

**FAMILY LAW ARBITRATION SCHEME**

**ARBITRATION RULES (2015, 4th EDITION, EFFECTIVE 23 MARCH 2015)**

*With commentary supplied by*  **FamilyArbitrator**

**Article 1 – Introductory**

- 1.1 The Family Law Arbitration Scheme ('the Scheme') is a scheme under which financial or property disputes with a family background may be resolved by arbitration.
- 1.2 The Scheme is administered and run by the Institute of Family Law Arbitrators Limited ('IFLA'), a company limited by guarantee whose members are the Chartered Institute of Arbitrators ('CI Arb'), Resolution and the Family Law Bar Association ('FLBA').
- 1.3 Disputes referred to the Scheme will be arbitrated in accordance with:
  - (a) the provisions of the Arbitration Act 1996 ('the Act'), both mandatory and non-mandatory;
  - (b) these Rules, to the extent that they exclude, replace or modify the non-mandatory provisions of the Act; and
  - (c) the agreement of the parties, to the extent that that excludes, replaces or modifies the non-mandatory provisions of the Act or these Rules; except that the parties may not agree to exclude, replace or modify Art.3 (Applicable Law).
- 1.4 The parties may not amend or modify these Rules or any procedure under them after the appointment of an arbitrator unless the arbitrator agrees to such amendment or modification; and may not amend or modify Art.3 (Applicable Law) in any event.
- 1.5 Expressions used in these Rules which are also used in the Act have the same meaning as they do in the Act and any reference to a section number means the section of the Act so numbered, unless otherwise indicated.

**FamilyArbitrator** *Commentary:*

**What is arbitration?**

Arbitration is a form of out-of-court dispute resolution. The parties enter into an agreement under which they appoint a suitably qualified and independent person to adjudicate their dispute and agree to be bound by his or her adjudication. For an Overview of family arbitration [click here](#).

### **The IFLA family arbitration scheme**

The family arbitration scheme was established by the Institute of Family Law Arbitrators (IFLA) ([www.ifla.org.uk](http://www.ifla.org.uk)) and took effect on 22 February 2012. The scheme is governed by the Arbitration Act 1996 ('the Act') and the IFLA Arbitration Rules ('the Rules'). The version of the Rules currently in force is the fourth, 2015 edition, which took effect on 23 March 2015.

A key feature of arbitration is the principle of the parties' autonomy. Section 1(b) of the Act states that 'the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest'. This feature of arbitration was highlighted in the leading case of [S v S \(financial remedies: arbitral award\)](#) [2014] EWHC 7 (Fam), [2014] 1 FLR 1257 at [7] to [15].

Thus, the Act contains mandatory provisions out of which the parties cannot contract (set out in Schedule 1) and non-mandatory provisions, which will apply unless the parties choose to agree something different. The mandatory provisions of the Act are highlighted for ease of reference in the version of the Act viewable [here](#).

Consistent with this principle, by art 1.3 the parties have considerable freedom to exclude, replace or modify the non-mandatory provisions of the Act and of the Rules. The parties may only do so following appointment of the arbitrator, however, with his or her agreement (art 1.4).

The only mandatory provision of the Rules is art 3 (Applicable law), which states that the arbitrator will decide the substance of the dispute only in accordance with the law of England and Wales.

### **The Arbitration Act 1996**

The Act is a well-drafted, user-friendly consolidating statute which draws together best arbitration practice in commercial and civil disputes. The only one of the three Parts of the Act that is likely to be of interest to family lawyers is Part I (Arbitration pursuant to an arbitration agreement).

### **Key provisions of the Act**

- s.1 sets out the general principles of the Act. It provides that the Act is founded on the following principles:-
  - the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;
  - the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;
  - in matters governed by this Part the court should not intervene except as provided by this Part.

- s.3 defines the meaning of the seat of the arbitration. The seat is the juridical basis for the determination of the arbitration. The seat of an IFLA arbitration must be a place in England and Wales.
- s.4 defines the mandatory and non-mandatory provisions of the Act (by cross reference to Schedule 1).
- s.33 contains the duty of the arbitrator who shall:-
  - act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and
  - adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.
- s.34 confers wide case management powers on the arbitrator, subject to the parties agreeing otherwise (although note that by Art 1.4 the parties may not amend any procedure after the appointment of an arbitrator unless the arbitrator agrees to such amendment).
- s.40 places a duty on the parties to the arbitration “to do all things necessary for the proper and expeditious conduct of the arbitral proceedings” which includes:-
  - complying without delay with any determination of the tribunal as to procedural or evidential matters, or with any order or directions of the tribunal; and
  - where appropriate, taking without delay any necessary steps to obtain a decision of the court on a preliminary question of jurisdiction or law (see ss. 32 and 45).
- s.41 describes the powers of the arbitrator in the event of a party’s failure to do something necessary for the proper and expeditious conduct of the arbitration.
- ss.42 to 45 set out the support that the arbitrator can look to receive from the court.
- ss.66 to 71 set out the powers of the court in relation to an award, including enforcement and the rights of challenge which may be entertained:-
  - Under s.67 a challenge can be made to the award on the basis that the arbitrator lacks jurisdiction. Given the clarity of the ARB1, that appears unlikely to arise in most post-separation appointments under the IFLA scheme.
  - Under s.68 a challenge can be made for a “serious irregularity”, which includes the arbitrator failing to comply with his duty under s.33 of the Act, a failure to conduct the proceedings in accordance with the procedure agreed by the parties and failing to deal with the issues put by the parties.
  - Under s.69 there is an appeal on a point of law, unless that is expressly excluded by the parties.

### **The IFLA Arbitration Rules**

Family lawyers have worked in conjunction with experienced commercial arbitrators to devise a set of procedural rules suited to family arbitration. By the establishment of default procedures

practitioners are saved the trouble of deciding which of the non-mandatory provisions of the Act to apply. The parties' ability to adapt those procedures to the circumstances of their dispute (after appointment of the arbitrator, with his or her consent: art 1.4) is ensured to a large degree by the provisions of art 1.3.

## **Article 2 – Scope of the Scheme**

2.1 The Scheme covers financial and property disputes arising from:

- (a) marriage and its breakdown (including financial provision on divorce, judicial separation or nullity);
- (b) civil partnership and its breakdown;
- (c) co-habitation and the ending of co-habitation;
- (d) parenting or those sharing parental responsibility;
- (e) provision for dependants from the estate of the deceased.

