The emergence of arbitration in family law in Australia

Colin Kaeser
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In Australia, the emergence of arbitration in family law has been a slow and laborious process. In 1988 the Family Law Council published a report entitled Arbitration in Family Law. This report recommended the establishment of a court-annexed system of arbitration for family property disputes. In 1991 the Family Law Act 1975 (Cth) was amended to allow post-separated married couples to have property and spousal maintenance disputes arbitrated.

Arbitration was then a toothless tiger as, in the absence of any unilateral mechanism to provide for registration of an arbitration award as a binding order, there was not much point in attempting arbitration. The award could only be registered by the consent of both parties. If one party did not like the result, they simply did not provide consent.

Ten years later, in early 2001, the Family Law Regulations were amended to allow for registration of awards, and to deal with various other issues such as qualifications of arbitrators, arbitration agreements and other matters regarding the conduct of arbitrations. ‘Arbitration Mark 2’ was born and it had teeth. Either party could now register an award without the consent of the other and it would still be binding on both parties.

Arbitration has now emerged as one more piece in the primary dispute resolution (PDR) jigsaw. Family lawyers are required to consider advising clients about arbitration.

Arbitration as part of PDR

Arbitration is but one PDR method parties in the family law area can use to resolve their issues. They need not follow the traditional litigious path. Even if they embark on litigation, parties are never restricted to that path alone. Mediation, counselling, negotiation and arbitration all have their place in the repertoire of the family lawyer.

Rationale of arbitration

Why has arbitration been included in legislation covering family law? There are many factors behind the push for arbitration:

1. The continuous economic rationale of value for money.
2. The perceived ‘failings’ of the current judicial system and legal practice.
3. Government pressure to provide more ways to resolve disputes, for instance, the ‘Pathways out of the Maze’ report.
4. The knowledge that even with highly competent mediation, counselling or negotiation, some issues will simply not settle and will need a decision maker.
Scope of arbitration

Part VIII of the Family Law Act 1975 and Part 5A of the Family Court Act 1997 both provide for court-referred and private arbitration of disputes. This limits arbitration to property settlement and spousal/de facto maintenance issues. An arbitrator cannot bindingly determine child welfare or child support issues.

Features of arbitration

The arbitration agreement

The arbitration procedure is underpinned by an agreement between the parties and the arbitrator. This arbitration agreement sets out and determines:

- appointment of the arbitrator
- issues for determination
- form of the arbitration
- a timetable
- procedure for the arbitration
- whether or not the rules of evidence will be applied
- receipt of evidence from other sources, eg experts and documents
- default procedures and the circumstances in which the arbitration can be terminated
- costs of the arbitration, including payment of disbursements and the responsibility for payment of those costs
- any other matter the parties may find is relevant.

In some situations, the arbitration agreement may only deal with the main points, such as the appointment of the arbitrator, the issues for determination, the form of arbitration and the costs. The other issues can then be decided upon at a directions conference or planning meeting, which precedes the actual arbitration.

Forms of arbitration

The arbitration process can be tailored to encompass many different methods and features. Examples include:

- 'papers only' arbitration
- representation of parties
- oral evidence or affidavit only
- no, limited or full cross-examination
- no, limited or full discovery
- no, limited or full pleadings
- opening and closing addresses.

To reap the perceived advantages of arbitration, most cases are likely to be dealt with in a relatively simple manner, such as 'on the papers' with an agreed statement of facts and submissions in writing, or a short hearing. Hearings will probably require a limitation on the length and means of presenting evidence and submissions.

Procedures in aid

There are a number of circumstances where the court can be called upon to assist in the conduct of an arbitration – apart from the general power to make orders to facilitate the arbitration.

One instance is the ability of the arbitrator to refer a question of law arising in the arbitration to a judge for determination. Another example arises in circumstances where, in the course of a court-referred arbitration under s 19D, a party does not comply with a procedural direction or, in the view of the arbitrator, does not have capacity to participate in the arbitration.

A third example of assistance provided by the court relates to the ability of a party to apply to the court for the issue of a subpoena to attend and/or produce documents at the arbitration. This subpoena has the same validity and effect as any other subpoena issued by the court.

Registration, enforcement and review of awards

Once an award has been handed down in the prescribed form, either party can apply to the court for registration of the award. The other party then has 28 days to object to its registration. There is no indication what the basis for such an objection may be as the provisions for the review and setting aside of an award (see below) only apply to a registered award. Objection may be limited to whether the award is in the prescribed form.

