Family Arbitration

Sir Hugh Bennett

Lecture at the Inner Temple on 30th March 2015

1. I am very honoured to have been asked to deliver a lecture on Family Law Arbitration. I have never delivered a lecture in the Inner Temple before. Indeed I have never delivered a lecture on any subject at all until now. Accordingly I thought it prudent to look in my dictionary for the definition of the word "lecture". The Concise Oxford Dictionary told me that a "lecture" is "a discourse giving information about a subject to a class or other audience". It also told me that a lecture is "a long, serious speech especially as a scolding or reprimand".

2. Of course, I would never dream of scolding or reprimanding an audience such as yourselves who have come hoping to be enlightened on family law arbitration. But if by the end of this lecture you feel none the wiser about my subject and/or indeed mightily bored by it, then I suggest you deliver a lecture, that is to say a severe scolding or reprimand, to the person who is entirely to blame for having enticed me here this evening, Master Reader.

3. So, how best then can I give to you this evening information about family law arbitration? The first essential is to answer the question – what is arbitration? Then, next, I shall try to tell you about what is called the IFLA scheme, and speak about its advantages, and the disadvantages perceived by some practitioners. Finally, I shall touch upon arbitration in disputes involving children.

4. What is arbitration? First, it is a means of resolving disputes between two or more parties. Second, it is a consensual means of resolving their

disputes i.e. the parties must agree to have their disputes resolved by an arbitrator. Third, the parties agree who the arbitrator shall be and what are the terms of his appointment i.e. precisely what disputes he will be asked to determine. Fourth, the arbitral proceedings will be in private. Fifth, the arbitrator will determine the disputes by means of a written award together with reasons. Sixth, his determination will be final.

5. I now move on to describe to you the IFLA scheme which went live 3 years ago in March 2012. So far as I know, despite the fact that arbitration concerning land and commercial disputes has been around in this country since about the 13th century, there has never been, prior to the IFLA scheme, family law arbitration by which I mean arbitration applying the secular family law of the state. Why, you may ask? The best answer I can make is that few, if any, people gave it any thought at all. Family litigation was seen to be the sole preserve of the courts. However, about 10 or so years ago a few brave souls decided to devise an arbitral scheme to resolve financial and property disputes between separated couples, whether married or not. It did not get very far to begin with. But after much perseverance and hard work by several people, including Master Reader and the Centre for Child and Family Law of City University, the scheme was launched.

6. What is IFLA? It is the Institute of Family Law Arbitrators which is a company limited by guarantee, with a board of directors chaired by Lord Falconer of Thoroton, a former Lord Chancellor. It is responsible for the implementation and administration of the family law finance arbitration scheme. The qualified arbitrators, now numbering 185 with more to come, have all been trained in arbitral techniques and have a good working knowledge of the important and relevant parts of the Arbitration Act 1996. Each person so trained and wishing to practise as a family arbitrator must become a member of the Chartered Institute of Arbitrators and thus make him or herself subject to its disciplinary code. Solicitors, barristers, QCs, and retired judges, all of whom are, or were,

full-time practising family lawyers, comprise the corps of arbitrators under the scheme. They are therefore real specialists in the field of family finance law.

7. The scheme has been given not only real impetus but also a seal of approval by the English courts. The impetus has been provided by the courts in sanctioning and enforcing agreements between divorcing couples through a number of cases, culminating in the seminal case in the Supreme Court of Radmacher v Granatino in 2010. There, pre and post nuptial agreements came under the microscope and were emphatically endorsed. May I just remind you of one paragraph of the judgment of the majority of 7 of the 9 Justices, namely para 78. It is headed "autonomy" and reads as follows:- "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 ask rhetorically – if nuptial agreements between couples who thereby may agree the disposition of the assets at the end of the marriage are now a judicially approved part of the financial disengagement of separated couples, why should not the parties agree the forum in which they would like to have their disputes decided? I suggest that it would be patronising and paternalistic for the courts to override an agreement between parties to arbitrate, as opposed to litigate, their financial disputes. Fortunately, the courts, far from having adopted that position, have gone in the direction of emphatically endorsing the IFLA scheme.

