Achieving finality

Beth Mason considers the court's approach to a challenge to an arbitral award, and the limited circumstances in which such an award will be set aside

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'An arbitral award is effective and binding as between the parties without further court order and an order of the court is not a precondition to the binding effect of an award on the parties.'

With an increasingly overloaded court system, a need for swift resolution of financial matters and a great desire for privacy and confidentiality, arbitration is becoming a popular option for many. Since it was introduced in family proceedings for financial matters seven years ago, and for children matters three years ago, family practitioners have become more and more familiar with the process. However, during that time, challenges and appeals to the decisions made by arbitrators have been extremely rare and a degree of uncertainty has lingered as to how such challenges should be, and would be, dealt with.

This article looks, in particular, at *BC v BG* [2019], but will also necessarily involve a review of earlier cases of *S v S* [2014] and *DB v DLJ* [2016]. Given the paucity of cases dealing with such arbitration challenges, the decision in *BC v BG* provides useful guidance on the future of arbitration in these types of cases.

BC v BG

Background

BC v BG arose out of a set of circumstances which will be depressingly familiar for many family practitioners. The parties were, it seems, driven to arbitration through their sheer frustration with the court system. The husband applied for financial remedies on 18 November 2016. Decree nisi was pronounced on 4 April 2017 and the matter proceeded through the first appointment and the financial dispute resolution appointment in the usual fashion. It was then set down for a three-day final hearing in February 2018, but vacated because the case could not be accommodated. The matter was relisted for three days starting on 10 July 2018, and was once again vacated, this time due to the illness of the judge. Faced with a further, potentially lengthy, adjournment the parties agreed to arbitrate, and the agreement to arbitrate in form ARB1 was signed by both parties on 11 July 2018 and arbitration took place on the same day. The arbitration award followed on 2 August 2018.

At the time of the arbitration the husband was aged 61 and the wife was aged 56. They had married in 2006, having been in a cohabiting relationship since 1998. They had two children, one of whom was aged over 18 and the other was at sixth form. It was agreed that the children would primarily live with their mother but that their father required accommodation that was suitable for them to spend time with him. The total assets including pensions (on the wife's figures) were around £1.96m with liquid assets of £497,287. The husband's income (again on the wife's figures) was around £63,000 net pa, plus pension contributions of £7,464, and the wife's estimated gross earnings were £6,500 pa.

The arbitrator awarded the wife 60% of the net capital on the basis of the parties' unequal mortgage capacities. The capital division was designed to enable both to re-house in broadly similar accommodation, as well as to reflect the parties' unequal non-matrimonial capital contributions and the husband's

ability to generate further pension provision in future years. The parties had already agreed, and it was contained in the award, that there would be a pension sharing order in the wife's favour in relation to 76% of the husband's civil service pension. The award provided for the husband to pay the wife global maintenance at the rate of £1,600 per month, reducing in steps to £1,050 and then again to £650 once the wife was able to draw down on the pension, and to cease entirely upon the husband's retirement.

Arbitration decisions should be appealed only very rarely and consideration should always be given to the steps to be taken under the Arbitration Act 1996.

The wife's application

The wife did not accept the award and attempted to persuade the arbitrator to reconsider. He refused to do so, explaining to the wife that his further involvement would require the agreement of both parties. The husband did not agree. Having failed to obtain the husband's agreement the wife made an application to the court which effectively amounted to an attempt to appeal the award. Mostyn J gave directions that the application could be issued and should be 'treated as an application that the award is not made an order of the court pursuant to *DB v DLJ*'. The matter came before Ms Clare Ambrose, sitting as a deputy High Court judge, and she determined a list of issues in the wife's application, in order to decide whether or not the award should be converted into an order. Those issues were as follows:

Whether the wife's assertion that she has no mortgage capacity amounted to a supervening event

