City University – Arbitration 5 years on

By His Honour Judge Donald Cryan (Hon) LL.D.

1. Thank you for coming this afternoon. I am grateful for the introduction by the President.

2. I am particularly pleased to be able to give this talk at City University which for well over a decade has supported the Centre for Child and Family Law Reform. The Centre has had various projects and interests over the years, but it’s work on family arbitration has undoubtedly been very significant. It is there the seed was sown and there it has been nurtured.

3. In medicine, Engineering and the sciences it is commonplace for there to be collaboration between academia and the practical world. This is not so common, or as easily recognised in the field of the administration of justice. But in Family arbitration we have a paradigms example of how academia and the professions can come together for the public good. And to contribute to solving the problems facing the administration of justice in a progressively more challenging environment. In initiating the process which has lead to the launching of family arbitration in this country, without primary legislation, the Centre has facilitated a real “sea change” in how Family justice can be delivered and I believe we ain’t seen nothing yet.
4. I’m conscious that I’m addressing a mixed audience this evening. There are some who will understand wholly and completely how the Arbitration works in family proceedings. Others will not be so familiar with it, and so I am faced with something of a challenge. I thought perhaps I might overcome it by telling the story of how arbitration came about and how and why it has come to be accepted as an important option on the ADR menu. It may not be a ripping yarn, but, as an example of how systems can develop through imaginative and collaborative effort it is an interesting one.

5. Change in the Family Justice system is in fact much more endemic and dynamic than is general appreciated. In England and Wales and other developed societies in the 20th Century there has been a massive growth in state administered Family Justice. The first year in our history when there were over 1,000 divorces was 1918. In 2013, the last year for which statistics are available, there were over 118,000 divorces. Over the last Century, really for the first time, as a system of family justice through the Courts has slowly become available to the whole of society.

6. As it developed the Family justice system has become, more complex, slower and expensive. That can be illustrated by the fact that when I started to study Family Law 50 years ago, Rayden, the major text book was a single volume with occasional supplements. It cost £9.10s. It now cost £1,100.00 and has an updating service which costs about £1,400 a year. Then there were about half a dozen Family Silks. Now, in London alone there are at least 50.
7. A system cannot develop like that without putting considerable strain on the resources of the State. I do not criticise the motivation behind what happened. The courts and the professions involved were trying to rise to the challenge of getting the best results. However, the impact on families of the involvement of the Courts in this way, because of the delay, and cost has the potential, in and of itself, to be detrimental to the welfare of children and families.

8. Family justice is multifaceted and as our system has evolved priority has been given to different areas. Divorce itself was the main focus until the late 1970s. As is often the case, change is driven by cost, and cost to the public purse in particular. It was, in fact, completely unjustifiable that public resources in terms of the judiciary, courts and Legal Aid should be spent on divorce, and cost saving reforms were introduced. Now, with the reforms in I.T. and online applications, divorces will soon be granted by the judicial equivalent of R2D2.

9. The reprioritisation of resources in the 1980s came in time to support the very welcome changes brought in by the Children Act 1989 and the development of a vastly improved Family Justice system so far as it affected children, both in terms of Private Law, cases where only the family are involved, and Public Law where the State takes a hand.

10. For the first decade and a half after the introduction of that Act the system was relatively well resourced and the number of cases were manageable.
The number of Public Law Cases has risen inexorably, particularly after the predictable tragedies such as the Baby P case, to name one of a number. The length and complexity of Public Law cases began to increase unsustainably and, frankly, unjustifiably. But even with the reforms which were put in place from 2000 onwards the sheer number of cases was absorbing the available resources and eventually this led to the redistribution of Legal Aid and the effective withdrawal of funding from the vast majority of private law financial and Private Law children’s cases.

11. It has become seriously questionable whether even the moderately well-off can afford Family Justice in the courts and even whether the rich are getting value for money. It is against the backdrop of all those factors that some people began to consider whether Family arbitration might have a role to play.

12. In 2004 Dr Frances Burton of the Centre of Child and Family Law of City University floated the idea that Family arbitration could be introduced, in a way which would be recognised by the courts. There was a great deal to be said for the theory, but the route to implementation was far from clear. At that stage a working group was formed which included the Chartered Institute of Arbitrators, the Family Law Bar Association, the Law Society and Resolution, the solicitors’ Family Law Group. By then I had become the chair of the Centre and Frances Burton asked me to join the working group. There was much to be done.

