LECTURE TO THE WORSHIPFUL COMPANY OF ARBITRATORS.

1. You may feel that the title that I have chosen for my talk this evening, "Family Law Arbitration: A better way to Justice?" is perhaps rather prosaic. But it is a question that practitioners in family law are going to have to ask themselves more and more, for the reasons that will appear from my talk. The title, of course, begs the question "better than what other ways"? Mediation? Collaborative law? Litigation?
2. I shall concentrate on comparing family financial arbitration with litigation about family financial disputes. I shall exclude from my talk mediation and collaborative law for 2 reasons. (1) I know very little about either mechanisms, but (2) I know enough to say that although both may well have an important part to play in any particular case, mediation and collaborative law have one significant weakness – neither guarantee that the dispute will end – it all depends upon the parties reaching an agreement. If they do not, much time and money may have been wasted. By contrast, both arbitration and litigation do guarantee that the disputes will be resolved; in an arbitration by the award, in litigation by a judgment.
3. For centuries family law was the preserve of the legislature, the church and finally the secular courts. Divorce was the preserve of the wealthy either by a private Act of Parliament, or by decree of the church authorities. In later times, Parliament empowered the secular courts to pronounce decrees of divorce and ancillary orders. Because marriage was viewed as one of the bedrocks of society, the courts jealously guarded their jurisdiction. In the latter half of the 20th c. things began to change. Divorce became much easier to obtain with the passing of the Divorce Reform Act, 1969. Gradually the courts ceased to focus on the grounds of divorce – cruelty, desertion, adultery etc – and began to focus much more on the consequences of divorce, namely disputes about the children, money and property of the parties. But here, too, the only avenue open to a divorcing couple to obtain a binding resolution of their disputes was the court i.e. a judgment of a judge. Arbitration, known to the commercial world since the Middle Ages and the subject of several Acts of Parliament in the last 100 years or so culminating in the Arbitration Act, 1996, was a species of resolution completely and utterly foreign and unknown to the world of family law, its practitioners and judges. I speak here of the secular world, not of those religions who have their own internal dispute resolution mechanisms.

4. What has changed? The old paternalistic grip of the family courts has been very considerably loosened. It is now recognised by the courts of England and Wales, led by the Supreme Court in its seminal decision in Radmacher v Granantino in 2010 that the paternalistic approach of the courts – best summed up by the phrase "we know best"- is dying if not dead – at least in family disputes about money and property. At the heart of Radmacher v Granantino was the standing in English law of a pre-nuptial agreement, that is to say an agreement entered into by a couple intending to marry which would regulate the disposition of their assets if they divorced. The Supreme Court emphatically endorsed both pre-nuptial and post-nuptial agreements. Para 78 of the judgment of 7 of the 9 Justices is headed "autonomy" and reads as follows:- "The reason why the court should give weight to a nuptial agreement is that there should be respect for individual autonomy. The court should accord respect to the decision of a married couple as to the manner in which their financial affairs should be regulated. It would be paternalistic and patronising to override their agreement simply on the basis that the court knows best. This is particularly true where the parties' agreement addresses existing circumstances and not merely the contingencies of an uncertain future."
5. So, I suggest, that that steer of the Supreme Court must lead inexorably to this proposition – if nuptial agreements between couples who thereby agree the disposition of their assets upon divorce are now a judicially recognised mechanism of matrimonial financial disengagement, the parties should be free to agree the forum in which they would like their disputes to be decided. And now they can, thanks to the scheme propounded by the Institute of Family Law Arbitrators, which has been emphatically endorsed by Sir James Munby, the President of the Family Division of the High Court in a case S v S in 2014 together with the Practice Guidance issued by the President last November.
6. Before I attempt to compare the merits or otherwise of litigation against arbitration, let me first tell you, as briefly as I can, about the IFLA scheme of arbitration.
7. The scheme is designed to resolve by arbitration disputes which are financial and/or involve property, for example financial and property remedies under the Matrimonial CausesAct 1973 as amended, the equivalent provisions in the Civil Partnership Act 2004 and Schedule 1 of the Children Act, 1989. It does not cover the granting of a divorce or matters to do with status, and, as yet, does not cover disputes involving the upbringing of children, although this development is almost up and running.
8. Next, the scheme specifically incorporates the relevant provisions of the Arbitration Act, 1996. In the form Arb 1, which is the agreement to arbitrate, the parties specifically agree that their arbitration will be conducted in accordance with the 1996 Act.
9. The Rules of the scheme, to which the parties bind themselves under