Upon registration, the award has the same effect as if it were an order of the court and can be enforced in the same way. It is clear that an arbitration award is treated differently from a court order. For the reasons set out below, there is the potential for an arbitration award to have a greater degree of finality than an order of a judge at a trial.
Under the Family Law Act 1975\(^1\) and the Family Court Act 1997\(^2\) the court can:

1. review an award on questions of law; and/or
2. set aside an award on the grounds that:
   a. the award was obtained by fraud (which includes the non-disclosure of a material matter);
   b. the award or agreement is void, voidable or unenforceable;
   c. since the making of the award, circumstances have arisen which make it impracticable for the award or parts of it to be carried out;
   d. the arbitrator was affected by bias or there was a lack of procedural fairness in the arbitration.

By limiting a review to a question of law only, the legislation arguably gives an arbitration award less potential to be overturned than a judge’s decision. On the other hand, new arguments will arise as to contractual matters such as procedural fairness, repudiation of contracts and whether the terms of the arbitration agreement are clear. The question for practitioners is whether these are positive or negative elements of the arbitration process.

**Qualifications of arbitrators**

An award is only binding if made by a person who meets the requirements set out in the Regulations.\(^3\)

The person has to:

- be a legal practitioner
- either be an accredited family law specialist, or have practised for a period of at least five years with at least 25 per cent in relation to family law matters
- completed specialised arbitration training
- enter his or her name on the list kept by the Law Council of Australia or its nominee.

The current list of approved arbitrators can be viewed at: <www.familylawsection.org.au\arbitration\index.htm>.

**Recent developments**

The Australian Institute of Family Law Arbitrators and Mediators (AIFLAM) maintains the list. It is the body nominated by the Law Council of Australia for that purpose.

**Suitability of arbitration**

Arbitration is suitable for, or at least attractive to, one or both of the parties where some of the following features are present:

1. Both parties have recovered from the separation and are keen to ‘get on with their lives’.
2. The asset pool is uncomplicated.
3. Failure to disclose assets is not an issue. If it is an issue, application to the Family Court with procedures such as subpoenas and third party notices may be more appropriate.
4. Where neither party is interested in any tactical delay or in swamping the other party in legal fees.
5. Where there are no disputed third party claims to the parties’ assets.
6. A mutually respected arbitrator is available and his or her fees are within the parties’ means.
7. The waiting list in the Family Court is particularly long.
8. The parties have aspects of their personal lives they would both prefer to keep secret and therefore not divulge in open court.
9. The parties do not want to go through a series of ‘attempts to settle’ such as conciliation and pre-hearing conferences before having someone rule on their case. The arbitrator will simply decide the case for the parties.
10. The parties can appreciate the cost/benefit analysis of arbitration versus both parties being represented through the litigation process to a trial.
11. The parties want less formality and more flexibility in determining their dispute.
12. There are many influential people ‘pulling the strings’ of the parties. Relatives, for instance, may be critical of any mediated settlement as ‘weak’. The party may want to have an arbitrator to take the blame for the decision, rather than have to face such criticism.

**Advantages of arbitration to the client**

1. There can be a considerable emotional overlay in a family law financial dispute, which often disappears once the dispute is resolved.
2. The percentage of self-represented persons is high in the family law area. In many cases, parties find it difficult to obtain or afford representation for the entirety of proceedings, or it may not make economic sense for the parties to apply funds from what is a limited

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pool towards extensive legal costs. They may, however, be able to apply limited resources to the costs of preparation and conduct of an arbitration.

3. Selection of the decision maker. The parties can select an arbitrator with whom they both feel comfortable given that person’s experience and qualifications.

4. Flexibility of process. The parties can choose how to conduct their arbitration. They are not restricted by the Rules of Court nor the rules of evidence. This allows the parties to resolve their dispute in a less daunting and less formal/strict environment.

5. Privacy. The arbitration process is confidential. There are no open hearings where other interested parties can hear the intimate details of their lives. Examples may include medical histories, alcoholism, family violence, tax evasion, social security fraud and business secrets. The arbitrator must not disclose information obtained as part of the arbitration process, and has to make an oath or affirmation to that effect. There are, however, some situations, such as where there is imminent danger to the life and health of another person, where the arbitrator may override the duty of confidentiality.  

6. Speed. Arbitration should take between six and eight weeks, as compared with the Family Court of Western Australia, which currently takes about 12-18 months to proceed to a trial and judgment.

7. Arbitration can be used to resolve part of a dispute. For example, if the parties are agreed on percentages, but are not agreed on the valuation of a particular item, then that issue could go to arbitration. When the valuation issue is determined, the balance of the dispute may be resolved by consent.

8. There are no rolling lists with arbitration. There is therefore a greater likelihood that the arbitration will start on time.

9. The parties are more likely to perceive that the process has been geared to their own needs and wishes, rather than being imposed upon them. They are more likely to accept the result, having been more involved in the process.

10. Arbitration should relieve congested court lists. If a reasonable number of current cases proceed to arbitration, then the list sizes will decrease, and the matters remaining will be reached more expeditiously.

