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Matrimonial Finance: Shaping New Law into Solution-Focused Advice for Your Clients

What are the practical and legal implications of arbitration in family cases?

Where are the red lines? What will sway your case?

A. What are the practical implications of arbitration?

1. **What is arbitration?** Arbitration is a voluntary process whereby an independent third party, the arbitrator, is appointed by the parties to come to a binding decision as to the outcome of an issue. The parties must agree to enter into the arbitration process. The arbitration scheme in the family context is governed by the Institute of Family Law Arbitrators ('IFLA') – see *ifla.org.uk*.

2. This note will focus on IFLA's Financial Scheme launched in February 2012. A parallel Children's Scheme for the resolution of 'private law' children disputes was launched in July 2016.

3. **What can be arbitrated?** The IFLA Financial Scheme covers financial and property disputes arising from:[1]

    a. marriage and its breakdown (including financial provision);
    b. civil partnership and its breakdown;
    c. cohabitation and the ending of cohabitation;
    d. parenting or those sharing parental responsibility; and
    e. provision for dependants from the estate of the deceased.

[1] Family Law Arbitration Scheme, Arbitration Rules 2018 (6th edition, 1st January 2018), Article 2.1

4. Within those areas, the parties can determine the scope of what the arbitrator is tasked with deciding. In the financial remedy context, this could be as broad as the entire financial remedy claim of one party or as narrow as the determination of which party should keep a particular property (or when it should be sold), whether there should be a 'clean break', or which party should have specific chattels.

5. **Who is arbitration for?** Arbitration is not only for the wealthy. An early arbitration can offer a real cost benefit where a time delay in the court system could increase fees (e.g. if updating disclosure needs to be continually provided).

6. **What does arbitration cost?** Many arbitrators offer a fixed-fee service for their work. Notwithstanding this additional cost, arbitration can offer many cost-saving benefits including but not limited to the following:

    a. the parties are not required to complete the standard documents the court requires if they do not wish to do so, as the process is bespoke;
    b. the speed with which can arbitration can take place means that the parties avoid the costs inherent in litigating for a prolonged period of time whilst waiting for a court hearing (e.g. updating disclosure);
    c. the arbitrator will read all of the documentation sent to them and prepare in advance of any hearing, unlike in the court system where, with the judiciary under pressure, judges are routinely unable to read-in ahead of a hearing; and
    d. in an appropriate case, costs can be reduced by having hearings take place over the telephone or on paper.

    Anecdotally, an arbitrator will often put in a significant amount of work on a fixed-fee brief that, had they charged on an hourly rate, would have cost much more.

7. **How do you start the arbitration process?** Once the parties have decided to enter arbitration, they may refer a dispute to arbitration by making an agreement to arbitrate in Form ARB1FS (or ARB1CS for the children scheme) signed by both parties or their legal representatives, and submitting it to IFLA (Article 4.1).

8. The ARB1FS – 2018 Edition states (at paragraph 1) [emphasis added]:

> "We, the parties to this application, whose details are set out below, apply to the Institute of Family Law Arbitrators Limited for the nomination and appointment of a sole arbitrator from the Family Arbitration Financial Panel ('the Financial Panel') **to resolve the dispute referred to in paragraph 2 below** by arbitration in accordance with the Arbitration Act 1996 ('the Act') and the rules of the Family Law Arbitration Scheme ('the Financial Scheme')."

9. Paragraph 2 states *"The dispute concerns the following issue(s) …"*. This is an important paragraph. Care needs to be given when it is completed otherwise there is the potential for either (i) a dispute to arise as to the scope of the arbitration which the arbitrator will have to resolve; and/or (ii) an *ex post facto* challenge to the Award under s67 of the Arbitration Act 1996 challenging the arbitral tribunal as to its *"substantive jurisdiction"* namely what matters were submitted to arbitration in accordance with the arbitration agreement. The grounds of challenge to an Award are considered further below.

10. **When can the parties enter arbitration?** They can do so at any stage in a dispute; whether before proceedings have commenced, whilst they are ongoing in the court process or even after court proceedings have concluded if there remain outstanding issues that need to be resolved.

11. **Who is the arbitrator?** One of the (if not the) greatest benefits of arbitration is that the parties can select the identity of the arbitrator. There are a great number of practitioners (barristers, solicitors, and retired members of the judiciary) who are trained as arbitrators. This removes an enormous degree of uncertainty from the process that is inherent in the court-based system. The parties can either nominate a specific arbitrator, provide a short-list from which IFLA will nominate, or ask IFLA to nominate (Articles 4.3.1 – 4.3.3).

