

## THE ARBITRATION ACT 1996

### A synopsis

**The members of FamilyArbitrator would like to express their sincere thanks to Dr Wendy Kennett of Cardiff University Law School for her considerable assistance with the drafting of this document. Dr Kennett is planning to undertake research into family arbitration in several jurisdictions, including England and Wales, and we hope to publish some of her research findings in due course.**

### *Introduction*

1. Arbitration is a form of dispute resolution in which the parties agree to submit their dispute to a neutral third party (an arbitrator, or an arbitral tribunal) for determination, and to be bound by the resulting decision (the arbitral award). It is thus distinct from mediation in the sense that a decision on the substance of the dispute between the parties may be imposed by the arbitral tribunal, but this is only because the parties have *agreed* in advance that they will be bound by the award.
2. In commercial disputes, arbitration is very widely accepted internationally. As a result of the work of UNCITRAL (the United Nations Commission on International Trade Law), there is a considerable degree of harmonisation of the national laws that provide the domestic framework within which arbitration takes place. In England and Wales, that framework is provided by the Arbitration Act 1996 (AA 1996). The Act has a number of distinctive features, but is broadly comparable to legislation regulating arbitration in other European states and the US, and to the UNCITRAL Model Law which has provided the basis for regulation of arbitration in Scotland and in many other parts of the world.
3. The fact that the agreement of the parties is the foundation for arbitration has led to a willingness on the part of states to recognise the binding effect of an arbitral award and to employ their enforcement machinery to enforce arbitral awards. That willingness finds expression in ss. 58 and 66 of the AA 1996. Thus s.58 provides that, unless otherwise agreed by the parties:

'An award made by the tribunal pursuant to an arbitration agreement is final and binding both on the parties and on any persons claiming through or under them.'

4. Section 66 then states that such an award:

'(1) .... may by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.

(2) Where leave is so given, judgment may be entered in terms of the award.'

5. 'The court' within the meaning of the AA 1996, means the High Court or county court, and taking into account any orders made by the Lord Chancellor as to the allocation of proceedings.

*Arbitration of family law disputes*

6. The AA 1996 does not address the question whether family law disputes are arbitrable. Indeed it does not contain any statement of its scope, or the range of disputes to which it applies, although there are a few provisions which have some bearing on the matter.
7. First of all, according to s.1(b) 'the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest.' Party autonomy is therefore promoted, so far as is consistent with the public interest. However, the scope of the public interest and the necessary safeguards are not further defined.
8. Furthermore, it is clear from s.6(1) that disputes may be submitted to arbitration 'whether they are contractual or not'.
9. Section 81(1) further states that:

'Nothing in [Part I of the Act] shall be construed as excluding the operation of any rule of law consistent with the provisions of this Part, in particular, any rule of law as to —

  - (a) matters which are not capable of settlement by arbitration;
  - ...
  - (c) the refusal of recognition or enforcement of an arbitral award on the grounds of public policy.'
10. The question of arbitrability is in fact substantially left to judicial interpretation, although certain statutes establish a mandatory dispute resolution regime (see e.g. s.203 of the Employment Rights Act 1996 as interpreted in *Clyde & Co LLP v Krista Bates van Winkelhof* [2011] EWHC 668).
11. The precise juridical status of awards in family financial remedy proceedings remains uncertain, since in such cases the jurisdiction of the court cannot be ousted. (The position in other family-type proceedings is considered below.)
12. However, it is clear that *Radmacher (formerly Granatino) v Granatino* [2010] UKSC 42 has changed fundamentally the way that the courts regard agreements, whether pre-nuptial or post-nuptial, by spouses governing the consequences of their marriage 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 patronizing 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.'

13. The scope and rationale of *Radmacher* has been examined in a number of subsequent first instance decisions. Of note for present purposes is the passage at [36] in the judgment of Charles J in *V v V* [2011] EWHC 3230 (Fam):

'[36] To my mind, this decision [*Granatino*] 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 (see paragraph 78). 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.'

14. Charles J also stated at [41]:

'[41]... it is also very important to recognise and remember that it is the court and not any prior agreement between, or choices made by, the parties that will determine the award to be made under the MCA 1973 (see for example paragraph 7 of the majority judgment in *Granatino*). It follows that:

- i) a nuptial agreement is only a factor in the exercise of the judicial discretion conferred by the MCA, and
- ii) the guidance given in *Granatino*, on the approach to be adopted by the court, and on the weight to be given to an agreement (and thus to autonomy in a given case) and to factors which detract from and enhance that weight, have to be read and applied in that context, but also
- iii) in the context of the important and significant shift in the weight that the Supreme Court has made clear should be given to autonomy in determining what is overall a fair result judged by a proper application of the statutory discretion.'

15. See also *Z v Z* [2011] EWHC 2878 (Fam) (Moor J); *Kremen v Agrest (No.11) (Financial Remedy: Non-Disclosure: Post-Nuptial Agreement)* [2012] EWHC 45 (Fam) (Mostyn J) at [72] to [73]; *B v S (Financial Remedy: Marital Property Regime)* [2012] EWHC 265 (Fam) (Mostyn J).