13. Mediation in family matters has a major role, and always has had. But arbitration itself is not new. In Family matters it is probably older that
any other field. Since time immemorial partners in domestic conflict have agreed to put their differences to the sage in the family or the community, and to be bound by what Great-uncle James or Aunty Judith thought was right. They still do. However, such arrangements are premised upon a particular type of family trust and the effective obedience of the parties to the ruling. The problem arises when the state is required to become involved.

14. A Little law: It is a fundamental premise of the Family Court that its jurisdiction over Matrimonial Causes and child welfare matters, vested in it by Parliament cannot be ousted by agreement of the parties. The Courts have the ultimate duty to determine such issues. The parties cannot lawfully make an agreement either not to invoke the jurisdiction or to control the powers of the court where the jurisdiction in invoked. That was established by Lord Hailsham in *Hyman v Hyman*. But since then there have been immeasurable changes in social and religious attitudes and the capacity of the courts to deal with those changes has meant that a more flexible approach has had to be found.

15. There was growing recognition of the benefits of encouraging the parties to reach settlements. By 1981 in the case of *Edgar v Edgar*, it was held that formal agreements, properly and fairly arrived at with competent legal advice, should not be displaced unless there were good and substantial grounds for concluding that an injustice would be done by holding the parties to the terms of their agreement. In that case, although the husband

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1 [1929] AC 601, (1929) FLR Rep 342
2 (1981) 2 FLR 19
had the advantage in bargaining power, there was nothing to suggest that there had been any pressure on, or exploitation of, the wife and there was no adequate explanation of the wife's conduct in deciding to agree to a deed of settlement which purported to limit her right to apply to the court. When she then asked the court to disregard it, the court held there were no grounds for finding that justice required the court to relieve her from the effects of her agreement, but in so deciding the court held:

(i) even though the wife had undertaken in a deed not to seek further financial provision the judge had jurisdiction to entertain the wife's application for a lump sum;
(ii) where such an agreement existed, it should be taken into account under the heading of conduct when the court exercised its discretion on financial matters under s. 25 of the Matrimonial Causes Act 1973;
(iii) In taking such an agreement into account the court must have regard to all the circumstances, including potentially invalidating circumstances such as undue pressure, exploitation of a dominant position, inadequate knowledge, bad legal advice, or an important change of circumstances. But it was also important that formal agreements, properly and fairly arrived at with competent legal advice, should not be displaced unless there were good and substantial grounds for concluding that an injustice would be done by holding the parties to the terms of their agreement.

16. But still the court’s determinative role both de facto as well as de jure remained closely guarded. In Xydhias v Xydhias: Thorpe LJ, held that the principles of contract law were of little use when looking at the

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3 CA 21 December 1998
course of negotiations in divorce ancillary proceedings. An agreement for
the compromise of an ancillary relief application does not give rise to a
contract enforceable in law. The parties seeking to uphold a concluded
agreement for the compromise of such an application cannot sue for
specific performance. The only way of rendering the bargain enforceable
is to convert the concluded agreement into an order of the court.

17. An agreement to arbitrate and to be bound by the terms of the arbitration,
is in essence a contract and so it might seem that unless Thorpe LJ’s view
could be finessed, binding arbitration had no place in the Family Courts.
However, the view of the Centre for Child and Family Law Reform was
that in fact an agreement to arbitrate should be regarded as an agreement
in the same sense as an agreement to settle a case on the Edgar principles.
That view has found general favour with the Courts and the fact that an
IFLA ARB1, the document embodying the agreement to arbitrate, has the
characteristic of a contract does not render it ineffective within the context
of Family proceedings.

18. In other jurisdictions the significance in money cases, of both prenuptial
and post nuptial agreements was growing and it became clear that parties
in England and Wales also wished to have them recognised, at least within
the parameters of our legislation. To coin a phrase, the jurisprudential
mood-music was changing. By 2010, led by the Supreme Court in its
seminal decision in *Radmacher (Formerly Granatino) v Granatino*<sup>4</sup> the
earlier paternalistic approach of the courts – best summed up by the phrase

<sup>4</sup> [2010] UKSC 42 [2010] 2 FLR 1900
“we know best”- was dying if not dead – at least in family disputes about money and property.

