Arbitration of personal injury and clinical negligence claims for children and protected parties v4

The PIcArbs System

The PIcArbs system for arbitration of personal injury and clinical negligence claims operates under the Arbitration Act 1996. It provides specialist arbitrators with long experience in these fields from established chambers, who have been trained and certified and who take a collegiate approach to resolve binding arbitrations under English Law.

The pre-action protocols in personal injury and clinical negligence encourage parties to use arbitration to resolve their disputes.

However cases involving children and protected parties cannot be the subject of any binding PIcArbs arbitration until certain legal issues are resolved by the courts. This note explains how PIcArbs came to draft **Rule 33 of the Rules** and why children and Protected Parties cannot use the PIcArbs arbitration system until the courts approve the system by approving a child or Protected Party using the system to resolve a personal injury or clinical negligence claim.

Children

1. To enter an arbitration agreement the child would need a parent to sign on his/her behalf. Even if this is done *Chitty on Contracts* and *Russell on Arbitration* state that the general law applies to children's contracts. There is no decided case which states that Arbitration Agreements are contracts which bind children. On the contrary such a contract is not binding on the child.

2. At common law for a contract to bind a child it must fall into one of the historic categories which benefit children: contracts for necessaries, education, apprenticeship or instruction which are of benefit to the minor. If the agreement is not within those categories then it is voidable at the child's option unless ratified by him after his majority. It does bind the adult who contracts with the child. So under contract law an arbitration agreement with a child could bind the adult defendant and the insurer but not the child.

3. This issue is considered in *Chitty 31st ed* para 8-043 and 044 referring to *Slade v Metrodent [1953] 2 QB 112.* That case concerned a contract of apprenticeship with an arbitration clause in it. The parties fell out. The clause was held to be binding because the contract was one which could be binding – it was a contract of apprenticeship. However when one looks at the judgment of McNair J, he considered

that an arbitration agreement may be declared to be for the benefit of the infant if the court so decided:

> *"In my judgment the question before me falls to be determined on two well-established principles, (1) that an infant, even during infancy, is bound by any contract which the court considers, after examining all its terms, is for the benefit of the infant, and (2) that if the contract as a whole is beneficial, the infant cannot pick and choose and adopt those terms which are clearly beneficial while rejecting those terms which are not beneficial or not clearly beneficial: see Clements v. London and North Western Railway Co.*
> *1 The judgment in that case of Kay L.J.*
> *2 sets out a quotation from Coke upon Littleton, 172a, to the effect that there are some exceptions to the infant's inability to bind himself by contract, as "an infant may bind himself to pay for his necessary meat, drink, apparel, necessary physicke, and such other necessaries, and likewise for his good teaching or instruction, whereby he may profit himself." ...*
> *"As regards the question of discretion, I feel no hesitation at all in holding that, in my judgment, the arbitration clause should be given effect to. The nature of the dispute as shown by the statement of claim is essentially one fit to be adjudicated upon, at any rate so far as concerns matters of fact and the practice of the art of dental mechanics, by a body such as the Joint Council. Adjudication before such a body would avoid the necessity of calling a body of expert evidence. Furthermore, the clause in no way involves an ouster of the jurisdiction of the court or in any way interferes with the jealous regard which the court observes for the interests of infants. In my judgment, the action should be stayed under section 4 of the Arbitration Act, 1950, and the appeal allowed with costs.*

4. PIcArbs takes the view that for a child to use the PIcArbs arbitration system to resolve a personal injury or clinical negligence claim the parent or guardian of the child and the prospective defendant should first apply to the Court for an order declaring the form of arbitration agreement which the parties intend to sign to be for the child's benefit and hence enforceable.

5. Such a declaration is not the end of the matter though. Under the CPR r.21 and *Dunhill v Burgin* [2014] UKSC 18, no settlement of a child's claim is enforceable through the courts unless reviewed and approved by the Court. Per Lady Hale:

> *"33. Policy arguments do not answer legal questions. But to the extent that they are at all relevant to the issues before us, the policy underlying the Civil Procedure Rules is clear: that children and protected parties require and deserve protection, not only from themselves but also from their legal advisers. The notes to Order 80 in the last (1999) edition of the Supreme Court Practice stated that among the objects of the compromise rule was "to protect minors and patients from any lack of skill or experience of their legal advisers which might lead to a settlement of a money claim for far less than it is worth", a sentiment which has been carried forward into the current edition of Civil Procedure."*

Protected Parties

6. A protected party needs a deputy or person with a proper Power of Attorney to sign an arbitration agreement then it is potentially binding.