16. It is suggested that, as the Form ARB1 (application for family arbitration) is, in effect, a type of post nuptial agreement, it is on this basis that the court will be ready to uphold arbitration awards, in cases where the *Radmacher* conditions are met.
17. The requirement for the parties to have a 'full appreciation' of the agreement's implications (see paragraphs 68, 71 and 74 of *Granatino*) suggests that, if the parties wish to arbitrate 'in person', they should at least be able to confirm that they have received advice from a solicitor as to the implications of their decision to submit to arbitration.
18. Second, and leaving aside the specific routes of challenge available under the Act (as to which see below), there may be circumstances in which it would be 'unfair' (*Radmacher* [75]) to hold the parties to their agreement to be bound by the arbitrator's decision. Thus, it is suggested that an arbitral award which, if it were a court order, would be held to be 'plainly wrong' is unlikely to be given effect by the court.
19. Brief mention should be made of s.34 of the Matrimonial Causes Act 1973 ('MCA') which provides that any 'maintenance agreement' (but not 'other financial arrangements') which purports to restrict the right to apply to court shall be void. The background to this section is explained by Wilson LJ (as he then was) in the *Granatino* case in the Court of Appeal [2009] EWCA Civ 649 [134]. Section 34 of the MCA has been drafted in from earlier legislation which dealt with the situation where married parties were living separately (but not divorcing) and one sought maintenance from the other. Wilson LJ stated, 'sections 34 and 35 have been dead letters for more than thirty years ...'. In the Supreme Court in *Radmacher* Lord Phillips referred to Wilson LJ's analysis at [36] stating, 'It seems likely that issues as to maintenance have, since the 1973 Act came into force, been pursued in ancillary relief proceedings.' It is unlikely that this section will have much bearing on the question of the binding nature of an arbitrated award.
20. The case of *Crossley v Crossley* [2007] EWCA Civ 1491, [2008] 1 FLR 1467 may also have relevance as to the procedure for converting an arbitration award into an order of the court, if one party objects. In that case the parties were held to the terms of their pre-nuptial agreement without full ancillary relief proceedings. On the husband's notice to show cause application, Thorpe LJ held that the pre-nuptial agreement was, on the facts of that case, the 'magnetic factor' in favour of summary disposal.
21. It is hoped that there will be an early 'practice direction' style decision, similar to the collaborative law decision of *S v P (Settlement by Collaborative Law Process)* [2008] 2 FLR 2040, where a short form style of application for the lodging and approval of consent orders was approved by Coleridge J, in order to encourage the use of collaborative law.

... *If the parties are not married*

22. There are types of dispute falling within the family arbitration scheme which do not require the court to exercise the 'paternalistic' review that must be carried out prior to granting a financial remedy order. Litigation concerning the beneficial interest of unmarried partners in a property is frequently resolved by consent by means of Tomlin Orders. In such circumstances the court

exercises no formal supervisory 'fairness' jurisdiction and allows the parties to freely enter into such agreements as they choose. In this type of case the *Radmacher* 'fairness' test will not apply.

23. As already noted, the normal procedure to enforce a civil law award (albeit one under the family arbitration scheme) is by the summary procedure under s.66 of the Act. This provides that an award made by the arbitrator pursuant to an arbitration agreement, may, with leave of the court, be enforced in the same manner as a judgment or order of the court of same effect. Where leave is given, judgment may be entered in terms of the award.
24. Foskett (*The Law and Practice of Compromise*, Seventh edition) states at para 32.08: 'Machinery analogous to that of a *Tomlin* order is not available as a means of compromising an arbitration. Since enforcement is not a matter for the arbitral tribunal, which will be functus officio once it has delivered its award, there is no summary process available to be invoked in such a manner. Permission to enforce the award as a judgment or order [s.66] is the nearest equivalent.'
25. Finally, in relation to arbitrability, it is worth noting that similar family arbitration schemes already exist in Scotland, Australia, several provinces in Canada and a number of states in the US. They also exist in more legally remote jurisdictions such as Germany and Israel.

#### *Advantages and disadvantages of arbitration*

26. The particular advantages of arbitration vary depending on the type of dispute being submitted to arbitration. In the context of family law the major advantages are:
  - (i) **The confidentiality of the proceedings and award.** The principles of the IFLA Scheme relating to confidentiality are specified under [art.16](#) of the IFLA AR 2012 (as to which see below).
  - (ii) **Flexibility and convenience.** The parties can set hearing dates and times that suit them and opt for a cut-price or a Rolls Royce service. This opens the way for 'light touch' determinations on paper, the parties having determined their own disclosure regime. Thus if the parties remain in dispute as to a point of principle, say the treatment of an inheritance, they may choose to agree a very light level of disclosure, more akin to that provided upon the submission of a consent order.
  - (iii) **Choice of arbitrator.** The parties can choose someone whose judgment they trust, and enjoy the services of that arbitrator throughout the course of the proceedings. Furthermore, the availability of a dedicated arbitrator means that time is not lost because the adjudicator is not familiar with prior proceedings.
  - (iv) **Choice of environment.** The parties and arbitrator can meet in a location which is convenient to them, with the desired level of facilities, or may where appropriate communicate remotely via telephone.
  - (iv) **Cost.** Parties for whom the cost of proceedings is an issue can choose to limit the hearings and evidence, and may agree to dispense with legal representation before the arbitral tribunal (s.36 AA 1996).

