First judicial consideration of family law property arbitration reforms

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Snapshot

- *Braddon & Braddon* [2018] FCCA 1845 is the first judicial clarification of when a family law property arbitral award can be reviewed, or registration opposed.
- Judicial review is not a rehearing.
- Lawyers should make arbitration a part of their discussions with clients about the general dispute resolution process.

In 2016, the Family Law Court was at the point where waiting times exceeded three years from the first filing date to delivery of judgment. When amendments were made to the arbitration provisions of the *Family Law Act* and *Regulations* that same year, it was perhaps unsurprising that arbitration became an attractive dispute resolution option for those separating spouses who wanted to have their property disputes determined quickly, privately and efficiently.

However some practitioners expressed concerns around the provisions about opposing the registration of arbitral awards, and reviewing or setting aside arbitral awards. These concerns have been addressed in the recent Federal Circuit Court decision of *Braddon & Braddon* [2018] FCCA 1845.

The 2016 changes and post-arbitration remedies

Separating spouses can choose to engage in binding arbitration on division of property and spousal maintenance. Parties choose their arbitrator from a list of registered arbitrators maintained by the Australian Institute of Family Law Arbitrators and Mediators ('**AIFLAM**') or agree to an arbitrator nominated by AIFLAM.

The Arbitrator's Award must include a concise statement setting out the arbitrator's reasons for making the award, their findings of fact and the evidence on which the findings are based (*Family Law Regulation* 67P).

Either party may apply to register the arbitral award. The other party then has 28 days to bring to the attention of the court any reason why the agreement should not be registered (reg 67Q). The regulation does not specify what these reasons might be. If no reasons are raised, the award must be registered and takes effect as if it were a decree of the court (*Family Law Act,* s 13H(2) (*'**FLA**'*)).

Section 13J of the *FLA* allows a party to seek a review of a registered arbitral award on questions of law and s 13K allows a party to seek that a registered arbitral award be set aside or varied if the court is 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 way in which the arbitration process, as agreed between the parties and the arbitrator, was conducted.

The s 13K grounds are the same remedies already provided under s 79A for the setting aside of court orders, but with the addition of arbitrator bias and lack of procedural fairness.

Braddon & Braddon [2018]

The spouses agreed to arbitration and the wife registered the arbitral award. The husband, unhappy with the award, raised three objections:

1. He opposed registration (although registration had already occurred). He argued that as regulation 67Q allowed a party to bring to the attention of the court any reason why an award should not be registered, if a party raised *any* reason then the Court must review all evidence, findings of fact and applications of principle and in effect rehear the case. Judge Harmer rejected this argument and found that the grounds for opposing registration are the same as the grounds for reviewing or seeking to set aside a registered award pursuant to ss 13J and 13K. His Honour listed these grounds which are discussed below.
2. The husband also argued that there was an error of law in the award and it should be reviewed. Whilst Judge Harmer noted that the husband did not identify the errors of law on which he relied, His Honour still discussed what constitutes an error of law. His Honour dismissed the submission that a review of an arbitral award requires the court to conduct a hearing of the merits of a particular case. Judicial review merely requires the court to review whether the decision-maker used the correct legal reasoning or followed the correct legal procedures.
3. Thirdly, the husband argued that the award be set aside. However His Honour noted that none of the grounds relevant to s 13K were agitated and thus the section did not need to be considered.

Grounds for opposing registration, seeking review or setting aside an award, once registered

Judge Harmer listed possible reasons to oppose registration (1–11 below); or to seek review (1, below); or to seek to have the registered award set aside (2–5 below):

1. Errors of law

The husband argued unsuccessfully that, as section 13J referred to *questions* of law (rather than *errors* of law), if a review is sought on a question of law, the judge may determine that question of law and then has a broad discretion (even if they find no error of law) to review and vary the award.

His Honour found that it would be nonsensical to suggest that an award could be reviewed on the basis of anything but an error of law. It would be mischievous to be able to invoke the Court's jurisdiction by raising any question of law and thus automatically trigger a review and modification of the award. Judge Harmer noted the only specific error of law raised by the husband was a failure to give adequate reasons which is discussed at 11 below.

