **Part I** and **Schedule 1** of the **Arbitration Act 1996** which (together with other potentially relevant provisions) have been added to the statutory materials available within ***@eGlance***.

3.24.1 *[**@eGlance** Update January 2014]* A number of arbitration-specific orders have been published for consultation as part of the project to create a comprehensive set of standard orders to be used in all species of family proceedings when the Family Court is established in April 2014: see *[**@eGlance** Update January 2014]* to Commentary at para 5.21. They cover orders for a mandatory and a discretionary stay in favour of arbitration; for the enforcement of an arbitrator's peremptory order under section 42, Arbitration Act 1996; and to secure the attendance of witnesses under section 43, Arbitration Act 1996. They are currently (January 2014) available here.

Arbitration: Case-law

3.25 In *W v M (TOLATA Proceedings: Anonymity)* [2012] EWHC 1679 (Fam) Mostyn J at [70] commented:

> "Where parties are agreed that their case should be afforded total privacy there is a

> very simple solution: they sign an arbitration agreement. Arbitration has long been available in proceedings such as these. Recently arbitration has also become available in financial remedy proceedings by virtue of the much-to-be-welcomed scheme promoted by the Institute of Family Law Arbitrators. In those proceedings also privacy can now be guaranteed."

3.26 In *T v T* [2012] EWHC 3462 (Fam) Nicholas Francis QC sitting as a deputy High Court Judge considered an arbitration agreement in a US pre-nup, and rejected one spouse's application for a *Hemain* injunction intended to delay the US arbitral process. The judgment canvasses a number of topics of interest and relevance to family arbitration in general. But the question whether the US pre-nup arbitration clause was effective would be for decision within the US arbitration proceedings, if challenged. It formed no part therefore in what was decided in London on the *Hemain* application.

3.27 In *AI v MT* [2013] EWHC 100 (Fam) Baker J recounted the steps taken and safeguards applied to facilitate and to give effect to the desire of observant Jewish spouses to have their financial and child-related disputes determined by arbitration before a specified Rabbi who was a Beth Din judge. The judge required them to agree that the arbitration would be non-binding and that ultimately they would be bound by any additional or other terms imposed by the English court. The steps taken pre-dated the introduction of the IFLA scheme, but the case is illustrative of the growing preparedness of the courts to recognise party autonomy. It is also a paradigm example of cultural sensitivity, but *not* a green light 'opening the way to Sharia divorces', as misleadingly trumpeted by *The Times* on 1 February 2013. The case had nothing to do with the status change of divorce as such.

3.27.1 *[**@eGlance** Update January 2014]* In S *v* S [2014] EWHC 7 (Fam) Munby P called in an application for a consent order to reflect an arbitral award, and took the opportunity to endorse and to bestow his presidential approval on the principles and procedures of the IFLA Scheme. He commented [at 12] that:

> '… there is nothing in the Arbitration Act 1996 which on the face of it would preclude arbitration as a permissible process for the resolution of disputes rooted in family life or relationship breakdown'

and noted [at 4] the importance of the fact that 'the [IFLA Scheme] 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.' He added [at 12]:

> 'There is no conceptual difference between the parties making an agreement and agreeing to give an arbitrator the power to make the decision for them. Indeed, an arbitral award is surely of its nature even stronger than a simple agreement between the parties.'

3.27.2 *[**@eGlance** Update January 2014]* In this judgment the President also gave guidance on the appropriate judicial approach to such consent applications (and, by extension, to applications by one party for the other (resiling) party to demonstrate why an order should not be made to reflect such an award). His approach is exemplified in this extract:

> '20. It is worth remembering what the function of the judge is when invited to make a consent order in a financial remedy case. It is a topic I considered at some length in *L v L* [2006] EWHC 956 (Fam), [2008] 1 FLR 26. I concluded (para 73) that:
>
> > "the judge is not a rubber stamp. He is entitled but is not obliged to play the detective. He is a watchdog, but he is not a bloodhound or a ferret."

21. 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.

…

25. 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.'

3.27.3 *[**@eGlance** Update January 2014]* Thus the parties, practitioners, and indeed arbitrators can now be assured that the court's approach in such a situation will be to support the award as an exercise of party autonomy, rather than to adopt the posture of a forensic ferret and sniff out ways to unpick it.

