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[2014] EWHC 7 (Fam)

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Neutral Citation Number: [2014] EWHC 7 (Fam)

Case No: GU12D00692

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

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Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 14 January 2014

Before :

SIR JAMES MUNBY

President of the Family Division

- -

Between :

S	**Petitioner**
- and -	
S	**Respondent**

- -

- -

Hendersons for the Petitioner

Family Law in Partnership for the Respondent

No hearing : application dealt with on paper

- -

Judgment

Sir James Munby, President of the Family Division :

1. I have before me an application, transferred to me from the Guildford County Court at my direction, for the approval of a consent order which has been lodged with the court following, and intended to give effect to, an arbitral award made by Mr Gavin Smith in an arbitration conducted under the IFLA (Institute of Family Law Arbitrators) Scheme.

2. There is no doubt that in this case the court should approve the consent order, as I do. But it seemed to me appropriate to give some guidance about the proper approach of the court to such applications.

The IFLA Scheme

3. The IFLA Scheme is described by Sir Peter Singer in '*Arbitration in Family Financial Proceedings: the IFLA Scheme: Part 1*', [2012] Fam Law 1353, and '*Part 2*' [2012] Fam Law 1496. Up-to-date details about the Scheme and arbitrators accredited under it can be found on IFLA's website, ifla.org.uk.

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4. For present purposes all I need say is that:

i) IFLA is a not for profit organisation, created by the Chartered Institute of Arbitrators (CIArb), the Family Law Bar Association, and the family lawyers' group Resolution, in association with the Centre for Child and Family Law Reform;

ii) IFLA arbitrations are conducted in accordance with the Arbitration Act 1996 and IFLA's Arbitration Rules (the Rules);

iii) IFLA arbitrators are all Members of the CIArb, that is, MCIArb;

iv) The IFLA Scheme covers financial and property disputes arising from relationship breakdown (Article 2 of the Rules);

v) The Rules contain a mandatory requirement (Articles 1.3(c) and 3) that the arbitrator will decide the substance of the dispute only in accordance with the law of England and Wales.

This last point is significant.

The facts

5. I can take the relevant facts very briefly. The parties were married in 1986 and separated in 2012. Their only child is now 19. A decree nisi on the wife's petition was granted early in 2013. In June 2013 the parties signed IFLA's Form ARB1, agreeing to arbitration in accordance with the Rules by Mr Smith in relation to their claims for ancillary relief and thereby binding themselves to accept his award. The arbitrator's Final Award is dated 7 November 2013. On 9 December 2013 the parties applied to the Guildford County Court seeking approval of the consent order. In addition to the draft consent order they lodged the Form ARB1, the Final Award, a Joint Statement of Information in Form D81 and, marked for dismissal purposes only, their Forms A.

6. The facts relevant to the subject matter of the arbitration are set out, clearly and comprehensively, in the Final Award. They concern only the parties, so I say nothing more about them except to note that the Form D81 shows the matrimonial assets to be worth in excess of £1.5 but less than £2 million.

The legal context

7. The strong policy argument in favour of the court giving effect to an agreement that the parties have come to themselves for the resolution of their financial affairs following divorce has been recognised for a long time: see the discussion in *X v X (Y and Z Intervening)* [2002]

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1 FLR 508 of the line of authorities of which *Dean v Dean* [1978] Fam 161, *Edgar v Edgar* [1980] 1 WLR 1410, *Camm v Camm* (1983) 4 FLR 577 and *Xydhias v Xydhias* [1999] 1 FLR 683 were the most prominent.

8. Thus by the turn of the Millennium it was well established that the court would not lightly permit parties who had made an agreement between themselves to depart from it. Indeed, as a matter of general policy what the parties had themselves agreed would be upheld by the courts unless contrary to public policy or subject to some vitiating feature such as undue pressure or the exploitation of a dominant position to secure an unreasonable advantage.

9. In *X v X*, para 103, I said 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 that an "injustice" would be done by holding the parties to it. In propounding that formulation I adopted the language used by Ormrod LJ in *Edgar v Edgar* in preference to that of Thorpe J in *Smith v McInerney* [1994] 2 FLR 1077. I said that Thorpe J's references to "the most exceptional circumstances" and "overwhelmingly strong considerations" seemed to me, with respect, to put the matter perhaps a little too high. With the benefit of hindsight I was too questioning of what Thorpe J had said. Not for the first time he had seen, more clearly and presciently than others, the way in which the law was moving and, indeed, had to move.

10. There have of course been many significant developments in this area of the law since it was first set on its course by Ormrod LJ. Many have helpfully been identified by Baker J in *AI v MT* [2013] EWHC 100 (Fam), paras 20-21, 30-31. For present purposes three developments demand particular notice.

