FAMILY LAW PROPERTY ARBITRATION

PROGRESS, REVIEWS AND HOW TO INCREASE UPTAKE

Matthew Shepherd
Shepherds The Family Law & Mediation Specialists

Matthew is an Accredited Family Law Specialist, mediator and arbitrator. He teaches Dispute Resolution Advocacy at the University of Technology Sydney, and sits on the NSW Law Society Family Law and ADR Committees.

The 2016 amendments to the arbitration provisions in the Family Law Act and Regulations coincided with Family Law Court waiting times exceeding three years from first filing to delivery of judgment. Arbitration became an attractive dispute resolution option for separating spouses to have their property and spousal maintenance disputes determined quickly, privately and efficiently.

This article looks at:

- The uptake of arbitration.
- Arbitral awards including the two cases reported to date.
- Stamp duty relief including a recent NSW State Revenue Practice Note on arbitral awards.
- Discussing arbitration with clients.

The uptake of arbitration

The Family Law Courts keep no central record of the number of court matters referred to arbitration or arbitral awards registered. In February 2019 therefore all registered arbitrators were invited by AIFLAM to answer my anonymous survey. 62 arbitrators did so in respect of 107 arbitration cases. There were court proceedings underway in 80 cases and none in the remaining 27. In 78 cases, the arbitrator issued an arbitral award, and the remaining 29 cases were settled during the arbitration process. 26 cases were heard “off the papers” without any formal hearing; 22 involved a short hearing (one day or less) for submissions but no oral evidence or cross-examination; and 50 involved oral evidence, cross-examination and submissions. 65% involved a hearing of one day or less. A few involved hearings of two or three days, with one going into a fifth day. The average hearing length was 1.4 days.

Arbitral awards were issued by the arbitrators within seven days or less of the hearing in 32% of cases, between eight to fourteen days in 44%, and between fifteen and twenty-eight days in 24%.

Time taken from the commencement of the arbitration (defined as the signing of the agreement to arbitrate) to the issue of the award was much more variable. This was due to the usual problem of finding mutually convenient dates for parties, lawyers and the arbitrator; and the parties and lawyers needing preparation time. 28% of cases took four weeks or less, 26% took between four and eight weeks, 23% took between two and three months, 16% took between 3 to 4 months and a few took over four months.

Reviewing arbitral awards

Upon one party applying 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 (s13H(2)).

Section 13J allows a party to seek a review of a registered arbitral award on questions of law.

Section 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 conduct of the arbitration process.

The s13K grounds are the same remedies already provided under section 79A for the setting aside of court orders, but with the addition of arbitrator bias and lack of procedural fairness.

Judicial consideration of reg 67Q, and ss13J and 13K

In *Braddon & Braddon* [2018] FCCA 1845, the Husband, unhappy with the award, unsuccessfully raised three objections:

1. He opposed registration.

The Husband 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", then if a party raised any reason the Court must review all evidence, findings of fact and applications of principle and in effect rehear the case. Judge Harman 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 sections 13J and 13K.

This narrow reading of regulation 67Q was confirmed by Judge Harman in *Pavic* [2018] FCCA 3386. His Honour cited commercial arbitration jurisprudence that courts should proceed on the basis of prima facie recognition and enforcement of arbitral awards. He said (citing Professor Patrick Parkinson[1]) regulation 67Q must be consistent with the Family Law Act which does not give any right to object to registration but only a right to seek review on specified grounds.

2. The Husband argued that there was an error of law in the Award and it should be reviewed. 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 — rather than a review of the award. This was reaffirmed in Pavic.

3. Third, that the Award be set aside. His Honour noted that none of the grounds relevant to s13K were agitated and thus the section did not need be considered.

The Husband 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", then if a party raised any reason the Court must review all evidence, findings of fact and applications of principle and in effect rehear the case.

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

In Braddon, Judge Harman listed possible reasons to oppose registration (reasons 1 – 11 below), or to seek the review (reason 1) or setting aside of registered awards (reasons 2 – 5):

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.

2. Fraud (s13K(2)(a)).
3. Void, voidable or unenforceable (s13K(2)(a)).
4. Impracticality (s13K(2) (c)).
5. Bias or lack of procedural fairness in the way in which the arbitration process was conducted (s13K(2)(d)).
6. The Arbitrator is not an arbitrator in accordance with s10M and reg 67B which requires arbitrators be legal practitioners; accredited family law specialists or have 5 years practice with at least 25% of their work being family law; have completed specialist arbitration training and be on the AIFLAM arbitrators list.
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 Family Law Act; 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 (regulation 67L).
10. Lack of application of rules of evidence.[2]
11. Failure to give reasons or adequate reasons.

Regulation 67P requires the arbitral award to include a concise statement setting out their reasons for the award, their findings of fact and the evidence on which the findings are based (reg 67P).

Judge Harman 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 Harman found the Arbitrator satisfied the Bremer test and regulation 67P (see above) as the Award:

- identified the relevant case law and sections of the Family Law Act;
- 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; and
- 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.

2 Note however reg 67 which allows, if all parties consent, for an arbitrator not to be bound by the rules of evidence.

Stamp duty relief

The NSW Commissioner of State Revenue issued a new Practice Note in February 2019 on arbitration and s68 of the NSW Duties Act.[3] It confirms the exemption from stamp duty on transfer of property between spouses includes transfers between married spouses pursuant to arbitral awards (whether registered or not) but only to transfers between de facto partners pursuant to registered awards. De factos (or their lawyers) should therefore ensure their arbitral award is registered where there might be stamp duty liabilities. Practitioners in other states should check for similar provisions or make representations to their stamp duty authorities.

Discussing arbitration 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'. 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, and can be set aside on similar grounds as Orders can be. The grounds for reviewing a family law arbitral award are wider than those in the Commercial Arbitration Acts which has not prevented arbitration becoming a widely used process in commercial disputes.

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 process selection discussion may reveal that the right of review is a lawyer-driven concern and of less concern to the client compared to their other concerns about court litigation such as costs, delay, lack of confidentiality etc. 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 clients' perspectives. 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 tried unsuccessfully 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?'*

> *'I hate those court appearances, not knowing how much time to take off work, all those people sitting in court rooms waiting their turn' 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. It should not be commenced at court whilst waiting in a busy direction hearing list or on the morning of an adjourned hearing.

If the client's primary concern is control over the outcome, then they might prefer mediation. If they are concerned that 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 the parties are not suitable for mediation, then the client might prefer the certainties of the arbitration process rather than delays, costs and lack of confidentiality of court.

3 https://www.revenue.nsw.gov.au/help-centre/resources-library/commissioners-practice-note-no.-cpn-006-arbitration-and-section-68-of-the-duties-act-1997 Also note Section 126.6(e) Income Tax Assessment Act provides for capital gains tax roll-over relief for "something done under an award made in an arbitration referred to in s13H".