

White Paper Conference Talk 2018 Arbitration

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

What are the red lines?

What will sway your case?

Brief History

Arbitration has been available for commercial disputes for many years.

For family law issues it became a possible mechanism for resolution of financial disputes following a project which brought together the Chartered Institution of Arbitrators (CI Arb), Family Law Bar Association (FLBA) and Resolution in association with the Centre for Child and Family Law Reform.

The Institute of Family Law Arbitrators (IFLA) was established and is the governing body for family arbitrators.

Latterly in 2016 the scheme was extended to disputes relating to children.

The key tenets of the arbitration schemes are:-

1. That the arbitration must be conducted in accordance with the Arbitration Act 1996 and the Institute of Family Law Arbitrators Rules.
2. That arbitrators must decide the substance of the dispute only in accordance with the laws of England and Wales.

Financial Arbitration

By agreement between the parties, this process can be applied broadly to all areas of financial dispute between parties on relationship breakdown including :-

1. financial remedy applications on divorce and civil partnership;
2. Schedule 1 Children Act 1999 applications;
3. Trusts of Land and Appointment of Trustees Act 1996 applications (TOLATA);
4. Inheritance (Provision for Family and Dependants) Act 1975 claims;
5. Cohabitation disputes.

Financial arbitration can not be used in disputes regarding:-

1. the liberty of individuals;
2. the status either of individuals or of their relationship;
3. the care or parenting of children;
4. bankruptcy and insolvency.
5. issues regarding non parties;

[Family Law Arbitration Financial Scheme Arbitration Rules 2018 (6th edition, effective 1 January 2018)]

Arbitration in Financial Disputes

Process

The Financial Scheme Arbitration Rules set out the process for parties wishing to arbitrate a dispute. They govern:-

1. Choosing and agreeing the appointment of an arbitrator [Articles 4.1 – 4.3.3 and 5.1–5.5].
2. Entering into an agreement to arbitrate and signing ARBIFS including the IFLA or arbitrator deciding that the dispute is not suitable for arbitration [Article 4.1–4.5].
3. The practical process by which the arbitrator will either, with the parties' agreement or in the absence of their agreement by the arbitrator's determination, fix "hearings" on paper or in person for "directions". These may mirror the process for example in a financial remedy claim or may be considerably truncated with extraneous parts which are considered unnecessary for the dispute of the particular issue removed and the process edited to suit the needs of the particular case [Articles 9 –12].
4. The powers of the arbitrator including regarding evidential matters and the appointment of experts [Articles 7–8]
5. The ultimate final hearing and making of the arbitral award including its binding nature and the obligation to apply to court for an order in those terms [Article 13].
6. The circumstances in which the arbitration will be terminated [Article 15]:
 - 6.1 death of a party
 - 6.2 lack of capacity of a party
 - 6.3 arbitrator considers dispute not suitable
 - 6.4 court declines to stay concurrent proceedings
 - 6.5 parties settle
 - 6.6 parties agreement to discontinue

6.7 arbitrator makes a final award

The interface between arbitration and the family courts is considered in two reported cases addressed below and in the Arbitration in the Family Court Practice Guidance of the President issued 23 November 2015.

This envisages:-

1. Where there are existing court proceedings that these will be stayed by submitting by a consent order dealt with on paper together with form ARB1 (now known as ARB1FS) signed by the parties to the court dealing with the proceedings [CPR Rule 62.3(2)].
2. And confirms that the court has an obligation, where parties agree, to enable non court dispute resolution to take place [FPR3.3(1) (b)].
3. It highlights that Section 9 [4] of the Arbitration Act 1996 requires that the court "shall grant a stay unless satisfied that the arbitration agreement is null and void inoperative, or incapable of being performed".

Consent Orders

The President's Practice Guidance confirms that to obtain an order reflecting the arbitral award the parties must lodge the following:-

1. A consent order following the standard orders including recitals identifying that the consent order is to give effect to an arbitration award.
2. A copy of the ARB1 (ARB1 FS) showing the agreement of the parties.
3. Forms A for dismissal purposes.
4. A copy of the arbitrator's award.
5. The D81 statement of information.

It should be noted that subsisting proceedings must be on foot that and must have reached the appropriate stage (for example decree nisi in divorce proceedings) in the normal way for the court to make a consent order.

