Will Delays in Converting Arbitral Awards into Court Orders Deter the Use of Arbitration?

https://caselaw.nationalarchives.gov.uk/ewfc/2024/379

> ‘There is a common misconception that the use of arbitration, as an alternative to the court process in financial remedy cases, is the purview only of the rich who seek privacy, away from the courts and the eyes of the media. If that was ever the position, it is no more. The court was told during the course of argument, that it is widely anticipated that parties in modest asset cases (including litigants in person) will increasingly use the arbitration process in the aftermath of the Covid-19 crisis as the courts cope with the backlog of cases, which is the inevitable consequence of *“lockdown”*.
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> It goes without saying that it is of the utmost importance that potential users of the arbitration process are not deterred from using this valuable service; either, on the one hand, because the outcome is not seen as sufficiently certain or, on the other, because arbitration is regarded as providing no adequate remedy in circumstances where one of the parties believes there to have been an unjust outcome. [1]

Since the Court of Appeal’s judgment in *Haley* in 2020 there have been numerous attempts to encourage litigants and legal representatives to use arbitration to resolve family law disputes. These attempts include the guidance given by Mostyn J in *A v A* [2021] EWHC 1889 (Fam), the amendments to FPR Part 3 and Part 28 that came into effect on 29 April 2024, and the new pre-action protocol annexed to FPR PD 9A. Although the use of arbitration has increased in recent years it arguably remains the most under-utilised of the usual non-court dispute resolution options.

The recent case of *ON v ON* [2024] EWFC 379 will probably generate publicity in relation to the view expressed by HHJ Booth (sitting as a High Court Judge) that the duty of disclosure continues between the date of an arbitral award and subsequent court order. But the case also illustrates the difficulties which can arise when there is a change of circumstances between an arbitral award being delivered and reflected in a court order, particularly when the asset base includes resources such as business interests which can legitimately fluctuate quite substantially in a short period of time. [2]

The brief facts of *ON v ON* are as follows. The parties separated in 2020 after a 24-year marriage. They were both in their early 50s by the time of the hearing. They had four children, three of whom were over 18 years of age and largely independent. Divorce proceedings commenced in November 2020 followed by Form A in February 2021. The parties subsequently agreed to arbitrate the financial remedy proceedings with a 4-day hearing taking place before Nicholas Allen KC in May 2022.

The arbitrator found the total net assets to be approximately £4.8m. This included business interests owned by the husband which had been subject to a single joint expert (SJE) valuation which the arbitrator accepted and therefore valued at £1.3m on an earnings basis. The arbitrator shared the assets broadly equally between the parties, with the wife to retain the proceeds of sale of the family home and the husband retaining his business interests. The husband was also to pay periodical payments to the wife until her 67th birthday and support their youngest child who lived with the wife.

A draft award was circulated in July 2022. There was then a delay in converting the arbitral award into a court order. Both parties raised points of clarification and asked for other issues to be decided. The arbitrator decided those issues in an addendum to his award in January 2023. The parties then sought to agree the terms of a draft order without success. In June 2023 the wife applied to the court for directions about the terms of the order but, before that application was even listed, applied in August 2023 to set aside the award on the basis of the husband's alleged non-disclosure, seeking to receive substantially more. The husband cross-applied seeking to be relieved of his obligations under the award and to pay less.

The judgment of HHJ Booth is dated 11 December 2024. He heard oral evidence from both parties. The hearing lasted longer than the original arbitration final hearing.

The principal issue before HHJ Booth was the increase in the value of husband's business interests

after the arbitration hearing. The SJE and arbitrator had relied on accounts from 2021 and projected figures for 2022. When the 2022 accounts were filed with Companies House in January 2023 (shortly after the final arbitral award had been made) they showed an improved position. One of the main reasons was because the husband's business had been able to re-negotiate contracts to charge more for materials. Another reason was a substantial tax rebate.

The difference this change made to the accounts was substantial. The business which had been projected to make a loss in 2022 ended up making a profit. The SJE was asked to update his report and opined that the new figures would result in the value of the businesses increasing by £3.65m, although by the time of the hearing before HHJ Booth the 2023 accounts had also been filed which showed a more modest increase in value of £2.36m.

There had inevitably been other changes too. The family home (from which the wife was to receive the bulk of her settlement) was valued at a little under £3m net at the date of the arbitration hearing. However, by the time of the hearing before HHJ Booth it had been on the market for sale for more than 2 years and there had been no offers. The judge therefore assumed that it was worth less significantly less than thought and considered a realistic value would produce £2.5m for the wife. Tens of thousands of pounds had also been spent servicing interest payments on mortgages which had increased significantly upon the expiry of fixed terms. Interest on the wife's litigation loan was continuing to accrue. And both parties had spent substantial further costs on legal fees.

