Family law property arbitration

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The family law jurisdiction was an early adopter of mediation in Australia unlike the more cautious approach taken to mediation in commercial disputes. Conversely, arbitration of family law property settlement cases, whilst legislatively possible since 1991, has not been used until recently - unlike commercial disputes which have been frequently arbitrated. This article compares the histories of commercial arbitration and family law arbitration in order to:

(a) understand the different uptakes of arbitration in the two different jurisdictions;

(b) consider how - with the 2016 amendments to the Family Law Act, Rules and Regulations - family law property arbitration can become, like mediation, one of the standard family law dispute resolution processes; and

(c) suggest how family lawyers can discuss arbitration with their clients to determine when arbitration may - and may not - be appropriate for their disputes.

Early history of family law property arbitration

The *Family Law Act 1975* (Cth) (**Family Law Act**) was amended in 1991 to allow for arbitration of family law property settlements either voluntarily with party consent or mandated by court order. A party dissatisfied with the arbitral award was entitled to a review via a hearing *de novo*. Enforcement of the award was subject to judicial review. The 1991 amendments also provided for mediation of property settlements which quickly became a popular process for separating spouses to reach agreements about financial matters and also about parenting arrangements. Arbitration however was not adopted by spouses or family lawyers. One practical difficulty was the lack of a statutory regime for accrediting arbitrators. Another difficulty was the failure of the Family Court to create Rules providing a practical framework for the conduct of arbitrations. The lack of certainty and finality arising from the right of review merely because a party was dissatisfied with the outcome was also a disincentive to arbitration.

In 1995 the High Court held that for a party to be compelled to engage in non-consensual arbitration they must have a right to a hearing *de novo*, and enforcement of an arbitral award must be a matter of judicial discretion.[2] Although the 1991 amendments already provided these rights, the Family Law Act was again amended in 2000 to make family law property arbitration purely consensual. The amendments, which were arguably not necessary, did not cause family law arbitration to become any more popular.

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[2] *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

In 2016, further legislative changes coincided with a crisis in the caseloads of the Family Law Courts to potentially establish arbitration as a standard dispute resolution option for separating spouses. The arbitration sections of the Family Law Act were revamped, and new Rules and Regulations introduced to regulate the registration of arbitrators and the conduct of arbitrations. In the same year, standard court waiting times exceeded three years from first filing to delivery of judgment.

Commercial arbitration

In contrast to family law arbitration, arbitration of commercial disputes has a long and active history. The Australian Constitution recognised arbitration and gave the Commonwealth Parliament power to legislate for arbitration of industrial disputes. The *Commonwealth Conciliation and Arbitration Act 1904* was the first in a series of State and Commonwealth Acts establishing the framework of arbitration. The *International Arbitration Act 1974* (Cth) (**International Arbitration Act**) implemented the *1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards* so that an arbitral award issued under the laws of 142 signatory countries is enforceable in any of the signatory countries. All Australian states passed uniform *Commercial Arbitration Acts* in 1984 (**Commercial Arbitration Acts**) based on the *Arbitration Act 1979* (UK). These have subsequently been updated to reflect the *Model Law on International Commercial Arbitration* developed by the United Nations Commission on International Trade Law (**UNCITRAL**).[3] In 2013, the High Court of Australia upheld the constitutional validity of the International Arbitration Act operating under UNCITRAL. [4]

There are a number of reasons why private arbitration has proved popular to commercial disputants. Domestic Australian commercial disputes can involve multiple causes of action and traverse different state and territory laws making private arbitration an attractive way to overcome jurisdictional complexity. Commercial contracts regularly contain dispute resolution clauses imposing obligations to engage in dispute resolution processes including arbitration if disputes arise in carrying out the contract. In Australia, 'arbitration is most common in the construction industry, in business disputes generally, and in shipping and commodities disputes.'[5] Similarly, international commercial disputes have proved especially amenable to arbitration partially due to the complexities of competing jurisdictions. 'Arbitration is the most common form of transnational commercial dispute resolution.'[6]

In addition to parties choosing to arbitrate, or being obliged to arbitrate due to contractual alternative dispute resolution (**ADR**) clauses, courts were quick to promote arbitration of cases. As early as 1987, thousands of cases had been referred to arbitration by the NSW District and Local Courts.[7]

In contrast to the Family Law Act, which provides both the substantive law and the arbitral process, commercial arbitration legislation prescribes the process of binding and enforceable arbitration but not the legal remedies which come from a wide range of statutory, equity and common law sources. A

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[3] For example, in NSW, *Commercial Arbitration Act (2010)* (NSW).

