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Bermuda Branch

FAMILY LAW (FINANCIAL SCHEME)

ARBITRATION RULES 2019

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The Chartered Institute of Arbitrators is a learned society that works in the public interest to promote and facilitate the use of Alternative Dispute Resolution (ADR) mechanisms. Founded in 1915 and with a Royal Charter granted in 1979, it is a UK- based membership charity that has gained international presence in more than 100 countries and has more than 14,000 professionally qualified members around the world. The Bermuda Branch has been in operation since 1996. While the Chartered Institute of Arbitrators has used its best efforts in preparing this publication, it makes no representations or warranties with respect to the accuracy or completeness of its content and specifically disclaims any implied warranties of merchantability or fitness for a particular purpose.

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FAMILY LAW (FINANCIAL SCHEME)

ARBITRATION RULES 2019

Article 1 – Introductory

- 1.1 The Family Law Arbitration Financial Scheme (“the Financial Scheme”) is a scheme under which financial or property disputes with a family background may be resolved by arbitration. The Financial Scheme is administered by the Chartered Institute of Arbitrators (Bermuda Branch) (“the Institute”). The Financial Scheme is based on the UK’s Institute of Family Law Arbitrators Limited’s Family Law Arbitration Financial Scheme Arbitration Rules 2018.
- 1.2 Disputes referred to the Financial Scheme will be arbitrated in accordance with:
- (a) the provisions of the Arbitration Act 1986 (‘the Act’);
 - (b) these Rules, to the extent that they exclude, replace or modify the non-mandatory provisions of the Act; and
 - (c) the agreement of the parties, to the extent that that excludes, replaces or modifies the non-mandatory provisions of the Act or these Rules; except that the parties may not agree to exclude, replace or modify Art.3 (Applicable Law).
- 1.3 The parties may not amend or modify these Rules or any procedure under them after the commencement of the arbitration unless the arbitrator agrees to such amendment or modification; and may not amend or modify Art.3 (Applicable Law) in any event.
- 1.4 Expressions used in these Rules which are also used in the Act have the same meaning as they do in the Act.

Article 2 – Scope of the Financial Scheme

- 2.1 The Financial Scheme covers financial and property disputes arising from:
- (a) marriage and its breakdown (including financial provision on divorce, judicial separation or nullity);
 - (b) civil partnership and its breakdown;
 - (c) co-habitation and the ending of co-habitation;
 - (d) parenting or those sharing parental responsibility;
 - (e) provision for dependants from the estate of the deceased.
- 2.2 The Financial Scheme covers (but is not limited to) financial and property related

claims which relating to or arising from the following statutes:

- (a) the Matrimonial Causes Act 1974;
- (b) the Law Reform (Husband and Wife) Act 1977;
- (c) the Succession Act 1974;
- (d) the Domestic Partnerships Act 2018.

2.3 The Financial Scheme does not apply to disputes directly concerning:

- (a) the liberty of individuals;
- (b) the status either of individuals or of their relationship;
- (c) the care or parenting of children;
- (d) bankruptcy or insolvency;
- (e) any person or organisation which is not a party to the arbitration.

Article 3 – Applicable law

3. The arbitrator will decide the substance of the dispute only in accordance with the law of Bermuda. The arbitrator may have regard to, and admit evidence of, the law of another country insofar as, and in the same way as, a Judge exercising the jurisdiction of the Supreme Court of Bermuda would do so.

Article 4 – Starting the Arbitration

4.1 The parties may refer a dispute to arbitration under the Financial Scheme by letter citing these Rules, signed by the parties or their legal representatives, and submitting it to the Institute.

4.2 The Institute has a Financial Panel of arbitrators ('the Financial Panel') comprising Members of the Institute who are experienced family law professionals with particular expertise in financial matters.

4.3 The parties may agree to nominate a particular arbitrator from the Financial Panel. In such circumstances, the Institute will offer the appointment to the agreed arbitrator. If the appointment is not accepted by their first choice of arbitrator the parties may, if they agree, make a second or subsequent choice. Otherwise, it will be offered to another member of the Financial Panel chosen by the Institute in accordance with paragraph 4.5 below.