7. Because there has been no arbitration in England and Wales of personal injury claims to date a deputy should seek approval from the Court of Protection before entering a PIcArbs arbitration agreement to ensure that he is not acting in a way that the Court would disapprove of.

8. However even with such approval the potentially binding arbitration agreement will be undermined by CPR 21 and *Dunhill v Burgin* because after the arbitration is settled or a final award is made after a hearing review and approval by the Court will still be needed.

The Issue – Arbitration Awards and review/approval by the Court

9. The objective when arbitrating a personal injury claim through the PIcArbs system is to achieve justice between the parties in a quicker and more cooperative way than can be achieved through litigation in a court at lower cost using an independent and specialist arbitrator.

10. This objective is undermined if the arbitrator's final award after a hearing on the evidence has to be put before a Court for review and approval.

11. If a QBD Judge refuses to approve an arbitrator's award after a full hearing had taken place before the arbitrator on the evidence, the parties would have to re-litigate the issues through the courts which would undermine the whole purpose of the arbitration process and increase the costs out of all proportion. The same concern arises albeit to a lesser extent where the final award is made after the parties have settled the claim.

12. The costs of applying for and obtaining Court approval even for a settlement are an additional burden.

13. PIcArbs consider that approval of the court should be seen as unnecessary so long as the PIcArbs Institutional Rules provide for review and approval by the specialist independent arbitrator of any settlement which the parties reach in a similar way to that set out in CPR 21 before a consent award is made. This should satisfy the policy requirement set out by Lady Hale above. So long as the child or protected party is protected against any oversight or incompetence by his legal representatives or his deputy in the litigation by a review and approval by the specialist independent arbitrator then the child or person lacking capacity is protected.

14. PIcArbs note that the Institute of Family Law Arbitrators has faced a parallel issue in relation to court orders and ancillary relief and it has been resolved to an extent by the case *S v S (Financial Remedies: Arbitral Award) [2014] EWHC 7 (Fam), [2014] 1 FLR 1257*, about the attitude likely to be adopted by the court in such cases:

> *"where the parties are putting the matter before the court by consent, … it can only be in the rarest of cases that it will be appropriate for the judge to do other than approve the order."*

That case was supported by *DM v DLJ [2016] EWHC 324 (Fam)* in which the Court refused to reopen an award despite a substantial change in circumstances after the award. Subsequently Sir James Munby issued practice Guidance which is attached at Appendix 1.

However the family law Guidance applies to consent orders made between adults with capacity not children and protected parties.

What Arbitration procedure should PIcArbs adopt for children & Protected Parties?

15. This will depend on what the CoP and the QBD decide in future.

16. If the Courts adopt that same practice for personal injury claims involving children and protected parties as has been adopted for ancillary relief arbitration then PIcArbs will arbitrate such claims. Final awards will be converted into court orders without a CPR 21 review and approval process. After a final award is made whether by consent or after a hearing the normal application would take place for the award to be reduced into a court order.

17. If the Courts require arbitration awards to be reviewed and approved by the court under CPR 21 before they will be enforced then PIcArbs consider that no valid arbitration should or can be commenced through the PIcArbs system. PIcArbs consider that the main purposes of using binding arbitration presided over by independent specialist arbitrators would be undermined by the requirement for a CPR 21 review and that no case involving a child or protected party should be arbitrated through the system due to the risk of rejection and re-litigation.

18. Currently R 33 makes any arbitration a nullity unless prior court approval has been obtained for a child or protected party.

15 May 2017
END

Appendices

1. Sir James Munby's Practice Direction relating to arbitration and Ancillary Relief Orders.

Attachments in PDF form

2. Dunhill v Burgin
3. DB v DLJ 2016
4. *Slade v Metrodent [1953] 2 QB 112*

Appendix 1

PRACTICE GUIDANCE
issued on 23 November 2015 by
SIR JAMES MUNBY, PRESIDENT OF THE FAMILY DIVISION