2.2 The Scheme covers (but is not limited to) claims which would come within the following statutes:

- (a) the Married Women's Property Act 1882, s.17;
- (b) the Matrimonial Causes Act 1973, Part II;
- (c) the Inheritance (Provision for Family and Dependants) Act 1975;
- (d) the Matrimonial and Family Proceedings Act 1984, s.12 (financial relief after overseas divorce);
- (e) the Children Act 1989, Sched.1;
- (f) the Trusts of Land and Appointment of Trustees Act 1996;
- (g) the Civil Partnership Act 2004 Sched.5, or Sched.7, Part 1, para.2 (financial relief after overseas dissolution).

2.3 The Scheme does not apply to disputes directly concerning:

- (a) the liberty of individuals;
- (b) the status either of individuals or of their relationship;
- (c) the care or parenting of children;

- (d) bankruptcy or insolvency;
- (e) any person or organisation which is not a party to the arbitration.

**FamilyArbitrator** *Commentary:*

The scope of art 2.1 is very wide, embracing all forms of financial and property disputes arising from relationship breakdown in a family context. The essential question here is: is this a financial or property dispute which could be heard in the Family Court? If so, it will fall within the scope of the Scheme. It is possible that other related issues such as a partnership issue may also be brought within the ambit of the arbitration. Whether a dispute is suitable for arbitration will be decided by the arbitrator or IFLA, after considering the Form ARB1 and any representations from the parties: see art 4.4. See also art 7.2 below for the arbitrator's power to terminate an arbitration once commenced.

**Article 3 – Applicable law**

- 3. The arbitrator will decide the substance of the dispute only in accordance with the law of England and Wales. The arbitrator may have regard to, and admit evidence of, the law of another country insofar as, and in the same way as, a Judge exercising the jurisdiction of the High Court would do so.

**FamilyArbitrator** *Commentary:*

This is the only provision of the Rules that the parties may not exclude, replace or modify. An arbitration which applies the law of any country other than England and Wales will not be an arbitration under the scheme. This fundamental rule also sets IFLA arbitrations apart from arbitrations carried out by religious bodies (such as Sharia councils), which apply their own law. See [\*S v S \(financial remedies: arbitral award\)\*](#) [2014] EWHC 7 (Fam), [2014] 1 FLR 1257 at [27] and the discussion (in relation to a 'non-binding' arbitration by the New York Beth Din) in *AI v MT* [2013] EWHC 100 (Fam), [2013] 2 FLR 371.

**Article 4 – Starting the arbitration**

- 4.1 The parties may refer a dispute to arbitration under the Scheme by making an agreement to arbitrate in Form ARB1, signed by both parties or their legal representatives, and submitting it to IFLA.
- 4.2 IFLA has set up a Panel of arbitrators who are experienced family law professionals, are Members of the Chartered Institute of Arbitrators and have received specific training in arbitrating family disputes ('the Panel').
  - 4.3.1 The parties may agree to nominate a particular arbitrator from the Panel; and may, if they are agreed, approach a particular arbitrator directly. Any arbitrator directly approached must refer the approach to IFLA before accepting appointment in order to facilitate the completion of Form ARB1 before the arbitration commences. IFLA will offer the

- appointment to the agreed arbitrator. If the appointment is not accepted by their first choice of arbitrator the parties may, if they agree, make a second or subsequent choice. Otherwise, it will be offered to another member of the Panel chosen by IFLA in accordance with paragraph 4.3.3 below.
- 4.3.2 Alternatively, the parties may agree on a shortlist of arbitrators from the Panel any one of whom would be acceptable to them, and may ask IFLA to select one of the arbitrators on the shortlist without reference to any criteria. In this case, IFLA will offer the appointment to one of the shortlisted arbitrators chosen at random. If the appointment is not accepted by the first choice of arbitrator, IFLA will offer the appointment to a second or subsequent shortlisted arbitrator, similarly chosen at random. If none of the shortlisted arbitrators accepts the appointment, IFLA will inform the parties and invite them to submit further agreed names.
- 4.3.3 In all other cases (including if so requested by the parties) IFLA will offer the appointment to a sole arbitrator from the Panel whom it considers appropriate having regard to the nature of the dispute; any preferences expressed by the parties as to the qualifications, areas of experience, expertise or other attributes of the arbitrator; any preference expressed by the parties as to the geographical location of the arbitration; and any other relevant circumstances.
- 4.4 If, after considering Form ARB1 and any representations from the parties, either IFLA or the arbitrator considers that the dispute is not suitable for arbitration under the Scheme, then the parties will be so advised and their reference of the matter to the Scheme will be treated as withdrawn.
- 4.5 The arbitration will be regarded as commenced when the arbitrator communicates to the parties his or her acceptance of the appointment.
- 4.6 Except as provided in Art.4.7, a party to an arbitration under this Scheme may be represented in the proceedings by a lawyer or other person chosen by him; or, if he is acting in person, may receive the advice and assistance of a McKenzie Friend.
- 4.7 If at any time the arbitrator forms the view that the participation of a non-lawyer representative or the assistance given by a McKenzie Friend unreasonably impedes or is likely to impede the conduct of the arbitral proceedings or the administration of justice, he may direct that the relevant party should not continue to be so represented or assisted, as the case may be, and will state his reasons in writing.

**FamilyArbitrator** *Commentary:*

Whilst it is perfectly permissible to approach an arbitrator or his / her clerk or office directly in order to canvass availability, the application for the appointment of an arbitrator in Form ARB1 (the current version of which may be completed on screen [here](#)) must be sent to IFLA (c/o Resolution, PO Box 302, Orpington, Kent, BR6 8QX; tel: 01689 820272; email: [info@ifla.org.uk](mailto:info@ifla.org.uk)), the scheme administrators. There is no reason, however, why the parties should not copy the ARB1 simultaneously to the proposed arbitrator. On receipt of the ARB1, IFLA

makes formal contact with the arbitrator to establish whether he/she wishes to accept the appointment.

Please note that if parties wish to appoint an arbitrator known to them, it is inadvisable to contact him / her to discuss the case, as the tribunal must be, and be seen to be, independent. Parties interested in appointing a specific arbitrator and wishing to make contact to canvass issues about suitability and/or administration are strongly advised to do so by e-mail, with both parties being copied into all communications.

In many cases the parties will be able to agree the identity of the arbitrator to be approached. If they are unable to agree, a number of ways of appointing the arbitrator are suggested.

First, the parties can jointly approach an experienced and well regarded arbitrator to make the nomination for them, based on their stated requirements such as specific expertise, seniority and geographical location.