19. At the heart of *Radmacher v Granantino* \(^5\) was the standing in English law of a pre-nuptial agreements, that is to say an agreement entered into by a couple intending to marry which would regulate the disposition of their assets if they divorced. The Supreme Court emphatically endorsed both pre-nuptial and post-nuptial agreements. 7 of the 9 Justices under the heading headed “autonomy” agreed the 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.”

20. In the same year that *Radmacher* was decided came the Family Procedure Rules 2010 - As with civil litigation and the Civil Procedure Rules it was recognised that the ‘overriding objective’ of the procedural code is to enable the court to deal with cases justly, but that had to include a provision requiring that cases be dealt with expeditiously and fairly, in ways that are proportionate to the nature, importance and complexity of the issues, and saving expense.

\(^5\) [2010] UKSC 42 [2010] 2 FLR 1900
21. Under r 1.4, the court is now under an obligation to further the overriding objective by actively managing cases including, inter alia, encouraging the parties to use an alternative dispute resolution (ADR) procedure if the court considers that appropriate and facilitating the use of such procedure. The court was given powers to encourage and facilitate the use of ADR such as adjourning the proceedings at any stage to enable ADR to take place.

22. The aim was to speed up the process, and to reduce costs for the both the individuals and the state. In England and Wales the use of Mediation and collaborative procedures have had a considerable attention, but they had not solved the problem. The time was clearly right for the introduction of arbitration as an additional tool. I say immediately that arbitration will not, on its own, solve the challenges facing the Family Justice System. It is one choice on a menu. I accept that sensitive negotiation, or mediation will nearly always be a better solution, provided it is not too protracted. But the breakdown of relationships often means that even the most effective mediator cannot find a way through and the decision has to be taken by a third party.

23. When the working group was considering the way forward, it became clear that for various reasons the government was not prepared to legislate for the introduction of family arbitration and if it was to be introduced in England and Wales it would have to be done within existing legislation.
24. I must say a little more about the route which was identified by the Centre early on, and how it has evolved, but it is worth mentioning at this stage that there were initial arguments advanced, both for and against the introduction of family arbitration, which were overstated. Those against the introduction argued that the Courts had been given exclusive jurisdiction over Family disputes by Parliament. Statutory schemes and special courts existed for the resolution of such disputes and the Family Courts would see it as their duty to uphold that jurisdiction. Furthermore, they argued that the problem of enforcement was such that arbitral awards would be of no value. They would not be enforced. The Arbitration Act 1996 was not intended to be used in Family cases and the only enforcement procedure which existed was under the Civil Procedure Rules in the Commercial Court. The Family Procedure Rules made no such provision. As it was, such arguments got the judicial zeitgeist wrong and it has been possible to introduce arbitration within the context of existing legislation.

25. Those who argued too boldly in favour of the introduction of Family arbitration did so on the basis that since the consolidating Arbitration Act 1996 did not expressly exclude Family issues it could and should be used to resolve them. The more astute proponents of that argument were content to limit their case to the financial issue between divorcing or separating partners, but even that stretched the scheme of the 1996 Arbitration Act too far, since on a full reading it was clearly not aimed at resolving disputes in the realm of Family Law, as the assignment of enforcement to the Commercial Courts by the Civil Procedure Rules clearly demonstrated.
26. The working group accepted that that there were areas such as trust disputes between cohabiting partners where arbitration had not previously been used, but where that the Arbitration Act 1996 could be applied. It was also thought that whilst it could be used effectively as a template for Family Arbitrations, Parliament had give the Family Courts an exclusive role in most family disputes and had passed specific legislation to deal with it. If Family Arbitration was to proceed it had to do so down a defined corridor compatible with the existing Family Law and the rules and practices of the Family Courts. That said it was thought, as it has proved rightly, that though the corridor was narrow, judicial attitudes were changing and the corridor was widening.

27. The International lessons: In 2010 I attended the excellent Australian Bi-Annual Family Law Conference with David Hodson, another member of the working group, and it was apparent from our enquires that in Australia at least, notwithstanding a legislative framework, arbitration had not proved a popular option. In 1991 the Australian Family Law Act 1975 had been amended to allow post-separation spouses to have property and spousal maintenance disputes arbitrated. However, such Arbitration was a toothless tiger in the absence of any unilateral mechanism to provide for enforcement of an arbitration award as a binding order. Parties understandably thought there was not much point in attempting arbitration at considerable cost, if there was a real risk that the court process would not thereby be avoided. Here was a clear lesson for us.