1. This Guidance concerns the interface between the Family Court and Arbitrations conducted in accordance with the provisions of the Arbitration Act 1996 (AA96) where the parties to a post-relationship breakdown financial dispute have agreed to submit issues for decision by an arbitrator whose award is to be binding upon them.
2. It is a fundamental requirement of this Guidance that the arbitrator will decide the substance of the dispute only in accordance with the law of England and Wales. This Guidance does not apply to, or sanction, any arbitral process based on a different system of law nor, in particular, one where there is reason to believe that, whatever system of law is purportedly being applied, there may have been gender-based discrimination.
3. To avoid unnecessary complication this Guidance is directed towards what may well be the most common form of arbitration with which the Family Court will become concerned, where the issues between the parties involve relief or an award by way of one or more of the financial remedies listed in rule 2.3 of the Family Procedure Rules 2010 (FPR).
4. In order to be effective, elements of some arbitral awards (by comprehensive dismissal of claims to create a clean break, or so as to bind the provider to a pension split, for example) will require their terms to be reflected in a Family Court order. If enforcement of the award becomes necessary, doing so via Family Court processes will be available only if orders reflecting the award are obtained. (Paragraph 30 below describes an alternative route which may be available via section 66 of AA96 in the county court or in the Family Division of the High Court.)
5. But it should be borne in mind that not every award need be brought before the Family Court for a financial order to be made, and that it may be more appropriate for some to be brought (if necessary) before a court which does not exercise family jurisdiction. Thus, for instance, where an arbitrator has decided upon the title to or possession of property under the Married Women's Property Act 1882, or has determined the respective beneficial interests of the disputants in a property or fund, the parties may simply choose to operate in accordance with the award and thus have no need for a court order to reflect it. Or a Trustees of Land and Appointment of Trustees Act 1996 ("TOLATA") award might more appropriately be made the subject of an order in the County Court if it simply declares the interests of the parties and does not involve any financial remedy element. It should be noted, however, that (pending any statutory changes to facilitate the Family Court hearing them) only the

High Court and county court have jurisdiction to determine applications made under TOLATA or the Inheritance (Provision for Family and Dependants) Act 1975.

6. Taking the most common example of an arbitration where the agreed issues are what periodical payments, lump sum and adjustment of property awards should be received by a claimant spouse, it is important first to establish whether or not financial remedy proceedings have already been instituted and a Form A issued.
   A: Where there are subsisting proceedings seeking the same relief as is in issue in the arbitration

   Stay of proceedings:

7. The court should be invited to stay the financial remedy proceedings pending delivery of the award. The arbitration agreement (in the case of an IFLA Scheme arbitration, the Form ARB1) will in most instances only recently have been signed by both parties, and thus contested applications for a stay will likely be rare. CPR rule 62.3(2) provides that such an application "must be made by application notice to the court dealing with those proceedings".
8. The Family Court has an obligation under FPR 3.3(1)(b) "where the parties agree, to enable non-court dispute resolution to take place." Section 9(4) of AA96 requires that the court "shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed" and makes it clear that a stay application should be made to the court where the subsisting proceedings are pending. By paragraph 6.2 of Form ARB1 the parties will have agreed that they "will apply for or consent to a stay of any existing court proceedings, as necessary."
9. In such circumstances where the application to stay is by consent or unopposed it should be dealt with on paper and (absent any unusual circumstances indicating a need) without listing or hearing.
10. Parties seeking such a stay should (in person or through their solicitors, who need not for this purpose be on the court record in the financial remedy proceedings) lodge in the place where the proceedings have been commenced, and within those proceedings, clear evidence of their agreement (or lack of opposition) to the stay order, together with a copy of their signed arbitration agreement (such as the IFLA Form ARB1). One of the standard orders approved for use in conjunction with arbitrations provides for a stay, and a copy completed with the details of the case, and signed by both parties or their representatives to signify approval, should be lodged with the other documents. The file will then be placed before a judge for approval, or for queries to be raised and dealt with by correspondence, and/or (if necessary) a hearing listed. The suite of arbitration-specific standard orders are Annexed to this Guidance: see below.
11. Applying for an order to reflect the award: by consent
    The terms of the proposed consent order will be drafted to reflect the decisions and directions contained in the award. Insofar as financial remedy orders are involved, their form should follow the relevant paragraphs of the standard orders, which contain

recitals apt for an arbitration award case. Together with a signed copy of the proposed order in the terms agreed, the parties, in order to take advantage of this accelerated procedure, should at the same time lodge their Forms A and D81, a copy of the arbitrator's award and (unless already on the court file) their Form ARB1. There is no reason in principle why unopposed applications for a consent order should not be dealt with on paper by a District Judge, although the court will always retain the ability to raise questions in correspondence or to call for a hearing.

