

## **Why agreements to arbitrate family financial disputes should be treated comparably as 'qualifying nuptial agreements'<sup>1</sup>**

1. In an article published in 2008<sup>i</sup>, voicing support for family arbitration, Lord Justice Thorpe stated, '...the advantages of arbitration can only be assured if arbitration rests on a statutory foundation that prevents a party rejecting the arbitrator's award.'
2. Thorpe LJ's approach then developed a, as manifest in [Lykiardopulo v Lykiardopulo \[2010\] EWCA Civ 1315](#), [2011] 1 FLR 1427 where at [69] he observed:

'...I see no public policy objection to parties opting for an arbitrator or what is now known as "private judging." *Resolution* have presented a strong case for the introduction of binding arbitration in ancillary relief. The abstraction of cases from the family justice system, whether for alternative dispute resolution, collaborative practice or *non-binding arbitration* is generally to be welcomed.'  
[Our emphasis]

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<sup>1</sup> This Discussion Paper has been prepared for the Board of IFLA, for submission to the Law Commission, by Sir Peter Singer and Rhys Taylor (with helpful input from Sir Hugh Bennett, Tim Scott QC, Gavin Smith, David Hodson and Grant Howell).

It has been circulated in draft to all current accredited IFLA arbitrators, and the following have stated that they agree with its content and recommendations:

Lyn Ayrton, David Balcombe QC, Roger Bamber, Ann Baptist, Matthew Barry, Paul Beevers, Sir Hugh Bennett, Bruce Blair QC, Lisa Boileau, Andrzej Bojarski, Patrick Bowe, Andrew Breakwell, Duncan Brooks, Mark Chapman, Jonathan Cohen QC, Liz Cowell, Elissa Da Costa-Waldman, Jane Drew, Elizabeth Edwards, Judith Fordham, Nicholas Francis QC, Stephen Foster, Fiona Glenday, Jenny Goldstein, Oliver Gravell, HH Judge Victor Hall, Richard Harris, Michael Hayes, David Hodson, Grant Howell, Christine Hughes, Paul Infield, Peter Jones, Margaret Kelly, Peter Kent, Suzanne Kingston, Valentine Le Grice QC, Simon Lillington, Frances Lindsay, Nicholas Longford, Martin Loxley, Marian Lynch, Stephen Lyon, Katie McColgan, Lord Marks of Henley on Thames QC, Derek Marshall, Judith Mayhew, Diana Parker, Ian Pattinson, Kathryn Peat, James Pirrie, Christopher Pocock QC, Michelle Potts, Helen Proops, Pauline Purcell, Fiona Read, Tony Roe, David Rose, Mena Ruparel, Tim Scott QC, Nicola Shaw, Felicity Shedden, Nigel Shepherd, Dennis Sheridan, Sir Peter Singer, Gavin Smith, Judith Speed, Michael Sternberg QC, Marilyn Stowe, Margaret Styles, Jonathan Swift, Deborah Taylor, Rhys Taylor, Clare Thornton, Andrew Todd, David Walden-Smith, Claire Webb, Bradley Williams, Denise Woodward

3. The established judicial view of nuptial agreements (or, perhaps more accurately, its earlier manifestations) changed dramatically in 2010 with the case of [Radmacher v Granatino \[2010\] UKSC 42](#), [2011] 1 AC 534 (see especially paragraphs [2], [3], [75] and [78]). In particular at [78] it was stated:

'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 patronising 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.*'

4. In this Submission we invite attention to the possibility that the time is now ripe for statutory provision to be made, alongside the Law Commission's recommendations concerning nuptial agreements, for acceptance, encouragement and enforcement of the binding agreement into which disputant parties enter when they opt to submit financial issues to arbitration by accredited and regulated family law expert arbitrators, such as those who are Members of the Chartered Institute of Arbitrators and who offer their services under the IFLA Scheme.
5. We question whether such changes could only be achieved by legislation, or whether an acceptable and appropriate framework can be arrived at through amendments to secondary legislation and statutory instruments. This Paper gives consideration to each route.

### **The IFLA Scheme**

6. In February 2012 the Institute of Family Law Arbitrators ('IFLA') launched a Scheme which provides for the arbitration of financial family disputes. The detail was developed over a lengthy period of gestation, and the senior family judiciary were kept informed about the development of the proposal. The Scheme Rules and application form for IFLA arbitration ('Form ARB1') are accessible from the IFLA homepage at [ifla.org.uk](http://ifla.org.uk). Further detailed annotations to the rules and explanatory documents, such as a Procedural Summary, Checklist and an Introduction to the Arbitration Act 1996 ('AA96') are to be

found in the 'key information' section on the family arbitration resource site [FamilyArbitrator.com](http://FamilyArbitrator.com).

