Arbitration: Why your clients should use it and what you need to know so they can

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Contents

[1] The views expressed in this presentation are my own views. They do not represent the views of the Federal Circuit Court of Australia or of other judges. These views do not indicate how I would decide a case after having the benefit of evidence and argument. I thank my Associate Danae Lekakis for her diligent proof reading, editing and amendment of citations to comply with the Australian Guide to Legal Citation, substantial work undertaken by her in her own time.

As at 30 June, 2019, not less than 119 matters had been referred to Arbitration by the Federal Circuit Court of Australia.[2] Arbitration is an important means of dispute resolution which is both efficient and cost-effective. It can and should be utilised to help litigants resolve their family law property disputes. This paper intends to provide a helpful overview of arbitration in the Australian family law context.

What is arbitration?

Arbitration is defined by section 10L of the *Family Law Act 1975* (the "FLA") as follows:

> **Arbitration** is 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.

This definition, however, does not assist in developing a fundamental understanding of the concept of arbitration nor what arbitration might involve.

Derek Roebuck describes arbitration as a determinative means of alternative dispute resolution 'by which parties to a dispute submit [the dispute] to a third party to resolve and by which that resolution is reached and enforced'[3]. Roebuck opines that arbitration is typified by three criteria, namely:

1. That 'Arbitration is not litigation… Arbitration allows a dispute to be resolved by representatives of the community, rather than taking the law into one's own hands [and] has been seen as a sign of civilised behaviour since the time of Homer';
2. The process must be, at least potentially, adjudicative and intended to lead to a third party's award which disposes of the dispute;
3. The parties must have submitted their dispute voluntarily or at least as part of a process which one or both initiated. [4],

These three features of arbitration are certainly present in arbitration under the FLA. The arbitral determination occurs away from the Court and instead of a Court

[2] 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.

[3] Derek Roebuck, *Early English Arbitration*(The Arbitration Press, 2008), 6

[4] Roebuck, above n 3, 7

determination of the dispute, is adjudicative or determinative but permitting of consensual resolution, and occurs only by consent.

Laurence Boulle and Rachel Field discuss the role of the legal system in resolving disputes as:

> …the orderly management of disputes…a critical feature of democratic governance, a feature enabled by the rule of law. 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. [5]

Increasingly, it would seem, the "institutions and procedures" that have been seen as allowing or providing for the resolution of disputes, have comprised largely of? Courts. However, Courts are a relatively recent phenomena as a means of dispute resolution especially as regards resolution of dispute and controversy for all members of the community. [6] Ready access to the Courts, particularly by those of limited means, is a relatively recent phenomena following the establishment of Legal Aid Commissions and, in the family law domain, the introduction of "no-fault" divorce in the 1970's.

Courts are the judicial arm of executive government. As such, Courts have developed as the means by which social order has been established. Courts are intended to deal with serious controversy and dispute, especially those disputes which fundamentally impact upon the peace, order and good government of society.[7] Each member of a society is taken to submit (or consent) to the operation of law and the jurisdiction of Courts as a function of democratic governance. Within a democratic society, the role and function of Courts is to embody and define the rule of law through interpretation and enforcement of law as passed by democratically elected government and by establishing precedent.

Disputes need not be submitted to a Court. Disputes can be resolved consensually. If a dispute cannot be resolved consensually or by facilitative dispute resolution mechanisms, [8] the dispute can be determined by a neutral third party through

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[5] Rachael Field and Laurence Boulle *Australian Dispute Resolution Law and Practice* (LexisNexis Butterworths, 2016), ch 4.26, 124

[6] I agree completely with the views expressed by Justice Rares that Courts are far more than a mere means of dispute resolution (see Justice Rares,'Is access to justice a right or a service?' [2015] *Federal Judical Scholarship*, 11)

[7] For an erudite discussion of such issues see the excellent paper by Justice Rares 'What Is A Quality Judiciary?'(paper presented at the Asia-Pacific Courts Conference, Singapore, 4-6 October 2010)

[8] Including lawyer assisted negotiation, Neutral third party evaluation and Family Dispute Resolution (mediation).

contractual submission to the authority of an arbitrator. Because arbitration involves the imposition of a decision by a neutral (or unbiased or disinterested) third party, it is often referred to as "private judging". This is, in some ways, unhelpful, as an arbitrator does not, in reality, fill the role of a judge. The arbitrator's authority does not arise as a function of democratic governance but from contractual submission. An arbitrator must apply the law but does not create precedent. Arbitral proceedings are confidential and unreported. The "enforceability" of an arbitral award comes from the agreement of the parties to be bound by the decision of the arbitral tribunal,[9] rather than any statutory basis and the authority of the law.[10]

In this context NSW Supreme Court Justice Robert McDougall describes that:

> The concept of arbitration embodies, at its core, two elements. First, it is consensual: for example, the parties to a contract agree to settle their disputes by arbitration rather than by litigation. Second, it is intended to be final. The second element is shared with the resolution of disputes through litigation. The first is not. [11]

Arbitration, as a means of dispute resolution, particularly of civil (i.e. non-criminal) disputes, is ancient and predates the relatively recent phenomena of Courts.[12] As Earl S Wolaver describes:

> The origin of arbitration is lost in obscurity. At what time or place man first decided to submit to his chief or to his friends for a decision and a settlement with his adversary, instead of resorting to violence and self-help, or to the public legal machinery available, is not known…In Heraldus' Animadversiones there is described a Court of reconcilement that existed among the Greeks. It was common among the Romans "to put an end to litigation" by means of arbitration. Bell says "this amicable private tribunal is of an earlier date than the public Courts." The introduction of arbitration seems to be coeval with the foundation of our law. [13]

Similarly, Justice McDougall considers that:

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[9] Under the FLA the arbitral tribunal generally comprises a single arbitrator. An arbitral tribunal can, and historically and in some non-family law jurisdictions, can comprise more than one arbitrator with one of the arbitrators comprising the arbitral tribunal being designated as the umpire with the "casting vote" in the event that a determination is not unanimous.

