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Implementing arbitration awards in financial remedy applications
S v S [2014] EWHC 7 (Fam)

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Part 3 of the Family Procedure Rules 2010 contains the court's powers to encourage the parties to use alternative dispute resolution and to facilitate its use. Rule 3.2 provides that the court must consider, at every stage in proceedings, whether alternative dispute resolution is appropriate and rule 3.3 provides:

> (1) If the court considers that alternative dispute resolution is appropriate, the court may direct that the proceedings, or a hearing in the proceedings, be adjourned for such specified period as it considers appropriate –
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> (a) to enable the parties to obtain information and advice about alternative dispute resolution; and
>
> (b) where the parties agree, to enable alternative dispute resolution to take place.
>
> (2) The court may give directions under this rule on an application or of its own initiative.

Over the last half decade (and more) the use of extra-judicial methods of resolving financial disputes on relationship breakdown have increased in popularity (albeit that the Government's hopes for mediation in private law children's cases have proved sadly but predictably unfounded with the removal of the assistance of publicly funded lawyers who might otherwise have been able to direct the parties to mediation in preference to the court process). The lottery of the allocation of a case to a particular judge, or a series of judges bringing a different approach to a case during its currency, and the inconvenience of the delays in listing, or the listing of cases without reference

to the convenience of the parties, as well as the costs incurred by running a case through the full gamut of the legal process, has all added to the eagerness for a search for alternative methods of dispute resolution.

Thus has the collaborative law process developed, and so too the growth of 'private' FDRs running alongside an existing court process, as well as the traditional mediation process. However, to these resources in 2012 was added a scheme of arbitration conducted by the Institute of Family Law Arbitrators (IFLA) created by the Chartered Institute of Arbitrators, the Family Law Bar Association and Resolution (the family lawyers' group), in association with the Centre for Child and Family Law Reform (although the scheme is solely for money and property and not disputes relating to children).

For some years a number of leading figures in Family Law including Sir Matthew Thorpe had been suggesting that financial issues arising on relationship breakdown might sensibly and safely be included in the areas to which the provisions of the Arbitration Acts might be extended, and the increasing concentration on respect for the autonomy of individuals to control their own affairs which was most clearly recently stated in the Supreme Court in the *Radmacher* decision in 2010 in the context of nuptial agreements, has underscored the justification for such a development. Indeed for years, since at least the decision of *Edgar v Edgar* in 1980 the courts have supported the idea that a formal agreement, properly and fairly arrived at with competent legal advice should be upheld by the Court unless there were 'good and substantial grounds' for concluding the an 'injustice' would be done by holding the parties to it (see eg *Xydias v Xydias* [1999] and *X v X (Y and Z Intervening)* [2002])

So, it has been argued, the agreement of parties in the circumstances of the breakdown of their relationship to submit to and be bound by the decision of an independent arbitrator, deciding the case on the basis of the law of England and Wales, must be a "magnetic factor" leading to the enforcement of an arbitrated award.

It is important to bear in mind that while the parties are free to bind themselves under an arbitration agreement, any award will not bind third parties and while some agreements may be capable of being implemented in practice without recourse to the Court, nevertheless the jurisdiction of the Court cannot be ousted (*Hyman v Hyman*

[1929] AC 601) and certain provisions typically included in a financial settlement (such as a pension sharing order or a clean break) require a court order to be given effect.

The question has therefore arisen how should an award made in arbitration proceedings be given effect, and the decision of the President in *S v S* [2014] EWHC 7 (Fam) on 14th January 2014 provides some guidance in this respect. Sir James Munby (at para [23]]) follows the lead provided by Coleridge J (with the support of Sir Mark Potter P) in *S v P (Settlement by Collaborative Law Process)* [2008] 2 FLR 2040 in establishing a streamlined process to convert a settlement achieved in the collaborative process to a court order. It will therefore be appropriate to follow the same process of applying in the without notice applications list on short notice (in the High Court) in the way described in *S v P*

The President however added guidance as to the procedure as follows (para 24]):

> "…. 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."

However, the President also made the point that the decision of the arbitrator does not oust the jurisdiction of the judge who will still, as with any consent order, exercise some overview of the proposed award. At paras [20-21] he said:

> 20. It is worth remembering what the function of the judge is when invited to make a consent order in a financial remedy case. It is a topic I considered at some length in *L v L* [2006] EWHC 956 (Fam), [2008] 1 FLR 26. I concluded (para 73) that:
> "the judge is not a rubber stamp. He is entitled but is not obliged to play the detective. He is a watchdog, but he is not a bloodhound or a ferret."
> 21. Where the consent order which the judge is being asked to approve is founded on an arbitral award under the IFLA Scheme or something similar (and the judge will, of course, need to check that the order does indeed give effect to the arbitral award and is

workable) the judge's role will be simple. The judge will not need to play the detective unless something leaps off the page to indicate that something has gone so seriously wrong in the arbitral process as fundamentally to vitiate the arbitral award. Although recognising that the judge is not a rubber stamp, the combination of (a) the fact that the parties have agreed to be bound by the arbitral award, (b) the fact of the arbitral award (which the judge will of course be able to study) and (c) the fact that the parties are putting the matter before the court *by consent*, means that it can only be in the rarest of cases that it will be appropriate for the judge to do other than approve the order. With a process as sophisticated as that embodied in the IFLA Scheme it is difficult to contemplate such a case.

What if one party to the arbitration nevertheless seeks to avoid the outcome? Where there has been an appropriately fair and independent process of arbitration freely entered into by both parties, then the "magnetic factor" will be that agreement and the outcome of that agreed procedure. In the same way that a nuptial agreement was the 'magnetic' factor in cases like *Crossley v* Crossley [2007] and *S v S (Ancillary Relief)* [2008], so in such a case would it be anticipated that there would be an application to the court to "show cause" why the proposed order implementing the arbitral award should not be made. The President makes these comments at para [25-26}:

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.

In his concluding remarks the President suggests in *S v S* that there is a need (which is being addressed as part of the Family Orders Project overseen by Mostyn J) to introduce effective procedure to enable the Family Division (and not the Commercial Court) to deal expeditiously, and if appropriate without an oral hearing, with applications to stay financial remedy proceedings pending the outcome of an arbitration (albeit the provisions of Part 3 of the FPR 2010 appear to provide a mechanism for this) and applications seeking any relief under the Arbitration Act 1996 (eg to enforce an arbitrator's peremptory order, to preserve property or to secure the attendance of a witness).

The message which the President's judgment delivers is that individuals deserve to be able to exercise autonomy over their own affairs but also that the Court's processes must keep up with the needs of litigants and their advisors and the innovations that are developing in the world of financial remedies. All of this is to be welcomed.

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