12. Attention is drawn to my observations in S v S (Financial Remedies: Arbitral Award) [2014] EWHC 7 (Fam), [2014] 1 FLR 1257, about the attitude likely to be adopted by the court in such cases: "where the parties are putting the matter before the court by consent, … it can only be in the rarest of cases that it will be appropriate for the judge to do other than approve the order."
13. Draft orders submitted which invite the court to make orders it has no jurisdiction to make (or which are otherwise in unacceptable form) will, like any other defective consent order submitted, be returned for reconsideration. There is of course no objection to recitals which express the parties' agreement to provisions which fall outside the scope of the available statutory relief. Nor indeed is there anything to prevent parties agreeing to change the terms of an award if they are agreed upon a revised formulation. In that event, though, it would be sensible for the covering correspondence to make it clear which provisions of the award have been overtaken by what subsequent arrangement arrived at by the parties.
14. Parties anxious to preserve the privacy and to maintain the confidentiality of the award should lodge that document in a sealed envelope, clearly marked with the name and number of the case and the words "**Arbitration Award: Confidential**". The award will remain on the court file but should be placed in an envelope clearly marked as above, plus "**not to be opened without the permission of a judge of the Family Court.**" The request for the award to be sealed once the order has been approved should be made prominently in the covering letter.Applying for an order to reflect the award: opposed
15. The party seeking to have the award reflected in a court order will need to proceed adopting what at para [25] of S v S was described as the "notice to show cause" procedure. An alternative formulation of the Arbitration recital for such a situation is contained in each standard order.
16. Similar documentation should be submitted with the application, except of course that the order proposed is likely to have been unilaterally drafted on behalf of the party seeking to obtain the order. An application of this sort will ordinarily be listed for a hearing before a judge of Circuit Judge or High Court Judge level.
17. Attention is drawn to my observations in S v S concerning the attitude likely to be adopted by the court in opposed cases: *"The court will no doubt adopt an appropriately robust approach, both to the procedure it adopts in dealing with such a challenge and to the test it applies in deciding the outcome. … The parties will almost invariably forfeit the right to anything other than a most abbreviated hearing; only in*

highly exceptional circumstances is the court likely to permit anything more than a very abbreviated hearing."

18. Applications for consent orders are specifically placed outside the scope of the MIAMs requirement by Practice Direction 3A, para 13(2). So, by virtue of the same provision, are proceedings "for enforcement of any order made in proceedings for a financial remedy or of any agreement made in or in contemplation of proceedings for a financial remedy." Parties who have agreed to arbitrate but have become engaged in any post-arbitral award dispute, as for instance a contested "show cause" application, should not be required to deviate into a MIAM.

B: Arbitration claims

19. An "arbitration claim" is a term of art, and its scope for the purposes of its application to arbitrations conducted under AA96 is defined by CPR rule 62.2(1) in these terms:[In relation to AA96] 'arbitration claim' means –
(a) any application to the court under the 1996 Act;
(b) a claim to determine –
(i) whether there is a valid arbitration agreement;
(ii) whether an arbitration tribunal is properly constituted; or
what matters have been submitted to arbitration in accordance with an arbitration agreement;
(c) a claim to declare that an award by an arbitral tribunal is not binding on a party; and
(d) any other application affecting –
(i) arbitration proceedings (whether started or not); or
(ii) an arbitration agreement.
20. The court where "arbitration claims" as so defined are to be commenced is governed by CPR PD62 para 2 and the High Court and County Courts (Allocation of Arbitration Proceedings) Order 1996 (S.I. 1996/3215) as amended (the 1996 Order), which do not currently cater for such claims to be launched in the Family Court. Pending changes made to CPR PD62 and/or the 1996 Order, an applicant for an "arbitration claim" should issue the requisite Form (see below) in the Commercial Court and should at the time of issue seek transfer to the Family Division. Para [6] of the 1996 Order does not as yet permit the transfer of any such application to the Family Court – the transfer must therefore be to the Family Division of the High Court.
21. The Form N8 initiating such a claim should be prominently marked "Family business: direction sought for transfer to the Family Division of the High Court" and should detail (where there are subsisting Family Court proceedings, albeit stayed) the case title and number.
22. Attention is drawn to sections 42 (enforcement of peremptory orders of the arbitrator) and 43 (securing the attendance of witnesses) of AA96 which are the provisions in relation to which an "arbitration claim" is most likely to be sought in the course of an ongoing post-separation financial arbitration. Attention is also drawn to the provisions

of section 44 (court powers exercisable in support of arbitral proceedings). Standard Orders have been issued to meet each of these contingencies: see Annex A, below.

