

# **Arbitration of matrimonial property disputes in Australia**

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This article will address the area of arbitration of matrimonial property disputes. This topic is of particular interest in Australia in 2000 as long-awaited legislation and regulations passed through Federal Parliament on 1 March 2001 to enable the enforcement of matrimonial property and spousal maintenance arbitral awards.<sup>1</sup>

The sub-topics set out in this paper are as follows:

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Bond University Dispute Resolution Centre in conjunction with the Law Council of Australia (AIFLAM – Australian Institute of Family Law Arbitrators and Mediators) designed a 3 day Family Arbitration Course in 1992. This course has been taught 8 times since to lawyers around Australia and is being taught again 11-13 October 2001 in Canberra.

The author wishes to thank Professors Bobette Wolski and Sartaj Gill for writing the bulk of those materials; and to thank Professors Laurence Boulle and Pat Cavanagh, Rick Jones, John Hertzberg and Phil Theobald for ideas.

<sup>1</sup> *Family Law Act* 1975 (Cth); as amended by *The Courts (Mediation and Arbitration) Act* 1991 (Cth); as amended by the *Family Law Amendment Bill* 1999; and by the Family Law Amendment Regulations 2001 (No.1).

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## **(A) Terminology and particular types of arbitration**

### ***Amiable composition***

This is a form of arbitration where the parties agree that the arbitrator has the power and discretion to apply his/her perceptions of fairness and commercial reality, which may differ from legal precedents. It normally requires an arbitrator who is widely respected, and trusted by all the disputants.

### ***“Approved” arbitrator***

This was a statutory term only between 1991 and 2000 in Australia. Now it is a shorthand way of describing a family arbitrator whose name is entered on a national list administered by the Law Council of Australia based on his/her specialisation in family law, and attendance at arbitration training.

### ***Arbitration***

A process of private adjudication in which an impartial and independent third party (or parties) makes a binding award on the basis of some objective standards and measures.

### ***Arb-med***

Arb-med is another combination of processes designed to save time and money and guarantee an outcome. The parties prepare for a short arbitration, make short oral arguments and the arbitrator immediately writes a confidential award and places it in a sealed envelope on the table. (S)he then switches roles and assists the parties as a mediator to negotiate. If settlement eventuates, the envelope is destroyed unopened. If settlement does not eventuate within an agreed time, then the mediation ceases, and the envelope opened to become the binding award. Arb-med can help to overcome any unwillingness to disclose confidences to the dormant arbitrator which exist when the reverse process of med-arb is used.

### ***Baseball arbitration***

See final-offer arbitration

### ***Case appraisal***

See “early neutral evaluation”.

### **“Complex” arbitration**

An arbitration process which is as lengthy and expensive, and sometimes more so, than equivalent litigation in a superior court. The disputants agree to detailed due process in the hope that this will produce a more accurate version of facts and law.

### **“Court-ordered” arbitration**

This is a mandatory form of arbitration created because a judge refers certain issues or a whole dispute out of the court system to an arbitrator. In Australia, non-consensual court-ordered arbitration may be constitutionally invalid.

### **Documents-only arbitration (or On-the-papers arbitration)**

A decision-making process whereby the arbitrator receives one or more written submissions from the disputants and makes a decision based on those documents, normally without seeing, or speaking to, the disputants or their witnesses.

### **Early neutral evaluation**

This is a process whereby an expert in a particular field (eg. banking, share trading, family property, farming) is employed by some or all of the disputants to give a non-binding opinion on the likely outcome if the dispute continued to a court hearing. Although the opinion is not legally enforceable, it may be very persuasive if the evaluator is highly respected, if the disputants lack funds to proceed further, or if the opinion can be produced in a later court hearing as evidence that one party rejected a reasonable outcome. Such “unreasonable” behaviour may lead to an order for costs being made against that party.

### **“Freelance” arbitration**

This is an attempt to describe a form of arbitration whose awards are not expressly enforceable under any legislation (such as the *Family Law Act 1975 (Cth)*; or the state *Commercial Arbitration Acts*; or the *International Arbitration Act 1974 (Cth)*.) For example, arbitration about child support; or third party property rights of a creditor or relative. Therefore, the legal enforcement of a freelance arbitrator’s award is particularly problematic. In family property disputes, it requires ingenuity to create contractual disincentives against breaching the “freelance” arbitral award. In reality, a freelance arbitral award without effective enforcement mechanisms becomes only a non-binding recommendation on how the conflict might be settled.

### **Final-offer arbitration**

This is a form of arbitration which attempts to encourage reasonable behaviour by disputants; discourage wild claims; and discourage the arbitrator from splitting the difference between the claim and counter claim.

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Each disputant makes a submission; and then writes a confidential offer on a pro forma document and gives the sealed offer to the arbitrator. The arbitrator makes a (confidential) decision; opens the two offers; and the offer which is closest to his decision becomes the arbitral award. It is arguable that a final-offer arbitration cannot be used under the *Family Law Act* as regulation 67I requires that “an arbitrator must determine the issues... in accordance with the Act”.

### ***Med-arb***

This is a combination of processes. The arbitrator is expressly authorised by the parties to act initially, or at any chosen time, as a mediator. If that assisted negotiation is unsuccessful, the arbitrator consciously and ritualistically switches to a decision-making role. This has the benefits of continually exploring negotiated settlements, at a one-stop, one-fee shop, together with the knowledge that a result will emerge even if the mediation is unsuccessful. It has the disadvantage that in the mediation the parties may be reluctant to be completely frank with a person who could soon switch hats.<sup>2</sup>

### ***On-the-papers arbitration***

See “Documents-only” arbitration

### ***“Private” arbitration***

An arbitration process chosen by the disputants either before or after a particular conflict breaks out, whose outcome can be registered and enforced through the court system.

### ***“Short” arbitration***

An arbitration process which attempts to reduce time, expense and “uncovering every stone”. The parties agree to shorten documents, limit witnesses, shorten speeches, reduce cross-examination, limit the length of the judgement, agree to summaries of facts and issues etc.

## **(B) Repetitive burning issues in arbitration**

The literature on the topic of arbitration is vast. (See the bibliography at the end of this paper for a small sample.) However, a number of recurrent themes emerge for policy-makers,

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<sup>2</sup> The various state *Commercial Arbitration Acts* expressly state “Parties to an arbitration agreement may authorise an arbitrator or umpire to act as a mediator...”(eg. 1990, Queensland, s. 27)

brokers, lawyers and disputants. These themes are also found (and are more thoroughly empirically researched) in other areas of conflict resolution, particularly mediation.<sup>3</sup>

These themes include:

### **1. Taxonomy – What categories of arbitration exist?**

The large number of variations in the arbitration process need to be catalogued and circulated particularly to go-betweens, brokers and lawyers who provide dispute resolution services. These systematic catalogues and labels are important in an era of professional transparency and accountability. Clients need to know what service they are buying (is it a wolf under an arbitration label?); and then whether the service has measured up to the description and standards described in the supermarket catalogue or at the conflict management.com site.

### **2. Diagnosis – Which conflict types should be sent to which kind of arbitration?**

Once a catalogue of arbitration services is known, the next question relates to diagnosis and “matching”. Which kind of arbitration for which kind of clients? The same question applies to all professional services including advocacy, surgery, counselling and mediation.

Often diagnostic matching is based on pragmatic factors such as expense, accessibility and the broker’s or referring agent’s habits.

The absence of conflict management services for poor people suggest that the most sought after type of arbitration will be quick, fixed-price, cheap on-the-papers arbitrations – despite the lack of traditional due process attached to such procedures.

### **3. Diagnosis - What adaptations of the arbitration process across cultures and languages?**

Whatever basic Western model of arbitration is chosen, this model can then be adapted in many ways to become more (or less) acceptable to the couple disputing over property. Possible adaptations include changes to venue, panel of arbitrators, language of submissions, inclusion of local rules and norms, style of testimony, presence of relatives, and language of judgment.

These (often controversial) adaptations not only potentially make the arbitration more user-friendly, but also may make a particular arbitrator more marketable within a cultural group.

### **4. What are the micro-skills of a successful arbitrator?**

Policy makers, educators, customers and arbitrators are all particularly interested in learning about what micro-behaviours make a competent arbitrator. Why is one particular arbitrator in

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<sup>3</sup> eg. see J. Kelly, “A Decade of Divorce Mediation Research – Some Answers and Questions” (1996) 34 *Family and Conciliation Court Review* 373.

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great demand? Does (s)he “interrupt” more/less? What style of language does (s)he use? Does (s)he have long/short preparation meetings? How does (s)he relate personally to clients? etc. etc.

Empirical studies of “success” and “competence” have become common-place in counselling and mediation. Inevitably these studies will spread slowly to the arbitral and judicial professions.

### ***5. How to set up systematic studies which compare the “success” rates of different kinds of arbitration with other dispute resolution services?***

(Eg. Doing nothing, private negotiation, lawyer-led negotiation, various models of counselling, various models of mediation, judicial decisions, Federal Magistrates’ Court, etc.)