[10] An arbitral award can be registered with the Court. Upon registration the award is treated as and has the status of an order or decree of the Court, thus attracting the enforcement provisions of the FLA. However, parties need not registered their arbitral award to comply with it and to give effect to the determination.

[11] Justice McDougall, 'Arbitration: past, present and future' (Opening address to the RAIF Arbitration Conference, 25 November 2016)

[12] For an excellent comparative discussion of the development of Arbitration see Kyriaki Noussia, *Confidentiality in International Commercial Arbitration* (Springer, 2010) Ch 2

[13] Earl S Wolaver 'The Historical Background of Commercial Arbitration' (1934) 83 *University of Pensylvania Law Review* 132, 132

> Arbitration has a long history. Submission to arbitration was a feature of the laws of several of the city states of ancient Greece. However, many commentators see the European origins of the modern system of arbitration in medieval trade fairs. Merchants attending those fairs who had disputes with one another would not submit themselves to the Royal Courts or to the local Courts. Instead, they would go to a panel of several merchants chosen from among those attending the fair. Those merchants were familiar with the market place, knew the customs and practices of the market participants, and were able to resolve disputes promptly, cheaply and with sufficient "justice" to satisfy the disputants…Thus, arbitration grew as an alternative to dispute resolution through the Courts. In its origins, arbitration was seen as quick, cheap, and sufficiently just to be acceptable. The Royal Courts of the time could not be said to possess the first two attributes. [14]

In Elizabethan England, arbitration was broadly applied to resolve an array of disputes including commercial disputes between merchants, matters relating to wills and intestacy, land disputes and matters relating to marriage, spouse maintenance and what might be generally referred to as "family law".[15] At that time the fundamental value of arbitration as a means of dispute resolution was eloquently described by Bess of Hardwick, circa 1565 as 'appeasing those troublesome suits by which I think in the end neither party will gain but the lawyers will be enriched' [16]

Across various domains of arbitration judicial officers have, for some time, supported the increase role of Courts in the use of ADR generally and arbitration specifically.[17] Similarly, there has been long standing support of government, Law Reform Commissions,[18] and from the Family Law Section of the Law Council of Australia[19] for the use of arbitration including in the specific context of family law.

Notwithstanding the extensive history of arbitration as a means of binding, determinative dispute resolution, the expansion of arbitration to the modern family law domain has been the subject of some controversy. This is described by Wendy Kennett in terms of competing public policies and 'State interests', noting the overall cost to the State that marital or relationship breakdown brings:

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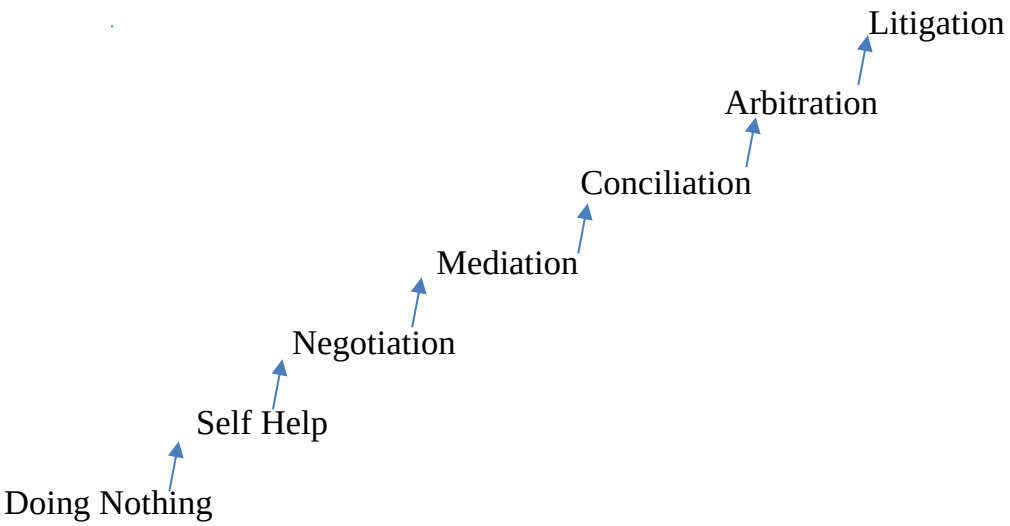
[14] McDougall, above n 13
[15] Darren Roebuck, *The Golden Age of Arbitration: Dispute Resolution under Elizabeth I* (The Arbitration Press, 2015), pp 8, 57, 63, 80, 166, 259 and 263 for examples.
[16] Ibid, 155
[17] See for example CJ Bathurst 'The Role of The Courts in The Changing Dispute Resolution Landscape' (2012) 35(3) *UNSW Law Journal* Volume 870 and CJ Allsop and Justice Croft, 'The Role of the Courts in Australia's Arbitration Regime' (paper prepared for the Commercial CPD Seminar Series, 11 November 2015)
[18] See NSW Law Reform Commission, *Report on Commercial Arbitration* No 27 (1976); Australian Law Reform Commission *Family Law for the Future: An Inquiry into the Family Law System* No 135 (2019)
[19] Family Law Council, *Interim Report: Penalties and Enforcement* (1998)