11. First, there was the identification and subsequent elaboration by Thorpe LJ of the concept of the 'magnetic factor' – the feature(s) or factor(s) which in the particular case are of "magnetic importance" in influencing or even determining the outcome: see, for example, *White v White* [1999] Fam 304, 314 (affirmed, [2001] 1 AC 596) and *Crossley v Crossley* [2007] EWCA Civ 1491, [2008] 1 FLR 1467, para 15. We see this approach, though not the label, carried forward in the fundamentally important statement of principle by the Supreme Court in *Radmacher (formerly Granatino) v Granatino* [2010] UKSC 42, [2011] 1 AC 534, para 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."

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12. Secondly, mediation and subsequently other forms of alternative dispute resolution have become well established as a means of resolving financial disputes on divorce. As Thorpe LJ observed in *Al Khatib v Masry* [2004] EWCA Civ 1353 [2005] 1 FLR 381, para 17, "there is no case, however conflicted, which is not potentially open to successful mediation". By 2008 use of the collaborative law approach was being encouraged by the court: see the observations of Coleridge J in *S v P (Settlement by Collaborative Law Process)* [2008] 2 FLR 2040. The same year, writing extra-judicially in '*Statutory Arbitration and Ancillary Relief*', [2008] Fam Law 26, Thorpe LJ ventured the view that "to extend the Arbitration Acts to reach all financial issues created by the breakdown on relationships is surely safe territory." Indeed, there is nothing in the Arbitration Act 1996 which on the face of it would preclude arbitration as a permissible process for the resolution of disputes rooted in family life or relationship breakdown. The Family Procedure Rules 2010 now encourage resort to alternative dispute resolution procedures in this as in other areas of family law: see FPR rule 1.4(e) and FPR Part 3. It was against this background that the IFLA Scheme was introduced in February 2012.

13. Thirdly, the court has adapted and abbreviated its processes to facilitate the appropriately simple and speedy judicial approval of such agreements. Where the parties are agreed on the terms of the consent order the court has available to it the process adopted by the parties in the present case. But in the context of collaborative law, Coleridge J, with the support of Sir Mark Potter P, was willing to adopt an even more streamlined process in *S v P (Settlement by Collaborative Law Process)* [2008] 2 FLR 2040.

14. Where, in contrast, one of the parties seeks to resile, the court has long sanctioned use of the abbreviated 'notice to show cause' procedure utilised in *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. The approach here was well captured by Thorpe LJ in *Xydhias v Xydhias* [1999] 1 FLR 683, 692:

> "If there is a dispute as to whether the negotiations led to an accord that the process should be abbreviated, the court has a discretion in determining whether an accord was reached. In exercising that discretion the court should be astute to discern the antics of a litigant who, having consistently pressed for abbreviation, is seeking to resile and to justify his shift by reliance on some point of detail that was open for determination by the court at its abbreviated hearing."

Moreover, in such a case the court, if need be of its own motion, can always, by the appropriately robust use of its case management powers, limit the ambit of the issues to be considered at the hearing; for example, as was done in both *Crossley v Crossley* [2007] EWCA Civ 1491, [2008] 1 FLR 1467, and *S v S (Ancillary Relief)* [2008] EWHC 2038 (Fam), [2009] 1

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FLR 254, by focusing the hearing exclusively on those issues relevant to the magnetic factor(s).

15. Back of all this there is the increasing emphasis on autonomy exemplified by cases such as *MacLeod v MacLeod* [2008] UKPC 64, [2010] 1 AC 298, and *Radmacher (formerly Granatino) v Granatino* [2010] UKSC 42, [2011] 1 AC 534. As Lord Phillips PSC said in *Radmacher*, para 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 patronising 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 the contingencies of an uncertain future."

I draw attention in the present context to the last sentence. I would accordingly respectfully endorse what was said by Charles J in *V v V (Prenuptial Agreement)* [2011] EWHC 3230 (Fam), [2012] 1 FLR 1315, para 36:

> "[*Radmacher*] necessitates a significant change to the approach to be adopted, on a proper application of the discretion conferred by the MCA, to the impact of agreements between the parties in respect of their finances. At the heart of that significant change, is the need to recognise the weight that should now be given to autonomy, and thus to the choices made by the parties to a marriage … The new respect to be given to individual autonomy means that the fact of an agreement can alter what is a fair result and so found a different award to the one that would otherwise have been made".

The future

16. What, then, should be the approach in cases where there has been an arbitration award under the IFLA Scheme or something similar?

17. Two situations need to be considered: one where the parties come before the court seeking a consent order; the other where one or other party is seeking to resile from the arbitrator's award. In the present case I am, strictly speaking, concerned only with the first, but some provisional comments on the other may be helpful and not out of place.