12. **What is the process?** The parties 'own' the procedure to a far greater extent than in court proceedings. The parties are free to agree the form of the procedure (if necessary, with the concurrence of the arbitrator) and, in particular, to adopt a documents-only procedure or some other simplified or expedited procedure (Article 9.1). There is a *General Procedure* set out in Article 10 and an *Alternative Procedure* which follows the

standard financial remedy procedure of Forms E, Questionnaires and (in effect) a First Appointment set out in Article 12.

13. Communication between the arbitrator and either party will be copied to the other party (Article 6.1). The arbitrator will decide all procedural and evidential matters subject to the right of the parties to agree any matter (if necessary, with the concurrence of the arbitrator) (Article 8.1). If the parties opt for a court-style final hearing, they can decide whether the arbitrator is to hear oral evidence or just submissions. If there is to be oral evidence, the parties can decide whether this is to be on oath/affirmation and/or whether it is to be recorded.

14. **How can you combine arbitration with other forms of alternative dispute resolution?** The arbitration process also lends itself to a creative approach. It is possible for the parties to, for example, agree to enter into an arbitration of a financial remedy claim with provision for there to be a Private FDR beforehand so as to mimic the ordinary court process.

15. **What sort of cases are suitable for arbitration?**

a. disclosure (whether voluntary or as part of the court process) has been completed and the parties are satisfied with its conclusion, but no agreement has been reached;
b. there is only a discrete issue that is not agreed, e.g. the quantum and duration of spousal maintenance;
c. it would be disproportionate to the issues for there to be a full hearing and the case is suitable to be dealt with on paper, e.g. a dispute about which party should take a particular chattel; or
d. where privacy is important because one or both of the parties are high-profile.

16. **What sort of cases are not suitable for arbitration?**

a. there are issues about whether full, frank and clear disclosure has been made and/or applications for disclosure might be necessary;

b. the coercive powers of the court might be necessary to ensure compliance, e.g. by way of application for committal; or

c. there is a novel point of law where the assistance of an appellate court might be necessary.

17. **How is the result communicated?** The arbitrator is required to deliver an Award *"within a reasonable time"* (Article 13.1) after the conclusion of the proceedings. The Award will be in writing and, unless the parties agree otherwise or the Award is by consent, contain sufficient reasons to show why the arbitrator has reached the decisions it contains (Article 13.2).

18. **Which costs rules apply?** Articles 14.4 and 14.5 provide that subject to (i) prior agreement; and (ii) the arbitrator's overriding discretion, the *"general principle"* will be that the parties will bear the arbitrator's fees and expenses in equal shares and there will be no order for costs. However (a) the parties can agree any costs rules which they like – e.g. that *Calderbank* offers could be taken into account; and (b) the arbitrator has a discretion to depart from the no order starting point on the basis of the conduct of a party in relation to the arbitration.

19. **What about third parties?** The most recent edition of the Financial Scheme Rules have (by Article 7.5) made express provision for what previously understood to be possible namely that the parties may agree that a third party or parties be joined to the arbitration provided that the third party or parties agree in writing (a) to be so joined; (b) to abide by the rules; and (c) to be bound by any award made by the arbitrator. In such a case, the arbitrator may join the third party or parties to the arbitration on such terms as may be agreed by all relevant parties, or as may be directed by the arbitrator.

20. Absent such agreement the arbitrator has no power over any person who is not a party to the arbitration. However, there will be many cases where arbitration will be a convenient and expeditious route to resolve issues involving third parties provided that they agree to take part. For example:

a. an issue over whether a family member or business associate has an interest in an asset can be submitted to arbitration and resolved as a preliminary issue. The

third party will not have to be joined to the financial proceedings (if any). When the preliminary issue has been resolved the parties could either continue in the arbitral process or go down the court route; and

b. trustees may object less to becoming parties to an arbitration than to court proceedings for the resolution of such issues as whether a trust is an ante-nuptial or post-nuptial settlement.