Arb 1, make it mandatory for the law of England and Wales to be applied. The parties cannot contract out of that provision. There is no room for the parties to agree that the arbitrator will apply the laws of their choice, whether secular or religious. That is because it is essential that the law applied by the arbitrator is to be English law which in turn will be applied by the family courts of England and Wales when converting the award into orders of the court.

10. The final overarching ingredient of the scheme is that the parties agree in Arb 1 that they will apply to the family court to convert the award into court orders where it is necessary to do so, and furthermore, they acknowledge in Arb 1 that the court has a discretion as to whether, and in what terms, it will make orders arising out of the award. Why is this? First, all the Acts of Parliament, which give the court power to make financial and property provision orders, specifically give to the court a discretion whether to make such orders and in what terms. Second, in many cases a court order will be necessary to convert the award into orders which can be enforced. Let me give you just 3 examples. (1) The applicant gains an award of £X by way of a lump sum against the respondent, (2) the respondent in turn gains an award that the lump sum of £X is to be on the basis of a "clean break" i.e. the lump sum when paid satisfies the applicant's claim for not only capital but also income provision so that the applicant's claim to continuing periodical payments is extinguished, and (3) the applicant also gains an award that the respondent's pension should be shared i.e. there should be a pension sharing order. In each of these examples, unless the court makes the appropriate orders, there is no means of the rights gained by the parties under the award being enshrined in law and thus enforced.
11. I am now going to turn my spotlight on litigation i.e. the court process in family financial and property disputes. I want to make it absolutely clear that I have the greatest admiration for all the talented and dedicated judges, courtroom staff and backroom staff in the family justice system. All that they do is to be applauded. But the system is under colossal strain. Its weakness is that it is funded by the state, which in reality means the government of the day, and like many other parts of the body politic is being starved of resources. For instance, there are simply not enough judges to carry the load. This leads to a major deficiency. Cases fixed months ahead of the final hearing are at risk of being cancelled at the last moment due to there being no judge available. This can lead to unjustifiable delay and greater expense and dissatisfaction on the part of the parties.
12. In litigation the parties have little or no autonomy as to the procedure to be adopted or as to what issues they want decided. In essence the case is judge led. Judges are now, and are encouraged to be, interventionist, overriding if necessary the parties' agreed course of action. Despite the innovation of Mr Justice Coleridge, as he then was, in OS v DS, discrete

issues are not often isolated for decision. The pattern of the court going through the whole gamut of the case persists. Although the court is likely to adopt a course of action, for instance limiting discovery of documents, agreed between the parties, the concept of "party autonomy" is unknown in litigation.