3.27.4 *[**@eGlance** Update January 2014]* It will remain of course for the parties' representatives (and for the court) to ensure that the terms of the order proposed are workable and that the court can achieve the effect of implementing the award, i.e. that there is power to make it. It appears that quite frequently draft consent orders have to be returned for those reasons. It is also important (and self-evident) that the court establishes whether there are any current proceedings, and whether a decree nisi has been made. If not, the court would have to return an application for orders which can only be made on or after decree nisi, or which impermissibly purport to take effect before decree absolute.

3.27.5 *[**@eGlance** Update January 2014]* Not every award calls for or requires a court order to reflect its terms so as to facilitate efficacy: at least for so long as the parties carry it into effect or continue to operate in accordance with its terms. This may be the case for declarations as to beneficial interests; MWPA orders as to the ownership of chattels; or an award requiring sale and specifying the distribution of the sale's proceeds. But other awards (and especially those made, for example, in relation to matrimonial or civil partnership situations; on a Schedule 1 claim; or on an Inheritance Act claim) can only be effective if an order reflecting the award is made by the court (for instance in the case of a clean break or pension-sharing order; or to mark that a lump sum payment has been ordered; or as a prelude to enforcement through the court in the event of non-compliance). In many such situations it is trite law that the court's jurisdiction to make such orders (as indeed any other form of order representing the negotiated settlement of a dispute) is subject to the judge's discretion, which no agreement can oust: but which should be exercised in abbreviated fashion as and for the reasons expounded by the President in *S v S*.

Arbitration: A Note on allocation and procedure

3.28 This Note is intended as a guide to the allocation of applications to the court that arise out of or relate to IFLA Scheme arbitrations. The appropriate procedure to adopt will depend upon whether an application is being made in 'Arbitration Act' proceedings or in the context of proceedings for family (or analogous) financial relief, or for an order in TOLATA proceedings. As noted *below*, Rule changes to simplify and streamline the position are anticipated.

(a) 'Arbitration claims' under the Arbitration Act

CPR Part 62 (and its accompanying PD 62) govern procedure in relation to 'arbitration claims' made in arbitration proceedings under the Arbitration Act 1996.

Rule 62.2 ('Interpretation') is in these terms:

> (1) In this Section of this Part 'arbitration claim' means –
>
> (a) any application to the court under the 1996 Act;
>
> (b) a claim to determine –
>
> (i) whether there is a valid arbitration agreement;
>
> (ii) whether an arbitration tribunal is properly constituted; or what matters have been submitted to arbitration in accordance with an arbitration agreement;
>
> (c) a claim to declare that an award by an arbitral tribunal is not binding on a party; and
>
> (d) any other application affecting –
>
> (i) arbitration proceedings (whether started or not); or
>
> (ii) an arbitration agreement.

3.29 So far as enforcement is concerned, in commercial cases an application under section 66 of the Arbitration Act 1996 is the standard route whereby arbitral awards are summarily enforced, with the leave of the court, 'in the same manner as a judgment or order of the court to the same effect'. As 'arbitration claims' include 'any application to the court under the 1996 Act', a section 66 application is subject to the Part 62 procedure.

3.30 It will however rarely if ever be appropriate or indeed possible to make an application under section 66 seeking the summary enforcement of a family financial arbitral award, because that provision does not enable the court, without more, to convert an arbitral award in a family financial case into an order within the scope of (for instance, and most obviously) the Matrimonial Causes Act 1973: say for a clean break, a pension sharing or attachment order, or indeed an order for continuing maintenance provision. But nothing in section 66, nor indeed in

the other relevant provisions of the Arbitration Act 1996, **requires** that an application to obtain a court order reflecting an arbitral award be made under section 66. The (currently circuitous) path round this apparent obstacle is described in section (c) *below*.

3.31 It is therefore suggested that the only circumstances in which the 'arbitration claims' procedure set out in CPR Part 62 applies to family arbitrations are when the following powers under the Arbitration Act 1996 are invoked: to seek orders of the court in support of the arbitral process (e.g. sections 42 to 45); or to challenge the arbitration under sections 67 to 73 of the Act; or to apply to the court for any of the other forms of relief enumerated in rule 62.2(1) (there are a number of avenues, such as a section 24 application to remove an arbitrator, which in practice are unlikely often to be trodden).