23. As these are all within the CPR definition of "arbitration claims," pending changes to para [2] of CPR PD62 such applications should (as described above) be issued in the Commercial Court and bear prominently upon them a request for speedy transfer to the Family Division (or, in the case of, for instance, a TOLATA claim which does not also invoke the family court jurisdiction, to the relevant county court).
24. In relation to applications under sections 42 and 43 the standard orders are self-explanatory. Such applications should be heard by a judge of High Court level.

C: Arbitrations conducted when there are no subsisting proceedings seeking relevant relief

Stay of proceedings:

25. An application to stay legal proceedings under section 9 of AA96 is in effect excluded from the definition of and procedural requirements for "arbitration claims" by CPR rule 62.3(2), which provides that such an application "must be made by application notice to the court dealing with those proceedings".
26. In the case of an IFLA Scheme arbitration the parties will have agreed (by paragraph 6.2 of their Form ARB1) that they "will not commence court proceedings … in relation to the same subject matter". If however such proceedings are thereafter initiated then it is open to either party to apply for a stay pursuant to section 9 of AA96 in the court where the proceedings have been commenced, and within those proceedings. If a stay remains opposed an early hearing will obviously be required to determine the application.

Applying for an order to reflect the award: by consent

27. The principles discussed in Part A apply, but if the relief awarded and sought to be reflected in an order includes one or more financial remedies only capable of being made on or after pronouncement of a decree, then it will be necessary for "status proceedings" seeking divorce, judicial separation, nullity or (in the case of civil partners) dissolution to have been instituted, the relevant financial remedies applied for, and the stage in the proceedings reached when it will be appropriate for the court to make an order. In the case of divorce proceedings that would normally predicate a decree nisi having been pronounced, but see JP v NP [2014] EWHC 1101 (Fam), [2015] 1 FLR 659.

Applying for an order to reflect the award: opposed

28. The section of Part A describing the "show cause" procedure applies, and again it would be necessary to have the necessary status proceedings in being for financial remedy orders to be made.
29. Where the aid of the Court is needed in support of a family financial arbitration in relation to which status proceedings have not yet been commenced, then the route suggested in paragraph 20 et seq. above must be followed, and transfer from the Commercial Court sought. It will however be necessary for the FPR Part 18 procedure to be adopted in order to bring the arbitration claim (for instance, under section 42 or section 43 of AA96) before the Family Division.

D: Enforcement

30. Section 3 of CPR Part 62 (rules 62.17 and 62.18) make provision for the direct enforcement of awards. In some situations it may be possible to pray section 66 of AA96 in aid to enforce an award. Para 4 of the 1996 Order authorises the commencement in any county court of section 66 proceedings under which awards can, with the court's permission, be enforced in the same way as a judgment or order of the court to the same effect. This may prove effective in the case of a TOLATA award but is not appropriate in the case of a financial remedy award.

E: Challenging the Award under sections 67 to 71 of the Arbitration Act

31. Some very specific bases for challenging arbitrations are contained in these sections of AA96. They are hedged about with preconditions and limitations, and the commercial experience in arbitration is that they are relatively rarely successful. In relation to an arbitration dealing with family financial issues, however, it would ordinarily be appropriate for a High Court Judge of the Family Division to hear them, and thus it is to be expected that applications commenced pursuant to these provisions will by the same route be transferred to that court.

F: Arbitration-specific standard court orders

32. This suite now consists of three orders for use in conjunction with arbitrations. They are reproduced in their approved form within Annex A to this Guidance and comprise orders to:
    - Stay pursuant to Arbitration Act 1996 section 9 and/or under the court's case management powers
    - Enforce an arbitrator's peremptory order under section 42, Arbitration Act 1996
    - Secure the attendance of witnesses under section 43, Arbitration Act 1996

33. The forms of "omnibus" orders already commonly in use for both Financial Remedy and Children Act Schedule 1 Final Orders each contain a recital to be completed where the order sought was to reflect an arbitral award. A slightly revised form for such recital is included in Annex B.
34. Pending any new or revised Practice Direction to accompany Part 5, these formulations should be adopted for use, subject always to the proviso that their provisions may be varied by the court or a party if the variation is required by the circumstances of a particular case.

James Munby
President of the Family Division
23 November 2015