

Arbitration: the IFLA Financial Scheme

Introduction

Scope of the IFLA Scheme

The leading case: S v S

Other early case law

The present and prospective procedural interface with the courts

The Financial Remedies Working Group's Reports

Current allocation and procedure

'Arbitration claims' under the Arbitration Act 1996

Applications to stay court proceedings in favour of arbitral proceedings

Applications to the court for an order to reflect or give effect to an arbitral award: the current position

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Arbitration: the IFLA Scheme

Introduction

3.64 In February 2012 a new route to financial settlement was introduced by the Chartered Institute of Arbitrators (CI Arb): arbitration is now available as an optional alternative to the forensic process for those for whom mediation or collaborative law arrangements are unsuitable or have failed. The Scheme operates under the aegis of the Institute of Family Law Arbitrators (IFLA).

3.65 Information about the arbitration process is contained within the **Support Material/Arbitration** section of **@eGlance** where can be found both an introductory and a fuller description of the IFLA Scheme and of its potential advantages both for clients and for those instructed by them, together with a tabular Procedural Summary. Further extensive explanatory materials for both lawyers and clients contemplating the arbitration option are freely available at www.familyarbitrator.com.

3.66 Also reproduced (with the permission of IFLA) are the current (as from March 2015) **IFLA Scheme Rules** and the **Arbitration Agreement (Form ARB1)**, the latter as a Word template file which can be completed on-screen; and a set of informative Q&As.

3.67 The March 2015 issues of the IFLA Scheme Rules and Form ARB1 offer additional selection options for nominating an arbitrator. IFLA can now be asked to make a random selection from amongst a group of prospective arbitrators selected by parties who are unable for whatever reason to fix on just one name. However, it remains possible for parties to agree (by whatever route they may between them choose) upon their selected arbitrator and to nominate that person in the Form. They also have the option of asking IFLA to make the selection from amongst the general list of qualified arbitrators listed on its website. In this latter event IFLA will apply the principles established in its Nomination Protocol.

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

3.69 IFLA has published (online only, but downloadable at www.ifla.org.uk and on the FamilyArbitrator website) two guides:

- Introductory Guide for Public.
- Introductory Guide for Practitioners.

There is an in-depth consideration of the process in a two-part article by Sir Peter Singer in the November and December 2012 issues of *Family Law* at [2012] Fam Law 1353 and 1496.

3.70 The Arbitration Panel List, identifying those qualified by virtue of their training and membership of the CI Arb, is to be found at www.ifla.org.uk, or by calling the IFLA Administrator on +44 (0)1689 820272. The initial list has expanded as more family finance practitioners have qualified and become Members of the CI Arb (MCI Arb).

3.71 It seems likely that within the lifetime of this edition IFLA will extend the scope of arbitration conducted under its aegis to include a wide variety of private law children issues.

3.72 This is established by Article 2 of the IFLA Rules as follows:

- 2.1 The Scheme covers financial and property disputes arising from:
 - (a) marriage and its breakdown (including financial provision on divorce, judicial separation or nullity);
 - (b) civil partnership and its breakdown;
 - (c) co-habitation and the ending of co-habitation;
 - (d) parenting or those sharing parental responsibility;
 - (e) provision for dependants from the estate of the deceased.
- 2.2 The Scheme covers (but is not limited to) claims which would come within the following statutes:
 - (a) the Married Women's Property Act 1882, s.17;
 - (b) the Matrimonial Causes Act 1973, Part II;
 - (c) the Inheritance (Provision for Family and Dependants) Act 1975;
 - (d) the Matrimonial and Family Proceedings Act 1984, s.12 (financial relief after overseas divorce);
 - (e) the Children Act 1989, Sched.1;
 - (f) the Trusts of Land and Appointment of Trustees Act 1996;
 - (g) the Civil Partnership Act 2004 Sched.5, or Sched.7, Part 1, para.2 (financial relief after overseas dissolution).
- 2.3 The Scheme does not apply to disputes directly concerning:
 - (a) the liberty of individuals;
 - (b) the status either of individuals or of their relationship;
 - (c) the care or parenting of children;
 - (d) bankruptcy or insolvency;
 - (e) any person or organisation which is not a party to the arbitration.

3.73 The practice has developed for some prenuptial agreements to be drafted to include an arbitration clause, but as yet the efficacy of such a commitment has not come before an English court for consideration. Potentially relevant to such a question as and when it arises are citations referred to by Mostyn J at [18] and [19] of *Mann v Mann* [2014] EWHC 537 (Fam) from the judgments of Hildyard J in *Wah (Aka Alan Tang) & Anor v Grant Thornton International Ltd & Ors* [2012] EWHC 3198 (Ch) at [56] to [61], and of Longmore LJ in *Petromec Inc and others v Petroleo Brasileiro SA Petrobras and others* [2005] EWCA Civ 891 at [121].

