PRACTICE GUIDANCE: CHILDREN ARBITRATION IN THE FAMILY COURT

26 July 2018

1 This Guidance concerns the interface between the Family Court and Arbitrations conducted in accordance with the provisions of the Arbitration Act 1996 (AA96) where the parties to a post-relationship breakdown private law dispute relating to the welfare of a child or children in respect of whom either or both of them have parental responsibility or are otherwise concerned have agreed to submit the issues in dispute for decision by an arbitrator whose decision is to be binding upon them. It is anticipated that most arbitrations will be conducted under the IFLA Children scheme and Rules by arbitrators trained under the IFLA scheme, but this guidance applies to any decision reached by an arbitrator chosen by the parties in relation to a children issue. In this Guidance the neutral terminology of the IFLA Children Scheme Rules is adopted by which the decision of the arbitrator is described as a determination rather than an award.

2 It is a fundamental requirement of this Guidance that the arbitrator will decide the substance of the dispute only in accordance with the law of England and Wales including the key welfare principle set out in s1 of the Children Act 1989. This Guidance does not apply to, or sanction, any arbitral process based on a different system of law nor, in particular, one where there is reason to believe that, whatever system of law is purportedly being applied, there may have been gender-based discrimination.

3 The attention of arbitrators and the parties is also drawn to the outline guidance set out in *Practice Direction 12B – Child Arrangements Programme*, particularly paragraphs 1, 2.4-2.6 and 4.

4 To avoid unnecessary complication this Guidance is primarily directed towards what may well be the most common form of children issues with which the Family Court and the parties may become concerned, namely disputes as to child arrangements including where the child lives, contact, division and allocation of holidays, education, religious upbringing, medical treatment for non-life threatening or life changing conditions and other issues as to the exercise or limitation of parental responsibility of either of the parties.

Safeguarding

5 The welfare principle requires that safeguarding is a fundamental element of any child planning dispute resolution whether conducted via the Court or by alternative dispute resolution. There are two aspects to safeguarding in a child issue dispute: first, providing for the physical and emotional safety of the child concerned and the parties in the immediate time frame of the dispute; second, taking appropriate care not to make an order or provision that will put the child concerned or the parties at avoidable future risk.

6 In applications under the IFLA Children Scheme, the parties will have completed a safeguarding questionnaire and obtained Basic Disclosure from Disclosure Scotland. The attention of the parties and arbitrator in any proposed arbitration is also drawn to paragraph 5.1 and 5.2 of Practice Direction 12B, which advises that a process of non-court dispute resolution is unlikely to be appropriate in situations involving domestic violence, drug and/or alcohol misuse and mental illness.

Children Arbitration and the No Order principle

7 Under the No Order principle, not every agreement concerning a child requires to be confirmed by incorporation in a subsequent Court order. The statutory principle extends to an agreement to arbitrate and the outcome of such arbitration. The parties may simply agree to manage their arrangements and the exercise of parental responsibility in accordance with the determination and thus have no need or obligation for a court order to reflect it.

8 However, the parties may seek a consent order for various reasons. For example, having regard to the context or the history of the dispute, to avoid the risk of relitigating the same issue in the future, in order to obtain a confirmatory order for production to non-parties such as medical or educational authorities, or to obtain an injunctive or other form of order via family Court processes reflecting the determination and which will only be available if orders reflecting the determination are obtained.

A: Where there is a subsisting application seeking the same relief as is in issue in the arbitration

Stay of proceedings

9 The court should be invited to stay the application pending delivery of the determination. The arbitration agreement (in the case of an IFLA Children Scheme arbitration, the Form ARB1CS) will in most instances only recently have been signed by both parties, and thus contested applications for a stay will likely be rare. CPR rule 62.3(2) provides that such an application ''must be made by application notice to the court dealing with those proceedings". The Family Court has an obligation under FPR 3.4(1)(b) “where the parties agree, to enable non-court dispute resolution to take place.”

10 Section 9(4) of AA96 requires that the court "shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed" and makes it clear that a stay application should be made to the court where the subsisting proceedings are pending. In the case of a children arbitration under the IFLA Children Scheme, by paragraph 8.2 of Form ARB1CS the parties will have agreed that they "will apply for or consent to a stay of any existing court proceedings, as necessary."

11 In such circumstances where the application to stay is by consent or unopposed it should be dealt with on paper and (absent any unusual circumstances indicating a need) without listing or hearing.

