1GC newsletter
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WELCOME

By David Swann CBE
Chambers Director

Although only two months since our last newsletter much of note has happened.

In the following articles Joint Head of Chambers, Janet Bazley QC, highlights the attraction of arbitration and early neutral evaluation, given the current pressure of work on our courts system. Janet also draws attention to the Children Arbitration Scheme, launched this month, in which she has played a leading role. Janet and Gillian Stanley are both fully accredited for children arbitration and we hope more members will soon join them in this developing area of our work.

"Chambers has been delighted to welcome Nkumbe Ekaney QC and Jessica Lee as new members"

In the second article, Elizabeth Szwed summarises the landmark Anglo-Polish seminar Chambers jointly hosted with the Polish Embassy in May. Liz briefly considers the outcome of June's EU referendum on pan-European concern and co-operation in child protection cases, but we hope to offer more informed comment on the referendum's implications for family law at our EU seminar being held at The Law Society on 5 October, which will provide a timely review.

In other news, Chambers has been delighted to welcome Nkumbe Ekaney QC and Jessica Lee as new members. Both have established practices which we hope will grow further at 1 Garden Court. Nkumbe has deep experience in the most sensitive and challenging children proceedings; the majority of his work is in Public Law acting for parents and children in care (and local authorities), cases of infanticide, non-accidental injury, sexual abuse and chronic neglect. Jessica has been instructed in a wide range of cases and has particular experience in all aspects of law relating to children as well as financial proceedings, including the drafting of pre-nuptial agreements.

In conclusion, Chambers was delighted to announce that Darren Howe QC has been selected to be a Deputy High Court Judge. This is a significant accolade and Darren follows in the footsteps of many other members who sit as a Deputy High Court Judge.

Forthcoming Events

- A seminar on EU Public Law Children Proceedings — 5 October
- A seminar on topical Family Finance issues — 13 October
- A seminar on FGM Issues — 15 November

Editors
Philip Perrins & Eleri Jones

1 Garden Court
FAMILY LAW CHAMBERS

ARBITRATION & EARLY NEUTRAL EVALUATION

By Janet Bazley QC

Each of these modern forms of alternative dispute resolution (ADR) offers an exciting and practical alternative to litigation through the courts. When pressure on the court system means that listing delays are enormous and there is no guarantee that the judge will have had time for pre-reading (or be an expert in the issues the case raises), there is particular reason to see whether one of these alternatives will provide a better, more cost effective solution.

Early neutral evaluation (ENE)

Valuable in both financial remedy and children cases, ENE or 'private judging,' as it is sometimes known, enables parties to obtain a neutral, expert view as to the likely outcome of the case if it went to court. The parties jointly instruct their expert lawyer, who may also sit as a part-time judge, providing information relevant to the evaluation and opinion sought.

According to the parties' preference, the opinion may be provided following a meeting attended by the parties and their lawyers. In financial remedy cases, this often takes the shape of a Financial Dispute Resolution (FDR) hearing, where an advocate for each party outlines that party's case and contends for a particular outcome. The expert will then indicate what she or he considers is the likely outcome, or the appropriate bracket. Alternatively, or additionally, the opinion may be given in writing.

ENE has considerable merit as a form of ADR for former cohabitants who do not have available to them the same statutory regime as married couples and where costs risks are high, the law being complex and rather uncertain.

In private law children disputes the ENE may take place in the style of court-based First Hearing Dispute Resolution Appointment (FHDRA) or DRA. Alternatively, the expert may be instructed, on the basis of relevant papers (to be agreed between the parties, their lawyers and the arbitrator), to give a written evaluation of the likely outcome or range of outcomes.

In all cases, ENE allows parties to select a suitably qualified and experienced lawyer, whom those they instruct trust, to provide them with a clear opinion, based on which they can negotiation a mutually acceptable outcome. They can rely on their chosen expert to have read the papers in advance and to be able to give the evaluation the time it needs.

Arbitration

Arbitration has long been a forum for determination of commercial disputes. It has been the subject of much legislation, culminating in the Arbitration Act 1996. Arbitration was unheard of in Family Law until comparatively recently. In 2012, the Institute of Family Law Arbitrators (IFLA) launched a scheme for resolution of disputes which are financial or in relation to property. The referral form for financial arbitrations in family cases (Arb 1) expressly brings in the provisions of the 1996 Act. The scheme includes but is not limited to disputes within:–

- the Matrimonial Causes Act 1973
- the Inheritance (Provision for Family and Dependents) Act 1975
- Part III of the Matrimonial Finance and Property Act 1984
- Schedule 1 Children Act 1989
- the Trusts of Land and Appointment of Trustees Act 1996
- the Civil Partnership Act 2004
- the Married Women's Property Act 1882

It does not, of course, cover divorce or matters affecting status.