(v) **Speed of dispute resolution.** Since the parties control the procedure, they may agree to a timetable that will ensure rapid resolution of their dispute. Alternatively, they may choose an experienced arbitrator who is able to achieve that result for them.

27. Arbitration is a highly successful method of dispute resolution where the arbitrator is competent and efficient. But it is not suitable for every dispute. Although an arbitral tribunal may seek the assistance of the court, it does not have the same powers as a court to compel compliance with its orders, and since the tribunal's powers derive from the agreement of the parties, it is not possible to require the cooperation of third parties. Furthermore, in the absence of measures to control costs, arbitration may prove more expensive than litigation because of the need to pay for the tribunal's services and to meet the additional costs of premises, and of technical and secretarial support for the arbitration. It should be seen as a further choice open to parties and their legal advisors in determining how best to resolve their differences.

*General principles of the AA 1996*

28. The AA 1996 seeks to draw an appropriate balance between allowing parties freedom to determine the procedure for resolution of their dispute, while at the same time maintaining adequate and appropriate supervision by the courts. In particular, the provisions of the Act are designed to ensure that the arbitration is founded on genuine agreement, and that the procedure is fair and impartial.

29. The Act is divided into three Parts. Part I contains the main provisions on arbitration pursuant to an arbitration agreement, while Part II is concerned with specific aspects of domestic and consumer arbitration agreements. In Part II, only ss.85 to 88 are of potential relevance to family arbitrations. Part III deals with the enforcement of international arbitral awards and will not be further considered here.

30. The provisions of Part I of the Act are founded on the principles established in s.1 'and shall be construed accordingly'. There are three principles:

- (a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;
- (b) 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
- (c) in matters governed by Part I of the Act, the court should not intervene except as provided by that Part.

31. Court intervention is thus to be kept to a minimum, in so far as that is consistent with the other principles underpinning the Act.

32. The Act establishes a certain number of mandatory provisions, which are listed in Schedule 1. The remainder of the provisions of the Act are non-mandatory, default provisions, applicable in the absence of contractual agreement (see s4). The Act thus allows a large measure of freedom to

the parties to design their own procedure, and this is one of the principal advantages of arbitration. It is flexible and can be adapted to suit the priorities, needs and financial resources of the parties.

33. Nevertheless, most parties will not want to design their own custom-made procedures from scratch. Arbitral institutions perform an important function in providing a set of generally acceptable rules that the parties may incorporate by reference into their arbitration agreement. The support offered by this legal framework is often combined with administrative support to ensure the smooth conduct of the arbitration. In the context of family law arbitration, the Institute of Family Law Arbitrators has drawn up rules founded on the AA 1996 which are tailored to the subject matter of the dispute (the [IFLA Arbitration Rules \(2012 edition\)](#) (IFLA AR 2012)) and those rules are incorporated by reference into the parties' agreement. The IFLA also provides assistance to the parties in establishing a tribunal through specification of the qualifications required to become an IFLA arbitrator and the maintenance of a panel of trained arbitrators. Since the AA 1996 does not specify any qualifications for an arbitrator, but leaves it entirely to the parties to determine this matter, the IFLA Scheme provides an important measure of protection to parties who will not typically be expert in the law.

#### *Structure of the AA 1996*

34. After dealing with certain preliminary points concerning, *inter alia*, the validity and enforcement of an arbitration agreement, the Act addresses, in particular, the following issues:
- (i) matters relating to the constitution and administration of the arbitral tribunal (ss.15-29);
  - (ii) the jurisdiction of the arbitral tribunal (ss.30-32);
  - (iii) the powers and duties of the tribunal in the conduct of the arbitral proceedings, and the general duty of the parties (ss.33-41);
  - (iv) the powers of the court to assist arbitral proceedings – particularly where coercive measures may be necessary (ss.42-45);
  - (v) the form and content of the arbitral award (ss.46-58);
  - (vi) the costs of the arbitration (ss.59-65); and
  - (vii) the powers of the court in relation to the award, notably with respect to enforcement, challenges to the award, and appeals on a point of law (ss.66-71)

#### *Formal requirements for a valid arbitration agreement*

35. By s.5 of the AA 1996, an arbitration agreement must be in writing if it is to fall within the scope of the Act and benefit from its provisions. While the definition of 'in writing' is a broad one under s.5, the IFLA scheme seeks to ensure that there can be no dispute as to the fact of agreement. The parties are required to personally sign form [ARB1](#). That form sets out in some detail the obligations assumed by the parties to an arbitration, to ensure that the full implications of an agreement to arbitrate are appreciated.
36. Section 6 of the Act defines an arbitration agreement as an agreement to submit present or future disputes to arbitration. In this respect, Form ARB1 envisages the submission of an existing dispute to an IFLA arbitrator. The AA 1996 allows the parties to a contract to specify in that

contract itself that any future disputes arising out of it shall be submitted to arbitration. In principle, this would allow pre-nuptial agreements to include an enforceable arbitration clause. However, the IFLA Scheme does not currently support such clauses.