28. The Australians came to recognise their problems and ten years later, in early 2001, their Family Law Regulations were amended to allow for
registration and thus awards became enforceable. Their experience taught them that other problems would also have to be resolved if their Family Arbitration scheme was to become acceptable. Steps were taken to deal with issues such as the qualifications of arbitrators, the form of arbitration agreements and other matters regarding the conduct of arbitrations. Family lawyers were also required to consider advising clients about it.

29. Further important lessons for our working group came from the measures taken by the Australian legislature, but from our enquiries in Australia they were clearly not enough. The legal community in Australia had not embraced arbitration by the time of the 2010 conference. The structures and other circumstances were not such that they had confidence that family arbitration would deliver finality and that the risk of that would not make arbitration a better option than simply taking the matter to court.

30. Since our work in Australia, a much more comparative work has been done and there is now a fascinating section in the second edition of Dennis Sheridan and Suzanne Kingston’s book on Family Law Arbitration, which you will see at the reception after this talk, which covers the experience in other jurisdictions. The take-up, even with supportive legislation, has generally been slow, sometimes to the point of stasis. Our own experience has been a slow process, but it has been continuous and the rate of take-up continues to increase, largely because we have learnt from the mistakes of others and have had the clear support from the judiciary, who have, I am relieved to say endorsed the jurisprudence first advanced by the Centre for Child and Family Law.
31. The task of the working group was to constructing a scheme which would give confidence to users, the profession and the judiciary that was likely not only to deliver high quality family justice, and be both faster and cheaper than going to court, but would also be likely to be final. Certainty, or at least as much certainty as would be available in the court process, had to be provided for. For the scheme to succeed there would have to be general confidence that the courts would enforce awards and this would have to be achieved without legislation.

32. It was clear that a vehicle need to be formed which would be the focus of the venture or in modern-speak, the brand. It would have to demonstrate that that arbitrations would be overseen by a body, the governance of which was clear and acceptable to the profession and the judiciary, and would give confidence to the general public. After some unhappy mistakes in resolving on a name (mostly because the acronym was either rude or silly), for example the name Society of Family Arbitrators, or SOFA, was thought best avoided, the Institute of Family Law Arbitrators was formed and the former Lord Chancellor, Lord Falconer, agreed to serve as chairman of its board. Representatives of each of its stakeholder were appointed to the board, including Dr Burton who represented the Centre. As a serving judge it was thought that I ought not serve on the board, but I was asked to chair the Advisory Committee which included a number of those who had worked to set it up in the first place.

33. IFLA has been able to control and direct what has been necessary to establish and achieve the scheme’s launch. For this to happen the basic issues which need to be to be resolved were:
The subject matter of Arbitrations:

34. From the outset it was resolved by the working group that there were some areas of family disputes which could never be the subject of arbitration, for example divorce and the status of parties. Parliament would never countenance that. There were other areas in which it would be very unlikely that arbitration would ever be able to operate, for example were the coercive power of the courts to protect children or vulnerable parties were necessary, or where the standing of the court was necessary in international matters involving children. There were further areas where it was thought that the standing and effectiveness of family arbitration needed to be established before a scheme that would command confidence could be put in place. The prime example of this was disputes over children.

35. And so a scheme was designed to resolve by arbitration disputes which were financial and/or involve property and which arose from:
   - marriage and its breakdown (including financial provision on divorce, judicial separation or nullity);
   - civil partnership and its breakdown;
   - co-habitation and the ending of co-habitation;
   - parenting or those sharing parental responsibility;
   - provision for dependents from the estate of a deceased.

36. The Rules which were prepared set out the most likely types of application within those areas without limiting the scope of the scheme.
How were arbitrations to be conducted:

37. Rules were drafted, over which IFLA retains control over. I should say something more about them to give you some idea of the approach that was taken. They were based on a combination of the CIarb Rules and the Family Procedure Rules.

38. The scheme did incorporate the relevant provisions of the Arbitration Act, 1996 in the agreement to arbitrate, (the ARB1) the parties specifically agree that their arbitration will be conducted in accordance with the 1996 Act. In relation to some limited areas this would also be the route to enforcement but, if enforcement is necessary in the majority of cases this would have to be through existing Family legislation supported by the Family Procedure Rules.