12 Parties seeking such a stay should (in person or through their solicitors, who need not for this purpose be on the court record in the Children Act proceedings) lodge in the place where the proceedings have been commenced, and within those proceedings, clear evidence of their agreement (or lack of opposition) to the stay order, together with a copy of their signed arbitration agreement (such as the IFLA Form ARB1CS). One of the standard orders approved for use in conjunction with arbitrations provides for a stay, and a copy completed with the details of the case, and signed by both parties or their representatives to signify approval, should be lodged with the other documents. The file will then be placed before a judge for approval, or for queries to be raised and dealt with by correspondence, and/or (if necessary) a hearing listed. The suite of arbitration-specific standard orders are Annexed to this Guidance: see below.

Applying for an order to reflect the determination: by consent

13 The terms of the proposed consent order will be drafted to reflect the decisions and directions contained in the determination. Insofar as orders under the Children Act 1989 are involved, their form should follow the relevant paragraphs of the Standard Family Orders, which contain recitals apt for an arbitration award/determination case. Together with a signed copy of the proposed order in the terms agreed, the parties, in order to take advantage of this accelerated procedure, should at the same time lodge their Forms C100, a copy of the arbitrator's determination and (unless already on the court file) their Form ARB1CS.

14 Attention is drawn to my observations in *S v S (Financial Remedies: Arbitral Award)* [2014] EWHC 7 (Fam), [2014] 1 FLR 1257, as to the attitude likely to be adopted by the court in such cases: ''where the parties are putting the matter before the court by consent, … it can only be in the rarest of cases that it will be appropriate for the judge to do other than approve the order."

15 The underlying principles I there ventured to state are of like application to a properly constituted and conducted arbitration in a children issue, subject only to paying proper regard to the question of safeguarding. Paragraph 7 of *Practice Direction 12J – Child Arrangements and Contact Order: Domestic Violence and Harm* provides that:

> "..... The Court shall not make a child arrangements order by consent or give permission for an application for a child arrangements order to be withdrawn, unless the parties are present in court, all initial safeguarding checks have been obtained by the court, and an Officer of Cafcass or Cafcass Cymru has spoken to the parties separately, except where it is satisfied that there is no risk of harm to the child in so doing."

16 In any application for a consent order, whether the proviso is satisfied so dispensing with the requirement for input from Cafcass or the physical presence of the parties, will be a matter for the judge. But in the case of a proposed consent order following an arbitration, the Court will have the assistance of the material placed before the arbitrator and usually the arbitrator's written reasons. Applicants should ensure that all safeguarding material in the arbitration including any report from DBS Scotland is annexed to the application. In what is likely to be the common case of an arbitration under the IFLA Scheme, the Court will take into account the careful structure of safeguarding provisions built into the Rules of the IFLA Scheme including the declarations made by the parties in their ARB1CS form and the contents of the disclosure they were required to obtain from DBS Scotland. An application for a consent order to embody or enforce an IFLA determination in which the information provided does not disclose any grounds for concern may well provide the court with grounds to be satisfied that there is no risk of harm to the child or the parents involved.

17 Draft orders submitted which invite the court to make orders it has no jurisdiction to make (or which are otherwise in unacceptable form) will, like any other defective consent order submitted, be returned for reconsideration. There is of course no objection to recitals which express the parties' agreement to provisions which fall outside the scope of the available statutory powers of the Court under, for example, section 8 of the Children Act. Where the parties provide for the giving of an undertaking, the application must include a signed statement by the party giving the undertaking that he or she has been advised about and understands the effect of an undertaking to the Court and the potential consequences of any breach. Nor indeed is there anything to prevent parties agreeing to

change the terms of a determination if they are agreed upon a revised formulation. In that event, though, it would be sensible for the covering correspondence to make it clear which provisions of the determination have been overtaken by what subsequent arrangement arrived at by the parties.

18 Parties anxious to preserve the privacy and to maintain the confidentiality of the determination should lodge that document in a sealed envelope, clearly marked with the name and number of the case and the words "Arbitration Determination: Confidential". The determination will remain on the court file but should be placed in an envelope clearly marked as above, plus "not to be opened without the permission of a judge of the Family Court." The covering letter should prominently request that the determination be sealed as an Order of the court once it has been approved.

Applying for an order to reflect the determination: opposed

19 The party seeking to have the determination reflected in a court order will need to proceed adopting what at para [25] of *S v S* was described as the "notice to show cause" procedure. An alternative formulation of the Arbitration recital for such a situation is contained in each standard order.

20 Similar documentation should be submitted with the application, except of course that the order proposed is likely to have been unilaterally drafted on behalf of the party seeking to obtain the order. An application of this sort will ordinarily be listed for a hearing before a judge of Circuit Judge or High Court Judge level.