> *"Arbitration has long been a forum for determination of commercial disputes"*

The Rules of the scheme provide that the law of England & Wales is to be applied in the arbitration; the parties may not agree otherwise and it is essential that this is so, since the parties may seek to convert the arbitral award into orders of the family court. The parties agree in their referral to arbitration (form Arb1) that they will, where necessary, invite the court to convert the award (determination) of the arbitrator into an order for the purposes of enforcement.

To qualify as an arbitrator under the IFLA scheme, one must be an experienced family lawyer who has successfully completed a ClArb [1] run training course. It is a condition that successful trainees become and remain Members of ClArb, the self-regulatory professional body for arbitrators. ClArb lays down ethical codes for its members and deals with complaints of misconduct through its Professional Conduct Committee.

Arbitration in financial cases and the IFLA scheme in particular were endorsed by the President of the Family Court in S v S *(Arbitral Award: Approval) (Practice Note)* [2014] 1 WLR 2299 [2014]; S v S 1 FLR 1257. He stated that, where an order by consent is sought by parties reflecting the award of an IFLA arbitrator, *'it can only be in the rarest of cases that the judge will do other than approve the order* [2]*'*. Further, in November 2015, the President issued helpful guidance, Arbitration in the Family Court [2016] 1 WLR 59 [3], setting out, amongst other things, the procedure for obtaining court orders after arbitral awards and making clear that this operates outside the Mediation Information & Assessment Meeting (MIAM) requirements.

In *DB v DLJ [2016] EWHC 324 (Fam)* [4] Mostyn J made clear the limited circumstances in which the court would be likely to interfere with an arbitral award:

> *"If following an arbitral award evidence emerges which would, if the award had been in an order of the court entitle the court to set aside its order on the grounds of mistake or supervening event, then the court is entitled to refuse to incorporate the arbitral award in its order and instead to make a different order reflecting the new evidence. Outside the heads of correction, challenge or appeal within the 1996 Act these are, in my judgment, the only realistically available grounds of resistance to an incorporating 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."*

> *"On the facts of that case, he decided that it was not appropriate to interfere"*

On the facts of that case, he decided that it was not appropriate to interfere. This judgment has been widely seen as providing further endorsement of the IFLA Scheme.

IFLA launched its new Children Arbitration scheme this month [5] and dedicated training for lawyers as arbitrators for the children's scheme is up and running [6]. The scheme has its own dedicated rules, which set out the parameters of children arbitrations. Most private law children disputes are within the scope of the scheme although, initially at least, matters requiring discrete fact finding hearings and international relocation disputes will be excluded. The scheme is ideal for single-issue children disputes, enabling them to be determined outside the court arena. It is likely that the family court will endorse this scheme as it has the financial scheme.

Careful consideration has been given to how safeguarding and the voice of the child will be dealt with in children arbitration. The arbitrator will be able to require the parties to obtain safeguarding checks on themselves from the DBS [7] similar to Cafcass safeguarding checks. The voice of the child will usually be heard via an independent social worker whom the parties will jointly instruct.

The advantages of arbitration are many and obvious. They include:

- Finality – arbitration is a binding process and the parties can agree that the determination will be made into an appropriate court order for enforcement processes.
- Speed – the parties can ensure in advance (before selection) that the arbitrator will deal with matters with expedition. The parties will agree the timetable with the arbitrator and any necessary adjournment is likely to be short.
- Confidentiality – is ensured by the Rules.
- Costs – arbitration is likely to be far more cost effective that litigation. The parties also know the main costs in advance since most arbitrators work for a fixed fee. The parties can also agree to limit the dispute to what is necessary for the arbitrator to decide, thereby keeping costs down further.
- Flexibility – one of the principles of arbitration is that the parties with the involvement of the arbitrator have considerable discretion regarding the form and scope of the arbitration will take. There is similar flexibility as to the time and place of the hearings.
- Choice of tribunal – the parties chose the person who will decide their dispute. That person will deal with the arbitration from start to finish.

Overlap between arbitration and mediation

Arbitration is, clearly, more akin to court proceedings, since the arbitrator's determination, after reading and hearing the evidence, is binding. By contrast, a mediator helps a couple reach their own settlement through agreement. However, there is no reason why mediation should not be arranged in parallel with an ongoing arbitration if the circumstances suggest that this would be beneficial. Equally, a mediator may recommend arbitration as a means of out-of-court resolution of issues, which are not capable of being resolved in mediation.