8. The seal of approval was given by the President of the Family Division, Sir James Munby, in a recent case, S v S [2014] EWHC 7 (Fam). In that case the parties had agreed to arbitrate their financial and property

disputes under the IFLA scheme. The arbitrator made his award which the parties then presented to the court for its approval and implementation into orders of the court. The President gave his approval, turned the award into orders of the court. and said this:- "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."

9. In relation to situations where one party seeks to resile from or challenge the arbitrator's award, he said this:- "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."

10. In June 2014 the President set up the Financial Remedies Working Group under the chairmanship of Mr Justice Mostyn. The Group consisted of Mr Justice Cobb and District Judges and lawyers who are specialists in the field of family financial law and remedies. It produced an Interim Report in July 2014 which it sent out for consultation. The Group thereafter produced its final report in December 2014. It deals with a number of matters and in particular family finance arbitration. Para 85 of the Report stated that family finance arbitration "demands procedural changes designed to ensure the adoption of arbitral awards in the family court which is as swift and as uncomplicated as possible". It sets out the procedural changes necessary. Appendix 12 of the Interim Report, adopted without change in the Final Report, sets out "Guidance" as to stay of proceedings in court where there is an arbitral agreement and as to the transformation of an award into orders of the court, whether the application for orders of the court are by consent or opposed.

11. With the creation of the Family Court came the necessity to produce standard forms. Those forms are now in use, and are designed to support and assist arbitral proceedings.

12. Thus it can be seen that family finance arbitration is now an established and recognised dispute resolution procedure. In the last 3 years the scheme has not only been promulgated, but also has been approved and supported by the judiciary, and is gradually finding acceptance amongst family practitioners. By about March 2014, i.e. shortly after the President's decision in S v S, the total number of arbitrations amounted to 23. The total number of arbitrations, started but not all concluded, now stands at 51, i.e. more than double in one year, which I suggest reflects the enormous importance of the decision in S v S.

13. So what is the scheme? It is to resolve disputes by arbitration which are financial and/or involve property. It does not cover the actual granting of a divorce or matters to do with status, or children disputes such as residence, contact, parental responsibility or other matters to do with the upbringing of children, but it does cover financial disputes under Schedule 1 of the Children Act, 1989 relating to the maintenance of children born to unmarried parents. Next, the scheme shelters under the statutory umbrella of the Arbitration Act, 1996. The parties, who wish to arbitrate under the scheme, expressly agree that the arbitration will be conducted in accordance with the Act. The Act contains important provisions as to the duties of the arbitrator and of the parties to an arbitration as well as other provisions vital to the expeditious and fair procedure for an arbitration. Section 33 lays a duty upon the arbitrator to act fairly and impartially. Section 40 imposes on the parties to an arbitration a duty "to do all things necessary for the proper and expeditious conduct of the arbitral proceedings" including complying with the arbitrator's determinations, orders or directions.

14. One very important part of the IFLA scheme is that its rules make it mandatory for the law of England and Wales to be applied. The parties cannot contract out of that. There is no room at all for the parties to agree that the arbitrator will apply the laws of their choosing, whether secular or religious. Why is that? Because it is essential that the law applied by the arbitrator is the same as will be applied by the court when it comes to turn the award into orders of the court. Let me again refer you to what the President said in S v S:- "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." So you may think that it is entirely sensible that the law of England and Wales must be applied.

15. The final overarching ingredient of the scheme is that the parties are under an obligation to make application to the family court to turn the award of the arbitrator into court orders where it is necessary to do so.

Except for one statute, namely The Trusts of Land and Appointment of Trustees Act, 1996, it will not be possible for an award to be turned into an order of the court by the mere registration of the award, for the court itself must exercise the discretion given to it under each of the statutes which the scheme covers.