> A common thread in the story of the development or advocacy of arbitration for the resolution of family law disputes is the overburdening or breakdown of the judicial system. In that sense, there is a state interest in relieving the Courts of as much of their family dispute resolution function as is compatible with the requirements of public policy. But substantial public policy grounds for retaining jurisdiction remain. As well as upholding well-established principles such as legal certainty and judicial protection of weaker parties, the state has an interest in ensuring that, as far as possible, any financial settlement between the parties does not impose welfare responsibilities on the state (Paulsson, 2013: 117). It also has an interest in ensuring that arrangements on separation or divorce are adequate to limit damage to individual family members (Gilfrich 2007: 32–75), to relieve it of the costs of caring for such individuals and to prevent wider harmful impact on society… Couples themselves are not the only ones that may experience financial loss; the government and community also incur losses related to marital or relationship dissolution and conflict… it is estimated that, in 2002, the [USA's] 10.4 million divorces cost taxpayers in excess of $30 billion… Attitudes towards arbitration of family disputes inevitably depend on attitudes towards personal autonomy and private ordering more generally in family law. [20]

If one were to consider a hierarchy of dispute management,[21] arbitration sits just behind litigation. This can be described as follows



[20] Wendy Kennett 'It's Arbitration, But Not as We Know It: Reflections on Family Law Dispute Resolution' (2016) 30 *International Journal of Law, Policy and The Family*1,4-5

[21] see Simon Roberts and Michael Palmer,*Dispute Processes* (Cambridge University Press, 2012); Peter Stein *Legal institutions: the development of dispute settlement* (Butterworths, 1984); Roebuck, above n 15 pp 8, 57, 63, 80, 166, 259, 263 Examples are found therein of arbitration touching upon broad, family law issues

Arbitration is, perhaps, best thought of as a step available to parties to seek the determination of their dispute when a negotiated or facilitated resolution (involving compromise) cannot be achieved.

Beyond this brief introduction, it is not the intention of this paper to dwell further upon the history of arbitration and its utility in the resolution of disputes save to observe the potential benefits of arbitration, as opposed to litigation, which are themes which will be returned to in this paper.

Benefits of arbitration

The benefits of arbitration over litigation are generally considered to include:

Choice of Decision Maker – the parties control the Arbitrator who is to be appointed. Accordingly, the parties can appoint an arbitrator with the knowledge, skills and experience they desire.

Efficiency – Arbitration can usually occur far more quickly than a hearing before a Court. As the arbitration process can be determined by the parties and as the arbitration process is generally far less formal than a Court hearing, the amount of time taken in preparation is usually less.

Privacy – Arbitration hearings are private and confidential. The arbitral award is not publicly accessible or published.

Convenience – The arbitration process, as well as being shaped and determined by the parties, in consultation with the arbitrator, can occur at a time and place convenient to all.

Flexibility – The arbitration can proceed however the parties desire and addressing as many or as few issues as are considered necessary to enable a fair determination.

Finality – There is no general right of 'appeal'. There are limited grounds upon which an arbitral award can be impeached and this gives certainty and finality. Whilst some suggest that a hearing de novo is preferable, this is contrary to any established conception of arbitration. For the party 'dragged along' on appeal by a party who asserts that the order they seek are the only appropriate outcome, usually without reference to relevant precedent, this is a considerable advantage.

Cost -Whilst the parties (generally equally) pay the costs which apply, when regard is had to the far more extensive preparation required for a Court hearing,

the greater delay and the need for a specific and rigorous judicial process to apply if proceedings are heard by the Court, cost is generally far less than a Court hearing. For practitioners who are conducting litigation on the basis of payment on settlement the advantage is that costs are paid far more promptly.[22]

Advising clients regarding arbitration

Rule 21 of the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* provides:

> **21. RESPONSIBLE USE OF COURT PROCESS AND PRIVILEGE**
>
> 21.1 A solicitor must take care to ensure that the solicitor's advice to invoke the coercive powers of a Court:
>
> 21.1.1 is reasonably justified by the material then available to the solicitor;
>
> 21.1.2 is appropriate for the robust advancement of the client's case on its merits…

The duty of a legal representative is to ensure that the Court is used as a last resort and only in circumstances where no other appropriate means of dispute resolution is available. This obligation, in the specific context of family law, is taken up by section 12A of the FLA which includes, as an object of the FLA:

(a) to ensure that married cuples considering separation or divorce are informed about the services available to help with a possible reconciliation, in situations where a reconciliation between the couple seems a reasonable possibility; and

(b) to ensure that people affected, or likely to be affected, by separation or divorce are informed about the services available to help them adjust to:

  (i) separation or divorce; and

  (ii) orders made under this Act; and

(c) to ensure that people affected, or likely to be affected, by separation or divorce are informed about ways of resolving disputes other than by applying for orders under this Act.

[22] This is not intended to introduce any issue of conflict or to suggest that a practitioner who recommend arbitration on this basis.