#### *Enforcement of the arbitration agreement*

37. The AA 1996 provides a legal environment which is supportive of arbitration. One of the ways in which it does this is by requiring courts to stay their proceedings where an action is commenced in breach of an arbitration agreement. This is regulated in s.9 of the Act, which is a mandatory provision:

'9. (1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.

...

(4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.'

38. The situation is slightly modified, however, in relation to a domestic arbitration agreement. In the context of family law arbitration, this means an arbitration agreement to which none of the parties is an individual who is a national of, or habitually resident in, a state other than the United Kingdom, and under which the seat of the arbitration (if designated) is in the United Kingdom (s.85(2) AA 1996). In such circumstances a further ground for refusing a stay is added by s.86(2)(b). A stay may be refused if the court is satisfied: 'that there are other sufficient grounds for not requiring the parties to abide by the arbitration agreement', and such grounds may include the fact that 'the applicant is or was at any material time not ready and willing to do all things necessary for the proper conduct of the arbitration or of any other dispute resolution procedures required to be exhausted before resorting to arbitration.'

39. Section 9 protects the party who wishes to pursue arbitration against litigation in breach of the arbitration agreement. The AA 1996 also contains provisions to protect the position of a party against whom arbitral proceedings have been commenced, who wishes to challenge the arbitration. Under s.30 of the Act the arbitral tribunal may rule on its own substantive jurisdiction as to

'30. (1)(a) whether there is a valid arbitration agreement,  
(b) whether the tribunal is properly constituted, and  
(c) what matters have been submitted to arbitration in accordance with the arbitration agreement.'



40. Under subs.(2) the ruling of the arbitrator may be challenged 'in accordance with the provisions of this Part' of the Act, which includes a challenge to the validity of the award or an appeal on a point of law (ss.67 to 69 AA 1996: see further below).
41. In principle, the requirement that parties use Form ARB1 in order to commence IFLA arbitration should obviate the need for such challenges, since their agreement is proximate in time to the arbitration and identifies the specific issues that the parties wish to refer to arbitration. Furthermore, [art.4.4](#) of the IFLA AR 2012 provides for specific consideration of the suitability of the dispute for arbitration under the Scheme.
42. In so far as disputes may arise, however, s.31 regulates objections to the substantive jurisdiction of the tribunal. In particular, it requires prompt challenge. Section 32 also permits a court application to determine a preliminary question as to the substantive jurisdiction of the tribunal, but such an application will only be admitted by the court if it is made with the agreement in writing of all the other parties to the proceedings (s.32(2)(a)) or it is made with the permission of the tribunal and the court is satisfied —
- '32. 2(b)(i) that the determination of the question is likely to produce substantial savings in costs,  
(ii) that the application was made without delay, and  
(iii) that there is a good reason why the matter should be decided by the court.'
43. Court involvement is therefore envisaged as a final resort, essentially where there is difficult or important point of law involved.
44. The AA 1996 also specifically regulates the extended opportunity for challenge to the arbitration allowed to a person alleged to be a party to an arbitration agreement who takes no part in the proceeding (s.72).

#### *The arbitral tribunal*

45. Sections 15 to 29 of the Act are concerned with matters relating to the arbitral tribunal itself:
- Sections 15 to 22 are concerned with the constitution of the tribunal and its decision making process
  - Sections 23 to 27 are concerned with ways in which an arbitrator may cease to hold office (revocation of authority, removal by the court, resignation, death), and the procedure for the filling of vacancies in a tribunal
  - Section 28 establishes the joint and several liability of the parties to pay the arbitrators fees and expenses, and
  - Section 29 establishes immunity of an arbitrator from suit in relation to 'anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith.'

46. The provisions are mainly non-mandatory. They are designed to cover the full range of types of arbitration and to deal, *inter alia*, with the difficulties raised by arbitration agreements which do not incorporate any reference to an arbitral institution. They thus cover such matters as the default number of arbitrators in the absence of choice (sole arbitrator) and procedures to deal with a breakdown in the contractually established appointment machinery as a result of non-cooperation by one of the parties.
47. The IFLA scheme makes use of the freedom given to the parties to determine the procedure for establishing an arbitral tribunal and so regulates appointment in [art.4.1 to 4.3](#) of the IFLA AR 2012.
48. There are two mandatory provisions in this section of the Act: s.24 confers on the court the power to remove an arbitrator on certain enumerated grounds, while s.26 regulates the position on the death of an arbitrator. Section 26(2) contains non-mandatory provision for the continuation of the arbitrator's authority on the death of the person by whom he was appointed, however this default position is modified by [art.15](#) of the IFLA AR 2012 which also provides for the termination of the arbitration if a party to the arbitration agreement lacks, or loses, capacity (within the meaning of the Mental Capacity Act 2005) subject to certain provisos.
49. Section 24 once again ensures that arbitration is properly supervised by the courts. Of particular note is the possibility of applying to the court to remove an arbitrator on the grounds that circumstances exist that give rise to justifiable doubts as to his impartiality (s.24(1)(a)), or that he has refused or failed (i) properly to conduct the proceedings, or (ii) to use all reasonable despatch in conducting the proceedings or making an award, and that substantial injustice has been or will be caused to the applicant (s.24(1)(d)).

