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Arbitration for HNWs and the cloak of invisibility

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Family litigation often captures the most sensitive elements of individuals' lives. As such, the privacy intrinsic to the arbitral process, combined with the extraordinary backlog in the family courts, means arbitration is an increasingly popular alternative.

Arbitration is a form of dispute resolution where a qualified 'arbitrator' is appointed to resolve the dispute. It has been available for family cases in England and Wales since 2012 and covers areas within private children arrangements and financial disputes following divorce or separation.

Unlike other forms of alternative dispute resolution, parties are guaranteed a decision. An order reflecting that decision will then ordinarily be made by the court, making it both final and enforceable.

Arbitration offers several advantages in comparison with the court process. The parties pick their arbitrator – a fundamental principle of the court process is that one cannot pick one's judge. Arbitration is quick – far quicker than court proceedings. The process can be tailored around the issues in the case. The result of both those factors is that it is often significantly cheaper than allowing a case to progress through the court system.

Perhaps more important than all that for HNW individuals however is the *confidentiality* inherent in the arbitral process. There are three key realms:

Location: Arbitration takes place in private, at a location of the parties' choice, whereas in courts parties walk through public entrances and wait in public areas (or at least, did pre-Covid).

Attendance and reporting: The media are not permitted to attend arbitrations and, as such, arbitral proceedings are not reported (save for appeals - see below). Though family court hearings are generally held in private, accredited journalists and legal bloggers are generally allowed to attend (except in special circumstances) and reporting is permitted in certain contexts.

Documentation: In arbitrations, the risk of leaking information is minimised as papers never go to court. Parties can also impose security conditions, such as requesting that documents do not leave the arbitrator's office. The arbitral award and order are also not published. In contrast, the guidance surrounding the publication of family judgments is more lenient.

Therefore, for HNW individuals for whom confidentiality is a priority, arbitration presents an attractive prospect.

However, it is just as well to be aware of the limits of the confidentiality afforded. In *Haley v Haley* [2020] EWCA Civ 1369, Mr Haley challenged the financial award made by an arbitrator. At first instance, his applications were unsuccessful, following the precedent set in *DB v DJ* [2016] 2 FLR 1308 where Mostyn J held that the court should only refuse to make orders implementing an arbitration award where something has gone so seriously wrong that it "leaps off the page".

Mr Haley then appealed further, to the Court of Appeal, which considered the test in circumstances where one party refuses to consent to, or challenges, the making of an order under the Matrimonial Causes Act 1973 in the terms of the arbitral award.

The Court of Appeal ruled that the same test for appealing arbitral awards should apply as to court judgments: the party challenging the decision must, in either case, show that the award was 'wrong'.

Consequently, it will now be more straightforward to challenge financial remedy arbitral awards than before. This should bring a significant degree of reassurance to those concerned about the fairness of outcome in arbitral awards.

Crucially, however, the arbitral cloak of confidentiality will slip as soon as that challenge crosses into the realm of the courts – and potentially dramatically so. Whilst financial remedy hearings in the family courts below Court of Appeal level are usually anonymised so far as possible when reported, appeals to the Court of Appeal are generally reported using the parties' real names (see the examples above: '*Haley*' was in the Court of Appeal; '*DB v DJ* was in the High Court, the level below the Court of Appeal).

For those considering the arbitral process precisely for its privacy, this may well be concerning. However, the impact of this decision should not be overstated. Firstly, the vast majority of awards are likely to remain unchallenged. Secondly, appeals from arbitral awards in family financial and/or children cases are ordinarily heard at High Court level, not the Court of Appeal. Thirdly, with HNW individuals, both parties are likely to be concerned about confidentiality, and hence both are likely to be hesitant about appealing – particularly pursuing a *second* appeal to the Court of Appeal.

Lady Justice King was keen to endorse the arbitral process in her judgment, highlighting its comparative speed, particularly given the existing court backlog. This, and the potential consequential cost savings, are benefits which may attract a broader spectrum of litigants to arbitration, not just HNWs.

Haley has certainly not done away with the privacy arbitration can offer and, with increasing numbers of litigants looking for alternatives to court litigation – and the backlog, light is being shone on the benefits arbitration can bring across the board.