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ARBITRATION

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> ***The result in Haley is likely to encourage more couples to refer their disputes to arbitration, and potentially lead to more challenges of arbitral awards by dissatisfied parties.***

While the use of arbitration in commercial disputes has been commonplace for centuries, arbitration in family proceedings is a comparatively recent development. The Institute of Family Law Arbitrators (IFLA) is a not-for-profit organisation created by the Chartered Institute of Arbitrators, Resolution, the Family Law Bar Association and the Centre for Child and Family Reform. It is chaired by Lord Neuberger and launched the family law arbitration financial scheme in February 2012. It was not until 2016 that the IFLA launched its children arbitration scheme, making it possible to arbitrate a wide range of private law children disputes relating to the exercise of parental responsibility and the present and future welfare of children.

As recently as April 2020, the children scheme was further expanded with the introduction of arbitration to temporary or permanent external relocation matters, regarding countries which are signatories to the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (the 1996 Hague Convention) and the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the 1980 Hague Convention), or (for as long as relevant) EU member states to which Brussels IIA (Council Regulation (EC) No 2201/2003) applies (see Art 2.2(c) of the children scheme rules, 4th Edition, www.legalease.co.uk/children-scheme).

Although comparatively new, all signs have pointed to the slow but steady widening of the use of arbitration as an alternative to court-based dispute resolution in family disputes. This is invariably partly as a result of judicial endorsement it has attracted. As president of the Family Division, Sir James Munby gave two sets of practice guidance on arbitration in the family courts, ie *Practice Guidance: Arbitration in the Family Court* (23 November 2015) (see: www.legalease.co.uk/arbitration-2015), and *Practice Guidance: Children Arbitration in the Family Court* (26 July 2018) (see: www.legalease.co.uk/arbitration-2018).

In November 2020, the Family Solutions Group (a subgroup of the Private Law Working Group led by Cobb J) reported to the current president of the Family Division, Sir Andrew McFarlane, highlighting the role family professionals have in offering clients more creative solutions to resolving disputes away from court, which it emphasised will involve having a broader understanding of all the options, including arbitration, that are available to the parties (see *What about me?: Reframing Support for Families following Parental Separation*, 12 November 2020, para 280, www.legalease.co.uk/what-about-me).

In the context of the Covid-19 crisis and the mounting pressures upon the family justice system, Sir Andrew McFarlane said in his guidance dated 9 June 2020, *The Family Court and Covid-19: The Road Ahead*, that the need has never been greater to have regard to alternative forms of dispute resolution such as arbitration (see: www.legalease.co.uk/the-road-ahead at para 37). It appears this call is already being heard by the profession and the IFLA has stated that between April and November 2020 there was a steeper rate of increase than previously seen in other years. In unpublished statistics as at 17 November 2020, the IFLA said that referrals to the finance scheme at this date stood at 345, compared to 15 April 2020 when they were at 293; for the children scheme referrals stood at 38, compared to 15 April 2020 when they were at 26. This chimes with what has been observed anecdotally by numerous family law professionals.

Benefits of arbitration

The benefits arbitration has in appropriate cases are well-established (see *A Guide to the Family Law Arbitration Scheme: An Introductory Guide for Family Arbitrators, Judges and Professional Referrers* (IFLA, 3rd edition), Pt 3: www.legalease.co.uk/ifla-guide).

Arbitration is frequently more expeditious, in particular during the current climate where court time is increasingly limited and securing court listings more difficult. This can make it particularly useful in situations when a decision needs to be made urgently. The Family Solutions Group has noted that arbitration encourages a collaborative approach from the outset in that the parties must agree to use arbitration and are able to choose an arbitrator with specialist knowledge and expertise. This can have positive outcomes on the parties' parenting relationship and ability to work together in the future (*A Guide to the Family Law Arbitration Scheme* at para 280).

The parties can also choose their own procedure and arrangements for how the arbitration is to be conducted; in particular arbitration can be conducted on paper, by telephone, or by video if face-to-face meeting is not possible, making it very flexible as a process. It is private and confidential, and if the same arbitrator deals with a dispute from start to finish it offers consistency. Parties can opt to resolve the whole of their dispute, or discrete issues – for example holidays, schooling, letters of instruction, expert appointments, maintenance pending suit, variation of maintenance, division of chattels etc. Perhaps most significantly, there are the costs savings that frequently result from streamlining procedures, fixed fees, and a case not being susceptible to last-minute relisting due to a lack of judicial availability.

The parties also agree as part of their agreement to arbitrate that the arbitral award is final and binding upon them, and that the award will be made into a consent order to be sent to the court for approval. Finality is therefore frequently viewed as a key advantage of arbitration, and it has long been held that only in exceptional circumstances will a court exercise its own discretion in substitution for the award (in finance cases) or determination (in children cases) that has been made during arbitration proceedings. This is something that is reflected in the wording at the foot of the arbitration agreement forms ARB1 FS and ARB1 CS, which has previously stated 'it is only in exceptional circumstances that a court will exercise its own discretion in substitution for the award'. Nonetheless, some practitioners have viewed the finality of arbitration as a distinct disadvantage. The notorious difficulty in challenging an arbitration award or determination offers a degree of

certainty, but can be something of a deterrent to clients concerned about being left with an unjust or unfair outcome.