4.4 The parties may agree on a shortlist of arbitrators from the Financial Panel any one of whom would be acceptable to them, and may ask the Institute to select one of the arbitrators on the shortlist without reference to any criteria. In this case, the Institute will offer the appointment to one of the shortlisted arbitrators chosen at random. If the

- appointment is not accepted by the first choice of arbitrator, the Institute will offer the appointment to a second or subsequent shortlisted arbitrator, similarly chosen at random. If none of the shortlisted arbitrators accepts the appointment, the Institute will inform the parties and invite them to submit further agreed names.
- 4.5 In all other cases (including if so requested by the parties) the Institute will offer the appointment to a sole arbitrator from the Financial Panel whom it considers appropriate having regard to the nature of the dispute; any preferences expressed by the parties as to the qualifications, areas of experience, expertise or other attributes of the arbitrator; and any other relevant circumstances.
- 4.6 If, after considering any representations from the parties, either the Institute or the arbitrator considers that the dispute is not suitable for arbitration under the Financial Scheme, then the parties will be so advised and their reference of the matter to the Financial Scheme will be treated as withdrawn.
- 4.7 The arbitration will be regarded as commenced when the arbitrator communicates to the parties his or her acceptance of the appointment.
- 4.8 Except as provided in Art.4.9, a party to an arbitration under the Financial Scheme may be represented in the proceedings by a lawyer or other person chosen by that party; or, if he or she is acting in person, may receive the advice and assistance of a McKenzie Friend.
- 4.9 If at any time the arbitrator forms the view that the participation of a non-lawyer representative or the assistance given by a McKenzie Friend unreasonably impedes or is likely to impede the conduct of the arbitral proceedings or the administration of justice, the arbitrator may direct that the relevant party should not continue to be so represented or assisted, as the case may be, and provide reasons in writing.
- 4.10 All appointments by the Institute are subject to the Institute's prevailing fees and charges for such services.

Article 5 – Arbitrator's Appointment

- 5.1 Before accepting the appointment or as soon as the relevant facts are known, the arbitrator will disclose to the parties any actual or potential conflict of interest or any matter that might give rise to justifiable doubts as to his or her impartiality.
- 5.2 In the event of such disclosure, the parties, or either of them (as appropriate), may waive any objection to the arbitrator continuing to act, in which case the arbitrator may commence or continue with the arbitration. If an objection is maintained, the arbitrator will decide whether to continue to act, subject to any agreement by the parties to revoke his or her authority or intervention by the court.
- 5.3 An arbitrator may not accept appointment in any dispute in relation to which he or she has acted in a different capacity; and after accepting appointment, the arbitrator may not concurrently or subsequently act in relation to the same dispute in a different capacity.
- 5.4 If the arbitrator ceases to act through revocation of his or her authority, removal by the court, resignation or death, or is otherwise unable, or refuses, to act, and either party

or the existing arbitrator so requests, the Institute may appoint a replacement arbitrator from the Financial Panel.

- 5.5 The replacement arbitrator may determine whether and if so to what extent the previous proceedings should stand.

Article 6 – Communications between parties, the arbitrator and the Institute

- 6.1 Any communication between the arbitrator and either party will be copied to the other party.
- 6.2 Unless agreed by the parties, the arbitrator will designate one party as the claimant and the other as respondent.
- 6.3 The arbitrator will not discuss any aspect of the dispute or of the arbitration with either party or their legal representatives in the absence of the other party or their legal representatives, unless such communication is solely for the purpose of making administrative arrangements.
- 6.4 The Institute will not be required to enter into any correspondence concerning the arbitration or its outcome.

Article 7 – Powers of the Arbitrator

- 7.1 The arbitrator will have all the powers given to an arbitrator by the Act.
- 7.2 In relation to substantive relief of an interim or final character, the arbitrator will have the power to make orders or awards to the same extent and in the same or similar form as would a Judge exercising the jurisdiction of the Supreme Court of Bermuda. (For the avoidance of doubt, the arbitrator's power does not extend to interim injunctions; committal; or jurisdiction over non-parties without their agreement.)
- 7.3 The arbitrator will have the power to award interest whether or not it is specifically claimed.
- 7.4 If the arbitrator considers that the dispute is not suitable for arbitration under the Financial Scheme the arbitrator will have the power to terminate the proceedings.
- 7.5 The parties may agree that a third party or parties be joined to the arbitration provided that the third party or parties agree in writing: (a) to be so joined; (b) to abide by the Financial Scheme Rules; and (c) to be bound by any award made by the arbitrator. In such a case, the arbitrator may join the third party or parties to the arbitration on such terms as may be agreed by all relevant parties, or as may be directed by the arbitrator.

