Family arbitration:

What is it and how to use it

JUDGE JOE HARMAN Federal Circuit Court of Australia

Boulle and Field[1] opine that:

"...the orderly management of disputes...[is]...a critical feature of democratic governance...The rule of law in democracies such as Australia ensures a consistently peaceful and ordered society because it puts in place a network of accessible, fair and usually open and accountable institutions and procedures that allow for citizens to address sources of dispute and conflict" (emphasis added)

There are many "institutions and procedures", other than Courts, which resolve disputes,[2] including facilitative modes of dispute resolution, such as mediation or Family Dispute Resolution, and determinative modes of dispute resolution such as arbitration, defined by s10L *Family Law Act 1975* (FLA) as:

...a process (other than the judicial process) in which parties to a dispute present arguments and evidence to an arbitrator, who makes a determination to resolve the dispute.

Notwithstanding the extensive history of arbitration as a means of determinative dispute resolution,[3] the expansion of arbitration to the modern family law domain has been somewhat slow. Wendy Kennett describes the move towards the use of arbitration[4] in terms of competing public policies or "State interests", on the one hand, preserving overburdened Court resources and, on the other hand, ensuring that financial settlements are adequate, weaker parties are protected and fairness ensured. Family arbitration is now available in most common law jurisdictions including England and Wales, Scotland, New Zealand, Canada, the United States and Australia. The purpose of this brief paper is to explore the availability and use of arbitration under the FLA.

Benefits of arbitration

The benefits of arbitration over litigation are generally accepted as including:

- **Choice of Decision Maker** The parties select the arbitrator;
- **Efficiency** Arbitration is completed far more quickly than a Court hearing;
- **Privacy** The arbitral award is not publicly accessible or published.
- **Convenience** The arbitration occurs at a time and place convenient to all;
- **Flexibility** The arbitration can proceed however the parties desire;
- **Finality** An arbitral award is final and is only subject to review with respect to errors of law or on bases similar to those in s79A FLA;
- **Cost** Whilst the parties, generally equally, pay the costs of the arbitration, cost is generally far less than a Court hearing.

Advising clients regarding arbitration

Legal Practitioners are obliged to give clients advice regarding arbitration. Section 12A FLA requires that *"people affected...by separation or divorce are informed about ways of resolving disputes other than by applying for orders under this Act". Section 12B FLA imposes a specific obligation upon advisors to ensure that clients are aware of "the arbitration facilities available to arbitrate disputes".*[5]

What can be arbitrated?

Arbitration is available in financial proceedings under the FLA.[6] Arbitration can only occur with the consent of all parties.

If a matter is referred to arbitration by Court order then the order must specify the part or parts of the proceedings which are referred.[7] Whilst arbitration is predominantly used to determine the whole financial dispute it might conceivably be used to hear only part of the dispute or to determine factual controversy and then allow the parties to use some other process, such as mediation or FDR, to then negotiate a resolution of the matter.

Arbitration can occur prior to or or in place of proceedings or by referral to arbitration after proceedings have been commenced. Arbitral awards can be registered by the Court irrespective of whether there are proceedings on foot.

Who can arbitrate?

Section 10M FLA defines an arbitrator as "...a person who meets the requirements prescribed in the regulations to be an arbitrator". These requirements are addressed in Regulation 67B *Family Law Regulations 1984* (the regulations). The Australian

Institute of Family Law Arbitrators and Mediators (AIFLAM) is responsible for maintaining the list of family law arbitrators.[8] Only those persons recorded upon the AIFLAM list of family law arbitrators, meet the definition of "arbitrator" for the purpose of the FLA. If someone is engaged as an arbitrator who is not accredited by AIFLAM, then the arbitral award cannot be registered.

The AIFLAM list can be accessed via https://www.aiflam.org.au/~aiflam/search-aiflam.php.

How is arbitration sought?

As arbitration is a consensual arrangement, parties can simply contact an arbitrator and contract them to arbitrate their dispute. If proceedings are on foot then regulation 67D provides that a Form 6 application can be made by the parties, seeking referral to arbitration. In reality, leave to make an oral application for referral to arbitration is readily granted.