21 Attention is drawn to my observations in *S v S* concerning the attitude likely to be adopted by the court in opposed cases:

> "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. … 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"

22 Applications for consent orders are specifically placed outside the scope of the MIAMs requirement by Practice Direction 3A, paragraph 12(2). Parties who have agreed to arbitrate but have subsequently become engaged in any post-arbitral determination dispute, as for instance a contested ''show cause'' application, should not be required to deviate into a MIAM notwithstanding the absence of a specific reference in paragraph 12(2) of Practice Direction 3A.

B: Arbitration claims

23 An "arbitration claim" is a term of art, and its scope for the purposes of its application to arbitrations conducted under AA96 is defined by CPR rule 62.2(1) in these terms:

> "[In relation to AA96] '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."

24 The court where "arbitration claims" as so defined are to be commenced is governed by CPR PD62 para 2 and the High Court and County Courts (Allocation of Arbitration Proceedings) Order 1996 (S.I. 1996/3215) as amended (the 1996 Order), which do not currently cater for such claims to be launched in the Family Court. Pending changes made to CPR PD62 and/or the 1996 Order, an applicant for an "arbitration claim" should issue the requisite Form (see below) in the Commercial Court and should at the time of issue seek transfer to the Family Division. Para [6] of the 1996 Order does not as yet permit the transfer of any such application to the Family Court – the transfer must therefore be to the Family Division of the High Court.

25 The Form N8 initiating such a claim should be prominently marked **"Family business: direction sought for transfer to the Family Division of the High Court"** and should detail (where there are subsisting Family Court proceedings, albeit stayed) the case title and number.

26 Attention is drawn to sections 42 (enforcement of peremptory orders of the arbitrator) and 43 (securing the attendance of witnesses) of AA96, which are the provisions in relation to which an ''arbitration claim'' is most likely to be sought in the course of an ongoing post-separation children arbitration. Attention is also drawn to the provisions of section 44 (court powers exercisable in support of arbitral proceedings). Standard Orders have been issued to meet each of these contingencies: see below.

27 As these are all within the CPR definition of "arbitration claims," pending changes to para [2] of CPR PD62 such applications should (as described above) be issued in the Commercial Court and bear prominently upon them a request for speedy transfer to the Family Division.

28 In relation to applications under sections 42 and 43 the standard orders are self-explanatory. Such applications should be heard by a judge of High Court level.

C: Arbitrations conducted when there are no subsisting proceedings seeking relevant relief

Stay of proceedings

29 An application to stay legal proceedings under section 9 of AA96 is in effect excluded from the definition of and procedural requirements for "arbitration claims" by CPR rule 62.3(2), which provides that such an application ''must be made by application notice to the court dealing with those proceedings".

30 In the case of an IFLA Scheme arbitration the parties will have agreed (by paragraph 8.2 of their Form ARB1CS) that they "will not commence court proceedings … in relation to the same subject matter". If however such proceedings are thereafter initiated then it is open to either party to apply for a stay pursuant to section 9 of AA96 in the court where the proceedings have been commenced, and within those proceedings. If a stay remains opposed an early hearing will obviously be required to determine the application.

D: Enforcement

31 Section 3 of CPR Part 62 (rules 62.17 and 62.18) make provision for the direct enforcement of a determination. In some situations it may be possible to pray section 66 of AA96 in aid to enforce an award. Para 4 of the 1996 Order authorises the commencement in any county court of section 66 proceedings under which determinations can, with the court's permission, be enforced in the same way as a judgment or order of the court to the same effect. I indicated at paragraph 30 of my 2015 Practice Guidance for arbitration in financial

disputes that these provisions are not appropriate in respect of financial remedies. They are similarly inapt for the enforcement of any provisions made in a determination in a children dispute. An application by a party seeking enforcement will accordingly be made in the appropriate form in the Family Court seeking a summary hearing as outlined in *S v S* to be dealt with expeditiously unless the court otherwise directs.

E: Challenging the Determination under sections 67 to 71 of the Arbitration Act

32 Some very specific bases for challenging arbitrations are contained in these sections of AA96. They are hedged about with preconditions and limitations, and the commercial experience in arbitration is that they are relatively rarely successful. In relation to an arbitration dealing with family financial and/or children issues, however, it would ordinarily be appropriate for a High Court Judge of the Family Division to hear them, and thus it is to be expected that applications commenced pursuant to these provisions will by the same route be transferred to that court.

F: Arbitration-specific standard court orders

33 An additional three orders for use in conjunction with children arbitrations have been added to the Standard Family Orders. They are contained in the zip file attached to this Guidance and comprise:

- Order 22.1: Stay pursuant to Arbitration Act 1996 section 9 and/or under the court's case management powers
- Order 22.2: To enforce an arbitrator's peremptory order under Arbitration Act 1996 section 42
- Order 22.3: To secure the attendance of witnesses under Arbitration Act 1996 section 43

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