The leading case: S v S

3.74 In the leading case on arbitration *S v S* [2014] EWHC 7 (Fam), *sub nom S v S (financial remedies: arbitral award)* [2014] 1 FLR 1257, [2014] 1 WLR 2299, Sir James Munby P took steps both to call in an application for a consent order to reflect an arbitral award and to endorse and to bestow 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.

Further, at [19] (in reference to *Crossley v Crossley* [2007] EWCA Civ 1491, [2008] 1 FLR 1467) he observed:

Where the parties have bound themselves, as by signing a Form ARB1, to accept an arbitral award of the kind provided for by the IFLA Scheme, this generates, as it seems to me, a single magnetic factor of determinative importance.

3.75 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:

21. 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.

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.*

3.76 The President’s recommendation in *S v S* that ‘notice to show cause’ applications occasioned by one party’s challenge to an award should be afforded short shrift (‘a most abbreviated hearing’) was endorsed in *Wyatt v Vince* [2015] UKSC 14, [2015] 1 FLR 972 at [29] where Lord Wilson (delivering the judgment of the Supreme Court) said:

Family courts have developed specific procedures for the determination of certain types of financial application. The obvious example is the determination of an application on a summons to a respondent to show cause why the

order should not be in the terms with which, prior to an attempt to resile from them, she or he had agreed either following the separation (*Dean v Dean* [1978] Fam 161) or prior to the marriage (*Crossley v Crossley* [2007] EWCA Civ 1491, [2008] 1 FLR 1467). In both cases, however, the court stressed that the show-cause procedure did not obviate the need for the court to discharge its duty under section 25 of the 1973 Act, powerful though the effect of the agreement would, within that exercise, probably prove to be. Indeed Sir James Munby, President of the Family Division, has recently directed that a spouse attempting to reject an award made following her or his submission to arbitration by a member of the Institute of Family Law Arbitrators should also be subject to the show-cause procedure: *S v S (Arbitral Award: Approval)*, *Practice Note*, [2014] EWHC 7 (Fam), [2014] 1 WLR 2299.

3.77 Thus practitioners and the parties, 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.

Arbitration: other early case law

3.78 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.

3.79 In *T v T (Hemain injunction)* [2012] EWHC 3462 (Fam), [2014] 1 FLR 96, Full transcript, Nicholas Francis QC sitting as a deputy High Court Judge considered an arbitration agreement in a US prenuptial agreement, 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 a US prenuptial agreement arbitration clause was effective would be for decision within the US arbitration proceedings, if challenged.

3.80 In *AI v MT (alternative dispute resolution)* [2013] EWHC 100 (Fam), [2013] 2 FLR 371 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 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.

3.81 See the observations, in passing, of Mostyn J in *J v J* [2014] EWHC 3654 (Fam) at [18] (as to the prospect of arbitration 'taking off' if fixed pricing were offered as a standard feature); and at [53] that 'if parties wish to have a trial with numerous bundles [as opposed to the single bundle prescribed by the *Efficient Conduct Statement*] then it is open to them to enter into an arbitration agreement which specifically allows for that'.

3.82 As to Mostyn J's suggestion of fixed pricing bundles being offered as a standard feature, an innovative and imaginative structure has been proposed for a package to be agreed by the solicitors acting for each party and the parties' selected arbitrator: see the 2 March blog on the topic on the FamilyArbitrator website for an outline of this proposal.

3.83 Observations to the same effect as those in *W v M* were made by Holman J in *Seagrove v Sullivan* [2014] EWHC 4110 (Fam), a case of consolidated proceedings under TOLATA and Schedule 1 to the Children Act 1989, where the parties had incurred £1.3m in costs fighting over £500,000. At [48] to [49] he observed:

The courts have to exert discipline in relation to this. I stress, as Mostyn J did in *J v J* at [53], that if parties wish, at their own expense, to litigate to their hearts' content, with thousands and thousands of pages of documents, there is a mechanism available to them known as private arbitration. But litigation within the courts has to be the subject of much more rigorous discipline and structure, precisely because the courts have a duty to ensure that an appropriate, but only an appropriate, share of the court's resources are allocated to any one case.