This is an eternal burning issue in the conflict-management industry (as it is in the medical profession). Publicly, governments want to spend shrinking taxpayer dollars only on arbitration (or other) services which have a reasonable chance of “success”, as defined by the government agency. Privately, customers and brokers always want to know “what are the chances that this (service) will be “successful”?”

Too often this important question is answered by vague and inaccurate gossip.

The word “success” has many possible meanings (which vary in emphasis from customer to customer) including speed, low cost, enforceable outcome, final outcome, sense of client control, respectful process, and face-saving outcome.

### ***6. What are the cultures, referral practices and values of the gatekeepers and brokers to arbitration?***

Any new product, such as family arbitration, will only be used if respected go-betweens refer customers to that new product. In family property disputes, important go-betweens or gatekeepers are counsellors, lawyers, friends, accountants, legal aid commissions and the media.

It is vital to understand the needs and interests of each particular gate-keeping group if any shape of arbitration is to be used regularly from their repertoire. In Australia, it seems likely that lawyers in country areas and Legal Aid Commissions will be the key gatekeepers whose interests could be quickly served by access to competent on-the-papers arbitrators.

If Legal Aid Commissions refuse to give funding for any kind of family property disputes, except for fixed-price arbitrations on-the-papers for the poor (who have no legal remedies at all at present, except self-representation in intimidating legal cultures), arbitration would then become almost mandatory for one niche group.

### ***7. How to market arbitration widely or in a particular niche market?***

Following the previous burning issue, it is clear that competent services can wither on the vine without successful marketing. Many services in competition for customers and funds with arbitration (eg. courts, federal magistrates, lawyers, mediators, counsellors) will create subtle and no-so-subtle barriers to the use of arbitration.

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How can competitors be encouraged to refer to a new and risky service such as family property arbitration? A host of marketing experts are waiting in the wings to be consulted.

The most successful marketing device will undoubtedly be virtual mandatory use of arbitration by poor clients who seek assistance from Legal Aid bodies; and satisfied customers who recommend arbitration to others, particularly other brokers such as lawyers.

### ***8. How to improve the quality of arbitration services?***

This key question applies to all professions including judicial and arbitral. The mediation industry in most countries is wrestling with this question and trying to avoid the various detrimental side-effects of over-regulation.

Standards in family property arbitration services can be addressed by a number of predictable steps, all of which have advantages and disadvantages. These include:

- Basic accreditation training for arbitrators
- Competency and skills training for arbitrators at various levels
- Yearly mandatory competency training
- Gradual creation of a monopoly of arbitrators
- Written client feedback on arbitrator behaviour
- Voluntary or mandatory system of apprenticeship or mentoring
- Gossip – leave it to the market to identify the perceived competent and to exclude the perceived incompetent.
- A society of family arbitrators which facilitates the exchange of information
- Development of and publicity for emerging ethical codes of conduct for arbitrators and those attending at arbitrations.
- Disciplinary codes and active disciplinary bodies in professional arbitration societies for errant arbitrators.
- Legal liability for damages for arbitrators whose behaviour is adjudged to be negligent or malicious. (This particular form of control of standards is unlikely to be effective as such claims are muddled by legislative or contractual immunity claimed by arbitrators. Approved family arbitrators are given “the same protection and immunity as a Judge” under **s.19M** of the *Family Law Act, 1975, (Cth).*)
- Some degree of publicity concerning procedures used in arbitration.
- The emergence of accessible written precedents of awards made by arbitrators.
- Legislatively mandated forms, procedures, judgement writing and “due process.”
- Training (and possible competency accreditation) for lawyers or others to (i) advise clients about arbitration, (ii) prepare for arbitration and (iii) appear as advocates at arbitration.
- Training and accessible education materials for family clients to consider arbitration, prepare, fill in written forms and appear at an arbitration unrepresented.

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- Occasional applications to Family Court by disgruntled disputants who want rulings on whether a particular arbitrator has acted “properly”.

This last mechanism has had a chequered reputation in the history of arbitration in different jurisdictions around the world. The more judicial supervision, the more arbitrators become obsessively conformist and careful, and the less attractive is arbitration. (A similar but far less frequent phenomena occurs with attempted judicial “supervision” of diverse mediation practices).

**9. In what circumstances does an arbitrator have a duty or a discretion to disclose material which “emerges” during the course of an arbitration?** (eg. evidence of tax evasion, child neglect, child abuse, immigration or social security fraud, physical assault etc.)

Other professional groups such as psychologists, reporters, doctors, and mediators face this difficult ethical and legal question. An array of subtle possible answers have emerged in those professions and will undoubtedly be recycled for family arbitrators. Regulation 67J sets out a list of situations where an arbitrator has an apparent duty to make disclosure. Regulation 67J of the *Family Law Act* contains a list of situations where an arbitrator may (or must?) breach confidentiality.

## **(C) Social Context in Australia for the emergence of family property arbitration**

There are many factors in Australia, as in other countries, which have set the scene for experimentation with various dispute resolution methods in family disputes, including arbitration. These factors are:

- (a) The pressure of more for less. All private and public service providers are being asked to provide more services, more choice, more quality for less money.
- (b) Multiple government reports on and critiques of the current dispute resolution schemes available for families.
- (c) Politicians constantly searching for methods of providing cheaper, faster and more informal dispute resolution options.
- (d) Fragmentation of one traditional monopoly, namely the legal profession, into many groups competing for the (family) conflict management business.
- (e) Research by social scientists and economists on the legal system, thereby providing informed comment on professional behaviour, comment on customer satisfaction, and the social costs of ongoing (family) conflict.
- (f) Educated and articulate customers who demand information, options and control. The god-like professional can no longer convincingly say, “Do what I tell you”.
- (g) Customers who often have more information, from the internet and self help literature, than the professional dispute resolver.
- (h) The availability of a number of respected and “retired” Family Court judges who are eager to work as family arbitrators.

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- (i) Repetitive statistical confirmation that all conflicts will not “resolve” by even highly competent mediation, counselling or negotiation. Other services, including a small sector of decision-making services, remain essential.
- (j) “More-for-less” emphasis that services will be user-pays whenever possible.
- (k) Inevitable under-funding of Family Court and state legal aid offices results in small asset family disputants being left in the wilderness with a limited number of dispute resolution options.
- (l) Emergence of a huge class of pro se or do-it-yourself disputants who cannot afford skilled assistance. This class of labour intensive disputants causes a crisis for traditional superior courts.
- (m) The emergence, institutionalisation and measured “success” of another dispute resolution process – namely mediation – since 1980s.
- (n) The acceptance in all industries (including lawyering and judging) that performance must be transparent and accountable. This has led predictably to the definition of objective measures for “success”; regular measurement of performance against those criteria; standardising and franchising of services whether counselling, medical, mediation, judicial or educational.

These factors in Australia and elsewhere, provide fertile soil for attempting change, including the addition of another legislatively supported dispute resolution process, such as arbitration in family property disputes.

## **(D) Alleged advantages and disadvantages of arbitration**

Like any new product, there are grand claims and doomsday scenarios painted around family property arbitration. The mediation industry went through this form of salesmanship and hysteria in the late 1980s in Australia. As courts and arbitrators are competitors, a see-saw effect is inevitable. The more perceived disadvantages (eg. delay, cost, uncertainty) which attach to courts, the more attractive is a “new” form of remedy such as arbitration; and vice versa.

Importantly, advantage is in the eye of the beholder. Every alleged advantage of arbitration can be converted readily into a raging grievance. Ability to select an expert soon becomes “but none are available”; or “the best are too expensive”. Flexibility of process soon becomes “ah, the process was too uncertain”; privacy becomes “but there’s no public scrutiny and accountability”. Speed, low cost, and informality are usually only advantages at the start of a hearing. At the end of a hearing, one or both parties cry “injustice” – “too fast, too unprepared, too sloppy”.

Justice systems have always lived with these inevitable tensions particularly in times of “more for less”.

### ***Alleged advantages***

The alleged advantages of generic as compared to a particular form of arbitration are:

### **(1) Selection of an expert**

The disputants can select an arbitrator who is respected; polite; well-organised; knowledgeable in the precedents for division of property and valuation; understands cross-cultural dynamics in a family; writes well; and turns work around promptly.

This degree of control contrasts with complete loss of control in litigation when disputants are assigned a judge who may possess few of these desirable characteristics.

In Australia, a number of retired Family Court judges are particularly attractive as arbitrators as their “performances” have been observed closely for decades by gate-keeping lawyers. Additionally, respected and retired Family Court judges will deliver arbitral judgments which are likely to be given a degree of respect by their “appellate” and as yet unretired colleagues on the Family Court bench.<sup>4</sup>

### **(2) Flexibility of process**

There is already some degree of flexibility in judicial process under the *Family Law Act*.

The parties can reduce the degree of cost, due process and delay by agreeing to:

- Forum shop as the Family court of Australia is a national court.
- File in a magistrates’ court.<sup>5</sup>
- File in a Federal Magistrates’ Court.<sup>6</sup>
- Restrict witnesses and documents in a pre-hearing meeting with a judge or Registrar.

However, as one court system becomes mired in procedural rules, exhaustion, forms and inflexibility, supposedly the arbitration process can offer greater degrees of off-the-shelf or custom-built flexibility.