13. The latest guidance issued on 1 February 2016 entitled "Efficient Conduct of Financial Hearings in the High Court..." basically limits the type of money case to be heard by a High Court Judge to cases where the overall net assets exceed £15m and/or the overall net earned income exceeds £1m. There are, it is true, exceptions for cases exceeding £7.5m of net annual assets if certain stringent conditions are satisfied. But this must mean that the vast majority of financial provision cases are and will be heard by judges below High Court level, most probably by District Judges who are the very level of judges most under the cosh of overwork. To add to this is the abolition of public funding for financial provision cases which has led to a very large rise in litigants in person. Thus, if the hapless litigant cannot afford legal representation, he or she must represent him or herself, with all the disadvantages, both for the litigant and judge, we know so well. Cases are and will take longer because the judge must act not only as adjudicator but also a sort of shepherd to the litigant in person. Delay can then result in hearing other cases.
14. In family cases before a court accredited members of the media can now be admitted into court to report the proceedings in the interests, it is said, of transparency. In my personal opinion, this is an unwelcome development. It cannot be a pleasant experience for any litigant, whether known locally, nationally or internationally, to have to run the gauntlet of having their privacy and intimate family affairs spread over the media, whether national or local. I do not believe that this development has done anything for transparency in family money cases. I suspect that if and when an analysis is carried out, it will be found that the only cases to have been reported in the media are the "sensational" ones.
15. There is, however, one area where the court process has no equivalent in arbitration. If a litigant has good grounds to apply for emergency relief, typically an injunction, without the knowledge of the respondent, he or she can literally turn up at the applications' court with the appropriate documentation and he will be heard. However, in arbitration, s.33 of the 1996 Act, as I understand it, precludes any such procedure since the arbitrator is under a duty to give to each party "a reasonable opportunity of putting his case". That, of course, would nullify the utility of applying for, say, a Mareva injunction, since the party to be injuncted could dispose of his assets before the grant of any injunction restraining him from so doing.
16. Finally, there is the appeals' procedure. Permission to appeal from either the trial judge or from the Court of Appeal is necessary before an appeal

can be launched. If permission to appeal is refused by the trial judge, which in a discretionary jurisdiction it is more often than not, application must be made to the Court of Appeal in writing, followed in the event of refusal by an oral hearing. If permission is granted then the oral appeal will follow. This elaborate procedure is both time consuming and therefore expensive. Typically a year or more can elapse between the judge's order and the decision of the Court of Appeal, leading to a very considerable increase in costs. And that may not be the end; an appeal to the Supreme Court may appear attractive to the losing litigant. Another year or more, with yet more expense, may then elapse.

17. I am now going to look at what I believe to be the significant advantages of arbitration in family matters provided by the IFLA scheme over litigation, and then at what are perceived to be the disadvantages.

18. I will take the advantages in no particular order. First, privacy and confidentiality. All the proceedings before the arbitrator are private and entirely confidential. The media and the public are not admitted. Rule 16 of the scheme makes it abundantly clear that the arbitration and its outcome are confidential. All documents, statements, information and other materials in the arbitration are confidential, as are all transcripts of evidence and/or submissions. I suggest that this is a real bonus for parties who do not relish their family disagreements, whether great or small, being bandied about in the national or local media. With the family courts now travelling at a gallop towards hearings being heard completely in open court, those couples caught up in a broken relationship who want their disputes adjudicated in private now have that option.

19. But what, you may say, happens when the award comes to the court for implementation? Will not the parties lose their privacy and confidentiality? Well, look at how the President dealt with the case of S v S. He simply said that he had read the necessary papers and approved the award and consequential orders. In para 22 of the judgment he said he did not propose to go into the details of the case as “why, after all, in case like this should litigants who have chosen the private process of arbitration have their affairs exposed in a public judgment?” So, nobody was any the wiser as to the identity of the parties or the facts of the case. But that dicta was, of course, delivered in a case where both parties desired the award to be transformed into court orders. What, you may ask, is the court’s likely attitude if one party challenges an award? Will the hearing be in open court with the media free to report what it likes thus destroying the privacy and confidentiality the parties gained through the arbitral hearing? Does there have to be an unanonymised judgment? As to the hearing, I think the courts, following the President’s lead, are going to have to be robust and respect the wishes of the parties, expressed in the arbitration agreement and the rules of IFLA, that they, by choosing arbitration as opposed to court based litigation,

opted for privacy and confidentiality throughout. A situation cannot be allowed to develop whereby the dissatisfied party in challenging the award before the court thereby destroys the very privacy and confidentiality which he or she agreed to in the first place. As to the judgment, I see no difficulty in the judge so framing his judgment and anonymising it so that it does not identify the parties in any shape or form.