7. Article 3 of the Rules establishes as a fundamental tenet of an IFLA arbitration that it will be conducted in accordance with the law of England and Wales, thereby setting this Scheme apart from religious or other social organisations, such as the Beth Din or Sharia Councils. Moreover, arbitrators accredited to arbitrate in accordance with the Rules (some 60 at present but likely to be 120 or so by early 2013) are all experienced family practitioners who have qualified as MCI Arb arbitrators, and are thus subject to the Chartered Institute of Arbitrators' code of practice and disciplinary procedures.
8. The Scheme is limited to financial disputes between separating or separated couples (including civil partners), and encompasses both family disputes (including those arising in relation to inheritance) and civil disputes such as those commenced under the Trusts of Land and Appointment of Trustees Act 1996 ('TOLATA'). The scope and limits are established by Article 2.
9. Submission to an IFLA arbitration takes place, once a dispute has arisen, by the parties each signing the Form ARB1, where they describe and define the scope of the dispute they agree to arbitrate. Form ARB1, very importantly, contains certain important declarations that the parties have understood and been advised upon the step they are taking. These include paras 6.4 and 6.5:

6.4 We understand and agree that any award of the arbitrator appointed to determine this dispute will be final and binding on us, subject to the following:

(a) any challenge to the award by any available arbitral process of appeal or review or in accordance with the provisions of Part 1 of the Act;

(b) insofar as the subject matter of the award requires it to be embodied in a court order (see 6.5 below), any changes which the court making that order may require;

(c) insofar as the award provides for continuing payments to be made by one party to another, or to a child or children, a subsequent award or court order reviewing and varying or revoking the provision for continuing payments, and which supersedes an existing award;

6.5 If and so far as the subject matter of the award makes it necessary, we 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. (In this context, 'an appropriate court' means a court which has jurisdiction to make a substantive order in the same or similar terms as the award, whether on primary application or on transfer from another division of the court.) We understand that the court has a discretion as to whether, and in what terms, to make an order and we will take all reasonably necessary steps to see that such an order is made;

10. IFLA forward the ARB1 to a nominated arbitrator or, if they so wish, the parties may allow IFLA to nominate an arbitrator. (There has been discussion amongst interested professionals as to the circumstances in which an agreement to submit disputes to arbitration should they arise at a later date, contained for instance in a pre-nup, constitutes an 'arbitration clause' which the courts should uphold and enforce, and that separate situation is addressed in outline later in this Submission.)
11. The arbitration commences once the arbitrator having agreed terms with the parties sends them a formal letter of acceptance.

### **The relationship between an arbitral award and the court**

12. Section 1(c) of AA96 provides that 'in matters governed by [Part 1] the court shall not intervene except as provided by [Part 1].' Part 1 provides a legislative framework for the judicial *support* and judicial *supervision* of arbitrations.<sup>ii</sup>
13. Section 9 of AA96 provides for the court to stay its proceedings in the event that their subject matter is or becomes the subject of arbitration, 'unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed'. This stay provision is mandatory, and is the means whereby the court enforces the arbitration agreement in the event that either party seeks to bypass it.
14. Awards can be the subject of AA96 challenges under s.67 (want of jurisdiction), s.68 (serious irregularity leading to substantial injustice) and s.69 (appeal on a point of law).<sup>iii</sup> These are the court's main *supervisory* mechanisms.
15. On occasion an arbitree can also look to the court to support and indeed to reinforce their arbitrator's orders or directions, and for other ancillary *supportive* orders, such as the issue of a witness summons

for attendance at the arbitration<sup>iv</sup>. Thus the court process and the arbitration process are symbiotic.

16. Some awards in respect of TOLATA claims, making a declaration or quantifying beneficial interests in real property may be enforceable summarily under the s.66 procedures established for civil claims by the Arbitration Act, as if they were an order or judgment of the court. Even in that context, however, the need for the court to exercise a discretion can arise: for instance when the decision-maker must evaluate the checklist of factors set out in s.15 of that Act and choose between making or not an order for sale or for the taking of an account.