For example, in the arbitration contract, the parties can agree to some less orthodox procedures such as documents only; night-time meetings; the arbitrator ‘phoning a valuer; meetings in church halls or golf clubs; a simplified form of written summaries for assets, values, issues and arguments.

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<sup>4</sup> *F.L.A. s. 19 F and 19 FA* – a single judge of the Family Court or the Federal Magistrates Court can review an arbitrator’s award on a question of law only.

<sup>5</sup> Under the *Family Law Act 1975 (Cth) ss. 39, 46*, it is possible to file family property claims in a non-specialist local magistrates’ court. This has a number of disadvantages including that magistrates are not specialists in family law; their courts have no counselling staff; the magistrate can choose to refer defended cases “upstairs” to the Family Court; both parties can choose to relitigate the decision from scratch (*not* an appeal) if it is unfavourable.

<sup>6</sup> In 2000, Federal Parliament introduced another court tier which will supposedly be faster, cheaper, and less formal than the Family Court when dealing with family property disputes – namely the Federal Magistrates Court. This reflects a planetary trend.

**(3) Privacy**

In Australia, there are already substantial restrictions on publication of details of proceedings under the *Family Law Act*.<sup>7</sup> However, courtrooms are open for the public to attend.

Arbitration offers the (two-edged sword) added advantage for the disputants of excluding curious meddlers, relatives, gossips, media muck rakers, vengeful creditors, business competitors and a variety of law enforcement officers.

This may assist the disputants by agreement to keep private certain categories of information including:

- Lurid sexual encounters
- Alcoholism
- Mental illness
- Family violence
- Tax evasion
- Social security fraud
- Immigration fraud
- Creative business ventures and secrets
- Etc.

Obviously this advantage raises competing public policy interests in knowledge, and difficult ethical questions about disclosure for all arbitrators. (See now regulation 67J setting out a list of situations where arguably the arbitrator is obliged to make disclosure.)

**(4) Ease of enforcement**

Ease of enforcement of judgements is a major advantage in arbitration of commercial disputes across national boundaries. This is because the parties can contract in the arbitration agreement to a registration of judgement venue which facilitates enforcement against land or assets in that venue. This will also occasionally be useful in the arbitration of international marital property disputes where assets are scattered across the planet, including some in Australia.

**(5) Lower cost and higher speed**

Many arbitration models can and do offer these two vital advantages. Arbitration on the papers can for example be offered at a fixed price for the arbitrator; with a guaranteed faxed judgement within seven days of written submissions being received by the arbitrator.

However, like all decision-making judicial systems, these two advantages can be quickly lost if:

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<sup>7</sup> *F.L.A.* s. 121

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- “bosses” supervise the decision-makers so regularly that they retreat to fearful conservatism;
- legal representatives move the arbitration procedure into their own “comfort zone” and traditional habits which involve delay, detail, leaving no stone unturned, making excessive ambit claims etc. That is, arbitration can readily replicate litigation habits;
- whenever a party perceives that an arbitration process is turning against him/her, an immediate application is made to the traditional Court system in order to create delay, attrition and tactical advantage;
- the best arbitrators have queues of disputants, waiting for a spare “available” day.

### ***(6) Avoids the uncertainties of foreign litigation***

Arbitration clauses are used commonly in commercial contracts to define which laws and venue will be used if unresolved conflict occurs between the parties. This is particularly common where one or both parties are fearful or ignorant about the laws and procedures in another country.

Likewise, on occasion one or both parties to a marriage contract may insist upon an arbitration clause which defines the marital property laws and procedures applicable if the marriage breaks down.

Once again, there may be a darker side to this alleged advantage if the chosen venue, procedures and substantive marital property laws are particularly oppressive to one person.

### ***Alleged disadvantages of arbitration***

To repeat, many of the alleged disadvantages of arbitration reflect flip-sides of the very advantages which make some form of arbitration attractive. Some have been foreshadowed in the previous section. The alleged disadvantages to individuals, or to society are:

- (1) The privacy attached to arbitration means that the process is not subject to public scrutiny and accountability. Moreover, society has an interest in investigating some of the criminal activity which is referred to in family disputes.
- (2) The low cost and speed of on-the-papers arbitration becomes a second class form of dispute resolution made available to the poor. This may deflate reform efforts which aim to divert more time and money into dispute resolution services for the poor.
- (3) As family arbitration is institutionalised, there will be an inevitable tendency for costs, delays, and complexity of process to increase.
- (4) In some jurisdictions, forms of commercial arbitration have been discredited where courts have failed to discourage the tactical games of litigants. These games include applying to a court for interim directions whenever an arbitration process appears to be going unfavourably for one party. It remains uncertain how far the Family Court or the Federal Magistracy will tolerate or encourage this predictable emasculation of arbitration. In some parts of the USA, courts have very consciously minimised supervision of those who choose private arbitration.

- (5) Similarly to the previous point, courts have defined powers to set aside arbitral awards (eg. *F.L.A. s. 19 G*). It takes several years to remove the uncertainty of whether courts will relish the opportunity to set aside arbitral awards; or will establish clear precedents to interfere only in exceptional cases.
- (6) Family property arbitrators have limited powers – particularly in Australia over third party creditors and debtors. This may make the arbitral process unhelpful to many families who have creditors or relatives claiming a share of the matrimonial property.
- (7) Anecdotally, arbitrators are notorious (like some judges) for trying to keep both “customers” satisfied by splitting the difference between their two claims. Neither disputant “loses” disastrously. However, this predictable pattern leads to extreme claims, and quickly alienates lawyers who are repeat users of the process.
- (8) Arbitration can have some of the other well-documented disadvantages of litigation including “I was not listened to”; “The arbitrator did not understand what this was all about”; “I lost any sense of control”; “My dispute was translated into incomprehensible legal categories and language”; “The arbitrator was forced to use one hammer, namely money, to fix a problem that had many other creative packaged possibilities”; “The other side was able to get away with lying”; “We were ambushed by undisclosed evidence”; “The arbitrator seemed to be against me from the very beginning”; “I have obtained an enforceable property award but I am now left with an aggrieved partner for the next 15 years of raising and paying for our children” etc.
- (9) Lawyers will take time to feel comfortable with this new process, and until they do, will rarely refer clients to arbitration – catch 22. Once again, pioneering Legal Aid pilot programs may create a level of mandatory familiarity.
- (10) Arbitration will rarely be suitable for unrepresented clients.
- (11) Parties who want an accurate record of the arbitration proceedings will have to pay for an expensive transcription service.
- (12) Arbitral awards currently do not have stamp duty exemption and capital gains tax rollover relief – an obvious reform oversight.

There is rarely a magical and risk-free conflict resolution process!!

## **(E) The Australian legislation on matrimonial property arbitration**

In Australia, the emergence of enforceable arbitral awards for family property disputes has been a laboured process. In 1988, the Family Law Council<sup>8</sup> published a report entitled *Arbitration in Family Law*.<sup>9</sup> This report recommended the establishment of a “court-annexed”

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<sup>8</sup> The Family Law Council is an independent review and research group appointed by the Attorney-General under s. 115 of the *Family Law Act*. This body, together with the Australian Institute of Family Studies, another research group of social scientists employed under s. 114 A of the *Family Law Act*, have produced dozens of impressive reports and recommendations over the last 20 years in relation to legislative reform and social change regarding Australian families. For a list of publications, contact The Director of Research, Family Law Council, Robert Garran Offices, Barton ACT 2600, Australia.

<sup>9</sup> *Arbitration in Family Law* Canberra:AGPS, 1988.

## ***Bond Dispute Resolution News***

system of arbitration for family property disputes. In 1991 the federal *Family Law Act* 1975 was amended to provide for arbitration in property and spousal maintenance disputes.<sup>10</sup>

However, the 1991 child was stillborn. Implementation of the legislative reform required the Family Court to draft Rules of Court to:

- (a) define who was eligible to be an “approved” or “private” arbitrator;
- (b) assist an arbitrator conduct an arbitration;
- (c) register the arbitral award in the Family Court.

For nine years, these triggering Rules of Court did not emerge from the Family Court of Australia. Much speculation has occurred on the reasons for this hiccup.

### ***Family arbitration 1991 - a toothless tiger***

Meanwhile, without legislative and Court support, family arbitration was a toothless tiger.

Why? A “freelance” or unapproved arbitrator is one who cannot register his/her awards in the Family Court. His or her awards are not legally enforceable because of lack of legislative support. (“Freelance” is not a statutory term.) There are a number of predictable devices which can be attempted in order to make unregistered awards unenforceable. All are flawed. They are as follows:

- (1) Parties pre-sign detailed consent orders leaving blanks which the arbitrator fills in.
- (2) Parties pre-sign a detailed financial agreement (previously a **s. 86** agreement) leaving blanks which the arbitrator fills in.
- (3) The parties both give the arbitrator written irrevocable power of attorney to complete the orders and seek court approval of those orders which reflect the arbitral award.
- (4) Both parties pay a bond to the arbitrator which is forfeited if one party does not co-operate in converting the freelance award into consent orders.
- (5) The arbitrator and lawyers give the parties pep-talks about post-award co-operation!
- (6) Both parties contract to pay all legal costs of the other side if either fails to co-operate in formalising the freelance award.
- (7) Both parties contract that the *Commercial Arbitration Act* applies to their dispute and therefore can be registered and enforced in a state Supreme Court.
- (8) Both parties sign an agreement to request the Family Court in any subsequent hearing to confirm the freelance award if it falls within a 10% margin or range of predictable orders.
- (9) Both parties sign an agreement to sign a caveat or charge over his/her property to reflect the terms of the freelance award.