Accordingly for arbitral awards made in cases falling outside of the family court's jurisdiction such as TOLATA or Inheritance (Provision for Family and Dependents) Act 1975 the consent order should be made to the appropriate County Court or High Court with jurisdiction to determine such applications.

The Law

There are two reported cases regarding financial remedy arbitration awards, post the introduction of the financial scheme *S v S* [2014] EWHC7 (Fam) and *DB v DLJ* [16] EWHC324 (Fam).

In *S v S* the President examines the authorities for approving arbitral awards drawing an analogy to the law on agreements, the parties having agreed to be bound by the arbitration award (by signing form ARB1).

The President refers to the development of the case law on agreements through *Edgar v Edgar* via *Crossley* and *Radmacher* which were of course respectively separation agreement and pre nuptial agreement cases and states at paragraph 19:

"in the absence of some very compelling counter veiling factor(s), the arbitral award should be determinative of the order the court makes".

Going on to say:

"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".

At paragraph 21 the President goes on to explore the role of the judge being asked to approve a consent order embodying the arbitral award:

"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 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".

Reference is also made in both this case and the President's Practice Guidance to the streamline process outlined by Coleridge J in *S v P* (Settlement by Collaborative Law Process) [2008] 2FLR 2040 which refers to the "urgent without prejudice notice" applications list. For those practising outside of London this is anticipated to be of rare practical relevance.

Resiling from the Arbitral Award

The President's Practice Guidance, *S v S* and *Mostyn J in DB v DLJ* address the appropriate process and potential basis upon which parties may seek to resile from an arbitral award.

Process

Paragraphs 15 to 18 of the Practice Guidance deal with the need to follow the "notice to show cause" procedure which provides for a truncated process including a likely, in most circumstances, abbreviated hearing and potentially where it is determined that there is no merit in the case of the party opposing the order, the court summarily making the order (*S v S* para 26).

Grounds for challenge

Under the Arbitration Act 1996:

1. S57 allows the arbitrator to correct his award to remove error or mistake or deal with a claim presented to the tribunal but not dealt with in the award;
2. S67 allows the challenging of the award as to its substantive jurisdiction;
3. Challenging an award on the ground of serious irregularity (S68)
4. an appeal to the court on a question of law arising out of an award made in the proceedings (S69).

In addition by S70 an applicant must have exhausted all available arbitral processes of appeal and review and any application or appeal must be brought within 28 days of the award.

In financial remedy proceedings the grounds of challenge remain as identified by *Mostyn J in DB v DLJ P*: mistake, fraud or supervening event. He took a more extensive view of the available grounds of challenge to that of the President in *S v S*, that in financial remedy proceedings where the jurisdiction of the court could not be ousted these remained available in addition to those grounds under the Arbitration Act. Paragraph 28 :

"If following an arbitral award evidence emerges which would , if the order had been made 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 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."

Accordingly *Mostyn J* determined whilst the court can interfere with arbitral awards in such cases, in this instance he would not do so as the wife's two arguments for either mistake or supervening event failed on their merit.

Enforcement

Once converted into a financial remedy order of the family court, financial remedy orders may be enforced in the usual ways.

In certain financial cases decided by arbitration for example, TOLATA awards, it may be possible to directly enforce the award with the court's permission in the same way as a judgment or order of the court to the same effect (S66 Arbitration Act 1996 and CPR Part 62 rules 62.17 and 62.18).

Neither enforcement applications or notice to show cause applications require a MIAM (paragraph 18 Practice Guidance)

Arbitration Claims

Defined as claims under the 1996 Act to determine:–

- a. whether there is a valid arbitration agreement;
- b. whether an arbitration tribunal is properly constituted;
- c. to declare that an award is not binding on a party and;
- d. any other application affecting
 - i. arbitration proceedings or
 - ii. an arbitration agreement

Such claims must be commenced in the Commercial Court at the same time seeking a transfer to the Family Division of the High Court (NB not the Family Court). (CPR Practice Direction 62 and the High Court and County Court (Allocation of Arbitration Proceedings) Order 1996 (SI 1996/32 15) as amended).

As highlighted at paragraph 22 of the Practice Guidance the most likely "arbitration claims" which may be sought during the course of ongoing financial remedy arbitration are the enforcement of peremptory orders of the arbitrator (Section 42 Arbitration Act 1996) and securing the attendance of witnesses (Section 43 of the Arbitration Act 1996). Applications in respect of either must also be issued in the Commercial Court with a simultaneous application for urgent transfer to the Family Division.