#### *Commencement of arbitral proceedings*

50. Section 14 of the 1996 Act permits the parties to agree when arbitral proceedings are to be regarded as commenced, where it is necessary to determine this for the purposes of Part I of the 1996 Act or of the Limitation Acts.
51. Article 4.5 of the IFLA AR 2012 accordingly specifies that: 'The arbitration will be regarded as commenced when the arbitrator communicates to the parties his or her acceptance of the appointment.'

*The conduct of the arbitral proceedings*

(i) The general duty of the tribunal

52. One of the principles underpinning Part I of the AA 1996, as stated above, is that the object of arbitration is the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense. That object is furthered in s.33 by the duty imposed on the arbitral tribunal in conducting the arbitral proceedings.

'33.(1)The tribunal shall —

- (a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and
- (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.'

53. Failure to comply with that obligation may result in annulment of the award under s.68 of the Act (see further below).

(ii) The general duty of the parties

54. The AA 1996 also emphasises the duty of the parties to 'do all things necessary for the proper and expeditious conduct of the arbitral proceedings', and in particular to comply promptly with any determinations, orders or directions made by the tribunal (s.40).

(iii) The principle of party control

55. While these general duties are mandatory obligations established by the Act, the majority of provisions relating to the conduct of the proceedings are non-mandatory. Since arbitration is founded on agreement, the parties have extensive freedom to establish the powers of the tribunal and all procedural and evidential matters. They also have the freedom to determine what consequences flow from the failure by a party to comply with his or her general duty (this freedom is also emphasised in [arts 9.1 and 9.2](#) of the IFLA AR 2012).

56. Nevertheless, in most cases the parties will not wish to exercise this freedom, except perhaps on one or two specific points. The Act therefore establishes a default position in the absence of agreement.

(iv) The default position: the powers of the arbitral tribunal

57. The tribunal is empowered to decide all procedural and evidential matters (s.34), including such matters as the level of disclosure and production of documents, the questions to be put to the parties, and the admissibility of oral or written evidence or submissions. It can also establish time limits for compliance with directions given. The IFLA AR 2012 affirm the breadth of the

tribunal's decision making powers in this respect ([art.8.1](#) and [8.4](#)). Moreover, in furtherance of both the general duty of the tribunal, and its power to decide procedural and evidential matters, [arts 10 to 12](#) of the IFLA AR 2012 set out the elements of a general procedure and an alternative procedure that may be used under the Scheme.

58. The AA 1996 also confers on the arbitral tribunal power to consolidate arbitral proceedings or hold concurrent hearings (s.35) and to appoint any experts deemed necessary (s.37: see [art.8.2 to 8.3](#) of the IFLA AR 2012).
59. Further general powers are granted by s.38, and notably the power to order a claimant to provide security for the costs of the arbitration, and the power to give directions in relation to 'any property which is the subject of the proceedings or as to which any question arises in the proceedings, and which is owned by or is in the possession of a party to the proceedings (a) for the inspection, photographing, preservation, custody or detention of the property by the tribunal, an expert or a party ...' (see also [art.8.4\(b\)](#) of the IFLA AR 2012 which replicates this provision). Directions may further be given in relation to the preservation of evidence.
60. Such directions may only be addressed to a party, however, since it is only parties who are bound by the agreement to arbitrate and are therefore under an obligation to comply with the orders of the tribunal. Court involvement becomes necessary if third parties are involved or enforcement measures are required (see below: *Powers of the court in relation to arbitral proceedings*).
61. The AA 1996 also addresses the possibility for the arbitral tribunal to order 'on a provisional basis any relief which it would have power to grant in a final award' including the payment of money or the disposition of property as between the parties (s.39(1)). However, the default position in this case is that the tribunal does not have the power to grant provisional relief. It is necessary for the parties specifically to confer such power on the tribunal. For the purposes of the IFLA Scheme the IFLA AR 2012 accords the arbitrator power to grant provisional relief subject to certain provisos ([art.7](#))

(v) The default position: enforcing the general duty of the parties

62. It is undoubtedly the case that arbitration is most effective where the parties have a genuine dispute on points of law or fact and wish to resolve the dispute as efficiently as possible. Nevertheless, the AA1996 grants the arbitral tribunal and the court various powers to assist in dealing with an uncooperative party. As far as the arbitral tribunal is concerned, since it is unable to enforce coercive orders using the machinery of the state, those powers relate to its conduct of the proceedings, and the right to draw certain inferences from the behaviour of the parties.
63. The default position is regulated in s.41 of the Act. Lack of cooperation on the part of the claimant may lead to the claim being dismissed.