21. **How does arbitration fare when compared to the court system?** Many of these issues have already been touched upon. However, in summary:

Issue	Arbitration	Court
Speed	As soon as the parties are ready and a suitable arbitrator is available, arbitration can commence	No choice as to when a hearing is listed, which may be many months later
Venue	Wherever the parties think would be suitable: in chambers, at a solicitors' firm, another neutral venue	A court building not of your choosing that will (in all likelihood) be hectic, under-resourced and under-staffed
Tribunal	An arbitrator of your choosing, who the parties can have confidence in as being a specialist in their field. The arbitrator will read everything you send them and have considered the issues before the hearing	A judge who is allocated to hear your case, who may or may not be a specialist in the sort of dispute coming before them. A judge may or may not have read everything, subject to whether all of the documents have reached them and/or whether they have had the time to look at everything (or, indeed, anything)
Scope	Arbitration can be as broad or as narrow as the parties want: it could cover the entire financial remedy claims or an issue as	The court seised of financial remedy proceedings will conduct a broad enquiry; unlike

	discrete as to which party should take particular chattels	arbitration, particular issues cannot be "hived off"
Process	Issues can be determined on paper, over the telephone or at a hearing; the parties can decide how they want the arbitral process to proceed	Issues are primarily determined at hearings in court, save for some very limited circumstances where discrete issues might be dealt with over the telephone (e.g. an application to an out of hours judge)
Bundles	It is up to the parties to decide what they want to put before the arbitrator, and in what format they wish to do so	Strict compliance with PD27A, FPR 2010, including bundles limited to 350 pages
Evidence	This can be in whatever format; there can, in the usual way in court, be written evidence and oral evidence in the form of examination-in-chief followed by cross-examination, but there need not be if the parties do not think it is necessary	The court will usually receive written evidence then hear oral evidence
Decision	Arbitral award written up by the arbitrator *"within a reasonable time after the conclusion of the proceedings"*	Judgment delivered *ex tempore* or handed down at a later date, possibly promptly but sometimes not
Appeal	There are limited routes of appeal from an arbitral award; whilst this ensures finality, it can also cause problems if a party feels an arbitrator gets the wrong result	The usual routes of seeking permission to appeal and appeal are open following a decision of the court

B. What are the legal implications of arbitration in family cases?

22. In overview, once the arbitrator makes an Award a decision the parties will be bound by that decision (save for in exceptional circumstances).

23. The family arbitration schemes are governed by the Arbitration Act 1996 and two sets of IFLA rules: the Financial Arbitration Rules (2018, 6th edition) and the Children Arbitration Rules (2018, 2nd edition).

S v S (Financial Remedies: Arbitral Award) [2014] 1 FLR 1257

24. This is a decision of Munby P concerning the approval of a consent order lodged by the parties following an arbitration.

25. The parties were married in 1986 and separated in 2012. They had one child. W petitioned for divorce and decree nisi was made in early 2013. In June 2013, the parties signed Form ARB1 agreeing to arbitration in relation to their financial remedy claims. The arbitrator's final award was delivered on 7 November 2013. On 9 December 2013, the parties applied to court seeking the approval of the consent order.

26. Munby P approved the consent order. In doing so he also provided guidance as to the proper approach that the court should adopt in respect of such applications. In particular he noted the following developments:

    a. the identification and elaboration of the concept of the "magnetic factor" **[11]**;
    b. the development of different forms of alternative dispute resolution **[12]**;
    c. the development of procedures for the simple and speedy approval of consent orders **[13]**; and
    d. the emphasis in the case law on the importance of respecting autonomy **[14] – [15]**.

27. Munby P further noted that where the parties have bound themselves to accept an arbitral award of the kind provided by IFLA, "*this generates … a single magnetic factor of determinative importance"* and that "*In the absence of some very compelling*

countervailing factor(s), the arbitral award should be determinative of the order the court makes" **[19]**.

28. Finally, Munby P provided the following guidance:

a. where a judge is being asked to approve a consent order founded on an arbitral award: "*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."* **[21]**

b. 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*." **[25]**

DB v DLJ **[2016] 2 FLR 1308**

29. This is a decision of Mostyn J concerning the husband's application that the wife show cause as to why an arbitral award should not be made into an order of the court.

30. The parties were married in 1999 and separated in 2013. They had one child. The wife commenced divorce proceedings in late 2013 and decree nisi was made in early 2014. At the time of the judgment it had not been made absolute. The wife commenced

financial remedy proceedings in early 2014. The parties signed Form ARB1 in early January 2015. The financial remedy proceedings were stayed to allow arbitration to proceed. At its conclusion in July 2015 an arbitral award was made.