How is arbitration conducted?

The conduct of the arbitration is a matter for the parties. The scope and process of arbitration is dealt with by a written contract or "arbitration agreement" between the parties. Regulation 67F provides that the parties "may" enter into an arbitration agreement. As a matter of best practice, a written arbitration agreement should be entered into before arbitration occurs. AIFLAM provides an "arbitration kit" which is accessible from the AIFLAM website.

There is substantial flexibility in the processes and procedures that might be adopted in arbitration. Arbitration can be conducted on a spectrum between on the papers determination to a process identical to a full hearing before the Court. However, there is scope for more creative processes to be adopted such as:

- Depositions might be taken from the parties or witnesses rather than their attendance before the arbitrator to give evidence and be cross-examined. This might have particular utility if one of the parties or a witness is incapacitated or suffers a disability;
- The parties can determine whether any oral testimony is transcribed or not;
- The parties can determine what rules of evidence are to apply to some or all of the evidence.

In conducting the arbitration:

- The arbitrator must apply the relevant provisions of the FLA as interpreted by relevant precedent. In short, the arbitrator must "get the law right" (regulation 67I(1));
- The arbitrator must conduct the arbitration with procedural fairness (regulation 67I (2))[9];
- The arbitrator must be free of bias (regulation 67I (3));
- The arbitrator must be satisfied that both parties have legal capacity to participate (regulation 67L);
- The arbitrator must only deal with the dispute that has been referred to them for determination;
- The Arbitral award must not infringe public policy (for example, it must not condone or require illegality in its performance);
- The arbitral award must be capable of performance and enforcement.

The Court's role with respect to arbitration

The Court's role in arbitration comprises:

1. Ordering arbitration when consent is forthcoming (s13E);
2. Defining the portion of the proceedings to be arbitrated;
3. If necessary, providing a mechanism to determine the arbitrator;
4. Staying Court proceedings whilst the arbitration is brought to finality;[10]
5. Making orders to facilitate and direct the arbitration (Regulation 67E and Rule 26B.31 Family Law Rules);
6. Determining questions of law referred by the arbitrator (s13G FLA);
7. Registering the arbitral award and determining an objection to registration (s13H FLA, Regulation 67Q and Rule 26B.33 Family Law Rules);
8. Undertaking any necessary review of the arbitral award (s13J FLA); and,
9. Enforcing the arbitral award.

Registration of the arbitral award

At the completion of the arbitration the arbitrator must deliver an arbitral award. The standard arbitration agreement requires that the arbitral award be delivered within 28 days of the arbitration concluding. The formal requirements with respect to an arbitral award are dealt with by Regulation 67P.

Either party may apply to register the award (s13H(1) FLA). It is not obligatory for the parties to seek registration of the arbitral award. However, if it is sought to enforce the arbitral award then registration is a necessary precondition.

For an arbitral award to be registered a Form 8 Application must be filed and served. Either party may, within 28 days of service of the Form 8 application, object to registration of the arbitral award. Absent objection, (or following any unsuccessful objection) the Arbitral Award must be registered (see *C & F* [2019] FCCA 373). Importantly, if either party seeks to impeach the arbitral award (by review or by seeking to set aside or vary the award) then registration is a pre-condition. →

Objecting to registration of an arbitral award

The ability to object to registration of an arbitral award is not found in the FLA but in Regulation 67Q(3) of the Regulations.[11] The Act, Regulations and Rules are silent as to the bases upon which registration of an arbitral award might be opposed. However, the bases upon which registration might be opposed were dealt with in *Braddon & Braddon* [2018] FCCA 1845 and *Pavic & Pavic* [2018] FCCA 3386 (at paragraphs 19–39 and especially at 34:

Objection to registration deals with the constitution of the arbitral tribunal and the necessary preconditions thereto, matters such as the giving of notice, submission to arbitration and the like.

Effect of registration of an arbitral award

This is dealt with by s13H FLA. Upon registration, the arbitral award has the same effect as an order or decree of the Court and is enforceable as such.

Application to review an arbitral award

Review of an arbitral award is addressed by s13J FLA. A review is on the basis of judicial review. Review of an arbitral award is confined to errors of law (again see B*raddon & Braddon* [2018] FCCA 1845 and *Pavic & Pavic* [2018] FCCA 3386).

