Articles

Arbitration in Family Financial Proceedings: the IFLA Scheme: Part 2

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I make no apology for repeating the paragraph with which I began last month's first instalment:

> 'Most people experiencing relationship breakdown wish their financial dispute to be dealt with as swiftly, cheaply, privately, and with as little acrimony as is possible. For those who wish that dispute to be resolved by an independent third party who will reach a conclusive decision, rather than to engage in a more or less face-to-face but potentially inconclusive negotiation, opting for family arbitration is the only viable alternative to the full-blown court-controlled (and court-dependent) process. Moreover arbitration can have a number of distinct advantages as an alternative to other forms of dispute resolution. Arbitration offers more privacy than conventional court proceedings and allows the parties the dignity of having as much "ownership" of the progress of what is after all their process. Arbitration is an adaptable process as well able to suit the needs of parties of modest means as of the more, and the most, affluent or celebrated.'

Here then, to add to last month's tally, are more potential advantages for clients (and their legal teams) contemplating taking their case (or part of it) to arbitration:

- *Keeping their lawyers*: If the parties have instructed lawyers, they are able to and normally will retain them throughout the arbitration process for advice, preparatory work and representation at hearings. Arbitration does not, like mediation sometimes can, involve seeing your client go off into closed conclave from which only muffled smoke signals intermittently emerge. While there is nothing to stop parties self-representing in an arbitration, it is strongly recommended that they should at least have taken independent legal advice before committing themselves to the process.
- *Control of the procedure*: The parties 'own' the procedure to a far greater extent than they can court proceedings. For instance, they can agree that the arbitrator should make his or her award based on consideration of the paperwork alone (which may be suitable where the issues are narrow) or that there should be a court-style hearing. If they opt for a hearing, they can decide in advance whether the arbitrator is to hear oral evidence or just submissions.
- *Defusing landmines*: In advance of embarking upon mediation, or indeed as a precursor to a collaborative endeavour, there certainly is scope for the parties to agree to employ arbitration to free up the path ahead of any obvious booby traps or other stumbling blocks. Arbitration can be fashioned to obtain a speedy and most likely more economical determination of preliminary issues of law or fact or both, where those issues can only have a binary outcome: either yes or no but not maybe. Thus is their potentially explosive effect dissipated in advance. This would leave the playing field

significantly smoother for mediation or the collaborative process to follow through and kick in with the goal of trying to resolve the more discretionary and nuanced issues left on the pitch. A number of situations may be susceptible to this technique.

  - One example would be a sole-name TOLATA dispute which largely turned on the detail of representations made (or not) in relation to the beneficial ownership of real property. It might be perfectly feasible to resolve this distinct evidential question in a streamlined manner, for instance curtailing or short-circuiting the disclosure process and other conventional but cost-generating litigation steps that would normally be necessary to enable the court to deal with all issues between the parties in one trial. If the arbitrated conclusion then is that there was a promise to share a beneficial interest the parties could find it very cost effective, once armed one way or the other with that binding decision, to embark upon mediation or to enter a participation agreement, to try to agree the relevant proportions and/or accounting issues in its light. There are numerous other instances where the resolution of binary questions would unlock the door to a smoother mediated or collaborative outcome.

- *Unlock your mediations*: Consider arbitration if a mediation (or a round-table negotiation) is teetering on the edge of irrevocable discord because the parties cannot agree between themselves on one or more discretely identifiable issues. Conventionally in such an impasse the representatives' advice may be to commission a jointly-instructed opinion from an 'external' lawyer or other specialist. If the problem is, however, legal (rather than one for an accountant, an actuary or a valuer) a surer solution may be to see whether the parties can agree on the identity of an arbitrator under the IFLA Scheme. The difficulty with an opinion, from however luminary a source and with whatever degree of clarity and force it is expressed, is that one party or the other (or both) may not accept it: leaving them stuck where they started. But if they are prepared to agree to be bound by the outcome arbitration may be the solution, and once they – with good or bad grace – have received a binding award the path to overall settlement may then clear. That way also they avoid the risk that either the mediation will founder.
  - The parties and their advisers in co-operation with their mediator (and with the advice of any lawyers retained), should be able to agree what are the disputed issues, factual or legal questions or a mix, underlying the reference (as indeed they would if settling instructions to counsel for an opinion on a disputed point).
- *Speed of the process*: From start to finish the arbitration process is likely to take very significantly less time than contested court proceedings, and the timetable can more easily be tailored to suit the parties' convenience. Thus the extra expense of the arbitrator's fee should be set off against the additional haemorrhages with which the long wait for a final court hearing, and the gnawing anxiety and prolonged uncertainty, will drain both parties. No need then to fret at the likelihood, indeed often the inevitability, that by the time the delayed hearing date finally looms there will be the considerable further and often futile expense of fresh valuations of property or of companies, and all the price and burden of the correspondence which will inexorably meanwhile mount.
- *Cost savings*: This ability to streamline the procedure may well (and in the majority of cases should) lead to significant savings not only of time but also of overall expense, after allowing of course for the unmatched extras of an arbitration. For the lawyers involved, accelerated throughput of arbitrated cases should hold no terrors: they will be freer and fresher to turn their minds to the next client. Arbitration thus holds out the added bonus of promoting a healthier work/life balance for those