Alternatively, they can simultaneously exchange the names of, say, four arbitrators, ranked in order of preference. If one name is common to both, it is selected. If there is more than one name in common, they score in order of their ranking.

A third option is for one party to serve a list of say five names on the other party; that party deletes one; the first party then deletes one, and so on until one name is left.

There are also two options involving selection by IFLA. A 2015 Rule change enables the parties to submit to IFLA a shortlist of prospective arbitrators (all of whom must be panel members), of whom IFLA will select one at random (art 4.3.2).

It is also possible, as before, to request IFLA to nominate an arbitrator from its panel (art 4.3.3), in accordance with its [Nomination Protocol](#). However, the potential problem here is that unless the parties stipulate specific requirements, IFLA has to ensure that one arbitrator does not receive more arbitration nominations than another. Such a system, while no doubt resulting in a fair distribution of arbitration work, does not necessarily result in the nomination of the best arbitrator for the dispute in question.

For a wider discussion of this topic see [Choosing your arbitrator](#).

Profiles of the members of FamilyArbitrator may be viewed [here](#) and those of other IFLA panel members [here](#).

Note that the arbitration does not commence until the parties and the arbitrator have signed the arbitrator's terms and conditions (art 4.5). Many arbitrators, the members of FamilyArbitrator included, recommend a preliminary, without commitment meeting in advance of the formal appointment of the arbitrator. The purpose of such a meeting is to give the parties the opportunity to meet the arbitrator, and to enable him / her to be fully satisfied that the parties understand what the arbitration process involves and the commitment that it entails, and to deal with any preliminary queries that may arise.

It is anticipated that in most arbitrations both parties will be legally represented. However, art 4.6 provides for representation by a person other than a lawyer and for assistance by a McKenzie

friend, subject in each case to a decision by the arbitrator that the party should not be so represented or assisted, for the reasons set out in art 4.7.

## Article 5 – Arbitrator’s appointment

- 5.1 Before accepting the appointment or as soon as the relevant facts are known, the arbitrator will disclose to the parties any actual or potential conflict of interest or any matter that might give rise to justifiable doubts as to his or her impartiality.
- 5.2 In the event of such disclosure, the parties, or either of them (as appropriate), may waive any objection to the arbitrator continuing to act, in which case the arbitrator may commence or continue with the arbitration. If an objection is maintained, the arbitrator will decide whether to continue to act, subject to any agreement by the parties to revoke his or her authority or intervention by the court.
- 5.3 After accepting appointment, the arbitrator may not subsequently act in relation to the same dispute in a different capacity.
- 5.4 If the arbitrator ceases to hold office through revocation of his or her authority, removal by the court, resignation or death, or is otherwise unable, or refuses, to act, and either party or the existing arbitrator so requests, IFLA may appoint a replacement arbitrator from the Panel.
- 5.5 The replacement arbitrator may determine whether and if so to what extent the previous proceedings should stand.

### FamilyArbitrator Commentary:

The well-known test for judicial bias is: “*The question is whether the fair minded and informed observer, having considered the facts, would conclude there was a real possibility that the tribunal was biased.*” See, for example, *Porter v Magill* [2002] 2 AC 357 at [102] – [103]. Note that authorities prior to *Porter* formulated the test differently, namely, was there a ‘real danger of bias’. Those authorities, including the leading case of *Locabail (LJ) Ltd v Bayfield Properties Ltd* [2000] QB 451 (see especially para [25] for a commonly quoted passage) thus need to be read in light of the refinement to the test made in *Porter*.

The attributes of the fair minded informed observer are described further in *Gillies v Secretary of State for Work and Pensions* [2006] 1 WLR 781 at [39] and *Helow v Secretary of State for the Home Department* [2008] 1 WLR 2416 at [1] – [3]. Being a member of the same chambers as a fee paid judge is not indicative of bias (*Birmingham City Council v Yardley* (2004) Times, 9 December, where the recorder had informed the parties of this fact at the outset).

However, if members of the same chambers intend to appear as both advocate and tribunal in the case, great care needs to be taken to ensure that this is brought to the parties’ attention at the earliest opportunity and fully explained, with options clearly outlined (*Peter Smith v Kvaerner Cementation Foundations Ltd* [2006] EWCA Civ 242, [2007] 1 WLR 370).



In the arbitration-specific context there is no impediment to the arbitrator and advocate being members of the same chambers (*Laker Airways v FLS Aerospace Ltd and Stanley Burnton* [2000] 1 WLR 113). The authorities have also been considered in the more recent case of *A and others v B and another* [2011] EWHC 2345 (Comm), [2011] All ER (D) 71 (Sep), where there was held to be no bias in circumstances where the arbitrator only disclosed towards the end of the arbitration that he was being instructed in a wholly unrelated matter by one of the solicitors who were appearing before him in the arbitration. However, the court considered that it would have been far better had the matter been disclosed earlier.

#### **Article 6 – Communications between parties, the arbitrator and IFLA**

- 6.1 Any communication between the arbitrator and either party will be copied to the other party.
- 6.2 Unless agreed by the parties, the arbitrator will designate one party as the lead party. For the purposes of the Act, the lead party will equate to a claimant, but will be formally referred to in the arbitration as the ‘Applicant’. The other party will equate to a respondent, and will be formally referred to in the arbitration as the ‘Respondent’.
- 6.3 The arbitrator will not discuss any aspect of the dispute or of the arbitration with either party or their legal representatives in the absence of the other party or their legal representatives, unless such communication is solely for the purpose of making administrative arrangements.
- 6.4 Neither IFLA, the CIArb, Resolution nor the FLBA will be required to enter into any correspondence concerning the arbitration or its outcome.

##### **FamilyArbitrator Commentary:**

Email communication is to be encouraged provided that it is copied to all parties. The principle that the arbitrator is and must be seen to be entirely impartial is self evident and fundamental.

#### **Article 7 – Powers of the arbitrator**

- 7.1 The arbitrator will have all the powers given to an arbitrator by the Act including those contained in section 35 (consolidation of proceedings and concurrent hearings); and section 39 (provisional orders), but limited as provided by Art.7.2.
- 7.2 In relation to substantive relief of an interim or final character, the arbitrator will have the power to make orders or awards to the same extent and in the same or similar form as would a Judge exercising the jurisdiction of the High Court. (For the avoidance of doubt, the arbitrator’s power does not extend to interim injunctions; committal; or jurisdiction over non-parties without their agreement.)
- 7.3 The arbitrator will have the power to award interest in accordance with section 49 (interest) whether or not it is specifically claimed.