Application to set aside or vary an arbitral award

Section 13K(1) FLA allows the Court to vary or set aside an arbitral award. The grounds for setting aside of varying an arbitral award are similar to the grounds to set aside or vary an order under s79A and s90SN FLA in that jurisdiction to intervene arises from demonstrated bias, fraud, duress or impracticality of performance or unenforceability.

Enforcement of an arbitral award

Enforcement is dealt with by s13H(2) FLA and by Regulation 67S. All of the powers under Part 25B of the *Federal Circuit Rules 2001* are available to enforce an Arbitral Award.

Present use of arbitration

As of 22 March, 2019, not less than 109 matters had been referred to Arbitration by the Federal Circuit Court of Australia.[12] On the basis that the average hearing time of a property matter is 1.7 days, this has resulted in a saving of at least 185 days of Court hearing time (or 37 sitting weeks—more than a full year of hearings for one Judge).

The matters referred to arbitration have finalised in a fraction of the time that they would have if heard by the Court. The average time from referral to arbitration until disposal of the proceedings is approximately 4 months. Each matter would have waited substantially longer for Court determination. The referral of these matters has eased pressure upon the Court and allowed parties to conclude their dispute promptly.

1. Rachael Field and Laurence Boulle *Australian Dispute Resolution Law and Practice* 2016 p.124 Chapter 4.26. Indeed, Article 10 of the 1948 Universal Declaration of Human Rights of the United Nations provides, as a fundamental human right, that "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations…"
2. I acknowledge and concur, as opined by Justice Rares in His Honour's excellent paper *Is Access to Justice a Right or a Service?* [2015] FedJSchol 11 presented at the Access to Justice – Taking the Next Steps Symposium held on 26 June 2015 at Monash University, that "the role of the courts is to quell controversies in a final, binding decision that is immediately enforceable" and that Courts are more than a means of dispute resolution.
3. For an excellent discussion see Justice Robert McDougall (retired) "Arbitration: past, present and future" opening address to the RAIF Arbitration Conference, 25 November 2016 Sydney, NSW
4. Wendy Kennett *It's Arbitration, But Not as We Know It: Reflections on Family Law Dispute Resolution,* International Journal of Law, Policy and The Family, 2016, 30, 1–31 at 4-5
5. Rule 21 of the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 provides that "a solicitor must take care to ensure that the solicitor's advice to invoke the coercive powers of a Court is appropriate…for the robust advancement of the client's case on its merits". This might suggest that consideration of arbitration as an alternative means of determination is obligatory.
6. The restriction of arbitration to financial proceedings is inherent from the Court's power to refer proceedings to arbitration provided by section 13E FLA.
7. If proceedings involved both parenting and property adjustment issues the property issues can be "split" and the property proceedings referred to arbitration and the parenting issue determined by the Court. This might have real utility if the determination of parenting issues will significantly impact the determination of property issues such that the parenting can be determined and the property then promptly arbitrated.
8. The available arbitrators include former Appellate Judges, Judges, Senior Counsel, Academics and senior solicitors and Barristers. Those on the panel and well-qualified.
9. Whilst arbitration is not a judicial process, procedural fairness or due process must be afforded and demonstrated to have been so afforded. As the High Court has discussed in *Allesch v Maunz* [2000] HCA 40, what is required to afford due process is determined by reference to the facts and circumstances of any case.
10. In an audit of matters referred to arbitration by the Federal Circuit Court, some Judges would appear to conclude the proceedings at the point of referral to arbitration, rather than staying the proceedings.
11. Rule 26B.34 also touches on the issue at least as to the need for a Response and Affidavit to be filed within 7 days of service of the Form 8 Application for Registration.
12. This data is compiled from a survey of Judges sitting within the FCC's family law jurisdiction. The Court's work management software (Casetrack) does not record orders made referring proceedings to arbitration and, accordingly, a manual count is required. As there is no standardisation within the Court as to how orders are stored, a manual search of records may not be entirely accurate It is possible that further matters have been referred to arbitration.