17. In the context of family financial disputes, most governing provisions (MCA 1973 s.25 being but the most obvious example) require the court to exercise its discretion before making an order, which at present is also the case when the order is sought by consent. Under the current legislative scheme summary enforcement under s.66 AA96 does not seem possible, and the court rightly retains both the power and the duty (when appropriate) to amend any order which the parties jointly invite the court to make to reflect and indeed to give effect to the award. This conceptual and legal matrix is given appropriate emphasis by Article 13.3 and 13.4 of the Rules, reflecting paras 6.4 and 6.5 of ARB1 (*supra*), thus:-

13.3 Once an award has been made, it will be final and binding on the parties, subject to the following:

(a) any challenge to the award by any available arbitral process of appeal or review or in accordance with the provisions of Part 1 of the Act;

(b) insofar as the subject matter of the award requires it to be embodied in a court order (see Art.13.4), any changes which the court making that order may require;

(c) insofar as the award provides for continuing payments to be made by one party to another, or to a child or children, a subsequent award or court order reviewing and varying or revoking the provision for continuing payments, and which supersedes an existing award.

13.4 If and so far as the subject matter of the award makes it necessary, the parties will apply to an appropriate court for an order in the same or similar terms as the award or the relevant part

of the award and will take all reasonably necessary steps to see that such an order is made. In this context, 'an appropriate court' means a court which has jurisdiction to make a substantive order in the same or similar terms as the award, whether on primary application or on transfer from another division of the court.

18. Such considerations however do beg questions, on the assumption that the court will retain the option, perhaps only in specified and maybe closely statutorily defined circumstances, to disqualify a nuptial agreement:

- Should there be provision to deal with any who seek to unshackle themselves from their prima facie binding commitment to accept an arbitral award, comparable to the defined 'let-outs' which we assume will empower the court (in the case of a pre- or post-nup) to absolve a party from being bound, although the norm may be to require parties to adhere to a qualifying nuptial agreement; and
- If there is to be no such legislative provision, how should family judges be guided to approach the task of approving or rejecting applications for orders sought to reflect arbitral awards, with or without opposition from one of the parties.

19. There may well be a wide range of views about what should be the wording of any 'get me out of this straitjacket' escape clauses from a pre-nup. We do not propose to contribute to that debate here, but assume that, in the arbitration agreement context, something along the lines of the court being persuaded that the arbitrator has failed to apply the relevant law and/or that the award is manifestly perverse might be the approach recommended.

20. In the absence of any primary legislative provision, however, guidance (perhaps by way of amendment to the FPR and PDs) would seem to be the obvious and preferred route.

21. The conversion of an arbitral award into a court order would be essential for certain types of order (for example a pension sharing or attachment order or a clean break award), and desirable in any event should future enforceability ever be in issue, for an arbitrator, in whatever species of dispute, has no powers to enforce the award.

22. If both parties are at one as to the form of consent order they seek, we hope that the decision (in relation to the collaborative law process) of Coleridge J in *S v P (Settlement by Collaborative Law Process)* [2008] 2

FLR 2040, providing for speedy listing of consent applications, might be taken a stage further to permit the application seeking such an order, accompanied by appropriate supporting documentation, to be placed before a judge as box-work. That would not of course derogate from the judge's ability to call for explanation, or correction of technical defect, or attendance by the parties and/or their legal advisers. The position would therefore be almost entirely analogous with an application for a consent order arrived at in the course of negotiation or mediation, where the parties simply apply on paper for an order.

23. If however one party is recalcitrant, then we anticipate that the other would issue an application for him or her to show cause why an order should not be made to reflect the arbitral award, with a summary hearing to follow.
24. There would seem to be no reason in principle, however why a contested application should not be dealt with on precisely the same basis as a consent application, and what that basis should be is the topic of the propositions which follow.

### **To what extent should the court scrutinise the merits of the award**

25. [Crossley v Crossley \[2007\] EWCA Civ 1491](#), [2008] 1 FLR 1467 involved an application to show cause why the terms agreed in a pre-nup should not, without full enquiry, be conclusive of the outcome of one spouse's application for more generous relief. Thorpe LJ registered his reaction in trenchant terms:

'If ever there is to be a paradigm case in which the court will look to the prenuptial agreement as not simply one of the peripheral factors in the case but as a factor of magnetic importance, it seems to me that this is just such a case.'

26. The decision of Eleanor King J in [S v S \[2008\] EWHC 2038 \(Fam\)](#), [2009] 1 FLR 254 takes a similar approach, holding [as summarised in the headnote] that:

'...in circumstances in which there was a factor of such magnetic importance that it must necessarily dominate the discretionary process, the vehicle of a notice to show cause could appropriately be considered as the proportionate and just route by which to determine the extent to which that factor should be determinative of the action; [and at [88] that:]



this is one of the category of cases identified by Thorpe LJ in *Crossley v Crossley* where there is a factor of such magnetic importance that it must necessarily dominate the discretionary process.'