1. Chartered Institute of Arbitrators.
2. Judgment, paragraph 21.
3. https://www.judiciary.gov.uk/publications/practice-guidance-arbitration-in-the-family-court.
4. In which Jeni Kavanagh appeared.
5. Launch date was18 July 2016.
6. The author is privileged to be one of the inaugural trainers for the scheme.
7. Disclosure and Barring Service.

ANGLO/POLISH CONFERENCE

By Elizabeth Szwed

On the 19th May 2016 members of One Garden Court in conjunction with the Consulate attached to the Embassy of the Republic of Poland, presented a joint conference on cross-border child protection cases between England and Poland that was attended by members of the judiciary and family law practitioners. His Excellency Witold Sobków, Ambassador of the Republic of Poland to the Court of St. James, provided the welcoming address and hosted an evening reception attended also by the President, Lady Justice Black, Head of International Family Justice and Moylan J the Hague Network Judge for England and Wales.

The conference aims – dialogue and de-mystification of the practicalities for quick and effective exchange and transfer of information and transfer of proceedings and placement of children – universally acclaimed as opportune and necessary, were informatively and expediently addressed by excellent presentations from judiciary and a specialist court guardian from Poland. Mr. Justice Cobb, former Head of Chambers at One Garden Court, skilfully chaired with apposite introductions and resumes for each speaker. Judge Agnieszka Wiśnieska-Kaluta, a Family Court Judge and the Hague Network Judge for Poland, whose reputation as the most popular Network Judge was perceptible during the formal and informal aspects of the conference, outlined the Polish legal system and in particular the law and procedures relating to children. Judge Wiśnieska-Kaluta also explained how with the advantage of an excellent working relationship with Penny Langdon, secretary at the Office for International Justice, she is able to provide responses to queries on law and procedures in Poland, stressing that it is not her role to provide advice on individual cases. Judge Leszek Kuziak, known to many by name and reputation as the senior judge in the Central Authority for Poland highlighted how to make effective use of the channels of co-operation and information exchange provided by Central Authorities pursuant to *Arts. 53–58 of Council Regulation (EC) No 2201/2003 (B11R),* drawing attention to errors and misunderstandings that may arise when making enquiries of Polish courts and agencies which can frustrate an enquiry.

Professor Łukasz Kwadrans explained the wide ranging role of family guardians in Poland, describing how these are an executive organ of the court whose role is implementation of the court's decisions and guardianship ethos. Their role is therefore to educate, reform and help parents, minors and children in order to support individual families, to protect children and to contribute to the benefit of society as a whole. Consequently their responsibilities include undertaking assessments requested by English courts that are transmitted via ICACU to the Polish Central Authority which then refers them on to the relevant local Polish court.

Susan Jacklin QC of One Garden Court, with little time allocated to her oral presentation, provided a clear written exposition of *Arts. 8* (habitual residence), *Art.15* (transfer of proceedings), *Art. 20* (emergency measures) of *B11R* as recently analysed by several decisions of the Supreme Court and the Court of Appeal with ensuing guidance on their application by the courts of England and Wales.

HHJ Rowe QC, Designated Judge for the West London Family Court and formerly of One Garden Court brought together a number of cross-border difficulties and issues that courts for whom Judge Rowe has responsibility, have experienced in cases involving Polish children and families. As testament to fulfilment of the conference aims, Judge Rowe, whose presentation followed Judge Kuziak's acknowledged that many of the questions and issues raised in her paper had been clarified by the Polish presentations, in particular Judge Kuziak's.

Does Brexit undermine or abrogate England's role and contribution to the ongoing project that *B11R* is achieving in pan- European concern and co-operation in child protection cases? Will the mutual goodwill, co-operation and on-going education that we have developed with courts and agencies in Poland, which this conference accelerated further, become redundant?

I suggest the answer to both is that this is highly unlikely. In the first place until we formally cease being a Member State, it is business as usual with ICACU and the Polish Central Authority. Secondly we are signatories to and on the 27th July 2012 ratified the *Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children (the 1996 Hague Convention)* whose aim is to provide a uniform system to improve cross-border protection of children, to avoid conflict between the legal system in respect of jurisdiction, applicable law, recognition and enforcement of measures and to provide co-operation and collaboration between states. Many provisions of *B11R*, are drawn from the 1996 Hague Convention e.g. jurisdiction based on habitual residence, recognition, non-recognition registration and enforcement of decisions, co-operation and collaboration through Central Authorities for sharing and exchange of information and placement of children. Consequently, if we cease to be signatories to *B11R* we shall nevertheless remain parties to the *1996 Hague Convention* and transfer much of our operation and experience gained under *B11R* in respect of EU cases to the umbrella of the 1996 Hague Convention for EU cases.

While we remain a Member State of the EU, the provisions of *B11R* rather than the *1996 Hague Convention* apply to all cases with an EU dimension.