To repeat, none of these creative devices provide even a small degree of certainty that the freelance arbitral award will be legally enforceable.

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<sup>10</sup> *FLA* ss. 19D – 19Q

### **1999 – Legislative stirrings**

Finally in 1999, power over the enforcement of arbitral awards was partly taken away from the Family Court. On 22 September, 1999 the *Family Law Amendment Bill 1999* was introduced into Parliament. These amendments came into operation in December 2000, though supporting Regulations to assist arbitrators did not come into effect until 1 March, 2001. The new Regulations are clear in their intent, though they contain some inconsistencies which will need amendments in due course.

The Australian scheme has the following features:

- (a) There can be no arbitration unless the parties consent.
- (b) A court can suggest that arbitration is appropriate, but cannot order the parties to arbitrate.<sup>11</sup>
- (c) The parties can only arbitrate under the *Family Law Act* on disputes between them about property and/or spousal maintenance.<sup>12</sup>
- (d) Disputes about child support or child residence (custody), guardianship or contact (access or visitation) predictably cannot be arbitrated at all.
- (e) Presumably, some disputants will choose to arbitrate on one aspect of a conflict (eg. valuation of a business) and then use the decision of the arbitrator as the basis for settling by negotiation all other elements of the property dispute such as percentage, timing of distribution and apportionment of debts.
- (f) Disputes over property with third parties (eg. creditors or relatives claiming a share of the matrimonial property) probably cannot be arbitrated under the Federal *Family Law Act*. This is because (i) the arbitrator has no procedural power to join third parties; and (ii) the arbitrator has limited substantive power under the *Family Law Act* to make orders which affect the property rights of third parties.<sup>13</sup>
- (g) Disputes over the property rights of a third party can be arbitrated if the third party consents, enters into a written arbitration agreement and that “third party” part of the order is registered under a state *Commercial Arbitration Act*. This situation is ironical, as by consent arbitrators can have more power over third parties than is currently available to judges of the Family Court.
- (h) Only certain “arbitrators” can arbitrate and register his/her award under the *Family Law Act*.

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<sup>11</sup> In Australia, court ordered arbitration which results in “final” orders would probably be considered an improper delegation of judicial power and therefore unconstitutional: see *Brandy v Human Rights and Equal Opportunity Commission (1994-95) CLR 245*; *Harris v Caladine (1991) FLC 92-217*

<sup>12</sup> This includes disputes with children about property distribution to the children – *FLA s. 79(1)*

<sup>13</sup> *Ascot Investments Pty Ltd v Harper and Harper (1981) FLC 91-000*; *Re Ross Jones; ex parte Green (1984) FLC 91 – 555*. Between 1987 and 1999, cross-vesting legislation by the Australian states momentarily enabled Federal courts to exercise state jurisdiction, including determining the rights of third parties in matrimonial property disputes. However the state cross-vesting legislation has been held to be invalid by the High Court in *Re Wakim; ex parte McNally (1999) 73 ALJR 839*. It remains unclear when the revived “accrued” or associated jurisdiction of Federal Courts will enable orders which affect the property rights of third parties; see J.H. Wade, *Property Division Upon Marriage Breakdown (1984) p121-134*; *Wallace (1984) FLC 91-553*.

## ***Bond Dispute Resolution News***

Who is eligible to be a family arbitrator? The Federal Attorney-General foreshadowed that regulations from his department (notably not rules emanating from the Family Court) would provide as follows:

“(R)egulations will be made to approve as arbitrators legal practitioners with appropriate specialist experience in both family law and arbitration.

To be included on the list, lawyers will have to have completed specialist arbitration training conducted by a professional association of arbitrators or a tertiary institution.

They will also have to be accredited family law specialists or, where the legal professional bodies do not have a specialist accreditation scheme, have had at least five years practice with at least 25% of their practice being family law work.

These requirements will also apply to private arbitrators conducting arbitration under the Act.

People who have previously been employed as registrars in the Family Court for a comparable period could also be suitable arbitrators.

This will be the first stage of the approval and specification process and recognises that most family law arbitration is currently undertaken by lawyers. However, I also invite any other professional group that feels that its members would have suitable qualifications and experience to put forward their case for inclusion in future regulations.”<sup>14</sup>

Regulation 67B(d) now adds “the person’s name is included in a list, kept by the Law Council of Australia...”.

- (i) It is logical and inevitable that certain specialist accountants and valuers will become approved arbitrators. However, in the meantime, the requirements to be an arbitrator have been narrowly prescribed by Regulation 67B. Most notably, there is no grandperson clause or avenue for a non-lawyer to be an arbitrator. Retired judges must requalify!

Regulation 67B states:

“For the definition of *arbitrator* in subsection 4(1) of the Act, a person meets the requirements for an arbitrator if:

- (a) the person is a legal practitioner; and
- (b) either:
  - (i) the person is accredited as a family law specialist by a State or Territory legal professional body; or
  - (ii) the person has practised as a legal practitioner for at least five years and at least 25% of the work done by the person in that time was in relation to family law matters; and
- (c) the person has completed specialist arbitration training conducted by a tertiary institution or a professional association of arbitrators; and
- (d) the person’s name is included in a list, kept by the Law Council of Australia or by a body nominated by the Law Council of Australia, of legal practitioners who are prepared to provide arbitration services under the Act.”

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<sup>14</sup> Federal Attorney-General Darryl Williams, address to the National Press Club, October 1996.

## ***Bond Dispute Resolution News***

- (j) Presumably, unapproved “freelance” arbitrators can still conduct family property arbitrations, but will have no legislative provision to allow their awards to be registered in the Family Court.
- (k) The parties and the arbitrator may choose to enter into a contract about the terms of the arbitration (Reg 67F) or to receive equivalent detailed information about the process via a “notice of arbitration” (Reg 67G)
- (l) The parties to the dispute must pay the costs of the arbitration directly to the arbitrator (not into court, or to a court trust fund). A wise arbitrator will insist that all fees be paid into an account I the arbitration, though actual collection of such fees cannot take place until “after” an award has been made (Reg 67H). The arbitrator must give pre-arbitration written information about fees (*F.L.A.*, **S. 19 H**; Reg 67F; 67H).
- (m) Once the arbitral award is registered in the Family Court, it has the same effect as an order of the Family Court. (*F.L.A.* **s. 19 D, 19 E**. This is subject to a strange provision in Reg 67 Q (3) which currently allows 28 days to object after an award has been served).
- (n) An arbitrator can refer a question of law arising from the arbitration to the Family Court or the Federal Magistrates Court and await the Court’s decision. (*F.L.A.* **s. 19 EA, 19 EB**)
- (o) How final is an arbitral award? On the face of the legislation, very final. But legislative words do not necessarily resolve traditional tension between courts and arbitrators nor the historic tendency of “real” judges to want to supervise “private” judges. The *Family Law Act* provides that the award of an arbitrator can be:
  - (i) reviewed on a question of “law” by a single Judge of the Family Court or the Federal Magistrate’s Court (*F.L.A.*, **s. 19F, 19 FA**). The slippery nature of this concept gives some latitude for a review by a disgruntled disputant. A vast body of precedent attempts to delineate what is a question of “law”.
  - (ii) Varied by a judge of the Family Court or the Federal Magistrate’s Court where:
    - “(a) the award or agreement was obtained by fraud or
    - (b) the award or agreement is void, voidable or unenforceable; or
    - (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.” (*F.L.A.*, **s. 19 G**)

## **(F) Contracts to arbitrate**

### ***To determine existing disputes***

Most people will enter into a contract to arbitrate after a dispute has occurred and because they have not been able to resolve the existing dispute by negotiations. Such post-dispute contracts will often be in very general terms, with the details of procedure to be worked out in a preliminary meeting with the arbitrator. Example of short dispute written arbitration contracts are:

- (1) “The husband and wife agree to submit their current dispute over property and spousal maintenance to an arbitrator under the *Family Law Act*.”
- (2) or “The husband and wife agree to submit their current dispute over property and spousal maintenance forthwith to an arbitrator under the *Family Law Act* and agree to be subject to the Regulations or such modification thereof as imposed upon them by the arbitrator.”

An obvious question is whether a signatory to such a post dispute contract to arbitrate can legally change his/her mind and refuse to co-operate, attend or be bound by the decision of the arbitrator. Is the clause only an agreement to agree? Can one signatory withdraw effectively and unilaterally if an acceptable arbitrator cannot be found, or if at the preliminary arbitration conference, the parties cannot agree to the fine-tuning of arbitral procedures?

