REPORT OF THE FINANCIAL REMEDIES WORKING GROUP

ANNEX 12

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 an important requirement in relation to this Guidance that the arbitrator will decide the substance of the dispute only in accordance with the law of England and Wales, and other considerations will likely apply where an arbitral process is based on a different system of law or, in particular, 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. It should be borne in mind that not every arbitral 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 1882 Act, 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 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.

5. 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

6. <u>Stay of proceedings:</u>
   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.

7. 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."

8. 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.

9. Parties seeking such a stay should lodge (in person or through their solicitors, who need not for this purpose be on the court record in the financial remedy 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 proposed standard orders provides for a stay under AA96 s. 9. A copy of that draft 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.

10. <u>Applying for an order to reflect the award: by consent</u>
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 proposed 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.

11. Attention is drawn to the observations in ***S v S*** 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."

12. 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.

13. 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.

14. Applying for an order to reflect the award: opposed
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.

15. 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 or High Court level .

16. Attention is drawn to the 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."

17. Pending changes to CPR PD 62 para 2 applicants making an "arbitration claim" as defined in CPR rule 62.2(1) should on issue seek transfer to the Family Division. Para [6] of the High Court and County Courts (Allocation of Arbitration Proceedings) Order 1996 (S.I. 1996/3215), as amended, does not permit the transfer of any such application to the Family Court – the transfer must be to the Family Division of the High Court.

18. 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.

19. Reference should be made to sections 42 (enforcement of peremptory orders of the arbitrator) and 43 (securing the attendance of witnesses) of AA96 which are likely to be the provisions in relation to which the aid of the court is most 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).

20. These are all within the definition of "arbitration claims" in CPR rule 62.2(1). Pending changes to para [2] of CPR PD 62 as "arbitration claims" such applications should 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).

21. In relation to applications under sections 42 and 43 the proposed standard orders are self-explanatory. They contain reference to the transfer in of the application from the (currently) allocated court. Such applications should be heard by a judge of High Court level.

22. In relation to the enforcement of awards it should be noted that para 4 of the 1996 Order authorises the commencement in any county court of proceedings under AA96 section 66 (under which awards can, with the court's permission, be enforced in the same way as a judgment or order of the court of the same effect).

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

23. Stay of proceedings:
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 place where and in the proceedings which have been thus commenced. The considerations described in Part A *above* are relevant to such an application which, if contested, would obviously necessitate a hearing.

24. Applying for an order to reflect the award: by consent
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.

25. Applying for an order to reflect the award: opposed
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.

26. 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 suggested path must be followed, and transfer from the allocated 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.

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

27. 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.