39. The Rules of the scheme, to which the parties bind themselves make it mandatory for the law of England and Wales to be applied. The parties cannot contract out of that provision. There is no room for the parties to agree that the arbitrator will apply the laws of their choice, whether secular or religious. That is because it is essential that the law applied by the arbitrator is to be English law which in turn will be applied by the Family Courts of England and Wales when converting the award into orders of the court.

40. The final overarching ingredient of the scheme is that the parties agree that they will apply to the Family Court to convert the award into court orders where it is necessary to do so, and furthermore, they acknowledge that the court has a discretion as to whether, and in what terms, it will make orders arising out of the award.
41. The arbitration itself, shares with other forms of arbitration, considerable flexibility in its procedures. It can be limited to specific areas which the parties have not been able to resolve. It can be conducted on paper or with such oral evidence as the arbitrator thinks might be helpful. It has the benefit of informality.

Who were to conduct arbitrations?

42. Again it was essential in establishing the scheme that all could have confidence about the training, quality and regulation of the arbitrators. Putting together a training programme proved relatively easy. Fortunately, the working group and then IFLA has had available to it from an early stage the advice and services of two leading trainers. Jonathan Teck, whose primary experience had been in civil arbitration and Susanne Kingston, a highly experience Family Law practitioner of international standing with the leading London firm of Withers. They put together a training programme and qualifying assessment which would be independently marked and scrutinised.

43. Identifying the right criteria for candidates and then persuading a sufficient number of leading members of the profession and retired judiciary that it was worth their while qualifying and joining an untried enterprise was a potential challenge.

44. For IFLA arbitrators to have the confidence of the profession and the judiciary, candidates were going to have to be experienced family lawyers or judges with the relevant experience. The entry requirement was deliberately set at a high level. Candidates had to be either to be
  - a practising barrister,
o a practising solicitor,
o a part time fee paid judge,
o a practising Fellow of the Chartered Institute of Legal Executives
o who has at least 10 years post qualification experience.

He or she was required to have spent a minimum of 600 hours per annum carrying out family law casework during each of the 10 years immediately preceding his or her application. Retired practitioners would qualify if they met those requirements and applied within 12 months of the date of retirement.

45. It was fortunate for the scheme that from an early stage two leading former judges of the Family Division, Sir Hugh Bennett and Sir Peter Singer, have shown a keen interest in the scheme. Sir Hugh Bennett had in fact been co-opted onto the working party. Candidates for training came forward in good numbers. To date about 178 arbitrators have been trained in the financial scheme and 101 are qualified in the children’s scheme. They include former judges of the Court of Appeal, recently retired High Court Judges, Circuit Judges and District judges; Queen’s Counsel, Senior partners in leading Family Law firms and other experienced and qualified solicitors and barristers and are located throughout the country.

46. Of course, for there to be full confidence in the arbitrators a system for qualifying was not enough of itself. There also had to be a system in place for continued regulation. The CIArb had such system in place for the regulation of the professional conduct of its members. As most of you will know, the CIArb lays down ethical codes for its members and deals with complaints of misconduct through its Professional Conduct Committee. And so it was arranged that on completion of the training course for family
arbitrators it would be a condition that IFLA Family Arbitrators would become, and remain, Members of CIArb, and thus subject to their regulatory régime.

47. With these structure in place IFLA was ready to roll out the scheme, but there remained the confidence problem to which I have constantly referred. Without the direct support of well framed primary legislation developing trust in the IFLA scheme was always going to be slow to establish. In England and Wales at least, lawyers are conservative souls. That seemed to accord with international experience, even in some places where legislation was in place to support it. They were initially reluctant to advise their clients to agree to arbitrate.

48. In our family law system there is no provision for declaratory or hypothetical judgments which would give prospective approval of the type of scheme we came to propose. However, we have the Family Justice Council, consisting of judges, barristers, solicitors, other professionals and government official. The working group brought the outline of the scheme to the Financial Committee of the Council, chaired by Mrs Justice Parker, who I am pleased to see here this evening which encourage the advancement of the scheme without giving formal approval, which it thought beyond its remit. It seemed to us that that was all that was necessary and would allow the use of that limited endorsement to encourage support from the profession, whilst recognising that the start was bound to be slow and it would probably not be until the scheme was challenged in some way and found by the High Court or Court of Appeal to be sound that it would become accepted.
49. That happened in the case of S v S⁶, a judgment of the President of the Family Division, Sir James Munby. The impact of that case and of others which followed gave the profession more confidence and there followed, albeit slowly at first an expediency increase in the number of cases submitted to arbitration.