Section 12B of the FLA imposes a specific obligation upon all advisors to ensure that their clients are aware of arbitration as a means of dispute resolution and in the following terms:

> Without limitation, information prescribed under this section must include information about:
>
> (a) the legal and possible social effects of the proposed proceedings (including the consequences for children whose care, welfare or development is likely to be affected by the proceedings); and
> (b) the services provided by family counsellors and family dispute resolution practitioners to help people affected by separation or divorce; and
> (c) the steps involved in the proposed proceedings; and
> (d) the role of family consultants; and
> (e) *the arbitration facilities available to arbitrate disputes*[23]

These obligations require all legal practitioners to discuss arbitration with their clients both before commencing proceedings with the Court and as an alternative to the continuation of those proceedings. On the basis of the frequent disclosure by legal practitioners that 'I don't have instructions with respect to arbitration,' this would appear to be a duty that is poorly complied with. Potentially, the failure to comply with these obligations would render a legal practitioner open to complaint by client or Court.

Non-compliance with these obligations is not, however, intended to be the 'stick' which encourages legal practitioners to advise their clients with respect to arbitration and, where appropriate, to positively recommend it. The benefits that are available in the arbitration of a dispute should be focused upon as the 'carrot'.

The availability of cost-effective, expeditious determination of disputes by arbitration must be brought to the attention of all litigants. This is particularly so in light of the present strains upon Court resources and the delays which follow. It would be possible for the parties to reach a conclusion of their dispute by arbitration within such period as they desire to achieve it. This is in contradistinction to the delays apparent in obtaining hearing dates before the Federal Circuit Court,

[23] Emphasis added

especially when the Court's obligations to all Court users, as discussed for example in *Aon Risk Services & ANU,* [24] are taken into account.[25]

What can be arbitrated?

Arbitration can only occur with the consent of all parties.

Arbitration is available in financial proceedings under the FLA.[26] The restriction of arbitration to financial proceedings is inherent from the Court's power to refer proceedings to arbitration provided by section 13E FLA.

> (1) With the consent of all of the parties to the proceedings, a Court exercising jurisdiction in:
>
> (a) Part VIII proceedings; or
>
> (b) Part VIIIAB proceedings (other than proceedings relating to a Part VIIIAB financial agreement);
>
> may make an order referring the proceedings, or any part of them, or any matter arising in them, to an arbitrator for arbitration.
>
> (2) If the Court makes an order under subsection (1), it may, if necessary, adjourn the proceedings and may make any additional orders as it thinks appropriate to facilitate the effective conduct of the arbitration.

The arbitrability of a dispute is, to a large extent, determined by reference to whether there is or is not some degree of 'public interest' in the dispute or its subject matter. This is described by Doug Jones as being '[t]he approach of Courts has generally been to hold that where a dispute contains a broad public interest in the outcome, the

[24] *Aon Risk Services Limited v Australian National University* [2009] HCA 27

[25] In the absence of urgency, family violence or other circumstances rendering the determination of proceedings inappropriate for arbitration (largely focused upon significant factual complexity), it would be legitimate for any judicial officer to delay the hearing of financial proceedings in preference to parenting proceedings. On this basis the listing practices of individual judges might well give preference to the listing and hearing of parenting proceedings as against financial proceedings with even greater delay occasioned to financial proceedings than standard delays before the Court might suggest.

[26] The Australian Law Reform Commission Report "*Family Law for the Future — An Inquiry into the Family Law System*" March 2019 recommends(recommendations 26-28) an expansion or arbitration to include a broader range of financial proceeding and excluding only those cases with a public policy component, child support issues and a limited range of parenting issues (subject to the Court being required to approve rather than simply register an arbitral award dealing with parenting issues.

involvement of the Courts is warranted.' [27] For example, it is generally recognised that matters involving allegations of fraud or criminality would not be arbitrable.[28]

The complexity of factual issues, legal principles suggested to be relevant and value of assets does not preclude a dispute being arbitrable. If one considers that International commercial disputes of significant complexity and with a monetary value of hundreds of millions of dollars are routinely arbitrated, then it is difficult to sustain an argument that a family law property dispute is not arbitral by reference to such factors.

If a matter is referred to arbitration by Court order then the part or parts of the proceedings which are referred must be specified. This might be a referral of the totality of the proceedings or a specific portion only. Accordingly, if proceedings are in relation to claims for property adjustment and spousal maintenance, it would be possible for only one of these two claims to be referred to arbitration and the other retained and determined by the Court. However, it would be difficult to see the utility in this approach. Interim and interlocutory issues can be referred to arbitration.

Specific factual issues could be referred to arbitration such that arbitration might be used as a means by which facts are determined so that the parties might then use some other process, such as mediation or FDR, to negotiate a resolution of the matter. This use of arbitration was quite common in the Elizabethan period such that arbitrators were used to complete the 'fact-finding' aspect of litigation. Whilst the practice has fallen into disrepair (and, again, its utility may be limited in light of the cost and delay of litigation if the matter were to return to the Court) it is a legitimately available use of arbitration.

Arbitration can also occur prior to or without proceedings being commenced (or in place of proceedings being commenced). Arbitral awards issued following arbitration can be registered with the Court irrespective of whether there are already proceedings on foot.

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[27] Jones, Doug *Commercial Arbitration in Australia* (Lawbook Co, 2nd Ed, 2013), 161-162 [6.130]; An example of a case espousing this philosophy is *Nicola v Ideal Image Development Corporation Inc* (2009) 261 ALR 1 at 16 per Perram J

[28] In the context of the Australian Law Reform Commission Report *Family Law for the Future: An Inquiry into the Family Law System* No 135 (2019), specific comment is made as to the exclusion from arbitration of applications under ss.79A and 90SN, enforcement and cases in which a litigation guardian is appointed. These categories of matter have a clear public interest component. Similarly, as regards the suggested expansion of arbitration to parenting proceedings, a number of categories of matter are identified that would be excluded including relating to international relocation, matters relating to medical procedures of a nature requiring court approval, contravention matters, matters in which an Independent Children's Lawyer has been appointed and matters involving family violence which satisfy ss 102NA(1)(b) and (c) of the *Family Law Act 1975* (Cth).