- 7.4 If the arbitrator considers that the dispute is not suitable for arbitration under the Scheme the arbitrator will have the power to terminate the proceedings.

**FamilyArbitrator Commentary:**

**Consolidation etc.**

The power under section 35 will allow, say, a TOLATA dispute and a financial remedy dispute to be either consolidated or heard concurrently. (As to the wisdom of consolidation vs. concurrent hearing, it will be recalled that there are different costs presumptions in the FPR and CPR. Cf. art 14.4(b) which applies the financial remedy approach of ‘no order as to costs’ subject to a discretion to depart from that rule in appropriate circumstances, and subject to the parties agreeing a different costs regime which is approved by the arbitrator at the outset.)

**Maintenance pending suit**

Section 39 and art 7.2 appear to allow for an award of maintenance pending suit (MPS). A note of caution, however. A court only has the power to make a MPS award once a petition has been filed, and there is no power to back date an MPS order (and thus award) to before the date of the petition. This raises a potential problem in the event that an arbitration award for MPS is sought prior to issue of the main suit. Also note that if the arbitral applicant for MPS is the respondent in the main suit the court has no jurisdiction to back date MPS unless there is a cross prayer in the answer or an application for a financial remedy has been made to court (the latter possibly not being appropriate if the parties wish to resolve their dispute through arbitration).

**Interim injunctions and other powers not exercisable by the arbitrator**

The arbitrator does not have power to grant interim injunctions or to commit for contempt. If the case is likely to require this kind of relief, consideration may need to be given as to whether the dispute is suitable for arbitration.

However, the court has the power under s.44 of the Act to make orders “in support of arbitral” proceedings. This includes interim injunctions. It is thought, however, that this power is unlikely to be invoked in the family context.

(Note also that an arbitrator does not have the power to summons witnesses, whether to give evidence or to produce documents. The court may grant such relief with the permission of the arbitrator or the agreement of the parties: s.43 of the Act.)

Applications to court under the Arbitration Act 1996 are referred to as ‘Arbitration Act claims’ and are currently governed by CPR Part 62, although procedural amendment is expected. See the Note on allocation and procedure in the Appendix to this Commentary for further discussion.

**Resignation of the arbitrator**

If the matter ceases to become suitable for arbitration then the arbitrator may terminate the proceedings. As to the costs consequences of this, note the default provisions in s.25 of the Act. This matter may also be dealt with in the arbitrator's terms of engagement.

**Article 8 – Powers of the arbitrator concerning procedure**

- 8.1 The arbitrator will decide all procedural and evidential matters (including, but not limited to, those referred to in section 34(2)), subject to the right of the parties to agree any matter (if necessary, with the concurrence of the arbitrator (see Art.1.4)).
- 8.2 In accordance with section 37 (power to appoint experts), the arbitrator may appoint experts to report on specific issues or prepare valuations.
- 8.3 The arbitrator may limit the number of expert witnesses to be called by any party or may direct that no expert be called on any issue or issues or that expert evidence may be called only with the permission of the arbitrator.
- 8.4 Further, and/or in particular, the arbitrator will have the power to:
- (a) direct a party to produce information, documents or other materials in a specified manner and/or within a specified time;
  - (b) give directions in relation to any property which is the subject of the proceedings or as to which any question arises in the proceedings, and which is owned by or is in the possession or control of a party to the proceedings for the inspection, photographing, valuation, preservation, custody or detention of the property by the tribunal, an expert or a party.
- 8.5 If, without showing sufficient cause, a party fails to comply with its obligations under section 40 (general duty of parties) or with these Rules, or is in default as set out in section 41(4) (failure to attend a hearing or make submissions), then, after giving that party due notice, the arbitrator may continue the proceedings in the absence of that party or without any written evidence or submissions on their behalf and may make an award on the basis of the evidence before him or her.
- 8.6 The parties agree that if one of them fails to comply with a peremptory order made by the arbitrator and another party wishes to apply to the court for an order requiring compliance under s.42 (enforcement of peremptory orders of tribunal), the powers of the court under that section are available.

**FamilyArbitrator Commentary:**

**Who decides the procedure to adopt?**

While the parties may agree their own procedure, they may only do so following the arbitrator's appointment with his or her agreement (art 1.4). Given that the whole emphasis of arbitration is to vest control in the parties, arbitrators are not likely to object to any procedure that is ECHR art 6 compliant. However, if the arbitrator considers that the procedure adopted by the parties renders the dispute unsuitable for arbitration he or she may decline the appointment (art 4.4).

**Application under s.42 to enforce peremptory order**

An application under s.42 is an 'Arbitration Act claim' and as such is currently governed by CPR Part 62, although procedural amendment is expected. See the Note on allocation and procedure in the Appendix to this Commentary for further discussion.

## Article 9 – Form of procedure

- 9.1 The parties are free to agree as to the form of procedure (if necessary, with the concurrence of the arbitrator (see Art.1.4)) and, in particular, to adopt a documents-only procedure or some other simplified or expedited procedure.
- 9.2 If there is no such agreement, the arbitrator will have the widest possible discretion to adopt procedures suitable to the circumstances of the particular case in accordance with section 33 (general duty of the tribunal).

### FamilyArbitrator Commentary:

The emphasis here is on the parties' freedom to choose their own procedure (subject to art 1.4 above), in accordance with the principle of party autonomy enshrined in section 1(b) of the Act and highlighted in [\*S v S \(financial remedies: arbitral award\)\*](#) [2014] EWHC 7 (Fam), [2014] 1 FLR 1257 (as to which, see the discussion in the Commentary to art 13, below). Such procedures do not have to mirror court procedures, although it is likely that the parties and / or the arbitrator will borrow from the procedure available under the CPR and FPR. Plainly, however, the procedure adopted should be ECHR art 6 compliant. Lack of such compliance will be a potential obstacle to the conversion of the award into a court order, should that be necessary. A level of disclosure less than that required for a consent order would therefore be unwise. See also the discussion below on art 13 in relation to *Granatino*.