50. A Little more Law: In the case of S v S the husband and wife had been married for 26 years and had a 19-year-old child together. When the marriage broke down in order to settle their respective financial claims they entered into an arbitration agreement in the IFLA form – the ARB1. The parties applied to the county court for approval of the final award. The President transferred proceedings to the High Court and took the opportunity to provide guidance on judicial approval of arbitral awards. He held that: Where parties had bound themselves, by signing a Form ARB1, to accept an arbitral award of the kind provided for by the IFLA Scheme, this generated a single magnetic factor of determinative importance. In the absence of very compelling countervailing factors, the arbitral award should be determinative of the order the court makes.

51. The President considered that there was no conceptual difference between the parties making an agreement and agreeing to give an arbitrator the power to make the decision for them. In fact, an arbitral award was of its nature even stronger than a simple agreement between the parties.

52. Where the consent order which the judge was being asked to approve was founded on an arbitral award under the IFLA Scheme or something

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⁶ [2014] EWHC 7 (Fam)
similar, the judge’s role was simple. The judge would not need to play the detective unless something leapt off the page to indicate that something had gone so seriously wrong in the arbitral process as fundamentally to vitiate the arbitral award.

53. Although recognising that the judge was not a rubber stamp, the combination of:
   
   (a) the fact that the parties had agreed to be bound by the arbitral award;
   
   (b) the fact of the arbitral award; and
   
   (c) the fact that the parties were putting the matter before the court by consent, meant that it could only be in the rarest of cases that it would 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 was difficult to contemplate such a case.

54. The president went on to give procedural guidance which is now to be found in the President’s Arbitration Guidance November 2015.

55. Where a party sought to resile from the arbitral award, the other party’s remedy was to apply to the court using the ‘notice to show cause’ procedure. The court would adopt a robust approach, both to the procedure it adopted in dealing with such a challenge and to the test it applied in deciding the outcome. In accordance with the reasoning in cases such as *Xydhias v Xydhias*[^7], the parties would almost invariably forfeit the right to anything other than a most abbreviated hearing; only in highly exceptional circumstances was the court likely to permit anything more

[^7]: [1999] 1 FLR 683
than that (see para [25]). Where the attempt to repudiate 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 repudiate 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”

56. With the President here I hope it is not too presumptuous of me to say that it seems clear that his approval of the IFLA scheme was clearly influenced by the fact that it requires the arbitrator to decide the dispute in accordance with the law of England and Wales, and so there is no place for discrimination between husband and wife.

57. Last year Mostyn J followed the President’s approach in *S v S*\(^8\) in *DB v DLJ*\(^9\). Of family arbitration he said;

“Therefore, in essence, there are but three grounds of challenge in family proceedings namely mistake, fraud and supervening event.”

58. After the President’s judgement lawyers began to accept that here was an

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\(^8\) [supra]

\(^9\) [2016] EWHC 324 (Fam)
alternative way of resolving cases which could benefit their clients. Those of you who are experienced in arbitration will easily understand the advantages, but in Family cases they have can be subtly different and I think it would help if I were to summarise some of them: In no particular order they are:

- **Speed** – As I have already said the Family Courts are overburdened with work. Everyone prefers to see litigation resolved as quickly as possible, but in Family cases there is a “life blighting” impact of delay to the individuals, who invariably want nothing more than to put the dispute behind them and to get on with their new life and to be free of the uncertainties which effect them. A swift resolution of their family or domestic problems means a very great deal and advisers who can achieve that for them will be greatly appreciated.

- **Cost** - Whilst arbitration has the added cost of the arbitrator and arbitration facilities, family arbitration allows for a more focused approach to disputes and can thus limit the overall cost, but of greater importance is that in Family disputes there is an almost endless potential for the parameters of the dispute to alter – one party makes or looses a lot of money; someone becomes responsible for a new child; wealth is inherited; someone becomes seriously ill and so on and so on, and each time more letters are written, more evidence is required and the costs mount. Thus, unlike civil or commercial matters where the issues to a large degree are crystallised when the litigation starts, the longer a family dispute goes on the more will need to be done.