overworked and overstressed family lawyers whose caseload is crushing.

- *Confidentiality*: The arbitration process is completely private. Hearings take place at a venue of the parties' choice, and there is no possibility of media obtaining access during them. Papers are held securely in the arbitrator's office.
- *An arbitrator for all reasons*: However expert may be the legal teams engaged by the parties in their dispute, there is no guarantee that the judge allotted by the court listing officer will have the same degree of specialist knowledge or experience in resolving financial disputes nor be conversant with the often highly complex financial arrangements the parties are seeking to unravel. Many disputes, by virtue of their scale and substance, can though as fairly and efficiently be decided by a local (or not so local) solicitor or barrister advocate-cum-arbitrator specialist as by a judge, and one moreover in whom the parties can repose confidence, selected in consultation with their own lawyers.
- *The IFLA Panel*: For the names and contact details of those currently accredited see www.ifla.org.uk/directory. When it comes to the selection of an arbitrator you will there find a range of specialist family finance practitioners drawn from both branches of the profession (plus a retired judge or more) with extensive experience of the whole gamut of financial disputes, both great and small. Thus the parties with guidance from their advisers can tailor and trim their coat to match the expense and quality of the cloth available within their range (in terms of the complexity of the dispute and the arbitration fee level they can afford). At the risk of a surfeit of mixed metaphors, there are horses for every type of course amongst the runners in the Arbitration Stakes …

Grounds for appeal or challenge under the Arbitration Act 1996

Sections 67 to 71 of the Act codify the available grounds which the High Court can, under the Act, interfere with an arbitral award whether by setting it aside, varying it, confirming it in part only and/or by remitting it for further consideration. The circumstances which can give rise to such a challenge are closely circumscribed. Furthermore, in some cases the court's permission is required before the process can be embarked upon.

Under s 67 an award may be challenged on the ground that the arbitrator lacked substantive jurisdiction. In such a situation the court's permission is not required. Pursuant to s 70(2) and (3), however, no appeal lies under this section unless any alternatively available remedies have been exhausted, or when more than 28 days have elapsed after the date of the award (or notification of the result of any such process). On appeal the court may confirm or vary the award, or set it aside in whole or in part.

Next, under s 68, an award may be challenged for 'serious irregularity affecting the tribunal, the proceedings or the award'. The court must be satisfied that the irregularity has caused or will cause substantial injustice to the applicant, and that it falls within one of a number of specific categories listed in s 68(2). Such a challenge may also be barred if alternative remedies have not been exhausted or more than 28 days have elapsed. Furthermore the right to object can fall forfeit if s 73 applies, which (broadly) disentitles a would-be appellant who does not take such an objection promptly but instead continues with the arbitral process. The tactic of waiting to see which way the wind blows and opportunistically late objections are thereby scuppered. The primary remedy on a successful appeal under s 68 is for the award to be remitted, in whole or in part, for reconsideration by the tribunal; but if the court is satisfied that would be inappropriate it may set aside the award in whole or in part, or declare it or part of it to be of no effect.

Last, under s 69 there is a right of appeal to the court on a question of law, unless (as they are entitled to do) the parties have agreed to exclude it. An agreement (which the parties are entitled to reach if they so wish, perhaps to keep the costs of the arbitration to a minimum) to dispense with the ordinary requirement for an award to contain reasons similarly excludes the court's appellate jurisdiction under this section. For such an appeal to proceed either all parties to the arbitration must agree or the court's leave must be given. That leave will only be granted if the point of law raised satisfies the stringent requirements of s 69(3), quoted here as an illustration of the restrictive approach the statute envisages for the intervention of the court even where what may be a telling point is raised. The requirements are cumulative: the court must be satisfied of and on them all.