## Article 10 – General procedure

- 10.1 Generally, on commencement of the arbitration, the arbitrator will invite the parties to make submissions setting out briefly their respective views as to the nature of the dispute, the issues, what form of procedure should be adopted, the timetable and any other relevant matters.
- 10.2 If appropriate, the arbitrator may convene a preliminary meeting, telephone conference or other suitable forum for exchange of views.
- 10.3 Within a reasonable time of ascertaining the parties' views, the arbitrator will give directions and set a timetable for the procedural steps in the arbitration, including (but not limited to) the following:
- (a) written statements of case;
  - (b) disclosure and production of documents as between the parties;
  - (c) the exchange of witness statements;

- (d) the number and type of expert witnesses, exchange of their reports and meetings between them;
  - (e) arrangements for any meeting or hearing and the procedures to be adopted at these events;
  - (f) time limits to be imposed on oral submissions or the examination of witnesses, or any other procedure for controlling the length of hearings.
- 10.4 The arbitrator may at any time direct any of the following to be delivered in writing:
  - (a) submissions on behalf of any party;
  - (b) questions to be put to any witness;
  - (c) answers by any witness to specific questions.

**FamilyArbitrator** *Commentary:*

The article 10 procedure may be viewed as the default procedure. It is likely to be particularly suited to property disputes, to straightforward financial remedy disputes and to those disputes where a single, discrete issue is the subject of the arbitration. Note that in cases where the parties have not already selected a particular procedure their views will generally be canvassed before the arbitrator determines the procedure to be followed (art 10.1).

**Article 11 – Applications for directions as to procedural or evidential matters**

- 11.1 The arbitrator may direct a time limit for making or responding to applications for directions as to procedural or evidential matters.
- 11.2 Any application by a party for directions as to procedural or evidential matters will be accompanied by such evidence and/or submissions as the applicant may consider appropriate or as the arbitrator may direct.
- 11.3 A party responding to such an application will, if feasible, have a reasonable opportunity to consider and agree the order or directions proposed.
- 11.4 Any agreement will be communicated to the arbitrator promptly and will be subject to the arbitrator's concurrence, if necessary (see Art.1.4).
- 11.5 Unless the arbitrator convenes a meeting, telephone conference or other forum for exchange of views, any response to the application will be followed by an opportunity for the party applying to comment on that response; and the arbitrator will give directions within a reasonable time after receiving the applicant's comments.

**FamilyArbitrator** *Commentary:*

The arbitrator is likely, in the interests of speedy despatch and proportionality, to seek to deal with directions either on paper or by telephone hearing wherever possible, particularly where the issues to be decided are straightforward.

## **Article 12 – Alternative procedure**

- 12.1 In any case where it is appropriate, the parties may agree or the arbitrator may decide to adopt the procedure set out in this Article.
- 12.2 The parties may at any stage agree (with the concurrence of the arbitrator) or the arbitrator may direct any variation or addition to the following steps and/or timetable. In particular, the arbitrator may at any stage allow time for the parties to consider their positions and pursue negotiations with a view to arriving at an amicable settlement (see, also, Arts.17.1 and 17.2).
- 12.3 Within 56 days of the arbitrator communicating to the parties his or her acceptance of the appointment, each party will complete and send to the arbitrator and to the other party a sworn statement as to their financial situation (in the form of the ‘Form E’ or ‘Form E1’ Financial Statement in accordance with the Family Procedure Rules 2010, as appropriate) together with such further evidence or information as the arbitrator may direct.
- 12.4 Within 28 days of receipt of the other party’s financial statement, each party may send to the arbitrator and to the other party a questionnaire raising questions and/or requesting information and/or documents.
- 12.5 Within 14 days of receipt of a questionnaire, a party may send to the arbitrator and to the other party reasoned objections to answering any of the questions or meeting any of the requests, together with a submission as to whether a preliminary meeting is required.
- 12.6 Within 14 days of receipt of objections or, if there is a preliminary meeting, within a reasonable time after that meeting, the arbitrator will direct in respect of each party:
- (a) which questions are to be answered and which requests are to be met, together with the time within which these things are to be done;
  - (b) which property is to be valued, who is to undertake the valuation, how they are to be appointed and the time within which the valuation is to be carried out; and
  - (c) any other steps for providing information, dealing with enquiries or clarifying issues as may be appropriate.
- 12.7 Within a reasonable time of receipt from both parties of replies to questionnaires, valuations and any other information as may have been required, the arbitrator may convene a further meeting to review progress, address outstanding issues and consider what further directions are necessary.

12.8 The arbitrator will give detailed directions for all further procedural steps in the arbitration including (but not limited to) the following:

- (a) the drawing up of lists of issues and schedules of assets;
- (b) written submissions;
- (c) arrangements for any meeting or hearing and the procedures to be adopted at these events;
- (d) time limits to be imposed on oral submissions or the examination of witnesses, or any other procedure for controlling the length of hearings.

**FamilyArbitrator** *Commentary:*

The article 12 procedure, which is based on the FPR Part 9 procedure, is likely to be used (with or without adaptation: see art 12.2) where the dispute involves a full financial remedy claim, especially where extensive disclosure is required.

**Article 13 – Awards**

13.1 The arbitrator will deliver an award within a reasonable time after the conclusion of the proceedings or the relevant part of the proceedings.

13.2 Any award will be in writing, will state the seat of the arbitration, will be dated and signed by the arbitrator, and (unless the parties agree otherwise or the award is by consent) will contain sufficient reasons to show why the arbitrator has reached the decisions it contains.

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.

- 13.5 The arbitrator may refuse to deliver an award to the parties except upon full payment of his or her fees or expenses. Subject to this entitlement, the arbitrator will send a copy of the award to each party or its legal representatives.

**FamilyArbitrator Commentary:**

**Status of the award in cases where the court's jurisdiction may not be ousted**

It is clear that *Radmacher (formerly Granatino) v Granatino* [2010] UKSC 42 has changed fundamentally the way that the courts regard agreements, whether pre-nuptial or post-nuptial, by spouses governing the consequences of their marriage breakdown:

[75] The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement.

[78] The reason why the court should give weight to a nuptial agreement is that there should be respect for individual autonomy. The court should accord respect to the decision of a married couple as to the manner in which their financial affairs should be regulated. It would be paternalistic and patronizing to override their agreement simply on the basis that the court knows best. This is particularly true where the parties’ agreement addresses existing circumstances and not merely contingencies of an uncertain future.’