16. So the scheme covers disputes both in relation to a couple's finances, assets, liabilities and also to property disputes. It specifically covers disputes under certain Acts of Parliament which give financial and property remedies to couples, whether married or not, and whether of the same sex or not, arising out of the breakdown of their relationship. The statutes include, but are not limited to, the Matrimonial Causes Act 1973 as amended, s. 12 of the Matrimonial and Family Proceedings Act 1984, which provides for financial relief after an overseas divorce, the Civil Partnership Act 2004, Schedule 1 of the Children Act, 1989, the Trusts of Land and Appointment of Trustees Act, 1996, and the Inheritance (Provision for Family and Dependants) Act, 1975. The scheme does not apply to the liberty of individuals, the status of individuals or of their relationship, the care or parenting of children, bankruptcy or insolvency, and it does not apply to any person or organisation which is not a party to the arbitration. As to the last, if a case involves assets in trusts to which one or both parties are beneficiaries, the trustees can only be made parties to the arbitration with their consent.

17. Thus let us assume that a husband and wife or unmarried cohabiting partners or parties of the same sex, whose relationship has broken down, want to have their disputes referred to an arbitration under the IFLA scheme. How do they go about it?

18. They, or their lawyers, obtain a form Arb 1 from the website of IFLA. It is that document, which when signed by them, is the means by which the

arbitration process is put in motion. It is the arbitration agreement. It sets out, inter alia, the nature of the dispute or disputes to be arbitrated, the name of the chosen arbitrator and in para 6 the parties confirm several vital matters. First, they have been advised and understand the nature and implications of the agreement to arbitrate. Second, once the arbitration has started they will not begin court proceedings or if already begun they will apply for a stay. Third, they have read the current edition of the rules and will comply with them. The fourth and fifth confirmations overlap and are at the core of the scheme. The parties confirm that they understand and agree that any award of the arbitrator will be final and binding subject to any arbitral process of appeal or review in accordance with Part 1 of the Act, and subject also to any changes that the court, to which an application is made to enforce the award, may require before it makes any orders embodying the award. The parties agree that they will apply to the court for orders to reflect the award, that the court has a discretion as to whether, and in what terms, to make orders and that they, the parties, will take all reasonably necessary steps to see that such orders are made.

19. What critically are they agreeing to? First and foremost, that the award is binding on them, if I may put it like this, whether or not one or both like the award. Second, they, not just one of them but both of them, agree to ask the court to turn the award into orders of the court. Third, although the award will be binding on them, each recognises that the court has a discretion what to do when turning the award into an order or orders of the court. As the President made clear in S v S, if orders are sought by consent, they will be made. If there is a challenge to the award, that challenge will be met by the court robustly and summarily.

20. So, the arbitrator's fees are agreed, he accepts the appointment, and the arbitration then formally starts. How is the arbitration conducted?

21. The short answer to that is “party autonomy”. Section 1(b) of the 1996 Act provides that one of the principles of the Act is that the parties should be free to agree how their disputes are resolved. The arbitration will, therefore, be conducted in a manner that the parties agree or in default by the decision of the arbitrator – see Rule 9 of the rules. “The parties are free to agree as to the form of procedure … and, in particular to adopt a documents-only procedure or some other simplified or expedited procedure.” The procedure is likely to be determined by the issues in dispute and whether there are facts which require oral and/or written evidence. Rule 10 says that the arbitrator will initially invite the parties to make submissions as to what are the issues and what procedure should be adopted. Those submissions can be made at a meeting, or by telephone or by email or in any other suitable way. Once the issues have been defined, it is likely that the course of the arbitration will be determined, that is to say whether it is necessary for the arbitrator to look at the entirety of the case like a family court, where the parties may have appointed the arbitrator to do, or whether it is sufficient for the arbitrator just to decide a discrete but important issue which may then lead the parties to settle? And, can it be done on paper or must there be an oral hearing?