20. Flexibility as to procedure and as to issues to be arbitrated. S. 1 (a) of the 1996 Act provides that one of the principles of the Act is that parties should be free to agree how their disputes are resolved. S.34 of the Act provides that the tribunal shall decide all procedural and evidential matters "subject to the right of the parties to agree any matter", and sub-section (2) sets out examples of those procedural and evidential matters. And we know that under s. 68 an award can be challenged on the ground of "serious irregularity" which includes under s. 68(2)(c) "failure by the tribunal to conduct the proceedings in accordance with the the procedure agreed between the parties".
21. The Rules of the scheme are faithful to the Act. Rule 9 provides that "the parties are free to agree as to the form of procedure..." Rule 10 provides that the arbitrator will invite the parties to make submissions as to what are the issues and what procedure should be adopted.
22. As to flexibility of issues to be arbitrated, the parties can agree to define precisely what issues the arbitrator is to decide. Is he to decide the whole gamut of the case or is he to decide just those issues which the parties want him to decide? Let me give you an example. In an arbitration which I conducted the issue of control was involved of a private company in which the husband and wife each held 50% of the share capital. It was agreed that one of the parties would run the company. But they could not agree about the terms of the shareholder agreement to be executed by each of them. I was asked to, and did, determine that issue and that issue alone, all other issues (which had nothing to do with the company) being left to one side.
23. Thus the parties can submit to arbitration those issues which they see as the stumbling block to the resolution of their disputes, and done in a way which they desire, not in a way that a court may feel either that it has to impose on them or that it cannot permit.
24. Next, speed. The court system can be, for many family finance litigants, particularly those of modest means, impossibly slow. Of course, priority is rightly given to children cases, particularly those where a local authority takes proceedings in relation to a dysfunctional family or where one party is seeking the summary return of a child to a foreign jurisdiction pursuant to the Hague Convention. And, there is a limited pool of judges. Thus, what can happen is that finance cases may be adjourned almost at the last moment, because the courts are overworked, and in some courts adjourned not just once but more than once.

25. Compare that to what can happen under the IFLA scheme. I have done some research by asking Resolution, who collate the statistics, what is the longest and shortest arbitration i.e. the period of time from the date of the appointment of the arbitrator to the date of the delivery of the award. The statistics are not complete because there are a number of uncompleted arbitrations. But I understand that the longest was one year and the shortest was 7 days. S v S, was completed from the date of the appointment of the arbitrator to the delivery of the award in 5 months. The arbitration, in which I was the arbitrator to which I have referred, took no more than 4 weeks from start to finish. Five days after my appointment the oral hearing took place. There were further written submissions. Then no more than one month after my appointment the award, having been vetted by the lawyers for typos etc., was delivered to the parties. I readily concede that the arbitration lasting 7 days concerned a very short point.
26. I venture to suggest that such speed, even if of 12 months and certainly if of 4 weeks (or 7 days) is quite unattainable in our court system.
27. Next, the arbitrator. Once the arbitrator is selected and accepts appointment, the arbitrator must see the arbitration through to its conclusion. There is no chopping or changing of the tribunal as can happen, sometimes all too often, in the court system. Although a judge may be allocated to a case at an early stage and conduct the interlocutory hearings, there is absolutely no guarantee that he will actually conduct the final hearing. He may be pulled out to conduct a more urgent case. Further, the parties to an arbitration select their arbitrator. They are given the opportunity, unavailable to them in the court system, of choosing the person to adjudicate their disputes in whom they and their advisers have confidence and consider the best person to be the arbitrator.
28. Let me now come to the perceived disadvantages, which I take again in no particular order of importance. First, an objection which I believe has now died away. It was said that the arbitrators under the scheme are unregulated, by which, I believe, it is meant that there is no recognised body to whom they are accountable. Let me lay this canard to rest, once and for all. What is IFLA? It is the Institute of Family Law Arbitrators which is a company limited by guarantee, with a board of directors chaired by Lord Falconer of Thoroton, a former Lord Chancellor. It is responsible for the implementation and administration of the family law finance arbitration scheme. The qualified arbitrators, now numbering over 200 with more to come, have all been trained in arbitral techniques and have a good working knowledge of the important and relevant parts of the Arbitration Act 1996. Each person so trained and wishing to practise as a family arbitrator must become a member of the Chartered Institute of Arbitrators and thus make him or herself subject to its disciplinary code. Solicitors, barristers, QCs, and retired judges, all of