The court's leave to appeal on a question of law is only to be given if it is satisfied:

(a) that the determination of the question will substantially affect the rights of one or more of the parties;
(b) that the question is one which the tribunal was asked to determine;
(c) that, on the basis of the findings of fact in the award –
    (i) the decision of the tribunal on the question is obviously wrong, or
    (ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and
(d) that, *despite the agreement of the parties to resolve the matter by arbitration*, it is just and proper in all the circumstances for the court to determine the question.

(Note, in passing, the power presumptively attributed to the parties' autonomous election to arbitrate: as witness the italicised phrase.)

The same restrictions as above (s 70(2), (3)) apply to an appeal on a point of law: no appeal lies unless any alternatively available remedies have been exhausted, or more than 28 days have elapsed after the date of the award (or notification of the result of any such process). The experience in commercial arbitrations under the Arbitration Act 1996 has been that very few appeals have been successful on a question of law. There are reasonable grounds to anticipate that family judges will apply as rigorous an approach to substantive challenges and to

the requirement for permission as do their Queen's Bench and Commercial Court colleagues in response to challenges against civil dispute arbitrations.

Implementing the award

How the award is implemented will depend on the nature of the dispute. Where the court has no discretionary responsibility for the order in question (as for instance where a dispute involves purely declaratory property claims between unmarried couples), the award might perhaps be enforced, with leave of the court, as though a court judgment or order: s 66(1). In some situations the parties may simply be able to put the award into effect without recourse to the court. As against that, however, some potential ingredients of an award can have no concluded effect without an order: a clean break and a pension sharing or attachment order are examples.

But for financial remedy relief and other cases within the remit of the IFLA Scheme the parties will in general apply to a family court which for these cases will be the 'appropriate court' for an order confirming the terms of the award, as their express agreement in Form ARB1 requires them to do. 'An appropriate court' is by Art 13.4 of the Rules defined as 'a court which has jurisdiction to make a substantial order in the same or similar terms as the award, whether on primary application or on transfer from another division of the court'.

It is beyond dispute that the jurisdiction of the court may not be ousted, because s 25 of the Matrimonial Causes Act 1973 (MCA 1973) imposes on the court a duty to decide whether and how to exercise its powers under ss 23 to 24E inclusive. This indeed has been the reason why some have in the past suggested (and some may still think) that the resolution of financial issues arising under the MCA 1973 (and allied statutes with their own equivalent of s 25, such as Sch 1 to the Children Act, or s 3 of the Inheritance (Provision for Family and Dependants) Act 1975) lay outside the terrain over which a 1996 Act arbitration could operate. But, in relation to arbitrations conducted under the IFLA Scheme by lawyer arbitrators accredited by CIArb, it is anticipated that it will only be in rare circumstances that the court will decline to uphold the award, given the parties' agreement at the outset to be bound by it.

I will comment in greater detail below on the developing approach to upholding settlement agreements apparent in the line of more recent cases flowing from the well-established principles of *Edgar v Edgar* (1981) FLR 19 (CA), *Xydhias v Xydhias* [1999] 1 FLR 683 (CA), and *X v X (Y and Z intervening)* [2002] 1 FLR 508. Subsequent cases demonstrate even greater willingness on the part of the courts to uphold the financial agreements parties make between themselves to regulate their affairs (and moreover to regulate in what manner they should be regulated) after the end of their marriage.

It is to be hoped that procedural arrangements will be established to 'fast tracking' consent orders based on arbitral awards under the IFLA Scheme, as happens in the case of agreements reached through the collaborative process: see *S v P (Settlement by Collaborative Process)* [2008] 2 FLR 2040.

Enforcing an award against a recalcitrant party

There exists an inevitable and understandable uncertainty in what are still the early days of the IFLA Scheme as to how courts will react to requests (especially if contested by one dissatisfied and would-be resilient party) for orders to be made which reflect an award.

I would expect that the person seeking to enforce the award will issue an application for the 'bad loser' to show cause why an order should not be made in the relevant terms and form. It is to be anticipated that such an application, if accompanied by a copy of the ARB1, the arbitral award, and the desired draft order would in the ordinary case lead the court summarily to reject the wrecking attempt and make the order.

There may be some judges who will find it difficult, employing what some might in the ordinary case regard as over-intrusive technicality or zeal, to avoid exercising their paternal (or even avuncular) jurisdiction to re-investigate the s 25 factors, notwithstanding that both parties consent to an order in the terms of a reasoned award. The response to (and, if it

comes to it in a suitable case, the appeal from) such an attitude should be firmly founded on the public policy considerations which favour party autonomy. There is a wealth of authority which can be drawn upon: see the Party Autonomy section below.