These principles were powerfully endorsed and applied to the IFLA family arbitration scheme by the President of the Family Division Sir James Munby in his landmark judgment in the case of *S v S (financial remedies: arbitral award)* [2014] EWHC 7 (Fam), [2014] 1 FLR 1257. For detailed comment on the judgment read this [Comment sheet](#), but in essence:

- Sir James stressed the importance of upholding parties’ ‘autonomous decision’ to settle their dispute privately and by agreement [7] to [15]
- The fact that the parties have themselves decided to submit to arbitration should be seen as the ‘magnetic factor’ in such cases, and that ‘in the absence of very compelling countervailing factor(s) the arbitral award should be determinative of the order the court makes’ [18] to [19]
- He gave useful guidance to judges who are presented with applications for consent orders arising from arbitration: while the role of a judge is not to be a ‘rubber stamp’, only in the rarest of cases will it be appropriate for the judge to do other than approve the order that the parties are seeking, based on the arbitration award [20] to [21]



- He saw no reason why the streamlined procedure for approving consent orders in collaborative cases should not also be available in arbitration cases [23]
- He gave further guidance on procedure at [24] (as to which see 'Procedural issues', below)
- Likewise, in cases where one party is dissatisfied with the award and refuses to apply for a consent order, the court will take an appropriately robust approach [25] to [26]
- The President also called for amendment to the Family / Civil Procedure Rules to enable applications to court in support of the arbitral process to be made to the Family Court and not, as is currently the case, to the Commercial Court. This call has been echoed in [paragraph 38](#) of the Final Report of the Financial Remedies Working Group (15 December 2014), reprising [paragraphs 85 to 95 and Annex 12](#) of the Group's Interim Report.

It can thus be assumed, following *S v S*, that an order will be made in the terms of the award unless one of the parties can show very strong reasons indeed why the award should not be upheld.

For further discussion of these issues see IFLA's submission to the Law Commission '*Why agreements to arbitrate family financial disputes should be treated comparably as 'qualifying nuptial agreements'*' (December 2012), [here](#).

Whilst an award is intended to determine finally and conclusively all matters in dispute, it remains open to the arbitrator to include within the award a 'liberty to apply' provision, if the parties are likely to require further directions for the implementation of the terms of the order. It should be emphasised that the arbitrator does not possess powers of enforcement. Thus an arbitrator cannot, for instance, sign a conveyance. That said, there may well be implementation issues which the arbitrator can helpfully determine, falling short of formal enforcement, such as determining price and mode of sale. It will clearly be more convenient for the parties to be able to return to the tribunal seized of detailed knowledge of the background when dealing with such matters.

Again, while it is intended that awards should be final and conclusive, there are nevertheless a number routes of challenge provided under the Act: see the commentary to art 15 below.

### **'Full appreciation'**

The requirement for the parties to have a 'full appreciation' of the agreement's implications (see paragraphs 68, 71 and 74 of *Granatino*) suggests that, if the parties wish to arbitrate 'in person', they should at least be able to confirm that they have received advice from a solicitor as to the implications of their decision to submit to arbitration.

Further, and leaving aside the specific routes of challenge available under the Act (as to which see the commentary on art 15 below), there may be circumstances in which it would be 'unfair' (*Granatino* [75]) to hold the parties to their agreement to be bound by the arbitrator's decision. Thus, it is suggested that an arbitral award which, if it were a court order, would be held to be 'plainly wrong' is unlikely to be given effect by the court.

### **Procedural issues**

By art 13.4, and by paragraph 6.5 of the ARB1, the parties are required to apply if necessary for a consent order to give effect to the award. It is envisaged that in most cases such an application will be made. Indeed, in some instances, such as where the award include a pension sharing order, that part of the award will be ineffective without a court order.

In [\*S v S \(financial remedies: arbitral award\)\*](#) [2014] EWHC 7 (Fam), [2014] 1 FLR 1257 at [23] to [24] the President gave guidance on the procedure to be followed on such applications.

First, he stated at [23] that he saw no reason why the streamlined process for approving consent orders in collaborative cases applied by Coleridge J in *S v P (Settlement by Collaborative Process)* [2008] 2 FLR 2040 should not also be available in arbitration cases. That process is summarised in the footnote to *S v S* (although since 22 April 2014 most such applications will be made to the Family Court rather than the High Court):

The process is described in the headnote to the report [to *S v P*] as follows: "This application for approval of draft consent orders could be dealt with [by a High Court judge] in the 'urgent without notice' applications list, in order to shortcut the normal rather lengthier process of lodging consent orders ... and waiting for them to be approved and sent back ... The court would usually be prepared to entertain applications of this kind in the without notice applications list before the applications judge of the day on short notice. A full day's notice must be given to the clerk of the High Court judge in front of whom it was proposed to list the case; such notice could be given by telephone. The clerk of the rules should be informed that this was taking place. Use of the shortcut process was always subject to the consent of the urgent application judge. However, provided every aspect of documentation was agreed, the hearing was not expected to last more than 10 minutes, and the documentation was lodged with the judge the night before the hearing, this process had been approved by the President.

He made two further points at [24]:

' ... The first is that in every case the parties should, as they did here, lodge with the court both the agreed submission to arbitration (in the case of an arbitration in accordance with the IFLA Scheme, the completed Form ARB1) and the arbitrator's award. Second, the order should contain recitals to the following effect, suitably adapted to meet the circumstances:

"The documents lodged in relation to this application include the parties' arbitration agreement (Form ARB1), their Form(s) D81, a copy of the arbitrator's award, and a draft of the order which the court is requested to make.

By their Form ARB1 the parties agreed to refer to arbitration the issues described in it which encompass some or all of the financial remedies for which applications are pending in this court; and the parties have invited the court to make an order in agreed terms which reflects the arbitrator's award."

It is thought likely that a party who is dissatisfied with the award will simply decline to cooperate in making an application to the court for an order in the terms of the award, thus leaving the other party to take that step by means of a 'notice to show cause' application (*Dean v Dean* [1978] Fam 161, *Xydhias v Xydhias* [1999] 1 FLR 683, *X and X (Y and Z Intervening)* [2002] 1 FLR 508 and *S v S (Ancillary Relief)* [2008] EWHC 2038 (Fam), [2009] 1 FLR 254).

At [25] to [26] of his judgment in *S v S* the President stated:

'25. Where a party seeks to resile from the arbitral award, the other party's remedy is to apply to the court using the 'notice to show cause' procedure. The court will no doubt adopt an

appropriately robust approach, both to the procedure it adopts in dealing with such a challenge and to the test it applies in deciding the outcome. In accordance with the reasoning in cases such as *Xydhias v Xydhias*, the parties will almost invariably forfeit the right to anything other than a most abbreviated hearing; only in highly exceptional circumstances is the court likely to permit anything more than a very abbreviated hearing.