The answer to all these questions will be negative if the Family Court follows standard arbitration practice, and the state *Commercial Arbitration Acts*. Once spouses agree in writing post-conflict to arbitrate, in the event of a default to agree upon an arbitrator, the Family Court will appoint an arbitrator on application by the willing party. This arbitrator can set up his/her own procedures and conduct a hearing in the absence of the defaulter. This would be a dangerous option for the defaulter to have financial and costs issues determined in his/her absence.

### ***Contracts to arbitrate future anticipated disputes***

Presumably a less common practice in Australia will be the use of arbitration clauses in anticipation of future disputes. To a limited extent, such clauses have already been used in a few cohabitation contracts in various Australian states, specifying that the arbitration will take place under the procedures of the relevant state *Commercial Arbitration Act*, unless altered by mutual agreement with the arbitrator.

For married couples, such arbitration clauses anticipating possible future conflict could be inserted in:

- marriage contracts
- post-separation or divorce property or spousal maintenance settlements.<sup>15</sup>

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<sup>15</sup> eg. In Australia such settlements pre 1 July 2000 could be entered into at three levels of “bindingness” – each level becoming increasingly expensive, formal, lawyer-controlled, paper-laden, full disclosure mandated, court supervised and final. (*Family Law Act 1975*, ss. 86, 79, 87.)

## ***Bond Dispute Resolution News***

For example, in a property settlement, the parties may agree to arbitrate any future disputes about:

- variation of spousal support
- procedures to sell a business
- interpretation of any clause in the property settlement
- valuation for a buy-out of a home or business.

Such disputes frequently occur during the performance of the terms of a settlement.

## ***Anticipating conflict in marriage contracts***

Until 2000 in Australia, marriage contracts have had marginal “legal” effect. That is, the Family Court could, and did, freely vary the terms of property division set out in a marriage contract.<sup>16</sup>

Amendments to the *Family Law Act* which come into effect on 1 July 2000 move the degree of legal effectiveness of marriage contracts up several notches.<sup>17</sup> They can become more binding than in the past, but still not as binding as ordinary commercial contracts.<sup>18</sup>

If marriage contracts are appropriately independently “certified” under the *Family Law Act* by advising lawyers or “prescribed financial advisers” (*F.L.A. s. 90 G*) then they are legally binding unless:

- “(1) A court may make an order setting as termination agreement if, and only if,
- (a) the agreement was obtained by fraud; or
  - (b) the agreement is void, voidable or unenforceable; or
  - (c) in the circumstances that have arisen since the agreement was made it is impracticable for the agreement or a part of the agreement to be carried out; or
  - (d) in the circumstances that have arisen since the making of the agreement, being circumstances of an exceptional nature relating to the care, welfare and development of a child of the marriage, the child or, if the applicant has caring responsibility for the child (as defined in subsection (2)), a party to the agreement will suffer hardship if the court does not set the agreement aside.” (*F.L.A. s. 90 K (1)*)

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By December 2000, this three step selection will be rejuggled to a different catalogue of two gradations of property and spousal maintenance settlements – **s. 90 B-D** “financial agreements”; and **s. 79** “consent orders”.

<sup>16</sup> Eg. Jackson (1988) FLC 91 - 904; Plut (1987) F.L.C. 91 – 834.

<sup>17</sup> Ironically, marriage contracts in Australia have now been moved to approximately the same level of “bindingness” as cohabitation contracts have enjoyed since 1984 in New South Wales. Other states have followed N.S.W. with similar (though not identical) de facto marital property legislation (known as “common law” marriages in U.S.A.). See generally Australian De Facto Relationships Law (CCH, looseleaf).

<sup>18</sup> *Family Law Amendment Bill 1999*, **s. 90 B** (“financial agreements” made before marriage); **s. 90 C** (“financial agreements” during marriage); **s. 90 D** (“financial agreements” after divorce)

## ***Bond Dispute Resolution News***

An arbitration clause in a marriage contract may not be effective if one of these alleged events specified in **s. 90 K (1)** leads to the contract being set aside.

### ***Who decides whether an anticipatory arbitration clause is still binding?***

Who decides if a settlement or marriage contract is no longer in effect under **s. 79 A** or **s. 90 K** or **s.87(8)** of the *Family Law Act*? Can the parties effectively agree to appoint an arbitrator to decide any preliminary issue of whether the arbitration clause is still valid? (under **s. 79 A**, **s. 90 K** or **s. 87 (8)**)

On a literal interpretation of the *Family Law Act*, contracting parties seem to be able to exclude the judiciary from determining these issues. This is because **s. 19 E(3)** provides that...“dispute means

(a) Part VIII proceedings” (Part VIII includes all the sections which allow settlements to be set aside eg. **s. 79 A, 87 (8), 90 B – 90 D**).....

“(d) a dispute about a matter with respect to which such proceedings could be instituted.”

Then **s.19 E (2)** provides that an “award...of a dispute may” be registered in court.

Thus arguably arbitrators can be given jurisdiction by agreement over actual or potential Part VIII “disputes”, including “awards” which determine whether the anticipatory arbitration clause is still binding.

Accordingly, parties could attempt to use express clauses such as – “All and any future disputes under this contract/settlement will be determined by an approved arbitrator under the *Family Law Act*, including any disputes over whether this settlement or contract can be varied or set aside under the provisions of Part VIII of the *Family Law Act*.”

However, such all-embracing arbitral powers will not have the effect of excluding future judicial involvement as:

- (1) The arbitrator may be reluctant to make a threshold arbitral determination under **s. 79** and **90 B – 90 D** and **87 (8)** on whether (s)he has a job (ie. Whether the arbitration clause should be set aside);
- (2) The arbitrator is likely to refer the contentious threshold question which involves weighing various competing public policy interests to a Court for a decision as a “question of law”. (*F.L.A. ss. 90 EA, 90 EB*);
- (3) Any party disgruntled by the arbitrator’s decision to confirm or set aside the marriage contract, or settlement under **s. 79 A, 87 (8) or 90 K**, can readily have a second hearing on that question by applying to a single judge for a review of this “question of law” under **s. 19 G**.

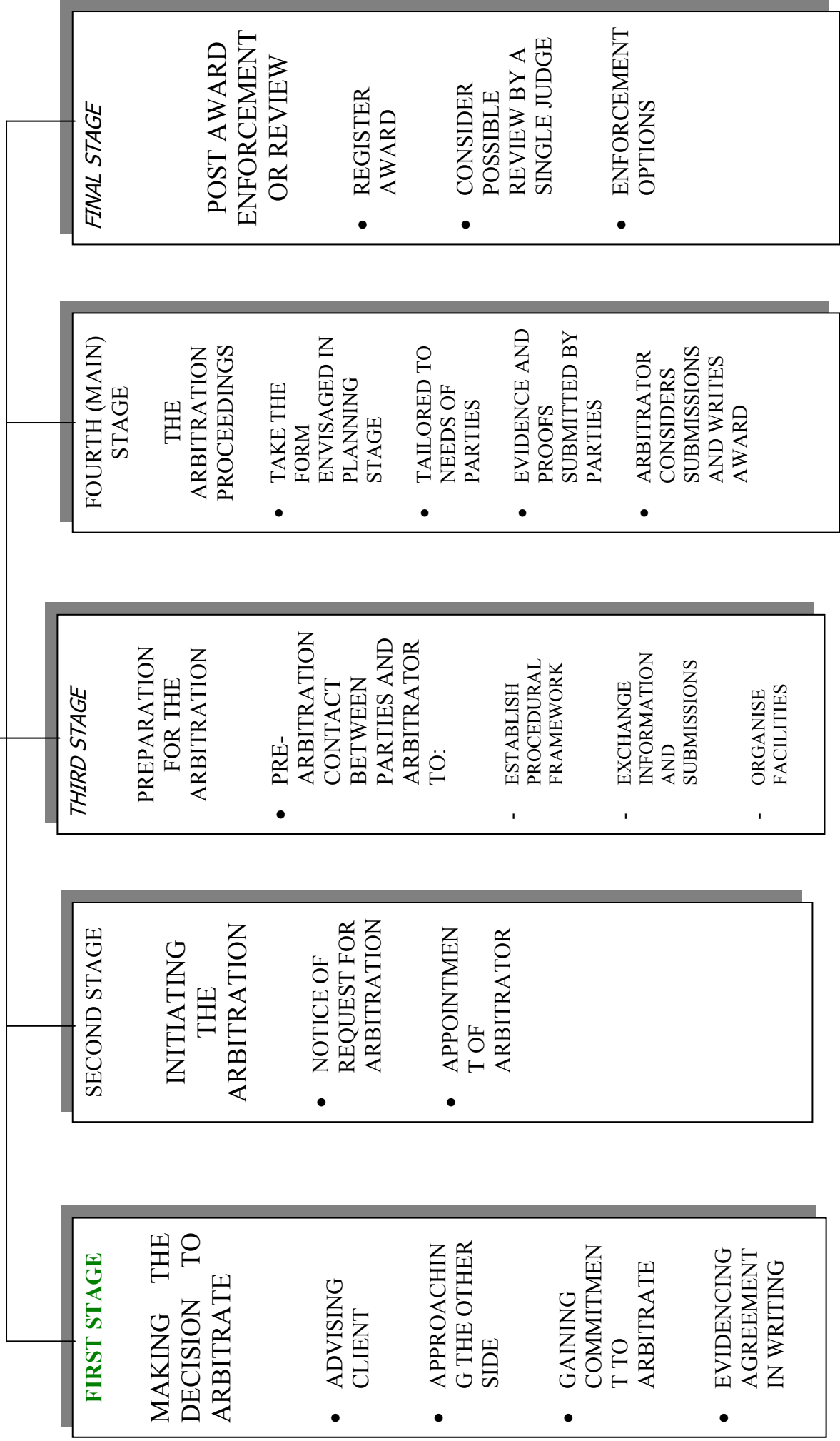
Accordingly, the Courts are likely to retain a supervisory role over setting aside agreements even if the parties try initially by agreement to minimise that role and enlarge the control of an arbitrator.