3.84 Holman J returned to the subject in *Fields v Fields* [2015] EWHC 1670 (Fam), [2015] Fam Law 883, a case which he held almost entirely in open court. At [5] he stated:

I am aware that as it progressed the case attracted considerable coverage in some newspapers and online, which I was told that the parties found distressing. I regret their distress; but it cannot, in my view, override the importance of court proceedings being, so far as possible, open and transparent. Courts sit with the authority of the Sovereign, but on behalf of the people, and the people must be allowed, so far as possible, to see their courts at work. There is considerable current, legitimate public interest in the way the family courts daily operate, and that cannot be shut out simply on an argument that the affairs of the parties are private or personal. Precisely because I am a public court and not a private arbitrator, I must be exposed to public scrutiny and gaze. But the exposure is very avoidable by the parties themselves. That is one of the many advantages of settling a case. The system already provides judicial assistance with settling at the totally private and totally privileged Financial Dispute Resolution or FDR stage. These parties had two whole days of such a hearing before a very senior High Court Judge in December 2013 and January 2015. That was their opportunity for judicially assisted in-court resolution without any publicity. If a case really cannot be settled, there are now sophisticated and specialist out of court mechanisms for private arbitration, including that provided by the Institute of Family Law Arbitrators. The advantages of arbitration include convenience (the parties can choose their own place and date), probably earlier resolution, probably costs savings, and certainly complete privacy.

Arbitration: the present and prospective procedural interface with the courts

3.85 Many awards (and especially those made, for example, in relation to matrimonial or civil partnership situations; on a Schedule 1 claim; or on a claim under the Inheritance (Provision for Family and Dependents) Act 1975) 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* [2014] EWHC 7 (Fam) at [25] and [26], cited *above*.

3.86 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 a draft order to reflect and to give effect to the award is framed in a manner consistent with the available statutory remedies. The fact that the consent order is based upon an arbitral award in no way entitles parties to seek any order or provision which the court has no jurisdiction to make. It appears that quite frequently draft consent orders have to be returned because their terms fall outside what statute provides. Such provisions of an arbitral award (as indeed of any such terms based on agreement between the parties) may take effect only as undertakings or may need to be recited as matters agreed between the parties.

3.87 It is also important (and self-evident) that the court must establish 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 ordinarily only be made on or after decree nisi, or which impermissibly purport to take effect before decree absolute.

3.88 On the other hand, 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; orders under the Married Women's Property Act 1882 as to the ownership of chattels; or an award requiring sale and specifying the distribution of the sale's proceeds.

3.89 What follows in this section of the Commentary 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 proceedings under TOLATA or the Inheritance (Provision for Family and Dependents) Act 1975.

3.90 Rule changes and Guidance to simplify and streamline the position are anticipated, and so in many respects this section is a call to 'watch this space'. Many of the suggestions contained in the (now Final) Recommendations of the Financial Remedies Working Group (FRWG) and in the draft Guidance which FRWG have invited the President to promulgate (as to which see further under *The FRWG's Reports (below)*) adopt what in earlier editions were tentatively suggested as procedures that might be necessary both before and after what is now firmly on the agenda of desirable change. The implementation of these proposals is now keenly awaited.

3.91 Ryder J (as he then was) first adverted to the need for change in July 2012 in *The Family Justice Modernisation Programme: Final report* where at para 62 he recommended that the Money and Property working group of the Family Justice Council should:
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.

3.92 The President echoed this in *S v S* [2014] 7 EWHC (Fam) where at [29] he indicated that he would invite the Family Procedure Rule 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 (e.g. to the Family Procedure Rules 2010 and/or the Civil Procedure Rules 1998) or by the issue of Practice Directions or Practice Guidance.

3.93 Furthermore at [28] of *S v S* he 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 preemptory order, or under section 43 to secure the attendance of witnesses.

3.94 In a number of respects very constructive progress has been made towards these identified goals, and in other regards there can be a realistic expectation of imminent progress.

3.95 The following paragraphs chart progress already made.

3.96 In furtherance of procedures enabling arbitration-based orders to be endorsed speedily, efficiently and economically by the court, in *S v S* [2014] EWHC 7 (Fam) the President specifically endorsed the 'shortcut process' established in *S v P (settlement by collaborative law process)* [2008] 2 FLR 2040 for consent orders after a successful collaborative process. 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.

3.97 At [24] he added:

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.

3.98 It is to be hoped that it may become commonplace practice for the court to accept written applications for consent orders and deal with them routinely as 'box-work' without the need for an appearance. This could be made to apply not only to applications for substantive orders, but also where (as is likely to be usually the case) application is made for the stay of existing proceedings once the parties have agreed to submit them to arbitration. This is, indeed, the recommendation which is incorporated in the Guidance which the President has been invited to promulgate in Annex 12 to the Interim Report of the FRWG, published in July 2014, extracts from which follow *below*.