27. We suggest that the 'magnetic factor' perspective provides an appropriate analogy and shows the way how applications (whether or not by consent) for orders to reflect an IFLA award should be viewed by the court: through the wrong end of a telescope rather than through a wide-angle lens. Such an approach respects the court's jurisdiction, but gives full force and effect to party autonomy by treating the parties' agreement to be bound by the award as the magnetic factor which should lead to a reflective order.
28. The essential scheme of the FPR 2010 is supportive of alternative dispute resolution. FPR 2010 rule 1.4(2)(e) places a duty on the court, if it considers that alternative dispute resolution appropriate, to 'encourag[e] the parties to use an alternative dispute resolution procedure' and to 'facilitat[e] the use of such procedure'. By Part 3, and in particular rule 3.2, the court is required to 'consider at every stage in proceedings, whether alternative dispute resolution is appropriate'. It would be manifestly inconsistent with the philosophy of the Rules for the court then to treat the outcome of an alternative dispute resolution, such as arbitration, as other than a final and binding result, albeit one subject to review by the judge in what (we hope and expect) would be rare and exceptional circumstances.
29. Clearly, awards outwith the broad ambit of an arbitrator's reasonable discretion could and should not survive such an application without amendment, an outcome which the IFLA rules clearly envisage. Although the procedure would properly be summary and robust, it would nevertheless adequately enable the court to intervene in a case where the family judge might conclude that the arbitrator has failed to apply the relevant law and/or that the award is manifestly perverse.
30. There are two noteworthy pre-*Radmacher* decisions which support the proposition that a properly conducted IFLA arbitration should be summarily endorsed by the court.
31. In [X v X \(Y and Z Intervening\) \[2001\] EWHC 11 \(Fam\)](#), [2002] 1 FLR 508 at [103], Munby J (as he then was) summarised the effect of a number of the post-[Edgar v Edgar](#) [1980] 1 WLR 1410 line of authorities. At [103] he said:



'The court should be slow to invade the contractual territory, for as a matter of general policy what the parties have themselves agreed should, unless on the face of it or in fact contrary to public policy or subject to some vitiating feature of the type referred to [in *Edgar*] by Ormrod LJ, be upheld by the courts.

The mere fact that one party might have done better by going to court is not of itself generally a ground for permitting that party to resile from what was agreed.

The court should bear in mind the undesirability of stirring up problems with parties who have come to an agreement: on the contrary the court should if possible, and consistent with its duty under s. 25, seek to bring about family peace and finality'

32. Then in [L v L \[2006\] EWHC 956 \(Fam\)](#), [2008] 1 FLR 26 Munby J (as he still then was) drew together citation from previous authorities in a passage at [68] to [73], very apposite for their commentary on the degree of assiduity a judge should deploy before approving (or indeed rejecting) a compromise or settlement. They deal with the court's function when invited to approve an ancillary relief consent order. Munby J commenced with some observations of Balcombe J (as he then was) in *Tommey v Tommey* [1983] Fam 15 at 21:

'A judge who is asked to make a consent order cannot be compelled to do so – he is no mere rubber stamp. If he thinks there are matters about which he needs to be more fully informed before he makes the order, he is entitled to make such enquiries and require such evidence to be put before him as he considers necessary. But, per contra, he is under no obligation to make enquiries or require evidence. *He is entitled to assume that parties of full age and capacity know what is in their own best interests, more especially when they are represented before him by counsel or solicitors. ...*'  
[Our emphasis, here and below]

33. Munby J then underscored observations of Waite LJ in [Pounds v Pounds](#) [1994] 1 FLR 775 at 779 that the effect of the statute and the rules:

'... is thus to confine the paternal function of the court when approving financial consent orders to a broad appraisal of the parties' financial circumstances as disclosed to it in summary form, without descent into the valley of detail. It is only if that survey puts the court on inquiry as to whether there are other circumstances into which it ought to probe more deeply that any further

investigation is required of the judge before approving the bargain that the spouses have made for themselves.'