- **Choice of Judge** – I need say no more about this, save that practitioners will easily understand that the provision of known experience and continuity of tribunal is obviously a benefit.

- **Privacy** – Over the time the scheme has been developed a move to
more open justice in the Family Courts has resulted in a loss of privacy. Most people do not want publicity and the perception is that it has made arbitration more attractive. In 2012 Mostyn said in *W v M (ToLata Proceedings: Anonimity)*\(^{10}\), “Where parties are agreed that their case should be afforded total privacy there is a very simple solution: they sign an arbitration agreement. Arbitration has long been available in proceedings such as these. Recently arbitration has also become available in financial remedy proceedings by virtue of the much-to-be-welcomed scheme promoted by the Institute of Family Law Arbitrators. In those proceedings also privacy can now be guaranteed.”

- Certainty of outcome – the fact that parties have chosen to invest in an arbitration is likely to make it less likely that the dispute will be protracted.

59. After the launch of the scheme it took time for it to be accepted, but the ground had been properly laid and as expected financial arbitration has become recognised as a viable alterative to litigation. Now over 140 financial arbitrations have taken place and it must be safe to say that hundreds of Millions of pounds worth of family assets have been successfully redistributed.

\(^{10}\) [2012] EWHC 1679 (Fam)
60. With financial matters established the Advisory Committee thought it time to extend the scope of the scheme to deal with children’s matters. It was encouraged to take that approach from a number quarters. In AI v MT (Alternative Dispute Resolution)\(^{11}\). Baker J. heard a case where a family of Orthodox Jews had agreed arbitration by a rabbi of the New York Beth Din. The judge permitted the parties to proceed with the arbitration – on basis that the outcome, although likely to carry considerable weight with the court, would not be binding. Baker J eventually agreed to make an order which effectively followed the decision of the rabbi. In so doing he made it clear that the arbitration could not oust the court’s jurisdiction. He was satisfied that the rabbi had determined the outcome by reference to children’s best interests and that the financial order was unobjectionable.

61. The Advisory Committee was also encouraged by various talks and articles by Sir Hugh Bennett and Sir Peter Singer to accept that families in dispute over children’s issues would welcome the advantage of what a Jewish friend of mine described a being able to “rent a mench” to definitively resolve matters between them.

62. Over a nine month period a sub-committee chaired by His Honour Michael Horowitz (not the Jewish friend I was referring to) who is current chairman of the Centre, drafted an additional set of Rules adapted to deal with the additional issues which would arise in arbitrations affecting children, including how the arbitrator was to deal with hearing the voice of the child and ensuring that welfare issues were properly considered. Training for arbitrators who are to deal with children’s issues had to be prepared and arbitrators of standing and with appropriate experience.

\(^{11}\) [2013] EWHC 100 (Fam) ; 2013 2 FLR 371
recruited. With IFLA’s earlier experience this was done relatively quickly and the scheme was launched at the Inner Temple in the late summer of 2016. There are now 101 qualified children’s arbitrators.

63. The subcommittee advised that not all issues affecting children would be suitable for arbitration, but many that now take up court time in private law children’s disputes could be resolved by arbitration, and that additionally the ownership of the process of choosing an arbitrator, who will be the constant figure throughout the process, would help to increase the effectiveness of the outcome.

64. Private Law children’s cases are probably the most plastic form of litigation. Children cannot be wholly predicted. Their needs change. Their wishes and feelings, preoccupations and interest change. That is why there is no such thing as a final order in Private Law under the Children Act, but I see no reason why arbitral decision will be of less utility than a Court order and it will have the added advantage of being more flexible and quicker. If there has to be enforcement, it is inevitable that the Court will need to be satisfied that there were no significant lacuna in the arbitrator’s decision, but a full reasoned decision from an experience arbitrator is bound to carry much weight.

65. The evolution of Family Arbitration will continue. As lawyers become more aware of it and appreciate its advantages they will be more prepared to advise its use. As client’s slowly learn of it and ask about it, pressure will grow to use it. As the judiciary see that it will alleviate the burden on the courts and even as government discovers that by supporting arbitration it will shrink its role and provide a swifter, cheaper and more appropriate service to families in conflict, its use will grow. It is early days yet, but
the next stage may well be for there to be a Family Arbitration Foundation to promote Family arbitration. The IFLA stakeholders are currently giving thought to that.

30 March 2017