2. Fraud (s 13K(2)(a));
3. Void, voidable or unenforceable (s 13K(2)(a));
4. Impracticality (s 13K(2)(c));
5. Bias or lack of procedural fairness in the way in which the arbitration process was conducted (s 13K(2)(d));
6. Arbitrator was not an arbitrator in accordance with s 10M;
7. Lack of notice of application to register the award;
8. Breach of arbitrator's duties. Regulation 67I requires an arbitrator to determine the issues in dispute in accordance with the *FLA*; to conduct an arbitration with procedural fairness; and to inform each party of anything that could lead to direct or indirect bias;
9. Lack of capacity of a party to take part (reg 67L);
10. Lack of application of rules of evidence;
11. Failure to give reasons or adequate reasons.

Judge Harmer referred to the High Court's review of an arbitral award under the *Commercial Arbitration Act 1984* (NSW) in *Westport Insurance Corporation v Gordian Runoff Ltd* [2011] HCA 37. The High Court adopted the so-called *Bremer* test (from the English Court of Appeal decision in *Bremer Handelsgesellschaft mbH v Westzucker GmbH (No 2)* [1981] 2 Lloyd's Rep 130) - 'All that is necessary is that the arbitrators should set out what, on their view of the evidence, did or did not happen and should explain succinctly why, in the light of what happened, they have reached their decision and what that decision is.'

Judge Harmer found the arbitrator satisfied the *Bremer* test and regulation 67P (see above) because the award:

- identified the relevant case law and sections of the *FLA*;
- identified the present legal and equitable interests in property of the parties as required by *Stanford & Stanford* [2012] HCA 52;
- disclosed the arbitrator's findings as to contributions;
- gave reasons which were sufficiently and tolerably clear as to why the wife's evidence was preferred where there was a difference in the evidence of the parties; and
- there was no need to consider s 75(2) as the parties agreed that no adjustment was necessary pursuant to that section.

Discussing family law arbitration and other dispute resolution processes with clients

Some family lawyers have expressed concern that clients may blame them for recommending arbitration if the arbitrator does not make the 'right decision' – given there is no automatic right of review. Family law property division is discretionary. There is no single right decision - merely a reasonable range. An arbitral award can be reviewed in similar circumstances to an appeal from a judge's orders when clearly wrong, and it can also be set aside on similar grounds as orders can be.

If process selection is discussed carefully with the client making the ultimate decision, lawyers can no more be blamed for an arbitrator making an allegedly wrong decision than if a judge does so. A careful discussion may in fact reveal that the lack of automatic review is actually more of a lawyer-driven concern, and of less concern to the client compared to their other concerns about court litigation. Indeed, the lack of an automatic right of review may be seen by the client as an advantage giving certainty and finality of outcome.

Lawyers' views of the best process options may not match the client's perspective. If lawyers are too directive, clients might feel obliged to go along with the lawyer's preferences but without real commitment. Lawyers can approach process selection by asking the client about how they are experiencing the dispute, and the dispute resolution processes that were tried to date. Clients will provide a litany of complaints, each of which contains an aspiration for a better process. These negative complaints can be flipped by the lawyer to make clearer to the client their positive aspirations. For example: 'It's 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?'; 'I don't know how much this all going to cost' can become 'Would you like to hear about other processes where you can decide the steps involved and therefore the cost?'; and 'I hate those court appearances, not knowing how much time to take off work' can become 'Would you like to discuss some other confidential processes that happen privately at times agreed by us?'. 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. This discussion should start from the first consultation, rather than commence when in court.

If the client's primary concern is control over the outcome, then they might prefer mediation. If they are concerned there is no guarantee of an outcome from mediation, then they might prefer the certainty of an arbitral award. If mediation has been unsuccessful, or is not suitable, then clients might prefer the certainties of the arbitration process to the delays of court. **LSJ**