11. The arbitrator can travel. Judges generally don’t. In country areas, it may be more economical for an arbitrator to travel to the location of the parties, witnesses and lawyers, rather than have all interested parties travel to a central location for a trial.

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Advantages of arbitration for the lawyer

A number of the advantages mentioned above also apply to the lawyers acting for the parties. The inconvenience of not having a trial start on the expected date is but one example.

Additional benefits may be:

1. Increased turnover and cash flow. A number of firms ‘carry’ litigants financially in that they recover some or all of their fees when the matter has been completed. Given that the arbitration is much faster than the trial process, disputes should be resolved faster, and solicitors recover their fees earlier.

2. Greater client numbers. As mentioned earlier, there may be a
percentage of people who cannot afford to have a lawyer represent them through the entire court process, but could afford to have representation for an arbitration. Instead of losing clients to the process, lawyers may in fact gain clients.

3. If a matter is proceeding to trial, arbitration can be used along the way to reduce the number of issues for determination at trial.

4. Greater client satisfaction. If clients are more satisfied with the process, the cost, the timing of the decision and the overall experience, they are more likely to make referrals to, and positive comments about, their lawyer.

The future of arbitration

To the best of the author’s knowledge, no binding arbitrations have been conducted in Western Australia at the time of preparation of this paper.

The primary question is whether practitioners, litigants, and/or the general public will accept arbitration. If it is going to ‘take off’, who will be the driving force – practitioners, the public, the government, or the courts? It may be that the Legal Aid Commission has a significant role to play in providing resolution of property disputes to a group of people who otherwise have to represent themselves in an intimidating and lengthy legal process.

In the author’s view, practitioners have a duty to go beyond the obligation noted in the Family Law Act 1975 and the Family Court Act 1997.21 Merely considering whether to advise clients of PDR options is insufficient. They should be advising every client of the available PDR options: how they work; the likely advantages and disadvantages; and whether they can produce a reasonable result for the client.

Alternatively if a spousal maintenance application sought less than, say, $100 per week, should it have to be determined by arbitration, and not by the court? This would have the effect of keeping out of the court system the ‘lower end of the scale’ applications, so that valuable judges’ time would be spent on cases involving more substantial amounts.

One might suggest that this would create a ‘poor man’s justice’, so that the court would be perceived as accessible to only the ‘well off’. It would clearly decrease court delays by reducing the number of matters able to be litigated. Is this any different to courts and parliament imposing jurisdictional limits between the Local Court, District Court and Supreme Court in relation to civil claims?

Conclusion

While arbitration has not been used very much to date, it remains a viable
alternative to litigation and to other primary dispute resolution methods. ●

Colin Kaeser is a Partner at Kaeser Kroon, an Approved Arbitrator, Accredited Family Law Specialist, Family and Child Mediator and Convener of the FLPA PDR subcommittee and can be contacted at kaeser@kaeser-kroon.

Endnotes

1. The author acknowledges Heinrich Moser for his article ‘Arbitration of Financial Disputes in Family Law’; and John Wade for his article ‘Arbitration of Matrimonial Property Disputes’ (1991) 11 Bond L Rev 395, from which much of this material is drawn.


3. Family Law Act 1975 (Cth) s 14G; Family Court Act 1997 (Cth) s 50 – yet another example of a toothless tiger.


5. Regulation 67F - although the Regulation does not make an agreement compulsory, other regulations require notification and disclosure of matters ordinarily contained in an agreement, so that, for practical purposes, the signing of an agreement provides a structured way to comply with the Regulations.

6. Regulation 670.

7. Family Law Act 1975 (Cth) s 19EA; Family Court Act 1997 (Cth) s 60A.

8. Family Law Act 1975 (Cth); Family Court Act 1997 (Cth) s 60A.

9. Regulation 67N.

10. Regulation 67P.

11. Regulation 67Q.

12. Family Law Act 1975 (Cth) ss 19D(5) and 19E(2); Family Court Act 1997 (Cth) ss 60A(5) and 60B(2); Regulation 67S.


14. Family Law Act 1975 (Cth) ss 60D and 60E.

15. Regulation 67B.

16. To the author’s knowledge, the Family Court of Australia has produced no such brochure. The Court has the duty, under s 19J(2) of the Family Law Act 1975, to provide persons who propose to institute proceedings under this Act, and (in appropriate cases) their spouses and other interested persons, with a document setting out particulars of any mediation and arbitration facilities available in the Family Court and elsewhere.


18. Regulation 67J provides for non-disclosure ‘unless I reasonably believe it is necessary for me to do so’.

19. Save in cases that have priority. This period changes among registries of the Family Court of Australia.

20. This is not suggested as a reason to recommend arbitration to clients, but merely an anticipated outcome.

21. Section 14G and Section 50 respectively.

22. Family Law Act 1975 (Cth) ss 19D; Family Court Act 1997 (Cth) ss 60A.