Article 8 – Powers of the Arbitrator concerning Procedure

- 8.1 The arbitrator will decide all procedural and evidential matters, subject to the right of the parties to agree any matter (if necessary, with the concurrence of the arbitrator (see Art.1.3)).

- 8.2 The arbitrator may appoint experts to report on specific issues or prepare valuations on such terms as the arbitrator may direct.
- 8.3 The arbitrator may limit the number of expert witnesses to be called by any party or may direct that no expert be called on any issue or issues or that expert evidence may be called only with the permission of the arbitrator.
- 8.4 Further, and/or in particular, the arbitrator will have the power to:
- (a) direct a party to produce information, documents or other materials in a specified manner and/or within a specified time;
 - (b) give directions in relation to any property, documents or materials which are the subject of the proceedings or as to which any question arises in the proceedings, and which are owned by or are in the possession or control of a party to the proceedings for their inspection, photographing, valuation, preservation, custody or detention by the tribunal, an expert or a party.
- 8.5 If, without showing sufficient cause, a party fails to comply with its obligations with these Rules or any directions of the arbitrator or generally, then, after giving that party due notice, the arbitrator may continue the proceedings in the absence of that party or without any written evidence or submissions on their behalf and may make an award on the basis of the evidence before him or her. This power is without prejudice to the ability of any party to seek enforcement through the Supreme Court of Bermuda.

Article 9 – Form of Procedure

- 9.1 The parties are free to agree as to the form of procedure (if necessary, with the concurrence of the arbitrator (see Art.1.3)) and, in particular, to adopt a documents-only procedure or some other simplified or expedited procedure.
- 9.2 If there is no such agreement, the arbitrator will have the widest possible discretion to adopt procedures suitable to the circumstances of the particular case.

Article 10 – General Procedure

- 10.1 Generally, on commencement of the arbitration, the arbitrator will invite the parties to make submissions setting out briefly their respective views as to the nature of the dispute, the issues, what form of procedure should be adopted, the timetable and any other relevant matters.
- 10.2 If appropriate, the arbitrator may convene a preliminary meeting, telephone conference or other suitable forum for exchange of views.
- 10.3 Within a reasonable time of ascertaining the parties' views, the arbitrator will give directions and set a timetable for the procedural steps in the arbitration, including (but not limited to) the following:
- (a) written statements of case;

- (b) disclosure and production of documents as between the parties;
- (c) the exchange of witness statements;
- (d) the number and type of expert witnesses, exchange of their reports and meetings between them;
- (e) arrangements for any meeting or hearing and the procedures to be adopted at these events;
- (f) time limits to be imposed on oral submissions or the examination of witnesses, or any other procedure for controlling the length of hearings.

10.4 The arbitrator may at any time direct any of the following to be delivered in writing:

- (a) submissions on behalf of any party;
- (b) questions to be put to any witness;
- (c) answers by any witness to specific questions.

Article 11 – Applications for Directions as to procedural or evidential matters

11.1 The arbitrator may direct a time limit for making or responding to applications for directions as to procedural or evidential matters.

11.2 Any application by a party for directions as to procedural or evidential matters will be accompanied by such evidence and/or submissions as the applicant may consider appropriate or as the arbitrator may direct.

11.3 A party responding to such an application will, if feasible, have a reasonable opportunity to consider and agree the order or directions proposed.

11.4 Any agreement will be communicated to the arbitrator promptly and will be subject to the arbitrator's concurrence, if necessary (see Art.1.3).

11.5 Unless the arbitrator convenes a meeting, telephone conference or other forum for exchange of views, any response to the application will be followed by an opportunity for the party applying to comment on that response; and the arbitrator will give directions within a reasonable time after receiving the applicant's comments.

Article 12 – Alternative Procedure

12.1 In any case where it is appropriate, the parties may agree or the arbitrator may decide to adopt the procedure set out in this Article.