[4] *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 87 ALJR 410.

[5] S Colbran, P Spencer, R Douglas, S Jackson, M O'Brien and T Penovic, *Civil Procedure: Commentary and Materials* (Lexis Nexis, 6th ed) 121.

[6] Ibid 84.

[7] F Herron, 'Arbitrate or Litigate' (1987) 25 *Law Society Journal* 52, 53.

significant jurisprudence has developed clarifying the obligations of parties to engage in commercial arbitration, the duties of commercial arbitrators, and the conduct of arbitration. In family law, given arbitration is purely voluntary and the arbitral process is regulated by the same legislation that provides the law and legal remedies to be applied, the comparable jurisprudence should be much simpler.

The Commercial Arbitration Acts provide only limited recourse against an arbitral award. This has not dissuaded parties, and their lawyers, from arbitrating and is an attraction to parties wanting finality and certainty. Section 34 of the *Commercial Arbitration Act 2010* (NSW) (**NSW Commercial Arbitration Act**) Act allows a court to set aside an arbitral award only if:

(a) a party to the arbitration agreement was under some incapacity, or the arbitration agreement is not valid;

(b) a party was not given proper notice of the appointment of the arbitral tribunal or the arbitral proceedings, or were unable to present their case;

(c) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;

(d) the arbitral tribunal or procedure was not in accordance with the arbitration agreement of the parties (unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate); or

(e) the subject-matter of the dispute is not capable of settlement by arbitration under the law of New South Wales (**NSW**), or the award is in conflict with NSW public policy.

Section 34A provides that parties can appeal with leave of the Court on questions of law only. Leave is only given if the Court is satisfied of all of the following:

(a) that the determination of the question of law will substantially affect the rights of one or more of the parties;

(b) that the question of law is one which the arbitral tribunal was asked to determine;

(c) that, on the basis of the findings of fact in the award, the decision of the tribunal on the question is obviously wrong, or the question is one of general public importance and the decision of the tribunal is at least open to serious doubt; and

(d) that, it is just and proper in all the circumstances for the Court to determine the question.

The attractions of arbitration to commercial disputants are equally attractive to separating spouses. They include:

(a) costs;

(b) speed;

(c) efficiency - the arbitrator has the permission of the parties to closely manage the arbitration process to maintain momentum. This is contrast to case management of court cases which only happens at sporadic mentions and directions hearing, and is handled by rotating judicial officers;

(d) privacy and confidentiality - this applies even more so to family law given the personal nature of family law proceedings;

(e) the complexities of law and jurisdiction in commercial disputes are greater than in family law. The potentially simpler jurisprudence of family arbitration suggest a greater consistency of procedure and outcome;

(f) businesses need to resolve disputes and avoid opportunities foregone due to delay and distraction of court proceedings - especially if the parties need to continue in business with each other. Separating spouses similarly often share the need to continue a relationship with each other if there are children. Court proceedings do not support good relationships.

Family law property arbitration following the 2016 legislation

The Family Law Act now provides for two types of arbitration:

(a) where proceedings have already been commenced, the court can pursuant to section 13E of the Family Law Act refer parties to arbitration, but only with party consent, in respect of property division and spousal maintenance between married and de facto spouses. The court cannot refer parties to arbitration over disputes about financial agreements (colloquially known as pre-nuptial agreements); and

(b) without the commencement of any proceedings, separating spouses can agree to arbitrate in respect of property division and maintenance as well as financial agreements.