A jointly instructed expert had provided evidence as to the mortgage capacities of the parties based on the receipt by the wife of between £1,500 and £2,250 per month in ongoing maintenance payments and on the assumption that she was earning £5,840 pa gross and receiving child tax credits of £2,050 per annum. A further indication was provided after the award had been made that the wife would not in fact have any mortgage capacity due to the reducing nature of the maintenance awarded to her. The court determined that this was not a supervening *Barder*-type event (per *Barder v Barder (Caluori Intervening)* [1987]) as it could not be said to be unforeseen or unforeseeable. The arbitrator had considered the variables that could affect the mortgage capacity of each party, which included not only maintenance payments but also the wife's receipt of more than 50% of the proceeds of sale of the family home and the future income from the pension sharing order. In any event he concluded, quite rightly, that the calculation of a mortgage capacity was not an exact science.

Whether the husband's alleged non-disclosure that his pension contributions were voluntary and not obligatory provided a further reason not to convert the award into an order

The court determined that there was no evidence of deliberate or dishonest non-disclosure and the voluntary nature of the contributions was unlikely to have made any material difference to the arbitral award.

Whether the arbitrator fell into error in his application of the law by failing to attach proper weight to the expressed declaration of trust relating to the family home dated 12 September 2001

The wife tried to suggest that the arbitrator had made a mistake and that the award was made in ignorance of facts which were not known by either the parties or the arbitrator at the time the award was made. That argument was rejected on the basis that not only had the arbitrator and the parties known of the existence of the trust, but the arbitrator had specifically taken into consideration the parties' contributions to the purchase of the family home.

Whether the arbitrator fell into error by failing to take into account the excessive spending and debt incurred by the respondent, as alleged by the applicant

The court determined that the arbitrator had been well aware of the husband's debts and had taken them into account. However, both the arbitrator and the court noted that the majority of the debt was not caused by extravagant spending, but rather was attributable to the husband's legal expenses.

The wife's appeal/application to prevent the award being made into an order therefore failed on all grounds, and the judge ruled that the husband was entitled to an order giving effect to the award and an order for costs.

In coming to her decision the judge considered both *DB v DLJ* and *S v S*, and set out her view of the law, as well as some helpful guidance for future cases. She made it very clear that arbitration decisions should be appealed only very rarely and that consideration should always be given to the steps to be taken under the Arbitration Act 1996 (AA 1996). Her views on the previous case law and the available options will be considered further below.

S v S

In *S v S*, Munby P (as he then was) gave strong guidance as to the binding nature of an arbitral award. He was clear that the signing of a form ARB1 by the parties generated a 'single magnetic factor of determinative importance'. He went on to say that the arbitral award should be determinative of the order the court makes 'in the absence of some very compelling countervailing factors', and that any party seeking to resile from the arbitrator's decision must meet one of the limited grounds set out in s67, AA 1996 (challenging an award as to its substantive jurisdiction), s68, AA 1996 (challenging an award on the grounds of serious irregularity) or s69, AA 1996 (an appeal on a question of law).

DB v DLJ

In *DB v DLJ*, Mostyn J considered challenges to arbitration awards under AA 1996 in a case where the husband had given notice for the wife to show

cause why an arbitral award should not be made an order of the court on the basis of a supervening event and a mistake. Mostyn J concluded that it would not be possible to raise those grounds of challenge in an ordinary arbitration, but noted that in the majority of family arbitration cases the parties will want an incorporating order (ie, for the purposes of a clean break, pension share etc) and that doing so necessarily involved the proposed order being considered by a judge. His view was that in signing the ARB1 form the parties agree that challenges to an arbitral award are not confined only to those available under AA 1996. The parties agree to the court retaining an overriding discretion and as such agree that they should be able to argue that the court should not exercise its discretion to incorporate the award into an order if the circumstances require it.

His conclusion therefore was that if evidence emerges after an arbitral award has been made that would, if the award had been an order, have entitled the court to set aside the order on the grounds of mistake or supervening event, then the court is entitled to refuse to incorporate the arbitral award into an order and to make a different order instead. Any such supervening event would however be considered in accordance with the approach in *Barder* and, as we know, such events are rare.