34. Then by way of conclusion Munby J approved observations of Ward LJ in *Harris v Manahan* [1997] 1 FLR 205 at 213 that:

'The realities of life in the Principal Registry and the divorce county courts are that the district judges are under inevitable pressure and the system only works because the judges rely on the practitioners' help. I would, therefore, be very slow to condemn any judge for a failure to see that bad legal advice is being tendered to a party. *The statutory duty on the court cannot be ducked, but the court is entitled to assume that parties who are sui juris and who are represented by solicitors know what they want. Officious inquiry may uncover an injustice but it is more likely to disturb a delicate negotiation and produce the very costly litigation and the recrimination which conciliation is designed to avoid.*'

35. The dicta Munby J selected are to be understood and applied in their context. In *L v L* ancillary relief proceedings had ended in a consent order made by a District Judge sitting in the Principal Registry. The husband later repented of his generosity to his wife and sought to escape from the order to which he had consented. He failed. The scope for backsliding, resiling and indeed any space for repentance should, we suggest, be just as narrowly confined where what is in question is an attempt to wriggle out of the binding effect of an arbitral award.

36. Post-*Radmacher*, of particular note is the judgment of Charles J in [V v V](#) [2011] EWHC 3230 (Fam), [2012] 1 FLR 1315, at [36]:

'To my mind, this decision [*Radmacher*] 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 (...). 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.*'

### **Judicial support for IFLA arbitration**

37. Paragraph 62 of Ryder J's key report ***Judicial proposals for the modernisation of family justice***, published on 28 July 2012, has this, encouragingly, to say about the IFLA Scheme:

'The [Money and Property working group of the Family Justice Council] will also be asked to make recommendations about rule and practice direction changes to facilitate the determination of cases out of court; for example, where the parties have agreed to an arbitration conducted in accordance with the principles of English law by an accredited family arbitrator, including interim directions and whether special arrangements should be made for the expedition of the approval of consent orders to reflect arbitrated decisions.'

### **To summarise the current position...**

38. The position so far presented in this submission can be summarised thus:

- Whilst the jurisdiction of the court cannot be ousted, the current state of the law offers some considerable support for a 'magnetic factor', robust and summary approach to the support of IFLA awards by their conversion into court orders. The Family Procedure Rules are likely (per Ryder J) to be amended to make arbitral business more easily transacted in the family courts.
- The arguments for the enforcement of an award pursuant to an ARB1 rest heavily upon 'nuptial agreement' case law, which is itself about to be overtaken by Law Commission recommendations in respect of qualifying nuptial agreements.
- It would appear quite illogical to give statutory footing to the parties' autonomous pre-marriage choices about the **substantive** resolution of a dispute (via a pre-nup entered into years prior to the dispute arising) without also respecting an autonomous election made by the parties as to **their preferred procedural mode** for resolution of an actual dispute, an election made at a time when the dispute is present rather than merely potential, and the issues can be clearly defined.
- The paternalistic argument in family cases does not, an arbitrator would suggest, outweigh the advantages of placing post-dispute ARB1 arbitrations on a statutory footing.

- Further, whilst civil proceedings such as TOLATA proceedings fall within the scope of the scheme, awards made within that context are sometimes also subject to the paternal jurisdiction of the court and therefore cannot all be summarily enforced under s.66 AA96 in any event.
- A note on the current position in relation to the allocation of applications arising from family arbitrations is, for completeness, appended<sup>v</sup>.

**A proposal for post-dispute arbitration agreements to be considered 'qualifying nuptial agreements'.**

39. It is understood that the Law Commission's broad proposal may be that nuptial agreements, to earn 'qualifying' status as 'Q-nups' should satisfy a number of requirements
40. For enforceability as a Q-nup, and thus to remove or limit the court's supervisory discretion it would need to be established that before the agreement (the Form ARB1, in the context of an IFLA process) is signed and becomes binding (i) legal advice has been given to the parties (in this context as to the pros and cons of the process and concerning the binding nature of the submission); and (ii) mutual material disclosure has been effected.
41. A further pre-condition may be that the process has regard as an objective to the satisfaction (so far as practicable) of the parties' (and no doubt their minor children's) needs: that of course in the case of an IFLA arbitration might well be satisfied without more by the requirement that the arbitrator will apply the law of England and Wales.
42. We therefore invite the Law Commission to consider including the category of post-dispute agreements for family arbitration in any proposal for Q-nups.
43. An approach might be by statute to specify what additional minimum pre-conditions would need to be demonstrated before an arbitral agreement arising out of a family dispute could be treated as a Q-nup. The conditions would include that the arbitration agreement should only have 'qualifying' force if it provides that:

- a) both parties shall have provided *material* disclosure of their financial circumstances to each other and to the prospective arbitrator (in the event that the Law Commission wishes to further explore ideas within this paper, it is suggested that it would be productive for there to be further direct discussion with representatives of IFLA to define the precise meaning of 'material' in this context);
  - b) the arbitration will be conducted in accordance with published rules upon which the parties to the arbitration have received legal advice before freely accepting to be bound thereby;
  - c) the arbitration will be conducted by a suitably qualified and regulated arbitrator;
  - d) the law of England and Wales will be the only law applicable by the arbitrator, and thus that the award will take account of the needs of the parties as would a court;
44. It may be observed that the IFLA Scheme in its present form requires the parties to describe the nature of their dispute in summary form, but does not require pre-agreement disclosure. Were the law in respect of qualifying nuptial agreements to be amended as envisaged, then it is recognised that amendments to the current Rules would be needed to 'qualify' the IFLA Scheme.
45. If a 'qualifying' family arbitration agreement can thus be brought within the scope of arrangements for the pre- and post-nup agreements hitherto envisaged as required for 'qualifying' status this would have the beneficial effect of providing a, family specific, statutory basis for the enforcement of the agreement by way of an automatic stay of any competing legal proceedings, in addition to arguments pursuant to s.9 of the Arbitration Act 1996 and/or the broad powers of conventional but discretionary case management under the FPR.
46. If a post-dispute arbitration agreement failed to meet the requirements of a Q-nup, it is suggested that this would not detract from any arguments which the parties may wish to advance under the Arbitration Act 1996 or pursuant to the ADR-supportive provisions of the Family Procedure Rules. The suggested treatment of a post-dispute arbitration agreement as a Q-nup, in defined circumstances,

would be *in addition* to the other mechanisms available to enforce the arbitration agreement.

47. It is suggested that parties wishing to secure 'special' Q-nup status for their arbitration agreement will be incentivised to provide the relevant pre-agreement material disclosure. Those who do not wish to make pre-agreement material disclosure (or those who say they are going to do so, and then mislead by failing to give material disclosure) are free to enter into family arbitration but would simply not be able to seek enforcement of the agreement as a Q-nup.

48. It should be noted in this context that statutory family arbitration schemes are in force in a number of other jurisdictions such as Australia, certain Provinces of Canada and, nearest home, Scotland. The Scottish Scheme is explained at [www.flagscotland.com](http://www.flagscotland.com)

### **Pre-Dispute Agreements**

49. We also invite the Law Commission to consider the status of arbitration clauses in nuptial agreements, entered into by spouses (or prospective spouses, or civil partners) before the breakdown of their relationship. Anecdotal evidence suggests that agreements which commit the parties to arbitration are now being included in pre- and post-nuptial agreements. The advantages of arbitration over court procedures – in particular speed, confidentiality and the ability to choose the tribunal – are attractive to some people. As family arbitration comes to be better known the prevalence of such pre-election clauses specifying arbitration as the parties' preferred process option in case of dispute can be expected to increase.

50. If the substantive aspects of nuptial agreements are to become enforceable at least in some circumstances, it seems common sense that an arbitration clause in such an agreement should in parallel circumstances be equally enforceable. Some family arbitrators argue that an arbitration clause is enforceable under the present law, in the sense that a claim for financial remedies brought in defiance of such a clause in a nuptial agreement could be stayed pursuant to s.9 AA96.

51. The argument in favour of this approach is that an arbitration clause does not oust the jurisdiction of the family court, but only suspends the operation of that jurisdiction during the arbitral process to the extent that the parties have agreed this. However unless and until

that argument is tested in the courts the legal position is in doubt. We suggest that such doubts should be resolved as part of the Law Commission's overall recommendations.

### **Other potential legislative developments**

52. Baroness Cox has introduced a Private Members' Bill in the House of Lords, entitled The Arbitration and Mediation Services (Equality) Bill. One amongst its aims is to control and indeed criminalise what purport to be binding family law arbitrations where the law applied is not that of England and Wales, but some other (and in many cases a religious and therefore personal) law. In some circumstances the pressures imposed and the outcome 'decided' by such processes are gender-discriminatory. Clause 4 of the draft Bill would amend the Arbitration Act 1996 to make it a criminal offence to seek to arbitrate a family or criminal law matter.

53. The Bill's Second Reading was on 19 October 2012. During the debate Baroness Cox explicitly accepted that the Bill should be amended to remove provisions that would outlaw all types of family arbitration. The Baroness announced:<sup>vi</sup>

'Let me here acknowledge valid concerns raised by the noble Lord, Lord Marks, and others, and say that I accept the need to amend the Bill to reflect recent developments in relation to family law arbitration. I intend to remove references to family law in the new criminal offence created by the Bill. Family law arbitration will therefore continue to be permitted. However, the non-discrimination provisions of the Bill will apply. Therefore, this will not be an obstacle to mainstream family law arbitration, but will reinforce the need to address sex discrimination in religious arbitration.'