22. Let me paint this scenario. The parties have been married for some 20 years and have children. They are divorcing. All the modest assets were acquired during the marriage and so, all things being equal, should be split 50/50 between them. But things are not equal. The matrimonial home is not valuable and if sold the net proceeds of sale will not fund the purchase of two homes, one for the wife and one for the husband. The wife does not work and looks after the children. The husband is in employment. They agree that the matrimonial home will have to be sold but cannot agree how the net proceeds of sale are to be split. The husband wants half, the wife more than half so she and the children can, she would say, be adequately housed. That is the issue that divides them. They decide to arbitrate because the arbitrator can decide that

discrete issue in the context of s. 25 of the Matrimonial Causes Act. 1973, leaving it to the parties to proceed once they have his award.

23. Is there any need in such a scenario for any evidence, and if so, can it be given on paper i.e. brief written statements from each of the parties? And is it necessary for there to be oral submissions by their lawyers or can it be done by way of written submissions? I suggest that this scenario I have just outlined is a good example of an arbitration being done all on paper.

24. Let me paint another scenario. The husband and wife have substantial assets. The wife has, amongst her assets, a chunk of wealth inherited from her parents during the marriage. The husband has a successful private company, the sale of which will not be realised for several years, let us say 5, after their separation. They agree that, after a marriage of 20 years, the marital assets should be split, all things being equal, 50/50. But things are not all equal. The wife maintains that her inheritance should be "ring fenced" i.e. it should not be taken into account when computing the marital assets. The husband disagrees. Further, the wife says that she should receive 50% of the value of the husband's company when it is sold in 5 years time. The husband says that is unfair because he will be slogging his guts out to build up the value of the company over a critical period of time when the marriage is over. He says she should therefore have a share a great deal less than 50%.

25. Here are 2 discrete issues which after swift adjudication are likely to lead to a rapid settlement of the case. A family court might, I believe, be reluctant to decide these discrete issues, despite Sir Paul Coleridge's innovation in OS v DS in 2004. But if the parties agree on arbitration to decide those 2 issues, then arbitration empowers them to do so, without having to gain the permission of the tribunal. Again, the parties can decide, or if not, the arbitrator, how these discrete issues are to be arbitrated – orally or on paper, or a combination.

26. Now, the evidence and submissions are over and the ball is in the arbitrator's court to write the award. Rule 13.1 shows the way. It must be in writing and dated and signed by the arbitrator. It will state the seat of the arbitration i.e. that jurisdiction with which the arbitration has its closest connection. Since the arbitrator must apply English law the seat will be England. The parties are free, if both so choose, to relieve the arbitrator from having to state in the award any reasons why he has reached his decisions. But if, as is most probable, he is asked for reasons, he does not have to produce a script that would be worthy of a judge, let alone a Fellow of All Souls. He is required to give "sufficient reasons to show why [he] has reached the decisions contained in [the award]". The award is not, unlike a judgment of a judge, a document which will be seen by the general public, including solicitors and barristers not engaged in the arbitration and therefore has no, what has been described by a former Chief Justice of Australia as "educational", purpose. It will not set any precedent, nor may it be quoted in other arbitrations without the permission of the parties. It is a document solely for the eyes of the parties and their legal advisers and its purpose is to tell them, and nobody else, in succinct and logical terms why the arbitrator has come to his conclusions.

27. I would now like, having briefly explained the scheme, to touch upon its advantages and what are said by some to be its disadvantages.

28. Advantages. I take them in no particular order of importance. First, privacy and confidentiality. All the proceedings before the arbitrator are private and entirely confidential. The media and the public are not admitted. Rule 16 of the scheme makes it abundantly clear that the arbitration and its outcome are confidential. All documents, statements, information and other materials in the arbitration are confidential, as are all transcripts of evidence and/or submissions. I suggest that this is a real bonus for parties who do not relish their family disagreements, whether great or small, being bandied about in the national or local

media. With the family courts now travelling at a gallop towards hearings being heard completely in open court, those couples caught up in a broken relationship who want their disputes adjudicated in private now have that option.

