

# Family Arbitration: Tips, Traps and Appeals

3<sup>rd</sup> March 2021

Deborah  
Dinan-Hayward  
Albion Chambers



Rhys Taylor  
30 Park Place & 36 Family



# AGREEING TO ARBITRATE

- Why want to do this?
  - Speed?
  - Privacy?
  - Expertise?
  - Loss of imminent hearing slot?
  - Dispute not amenable to other forms of DR?
- Are there court proceedings? Need to stay
- Jurisdiction - if married or civil partnership, is there a DN/CO in place?

# CHOOSING A TRIBUNAL

- Advantage but also a burden?
- Three names and other chooses?
- Diversity
- Impartiality
- IFLA will appoint
- Ask about

# APPOINTING THE ARBITRATOR

- ARB1FS
  - Getting the wording right
  - Pre-engagement meeting
- Arbitrator's terms and conditions
  - Standard T&Cs
  - Fees
- Accessibility of tribunal
  - Can assist but not advise
  - Golden rule re contact

# CASE MANAGEMENT

- Very similar to court - but tribunal more involved
- IFLA rules - what menu choices?
- Compliance with directions can be enforced by
  - Costs
  - Application for a peremptory order (AA s.42)

# THE FINAL HEARING

- Zoom and WhatsApp (at the moment)
- Tone and feel of hearing
- Longer days

# DELIVERY OF AWARD

- Expect prompt delivery - 7 - 14 days
- May have in draft for typos, errors etc
- Draft embargoed from clients?
- Further hearings to perfect the order?

# TOLATA

- Tweak
  - Art 10 - general procedure
  - No order as to costs
  - Calderbank
- *Haley* ARB1FS “amendment” applicability



“Remember, when parties agree arbitration,  
they buy the right to get the wrong answer”

Sir Bernard Eder

The background as to how the parties arrived at arbitration is very relevant.

One common theme is when a final hearing becomes "ineffective"; reluctant to wait months for a new hearing, the parties agree to arbitrate.

- *BC v BG* [2019] EWFC 7
- *Haley v Haley* [2020] EWCA Civ 1369

# What is the power to correct a misunderstanding or error in the award?

- *Re Barrell Enterprises* [1973] 1 WLR 19
- *Re L-B (Reversal of Judgment)* [2013] 2 FLR 859
- Arbitration Act 1996 governs arbitration awards (all ref to AA 96)
- s.57 of the Act provides:

“the tribunal may on its own initiative or on the application of a party...correct an award so as to remove any clerical mistake or error arising from an accidental slip or omission or clarify or remove any ambiguity in the award ...”.

# What is the power to correct a misunderstanding or error in the award?

- *Rees v Windsor-Clive* [2020] EWHC 2986 (Ch)
- *Mutual Shipping Corp of New York v Bayshore Shipping Co of Monrovia* [1985] 1 WLR 625
- *Gannet Shipping Ltd v Eastrade Commodities Inc* [2002] 1 Lloyds Rep 713
- *Axis v M&E UK Limited & Multiplex Construction Europe Limited* [2019] EWHC 169 (TCC)

Distinction between an accidental slip or omission (correctable under s57) and an error or gap in the reasoning or a mistaken assessment of the facts (outside section 57)

*H v W (Arbitration Award: Power to Correct)* [2019] EWHC 1897 (Fam)

- How far can an arbitrator go in ‘correcting’ his or her award after its formal delivery – whether an amended award under s.57 of the Arbitration Act 1996 should be given effect or whether it should be remitted, set aside or varied under s.68 and/or s.69 of the Act.

# What if one party does not like the award? Limited grounds to challenge.

- Sections 67 to 69 deal with the basis upon which an award can be challenged.
- Section 67 - where the tribunal did not have substantive jurisdiction in relation to the matter that it purported to decide;
- Section 68 - grounds of serious irregularity affecting the tribunal, the proceedings or the award.
- *DB v DLJ* [2016] EWHC 324
- Section 69 - on a point of law, where either the decision is “obviously wrong” or the question is one of general public importance and the decision of the tribunal is at least open to serious doubt.