54. The Bill does not, at this stage, enjoy government support. It remains to be seen whether it will receive the necessary further time for consideration at the Committee Stage, if it is to have any prospect of reaching the statute book.



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<sup>i</sup> Family Law [2008] 26

<sup>ii</sup> Described in detail by Karen Gough QC, Past President of the Chartered Institute of Arbitrators in her 2006 paper "Judicial Supervision and Support for Arbitration" at [http://www.39essex.co.uk/resources/article\\_listing.php?id=484](http://www.39essex.co.uk/resources/article_listing.php?id=484)

<sup>iii</sup> For an up to date summary of case law relating to Arbitration Act challenges, please see the 3-part article by Margaret Tofalides and Clare Arthurs in [2012] New Law Journal 9 March, 30 March and 17 August.

<sup>iv</sup> See ss. 42 to 45 of AA96

<sup>v</sup> **A (rather lengthy) Note on allocation and procedure**

This Note is intended as a guide to the allocation of applications to the court that arise out of or relate to IFLA Scheme arbitrations. The appropriate procedure to adopt will depend upon whether an application is being made in 'Arbitration Act' proceedings or in the context of proceedings for family (or analogous) financial relief, or for an order in TOLATA proceedings. As noted below, Rule changes to simplify and streamline the position are anticipated.

**(a) 'Arbitration claims' under the Arbitration Act**

[CPR Part 62](#) (and its accompanying [Practice Direction 62](#)) govern procedure in relation to 'arbitration claims' made in arbitration proceedings under AA96.

Rule 62.2 ('Interpretation') is in these terms:

- (1) In this Section of this Part 'arbitration claim' means –
  - (a) any application to the court under the 1996 Act;
  - (b) a claim to determine –
    - (i) whether there is a valid arbitration agreement;
    - (ii) whether an arbitration tribunal is properly constituted; or
 what matters have been submitted to arbitration in accordance with an arbitration agreement;
  - (c) a claim to declare that an award by an arbitral tribunal is not binding on a party; and
  - (d) any other application affecting –
    - (i) arbitration proceedings (whether started or not); or
    - (ii) an arbitration agreement.

So far as enforcement is concerned, in commercial cases an application under s.66 is the standard route whereby arbitral awards are summarily enforced, with the leave of the court, 'in the same manner as a judgment or order of the court to the same effect'. As 'arbitration claims' include 'any application to the court under the 1996 Act', a s.66 application is subject to the Part 62 procedure.

It will however rarely if ever be appropriate or indeed possible to make an application under s.66 seeking the summary enforcement of a family financial arbitral award, because that provision does not enable the court,

without more, to convert an arbitral award in a family financial case into an order within the scope of (for instance, and most obviously) the Matrimonial Causes Act 1973: say for a clean break, a pension sharing or attachment order, or indeed an order for continuing maintenance provision. But nothing in s.66, nor indeed in the other relevant provisions of AA96, **requires** that an application to obtain a court order reflecting an arbitral award be made under s.66. The (currently circuitous) path round this apparent obstacle is described in section (c) below.)

It is therefore suggested that the only circumstances in which the 'arbitration claims' procedure set out in CPR Part 62 applies to family arbitrations are when the following powers under AA96 are invoked: to seek orders of the court in support of the arbitral process (e.g. ss.42 to 45); or to challenge the arbitration under ss.67 to 73 of the Act; or to apply to the court for any of the other forms of relief enumerated in rule 62.2(1) (there are a number of avenues, such as a s.24 application to remove an arbitrator, which in practice are unlikely often to be trodden).

The consequence is that, until new rules are introduced, a combination of section 105 of the Arbitration Act 1996, the Allocation Rules made thereunder (The High Court and County Courts (Allocation of Arbitration Proceedings) Order 1996, SI 1996 No. 3215, as amended) ('the 1996 Order'), and (most accessibly) [CPR rule 62.3](#) and para 2 of the [Practice Direction to Part 62](#) (as to which see immediately below) will likely result in an Arbitration Claim Form N8 (available at [this link](#)) coming before a tribunal wholly unused to family business (but very likely well versed in arbitration law and practice): for the detail consult the White Book, volume 2. The operative provisions of para 2 of the PD so far as applicable to the subject-matter of IFLA Scheme disputes are that the Form N8 'may be issued at the courts set out in column 1 of the table below and will be entered in the list set out against that court in column 2 ... .