29. But what, you may say, happens then when the award comes to the court for implementation? Will not the parties lose their privacy and confidentiality? Well, look at how the President dealt with the case of S v S. He simply said that he had read the necessary papers and approved the award and consequential orders. In para 22 of the judgment he said he did not propose to go into the details of the case as "why, after all, in case like this should litigants who have chosen the private process of arbitration have their affairs exposed in a public judgment?" So, nobody was any the wiser as to the identity of the parties or the facts of the case. But that dicta was, of course, delivered in a case where both parties desired the award to be transformed into court orders. What, you may ask, is the court's likely attitude if one party challenges an award? Will the hearing be in open court with the media free to report what it likes thus destroying the privacy and confidentiality the parties gained through the arbitral hearing? Does there have to be an unanonymised judgment? As to the hearing, I think the courts, following the President's lead, are going to have to be robust and respect the wishes of the parties, expressed in the arbitration agreement and the rules of IFLA, that they, by choosing arbitration as opposed to court based litigation, opted for privacy and confidentiality throughout. A situation cannot be allowed to develop whereby the dissatisfied party in challenging the award before the court thereby destroys the very privacy and confidentiality which he or she agreed to in the first place. As to the judgment, I see no difficulty in the judge so framing his judgment and anonymising it so that it does not identify the parties in any shape or form.

30. Second, flexibity. This arbitral scheme, when compared to litigation, is able to take hold of the issues, if necessary the entire case, which the parties want decided without the necessity to go through the whole gamut of the process currently undertaken in the court system. The parties can submit for arbitration those issues which they see as the stumbling block to the resolution of their financial and property disputes, and, done in a way which they want, not in the way that a court may feel either that it has to impose on them or that it cannot permit. That is the ethos of the 1996 Act.

31. Third, speed. The court system can be, for many family finance litigants, particularly those of modest means, impossibly slow. Of course, priority is rightly given to children cases, particularly those where a local authority takes proceedings in relation to a dysfunctional family or where one party is seeking the summary return of a child to a foreign jurisdiction pursuant to the Hague Convention. And, there is a limited pool of judges. Thus, what can happen is that finance cases may be adjourned almost at the last moment, because the courts are overworked, and in some courts adjourned not just once but more than once.

32. Compare that to what can happen under the IFLA scheme. I have done some research by asking Resolution, who collate the statistics, what is the longest and shortest arbitration i.e. the period of time from the date of the appointment of the arbitrator to the date of the delivery of the award. The statistics are not complete because there are a number of uncompleted arbitrations. But I understand that the longest was one year and the shortest was 7 days. S v S, was completed from the date of the appointment of the arbitrator to the delivery of the award in 5 months. An arbitration on an important discrete issue, in which I was the arbitrator, took no more than 4 weeks from start to finish. Five days after my appointment the oral hearing took place. There were further written submissions. Then no more than one month after my

appointment the award, having been vetted by the lawyers for typos etc., was delivered to the parties. The arbitration lasting 7 days concerned a very short point.

33. I venture to suggest that such speed, even if of 12 months and certainly if of 4 weeks or 7 days is quite unattainable in our court system.

34. Fourth, the arbitrator. Once he or she is selected and accepts appointment, the arbitrator must see the arbitration through to its conclusion. There is no chopping and changing of the adjudicator as can happen, sometimes all too often, in the court system, where although a judge may start to deal with a case at an early stage and even "reserve" it to himself, there is absolutely no guarantee that he will actually try the case. But in arbitration there is that guarantee. Further, the parties to an arbitration select the "adjudicator". They are thus given the opportunity, unavailable, but understandably so, in the court system, of choosing the person whom they and their advisers consider to be the best person to decide their disputes.