A restriction arises as a consequence of regulation 67C which precludes arbitration with respect to property to which an approved maintenance agreement under section 87 of the Act applies.

Who can Arbitrate?

For the purposes of the FLA an arbitrator is defined by section 10M as 'a person who meets the requirements prescribed in the regulations to be an arbitrator'.

Regulation 67B *Family Law Regulations 1984* (the Regulations) provides that:

> *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 5 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*

For the purpose of this regulation, the Law Council has delegated to the Australian Institute of Family Law Arbitrators and Mediators (AIFLAM) responsibility for maintaining the list of family law arbitrators. Accordingly, only those persons recorded by AIFLAM, upon their 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 by a Court.

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

The list has a search functionality by State or areas within a State. However, be aware that:

- The list generated by the search function is alphabetical

- The list for any given area includes all practitioners who are prepared to accept work in that area. Accordingly, if a search is undertaken, for example, for Western Sydney (Parramatta), this will produce a list that includes practitioners from around Australia prepared to perform work in the area. Those based in Western Sydney are not listed in preference to those from outside of the area;

- All that is provided by the list are the name and ADR practice areas (e.g. Arbitration, mediation, etc) of each individual. Details are not included of relevant practice qualifications (e.g. years of practice, academic qualifications) or cost.

When can arbitration occur?

As would be apparent from the above discussion, arbitration can occur at any point in proceedings before a judicial determination (whether by approval of terms of settlement or delivery of judgement) or prior to and instead of proceedings.

I would encourage all practitioners to consider arbitration as a genuine alternative to litigation. If parties have, by reference to the hierarchy of dispute management referred to above, completed all necessary disclosure and discovery and engaged in all appropriate negotiation (whether lawyer assisted negotiation or facilitated negotiation such as mediation or family dispute resolution) but are unable to agree on a final outcome then arbitration is a valid alternative. Whilst the consent of all parties is necessary, it must be observed that the potential benefits of arbitration, including simplicity, speed and reduced cost, would present arbitration as an attractive alternative in the majority of disputes.

In the event that parties have engaged in arbitration rather than litigation, the arbitral award which results can be registered with the Court and enforced. The process which applies to registration of arbitral awards does not distinguish between arbitration which arises from Court order or through the parties consent to arbitration.[29]

How is arbitration sought?

Arbitration can be sought (by consent):

- By and between the parties by contractual agreement; or,
- By an order made in extant proceedings.

[29] This is entirely explicable as submission to arbitration is always voluntary.

With respect to extant proceedings, Regulation 67D provides:

> *An application for an order under section 13E of the Act in relation to a Part VIII proceeding, a part of a Part VIII proceeding, or a matter arising in a Part VIII proceeding, must be:*
>
> *(a) in accordance with Form 6; and*
>
> *(b) made jointly by all parties to the proceeding; and*
>
> *(c) accompanied by a financial statement in accordance with the applicable Rules of Court*

All Courts have the ability to dispense with the requirement of rules or regulations. In reality, and as an order referring proceedings to arbitration can only be made by consent, leave to make an oral application for referral to arbitration would be readily granted. This is particularly so as the Federal Circuit Court is required to operate informally[30] and as both parties would, prior to any referral to arbitration, have filed a statement of financial circumstances the requirement of a formal application is unlikely to be enforced.

How is arbitration conducted?

As any submission to arbitration is consensual, the conduct of the arbitration is a matter for the parties. The terms of the arbitration and matters relating to the conduct of the arbitration are dealt with in a written contract between the parties – the arbitration agreement. The arbitration agreement is binding upon the arbitrator and the parties and is determinative of any controversy relating to the conduct of the arbitration.

Regulation 67F deals with arbitration agreements. The regulation is in the following terms:

> *(1) The parties to an arbitration may make an agreement in relation to the arbitration (an **arbitration agreement**).*
>
> *(2) An arbitration agreement must:*
>
> *(a) be in writing; and*
>
> *(b) set out the information mentioned in subregulation (3) in relation to the arbitration; and*

[30] Section 42 Federal Circuit Court Act 1999

(c) give details of the arrangements agreed by the parties in relation to the payment of the costs of the arbitration; and

(d) include a statement to the effect that each party agrees to pay his or her agreed share of the costs of the arbitration within 28 days, or another specified period agreed by the parties and the arbitrator, after an award has been made; and

(e) be signed by each party to the arbitration.

(3) For paragraph (2)(b) the information is as follows:

(a) the name, address and contact details of each party to the arbitration;

(b) the name of the arbitrator;

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

(d) the issues to be dealt with in the arbitration;

(e) the estimated time needed for the arbitration;

(f) information about how the arbitration will be conducted (for example, information about the exchange of documents and witness statements, scheduling and receiving expert evidence);

(g) the circumstances in which the arbitration may be suspended or terminated;

(h) the estimated costs of the arbitration, including the costs of any disbursements that may be incurred in respect of the arbitration (for example, hire of a venue for the arbitration).

Whilst the regulation is a permissive as to the execution of an arbitration agreement, as a matter of best practice and consistent with all other jurisdictions, an arbitration agreement should be entered into before arbitration occurs.