<i>Court</i>	<i>List</i>
Admiralty and Commercial Registry at the Royal Courts of Justice, London	Commercial list
Technology and Construction Court Registry, St. Dunstan's House, London	TCC list
District Registry of the High Court (where mercantile court established)	Mercantile list
District Registry of the High Court (where arbitration claim form marked 'Technology and Construction Court' in top right hand corner)	TCC list

In the meantime, the best course will be to seek transfer to the Family Division, with a direction that the application be referred to a District Judge of the Principal Registry for determination or directions. Such transfer is envisaged by para 6 of the 1996 Order, which reads:

'Nothing in this Order shall prevent the judge in charge of the commercial list (within the meaning of section 62(3) of the Senior Courts Act 1981) from transferring proceedings under the Act to another list, court or Division of the High Court to which he has power to transfer

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proceedings and, where such an order is made, the proceedings may be taken in that list, court or Division as the case may be.'

That transfer process is indeed what article 13.4 of the IFLA Scheme Rules envisages when describing 'an appropriate court' as a court 'which has jurisdiction to make a substantive order in the same or similar terms as the award, whether on primary application or on transfer from another division of the court'.

It is suggested that the present procedural position is akin to the Family Division's jurisdiction when considering bankruptcy matters. Whilst a Judge of the Division may determine such a matter, the FD Judge may only do so once the case has been properly transferred by the bankruptcy court (see [Arif v Zar & Anor \[2012\] EWCA Civ 986](#)).

***(b) Applications to stay court proceedings in favour of arbitral proceedings***

Stay proceedings, although falling within the meaning of 'arbitration claim', are in a separate category. Section 9, AA96, a mandatory provision, provides for the stay of legal proceedings on application 'to the court in which the proceedings have been brought.' CPR Part 62.3(2) reiterates that such an application 'must be made by application notice to the court dealing with those proceedings'. Section 9(4) provides that on such an application 'the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed'. In agreeing to the IFLA Scheme Rules (and indeed explicitly in their Form ARB1) the parties agree that they will not, while the arbitration is continuing, commence an application to the court (nor continue any subsisting application) relating to the same subject matter, except in connection with and in support of the arbitration or to seek relief that is not available in the arbitration (as, for instance, via ss.42 to 45, AA96: see next section); and that they will apply for or consent to a stay of any existing court proceedings, as necessary (Form ARB1, para 6.2).

An alternative view is that a stay in such circumstances can and should ordinarily be ordered by the court pursuant to its case management powers and consistent with the philosophy underlying the FPR in relation to alternative dispute resolution procedures: see rr. 3.1 to 3.3.

But what in any event is clear is that, in a case where a family arbitration is being commenced, any application for a stay of extant proceedings for parallel relief must be made to the court in which those proceedings have been commenced.

***(c) Applications to the court for an order to reflect or give effect to an arbitral award (not therefore a Part 62 'arbitration claim'): the current position***

In the family context, applications to the court will routinely need to be made to reflect, or to give effect to, or as a precursor to the enforcement of an arbitral award. These most commonly will be made in tandem with divorce proceedings (but could also be in TOLATA or other proceedings), where the application will either be made in existing (stayed) proceedings, or to conclude with a consent order an application for financial relief launched for that purpose. So article 13.4 of the IFLA Rules provides:

'If and so far as the subject matter of the award makes it necessary, the parties will apply to an appropriate court for an order in the same or similar terms as the award or the relevant part of the award and will take all reasonably necessary steps to see that such an order is

made. In this context, 'an appropriate court' means a court which has jurisdiction to make a substantive order in the same or similar terms as the award, whether on primary application or on transfer from another division of the court.'

'The court' in both those (consent or disputed) situations will often be the PRFD or a divorce county court.

Thus it seems to the authors that in the context of family financial disputes (and taking the Matrimonial Causes Act as the typical contextual example) applications for reflective orders should be made, if by consent, in the conventional manner; and if for any reason opposed (other than via an Arbitration Act challenge) will most conveniently and appropriately be brought before the court by way of a 'show cause' application brought against the dissenting party.

***(d) Facilitating the determination of cases out of court by arbitration conducted in accordance with the principles of English law by an accredited family arbitrator: the future***

For the future, para 62 of **The Family Justice Modernisation Programme: Final report** recommends that the Money and Property working group of the Family Justice Council

'will also be asked to make recommendations about rule and practice direction changes to facilitate the determination of cases out of court; for example, where the parties have agreed to an arbitration conducted in accordance with the principles of English law by an accredited family arbitrator, including interim directions and whether special arrangements should be made for the expedition of the approval of consent orders to reflect arbitrated decisions.'

<sup>vi</sup> Column 1684, 3<sup>rd</sup> full para at <http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/121019-0001.htm#12101923000438>