35. Let me now turn to what I call the perceived disadvantages some practitioners and I will suggest that in reality there are none. Again, like the advantages I take them in no particular order of importance.

36. First, expense. It is said "the judge is free, the arbitrator must be paid". The second part is true, the first part is only partially true. Litigants must pay court fees. But the better answer to the criticism of expense is that if parties engage in arbitration and thereby get the hearing and the award through quickly, the saving in legal fees that would be otherwise expended whilst the case wends its way through the court system to a final hearing, will, I suggest, more than offset the cost of employing an arbitrator. We are all familiar with the delay that can take place in the

court system between the start of financial provision cases and the FDR hearing and then between the FDR hearing and the final hearing. I venture to suggest that this process can be drastically truncated if arbitration, allied perhaps to a private FDR before a specialist family lawyer or retired judge, is the preferred route. If months, even years, of litigation can be avoided by choosing arbitration, the savings in legal costs will be huge and vastly outweigh the fees of the arbitrator and the cost of hiring a venue.

37. Second, it is said "arbitration is only for the rich", by which I assume is meant that if only the rich can afford to pay an arbitrator, family arbitration can only be used by the rich. Not so. Amongst the 185 qualified arbitrators are a large number who are prepared to, and have agreed to, take on arbitrations in cases of very modest means and tailor their fees accordingly, and indeed who are happy to agree a fixed fee. In any event, no doubt the choice of arbitrator will be influenced by the fees he proposes to charge and the parties can shop around.

38. Third, I have heard the following as to why some lawyers will not advise their client to consider arbitration. It goes as follows. "If I advise my client to choose X as the arbitrator (and he is appointed) but he then goes against my client in the award I will get the blame. If, by contrast, the judge (whom I cannot choose) decides the dispute and he goes against my client, well, he gets the blame, not me". I find this an extraordinary, dare I say it irrational, excuse. Lawyers, and family lawyers are no exception, spend their professional lives making choices e.g. which counsel and/or expert to instruct and whether to advise their client to fight or settle, for which, if they make the "wrong" choice they may get the blame. I ask a rhetorical question- is it not better for the lawyer and his client that they should have the opportunity together with the other side, to choose the "adjudicator" i.e. the arbitrator in whom they have confidence, as opposed to the situation in the court system where, understandably, there is no choice whatsoever? And, to

be able to choose the "adjudicator" who is guaranteed to see the arbitration through all its phases to the very end. But if that does not satisfy the anxieties of the fearful lawyer, there is a solution at hand. Under the scheme the parties can submit an agreed shortlist of names from the IFLA panel and ask IFLA to nominate one from that list. Furthermore, if there is no shortlist of names, the parties can ask IFLA to nominate an arbitrator from its panel, taking into account matters such as the nature of the dispute and the location of the parties.

39. Fourth, it is said that "if the award is binding that means there is no right of appeal", the inference being that in the court system there is. Not so. No appeal in England and Wales from a decision of a family judge can be brought without the permission of the judge or the Court of Appeal. Section 69 of the 1996 Act makes provision for an appeal to the court on a point of law with leave of the judge. Section 68 makes provision for an application to be made to the court challenging an award on the grounds of serious irregularity, as defined in s.68(2), affecting the tribunal, the proceedings or the award. But, let us be realistic. Despite the restricted situations in which an award can be challenged under the Arbitration Act, 1996, the reality is that in family law if an arbitrator makes an award which is "off the wall" i.e. wrong in principle or perverse, no family court is going to turn such an award into court orders if one party were to challenge the award. Why? Because the court has a discretion under the various Acts of Parliament, to which I have already referred, whether to make the orders or not. I am sure the courts will give very great weight to the agreement of the parties that the award is final and binding. But if, in the end, it is convinced, and here the courts must be careful not to play the detective, that the arbitrator's award is truly "off the wall", then it is not going to accede to any application for the award to be enforced by means of court orders.