3.99 The President's confirmation in *S v S* [2014] EWHC 7 (Fam) that the equivalent of a 'show cause' procedure is available if a party to an arbitration does not consent to an order required to give effect to an award is valuable endorsement of the view expressed by commentators that such is the appropriate recourse in such an event.

3.100 A number of arbitration-specific orders have been published for consultation as part of the project to create a comprehensive set of standard Family Court orders (described in the **Overview** to the Commentary on Part 5). 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 of the Arbitration Act 1996; and to secure the attendance of witnesses under section 43 of the Arbitration Act 1996. They are available at www.judiciary.gov.uk: search for Family Orders Project. Appropriate paragraphs are also included in the 'omnibus' financial remedies and Schedule 1 child maintenance standard orders to contain provision not only for such orders made by consent, but also for the eventuality that one party to an arbitration does not consent to an order being made to reflect the terms of an award.

The FRWG's Reports

3.101 In June 2014 the President (in View from the President's Chambers No 12) announced the establishment of this Working Group to consider how to 'encourage and facilitate the use of out-of-court methods of resolving financial disputes, whether by mediation, arbitration or other appropriate techniques'. The twin aspects suggested by the President as necessary for this purpose are:

(1) Encouraging the use of non-court dispute resolution (N-CDR) methods both before the commencement of proceedings and at every stage thereafter. MIAMs are now as much a part of financial remedy cases as of private law children cases.

(2) Facilitating the quick and easy implementation of out-of-court agreements in financial remedy cases. Following on from my decision in *S v S*, dealing with how the court should approach applications to enforce arbitral awards in financial remedy cases, I want to move forward as soon as possible on two fronts, which the review will be considering. Pending more general changes to the Family Procedure Rules in relation to arbitration and other forms of Non-Court Dispute Resolution I wish 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*.

3.102 Changes to give effect to those objectives plainly helpfully impact on applications of the sort made in *S v S* [2014] EWHC 7 (Fam) itself for a consent order to reflect an arbitral award, and indeed such changes are incorporated in the Guidance which the President was invited to promulgate in the form of Annex 12 to the July 2014 Interim Report by the FRWG, and which after consultation that Group endorsed and reiterated in its December 2014 Final Report (see *below*).

3.103 As well as making proposals for procedural changes to facilitate the integration of family financial arbitration into the mainstream hitherto the prerogative of civil and commercial arbitration, the FRWG published draft proposed Guidance for consideration by the President. It is still the case that no timetable has been set for the implementation of these proposals, which however were reiterated unchanged at the conclusion of the consultation process in FRWG's Final Report published in December 2014. It can however at this stage be said that the whole endeavour is hugely supportive of arbitration as an acceptable and indeed welcome part of the family justice system.

3.104 The full text of the relevant paragraphs of these Reports is available online at www.judiciary.gov.uk/publications/report-of-the-financial-remedies-working-group-31-july-2014/. It is also to be found reproduced in full within the module **Arbitration** in *@eGlance*.

Amongst other matters the Reports contain suggestions:

- that unopposed stay applications under section 9 of the Arbitration Act 1996 should be dealt with on paper, without listing or hearing;
- that in principle unopposed applications for a consent order to reflect an arbitral award should be dealt with on paper by a district judge;
- for welcome provisions which, if adopted, will protect the privacy and confidentiality of an arbitration award filed with the court to obtain orders to reflect it;
- guidance (from paragraphs 17 to 21) on the procedure to be adopted pending the procedural changes necessary to bring ‘arbitration claims’ (see below) before an appropriate judge of the Family Court;
- how to go about obtaining orders to reflect an award when proceedings for relevant relief (e.g. divorce proceedings) have not yet been commenced;
- hinting (in paragraph 27) that challenges to an award under sections 67 to 71 of the Arbitration Act 1996 which come before judges of High Court level in the Family Court may in accordance with commercial court experience be relatively rarely successful.

3.105 Subject always to the caveat that this Guidance is draft and has not as yet received the Presidential imprimatur, the full text is set out at Annex 12 of the FRWG Interim Report. It is subdivided into the following sections:

- A: Where there are subsisting proceedings seeking the same relief as is in issue in the arbitration
- B: Arbitrations conducted when there are no subsisting proceedings seeking relevant relief
- C: Challenging the Award under sections 67 to 71 of the Arbitration Act

3.106 The relevant paragraphs 85 to 95 of the main body of the July 2014 Interim Report define as their target the introduction of procedural changes designed to ensure the adoption of arbitral awards in the Family Court in a way which is as swift and uncomplicated as possible. From paragraph 88 onwards necessary procedural proposals are detailed which will enable the High Court, Family Division directly to entertain ‘arbitration claims’ as defined by CPR Part 62.