31. The husband issued his aforementioned notice to show cause application. The wife resisted the husband's application on the basis that the arbitral award was vitiated by a mistake about the value of a property allocated to her or, in the alternative, that events had occurred since the award which invalidated the findings made by the arbitrator as to the value of that property.

32. At paragraphs **[5] – [13]** Mostyn J sets out the scope for challenging a commercial award governed exclusively by the Arbitration Act 1996:

a. s67 - challenging an award of the arbitral tribunal as to its *"substantive jurisdiction"*:
   i. this goes to the matters mentioned in s30(1)(a) – (c) namely whether there is a valid arbitration agreement; or whether the tribunal is properly constituted; or what matters have been submitted to arbitration in accordance with the arbitration agreement;

b. s68 - challenging an award on the ground of *"serious irregularity"*. This is specified in nine sub-sections:
   i. failure by the tribunal to comply with section 33 (general duty of tribunal to act fairly);
   ii. the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);
   iii. failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;
   iv. failure by the tribunal to deal with all the issues that were put to it;
   v. any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;
   vi. uncertainty or ambiguity as to the effect of the award;
   vii. the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;

viii. failure to comply with the requirements as to the form of the award; or

ix. any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award;

c. s69 - an appeal to the court on a *"question of law"* arising out of an award made in the proceedings. An appeal on a question of law needs the leave of the court. S69(3) states that leave to appeal shall be given only if the court is satisfied:

i. that the determination of the question will substantially affect the rights of one or more of the parties;

ii. that the question is one which the tribunal was asked to determine;

iii. that, on the basis of the findings of fact in the award (a) the decision of the tribunal on the question is obviously wrong, or (b) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt; and

iv. 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;

d. the limited corrective jurisdiction under s57 to ask the arbitrator to correct his award. Under s57(1) the parties are free to agree on the powers of the tribunal to correct an award or make an additional award. In the absence of agreement then by virtue of s57(3) and (4) a party may apply to the arbitrator within 28 days of the award either to (i) correct an award so as to remove any clerical mistake or error arising from an accidental slip or omission or clarify or remove any ambiguity in the award; or (ii) make an additional award in respect of any claim (including a claim for interest or costs) which was presented to the tribunal but was not dealt with in the award.

33. At paragraphs **[14]** – **[15]** Mostyn J then identifies that the traditional grounds for challenging a financial remedy award in family proceedings are mistake, fraud, non-disclosure and supervening event. Given that (he says) deliberate non-disclosure is a species of fraud and innocent non-disclosure is a species of mistake there are three

grounds of challenge namely mistake, fraud and supervening event. He notes that in commercial arbitration fraud is a ground of challenge under s68(2)(g), an alleged mistake can only be raised if it falls within s57, and a supervening event is completely impossible as a ground of challenge.

34. Mostyn J then goes on at paragraphs **[17]** – **[20]** to highlight the important differences between a civil arbitration (final and binding unless the parties agree otherwise and where in the vast generality of cases no incorporating order will be sought from the court and the award can be enforced by the court) and family arbitration cases where the parties will want an incorporating order (not least because a 'clean break' and a pension sharing order can only be achieved by a court order) and where the court exercises an independent inquisitorial discretion and is not 'rubber stamp'.

35. Mostyn J then at **[21]** sets out paragrahs 6.4 and 6.5 of the ARB1FS (current numbering) before stating (at **[22]**) that:

> *"It can therefore be seen that the parties have agreed in writing that challenges to an arbitral award would not be confined only to those available under the 1996 Act. In addition they specifically agreed that the court would retain an overriding discretion, and inferentially the parties agreed that they would each be enabled to argue that the court should not exercise its discretion to incorporate the award for reasons outwith those stated in the 1996 Act. In so doing they were agreeing, pursuant to section 58(1), an exception to the award being final and binding. In making such an agreement the parties were of course, doing no more than recognising what the general law already provided."*

36. At **[27]** Mostyn J therefore disagrees with the view expressed by Munby P at **[26]** of *S v S* that *"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 and to the extent this suggests that the Family Court could only refuse to make the order if a challenge or appeal under the 1996 Act could be made out given that *"this would appear to rule out a challenge on the ground of a vitiating mistake or a supervening event. If a challenge were to be made out on one or other such ground it would in my judgment be a plainly wrong exercise of discretion for the court to incorporate an award nonetheless."*