## **(G) Arbitration process**

Again, it should be emphasised that there is no fixed process for an arbitration. A common or popular form may emerge, but each arbitration is theoretically designed and custom built by the parties in consultation with the arbitrator.

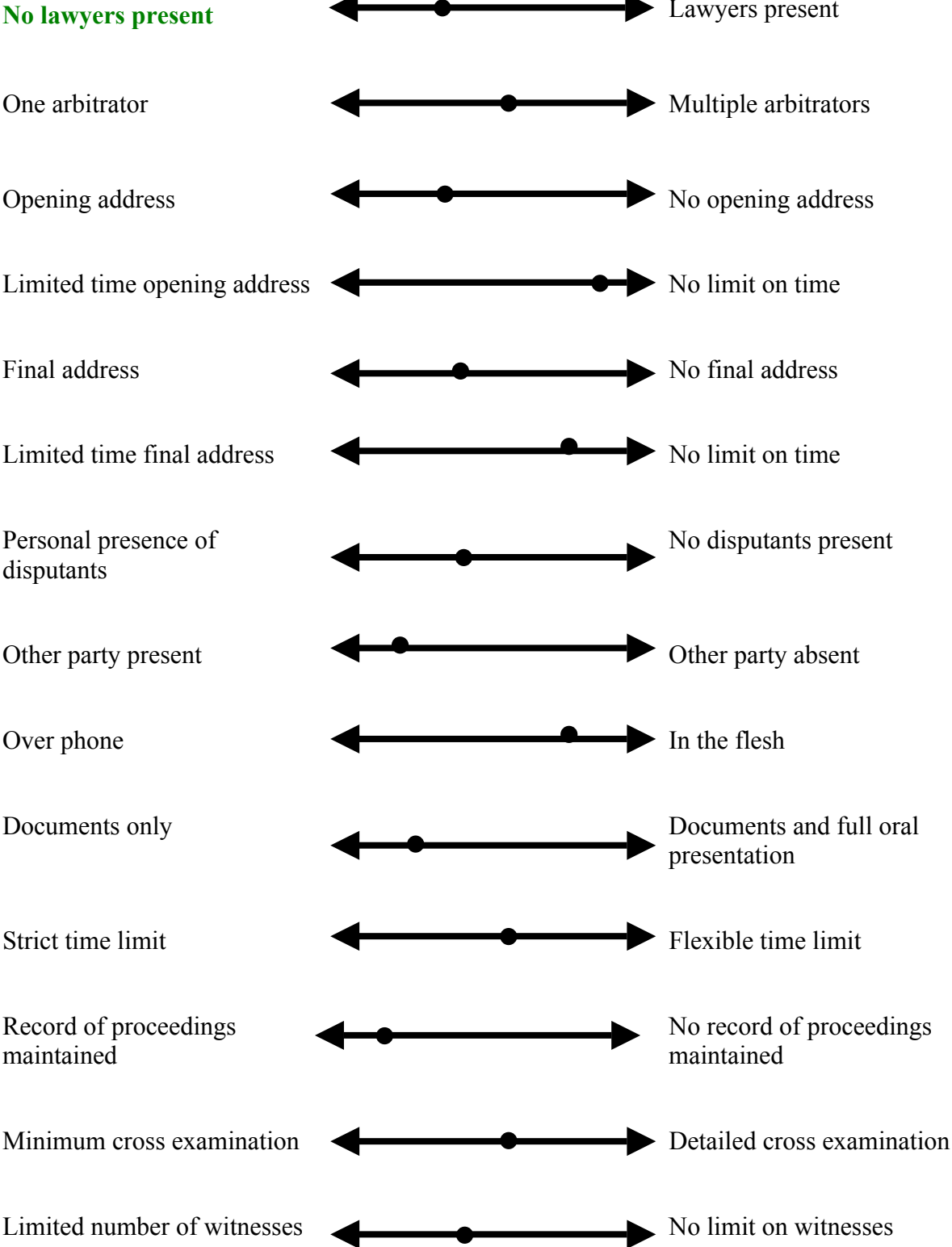
Nevertheless, a helicopter view of an arbitration often reveals the following five stages:

**ARBITRATION**



















The range of variables in any standardised or custom-built process can be further illustrated by the arbitration abacus set out below. The parties can move the bead on the abacus in all, or in particular, family property disputes.

**THE ARBITRATION ABACUS**



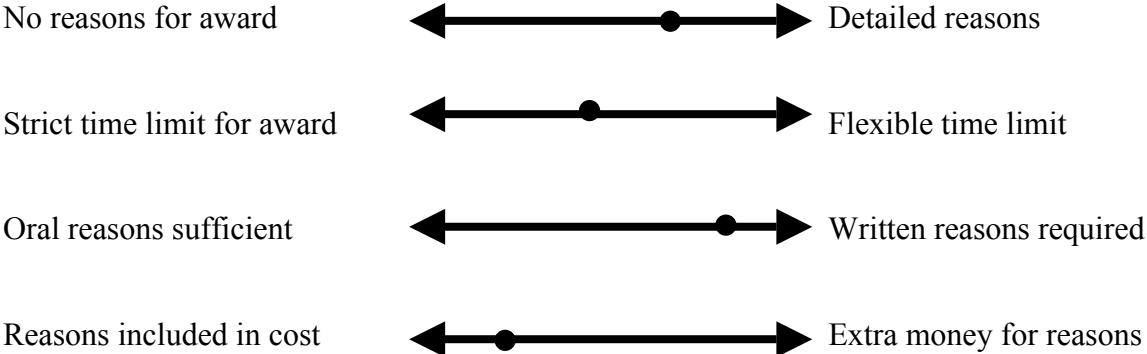
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Limited number of expert witnesses		No limit on number
No discovery		Limited discovery
No discovery		Full discovery
Tick a box forms		Technical pleadings
Limit on pages submitted		Technical pleadings
Oral evidence permitted		No oral evidence permitted
Affidavit evidence permitted		No affidavit evidence permitted
Money security required		No security required
Limited issue arbitration		Complete arbitration
Range arbitration		Complete arbitration
Mediation before arbitration		Arbitration before mediation
Standard off-the- shelf agreement		Custom built agreement
Comprehensive preliminary meeting(s)		No preliminary meeting
No rules of evidence		All rules of evidence
Parties decide which rules of evidence apply		All rules apply
Parties decide which rules of evidence apply		No rules apply

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## **(H) Arbitration Planning Meeting**

Some budget arbitrators will have no preliminary planning meeting. This particularly applies to arbitrations on-the-papers. This is because the disputants are paying a fixed fee for a product which is off-the-shelf (and possible franchised). The parties will be required to sign a take-it or leave-it agreement on standardised process, or else pay higher fees for custom building the arbitration.

More complex arbitral procedures will necessarily involve the step of the parties and/or their legal representatives meeting with the arbitrator to plan and agree upon the process. There are many available standard 5 to 10 page check-lists for arbitrators to work through with the parties. The parties are each asked to sign the checklist to confirm that the procedure has been agreed to. They effectively move the abacus beads on each variable to a mutually acceptable position. Under reg 67F of the *Family Law Act*, this checklist signed by the parties will become the "arbitration agreement". Set out below are illustrative questions contained in checklists used at preliminary planning meetings. (Extracted from *The Institute of Arbitrators Australia*, Nov. 1991, *Arbitrator's Draft Agenda*)

### **Sample questions from Arbitrator's Draft Agenda for use at the planning meeting**

#### **REPRESENTATION**

- |                                                                    |                         |    |
|--------------------------------------------------------------------|-------------------------|----|
| Any legal practitioner or other representative present?            | Yes                     | No |
| If yes: Is leave necessary for other than personal representation? | Yes                     | No |
| If yes: Is such leave granted?                                     | Yes                     | No |
| For Claimant:                                                      | of/by                   |    |
| For Respondent:                                                    |                         |    |
| For Claimant at hearing:                                           | Solicitor/Counsel/Other |    |
| For Respondent at hearing:                                         | Solicitor/Counsel/Other |    |

#### **NATURE OF PROCEEDINGS**

- (a) General nature of claims:  
Counterclaims:
- (b) approx amount of claim? \$ \_\_\_\_\_  
Counterclaim? \$ \_\_\_\_\_
- |                                              |     |    |
|----------------------------------------------|-----|----|
| (c) (i) Simplified arbitration?              | Yes | No |
| (ii) Formal arbitration?                     | Yes | No |
| (iii) A s. 27 conference before arbitration? | Yes | No |

- do parties authorise the arbitrator to act as mediator, conciliator or other non-arbitral intermediary between them Yes No

- do parties agree that the arbitrator is NOT bound by the rules of natural justice when seeking a settlement under subs. 27(1)? Yes No

(d) Will evidence (in chief) be given by affidavit/statement? Yes No

(e) Do parties agree that no oral evidence be given unless requested by the arbitrator? Yes No

(f) Do parties agree that the arbitrator may determine any question that arises for determination in the course of proceedings under the agreement by reference to considerations of general justice and fairness? Yes No

**COSTS**

(a) Do parties agree that the arbitrator shall NOT include in the Award a statement of the reasons for making the Award? Yes No

(b) Do parties agree to usual fees and room hire charged by nominating bodies? Yes No

(c) Do parties agree to arbitrator fees of \$\_\_\_\_\_per hour/day for self and \$\_\_\_\_\_per hour/day for co-arbitrator? Yes No

.....