Family Law Regulation 67B requires that the arbitrator:

(a) be a legal practitioner;

(b) be accredited by a legal professional body as a family law specialist, or have practiced as a legal practitioner for at least five years and at least 25% of their work in that time be in relation to family law matters;

(c) have completed specialist arbitration training; and

(d) be on a list of arbitrators kept by a body nominated by the Law Council of Australia which is currently the Australian Institute of Family Law Arbitrators and Mediators.[8]

Regulation 67I requires the arbitrator, once appointed, to:

(a) determine the issues in dispute between the parties in accordance with the Family Law Act;

(b) conduct the arbitration with procedural fairness; and

(c) inform parties in writing of anything that could lead to direct or indirect bias.

The parties and arbitrator enter into an arbitration agreement pursuant to Regulation 67F which must be in writing and signed by each party and contain:

(a) the arbitrator's estimated fees, and arrangements agreed by the parties for the payment of those fees plus possible disbursements such as room hire and transcription costs if necessary;

(b) names, address and contact details of each party;

(c) name of the arbitrator;

(d) date, time and place at which the arbitration is to be conducted;

(e) issues to be dealt with in the arbitration (these might be broad such as division of marital property, or as specific as who gets the house, whether superannuation should be split or not etc.);

(f) estimated time needed;

(g) how the arbitration will be conducted; and

(h) circumstances in which arbitration may be suspended or terminated.

A wise arbitrator will also include in the agreement additional matters such as:

(a) immunity of the arbitrator;

(b) description of the limited rights of appeal and review, process of registration, enforceability etc. so as to avoid parties subsequently complaining they were not aware of these statutory provisions;

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[8] AIFLAM, 'ADR Practice Areas' *The national body for family law arbitrators and mediators* (2017) <http://www.aiflam.org.au/~aiflam/search-aiflam.php?ADRPracticeArea=2&Name=&Location=>.

(c) confidentiality of the arbitration subject to the arbitrator's obligations to report threats to a child, persons or property, or to report the commission or likely commission of offences of violence or intentional damage to property;

(d) obligations of financial disclosure pursuant to Family Law Rule 26B.01, and the ability of a party to seek the setting aside of the award due to non-disclosure by the other;

(e) decision of the parties as to whether rules of evidence should apply or be waived pursuant to Regulation 67O;

(f) the process and arbitration model to be used including how evidence is to be given (e.g. via signed witness statements, sworn affidavits or orally under oath) and whether cross-examination may or not be allowed;

(g) timetable for provision of evidence and submissions, and arbitral hearing dates, and the issuing of the award.

A wise arbitrator will also endeavour to obtain the agreement of the parties wherever possible to procedural issues about how the arbitration is to be conducted. The satisfaction of the parties with the arbitral award will increase if they feel they have had an input into the process. Party consent to the process is also likely to reduce the possibility of a party seeking to challenge the award on the basis of procedural fairness.

Arbitration process choices include:

(a) off the papers - parties submit statements or affidavits of evidence plus written submissions as to relevant law sections of the Family Law Act and case law. The arbitrator reads the papers and then issues a written award;

(b) off the papers plus oral submissions which might be given via phone or video, or face to face. This is the model used by the Queensland Legal Aid arbitration scheme which has been arbitrating simple property matters since 2001 and

(c) full hearing including cross examination.

At the completion of the arbitration process, the arbitrator must issue to each party an award including a concise statement setting out:

(a) the arbitrator's reasons for making the award; and

(b) the arbitrator's findings of fact in the matter, referring to the evidence on which the findings are based.

If the arbitration was referred by the court under section 13E of the Family Law Act the arbitrator must inform the court that the arbitration has ended and an award has been issued. The arbitrator does not provide the award to the court. Registration of the award with the court is done by one of the parties. The

other party then has 28 days to bring to the attention of the court any reasons why the agreement should not be registered. Professor Patrick Parkinson suggests such reasons might be if the party did not consent to the arbitration, the arbitrator was not qualified in accordance with the Regulations or the award deals with matters outside of that referred to arbitration.[9] Once registered the award takes effect as if it were a decree of the court.