's.41(3) If the tribunal is satisfied that there has been inordinate and inexcusable delay on the

part of the claimant in pursuing his claim and that the delay —

- (a) gives rise, or is likely to give rise, to a substantial risk that it is not possible to have a fair resolution of the issues in that claim, or
- (b) has caused, or is likely to cause, serious prejudice to the respondent, the tribunal may make an award dismissing the claim.

...

- (6) If a claimant fails to comply with a peremptory order of the tribunal to provide security for costs, the tribunal may make an award dismissing his claim.'

64. Other sanctions available to the court under s.41 include the drawing of adverse inferences from an act of non-compliance with an order of the tribunal, proceeding to an award without giving the party in default further opportunity to submit evidence, and making such orders for costs as it thinks fit (see [art.14.5 and 14.6](#) of the IFLA AR 2012).

65. Failure to attend a hearing of which due notice was given, or, if matters are to be dealt with in writing, failure after due notice to submit written evidence or to make written submissions, may lead to the tribunal continuing the proceedings in the absence of the party in default and the making of an award on the basis of the available evidence (see also [art.8.5](#) of the IFLA AR 2012). In other cases of a failure to comply with orders or directions of the tribunal, the tribunal must issue a 'peremptory order' to the same effect, specifying a deadline for compliance, before imposing any sanction.

(vi) Miscellaneous procedural matters

66. Sections 76 to 80 of the AA 1996 regulate a number of matters concerned with service and time limits in arbitral proceedings. Sections 76(5) and 80 emphasise that where court, rather than arbitral, proceedings are concerned, the relevant regulation of these matters is to be found in rules of court and not in the AA 1996.

67. The parties are free to agree on the manner of service of any notice or other document required or authorised to be given or served in pursuance of the arbitration agreement or for the purposes of the arbitral proceedings. In the absence of such agreement, 'any effective means' of service is valid, including in particular postal service to 'the addressee's last known principal residence, or if he is or has been carrying on a trade, profession or business, his last known principal business address...' (s.76(3) to (4)).

68. The parties are also free to agree on the method of reckoning periods of time for the purposes of any provision agreed by them, or any provision of Part I of the AA 1996 having effect in default of such agreement. The default rules in this respect are found in s.78 of the Act. Time limits agreed by the parties may be extended by order of court (s.79 and see also s.50 in relation to the time agreed for making an award).

*Powers of the court in relation to arbitral proceedings*

69. Ideally, an arbitration will proceed without the need to make any applications to court. But, with the objective of providing an environment supportive of arbitration, the AA 1996 makes provision for the court to lend its assistance to an arbitral tribunal. Nevertheless, most of the provisions of the Act detailing the powers of the court are non-mandatory. It therefore remains open to the parties to exclude applications to the court during the course of the arbitral proceedings (this is common in certain types of commercial contract: *B v S* [2011] EWHC 691 (Comm)). The only mandatory provision in this regard (s.43(1) and (2)) ensures that, subject to obtaining the permission of the court or the agreement of the other parties, 'a party may use the same court procedures as are available in relation to legal proceedings to secure the attendance before the tribunal of a witness in order to give oral testimony or to produce documents or other material evidence.' Where non-mandatory powers exist they are to be exercised only with the permission of the tribunal or the agreement of the parties, and are hedged about with further provisos concerning the utility of an application to court. This is designed to ensure that the court plays a purely ancillary role and that the agreement of the parties to submit their dispute to arbitration is not undermined or circumvented through court applications.
70. In the absence of agreement by the parties, the default position is as described below.
71. Under s. 42, peremptory orders made by the arbitral tribunal pursuant to s.41 of the Act may be enforced by the court on application by the tribunal or by a party with the permission of the tribunal. The parties may also agree that the powers of the court shall be available without the permission of the tribunal. Use is made of this possibility in [art.8.6](#) of the IFLA AR 2012. Nevertheless, the court will not act under s.42 unless it is satisfied that the applicant has exhausted any available arbitral process in respect of failure to comply with the tribunal's order, and that there has been a failure to comply with time limits (or in the absence of time limits, to comply within a reasonable time): s.42(3) and (4).
72. Under s.44, the court has, for the purposes of and in relation to arbitral proceedings, the same power of making orders about certain identified matters as it has for the purposes of and in relation to legal proceedings. The identified matters are essentially those concerned with obtaining or preserving evidence, safeguarding or selling property, and the grant of an interim injunction or appointment of a receiver. These powers to some extent parallel those of the arbitral tribunal under s.38 of the Act, but allow coercive measures to be taken, and extend to orders against third parties. The ancillary role of the court is emphasised by the fact that it can act only to the extent that the arbitral tribunal has no power or is unable at the relevant time to act effectively (s.44(5)), and is further emphasised by the need for an application under s. 44 to be made with the permission of the arbitral tribunal or with the agreement in writing of the other parties, except in urgent cases. In such cases, the court may make such orders as it thinks necessary for the purpose of preserving evidence or assets (s.44(3)).
73. Provision is also made for the determination of a preliminary point of law by the court under s.45, but again party agreement or tribunal permission is necessary. In the latter case the court must additionally be satisfied that the determination of the question is likely to produce substantial savings in costs, and that the application was made without delay (s.45(2)).