(h) Do parties agree that the out of pocket expenses of the arbitrator are to be reimbursed? Yes No

(i) Do parties agree that the parties shall be jointly and severally liable to the arbitrator for fees and expenses? Yes No

(j) do parties agree that the arbitrator is entitled to progress payments for fees and expenses? Yes No

(k) Do parties agree that the arbitrator shall be at liberty to obtain technical and/or legal advice from such persons as the arbitrator may see fit to consult should the arbitrator deem it to be in the best interests of the conduct of the arbitration and the costs thereof shall be included in the fees of the arbitrator as out of pocket expenses to be reimbursed at cost? Yes No

**MATTERS TO EXPEDITE OR FACILITATE HEARING**

.....

(k) Have the parties retained any experts to give evidence in this reference?

Yes No

(l) If yes, who are they?

**DISCLAIMER**

Do parties agree that neither the nominating bodies (if any) nor any officer, member, servant or agent thereof, nor the arbitrator shall be liable to any party for any act or omission in connection with the arbitration save that the arbitrator shall be liable for fraud in respect of anything done or omitted to be done in the capacity?

Yes No

**TIMETABLE**

(a) Parties estimate of time for the hearing? \_\_\_\_\_ day(s)

(b) (Particularised) Points of Claim to be delivered by: / 200\_

(c) Request for Particulars re 8(b) (if required) to be delivered within \_\_\_\_\_ weeks of receipt of 8 (c).

(d) Answers to 8 (c) to be delivered within \_\_\_\_\_ weeks of receipt of 8 (c).

(e) (Particularised) Points of Defence and Counterclaim (if any) to be delivered within \_\_\_\_\_ weeks of receipt of 8 (b)/8 (d)/

(f) Request for Particulars re 8 (e) (if required) to be delivered within \_\_\_\_\_ weeks of receipt of 8 (e).

**DIRECTIONS & SUBPOENAS**

(a) The arbitrator hereby directs the Claimant to deposit \$ \_\_\_\_\_ and the Respondent \$ \_\_\_\_\_ with \_\_\_\_\_.

(b) Do parties agree that the holder(s) of such security is/are entitled to disburse the same in accordance with the written directions of the arbitrator? Yes No

(c) Are subpoenas to produce documents or things likely to be issued? Yes No

**GENERAL**

.....

(b) Do parties have any objection to a pupil arbitrator sitting in on hearing/conference

Yes No

(d) Is there any matter of a formal nature which either party wishes to raise?

Yes No

### **Award writing with reasons**

A key issue which is decided normally in either a standard form arbitration contract, or at the preliminary planning meeting is whether the arbitrator's award should include reasons. There will usually be considerable pressure from disputants to include reasons in family disputes. Set out below are familiar arguments for and against written arbitral reasons.

#### **Why write an award with reasons?**

- (1) An attempt to placate the "losing" party ("Your submissions were impressive but.....")
- (2) An attempt to show that every argument was heard and considered. ("This award is not an off-the-cuff response.") ("The applicant put forward the following 4 submissions.....")
- (3) An attempt to measure or exhaust the parties with the ritualistic drone and volume of words.
- (4) An attempt to reduce the possibilities of appeal by (i) using generalised language (eg. "I have considered the evidence of the parties and the factors listed in **sec. 79** of the *Family Law Act* and accordingly decide....") of (ii) by specifically discussing each potentially appealable issue ("And even if I am wrong on this second issue, nevertheless the application would still fail....")
- (5) The total absence of reasons may lead to a suspicion that facts, evidence or rules were overlooked or misconstrued.
- (6) To congratulate lawyers (if at all possible) in order to minimise client hostility being redirected at lawyers and to minimise future hard feelings between umpire and lawyers ("I wish to thank counsel for their helpful submissions....")
- (7) Conversely, expressly to blame lawyers and/or clients for an outcome due to poor presentation ("I did my best on the limited material provided"; "I received little help on what authorities were relevant....")
- (8) The most important reason for requiring written reasons is that this imposes a discipline upon the decision maker. The very act of writing clearly compels serious thought, analysis and frequently a change of mind!
- (9) Once written reasons are attempted or required by the arbitrator's contract, they probably should be comprehensive. Otherwise:
  - (i) the award invites appeal on "missing" issues
  - (ii) a court may order the arbitrator to rewrite reasons more fully. This is a different task weeks or months after the award.
- (10) An attempt to educate the legal profession for future cases on the arbitrator's level of competence; degree of expertise; values; expectations; (and on the arbitrator's marketability as an arbitrator).
- (11) The need for reasons is probably inversely proportional to the status of the arbitrator ("the grey-haired eminence factor").

#### **What are the dangers and disadvantages of writing reasons for an award?**

- (1) More expensive – it will probably take several drafts.

- (2) Finding a balance in length. The more that is stated, the more likely that offence will be taken to some statement. The less that is stated, the more likely that offence will be taken about omission of a perceived-to-be “relevant” factor.
- (3) The reasons may occasionally expose the disorganised submissions of lawyers and of evidence necessarily “missing” due to the budget nature of the hearing. This may lead to:
  - (i) unhelpful recriminations by clients against lawyers
  - (ii) lawyers who refuse to use the process in the future.

This debate about reasons has been settled for the moment by Regulation 67P which *requires* a single typed document which includes findings of fact, the evidence on which these findings are based, and “the arbitrator’s reasons for making an award”. A wise arbitrator will presumably follow the template given by the Full Court of the Family Court in *Whiteley’s* case (1966) FLC 92-684 on how to write a judgment, to avoid making a “mistake of law”.

Regulation 67P of the *Family Law Act* has cemented the abacus bead by requiring an arbitrator to write a “concise” award setting out findings of fact, evidence and reasons.

## **(I) Diagnosis**

Arbitration is arguably suitable or at least of some attraction to one or both disputants compared to other dispute resolution “products”, where some of the following features are present. (Conversely, where one or more of these features are missing, arbitration becomes less attractive than its competitors):

- (1) Both parties have substantially recovered from the loss of the separation. Both want to “get on with their lives”.
- (2) There are no or few suspicions of failure to disclose. That is, the less complex is the asset pool, the more likely that arbitration is suitable. Where there is uncertainty about disclosure or valuation of important assets, then one or both lawyers may want access to more familiar court processes of subpoena and third party discovery.
- (3) Where neither party gains tactical advantage by delay. For example, one party may be enjoying “free” accommodation in the former matrimonial home and may want to extend that benefit for as long as possible, rather than attend a quick arbitration. Another common fact pattern involves a spouse (usually a male) who is deep in grief and anger about the loss of a marriage. Accordingly, he makes a very high property claim and seeks by a war of attrition to punish his partner (and to destroy the family assets in legal costs). A quick arbitration obviously is contrary to this strategic scorched earth policy.
- (4) Where there are no disputed claims to the matrimonial property by third parties (such as relatives). Such third party claimants would require extra consents to become parties to the arbitration. Then the arbitrator could make third party property decisions pursuant to a state *Commercial Arbitration Act*, and the family property division under the *Family Law Act*.
- (5) The go-betweens or lawyers for both the disputants have had positive experiences with the use of arbitration in the past.
- (6) A mutually trusted arbitrator is accessible and his/her schedule is not over-booked.