Section 13J of the Family Law Act allows a party to seek a review of an arbitral award on questions of law only. It is wider than section 34 of the NSW Commercial Arbitration Act discussed above which has additional threshold tests. The lack of a hearing *de novo* has not perturbed commercial disputants in using arbitration. Some family lawyers have expressed concern that clients may blame them for recommending arbitration if the arbitrator makes the 'wrong decision.' This concern is linked to the lack of a right of review if the client is merely dissatisfied. Family law property division is discretionary. The decision maker cannot 'get it wrong' as there is no single correct answer - merely a reasonable range. A 'wrong decision' is one the client does not like or is different to their lawyer's educated guesses about possible outcomes. Lawyers cannot be blamed if they discuss process selection carefully with the client (see suggestions below) with the client making the ultimate decision. This discussion may reveal that the lack of automatic review is a lawyer-focused concern, and of little concern to the client (or even seen by them as a bonus giving certainty and finality of outcome) compared to the client's other concerns about litigation.

Section 13K of the Family Law Act provides further grounds for a dissatisfied party to seek that an arbitral award is registered to affirm, reverse or vary the award. The court must be satisfied that:

(a) the award was obtained by fraud (including non-disclosure of a material matter);

(b) the award is void, voidable or unenforceable;

(c) in the circumstances that have arisen since the award or agreement was made it is impracticable for some or all of it to be carried out; or

(d) the arbitration was affected by bias, or there was a lack of procedural fairness in the conduct of the arbitration process.

These are the same remedies already provided under section 79A for the setting aside of court orders, but with addition of bias and lack of procedural fairness. Bias in arbitration primarily arises from the shared interests or relationships between the arbitrator and the parties. Procedural unfairness includes inadequate opportunity to present one's case or lack of opportunity to correct or contradict matters prejudicial to one's case.

Arbitrators therefore take great care to avoid any such concerns. Arbitration needs to be a more formal process than mediation with less rapport building between the neutral and parties and no private meetings.

[9] Patrick Parkinson, 'Family Property Arbitration: Exploring the New Potential' (Speech delivered at the ESFLPG Weekend, Katoomba, June 2016).

Arbitrators should avoid informality with parties and lawyers, and err on the side of over disclosing prior relationships before the arbitration commences.

At the end of a well run arbitration, the parties on receiving the award should not just have saved time and money compared to litigating at court. In addition, the clients should feel heard and respected. Parties whose needs for procedural fairness and psychological recognition are met, will have a high level of satisfaction even if their substantive needs are not met as much as they may have liked. Research 'shows that parties are more likely be satisfied with the outcome of a dispute resolution procedure and be more likely to view the overall experience as just, if it was generated by a fair procedure.'[10]

Learning from the success of family law mediation

Whilst separating spouses have been slow to take up arbitration compared to commercial disputants, family law has been at the forefront of the growth of mediation. Many of the attractions of mediation to family law clients apply equally to arbitration:

(a) lesser costs mediation compared to litigation. Arbitration is also less costly than litigation;

(b) speed - an arbitration can be finalised, including the issue of the award, in less than three months compared to three years for court. The arbitral process can be customised for the individual parties and there is no wasted time waiting one's turn in busy court lists;

(c) privacy and confidentiality compared to open-court. This advantage of mediation applies equally to arbitration;

(d) empowerment and autonomy. Many spouses find mediation beneficial in allowing them to design the outcomes to meet their individual needs, and to allow spouses to transition their relationships. This partially applies to arbitration. Mediators are often said to be in charge of the process but the parties are in control of the outcome. The reverse applies to arbitration. The parties choose to give up control of the outcome to the arbitrator. They have control over the decision to arbitrate, choice of arbitrator, and have some input in to the design of the arbitral process. There are therefore more empowered than in a court process;