18. The starting point in every case, as it seems to me, is that identified in characteristically arresting language by Sir Peter Singer in '*Arbitration in Family Financial Proceedings: the*

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IFLA Scheme: Part 2' [2012] Fam Law 1496, 1503:

> "I suggest that the 'magnetic factor' perspective provides an appropriate analogy, and illuminates how applications (whether or not by consent) for orders to reflect an IFLA award should be viewed by the court: through the wrong end of a telescope rather than through a wide-angle lens. Such an approach respects the court's jurisdiction, but gives full force and effect to party autonomy by treating the parties' agreement to be bound by the award as the magnetic factor which should lead to a reflective order. Thus an arbitral award founded on the parties' clear agreement in their Form ARB1 to be bound by the award should be treated as a lodestone (more then than just a yardstick) pointing the path to court approval".

19. While respectfully questioning whether it can ever be appropriate for a judge to look through the *wrong* end of a telescope, I agree with that approach. Where the parties have bound themselves, as by signing a Form ARB1, to accept an arbitral award of the kind provided for by the IFLA Scheme, this generates, as it seems to me, a single magnetic factor of determinative importance. As Sir Peter Singer said ([2012] Fam Law 1496, 1503):

> "The autonomous decision of the parties to submit to arbitration should be seen as a 'magnetic factor' akin to the pre-nuptial agreement in *Crossley v Crossley*".

I agree. This, after all, reflects the approach spelt out by the Supreme Court in *Radmacher* in the passages I have already quoted. In the absence of some very compelling countervailing factor(s), the arbitral award should be determinative of the order the court makes. Sir Peter had earlier suggested (1502) that:

> "The scope for backsliding, resiling and indeed any space for repentance should … be just as narrowly confined [as it was in *L v L* [2006] EWHC 956 (Fam), [2008] 1 FLR 26] where what is in question is an attempt to wriggle out of the binding effect of an arbitral award."

Again, I agree. There is no conceptual difference between the parties making an agreement and agreeing to give an arbitrator the power to make the decision for them. Indeed, an arbitral award is surely of its nature even stronger than a simple agreement between the parties.

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*

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[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.

22. These are the principles that I have applied in the present case in deciding whether or not to approve the consent order. I do not propose to go into the details – why, after all, in a case like this should litigants who have chosen the private process of arbitration have their affairs exposed in a public judgment? Suffice it to say that I have no hesitation in approving the consent order in the form in which it has been put before me.

23. I should add that I can see no reason why the streamlined process applied by Coleridge J in *S v P (Settlement by Collaborative Law Process)* [2008] 2 FLR 2040 in the context of a consent order which was the product of the collaborative law process should not be made similarly available in cases where the consent order is the product of an arbitral award under the IFLA Scheme or something similar. From now on, if they wish, parties should be able to avail themselves of that process [1] whether the consent order is the product of the collaborative law process or an arbitral award under the IFLA Scheme or something similar.

24. I add two points in relation to procedure. 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,

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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."

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.

Concluding observations

27. I have already drawn attention to the fact that the IFLA Scheme requires the arbitrator to decide the dispute in accordance with the law of England and Wales. In this context it is important to remember the fundamental principles expounded by the House of Lords in *White v White* [2001] 1 AC 596, 604-605, that in arriving at any financial order the objective must be to achieve a fair outcome and that, in seeking to achieve a fair outcome, there is no place for discrimination between husband and wife. My observations in this judgment are confined to an arbitral process such as we have in the IFLA Scheme. Different considerations may apply where an arbitral process is based on a different system of law or, in particular, where there is reason to believe that, whatever system of law is purportedly being applied,

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there may have been gender-based discrimination. The proper approach in that situation will have to be considered when such a case arises.

28. There is one final matter I must mention. New and emerging forms of alternative dispute resolution highlight the need for the court's processes to keep pace with the needs of litigants and their advisers, nowhere perhaps more so than where, as in this context, the mechanism for resolving a family financial dispute is arbitration conducted in accordance with the Arbitration Act 1996. For example, and no doubt there are other such matters, we need appropriate procedures to enable the Family Court, not the Commercial Court, to deal expeditiously (and if appropriate without the need for an oral hearing) with:

i) applications for a stay of financial remedy proceedings pending the outcome of arbitration;

ii) applications seeking any relief or remedy under the Arbitration Act 1996, such as, for instance, under section 42 to enforce an arbitrator's peremptory order, or under section 43 to secure the attendance of witnesses.

29. Drafts of templates for such orders have been produced for consultation as part of the Family Orders Project being managed by Mostyn J. But alongside these innovations the need for procedural adaptation is becoming increasingly pressing. Whether such topics are most appropriately dealt with by rule changes (for example to the Family Procedure Rules 2010 and/or the Civil Procedure Rules 1998) or by the issue of Practice Directions or Practice Guidance is a matter for consideration. Initially, however, I would invite the Family Procedure Rules Committee to consider this as a matter of urgency.

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[1] The process is described in the headnote to the report 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".

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