The President's Practice Guidance provides standards orders for each of these circumstances.

In proceedings which do not invoke the Family Court jurisdiction such as TOLATA claims then the transfer from the Commercial Court would be to the relevant County Court.

Children

Arbitrations in respect of children issues must:–

1. Be conducted in accordance with the Arbitration Act 1996;
2. In accordance with IFLA's Family Law Arbitration Children Scheme Arbitration Rules 2018 (2nd Edition effective 1 January 2018);
3. The substance of the dispute must be decided only in accordance with the law of England and Wales.

Children Scheme can cover disputes between people with parental responsibility or a sufficient interest in the children's welfare which relate to the exercise of parental responsibility or the present or future welfare of the child concerned(including the child's upbringing , present or future living arrangements , contact and education). This includes but it is not limited to Section 8 applications.

Children Scheme does not apply to (Article 2.2 Rules) :-

1. applications under inherent jurisdiction for the return of a child from a country not a signatory to the 1980 Hague Convention.
2. applications for summary return under the 1980 Hague Convention.
3. applications for permanent or temporary removal from the jurisdiction.
4. applications for the court to examine the question of custody after an order of a foreign court on non return to this jurisdiction.
5. applications for cross- border access.
6. any dispute relating to life changing or life threatening medical treatment.
7. disputes where a party lacks capacity.
8. disputes where the person with parental responsibility is a minor or an applicant is a minor or where the person with parental responsibility is not a party to the arbitration.
9. where there is a child who is a party to the proceedings or in the arbitrator's view should be separately represented in the arbitration.

NB. Safeguarding issues (Article 17) and the arbitrator's duty to communicate concerns to relevant agency/ies.

Process

This is currently governed solely by the Children Scheme Rules. As yet there is no practice guidance from the President for children issues nor is there any reported case law. Although see AI and MT below.

The arbitration is commenced in the same manner as financial arbitration in terms of the selection, agreement and appointment of a suitable arbitrator.

The parties sign ARBS1CS and in addition are obliged to complete a safeguarding questionnaire in which the parties are obliged to disclose safeguarding issues including the existence of any CAFCASS or local authority report.

The case of Re AI and MT [2013] EWHC 100 (Fam) was decided by Baker J prior to the introduction of arbitration for children cases and is an example of the circumstances in which a court may be willing to approve an order agreed through a religious arbitration (in this case the New York Beth Din).

What are the red lines?

1. Cases requiring injunctions (arbitrator no power to make).
2. Case requiring committal.
3. Urgent applications – in particular where an order is needed to enforce.
4. Anticipated lack of cooperation , including procedural – time and cost savings may be quickly lost if obliged to enforce procedural compliance through the courts (see arbitration claims and preemptory orders above).
5. Costs of arbitrator – if there is going to be any issue with regard to their payment – joint and several liability (ARB1FS)
6. Non party issues(unless the non parties agree to be bound by the arbitration)
7. In children cases, safeguarding issues.
8. In children cases where Practice Direction 12J is applicable including fact finding.
9. In children cases generally any with an international aspect or issue (expressly excluded from the remit of the arbitrator).
10. Those cases expressly excluded (see Article 2.2).

What will sway your case [towards arbitration]?

1. Speed and reduced cost due to adapting the process to suit the particular needs of the parties.
2. Greater control of process, location, timings.
3. Choice of tribunal/specialist arbitrator.
4. Continuity of tribunal.

5. Ability to tailor the process to the needs of the parties and their particular issues.
6. Consequent reduction in conflict.
7. Privacy and confidentiality.
8. Where a decision is needed on a discrete issue or an issue of principle i.e. where the collaborative or mediation is not appropriate because a decision cannot be imposed.
9. Where both parties have a degree of sophistication and understanding of the process (versus the alternatives) and its benefits as well as shortcomings.
10. Future disputes– variation of maintenance / PNAs
11. Where the other side can be persuaded to agree!

Summary

In effect the use of arbitration is as a private court which operates in parallel to the court system. It is subject to the same law as the court system but is capable of adaptation as a process to meet the bespoke needs of the parties in question.

Interface with the court system cannot be completely circumvented particularly regarding obtaining final enforceable orders.

Other resources

See Resolution The Review March/April 2018

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