*The award*

74. The character of an award as 'final and binding' under s.58 of the Act was discussed above.
75. In relation to the decision on the substance of the dispute, in principle s. 46 of the AA 1996 allows the parties to choose the applicable law. However, it should be noted that [art.3](#) of the IFLA AR 2012 mandatorily establishes the applicability of English law to all arbitrations conducted under the IFLA Scheme.
76. An arbitral tribunal, no less than a court, will want to encourage the parties to settle their own dispute if possible. With this in mind s.47 of the AA 1996 permits the arbitral tribunal to make more than one award at different times on different aspects of the matters to be determined, thus making it possible select key issues for early determination. As to the remedies that may be granted by the tribunal in an award, they parallel those available in court proceedings. The default position under s.48 is that
- 's.48(3) The tribunal may make a declaration as to any matter to be determined in the proceedings.
- (4) The tribunal may order the payment of a sum of money, in any currency.
- (5) The tribunal has the same powers as the court —
- (a) to order a party to do or refrain from doing anything;
- (b) to order specific performance of a contract (other than a contract relating to land);
- (c) to order the rectification, setting aside or cancellation of a deed or other document.'
77. The tribunal may also award interest (as elaborated in s.49). In this respect [art.7.3](#) of the IFLA AR 2012 states that the arbitrator will have the power to award interest in accordance with s.49, whether or not it is specifically claimed.
78. As to requirements of form, [art.13.2](#) of the IFLA AR 2012 adopts the default position set out in s.52 of the AA 1996, which requires the award to be in writing, and to give reasons (unless it is an agreed arbitration). The award is also required to state the seat of the arbitration and the date when the award is made (see ss. 53-54 of the AA 1996 for further guidance). The IFLA Scheme presupposes that the seat of the award is in England and Wales.
79. If the parties settle the dispute during the arbitral proceedings, the default position is that the tribunal shall terminate the proceedings and, if so requested by the parties and not objected to by the tribunal, shall record the settlement in the form of an agreed award (s.51(2)) which shall have the same status and effect as any other award on the merits of the case (s.51(3)).
80. The one mandatory provision in the section of Part I concerned with the arbitral award is s.56, which grants the tribunal the right to refuse to deliver an award to the parties except upon full payment of the fees and expenses of the arbitrators (and see [art.13.5](#) of the IFLA AR 2012). Section 56 also provides for court intervention where there is a dispute as to the fees payable.

### *Costs of the arbitration*

81. Section 59 of the AA 1996 defines the costs of the arbitration as

- (a) the arbitrators' fees and expenses,
- (b) the fees and expenses of any arbitral institution concerned, and
- (c) the legal or other costs of the parties.

82. The tribunal may make an award allocating the costs of the arbitration as between the parties, subject to any agreement they may make (s.61 of the Act). The default position under the Act is that the tribunal shall award costs on the principle that costs follow the event, but this is modified by the IFLA AR 2012. [Article 14.4](#) specifies that, unless otherwise agreed by the parties, the parties will bear the arbitrator's fees and expenses and those of the IFLA in equal shares, and that there will be no order or award requiring one party to pay the legal or other costs of another party.

83. The parties or, in default of agreement, the tribunal may determine what costs of the arbitration are recoverable (s.63(1) and 3), or application to the court may be made for such a determination (s.63(4)). In relation to arbitrators' fees, unless otherwise agreed by the parties, only such reasonable fees and expenses are recoverable as are appropriate in the circumstances (s.64(1)), but this does not affect the arbitrators' right to claim payment (s.64(4)).

84. Only one provision in this part of the Act is mandatory. According to s.60, an agreement which has the effect that a party is to pay the whole or part of the costs of the arbitration in any event is only valid if made after the dispute in question has arisen.

### *Powers of the court in relation to the award*

#### (i) Enforcement

85. As stated in the introduction, one of the major benefits of arbitration is the fact that an arbitral award may be enforced in the same way as a judgment (s.66). For the particular enforcement issues raised by family law arbitration see [art.13](#) of the IFLA AR 2012 and the commentary on that article. Note that by paragraph 6.5 of Form ARB1 the parties agree that, if and so far as the subject matter of the award makes it necessary, they 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.

86. Section 66 of the Act is a mandatory provision. An award may only be enforced by leave of the court. Alternatively, under s.66(2), where appropriate and where leave of the court is given, judgment may be entered in terms of the award. It is anticipated that, in the context of family arbitration, s.66 will be invoked only in those cases where the court's jurisdiction may not be ousted.