26. Where the attempt to resile is plainly lacking in merit the court may take the view that the appropriate remedy is to proceed without more ado summarily to make an order reflecting the award and, if needs be, providing for its enforcement. Even if there is a need for a somewhat more elaborate hearing, the court will be appropriately robust in defining the issues which are properly in dispute and confining the parties to a hearing which is short and focused. In most such cases the focus is likely to be on whether the party seeking to resile is able to make good one of the limited grounds of challenge or appeal permitted by the Arbitration Act 1996. *If* they can, then so be it. If on the other hand they can *not*, then it may well be that the court will again feel able to proceed without more to make an order reflecting the award and, if needs be, providing for its enforcement. '

At [14] the President referred to *Crossley v Crossley* [2007] EWCA Civ 1491, [2008] 1 FLR 1467 and *S v S (Ancillary Relief)* [2008] EWHC 2038 (Fam), [2009] 1 FLR 254, as examples of cases where the court used its case management powers to limit the ambit of the issues to be determined at the hearing, by focusing the hearing exclusively on those issues relevant to the 'magnetic factor' (in an arbitration case, that factor being the parties' autonomous decision to submit to arbitration).

See the Appendix to this Commentary for further discussion of current procedure and proposals for reform.

#### **Matrimonial Causes Act 1973, s34**

Brief mention should be made of s.34 of the Matrimonial Causes Act 1973 ('MCA') which provides that any 'maintenance agreement' (but not 'other financial arrangements') which purports to restrict the right to apply to court shall be void. The background to this section is explained by Wilson LJ (as he then was) in the *Granatino* case in the Court of Appeal [2009] EWCA Civ 649 [134]. Section 34 of the MCA was drafted in from earlier legislation which dealt with the situation where married parties were living separately (but not divorcing) and one sought maintenance from the other. Wilson LJ stated: 'sections 34 and 35 have been dead letters for more than thirty years ...'. In the Supreme Court in *Granatino* Lord Phillips referred to Wilson LJ's analysis at [36] stating, 'It seems likely that issues as to maintenance have, since the 1973 Act came into force, been pursued in ancillary relief proceedings.' It is thus considered unlikely that s.34 will have any bearing on the question of the binding nature of an arbitrated award. See the discussion of s.34 (in the context of an arbitration clause contained in a pre-marital agreement) in *T v T* [2012] EWHC 3462 (Fam), [2014] 1 FLR 96.

For more detailed discussion of the issues noted above see Sir Peter Singer's articles at [2012] Fam Law 1353 and [2012] Fam Law 1496.

#### **Status of the award where the court's jurisdiction may be ousted**

There are types of dispute falling within the family arbitration scheme which do not require the court to exercise the 'paternalistic' review that must be carried out prior to granting a financial remedy order. Litigation concerning the beneficial interest of unmarried partners in a property is

frequently compromised by means of Tomlin Orders. In such circumstances the court exercises no formal supervisory 'fairness' discretion and allows the parties to enter freely into such agreements as they choose. In this type of case the *Granatino* 'fairness' test will not apply.

The normal procedure for enforcing a 'civil' award (albeit one made under the family arbitration scheme) is by the summary procedure under s.66 of the Act. This provides that an award made by the arbitrator pursuant to an arbitration agreement, may, with leave of the court, be enforced in the same manner as a judgment or order of the court of same effect. Where leave is given, judgment may be entered in terms of the award.

See Foskett (*The Law and Practice of Compromise*, Seventh edition) at para 32.08: 'Machinery analogous to that of a *Tomlin* order is not available as a means of compromising an arbitration. Since enforcement is not a matter for the arbitral tribunal, which will be functus officio once it has delivered its award, there is no summary process available to be invoked in such a manner. Permission to enforce the award as a judgment or order [s.66] is the nearest equivalent.'

## Article 14 – Costs

- 14.1 In this Article any reference to costs is a reference to the costs of the arbitration as defined in section 59 (costs of the arbitration) including the fees and expenses of IFLA, unless otherwise indicated.
- 14.2 The arbitrator may require the parties to pay his or her fees and expenses accrued during the course of the arbitration at such interim stages as may be agreed with the parties, and in the absence of agreement, at reasonable intervals.
- 14.3 The arbitrator may order either party to provide security for the arbitrator's fees and expenses and the fees and expenses of IFLA.
- 14.4 Unless otherwise agreed by the parties, the arbitrator will make an award allocating costs as between the parties in accordance with the following general principle:
- (a) the parties will bear the arbitrator's fees and expenses and the fees and expenses of IFLA in equal shares;
  - (b) there will be no order or award requiring one party to pay the legal or other costs of another party.

This principle is subject to the arbitrator's overriding discretion set out in Art.14.5.

- 14.5 Where it is appropriate to do so because of the conduct of a party in relation to the arbitration (whether before or during it), the arbitrator may at any stage order that party:
- (a) to bear a larger than equal share, and up to the full amount, of the arbitrator's fees and expenses and the fees and expenses of IFLA;

- (b) to pay the legal or other costs of another party;

and may make an award accordingly.

14.6 In deciding whether, and if so, how to exercise the discretion set out in Art.14.5, the arbitrator will have regard to the following:

- (a) any failure by a party to comply with these Rules or any order or directions which the arbitrator considers relevant;
- (b) any open offer to settle made by a party;
- (c) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
- (d) the manner in which a party has pursued or responded to a claim or a particular allegation or issue;
- (e) any other aspect of a party's conduct in relation to the arbitration which the arbitrator considers relevant; and
- (f) the financial effect on the parties of any costs order or award.

14.7 Unless the parties agree otherwise, no offer to settle which is not an open offer to settle shall be admissible at any stage of the arbitration.

14.8 These rules as to costs will not apply to applications made to the court where costs fall to be determined by the court.

**FamilyArbitrator Commentary:**

Subject to any agreement to the contrary, the default costs regime under the IFLA scheme is “no order for costs”. However, by virtue of art 14.5 the arbitrator may make an order for costs because of a party's conduct in relation to the proceedings. In exercising his or her discretion the arbitrator must have regard to the matters set out in art 14.6. These provisions correspond to FPR 28.3(5), (6) and (7).

This default regime applies to all types of dispute, including those, such as MPS and TOLATA applications, which would, if the subject of corresponding court proceedings, be subject to a different costs regime. Parties should be made aware of this, and, to avoid any misunderstanding, the costs regime to be applied should be discussed and agreed at the outset of the arbitration.

