Comment Sheet on *S v S* [2014] EWHC 7 (Fam)

On 14 January 2014 the President handed down a judgment which provides the strongest support for the use of arbitration in family and other relationship breakdown disputes.

He had before him an application for financial remedy orders, lodged with the consent of divorcing spouses who had agreed between themselves to be bound (in accordance with the IFLA Scheme and the terms of the arbitration agreement which they had signed} by the arbitrator's award. He approved the order without comment, but took the opportunity to deliver a number of statements of principle in relation to such arbitrations and the appropriate court response to them.

The full judgement contains many important points, of which what might be considered the most salient are here reproduced. (The passages below are from the President's judgment: the ***bold emphasis*** *is our own):*

Judgment Extracts

'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.'

Since the judgment of Ormrod LJ in *Edgar* [1980] 1 WLR 1410 'there have of course been many significant developments in this area of the law…

For present purposes three developments demand particular notice:

1. The identification and subsequent elaboration by Thorpe LJ of the concept of the **"magnetic factor"** – the feature(s) or factor(s) which in the particular case are of "magnetic importance" in influencing or even determining the outcome … this approach, though not the label, carried forward in the fundamentally important statement of principle by the Supreme Court in *Radmacher (formerly Granatino) v Granatino* [2010] UKSC 42, [2011] 1 AC 534, para 75:

   > **The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement**.

2. … mediation and subsequently other forms of alternative dispute resolution have become well established as a means of resolving financial disputes on divorce. … **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**. The Family Procedure Rules 2010 now encourage resort to alternative dispute resolution procedures in this as in other areas of family law: see FPR rule 1.4(e) and FPR Part 3.

3. … the court has adapted and abbreviated its processes to facilitate the appropriately simple and speedy judicial approval of such agreements. Where the parties are agreed on the terms of the consent order the court has available to it the process adopted by the parties in the present case.'

Where, in contrast, one of the parties seeks to resile, the court has long sanctioned use of the abbreviated 'notice to show cause' procedure … The approach here was well captured by Thorpe LJ in *Xydhias v Xydhias* [1999] 1 FLR 683, 692:

> If there is a dispute as to whether the negotiations led to an accord that the process should be abbreviated, the court has a discretion in determining whether an accord was reached. In exercising that discretion the court should be astute to discern the antics of a litigant who, having consistently pressed for abbreviation, is seeking to resile and to justify his shift by reliance on some point of detail that was open for determination by the court at its abbreviated hearing.

Moreover, in such a case **the court, if need be of its own motion, can always, by the appropriately robust use of its case management powers, limit the ambit of the issues to be considered at the hearing**; for example, as was done in both *Crossley v Crossley* [2007] EWCA Civ 1491, [2008] 1 FLR 1467, and *S v S (Ancillary Relief)* [2008] EWHC 2038 (Fam), [2009] 1 FLR 254, by focusing the hearing exclusively on those issues relevant to the magnetic factor(s).

… there is the **increasing emphasis on autonomy** exemplified by cases such as *MacLeod v MacLeod* [2008] UKPC 64, [2010] 1 AC 298, and *Radmacher (formerly Granatino) v Granatino* [2010] UKSC 42, [2011] 1 AC 534. As Lord Phillips PSC said in *Radmacher*, para 78:

> The reason why the court should give weight to a nuptial agreement is that there should be respect for individual autonomy. The court should accord respect to the decision of a married couple as to the manner in which their financial affairs should be regulated. It would be paternalistic and patronising to override their agreement simply on the basis that the court knows best. This is particularly true where the parties' agreement addresses existing circumstances and not merely the contingencies of an uncertain future.

I draw attention in the present context to the last sentence. I would accordingly respectfully endorse what was said by Charles J in *V v V (Prenuptial Agreement)* [2011] EWHC 3230 (Fam), [2012] 1 FLR 1315, para 36:

> [*Radmacher*] necessitates a significant change to the approach to be adopted, on a proper application of the discretion conferred by the MCA, to the impact of agreements between the parties in respect of their finances. At the heart of that significant change, is the need to recognise the weight that should now be given to autonomy, and thus to the choices made by the parties to a marriage … The new respect to be given to

> individual autonomy means that the fact of an agreement can alter what is a fair result and so found a different award to the one that would otherwise have been made.

The starting point in every case, as it seems to me, is that identified in characteristically arresting language by Sir Peter Singer in *Arbitration in Family Financial Proceedings: the IFLA Scheme: Part 2* [2012] Fam Law 1496, 1503:

> I suggest that the "magnetic factor" perspective provides an appropriate analogy, and illuminates how applications (whether or not by consent) for orders to reflect an IFLA award should be viewed by the court … Such an approach respects the court's jurisdiction, but gives full force and effect to party autonomy by treating the parties' agreement to be bound by the award as the magnetic factor which should lead to a reflective order. Thus an arbitral award founded on the parties' clear agreement in their Form ARB1 to be bound by the award should be treated as a lodestone (more then than just a yardstick) pointing the path to court approval.

In the absence of some very compelling countervailing factor(s), the arbitral award should be determinative of the order the court makes. Sir Peter had earlier suggested (1502) that:

> The scope for backsliding, resiling and indeed any space for repentance should … be just as narrowly confined [as it was in *L v L* [2006] EWHC 956 (Fam), [2008] 1 FLR 26] where what is in question is an attempt to wriggle out of the binding effect of an arbitral award.

Again, I agree. **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.**

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.**

I can see no reason why the streamlined process applied by Coleridge J in *S v P (Settlement by Collaborative Law Process)* [2008] 2 FLR 2040 in the context of a consent order which was the product of the collaborative law process should not be made similarly available in cases where the consent order is the product of an arbitral award under the IFLA Scheme or

something similar. From now on, if they wish, parties should be able to avail themselves of that process[1] whether the consent order is the product of the collaborative law process or an arbitral award under the IFLA Scheme or something similar.

I add two points in relation to procedure. The first is that in every case the parties should, as they did here, lodge with the court both the agreed submission to arbitration (in the case of an arbitration in accordance with the IFLA Scheme, the completed Form ARB1) and the arbitrator's award. Second, the order should contain recitals to the following effect, suitably adapted to meet the circumstances:

> 'The documents lodged in relation to this application include the parties' arbitration agreement (Form ARB1), their Form(s) D81, a copy of the arbitrator's award, and a draft of the order which the court is requested to make.
>
> By their Form ARB1 the parties agreed to refer to arbitration the issues described in it which encompass some or all of the financial remedies for which applications are pending in this court; and the parties have invited the court to make an order in agreed terms which reflects the arbitrator's award.'

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**.

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.

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[1] 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.'

… the IFLA Scheme requires the arbitrator to decide the dispute in accordance with the law of England and Wales. In this context **it is important to remember the fundamental principles expounded by the House of Lords in *White v White* [2001] 1 AC 596, 604-605, that in arriving at any financial order the objective must be to achieve a fair outcome and that, in seeking to achieve a fair outcome, there is no place for discrimination between husband and wife.** My observations in this judgment are confined to an arbitral process such as we have in the IFLA Scheme. **Different considerations may apply where an arbitral process is based on a different system of law or, in particular, where there is reason to believe that, whatever system of law is purportedly being applied, there may have been gender-based discrimination. The proper approach in that situation will have to be considered when such a case arises.**

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.

Drafts of templates for such orders have been produced for consultation as part of the Family Orders Project being managed by Mostyn J. But alongside these innovations the need for procedural adaptation is becoming increasingly pressing. 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 is a matter for consideration. **Initially, however, I would invite the Family Procedure Rules Committee to consider this as a matter of urgency**.'

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