The Court of Appeal decision of *Haley* v *Haley* [2020] has arguably resolved this problem.

Background

In *Haley* the court was fundamentally concerned with the test to be applied by the court on appeal in cases where the parties have agreed to arbitration but one party is dissatisfied with the award. The husband believed the arbitrator's financial remedy award was unfair. The appeal was primarily concerned with the husband's application under the Matrimonial Causes Act 1973 (MCA 1973) that the court should decline to make an order in the terms of the award, and should instead exercise its discretion anew. In particular, the Court of Appeal was concerned with whether there was a distinction between the approach to challenges on the basis of an award being wrong on a question of law, pursuant to s69, Arbitration Act 1996 (AA 1996), and challenges under MCA 1973.

Under s69, AA 1996, the party challenging the award requires leave and has to show that the decision was 'obviously wrong' (unless the question is one of general public importance, in which case it must be at least open to serious doubt). Fairness as a concept has no place in such a challenge (*Haley*, para 14). On the other hand, when challenging an order made in financial remedy proceedings under MCA 1973, leave is also required but will be given if there is a real prospect that the appellant can satisfy the court that the order made was either 'wrong', or 'unjust because of serious or other procedural irregularity in the proceedings of the lower court' (ie the appeal procedure and approach found under the Family Procedure Rules 2010 (FPR 2010)). Fairness will in contrast be central to the court's determination (*Haley*, para 15).

Prior to *Haley*, it was widely believed that something more than a decision simply being 'wrong' was required. In *S v S (Arbitral Award: Approval)* [2014], Munby P suggested (obiter, at para 21) that when considering whether to make an arbitral award into a consent order:

> *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.*

In *DB v DLJ (Family Law Arbitration: Award)* [2016], Mostyn J went further where one party wished to challenge the award as wrong, saying (at para 28):

> *My conclusion is this. If following an arbitral award evidence emerges which would, if the award had been in an order of the court[,] entitle the court to set aside its order on the grounds of mistake or supervening event, then the court is entitled to refuse to incorporate the arbitral award in its order and instead to make a different order reflecting the new evidence. Outside the heads of correction, challenge or appeal within the 1996 Act these are, in my judgment, the only realistically available grounds of resistance to an incorporating order.*

> *An assertion that the award was 'wrong' or 'unjust' will almost never get off the ground: in such a case the error must be so blatant and extreme that it leaps off the page.*

King LJ subsequently noted in *Haley* (at para 64) that:

> *... the phrase 'leapt off the page' has become some sort of measure (as applied by the judge in the instant case) of how wrong a decision has to be in order to invoke the jurisdiction of the court; not only in cases where a consent order is sought, but equally when one party submits that the arbitral award is unfair.*

The Court of Appeal decided however that (para 73):

> *... the logical approach by which to determine whether the court should decline to make an order in the terms of the award, is by reference to the appeal procedure and approach found in the FPR 2010.*

The court should only substitute its own order for that of the arbitrators (para 74):

> *... if the judge decides that the arbitrator's award was wrong; not seriously or obviously wrong, or so wrong that it leaps off the page, but just wrong.*

The Court of Appeal concluded that while court orders embodying commercial and civil arbitration awards derive their authority from the arbitration agreement itself, and its enforcement under the mandatory provisions of AA 1996, the same cannot be said of enforceable orders following family arbitrations. They derived their authority from the court. A court could refuse to make an order where there was 'good and substantial reason for concluding that an injustice will be done if an order is made in the terms of [the parties'] agreement', or 'it would not be fair to hold [the parties] to their agreement' (following *Radmacher v Granatino* [2010]). Where the agreement is for a third party to decide the disputed terms, the court has an inquisitorial role and could decline to make the order on similar grounds (para 69). The court has a duty to keep fairness front and centre and consider the applicability of the factors outlined at s25, MCA 1973 when deciding whether to give effect to an agreement between the parties; it also must do this when determining whether or not to make an order in the terms of an arbitral award. In other words, the court is not a rubber stamp, and retains a residual discretionary jurisdiction.

For some, this decision removes the finality and certainty previously offered by arbitration by making awards easier to challenge. For others, this provides a different source of certainty in ensuring that the court's supervisory jurisdiction remains in place to correct an unjust or unfair outcome. The result in *Haley* is likely to encourage more couples to refer their disputes to arbitration, and potentially lead to more challenges of arbitral awards by dissatisfied parties.