HHJ Booth found that the husband had breached his duty of disclosure which continued beyond the making of the award until the making of the court order. The husband should have disclosed the re-negotiated contracts and the impact they could have on the value of his business but had failed to do so. The failure was found to be a deliberate and fraudulent one.

There had therefore been a substantial change to the value of the main assets in the case in favour of one party and to the detriment of the other. What was the court to do in these circumstances? It would clearly be very unsatisfactory to re-litigate the financial remedy proceedings afresh.

The judge decided to adjust the arbitral award. He increased the value of the husband's business interest in line with the 2023 accounts and awarded the wife half, namely an extra £1.16m. He also ordered the husband to pay £200,000 towards the wife's legal costs. The judge also took the view the husband should be entitled to recover £250,000 from the wife towards his legal costs, although decided not to make an enforceable costs order because of the decrease in value of the family home.

Whilst it is easy to understand what led the judge to this decision, it does illustrate one of the risks associated with arbitration, namely the prospect that one or both parties may seek to challenge an award owing to a subsequent change in circumstances after its delivery. This is particularly relevant in cases involving business interests which are notoriously fragile and can change quite substantially in a short space of time for a variety of (wholly legitimate) reasons.

It can also be difficult to determine where to stop once a decision has been made to adjust an award. It is clear from the addendum to HHJ Booth's judgment that the wife complained that the revised outcome did not achieve a 50/50 split as the judge had updated some values but not others. In addition, there could be arguments as to post-separation accrual where there has been an increase in the value of an asset 3 or 4 years post-separation. Or arguments about the fair allocation of copper bottomed and risk laden/illiquid assets between the parties.

Another example of the risks associated with delays recording arbitral awards into court orders can be found in *LT v ZU* [2023] EWFC 179 (B) where HHJ Evans-Gordon allowed a challenge to an arbitral award because (among other more primary grounds) there had been a significant increase in borrowing rates after the arbitral award had been delivered. In that case HHJ Evans-Gordon felt unable to adjust the award meaning it would need to be litigated afresh. [3]

What can be done to mitigate the chance of these risks deterring the use of arbitration? Might one option, I suggest, to the almost audible groans of arbitrators across the country, be to include in the ARB1FS a request for the arbitrator to draft an order recording their award? Perhaps an expedited route to court so that arbitral awards can be converted into court orders with agreement, or directions can be given when an award is being challenged, without any undue delay?

After all, this is what was originally meant to happen with IFLA arbitration: per Munby J in *S v S* [2014] EWHC 7 (Fam) at [21]:

[redacted]

[redacted]

Or perhaps more rigorous adherence to the guidance given by Mostyn J in *A v A* including applications to implement or challenge arbitral awards being made within 21 days of the award?

As King LJ said in *Haley*, it is of utmost importance that people are not deterred from using arbitration because the outcome is not seen as sufficiently certain. Whilst there are *so* many benefits of arbitration, it is arguable that the current law and procedure in relation to converting arbitral awards into court orders – particularly in cases involving assets such as business interests which can legitimately fluctuate quite substantially in a short period of time – potentially risk deterring some from using arbitration.

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Notes

[1] *Haley v Haley* [2020] EWCA Civ 1369 at [5] and [6] per King LJ.

[2] As Lewison LJ said in *Versteegh v Versteegh* [2018] EWCA Civ 1050 at [85]: 'The valuation of private companies is a matter of no little difficulty … The reasons for this are many. In the first place there is likely to be no obvious market for a private company. Second, even where valuers use the same method of valuation they are likely to produce widely differing results. Third, the profitability of private companies may be volatile, such that a snap-shot valuation at a particular date may give an unfair picture. Fourth, the difference in quality between a value attributed to a private company on the basis of opinion evidence and a sum in hard cash is obvious. Fifth, the acid test of any valuation is exposure to the real market, which is simply not possible in the case of a private company where no one suggests that it should be sold.'

[3] The judgment of HHJ Evans-Gordon was overturned on appeal by Cobb J in *Re A and B (Schedule 1: Arbitral Award: Appeal)* [2024] EWHC 778 (Fam) on other grounds (i.e. not in relation to the decision to allow the arbitral award to be challenged because of a change of circumstances). It is understood the Court of Appeal had given permission to appeal the decision of Cobb J, but the parties have since reached a negotiated settlement.

[4] A similar suggestion was recently made by Resolution in their report *Domestic Abuse in Financial Remedy Proceedings* (Resolution, October 2024).