37. As to the court's approach when faced with an arbitral award **[27]**:

> "*…when exercising its discretion following an arbitral award the court should adopt an approach of great stringency, even more so than it would in an agreement case. In opting for arbitration the parties have agreed a specific form of alternative dispute resolution and it is important that they understand that in the overwhelming majority of cases the dispute will end with the arbitral award. It would be the worst of all worlds if parties thought that the arbitral process was to be no more than a dry run and that a rehearing in court was readily available."*

38. On when the court might refuse to incorporate an arbitral award in an order of the court, Mostyn J said the following **[28]**:

> "*If following an arbitral award evidence emerges which would, if the award had been in an order of the court entitle the court to set aside its order on the grounds of mistake or supervening event, then the court is entitled to refuse to incorporate the arbitral award in its order and instead to make a different order reflecting the new evidence. Outside the heads of correction, challenge or appeal within the 1996 Act these are, in my judgment, the only realistically available grounds of resistance to an incorporating order. An assertion that the award was 'wrong' or 'unjust' will almost never get off the ground: in such a case the error must be so blatant and extreme that it leaps off the page."*

39. At **[29]** Mostyn J states that *"[i]n my opinion ARB1 should be modified to make this clear"* but this has not (yet) been done.

40. In the instant case, Mostyn J refused to interfere with the arbitrator's award, which he described as "*a thorough, conscientious and clear piece of work Its quality is a testament to the merit of opting for arbitration*" **[60]**. Specifically, the arbitrator had not made a MCA 1973 s28(1A) direction so as to provide a safety net to the wife in the event that the capital she received was substantially less than its then current value **[66] – [67]**. On that basis, Mostyn J concluded that the existence of the safety net "*inevitably leads me to refuse to interfere with the arbitrator's award even if the threshold requirements for*

proof of mistake or supervening event are demonstrated" **[68]**. If he was wrong about that he then found against the wife on the grounds of vitiating mistake and/or supervening event.

41. Finally, Mostyn J noted the following **[90]**:

> "*In the future any notice to show cause why an arbitration award should not be made an order of the court must, for London and the South Eastern Circuit, be issued in the Royal Courts of Justice and immediately placed before me for allocation to a High Court judge for speedy determination. If the application is issued outside London or the South Eastern Circuit then it must be immediately placed before the Family Division Liaison Judge who will arrange for it to be heard speedily by him or her or another High Court judge (including a s 9 judge). It is important for the promotion of the arbitration system that litigants should know that if a challenge to an arbitration award is raised that it will be heard by a High Court judge at the soonest opportunity.*"

Practice Guidance (Family Court: Interface with Arbitration)

42. This is the guidance of Munby P on arbitration, issued on 23rd November 2015. In summary, Munby P provides guidance as to:
    a. where there are subsisting proceedings seeking the same relief as is in issue in the arbitration **[7] – [18]**;
    b. arbitration claims **[19] – [24]**;
    c. arbitrations conducted when there are no subsisting proceedings seeking relevant relief **[25] – [29]**;
    d. enforcement **[30]**;
    e. challenging the arbitral award **[31]**; and
    f. arbitration-specific standard court orders **[32] – [34]**.

President's Practice Guidance: Standard Orders

43. Munby P has produced the standard financial and enforcement orders, issued on 30th November 2017.

44. As to the status of the standard orders, Munby P notes in the guidance:

"These orders do not have the strict status of forms within Part 5 of the FPR 2010 and their use, although strongly to be encouraged, is not mandatory. Moreover, a standard order may be varied by the court or a party if the variation is required by the circumstances of a particular case. There will be many circumstances when a variation is required and departure from the standard form will not, of course, prevent an order being valid and binding. The standard orders should however represent the starting point, and, I would hope and expect, usually the finishing point, of the drafting exercise."

45. The standard orders specifically relevant to arbitration are:

a. **Order 1.1 – Financial Directions Order (longer version)**, specifically paragraph 81: adjournment for arbitration;
b. **Order 2.1 – Financial Remedy Order**, specifically paragraph 19: arbitration award recital;
c. **Order 6.1 – Stay or Adjourn for Arbitration under Court's Case Management Powers**;
d. **Order 6.2 – Stay Pursuant to Arbitration Act 1996 s. 9 or under Court's Case Management Powers**;
e. **Order 6.3 – Enforcement of Arbitrators Peremptory Order under Arbitration Act 1996, s. 42**; and
f. **Order 6.4 – Securing Attendance of Witnesses under Arbitration Act 1996, s. 43**.

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