Arbitration - The Court's View

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CATEGORY:
BLOG

Over a year has lapsed since the Family Law Arbitration Scheme was launched in England and Wales and I thought it would be a good idea to undertake a review. I have now trained about 180 potential arbitrators who are ready, willing and able to commence work. There have been approximately 16 new starts and month on month the number grows. In my view, it was always going to be a 'slow burn'. It is difficult for family lawyers to get to grips with new ideas and concepts and to entrust their clients to a new process. This is totally understandable. It is, however, important for clients to have access to this new process option particularly bearing in mind the current economic climate and the worsening situation regarding the Court Service. So what do the courts think of arbitration? There have been three key cases in which the important role that arbitration can play in family law cases have been highlighted. **W v M [2012] EWHC 1679 (Fam)** This dealt with a Trust of Land and Appointment of Trustees Act 1996 claim. The case involved issues of confidentiality and whether or not the proceedings should be anonymised. Mostyn J concluded: "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." It is to be welcomed that such a senior judge endorses the IFLA scheme and arbitration more generally. **TvT [2012] EWHC 3462 (Fam)** The case concerned an American couple who, before their marriage in the US, entered into a premarital agreement containing an arbitration clause. Their married life was mainly lived in England and their marriage broke down while they were living here. The husband started divorce proceedings in the US and the wife in England. The wife declined to embark on the arbitration process as prescribed by the premarital agreement claiming that she was not bound by any part of it. The husband started proceedings in the US to compel her to do so. The wife then sought an injunction here in Englandto restrain the husband from proceeding with that application. The application for an injunction came before Nicholas Francis QC and was refused. His judgment has many points of interest including the finding that the arbitration clause was not void on the basis that it ousted the jurisdiction of the court. Nick Francis QC also considered the separability of the arbitration clause. This case not only shows how important arbitration is becoming as a method of dispute resolution but that there are implications to consider in the drafting of arbitration clauses in various documents to include prenuptial agreements. **– AI v MT [2013] EWHC 100 (Fam)** In this case the court (Baker J) approved an arbitration process, before a Rabbi in New York under the auspices of the Beth Din, to determine all issues following the breakdown of the marriage of an international couple. The issues involved were child abduction, contact, residence, finances and obtaining a get, but the court kept strict control of the process so as not to oust the jurisdiction of the English Courtand to protect the welfare of the children involved. Having ordered foreign law evidence and evidence relating to the Beth Din arbitration, Baker J was satisfied that it was in the parties' interests (and that of the children) for the process to go ahead. A carefully crafted "safe harbour" order was approved by Baker J which made it possible for the arbitration process to go ahead in New York, but preserved the overriding role of theEnglish Court to determine issues. In his judgement, Baker J makes explicit reference to the Family Proceedings Rules 2010 promotion of ADR (Rule 1.4) and the Family Law Arbitration Scheme. It is clear that the courts are giving a strong message to parties that early consideration of arbitration as a potential way forward should be considered. It will be interesting to see the state of play in another year's time …