3.107 In paragraph 38 of its Final Report dated 15 December 2014 the FRWG reprised all its earlier recommendations concerning arbitration:

The group in its initial report made recommendations in relation to Arbitration in Family Proceedings to the effect that:

- (i) CPR PD62, paragraph 2 is amended to add the High Court, Family Division to the list;
 - (ii) a Family Division equivalent of Form N8 be devised and promulgated; and
 - (iii) the President should promulgate the Guidance set out in Annex 12 to the interim report.
- and records that the Group has considered the responses on this subject and maintains its recommendations.

Arbitration: current allocation and procedure

(a) ‘Arbitration claims’ under the Arbitration Act 1996

3.108 Circumstances in which the ‘arbitration claims’ procedure set out in CPR Part 62 may apply 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).

3.109 Until new provisions 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) (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 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 family 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, London Commercial list
Technology and Construction Court, 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

3.110 In the meantime and until such time as provision may be made to add the Family Division to the list of courts where a Form N8 may permissibly be issued, the best course would seem to 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) at the Central Family Court (CFC) for determination or directions: see paragraphs 88 *et seq* of Annex 12 to the FRWG Interim Report, *above*. Such transfer is envisaged by the 1996 Order, paragraph 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.

3.111 It may well be that, for the time being and to bring the application within the scope of the FPR, an application under Part 18 should in addition be issued.

3.112 Such 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'.

3.113 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 Family Division may determine such a matter, he or she 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

3.114 It is to be noted that the CPR rule 62.2 definition of 'arbitration claims' on its face includes any application under section 9 of the Arbitration Act 1996 for a stay of existing proceedings on the basis that a reference of their subject matter to arbitration has been agreed. This situation is, however, subject to separate considerations, as stay proceedings are in a separate category.

3.115 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 subscribing to the IFLA Scheme rules (and, indeed, explicitly in 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).

3.116 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 ADR procedures: see FPR 2010 rules 3.1 to 3.3.

3.117 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. As already stated, it is to be hoped that it may become commonplace practice for the court to accept written applications for consent applications for a stay and to deal with them routinely as 'box-work' without the need for an appearance.

(c) Applications to the court for an order to reflect or give effect to an arbitral award: the current position

3.118 So far as enforcement of an award is concerned, it is to be noted that 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 (currently circuitous) Part 62 procedure described *above* in section (b).

3.119 It will, however, rarely if ever be appropriate or indeed possible to make an application under section 66 of the Arbitration Act 1996 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.

3.120 In the family context, applications to the court will routinely need to be made to reflect, to give effect to, or as a precursor to, the enforcement of an arbitral award. Most commonly, these 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 such situations will often be the Family Court. But (pending any statutory change to facilitate the Family Court hearing them) only the High Court and county courts have jurisdiction to determine applications under TOLATA and the Inheritance (Provision for Family and Dependents) Act 1975.

3.121 The judgment in *S v S* [2014] EWHC 7 (Fam) has confirmed 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 a challenge under the Arbitration Act 1996) that they will most conveniently and appropriately be brought before the court by way of a ‘show cause’ application brought against the dissenting party.

3.122 The MIAMs requirement (described fully in **Chapter 3**) may need to be refined to facilitate and put beyond doubt the place of arbitration as being outside that scheme’s prerequisite requirements. Applications for consent orders are specifically placed outside its scope by PD 3A para 13(2). So, by virtue of the same provision, are proceedings ‘for enforcement of any order made in proceedings for a financial remedy or of any agreement made in or in contemplation of proceedings for a financial remedy’. Parties engaged in any post-arbitral award dispute, as for instance a contested ‘show cause’ application, should not be required to deviate into a MIAM.

3.123 Another unresolved question may be the extent of the ‘legal services’ for which an order for payment in respect of legal services (an LSPO) may be made under section 22ZA(10) of the Matrimonial Causes Act 1973. See the discussion at the conclusion of the section on **Chapter 2** *above*. Whereas at first blush it might appear unlikely that if the parties are as a necessary prerequisite agreed to submit their dispute to arbitration, then as part and parcel of that they would not agree how the arbitration might be financed, it is not inconceivable that a dispute as to that may come before a court for resolution – for instance if during the course of an application for an LSPO the question of diverting to arbitration arose, and consideration were being given to the forthcoming costs not only of the arbitrator, but also of one party’s continued representation during that process. For more information generally and for a more detailed consideration of these powers, see the section **Costs allowance: the legal services payment order** in the Commentary on Part 28.

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