Children arbitrations

The principles from *Haley* are arguably equally relevant to arbitrations under the IFLA children scheme. The arbitrator is necessitated by the rules of the children scheme to determine the dispute in accordance with the law of England and Wales. This includes, when determining any question relating to the upbringing of a child, ensuring that the welfare of the child is the arbitrator's paramount consideration in accordance with s1(1), Children Act 1989 (ChA 1989), and having regard to the welfare checklist in s1(3), ChA 1989 in doing so (per Art 3.1-2 of the children scheme rules).

'Welfare' is the lodestar that 'fairness' is in financial remedy work. If an order does not adequately consider the welfare factors adequately or apply the paramountcy principle properly, it may be susceptible to challenge.

Safeguarding

The children scheme rules aim to ensure that the safety and welfare of children is considered from the outset of an arbitration. Disclosure duties are imposed upon the parties (per Arts 17.1.1-2), ie:

- accurate information is required as part of the agreement to arbitrate (form ARB1CS) and the accompanying safeguarding questionnaire; and
- disclosure from the Disclosure and Barring Service is required in relation to each party, or an up-to-date Cafcass report/Schedule 2 letter, in addition to any relevant letters or reports prepared by Cafcass or any local authority.

This duty to disclose 'fully and completely' to the arbitrator/any other party anything relevant to the physical or emotional safety of the other party, or to the safeguarding or welfare of any child, is a continuing one (Art 17.1.2). This may include criminal convictions, cautions or involvement with children's services. An arbitrator has a duty to consider whether an arbitration can safely continue (Art 17.2.1) and is able to decline an appointment or terminate proceedings on safeguarding grounds. This may be as a result of information received or by reason of the behaviour of a party during the arbitration process (see Arts 7.3; 15.2(b) and 17.2). Sir James Munby's practice guidance on children arbitration notes (at para 6):

> *The attention of the parties and arbitrator in any proposed arbitration is also drawn to [FPR 2010, PD 12B, paras 5.1 and 5.2] 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.*

The importance of these disclosure obligations and duties upon the arbitrator cannot be underestimated. It is vital to ensure the arbitrator has within their knowledge the requisite information, and that any determination appropriately evaluates any harm it is alleged the child has experienced or will experience.

Wishes and feelings

The Family Solutions Group report emphasises that while ChA 1989 and Art 12 of the

United Nations Convention on the Rights of the Child (UNCRC) provide a framework for decision-making which respects the rights of children to be consulted when decisions are being made about their lives (while protecting them from making the decision and the consequences of making a mistake), as a jurisdiction, England and Wales lags behind in ensuring children have the ability to exercise these fundamental rights. This is particularly so in out-of-court dispute resolution processes. In mediation for example, the Family Mediation Council suggests that children are only consulted in roughly 26% of the one third of mediations involving children aged ten or above (see: www.legalease.co.uk/family-mediation-survey).

Arbitrators must have regard to the ascertainable wishes and feelings of the child concerned. This is even so in discrete and relatively minor decisions where the child's wishes and feelings can be perhaps overlooked, such as decisions in relation to holidays or schooling. The instruction of an expert independent social worker is vital therefore; the parties can agree to an instruction subject to the arbitrator's approval (Art 8.2.3) or the arbitrator is able to decide the identity of the independent social worker and even appoint one of their own motion regardless of whether the parties agree or not (Art 8.2.4). Furthermore, while an arbitrator is not able to meet with the child concerned at any stage of the proceedings (including to discuss or explain the determination or its implementation) (Art 8.3), this does not stop the child directly writing to the arbitrator to express their wishes and feelings.

Conclusion

King LJ made it clear in *Haley* (at para 5) that:

> *There is a common misconception that the use of arbitration, as an alternative to the court process in financial remedy cases, is the purview only of the rich who seek privacy away from the courts and the eyes of the media. If that was ever the position, it is no more.*

and that:

> *... it is widely anticipated that parties in modest asset cases (including litigants in person) will increasingly use the arbitration process in the aftermath of the Covid-19 crisis as the courts cope with the backlog of cases, which is the inevitable consequence of 'lockdown'.*

She went on to say (at para 6) that:

> *It goes without saying that it is of the utmost importance that potential users of the arbitration process are not deterred from using this valuable service.*

Parties can now enter the arbitration process encouraged by the knowledge that if a decision is reached that they regard as unfair or not in line with their child's welfare

interests, it is now much easier than originally thought to challenge on the basis that it is 'wrong'. The decision in *Haley* comes at an important juncture for the family justice system therefore, and adds to the existing judicial endorsement of arbitration, and suggestions that it should be more widely considered by both practitioners and their clients as an alternative to going to court.

Cases Referenced

Cases in **bold** have further reading - click to view related articles.

- DB v DLJ [2016] EWHC 324 (Fam)
- Haley v Haley [2020] EWCA Civ 1369
- Radmacher v Granatino [2010] UKSC 42
- S v S [2014] EWHC 7 (Fam)

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