3.32 The consequence is that, until new rules are introduced, a combination of section 105 of the Arbitration Act 1996, the Allocation Rules made thereunder (the High Court and County Courts (Allocation of Arbitration Proceedings) Order 1996 (S.I. 1996/3215), as amended: 'the 1996 Order'), and (most accessibly) CPR rule 62.3 and PD 62 para 2 (as to which see immediately *below*) will likely result in an Arbitration Claim Form N8 (available at this link) coming before a tribunal wholly unused to family business (but very likely well versed in arbitration law and practice): for the detail consult the White Book, volume 2. The operative provisions of para 2 of the PD so far as applicable to the subject-matter of IFLA Scheme disputes are that the Form N8 'may be issued at the courts set out in column 1 of the table *below* and will be entered in the list set out against that court in column 2'.

Court	***List***
Admiralty and Commercial Registry at the Royal Courts of Justice, London	Commercial list
Technology and Construction Court Registry, St Dunstan's House, London	TCC list
District Registry of the High Court (where mercantile court established)	Mercantile list
District Registry of the High Court (where arbitration claim form marked 'Technology and Construction Court' in top right hand corner)	TCC list

3.33 In the meantime, the best course will be to seek transfer to the Family Division, with a direction that the application be referred to a District Judge of the Principal Registry of the Family Division (PRFD) for determination or directions. Such transfer is envisaged by the 1996 Order, para 6, which reads:

> 'Nothing in this Order shall prevent the judge in charge of the commercial list (within the meaning of section 62(3) of the Senior Courts Act 1981) from transferring proceedings under the Act to another list, court or Division of the High Court to which he has power to transfer proceedings and, where such an order is made, the proceedings may be taken in that list, court or Division as the case may be.'

3.34 That transfer process is indeed what article 13.4 of the IFLA Scheme Rules envisages when describing 'an appropriate court' as a court 'which has jurisdiction to make a substantive order in the same or similar terms as the award, whether on primary application or on transfer from another division of the court'.

3.35 It is suggested that the present procedural position is akin to the Family Division's jurisdiction when considering bankruptcy matters. Whilst a Judge of the Division may determine such a matter, the FD Judge may only do so once the case has been properly transferred by the

bankruptcy court (see *Arif v Zar & Anor* [2012] EWCA Civ 986).

(b) Applications to stay court proceedings in favour of arbitral proceedings

3.36 Stay proceedings, although falling within the meaning of 'arbitration claim', are in a separate category. Section 9 of the Arbitration Act 1996, a mandatory provision, provides for the stay of legal proceedings on application 'to the court in which the proceedings have been brought.' CPR rule 62.3(2) reiterates that such an application 'must be made by application notice to the court dealing with those proceedings'. Section 9(4) provides that on such an application 'the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed'. In agreeing to the IFLA Scheme Rules (and indeed explicitly in their Form ARB1) the parties agree that they will not, while the arbitration is continuing, commence an application to the court (nor continue any subsisting application) relating to the same subject matter, except in connection with and in support of the arbitration or to seek relief that is not available in the arbitration (as, for instance, via sections 42 to 45 of the Arbitration Act 1996: see next section); and that they will apply for or consent to a stay of any existing court proceedings, as necessary (Form ARB1, para 6.2).

3.37 An alternative view is that a stay in such circumstances can and should ordinarily be ordered by the court pursuant to its case management powers and consistent with the philosophy underlying the FPR in relation to alternative dispute resolution procedures: see FPR 2010 rules 3.1 to 3.3.

3.38 But what in any event is clear is that, in a case where a family arbitration is being commenced, any application for a stay of extant proceedings for parallel relief must be made to the court in which those proceedings have been commenced.