12.2 The parties may at any stage agree (with the concurrence of the arbitrator) or the arbitrator may direct any variation or addition to the following steps and/or timetable. In particular, the arbitrator may at any stage allow time for the parties to consider their positions and pursue negotiations with a view to arriving at an amicable settlement (see,

also, Arts.17.1 and 17.2).

- 12.3 Within 56 days of the arbitrator communicating to the parties his or her acceptance of the appointment, each party will complete and send to the arbitrator and to the other party a sworn statement as to their financial situation together with such further evidence or information as the arbitrator may direct.
- 12.4 Within 28 days of receipt of the other party's financial statement, each party may send to the arbitrator and to the other party a questionnaire raising questions and/or requesting information and/or documents.
- 12.5 Within 14 days of receipt of a questionnaire, a party may send to the arbitrator and to the other party reasoned objections to answering any of the questions or meeting any of the requests, together with a submission as to whether a preliminary meeting is required.
- 12.6 Within 14 days of receipt of objections or, if there is a preliminary meeting, within a reasonable time after that meeting, the arbitrator will direct in respect of each party:
- (a) which questions are to be answered and which requests are to be met, together with the time within which these things are to be done;
 - (b) which property is to be valued, who is to undertake the valuation, how they are to be appointed and the time within which the valuation is to be carried out; and
 - (c) any other steps for providing information, dealing with enquiries or clarifying issues as may be appropriate.
- 12.7 Within a reasonable time of receipt from both parties of replies to questionnaires, valuations and any other information as may have been required, the arbitrator may convene a further meeting to review progress, address outstanding issues and consider what further directions are necessary.
- 12.8 The arbitrator will give detailed directions for all further procedural steps in the arbitration including (but not limited to) the following:
- (a) the drawing up of lists of issues and schedules of assets;
 - (b) written submissions;
 - (c) arrangements for any meeting or hearing and the procedures to be adopted at these events;
 - (d) time limits to be imposed on oral submissions or the examination of witnesses, or any other procedure for controlling the length of hearings.

Article 13 – Awards

- 13.1 The arbitrator will deliver an award within a reasonable time after the conclusion of the proceedings or the relevant part of the proceedings.

- 13.2 Any award will be in writing, will state the seat of the arbitration, will be dated and signed by the arbitrator, and (unless the parties agree otherwise or the award is by consent) will contain sufficient reasons to show why the arbitrator has reached the decisions it contains.
- 13.3 Once an award has been made, it will be final and binding on the parties, subject to the following:
- (a) any challenge to the award by any available arbitral process of appeal or review;
 - (b) insofar as the subject matter of the award requires it to be embodied in a court order (see Art.13.4), any changes which the court making that order may require;
 - (c) insofar as the award provides for continuing payments to be made by one party to another, or to a child or children, a subsequent award or court order reviewing and varying or revoking the provision for continuing payments, and which supersedes an existing award;
 - (d) insofar as the award provides for continuing payments to be made by one party to or for the benefit of a child or children, a subsequent assessment by any statutory authority in relation to the same child or children.
- 13.4 If and so far as the subject matter of the award makes it necessary, the parties will apply to an appropriate court for an order in the same or similar terms as the award or the relevant part of the award and will take all reasonably necessary steps to see that such an order is made. In this context, ‘an appropriate court’ means a court which has jurisdiction to make a substantive order in the same or similar terms as the award.
- 13.5 The arbitrator may refuse to deliver an award to the parties except upon full payment of his or her fees or expenses. Subject to this entitlement, the arbitrator will send a copy of the award to each party or its legal representatives.

Article 14 – Costs

- 14.1 In this Article any reference to costs is a reference to the costs of the arbitration including the fees and expenses of the Institute, unless otherwise indicated.
- 14.2 The arbitrator may require the parties to pay his or her fees and expenses accrued during the course of the arbitration at such interim stages as may be agreed with the parties, and in the absence of agreement, at reasonable intervals.
- 14.3 The arbitrator may order either party to provide security for the arbitrator’s fees and expenses.
- 14.4 Unless otherwise agreed by the parties, the arbitrator will make an award allocating costs as between the parties in accordance with the following general principle:
- (a) the parties will bear the arbitrator’s fees and expenses and the fees and expenses of the Institute in equal shares;

- (b) there will be no order or award requiring one party to pay the legal or other costs of another party.