BC v BG: the court's conclusions

The judge's views in *BC v BG* were helpfully summarised at para 53 of her judgment. She concluded that finality is an agreed priority for parties using the arbitration scheme and their agreement to use that scheme will be respected, and it is clear from *S v S* and *DB v DLJ* that financial disputes are arbitrable and the AA 1996 applies. In principle an arbitral award is effective and binding as between the parties without further court order and an order of the court is not a precondition to the binding effect of an award on the parties. However, it will usually be appropriate for parties in financial disputes to obtain an order so that they can rely on the award against third parties and achieve a clean break. The making of an award does not oust the court's jurisdiction to make an order and does not exclude its duty to investigate the circumstances. However, the court must take into account the agreement to arbitrate and the limited scope for setting aside, varying or declaring an award to be of no effect. It would be exceptional for a court to refuse to approve a consent order containing an award.

The court can refuse to make an order giving effect to an award where there are supervening circumstances within the *Barder* principles, but these have always been regarded as exceptional cases and the bar is high. The emergence of fundamental new circumstances justifies reopening the case because it gives rise to a new dispute upon which there are no findings and which is not covered by the arbitration agreement. The ground of mistake that justifies a reopening of the facts is narrowly defined and will also only be used exceptionally. Again, new evidence will only trigger relief if it gives rise to a new and materially different dispute.

To allow an application that an order is not made, in order to confer a broader jurisdiction to reopen findings in an award, would run directly counter to AA 1996 and the parties' intentions in agreeing to arbitrate. The judge was not satisfied that the wording of the ARB1 supported such wide powers to vary the effect of an award. She was clear that the decision in *DB v DLJ* did not create an open-ended discretion for reopening an award without regard to the restrictions and safeguards of AA 1996. Those statutory requirements and safeguards could not be circumvented by an application under *DB v DLJ*, and an order pursuant to *DB v DLJ* would usually only be granted where the parties had failed to agree on a consent order and the complaint fell outside the scope of AA 1996.

The judge went on to give guidance that the primary remedy for any party who seeks to challenge an award would be through AA 1996 rather than through an application for an order under *DB v DLJ*. She pointed out that the advantages of proceeding in accordance with AA 1996 include that:

- the process the wife underwent to bring her application was long, unclear and expensive: the procedures of arbitration are designed to resolve applications efficiently and often without the need for a hearing;
- an application to court does not provide the certainty and safeguards of AA 1996, which gives the arbitrator a right to answer challenges of misconduct, irregularity or mistake and confers a right to a rehearing on the issues of jurisdiction under s67, AA 1996;
- the statutory framework within AA 1996 gives a more predictable framework than the notice to show cause procedure;
- AA 1996 allows challenges on irregularities to be dealt with before the award is made, as well as afterwards; and
- AA 1996 allows for matters to be remitted back to the arbitrator, whereas the court procedure will result in the challenges being heard by an unknown judge.

Conclusions

It is clear that parties who choose to enter into arbitration should do so expecting that the award will be binding and will, if necessary, be converted into an order. The scope for challenging an award under the provisions of AA 1996 is limited and case law is clear that an application for notice to show cause should only be considered in extremely unusual circumstances. The benefits of arbitration are clear to see in this case and with the overburdening of the courts unlikely to improve any time soon we are likely to see more and more clients opting for arbitration. If they do so it should be through a desire to resolve matters swiftly, cost effectively, and with the assistance of an experienced and well-prepared arbitrator. It should not be through any ill-informed belief that they can, in the event that they do not like the result, try again through the courts. ■

BC v BG
[2019] EWFC 7
Barder v Barder (Caluori Intervening)
[1987] 2 All ER 440
DB v DLJ
[2016] EWHC 324 (Fam)
S v S
[2014] EWHC 7 (Fam)