AIFLAM provides an 'arbitration kit' which is accessible from the AIFLAM website. It would be expected that this default arbitration agreement would form the basis of any discussion as to the terms of the arbitration agreement adopted in any matter. The arbitration agreement is fundamentally important as the arbitration agreement, much more so than any statutory provision, determines the process to be adopted in arbitration. The standard AIFLAM agreement is attached to this paper.

By reference to the AIFLAM agreement the powers of the arbitrator (schedule B to the agreement – clause 21) are to:

- Define the process and procedure of the arbitration as one of four specific approaches, namely:
  - A fully contested hearing analogous to a Court hearing;
  - A modified contested hearing;
  - An arbitration on the papers;
  - A combination of the above three approaches. This would permit, for example, full exploration of evidence regarding issues of fundamental importance, a less formal address of other issues and the acceptance of agreed facts or address of even disputed facts, of limited importance and utility to the determination of the dispute, based on written statements of the parties.

The arbitration agreement defines the powers of the arbitrator. This would include, for example, matters such as the correction of mistakes within the arbitral award, making a costs order or which process to adopt if one party refuses to participate and the matter is thus undefended.

Definition of the arbitral process is important. Whilst arbitration is not a judicial process, procedural fairness or due process must still be afforded and demonstrated to have been so afforded. As the High Court has discussed in *Allesch v Maunz*[31] , that which is required to afford due process must be determined by reference to the specific facts and circumstances of any case. Accordingly, a determination of whether due process had been afforded would vary substantially dependent upon whether the parties have agreed to an arbitration on the papers or have required that the arbitrator conduct the arbitration in a fashion analogous to a full, defended hearing before a Court.

That said, there is substantial flexibility in the processes and procedures that might be adopted in arbitration. Not only would it be possible for an arbitration to be conducted on the papers but more creative processes might be adopted such as:

- Depositions being 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. It would be possible for a party's evidence to be given by affidavit or orally and then tested at a time and place convenient to all and that evidence

[31] [2000] HCA 40

transcribed in some fashion (whether by audio recording, video or contemporaneous notes).[32];

- The parties can determine whether any oral testimony is transcribed or not.
- The parties can determine what rules of evidence, if any are to apply to some or all of the evidence[33]

There are a number of fundamental propositions relating to the conduct of any arbitration. These include:

- The arbitrator must apply the relevant provisions of the FLA and consistent with 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));
- The arbitrator must be free of bias (regulation 67I (3));
- The arbitrator must be satisfied, at all times, 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 and as defined and delineated by any order pursuant to section 13E and/or the arbitration agreement;
- 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 compliance, performance and/or enforcement.

The Court's role with respect to arbitration

The Court has a number of limited but clear-cut roles to play with respect to arbitration. Once a matter is referred to arbitration it is the parties and the arbitrator, as set out in the arbitration agreement, who determine the conduct of the arbitration.

The roles of the Court comprise:

1. Ordering arbitration when sought and when consent is forthcoming;
2. Defining within the referral the portion of the proceedings to be arbitrated;
3. If necessary, providing a mechanism to determine the arbitrator;

[32] see regulation 67N
[33] see regulation 60 70

4. Staying Court proceedings when there is a valid arbitration agreement governing the dispute between the parties and whilst the arbitration is brought to finality;[34]
5. Facilitating and directing matters relating to the arbitration and making orders to facilitate the arbitration;
6. Determining questions of law referred by the arbitrator;
7. Attending to registration of the arbitral award;
8. Undertaking any necessary review of the arbitral award; and,
9. Enforcing the arbitral award.

Each of the above roles will be independently explored.

Ordering arbitration

Attached to this paper are the standard orders made by me in referring any matter to arbitration. Like any precedent, the order can be amended to address the specific circumstances of any case.

The order refers the totality of proceedings as a default and also provides:

- A requirement for the parties to enter into an arbitration agreement and, absent agreement as to its contents, the use of the AIFLAM precedent; and,
- A default provision for appointment of an arbitrator if the parties are unable to agree upon an arbitrator.

It is unclear what might occur in the event that a party, having provided their consent to arbitration, then purports to withdraw their consent. It is the writer's view that the referral, once made, would proceed subject to any application to facilitate and direct the arbitration (that is certainly the view I took in *B & B*[35] . The process to be adopted in that circumstance (or in the event that, on whatever basis, the matter became undefended) should be addressed by the arbitration agreement.

Staying Court proceedings

A number of different practices would appear to have evolved amongst the Judges of the Federal Circuit Court upon the making of orders referring proceedings to arbitration. The most common approach is to adjourn the proceedings. This ensures that the proceedings remain on foot before the Court in the event that any further intervention,

[34] 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.
[35] [2018] FCCA 3977– not yet reported

by way of facilitative or directive order, is required and enables the Court to retain ultimate control over the conclusion of the proceedings.

An alternative approach, adopted by a minority of Judges, is to conclude the proceedings as finalised at the point that an order pursuant to section 13E is made.

Either of these approaches could be argued as valid and it is not the purpose of this paper to argue for one practice in favour of another although, by analogy to proceedings which occur under the Commonwealth *International Arbitration Act 1974 (*the Commonwealth Act), an adjournment of the proceedings might be preferable. Adjournment would also be suggested as preferable in light of the availability of the Court's assistance, informally and without direct engagement of the docketed judicial officer, in preparing for arbitration if the proceedings remain extant. This might include the ability to issue subpoena in the arbitration, the filing of which might be rejected if no proceedings are on foot.

