From arbitrator's award to consent order

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The arbitrator has delivered the award in your financial remedy dispute. How then to obtain a consent order reflecting its terms? Sir James Munby, President of the Family Division, has given important guidance on this topic both in *S v S (Financial Remedies: Arbitral Award)* [2014] EWHC 7 (Fam), [2014] 1 FLR 1257, in which I was the arbitrator, and in his very recent *Arbitration in the Family Court: Practice Guidance*, issued on 23 November 2015 (see http://www.familylaw.co.uk/news_and_comment/president-s-practice-guidance-on-arbitration-in-the-family-court).

Drafting the order

The parties may instruct the arbitrator to draft the consent order. In my view, it is sensible to do so as the arbitrator is in a unique position to ensure that the draft order truly reflects his or her own award. Time and costs will often be saved in this way. Whoever does the drafting, there are certain recitals that should be included (adapted as may be appropriate) in the draft order. These are set out at Annex B to the *Practice Guidance* and derive from earlier versions set out at para [24] of the *S v S* judgment:

> 'By their Form ARB1 the parties agreed to refer to arbitration the issues described in it which include some or all of the financial remedies for which applications are pending in this court. The issues were referred to [insert arbitrator] under the IFLA scheme, who made an arbitral award on [insert date]. The parties have invited the court to make an order in agreed terms, which reflects the arbitrator's award.'

A variant is prescribed for Children Act 1989, Sch 1 cases.

Documents to be lodged

Paragraph 11 of the *Practice Guidance*, which is based on para [24] of *S v S*, lists the documents to be lodged with the court if the parties wish to use the so-called accelerated procedure (see below):

- the Form ARB1 (application for arbitration), unless already on the court file;
- the arbitrator's award;
- Form(s) A and D81;
- the signed draft order, which, in the usual way, should follow the relevant paragraphs of the Financial Remedies Final Orders 'Omnibus' (see www.judiciary.gov.uk/wp-content/uploads/2014/08/report-of-the-financial-remedies-working-grp-annex8.pdf).

Role of the judge

The *Practice Guidance* provides a reminder of what the President said at paras [20] and [21] of *S v S* about the role of the court when presented with a draft consent order, namely 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.'

As the *Practice Guidance* notes, however, the court always retains the ability to raise questions in correspondence or call for a hearing. Drafts that invite the court to make orders exceeding the court's jurisdiction, or which are otherwise in unacceptable form,

will be returned like any other defective order. This does not mean of course that the parties may not include *recitals* containing obligations which the court could not itself impose.

If, following the award, the parties agree to change its terms that should be pointed out in a covering letter.

Confidentiality

The *Practice Guidance* also contains important provisions designed to preserve the absolute confidentiality of the arbitral award:

> 'Parties anxious to preserve the privacy and to maintain the confidentiality of the award should lodge that document in a sealed envelope, clearly marked with the name and number of the case and the words "Arbitration Award: Confidential". The award will remain on the court file but should be placed in an envelope clearly marked as above, plus "not to be opened without the permission of a judge of the Family Court". The request for the award to be sealed once the order has been approved should be made prominently in the covering letter.'

Procedure for lodging the draft order

The *Practice Guidance* states at para [11] that there is no reason why unopposed applications for a consent order should not be dealt with on paper by a district judge. Provided that the necessary documents are lodged (see 'Documents to be lodged', above) such applications will be 'accelerated'.

At para [23] of *S v S* the President stated that parties may use the streamlined procedure available in collaborative law cases. That procedure, which involves a hearing rather than a paper determination, was set out by Coleridge J in *S v P (Settlement by Collaborative Law Process)* [2008] 2 FLR 2040, at para [6]:

> '… the court will usually be prepared to entertain applications of this kind in the ex parte applications list before the applications judge of the day on short notice. A full days notice must be given to the Clerk of the High Court judge in front of whom it is proposed to list the case (there is one such judge allocated per week). Such notice may be given by telephone. The Clerk of the Rules should be informed that this is taking place. It is important to emphasise that such a course is subject to the consent of the urgent application judge. It is only appropriate where every aspect of the documentation is agreed, the hearing is not expected to last more than 10 minutes and the documentation is lodged with the judge the night before the hearing.'

However, if, as it appears, the new *Practice Guidance* envisages that the accelerated procedure is available to parties making an application on the papers alone, it is suggested that it will only rarely be necessary – as for instance in the case of urgency – to incur the costs of a *S v P* hearing.