*Haley v Haley* [2020] EWCA Civ 1369 (23 October 2020)  
An appeal from the decision of Deputy High Court Judge  
Clare Ambrose in *R v K* [2020] EWHC 841 (Fam)

- Court of Appeal (King, Moylan, Popplewell LJJ) ruled unanimously that, by virtue of its inquisitorial role, the court can decline to make an order reflecting an arbitration award where there are good and substantial reasons for concluding that an injustice would be done were an order to be so made.

*Haley v Haley* [2020] EWCA Civ 1369 (23 October 2020)  
An appeal from the decision of Deputy High Court Judge  
Clare Ambrose in *R v K* [2020] EWHC 841 (Fam)

- Husband issued an application challenging the award under section 68 (serious irregularity) and section 69 (appeal on a point of law) and also for an order that the award should not be made into a final order by the court.
- At first instance, before Clare Ambrose sitting as a Deputy High Court Judge, those applications were unsuccessful (cited as *R v K* [2020] EWHC 841 (Fam)) and Mr Haley appealed to the Court of Appeal.

# What is the correct test where one party refuses to consent to, or challenges, the making of an order under the MCA 1973 in the terms of the arbitral award?

Still exceptional cases and the bar is set high

The Court of Appeal held

1. Financial remedy awards made by an arbitrator can be challenged on the same basis as appeals from a court of first instance; was the award wrong?
2. The correct procedure is for the reluctant party to show “cause procedure” why an order should not be made in the terms of the award.



3. Is there a real prospect of success; (realistic, not fanciful)

*CR v SR (financial remedies: permission to appeal)* [2013] EWHC 1155 (Fam)

*Re A (a child)* [2019] EWCA Civ 895]

4. The appeal procedure (Part 30 FPR 2010) should be used when deciding whether to decline to make an order reflecting an award: the party challenging the award must show that the award was ‘wrong’.

5. If it is wrong, review or rehearing.

6. Haley unlikely to apply to Tolata, less clear cut 75 Act claims; Schedule 1 arbitral awards will also be approached on the same basis as Haley.

- Without a court order, parties rights are both ‘legally undetermined’(s 31 – check) and ‘unenforceable’ (s 90 check)
- Challenges to arbitral awards are not limited to the statutory challenges under AA 1996 or mistake and supervening event, and (*S v S* [2014] EWHC 7 (Fam) and *J v B* were wrong in that regard)
- A challenge can also be based on mistake or a supervening event remains available:  
see *J v B (family law arbitration: award)* [2016] EWHC 324 (Fam)  
*DB v DLJ* [2016] EWHC 324 (Fam)

- The court can decline to make an order where there are good and substantial grounds for concluding that an injustice will be done if an order is made in the terms of the arbitral award. (Haley)
- If the arbitration involves a purely civil claim (e.g. under TOLATA 1996) you can apply to a court for permission to enforce the award as though it were a court judgment or order, under section 66 of the Arbitration Act 1996.
- Lodging a consent order in the Family Court is to enable enforcement against third parties (pension providers etc) and to achieve a clean break. It is usually more convenient to submit a consent order to enforce under the MCA 1973, rather than enforcing an award under s66 of the 1996 Act but that procedure is also available.

# CONTACTS

These slides are no substitute for professional advice and should not be relied upon as such.

Rhys Taylor

[rhys.taylor@30parkplace.co.uk](mailto:rhys.taylor@30parkplace.co.uk)

[rtaylor@36family.co.uk](mailto:rtaylor@36family.co.uk)

 [@RhysTaylor32](https://twitter.com/RhysTaylor32)

Deborah Dinan-Hayward

[deborah.dinan-hayward@albionchambers.co.uk](mailto:deborah.dinan-hayward@albionchambers.co.uk)

[albionchambers.co.uk](http://albionchambers.co.uk)

 [@DDinanHayward](https://twitter.com/DDinanHayward)

