Family Arbitration is no dress rehearsal: it is the first and last night of the show…Mostyn J's decision in DB v DLJ

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Mostyn J's judgment in DB v DLJ last week deals with the routes of challenge and appeal available for those with family arbitral awards. It is a legal treasure-trove, full of jewels for the practitioner: a thorough scrutiny of the arbitral process in both civil and family cases; an in-depth analysis of the court's power to interfere with an arbitral award; judicial guidance on what constitutes a mistake or unforeseeable event; and procedural guidance for those seeking to enforce or challenge an arbitral award. However, perhaps more importantly, it elevates Family Arbitration to its rightful position at the centre-stage of family dispute resolution so that clients and practitioners alike can feel confident to embrace family arbitration as a truly viable and reliable means of resolving issues following relationship breakdown. This case demonstrates that clients and their legal advisers can be confident that the circumstances in which an award may be challenged remain very limited. The arbitral award made by Mr Gavin Smith was described by the judge as being 'a thorough and clear piece of work' and its quality was 'a testament to the merit of opting for arbitration'. The case centred upon a husband's application to the court to show cause why the arbitral award should not be made into an order of the court. The wife was resisting this, arguing that the award was based on an incorrect valuation of her property in Portugal, which, after the arbitration award was made, was thought to have reduced in value because of an adverse response to a planning application to extend the property. The wife argued that the planning decision was a vitiating mistake or an unforeseeable event, which undermined the essence of arbitral award. In the event, Mostyn J decided that a financial safety net been built into the award which would counteract any reduction in value of the property. However, he went on to consider what the outcome of the case would have been had there been no such safety net. The following observations may be lifted from his judgment: – If, following an arbitral award evidence emerges which would entitle the court to set aside its order on the grounds of mistake or supervening event, then the court is entitled to refuse to commute the arbitral award into an order and instead make a different order reflecting the new evidence. – Outside the heads of correction, challenge or appeal within the Arbitration Act 1996, these are the only realistically available grounds of resistance to incorporating an order. An assertion that the award was 'wrong' or 'unjust' will almost never get off the ground: in such a case the error must be so blatant and extreme that it 'leaps off the page'. – The court is not a rubber stamp, but neither is family arbitration a dress rehearsal — it is 'the first and last night of the show'. – The civil cases dealing with unforeseeable events are important in the family law arena and it can be helpful to consider the risk of an event happening in numerical terms as well as linguistic terms. So, the test can be linguistically expressed as being that a wrongdoer is responsible for damage which should have been foreseen by a reasonable person as being something of which there was a real risk, even though the risk would actually occur only in rare (not far-fetched) circumstances. In numerical terms, for the damage to be unforeseeable, the probability of it happening would be very low indeed, probably less than 'P > 0.05', at a judicial guess. – The crucial distinction between a mistake case and a true Barder case is that in the former the relevant facts will exist at the time of the order, but will be unknown, while in the latter, the relevant facts will arise after the order. – Where a case of mistake, as opposed to supervening event, is being advanced the question of the ability of the claimant to have discovered the true facts by exercising due diligence is critically important. This case demonstrates how family arbitration is becoming the favoured choice for many separating and divorcing couples. Not all arbitral awards need court approval. Those dealing with unmarried cohabitants' claims under the Trusts of Land and Appointment of Trustees Act 1996 do not, for example. Family arbitration awards dealing with the finances of the parties' following divorce generally do, especially if provision is made for a clean break or pension sharing order. And there is more good news for clients. There are now over 220 trained Family Financial Arbitrators and last month saw the first Children Arbitrators trained with a view to the Children Arbitration Scheme being launched in July 2016. The family team at Withers LLP already has three Accredited Family Arbitrators amongst its partners: Suzanne Kingston, Diana Parker and Michael Gouriet. Suzanne Kingston spearheaded the Arbitration Training for Family Lawyers and Children Arbitration for Family Lawyers. The future of family arbitration looks very bright indeed. **Natalie O'Shea and Suzanne Kingston**