It is fundamental, however, that the Court takes no further action in addressing any application before it pending the completion of arbitration. To do so would interfere with the arbitral process and would be contrary to the express consent of the parties to submit the determination of their controversy to arbitration.

Facilitating and directing matters relating to the arbitration

Whilst the Court should be loath to interfere in the conduct of the arbitration, as it is the contractual 'bargain' of the parties, the Court retains a role in facilitating and directing the arbitration. This might include the address of controversy as to the manner in which the arbitration is to be conducted (noting that the AIFLAM precedent arbitration agreement sets out a number of ways in which arbitration might be conducted but it would be necessary for the parties to agree upon such matters).

There is a dearth of precedent with respect to family law arbitration in the Australian context. I am aware of only 5 judicial determinations with respect to arbitration all of which involve decisions undertaken by me.[36] Three of these decisions relate to registration of Arbitral Awards and/or the review of the Arbitral Award, one to a variation of a registered award to correct a mis-description of a property and one to the facilitation and direction of the arbitration.

[36] This will change as the number of matters referred to arbitration increases. I am aware of applications to review Arbitral Awards pending before Judges Jarrett (Brisbane) and Monohan (Sydney).

In one such decision, orders were made by me as to the date and place of arbitration, the payment of costs at first instance, valuations and disclosure.

The legislative basis for orders regulating the conduct of and preparation of Arbitration are found in:

- Regulation 67E – The power to make an order to facilitate the effective conduct of the relevant property or financial arbitration; and,
- Rule 26B.31 of the *Family Law Rules* – The power of an arbitrator to refer to the Court matters relating to costs of the arbitration, failure of a party to comply with a direction or issues relating to the incapacity of a party.

Determining Questions of law referred by the arbitrator

This power arises under section 13G of the FLA. This section permits the Arbitrator to 'refer a question of law arising in relation to the arbitration' whether of their own initiative or at the request of the parties. The Court must then determine the question of law (or determine that there is no issue to determine) and remit the matter to arbitration.

Attending to registration of the arbitral award

At the completion of the arbitration the arbitrator is required to deliver an arbitral award. Either party may apply to register the award.[37] 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. Further, if application for registration of the arbitral award is made then, unless a valid basis to not register exists (analogous to registration and enforcement of the agreement under the Commonwealth Act and the State and Territory Acts in the same terms) then the arbitral award must be registered.

Importantly, if either party should seek, in any way, to impeach the Arbitral Award (by seeking to invoke a review of the Arbitral Award on the basis of alleged error of law (section 13J FLA) or seeking to set aside or vary the award (section 13K FLA)) then registration of the Arbitral Award is a pre-condition. In this regard, seeking to impeach the award is separate to opposing registration of the Arbitral Award.

The formal requirements with respect to an Arbitral Award are dealt with by Regulation 67P as follows:

> **Making an award**

[37] section 13H(1) FLA

(1) At the end of an arbitration, the arbitrator must make an award.

(2) The award must include a concise statement setting out:

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

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

(3) The award must:

(a) be mechanically or electronically printed; and

(b) be contained in a single document.

(4) The arbitrator must:

(a) give a copy of the award to each party to the award; and

(b) if the award was made in an arbitration under section 13E of the Act--inform the Court that ordered the arbitration that:

(i) the arbitration has ended; and

(ii) an award has been made in relation to all, or part, of the proceeding to which the arbitration relates.

An application to register an arbitral award is dealt with by section 13H FLA, Regulation 67Q and by Rule 26B.33 of the *Family Law Rules*:

FAMILY LAW ACT 1975 - SECT 13H

Awards made in arbitration may be registered in Court

(1) A party to an award made in section 13E arbitration or in relevant property or financial arbitration may register the award:

(a) in the case of section 13E arbitration--in the Court that ordered the arbitration; or

(b) otherwise--in a Court that has jurisdiction under this Act.

(2) An award registered under subsection (1) has effect as if it were a decree made by that Court

FAMILY LAW REGULATIONS 1984 - REG 67Q

Registration of award (Act s 13H)

(1) For section 13H of the Act, an application to register an award made in an arbitration must be in accordance with Form 8.

(2) The applicant must serve a copy of the application on each other party to the award.

(3) A party on whom an application is served may, within 28 days after service, bring to the attention of the Court any reason why the award should not be registered.

Note: An example of a way of bringing a matter to the attention of the Court is by filing an affidavit.

(4) If nothing is brought to the Court's attention under subregulation (3), the Court must register the award.

(5) If a party brings a matter to the Court's attention under subregulation (3), the Court must, after giving all parties a reasonable opportunity to be heard in relation to the matter, determine whether to register the award.

FAMILY LAW RULES 2004 - RULE 26B.33

Registration of awards made in arbitration

(1) A copy of an application to register an arbitration award required to be served under subregulation 67Q(2) of the Regulations must be served within 14 days of the day on which the application is filed.

(2) The applicant must file an Affidavit of Service within 7 days of the day on which a copy of the application is so served.

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, raise objection to the registration of the arbitral award (dealt with in the following section of this paper). Absent objection, (or upon determination of any application unsuccessful objection to registration) the Arbitral Award must be registered (see *C & F*[38]).