In *X v X (Y and Z intervening)* [2002] 1 FLR 508 Munby J (as he then was) restated (as summarised in the headnote) that:

> 'an agreement between the parties was a very important factor in considering what was a just and fair outcome. The court would not lightly permit parties to an agreement to depart from it, and a formal agreement, properly and fairly arrived at with competent legal advice, should be upheld by the court unless there were good and substantial grounds for concluding that an injustice would be done by holding the parties to it. The court must, however, have regard to all the circumstances, in particular to the circumstances surrounding the making of the agreement, the extent to which the parties themselves attached importance to it and the extent to which the parties had acted upon it.'

Moreover in para [103] the judge added, in what was a distillation of the accrued propositions on the topic to that date, the following among other potent considerations, that:

> 'The court should be slow to invade the contractual territory, for as a matter of general policy what the parties have themselves agreed should, unless on the face of it or in fact contrary to public policy or subject to some vitiating feature of the type referred to [in *Edgar*] by Ormrod LJ, be upheld by the courts.
>
> The mere fact that one party might have done better by going to court is not of itself generally a ground for permitting that party to resile from what was agreed.
>
> The court should bear in mind the undesirability of stirring up problems with parties who have come to an agreement: on the contrary the court should if possible, and consistent with its duty under s 25, seek to bring about family peace and finality.'

The appropriate judicial reaction when presented with a consent order for approval has never since been subjected to more rigorous appraisal than by Munby J (again) in a bravura performance in the case of *L v L* [2006] EWHC 956 (Fam), [2008] 1 FLR 26. That judgment is memorable moreover as the terrain course over which the judge hunted down and meticulously unearthed and uncovered that elusive (but not yet utterly extinct) beast, the forensic ferret. It repays reading for that reason alone. He concluded his conducted tour d'orchestre with this flourish of the baton, that 'if epigrammatic phrases are preferred, the judge is not a rubberstamp. He is entitled but is not obliged to play detective. He is a watchdog, but he is not a bloodhound or a ferret.' The passages in question fall between paras [68] and [73] and are very relevant for present purposes for their commentary on the degree of assiduity a judge should deploy before approving (or indeed rejecting) a compromise or settlement. They deal with the court's function when invited to approve an ancillary relief consent order. Munby J ouvertures with some observations of Balcombe J (as he then was) in *Tommey v Tommey* [1983] Fam 15 at 21:

> 'A judge who is asked to make a consent order cannot be compelled to do so – he is no mere rubber stamp. If he thinks there are matters about which he needs to be more fully informed before he makes the order, he is entitled to make such enquiries and require such evidence to be put before him as he considers necessary. But, per contra, he is under no obligation to make enquiries or require evidence. He is entitled to assume that parties of full age and capacity know what is in their own best interests, more especially when they are represented before him by counsel or solicitors.'

He underscores observations of Waite LJ in *Pounds v Pounds* [1994] 1 FLR 775 at 779 that the effect of the statute and the rules:

> '… is thus to confine the paternal function of the court when approving financial consent orders to a broad appraisal of the parties' financial circumstances as disclosed to it in summary form, without descent into

> the valley of detail. It is only if that survey puts the court on inquiry as to whether there are other circumstances into which it ought to probe more deeply that any further investigation is required of the judge before approving the bargain that the spouses have made for themselves.'

Then by way of concluding crescendo he approves observations of Ward LJ in *Harris v Manahan* [1997] 1 FLR 205 at 213 that:

> 'The realities of life in the Principal Registry and the divorce county courts are that the district judges are under inevitable pressure and the system only works because the judges rely on the practitioners' help. I would, therefore, be very slow to condemn any judge for a failure to see that bad legal advice is being tendered to a party. The statutory duty on the court cannot be ducked, but the court is entitled to assume that parties who are sui juris and who are represented by solicitors know what they want. Officious inquiry may uncover an injustice but it is more likely to disturb a delicate negotiation and produce the very costly litigation and the recrimination which conciliation is designed to avoid.'

These dicta are to be read in their context: ancillary relief proceedings had ended in a consent order made by a district judge sitting in the Principal Registry. The husband later repented of his generosity to his wife and sought to escape from the order to which he had consented. He failed. The scope for backsliding, resiling and indeed any space for repentance should, I suggest, be just as narrowly confined where what is in question is an attempt to wriggle out of the binding effect of an arbitral award.