whom are, or were, full-time practising family lawyers, comprise the corps of arbitrators under the scheme. They are therefore real specialists in the field of family finance law.

29. Next, it is said "the judge is free, the arbitrator must be paid". The second part is true, the first part is only partially true. Litigants must pay court fees. But the better answer to the criticism of expense is that if parties engage in arbitration and get the hearing and the award through quickly, the saving in legal fees that would be otherwise expended whilst the case wends its way through the court system to a final hearing, will, I suggest, more than offset the cost of employing an arbitrator. If months, even years, of litigation can be avoided by choosing arbitration, the savings in legal costs will be huge and vastly outweigh the fees of the arbitrator and the cost of hiring a venue.
30. Next, it is said "arbitration is only for the rich", by which I assume is meant that if only the rich can afford to pay an arbitrator, family arbitration can only be used by the rich. Not so. Among the qualified arbitrators are a large number who are prepared to, and have agreed to, take on arbitrations in cases of very modest means and tailor their fees accordingly, and indeed who are happy to agree a fixed fee. In any event, no doubt the choice of arbitrator will be influenced by the fees he proposes to charge and the parties can shop around.
31. I now come to 2 objections, which I have frequently heard, as to why some family practitioners advise their clients not to agree to arbitration. They are in a way linked. The first objection I have reduced to its bare essentials. It goes like this - "If I advise my client to agree to arbitration with X as the arbitrator but then in his award he goes against my client I may get the blame. If, however, in litigation the judge (whom I cannot choose) decides the dispute contrary to my client's case, well, he gets the blame, not me". The second objection is more nuanced! It is this - "if the arbitrator decides the dispute contrary to my client's case there is no effective right of appeal. Although the 1996 Act does stipulate grounds upon which an award can be challenged – see ss. 67 to 70 inclusive – they are very circumscribed, see the judgment in the case of DB v DLJ, dated 24 February 2016, where Mostyn J described them as providing "very limited rights of challenge". Further, (the objection goes on) any challenge to the award will face the hurdle that my client has agreed in the arbitration agreement that the award will be final and binding which can only encourage a family judge to enforce the award. By contrast, if my client has arguable grounds of appeal from an order of a judge, my client is likely to be given permission to appeal".
32. I am going to take the 2nd objection first because it impacts on the first objection. It may be that it is easier to mount an appeal from a judgment than it is to mount a challenge to an arbitral award. But, if so, that is unsurprising. Arbitration is, after all, intended to be a one-stop shop. It is not there to provide a dry run for disaffected parties to rerun their cases

before the courts, whether by way of appeal or rehearing or whatever. It is one of the attractions of arbitration that the 1996 Act gives very limited grounds of appeal or challenge, thereby cutting out much delay and expense. Surely, the party to an arbitration who is satisfied with the award should be pleased that the avenue to appeal under the 1996 Act is limited. It saves him or her from delay and further expense and discourages the unsuccessful party from challenging the award. Is not that an important factor for family practitioners to take into account when advising their clients? Nevertheless, in family law, the objection that there is no effective way of challenging an award outside the grounds in the 1996 Act, is, I believe, misplaced. If the unsuccessful party can persuade a court, which is asked by the successful party to convert the award into orders of the court, that the arbitrator has made an award which is wrong in principle or perverse (by which I mean that no reasonable tribunal, exercising its discretion and properly directing itself as to the law, could have come to the conclusion which it did), then no family court is going to convert the award into orders of the court. To do so would be an abdication of the court's exercise of discretion specifically placed upon it by Parliament.