**Article 15 – Conclusion of the arbitration**

15.1 The agreement to arbitrate will be discharged (and any current arbitration will terminate) if:

- (a) a party to the arbitration agreement dies; or
- (b) a party to the arbitration agreement lacks, or loses, capacity (within the meaning of the Mental Capacity Act 2005); except that:
  - (i) if the party is represented by an attorney who has the power so to act, the attorney may, in his or her discretion, continue with the arbitration or terminate it;
  - (ii) if a Deputy is appointed by the Court of Protection in relation to that party and has the power so to act, the Deputy may, in his or her discretion, continue with the arbitration or terminate it.

15.2 The arbitration will be terminated:

- (a) If the arbitrator considers that the dispute is not suitable for arbitration under the Scheme and terminates the proceedings;
- (b) If and insofar as a court entertains concurrent legal proceedings and declines to stay them in favour of arbitration;
- (c) If the parties settle the dispute and, in accordance with section 51 (settlement), the arbitrator terminates the proceedings;
- (d) If the parties agree in writing to discontinue the arbitration and notify the arbitrator accordingly;
- (e) On the arbitrator making a final award dealing with all the issues, subject to any entitlement of the parties to challenge the award by any available arbitral process of appeal or review or in accordance with the provisions of Part 1 of the Act.

**FamilyArbitrator** *Commentary:*

Note that the Act prescribes the following routes of challenge to the award:

- Under s.67, an award may be challenged on the ground that the tribunal did not have substantive jurisdiction. Challenges on this ground are likely to be rare in family cases given that the parties expressly agree to the arbitration by signing the ARB1, thus granting the tribunal jurisdiction.
- Under s.68 a challenge may be made 'on the ground of serious irregularity affecting the tribunal, the proceedings or the award'. A serious irregularity is one falling within a list of irregularities in s.68(2) 'which the court considers has caused or will cause substantial injustice to the applicant'.
- By s.69(2) an appeal is permissible on a point of law, but only if the agreement of all the parties to the proceedings or the leave of the court is obtained. Furthermore, given that one of the perceived advantages of arbitration, at least in commercial disputes, is the

finality of the award, s.69 also allows the parties to agree at an earlier stage to exclude such an appeal.

For further comment on appeals see paragraphs 86 to 96 of the [Arbitration Act – Commentary](#).

## **Article 16 – Confidentiality**

- 16.1 The general principle is that the arbitration and its outcome are confidential, except insofar as disclosure may be necessary to challenge, implement, enforce or vary an award (see Art.13.3(c)), in relation to applications to the court or as may be compelled by law.
- 16.2 All documents, statements, information and other materials disclosed by a party will be held by any other party and their legal representatives in confidence and used solely for the purpose of the arbitration, unless otherwise agreed by the disclosing party or compelled by law.
- 16.3 Any transcript of the proceedings will be provided to all parties and to the arbitrator. It will similarly be confidential and used solely for the purpose of the arbitration, implementation or enforcement of any award or applications to the court, unless otherwise agreed by the parties or compelled by law.
- 16.4 The arbitrator will not be called as a witness by any party either to testify or to produce any documents or materials received or generated during the course of the proceedings in relation to any aspect of the arbitration, unless with the agreement of the arbitrator or compelled by law.

### **FamilyArbitrator Commentary:**

The guarantee of total confidentiality that the arbitration process provides has been highlighted by Mostyn J in *W v M (TOLATA Proceedings: Anonymity)* [2012] EWHC 1679 (Fam), [2013] 1 FLR 1513 at [70]:

'Where parties are agreed that their case should be afforded total privacy there is a very simple solution: they sign an arbitration agreement. Arbitration has long been available in proceedings such as these [viz, TOLATA claims]. Recently arbitration has also become available in financial remedy proceedings by virtue of the much-to-be-welcomed scheme promoted by the Institute of Family Law Arbitrators. In those proceedings also privacy can now be guaranteed.'

See also the observations of the President in [S v S \(financial remedies: arbitral award\)](#) [2014] EWHC 7 (Fam), [2014] 1 FLR 1257 at [22].

## **Article 17 – General**

- 17.1 At relevant stages of the arbitration, the arbitrator may encourage the parties to consider using an alternative dispute resolution procedure other than arbitration, such as mediation, negotiation or early neutral evaluation, in relation to the dispute or a particular aspect of the dispute.



- 17.2 If the parties agree to use an alternative dispute resolution procedure such as mediation, negotiation or early neutral evaluation, then the arbitrator will facilitate its use and may, if appropriate, stay the arbitration or a particular aspect of the arbitration for an appropriate period of time for that purpose.
- 17.3 In the event that the dispute is settled (following a mediation or otherwise), the parties will inform the arbitrator promptly and section 51 (settlement) will apply. Fees and expenses accrued due to arbitrator by that stage will remain payable.
- 17.4 The parties will inform the arbitrator promptly of any proposed application to the court and will provide him or her with copies of all documentation intended to be used in any such application.
- 17.5 IFLA, the CI Arb, Resolution, the FLBA, their employees and agents will not be liable:
- (a) for anything done or omitted in the actual or purported appointment or nomination of an arbitrator, unless the act or omission is shown to have been in bad faith;
  - (b) by reason of having appointed or nominated an arbitrator, for anything done or omitted by the arbitrator (or his employees or agents) in the discharge or purported discharge of his functions as an arbitrator;
  - (c) for any consequences if, for whatever reason, the arbitral process does not result in an award or, where necessary, a court order embodying an award by which the matters to be determined are resolved.

With thanks to Family Law Week for allowing extracts from “Family Arbitration – a soft launch or a hard landing?” to be reproduced here. A full version of the article can be accessed [here](#).

## Appendix

### Note on allocation and procedure

This Note is intended as a guide to the current 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.

In [S v S \(financial remedies: arbitral award\)](#) [2014] EWHC 7 (Fam), [2014] 1 FLR 1257 at [28] to [29] the President called for amendment to the Family / Civil Procedure Rules to enable applications to court in support of the arbitral process to be made to the Family Court and not, as is currently the case, to the Commercial Court. This call has been echoed in [paragraph 38](#) of the Final Report of the Financial Remedies Working Group (15 December 2014), reprising [paragraphs 85 to 95 and Annex 12](#) of the Group's Interim Report (31 July 2014).



The Note below states FamilyArbitrator's understanding of the current procedural regime.

**(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; orwhat 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 Court, with a direction that the application be referred to a District Judge 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 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.

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