This principle is subject to the arbitrator's overriding discretion set out in Art.14.5.

- 14.5 Where it is appropriate to do so because of the conduct of a party in relation to the arbitration (whether before or during it), the arbitrator may at any stage order that party:
- (a) to bear a larger than equal share, and up to the full amount, of the arbitrator's fees and expenses and the fees and expenses of the Institute;
 - (b) to pay the legal or other costs of another party;

and may make an award accordingly.

- 14.6 In deciding whether, and if so, how to exercise the discretion set out in Art.14.5, the arbitrator will have regard to the following:
- (a) any failure by a party to comply with these Rules or any order or directions which the arbitrator considers relevant;
 - (b) any open offer to settle made by a party;
 - (c) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
 - (d) the manner in which a party has pursued or responded to a claim or a particular allegation or issue;
 - (e) any other aspect of a party's conduct in relation to the arbitration which the arbitrator considers relevant; and
 - (f) the financial effect on the parties of any costs order or award.

- 14.7 Unless the parties agree otherwise, no offer to settle which is not an open offer to settle shall be admissible at any stage of the arbitration.

- 14.8 These rules as to costs will not apply to applications made to the court where costs fall to be determined by the court.

Article 15 – Conclusion of the Arbitration

- 15.1 The arbitration will be terminated if:
- (a) a party to the arbitration agreement dies;
 - (b) a party to the arbitration agreement lacks, or loses, capacity unless a receiver is appointed under the Mental Health Act 1968 in relation to that party and has the power so to act, the receiver decides, in his or her discretion, to continue with the arbitration;

- (c) the arbitrator considers that the dispute is not suitable for arbitration under the Financial Scheme and terminates the proceedings;
- (d) the parties settle the dispute and the arbitrator terminates the proceedings;
- (e) the parties agree in writing to discontinue the arbitration and notify the arbitrator accordingly;
- (f) the arbitrator makes a final award.

Article 16 – Confidentiality

- 16.1 The general principle is that the arbitration and its outcome are confidential, except insofar as disclosure may be necessary to challenge, implement, enforce or vary an award or as may be compelled by law.
- 16.2 All documents, statements, information and other materials disclosed by a party will be held by any other party and their legal representatives in confidence and used solely for the purpose of the arbitration, unless otherwise agreed by the disclosing party or compelled by law.
- 16.3 Any transcript of the proceedings will be provided to all parties and to the arbitrator. It will similarly be confidential and used solely for the purpose of the arbitration, implementation or enforcement of any award or applications to the court, unless otherwise agreed by the parties or compelled by law.
- 16.4 The arbitrator will not be called as a witness by any party either to testify or to produce any documents or materials received or generated during the course of the proceedings in relation to any aspect of the arbitration, unless with the agreement of the arbitrator or compelled by law.

Article 17 – General

- 17.1 At relevant stages of the arbitration, the arbitrator may encourage the parties to consider using an alternative dispute resolution procedure other than arbitration, such as mediation, negotiation or early neutral evaluation, in relation to the dispute or a particular aspect of the dispute.
- 17.2 If the parties agree to use an alternative dispute resolution procedure such as mediation, negotiation or early neutral evaluation, then the arbitrator will facilitate its use and may, if appropriate, stay the arbitration or a particular aspect of the arbitration for an appropriate period of time for that purpose.
- 17.3 In the event that the dispute is settled (following a mediation or otherwise), the parties will inform the arbitrator promptly. Fees and expenses accrued and due to the arbitrator by that stage will remain payable.
- 17.4 The parties will inform the arbitrator promptly of any proposed application to the court and will provide him or her with copies of all documentation intended to be used in any such application.

17.5 The Institute, its employees and agents, will not be liable:

- (a) for anything done or omitted in the actual or purported appointment or nomination of an arbitrator, unless the act or omission is shown to have been in bad faith;
- (b) by reason of having appointed or nominated an arbitrator, for anything done or omitted by the arbitrator (or his employees or agents) in the discharge or purported discharge of his functions as an arbitrator;
- (c) for any consequences if, for whatever reason, the arbitral process does not result in an award or, where necessary, a court order embodying an award by which the matters to be determined are resolved.