33. In this respect I would like to comment briefly on parts of the judgment in DB v DLJ delivered by Mostyn J. The facts of the case are not important for the purpose of my talk. The wife sought to resist an application by the husband to turn the arbitrator's award into orders of the court on the grounds that the award was vitiated by a mistake or unforeseen event concerning the true value of a property in Portugal allocated to her. She failed.
34. This authority, like the President’s decision in S v S, is very supportive of family law arbitration. I commend it to your attention. Much of the judgment I agree with. However there are one or two passages in the judgment which appear to me to give an erroneous impression of the nature of a family arbitration agreement entered into by parties under Arb 1. The judge first analyses the scope for challenging a commercial award under the 1996 Act. At para 6 he recites part of a paper given by Sir Bernard Eder in December 2014 to an International Arbitration Conference in Mauritius in which Sir Bernard said:- “...the general approach of the Court is one which supports the arbitral process. By way of anecdote, it is perhaps interesting to recall what I was told many years ago by Michael Kerr, a former judge in the Court of Appeal and one of the leading figures in the recent development of the law of arbitration in England, when I was complaining about an arbitration that I had just lost and the difficulties in the way of challenging the award. I told him the award was wrong and unjust. He looked baffled and said: “Remember, when parties agree arbitration they buy the right to get the wrong answer”. So, the mere fact that an award is “wrong” or even “unjust” does not, of itself, provide any basis for challenging the award or

intervention by the Court. Any challenge or appeal must bring itself under one or more of the three heads which I have identified".

35. In my personal opinion, as I shall demonstrate, I consider that the dicta of Michael Kerr leading to Sir Bernard's conclusion is not applicable to arbitral awards in family law.
36. Mostyn J then rightly states that the heads of challenge under the 1996 Act to an award are "very circumscribed indeed" and illustrates that by reference to the grounds given in the Act.
37. In para 27 the judge rightly said that a family court, when exercising its discretion following an arbitral award, should adopt an approach of great stringency. The parties, having agreed to arbitrate, should understand that their dispute should end with the award. An arbitration is not a dry run prior to a court hearing.
38. However, in para 28 the judge went on ".....Outside the heads of correction, challenge or appeal within the 1996 Act these (I interpolate – the word "these" refer to a court refusing to implement an arbitral award on the grounds of mistake or supervening event) are, in my judgment, the only realistic 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".
39. If the judge there was saying or giving the impression that a party can never, or almost never, challenge an award on the ground that it is "wrong" or "unjust", then with the greatest of respect I disagree. It may be that the judge has misunderstood that part of Sir Bernard Eder's lecture to which I have referred. Sir Bernard was, as I understand it, referring to civil or commercial cases. I am led to believe by a retired commercial judge (now an arbitrator) that in such cases the arbitration clause in the contract may exclude any right of appeal to, or review by, a court of law. If so, then it may fairly be said that the parties in agreeing to arbitration have bought "the right to get the wrong answer". But, in sharp contrast to such arbitration clauses, in family law arbitrations under the IFLA scheme, the parties agree the very opposite. In Arb 1, the arbitration agreement, the parties specifically agree and acknowledge the right of the family court to exercise its own discretion when invited by the parties, whether consensually or not, to convert the award into orders of the court. In family law, case after case from the House of Lords and Supreme Court downwards emphasises that it is the duty of the court to achieve a fair and just result. Under the Rules of the IFLA scheme the arbitrator is in precisely the same position. It is his duty to apply the law of England and Wales. If therefore, Mostyn J was saying or implying that, notwithstanding that a court, asked to implement an award, is satisfied that the arbitrator's award may be wrong in principle or perverse so that the award can fairly be categorised as "wrong"or "unjust", cannot refuse to implement the award, then I profoundly

disagree with him. For a court so to act would be an abdication of its duty. If he was saying, which in fact I believe he was when the whole of his judgment is considered, see in particular paras 17 to 22, that it will be a considerable uphill battle for a "dissatisfied" party to an arbitral award to challenge it successfully before a family court, whether or not under the grounds in the 1996 Act, then I would have no quarrel with him.