These sentiments, I hope and dare to predict, will be held to apply with equal force where the agreement in question is an agreement to be bound by an arbitrator's decision. In this context may I also repeat the words of s 1(c) of the Arbitration Act 1996, that '… in matters governed by Part I of the Act, the court should not intervene except as provided by that Part'.

Party autonomy

So 'Party autonomy' should therefore be the rallying-cry for, as already emphasised, it is a keystone of arbitration. Section 1(b) of the Arbitration Act 1996 states that 'the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest'. And it is entirely consistently with this principle that by Art 1.3 of the IFLA Rules the parties enjoy their very considerable freedom to exclude, replace or modify the non-mandatory provisions of the Act and of the Scheme Rules.

Significantly, the importance of autonomy is reflected in and has been emphasised by recent case-law. It is clear that *Radmacher (Formerly Granatino) v Granatino* [2010] UKSC 42, [2010] 2 FLR 1900, has changed fundamentally the way that the courts regard agreements between spouses, whether pre-nuptial or post-nuptial (or between civil partners), which govern the consequences of their relationship breakdown:

> '[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 …
> [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 contingencies of an uncertain future.'

The scope and rationale of *Radmacher* have been examined in a number of subsequent first instance decisions. Of note for present purposes is the passage in the judgment of Charles J in *V v V (Prenuptial Agreement)* [2011] EWHC 3230 (Fam), [2012] 1 FLR 1315, at para [36]:

> 'To my mind, this decision [*Radmacher*] of the Supreme Court 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 made 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.'

It would be illogical if 'respect for autonomy' were to prove to be a divisible concept, applying only to substantive resolution by way of pre- or post-nuptial agreement but not also to the parties' choice for procedural resolution. In the former situations the fiancés or spouses bind themselves to a future outcome, maybe years later in unforeseeably changed circumstances: whereas those who submit their financial dispute to arbitration do so in the here and now. Their agreement is far more proximate to the outcome and thus, I suggest, even more binding – if anything can be even more binding then a pre-nup held to be binding.

Respect for party autonomy for these reasons should not therefore just be a starting-point, nor a mere rallying-cry: the concept provides a principal and principled reason why the courts should regularly and routinely reflect arbitral awards in orders, where necessary and appropriate. The autonomous decision of the parties to submit to arbitration should be seen as a 'magnetic factor' akin to the pre-nuptial agreement in *Crossley v Crossley* [2007] EWCA Civ 1491, [2008] 1 FLR 1467, at para [15] where the recalcitrant wife seeking detailed disclosure was denied it and held to the terms of the pre-nup via a summary disposal. In the course of judgment Thorpe LJ opined at para [17]:

> 'It does seem to me that the role of contractual dealing, the opportunity for the autonomy of the parties, is becoming increasingly important.'

This gives rise to an intriguing prospect: should IFLA Scheme family finance arbitrations come within the ambit of whatever the Law Commission may propose as a principled régime to govern 'qualifying nuptial agreements'?

Crossley concerned an application to show cause why the terms agreed in a pre-nup should not, without full enquiry, be conclusive of the outcome of one spouse's application for more generous relief. Thorpe LJ registered his reaction in trenchant terms:

> 'If ever there is to be a paradigm case in which the court will look to the *prenuptial agreement* as not simply one of the peripheral factors in the case but as a factor of magnetic importance, it seems to me that this is just such a case.'

Try re-reading that dictum with '*arbitration agreement*' in place of '*prenuptial agreement*'.

The decision of Eleanor King J in *S v S (Ancillary Relief)* [2008] EWHC 2038 (Fam), [2009] 1 FLR 254 takes a similar approach, holding [as summarised in the headnote] that:

> '… in circumstances in which there was a factor of such magnetic importance that it must necessarily dominate the discretionary process, the vehicle of a notice to show cause could appropriately be considered as the proportionate and just route by which to determine the extent to which that factor should be determinative of the action; [and at [88] that:] this is one of the category of cases identified by Thorpe LJ in *Crossley v Crossley* where there is a factor of such magnetic importance that it must necessarily dominate the discretionary process.'

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: through the wrong end of a telescope rather than through a wide-angle lens. 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 …

Material in this article in part derives from the website http://www.FamilyArbitrator.com which Sir Peter Singer co-edits with fellow arbitrators Gavin Smith and Rhys Taylor, and for which they were jointly voted Most Innovative Family Lawyer of the Year 2012 at the Family Law Awards in October. The article has developed from a Chapter contributed by him to S Sugar and A Bojarski, Unlocking Matrimonial Assets on Divorce *(Jordans, 3rd edn, 2012).*