40. Fifth, it may be said that "if all arbitrations are confidential then no award in one can be cited in another, thus creating the risk of

inconsistent awards being made". I accept that an award in any particular arbitration cannot be cited in another, not at any rate without the express consent of both parties in the first arbitration. This is inherent in any system of arbitration where the principle of confidentiality prevails. So there is indeed the risk of inconsistency. But it is more apparent than real. In family finance cases, the inconsistency is likely to arise not by reason of the discretion given to tribunals under English law to determine the fair outcome, but by an arbitrator making a decision which is wholly outside the wide parameters of that discretion. That can be cured by the court. And just because two arbitrators may differ on roughly the same set of facts as to outcome does not under English family law mean that one is right and the other is wrong. It is only if one arbitrator makes an award which is indeed outside the wide ambit of the discretion given to the tribunal under English law, so that it can be said that the award is wrong in principle or perverse, that the court is likely to uphold a challenge to it by the dissatisfied party. In that way the courts will be able to keep an eye on the arbitral process.

41. Sixth it is said "the law cannot be developed in an arbitration". That may be so. But the vast majority of family cases involve the application of existing principles to the facts of the particular case. For those very small number of cases where the law may need developing, then they can remain in the court system.

42. I now turn to the issue of arbitration in children matters. There is, as yet, no secular scheme in operation for disputes about children to be arbitrated. However, IFLA has set up a sub-committee under the chairmanship of HH Judge Judge Michael Horowitz QC to consider this matter. One of its members is Mr Justice Jonathan Baker who gave an illuminating judgment on child arbitration in January 2013 in the case of AI v MT [2013] EWHC 100 (Fam). The other members are leading lawyers in the field of child law and arbitration. The sub-committee's remit is to consider a number of issues such as the legal basis, jurisdiction, and

effect of an arbitral award concerning children and its enforceability, what should be the qualifications and experience of an arbitrator, their training and certification, and the nature of the rules governing such a scheme. It will be extremely interesting to see what they report. Anything I may venture on the subject are of course my own views, and nobody else's, and cannot be distilled in the same way as the deliberations of this important and distinguished sub-committee.

43. In my view, the first question to consider is whether there ought to be, as a matter of principle, an arbitral scheme to resolve children disputes which is, by its nature, a dispute resolution procedure alternative to the one provided by the court system. I do not see why not, provided that certain criteria are met, to which I will come in a moment. Let me first look at the background. The child's parents are responsible for its upbringing and most parents are very concerned to see that their child is given the best emotional, psychological and material support possible. They may have to take difficult decisions, but they take them, for better or for worse; and unless the state, through the mechanism of the local authority, intervenes under Part IV of the Children Act, 1989 or some other lawful power, then the parents are the arbiters of their children's upbringing. As the child grows up they will obviously have to be sensitive to the child's wishes and feelings. Thus, if and when the relationship of the parents breaks down, they may disagree as to how, where, and by whom their child is to be brought up, but, I ask rhetorically, why should they not be able to agree to resolve their differences through a secular, arbitral mechanism? Which mechanism can be private, confidential, quick and with a "adjudicator" in whom they have confidence? Is it not patronising and paternalistic to say that parents may not have the opportunity to agree on what method of resolution they consider is best in the circumstances of the case?

44. The first criteria I would suggest for any such arbitral scheme in the future is that the arbitrator must apply English secular, family law which

is to be found largely, but not exclusively, in The Children Act, 1989. The mandatory application of English law is the cornerstone of the present IFLA scheme. The President in S v S plainly thought it of critical importance when considering the enforceability of financial awards by the courts of England and Wales. In my opinion it should be the cornerstone of any future arbitral scheme for children. As that is the law applied in the courts, then so should it be in any future arbitral scheme for children disputes. Indeed I venture to suggest that any future arbitral scheme for children which does not have at its centre the principles enshrined in the Children Act, particularly section 1 which makes the welfare of the child the court's paramount consideration, will never find acceptance in the courts of England and Wales. I do not wish in any way to trespass into the territory of private arbitration under any religious law. But I do notice that in AI v MT where the New York Beth Din applied its own law, Baker J was satisfied not only that the arbitrator in that case was concerned with the welfare of the children as a matter of paramountcy but also that the decision or award was plainly in the best interests of the children.