- (7) The queues for hearing in the Family Court and Federal Magistrates' Court are particularly long. (ie. the competing decision-making service is busy.).
- (8) One or more of the available judges in the local Family Court or Federal magistracy are not respected by the lawyers advising the two parties. Selecting an arbitrator removes all risk that an unpopular judge will conduct the hearing.
- (9) Some couples who have "secrets" which they would rather not broadcast in a public Family Court hearing, may prefer the privacy of a closed arbitration. The secrets may include events in the lives of the rich and famous; tax evasion, family violence, social security and immigration fraud, or future business ventures.
- (10) Selecting an arbitrator gives certainty that a hearing will take place as scheduled. The Family Court (and other courts) often engage in practices of over-listing cases for a single day of hearing, thus forcing unheard litigants to spend money preparing for a hearing, and then choose either to settle hastily, or return for another expensive hearing at a later adjourned date.
- (11) Arbitrators will not put litigants through a series of expensive meetings and hurdles in an attempt to precipitate settlement. Courts must necessarily schedule a variety of pre-hearing settlement conferences as the vast majority of litigants have not filed in order to have a judicial hearing, but for other purposes; and so many litigants need prompting to prepare their cases adequately; and courts do not have the resources to have full hearings in more than about 5%-10% of filed cases. To meet their shrinking budgets, the courts must exert considerable pressure on litigants to settle. Arbitrators are usually contracted not to exert such expensive and delaying settlement pressures.
- (12) Where parties do not have enough money to go through several expensive professionally-assisted processes such as negotiation, mediation and then finally a court hearing. They only have enough money for "one" process and cannot risk several operations – such as a lengthy negotiation or mediation which does not result in a settlement. Again, this situation should arguably make arbitration on-the-papers attractive where the asset pool is "small" – say under \$300,000. For example, each party could spend say \$2,500 to prepare for and have an arbitration on-the-papers completed. Joint transaction cost of \$5,000 only deplete a pool of \$300,000 by 1.7%, of \$200,000 by 2.5%, of \$100,000 by 5%.  
  
For balanced and rational players, these low transaction costs or arbitration on-the-papers are appealing. The equivalent joint transaction costs of litigotiation (negotiating up to the door of the hearing) would be around \$30,000 which depletes a pool of \$300,000 by 10%; of \$200,000 by 15%; of \$100,000 by 30%.
- (13) Where one or both lawyers do not have expertise in the ever-changing complexity of procedures and forms used in the Family Court. Such lawyers (and clients) may be attracted to a respected and friendly arbitrator who shepherds the lawyers and clients through filling in his/her own less daunting forms and procedures.
- (14) Where one or both parties want to adapt procedures to suit budget or a personal sense of procedural fairness. For example, the arbitral hearing could be in the evening, or on the weekend; each party could make a ten minute presentation to the arbitrator; the arbitrator could ask all the clarifying questions; sworn statements could be limited to "x" pages; the hearing room could be around a conference table at a local church hall or golf club.
- (15) It is possible that a highly respected arbitrator may be able to develop a set of procedures suitable for do-it-yourself litigants. This is a daunting and growing

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challenge. Nevertheless, it has possibilities if an organisation staffed by para-legals initially assists the clients to complete and jointly sign a standardised table of assets, debts, income and chronology of marriage history.

- (16) Where there are multiple influential tribal members or cheer-squads behind the disputing couple – for example, grandparents, new partners, or other relatives. The husband and wife are reluctant to agree to a settlement as the tribal members will be critical of such “weakness”. Therefore they need a decision-maker to blame for the outcome (“That’s what the arbitrator said; it’s not my fault”), and a process which keeps the tribes away on the day of the hearing.

**Diagnostic factors which suggest that family property arbitration may be suitable:**

	Yes	No	Uncertain
1. Parties off emotional roller-coaster			
2. Full disclosure has occurred			
3. No tactical advantage in delay			
4. No third party claims			
5. Lawyers like arbitration			
6. Good arbitrator is available			
7. Family Court queues are long			
8. Family Court judge is unpopular			
9. Privacy important			
10. Want to avoid adjournments			
11. Want to avoid multiple settlement meetings			
12. Low assets; “house and garden” dispute			
13. Lawyers unfamiliar with Family Court			
14. Custom-built procedures			
15. Arbitrator who help DIY litigants			
16. Parties need to blame an arbitrator for the outcome.			

Obviously, it is not sufficient for one disputant to conclude that some form of arbitration is suitable. How can the other party (and background supporters) be persuaded to reach a similar conclusion? Persuasion takes time and money; new products appear to be a risky investment of time and money until they are tried and proven; even constructive procedural suggestions from the “opposition” are usually looked upon with suspicion (known as “reactive devaluation”).

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## **(J) Predicting the future of arbitration in family disputes**

Predicting the future is a hazardous but enjoyable activity.

The writer's guesses are that there will be initial reluctance to use arbitration in family property disputes from clients and lawyers in Australia. However, the presence of several retired, respected and entrepreneurial Family Court judges will lead to country and suburban specialist family lawyers cautiously referring low budget cases to these individuals "to see what happens, as my client has no other affordable options". ("Have gavel will travel.") These referrals will especially occur immediately after a specialist lawyer has a "bad experience" in a Family Court queue or hearing.

If these cautious referrals are classified as a "success" by the specialist lawyer and/or the clients, then gossip will ensure that referrals of low budget cases to that particular arbitrator will become a regular stream of business. The particular individual as arbitrator and his/her multiplying experience will provide a form of quality control vital to the referring lawyer. ("I've used him/her before"; (s)he is very good with the clients"; (s)he listens well"; (s)he is firm but fair" etc.)

However, the honeymoon period for even these arbitrators will quickly wear off as:

- (a) his/her judgments (particularly "splitting the difference between the claims") become predictable ("Why hire someone to divide by two?");
- (b) gossip spreads about a few unhappy customers – "my client needed more time"; "my client did not have a chance to explain what was important to him"; "the arbitrator should have asked for some more evidence"; "the arbitrator's written judgment was too short"; "the other side ambushed us with a new valuation" etc. etc.
- (c) other cut-price services are set up;
- (d) the best arbitrators charge too much and have long queues of customers;
- (e) the best arbitrators have retired and gone fishing
- (f) one or both disputants develop the post-arbitration blues when they conclude that more creative settlement packages (eg. lump sum child support; paid school fees; delayed sale of houses; assigning taxation debts; joint income from a business; etc.) should have been negotiated, rather than simplistic clean break financial orders from the arbitrator. ("We cut prematurely");
- (g) the Family Court reprimands an arbitrator for his/her informality, speed and lack of due process thereby intimidating all arbitrators into loading their own process with forms, due process, education, adjournments, minimal intervention, expense and delay;
- (h) emerging ethical codes and watchdogs cause a shift away from informality, speed and low cost;
- (i) some media sensationalism occurs over allegations that a particular arbitrator "favours women"; "applies Islamic or fundamentalist Christian values when making his/her awards"; "flips coins"; "intimidates disputants"; "is just as bad as a judge" etc.

Nevertheless, despite these inevitable side-effects of institutionalisation and quality control of any new process, a core of respected arbitrators will remain, though the flow of business from lawyers will diminish. Lawyers will again prefer "to hang on to the clients and settle the cases myself".

Gazing further into the crystal ball, the main potential for the growth and use of family property arbitration will be in “small asset” cases (say under \$300,000), where the disputants rationally cannot afford the cost of traditional expert helpers. There are of course many effective options available for such disputants including do-it-yourself kits; specialised unrepresented litigant court lists; mandatory mediation; subsidised mediation; educational videos; cheaper court systems; taxpayer subsidised lawyers; contingency fees for lawyers; rule oriented legislation reducing vague discretion etc.

However politicians, like everyone, continue to look for “more for less”. One obvious addition to the above smorgasbord of responses is taxpayer subsidised arbitration on-the-papers, fixed fee, paid in advance, guaranteed performance criteria (eg. 2 page judgment returned in 7 days), modelled by state Legal Aid offices. One model like this has already been prepared by the entrepreneurial Legal Aid Department in Queensland.

Mediation became culturally “accepted” in Australia partly because Legal Aid in Queensland made conferences mandatory for people who sought state legal aid for disputes about children. In 1991, Legal Aid also engaged in expensive training and quality control for the mediation process it had established. Likewise, a similar pattern and policy from a pioneering Legal Aid office could be applied to on-the-papers arbitration. “If you do not settle at mediation, we normally only have sufficient funds to subsidise one decision-making process in small asset family property disputes – namely on-the-papers arbitration”. As a necessary incident to this service, there will inevitably emerge groups of para-legals who offer expert fixed-price form-filling services to the couple jointly or individually to prepare for the arbitration. The writer understands that Legal Aid in Queensland has recently received Federal funding to launch a pilot arbitration project again in 2001.

As a final aside, the writer believes that final offer arbitration will eventually be irresistible to politicians who are trying to reduce the transaction costs of conflict in family property and other disputes.<sup>19</sup>

Final offer arbitration may become attractive as ongoing reduction of funds force state legal aid commissions to subsidise only the most ruthlessly “efficient” method of arbitration. However, the stress that process places on lawyers may mean that lawyers will rarely agree to use final offer arbitration as their first arbitral option. Moreover, unless carefully structured, final-offer arbitration may face a legal challenge that it removes the traditional broad discretion under the *Family Law Act*.

J. H. Wade  
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August 2001

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<sup>19</sup> eg. see *Sugar Industry Regulation* 1999 (Queensland), s. 12 (Mandatory final offers must be handed to the arbitrator and the other party at “the start of the arbitration”. This is a soft version of “final offer” arbitration as both the opposition and the arbitrator see the “final offers” before making their own decisions.). The rules for final offer arbitration would need to be drafted carefully to come within the terms of reg. 671 of the *Family Law Act*. This requires arbitral determinations “in accordance with the Act”.

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