40. But it must follow that the parties in a family arbitration conducted under the IFLA scheme most emphatically do not buy into "the right to get the wrong answer" from the arbitrator. Quite the reverse.
41. I now return to the other objection, which is about the practitioner being blamed by his client for choosing the arbitrator in the event of an adverse award. It is, I believe, an irrational fear that will disappear in time as the culture of arbitration becomes embedded in family law. But in the meantime let me reassure the "doubting Thomases". First, challenges to an award are not limited to those under the 1996 Act, as I hope I have demonstrated. If a challenge to an award can be made good, even after applying what Mostyn J said was a stringent test, then why should the lawyer fear choosing the arbitrator? And conversely, the lawyer will have the comfort of knowing that if his client wins then the opposition faces an uphill battle in challenging the award.
42. Second, I ask a rhetorical question of the fearful lawyer - is it not better for your client that he or she should have the opportunity to choose the arbitrator in whom he or she has confidence and who will see the case through to the end, rather than take a risk with a judge in whom he or she (or more likely, you) has little confidence or in whom they may have confidence but who is pulled from the case before the final hearing, sometimes at the 11th hour?
43. Third, if all that I have said does not still anxieties, then the parties can submit to IFLA a shortlist of names and ask IFLA to nominate the arbitrator.
44. Next, it may be said that "if all arbitrations are confidential then no award in one can be cited in another, thus creating the risk of inconsistent awards being made". I accept that an award in any particular arbitration cannot be cited in another, not at any rate without the express consent of both parties in the first arbitration. This is inherent in any system of arbitration where the principle of confidentiality prevails. So there is indeed the risk of inconsistency. But it is more apparent than real. In family finance cases, the inconsistency is likely to arise not by reason of the discretion given to tribunals under English law to determine the fair outcome, but by an arbitrator making a decision which is wholly outside the wide parameters of that discretion. That can be cured by the court. And just because two arbitrators may differ on roughly the same set of facts as to outcome does not under English family law mean that one is right and the other is wrong. It is only if one arbitrator makes an award which is indeed outside the wide ambit of the

discretion given to the tribunal under English law, so that it can be said that the award is wrong in principle or perverse, that the court is likely to uphold a challenge to it by the dissatisfied party. In that way the courts will be able to keep an eye on the arbitral process.

45. Finally, it is said "the law cannot be developed in an arbitration". That may be so. But the vast majority of family cases involve the application of existing principles to the facts of the particular case. For those very small number of cases where the law may need developing, then they can remain in the court system.
46. So, ladies and gentlemen, to my conclusions. We are fortunate in this country to have a good legal and judicial system. But it is under immense strain. Resources are constantly being cut or withdrawn. This leads to rigidity, delay, and expense and dissatisfaction. There is a lack of freedom in the court system for individuals to determine the procedure under which they themselves would like their differences to be adjudicated. Here for the first time is an arbitral scheme, applying English law, which empowers couples, suffering a terminal breakdown in their relationship, to opt to have their financial and property disputes adjudicated in the way that they consider suits them best. If the parties want privacy, arbitration will provide it. If they want speed, flexibility, and one "adjudicator" (and a specialist at that) to take their case through from beginning to end, then arbitration provides all of that.
47. To return then to the title of my talk. Which is a better way to justice in family cases – litigation or arbitration? My question will , I suggest, only be answered definitively when arbitration gains the confidence of a significant body of family practitioners and their clients. My personal view is that arbitration under the IFLA scheme is the much more attractive path. The advantages of parties submitting their financial and property disputes to arbitration so outweigh what are said, very inaccurately, to be disadvantages, that I confidently predict that within the near future family finance arbitration will complement the court system just as private medicine complements the National Health Service.