45. Secondly, there will have to be areas of children law that cannot be the subject of arbitration. Perhaps the most obvious example is public law, where the state, through the medium of local authorities, intervenes in a family, and in the end may have to remove from one or both parents one or more of their children, either temporarily or permanently. Another example may be child abduction, both domestically and internationally. Yet a further example is wardship where the court is exercising its own inherent jurisdiction to protect a child in place of its parents. And there may be other examples. But there are areas where arbitration could be very helpful – what the family arrangements should be; with which parent the child should live; what contact the child should have with the other parent; what schools should the child attend; and how much should the child see of either set of grandparents. I am sure there may be several other areas where arbitration could prove to

be a very swift and decisive way of resolving child centred disputes between parents.

46. Thirdly, in an appropriate case provision ought to be made for the child or children, the subject of the dispute between their parents, to be able to participate directly. This will need some very careful thought, but if a child may be represented in court based proceedings and thus make his or her wishes directly known to the tribunal, there seems no good reason why the same should not happen in arbitral proceedings.

47. Fourth, in my view, the award of the arbitrator, framed to reflect the best interests of the child, should, as between the parties, be final and binding. There should be a provision similar to the one in the current IFLA scheme that both parties, not just one of them, will apply to the court to transform the award into court orders with an express recognition that the court can exercise its own discretion. I say this because children disputes can be extraordinarily destructive and if the parties agree on arbitration, which can only happen consensually, then the "dissatisfied" parent should not be permitted, absent an award which is plainly perverse, to have a second bite at the cherry by relitigating the dispute before the court asked to implement the award. It would not be in the child's best interests to do so.

48. Fifth, those who wish to become arbitrators in children matters should undergo suitable training just as the arbitrators under the current IFLA scheme underwent, and, having undergone that training, should be required to become members of the Chartered Institute of Arbitrators. It is, in my view, so important for the success of any arbitral scheme in family matters, whether concerned with money or children, that the public should see that the arbitrators are members of a highly reputable professional body that has a disciplinary code of conduct, which, if transgressed, may lead to the transgressor ceasing to be able to conduct arbitrations just as in the same way the GMC can strike a doctor off its register and thereby stop him practising.

49. So, ladies and gentlemen, to my conclusions. I return to the current IFLA scheme which covers finance and property disputes. We are fortunate in this country to have a good legal and judicial system. But it is under immense strain. Resources are constantly being cut or withdrawn. This leads to rigidity, delay, and expense. There is a lack of freedom in the court system for individuals to determine the procedure under which they themselves would like their differences to be adjudicated. Here for the first time is an arbitral scheme, applying English law, which empowers couples, suffering a terminal breakdown in their relationship, to opt to have their financial and property disputes adjudicated in the way that they consider suits them best. If the parties want privacy, arbitration will provide it. If they want speed, flexibility, and one "adjudicator" (and a specialist at that) to take their case through from beginning to end, then arbitration provides all of that. In my estimation the advantages of parties submitting their financial and property disputes to arbitration so outweigh what are said, very inaccurately, to be disadvantages, that I confidently predict that within the near future family finance arbitration will complement the court system just as private medicine complements the National Health Service.

50. You will be pleased to hear that I have now only 2 more things to say. Thank you for listening so patiently and attentively. And, on your chairs have been placed three documents for you to take away if you wish. They are the form Arb 1, the IFLA Rules, and the President's judgment in S v S. They will provide interesting reading, and I promise that they can be easily digested with the assistance of no more than one gin and tonic.