#### (ii) Challenging the award



87. The fact that an arbitral award is final and binding on the parties 'and on any persons claiming through or under them' under s.58 does not mean that an award cannot be subject to challenge. Sections 67 and 68 of the Act, which are also mandatory provisions, deal with two different grounds of challenge. Under s.67, an award is vulnerable to challenge on the ground that the tribunal did not have substantive jurisdiction, while under s.68 a challenge may be made 'on the ground of serious irregularity affecting the tribunal, the proceedings or the award'. A serious irregularity is one falling within a list of irregularities in s.68(2) 'which the court considers has caused or will cause substantial injustice to the applicant'.
88. The reason for the use of two separate categories is that where jurisdiction is concerned, there can be no question of applying a test of 'substantial injustice'. An award of a tribunal purporting to decide the rights or obligations of a person who has not given that tribunal jurisdiction to do so cannot stand (subject to s.73 below), whereas the drafters of the Act considered it essential that irregularities should pass the test of causing 'substantial injustice before the Court can act (DAC Report, paras 279-280). The irregularities listed in s.68(2) include failures to comply with the requirements of the AA 1996, including the general duty imposed by s.33, and with procedures and other matters defined by the parties. They also include uncertainty or ambiguity as to the effect of the award.
89. Since the arbitral tribunal may make a preliminary award as to jurisdiction where the matter is contested (s.31(4) AA 1996), s.67(2) permits the tribunal to continue its proceedings while the challenge is pending. The grounds of challenge may include an excess of jurisdiction, as well as the invalidity of the arbitration agreement or problems with the constitution of the arbitral tribunal (s.30(1) AA 1996), so a successful challenge may result in the award being set aside, in whole or in part, or varied.
90. The position is somewhat different in the case of a serious irregularity under s.68(3) of the Act. A successful challenge may result in the award being remitted to the tribunal, in whole or in part, for reconsideration (see further s.71(2)). However if the court is satisfied that such a course would be inappropriate, the award may be set aside or declared to be of no effect, in whole or in part. Remission of the award to the tribunal may in particular be difficult since the tribunal is *functus officio* on the making of the award and circumstances may prevent reconstitution.
91. Sections 67 and 68 cannot, however, be used as an afterthought by a disgruntled losing party. A party who considers that there is a defect in the arbitral proceedings must register their objection 'forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of [Part I of the Act]' (s.73, which is a mandatory provision). If they continue to participate in the arbitral proceedings without making any objection, they lose the right to a later challenge, both on grounds of substantive jurisdiction and on grounds of improper conduct of the proceedings. Furthermore, if an award on substantive jurisdiction is made by the tribunal, a party who wants to question that award must also do so promptly (s.73(2)).

(iii) Appeal on a point of law

92. One of the distinctive features of the AA 1996, as compared with the arbitral laws of other jurisdictions, is the fact that it allows an appeal against an arbitral award on a point of law (s.69). The original rationale for this was the importance of English law in maritime and commercial disputes. It had been possible under previous legislation governing arbitration to require an arbitrator to use the 'case stated' procedure to refer questions of law to the court. That procedure was removed by the Arbitration Act 1979 as a measure which added delay and expense to arbitration and made London a less attractive arbitral seat. The possibility of an appeal against an award was nevertheless retained to meet the concern that otherwise the development of English commercial law would be stunted because cases raising new and important issues would no longer be heard by the courts. But, in contrast to the position in relation to challenges under s.67 and s.68 of the Act, there is no mandatory right of appeal. By s.69(2) an appeal is only permissible if the agreement of all the parties to the proceedings or the leave of the court is obtained. Furthermore, given that one of the perceived advantages of arbitration, at least in commercial disputes, is the finality of the award, s.69 also allows the parties to agree at an earlier stage to exclude such an appeal. In the case of a domestic arbitration agreement (see above), an agreement to exclude an appeal under s.69 is not effective unless entered into after the commencement of the arbitral proceedings in which the question arises or the award is made.

93. Section 69(3) specifies the criteria governing a decision by the court to give leave to appeal. The court must be 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.'

94. While concern has been expressed about the scope for delay in the resolution of the dispute that is engendered by this section, in practice very few appeals have been successful on the merits.

95. On such an appeal, the court may confirm, vary or set aside the award, but, as with s.68, it may also remit it to the tribunal, in whole or in part, for reconsideration in the light of the court's determination (s.69(7)).

(iv) General provisions

96. Further (mandatory) provisions as to procedure and time limits relating to application or appeal under s.67, 68 or 69 are made in s.70 of the Act. The applicant or appellant is, in particular, required to have exhausted any method of recourse available within the framework of the arbitral proceedings first (s.70(2)). Where no reasons are given for the award, or the reasons given are

inadequate to allow the court properly to consider the application or appeal, the court may order the tribunal to state the reasons for its award in sufficient detail for that purpose (s.70(4)).

97. A person alleged to be a party to arbitral proceedings, but who takes no part in the proceedings, also has the right to challenge an award under s.67 or s.68 by virtue of the mandatory rule in s.72(2) of the Act, and in such a case is not required to exhaust arbitral procedures under s.70(2).

*Immunity of arbitral institutions*

98. Section 74(1) of the AA 1996 stipulates as a mandatory rule that an arbitral institution is not liable for anything done or omitted in the discharge of that function 'unless the act or omission is shown to have been in bad faith', while s.74(2) excludes the liability of an arbitral institution for the acts or omissions of the arbitrator by reason of having appointed or nominated him. For the position under the IFLA Scheme see further [art.17.5](#) of the IFLA AR 2012.

**This Synopsis is intended as a guide only and is general in nature. It is no substitute for professional advice. FamilyArbitrator accepts no responsibility for the consequences of any action taken or refrained from as a result of this Synopsis.**