(c) Applications to the court for an order to reflect or give effect to an arbitral award (not therefore a Part 62 'arbitration claim'): the current position

3.39 In the family context, applications to the court will routinely need to be made to reflect, or to give effect to, or as a precursor to the enforcement of an arbitral award. These most commonly will be made in tandem with divorce proceedings (but could also be in TOLATA or other proceedings), where the application will either be made in existing (stayed) proceedings, or to conclude with a consent order an application for financial relief launched for that purpose. So article 13.4 of the IFLA Rules provides:

> 'If and so far as the subject matter of the award makes it necessary, the parties will apply to an appropriate court for an order in the same or similar terms as the award or the relevant part of the award and will take all reasonably necessary steps to see that such an order is made. In this context, 'an appropriate court' means a court which has jurisdiction to make a substantive order in the same or similar terms as the award, whether on primary application or on transfer from another division of the court.'

'The court' in both those (consent or disputed) situations will often be the PRFD or a divorce county court.

3.40 Thus it seems to the authors that in the context of family financial disputes (and taking the Matrimonial Causes Act 1973 as the typical contextual example) applications for reflective orders should be made, if by consent, in the conventional manner; and if for any reason opposed (other than via an Arbitration Act challenge) will most conveniently and appropriately be brought before the court by way of a 'show cause' application brought against the dissenting party.

3.40.1 *[**@eGlance** Update January 2014]* The view here adopted has been endorsed by the President's judgment in *S v S* [2014] EWHC 7 (Fam), and indeed taken further by his indication that parties may take advantage of 'the shortcut process' established in *S v P (Settlement by Collaborative Law Process)* [2008] 2 FLR 2040 for consent orders sought not only after a

successful collaborative process but also to reflect an arbitral award. By way of footnote to [23] of his judgment the President described the present-day procedure thus:

> 'The process is described in the headnote to the report as follows: "This application for approval of draft consent orders could be dealt with [by a High Court judge] in the 'urgent without notice' applications list, in order to shortcut the normal rather lengthier process of lodging consent orders … and waiting for them to be approved and sent back … The court would usually be prepared to entertain applications of this kind in the without notice applications list before the applications judge of the day on short notice. A full day's notice must be given to the clerk of the High Court judge in front of whom it was proposed to list the case; such notice could be given by telephone. The clerk of the rules should be informed that this was taking place. Use of the shortcut process was always subject to the consent of the urgent application judge. However, provided every aspect of documentation was agreed, the hearing was not expected to last more than 10 minutes, and the documentation was lodged with the judge the night before the hearing, this process had been approved by the President."'

(d) Facilitating the determination of cases out of court by arbitration conducted in accordance with the principles of English law by an accredited family arbitrator: the future

3.41 For the future, para 62 of *The Family Justice Modernisation Programme: Final report* recommends that the Money and Property working group of the Family Justice Council:

> 'will also be asked to make recommendations about rule and practice direction changes to facilitate the determination of cases out of court; for example, where the parties have agreed to an arbitration conducted in accordance with the principles of English law by an accredited family arbitrator, including interim directions and whether special arrangements should be made for the expedition of the approval of consent orders to reflect arbitrated decisions.'

3.41.1 *[**@eGlance** Update January 2014]* As to special arrangements for the expedition of the approval of consent orders to reflect arbitrated decisions, see para 3.40.1 *above* for the President's endorsement and expansion of 'the shortcut process' established in *S v P (Settlement by Collaborative Law Process)*. In *S v S* [2014] EWHC 7 (Fam) at [28] the President expressed the view that:

> 'New and emerging forms of alternative dispute resolution highlight the need for the court's processes to keep pace with the needs of litigants and their advisers, nowhere perhaps more so than where, as in this context, the mechanism for resolving a family financial dispute is arbitration conducted in accordance with the Arbitration Act 1996. For example, and no doubt there are other such matters, we need appropriate procedures to enable the Family Court, not the Commercial Court, to deal expeditiously (and if appropriate without the need for an oral hearing) with:
> (i) applications for a stay of financial remedy proceedings pending the outcome of arbitration;
> (ii) applications seeking any relief or remedy under the Arbitration Act 1996, such as, for instance, under section 42 to enforce an arbitrator's peremptory order, or under section 43 to secure the attendance of witnesses.'

He there [at 29] indicates that he will invite the Family Procedure Rules Committee to consider this as a matter of urgency, while commenting that it is a matter for consideration whether such topics are most appropriately dealt with by rule changes (for example to the Family Procedure

Rules 2010 and/or the Civil Procedure Rules 1998) or by the issue of Practice Directions or Practice Guidance.

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