(e) focus on needs and common interests. This is the primary attraction of mediation. An arbitrator however is obliged to make a determination in accordance with the law - irrespective whether it meets the needs of either party. This is why arbitration might be best considered after interests based mediation and negotiation has failed to resolve all issues, or where mediation is not suitable, or where one of the parties is adamant they do not wish or are unable to look at each other's needs and interest. Arbitration would be useful where parties have resolved some but not all issues at mediation. If they go to court, they will be potentially starting again and litigating all issues. An alternative at the end of mediation is to refer the outstanding issues to arbitration; and

[10] Jill Howieson, 'Family law: the lawyer–client relationship, procedural justice and the dispute resolution process,' (2007) 10(2) *ADR Bulletin* Article 6 <http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1422&context=adr>.

(f) minimising damage to the relationships which is especially important where there is an ongoing parental relationship. Given that arbitration is consensual, and parties agree on the choice of arbitrator, at least a partially cooperative relationship can be fostered.

In contrast to the above advantages of mediation, a disadvantage of mediation is there is no guarantee of an agreement or outcome. This is not the case in arbitration where a major advantage is the certainty of an outcome being determined within a guaranteed time period.

Discussing arbitration with family law client as part of the spectrum of dispute resolution process choices

Family lawyers have obligations to discuss dispute resolution with clients.[11] Merely providing a list of process choices does not assist clients in making the best choice for themselves.

Lawyers' opinions about the relative advantages and disadvantages or process options may not match the clients' perspective. Lawyers should avoid beginning the process selection discussion with what they personally perceive the advantages to be which may have no relevance to the parties' experience of the dispute. If lawyers are too directive, clients might feel obliged to go along with what they perceive the lawyers preferences to be but without real motivation. This can result in clients not being fully committed explaining client resistance to the timely implementation of the process. The difficulties often experienced in parties making themselves available for mediation meetings, and promptly providing documents might arise from them not perceiving the benefit of the process. Clients who choose a process on the basis of advantages perceived by them - as opposed to doing what is ordinarily done - will have greater commitment to the process.

A better approach to process selection is to ask the individual client about how they are experiencing the dispute, and the dispute resolution processes tried unsuccessfully to date. Clients will respond with a litany of complaints. Each of those complaints contain an aspiration for a better process. Through 'double listening' these negative complaints can be flipped by the lawyer to make clearer to the client their positive aspirations. For example:

(a) 'Its been so slow' can be reframed by the lawyer to 'So you would like a process that will be quick and resolve the dispute now?'

(b) 'I don't get her to have listen to what I think … I don't know what she really thinks about all this' can be reframed 'Would you like a process by which we all get to sit in the same room and she listens to what we say, and you hear what she and her lawyer have to say?'

(c) 'I don't know how much this all going to cost and how I am going to pay' becomes 'Would you like to hear about other processes where the two of you can decide the steps involved and therefore the cost?'

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[11] See, eg, *Family Law Act 1975* (Cth) s 12E; Family Law Council and Family Law Section of the Law Council of Australia, *Best Practice Guidelines for lawyers doing family law work* (October 2010) Part 2.

(d) ‘I hate those court appearances, all that sitting around, not knowing how much time to take off work and all those people sitting in court rooms waiting their turn’ can become ‘Would you like to discuss some other confidential processes that happened privately at times agreed by us?’

(e) ‘How do I know what judge I will end up with, how do I know if they will get it right?’ becomes ‘So would you like to have a say in the choice of the decision maker, and know that they their decision-making is guided by the established legal principles of fairness and equitable?’

The client’s affirmative answers to these questions give the lawyer permission to explain the range of processes in a way that will resonate with the client. The client will have greater buy-in to their own choices and thus motivation to fully engage in the process. The inquiry into the client’s experience of the dispute should start from the first consultation and continue. It should not be commenced at court whilst waiting for the client’s matter to be called in a busy directions hearing list.

Arbitration offers a tried and tested process which can meet many of the needs of clients, and avoid many of the downsides of litigation. Like mediation, arbitration can become a standard process option about which clients will expect their prospective family lawyer to be knowledgeable and experienced.