[38] [2019] FCCA 373

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,[39] which provides:

> A party on whom an application is served may, within 28 days after service, bring to the attention of the Court any reason why the award should not be registered.[40]

The Act, Regulations and Rules are silent as to the bases upon which registration of an arbitral award might be opposed. The bases upon which registration might be opposed were dealt with in *Braddon & Braddon*[41] and *Pavic & Pavic*[42]. *Pavic* dealt more authoratively with the relevant bases to object to registration at paragraphs 19-39 of *Pavic* and especially at paragraph 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

The effect of registration of an arbitral award is dealt with by section 13H FLA. Upon registration, the arbitral award has the force and effect of a decree of the Court and is enforceable on that basis.

Whilst the arbitral award has force as though it is a degree of the Court, it is subject to specific bases for review or application to set aside or vary as will be dealt with separately.

The grounds for review of an arbitral award are more limited than would apply to the exercise of delegated authority by, for example, a Registrar. That is because the arbitrator does not exercise a delegated authority. Hence, there is no hearing de novo with respect to the determination of an arbitrator and an arbitral award but, instead, judicial review of the award. This arises as the arbitrator has exercised their authority

[39] 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.
[40] The Australian Law Reform Commission Report *Family Law for the Future: An Inquiry into the Family Law System* No 135 (2019), recommends the removal of provisions permitting objection to registration (recommendation 27). As an objection to registration relates to the composition and integrity of the arbitral tribunal it may be preferable to, instead, clearly delineate the bases for objection rather than remove the right of objection.
[41] [2018] FCCA 1845 ("*Braddon")*
[42] [2018] FCCA 3386 ("*Pavic")*

with the consent of the parties and as a consequence of their contractual submission to the arbitrator's authority.

Application to Review an Arbitral Award

Jurisdiction to review the Arbitral Award is found in section 13J FLA:

FAMILY LAW ACT 1975 - SECT 13J

> **Family Court or Federal Circuit Court can review registered awards**
>
> (1) A party to a registered award…may apply for review of the award, on questions of law
>
> (2) On a review of an award under this section, the judge…may:
>
> (a) determine all questions of law arising in relation to the arbitration; and
>
> (b) make such decrees as the judge…thinks appropriate, including a decree affirming, reversing or varying the award

A review of the award is on the basis of judicial review. As such, review of an arbitral award is confined to error of law (again see and *Pavic*).

Application to Set Aside or Vary an Arbitral Award

Jurisdiction to set aside or vary an Arbitral Award is found in section 13K(1) FLA:

> If an award made in section 13E arbitration or relevant property or financial arbitration, or an agreement made as a result of such arbitration, is registered…the court in which the award is registered may make a decree affirming, reversing or varying the award or agreement.

However, section 13K(2) limits the grounds upon which this can occur on the following basis:

> The Court may only make a decree…if the Court is satisfied that:
>
> (a) the award or agreement was obtained by fraud (including non-disclosure of a material matter); 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.

These grounds have elements in common with the exercise of discretion under s.79A (and s.90SN) in that jurisdiction to intervene arises from bias, fraud, duress or similar circumstances as well as impracticality of performance and unenforceability.

Even if a ground is established, the Court retains a discretion as to whether there will be interference with the arbitral award and, if so, whether the arbitral award will be set aside or simply varied (for example the power to vary an arbitral award has been used to correct the address of misdescription of a property to be conveyed pursuant to the arbitral award as the Arbitral Award would be otherwise unenforceable).

Enforcement of an Arbitral Award

Enforcement is dealt with by section 13H(2) FLA and by Regulation 67S

FAMILY LAW ACT 1975 - SECT 13H(2)

Awards made in arbitration may be registered in Court

An award registered under [section 13H(1)] has effect as if it were a decree made by that Court.

FAMILY LAW REGULATIONS 1984 - REG 67S

Enforcement of registered awards

A party to a registered award may apply for enforcement of the award as if the award were an order made under Part VIII of the Act.

All of the powers under Part 25B of the *Federal Circuit Rules 2001* are available to enforce an Arbitral Award.

Present Use of Arbitration

Of the 119 matters referred to Arbitration by the Federal Circuit Court of Australia, 102 (86%) have been referred by Judges sitting in NSW. This comprises:

Parramatta	82/102 (80%)	82/119 (69%)

Sydney	17/102 (17%)	17/119 (14%)
Wollongong	3/102 (3%)	3/119 (2.5%)

On the basis that the average hearing time of a property matter is 1.7 days, this has resulted in a saving of over 200 days of Court hearing time (or 41 sitting weeks – more than a full year of hearings for one Judge).

Each of these matters have finalised in a fraction of the time that they would have if heard by the Court. Each matter would likely have waited substantially longer for Court determination. Because hearings are over-listed, the resolution of these financial matters does not mean that 37 sitting weeks have necessarily been made available. The referral of these matters has, however, eased pressure upon the Court and allowed the more expeditious determination of remaining matters and a far more expeditious determination for the individual litigants involved.

In addition to my own research of Federal Circuit Court usage of arbitration, Matthew Shepherd has undertaken an extensive survey of arbitrators a summary of which has been published in the Australian Family Lawyer.[43] This research is particularly pleasing in that:

- The data obtained is congruent with that of the Court;[44]
- The data suggests that arbitration is not only Court ordered but is also occurring voluntarily and without or in place of Court filing;[45]
- The total time to determination by arbitration, whilst variable, is generally much less than Court determination;[46] and,
- The delivery of arbitral awards is extremely expeditious.[47]

It is also important to note that the same stamp duty exemption that applies to transfers of property pursuant to orders under the Family Law Act 1975 apply to arbitral awards. In February, 2019 the NSW Commissioner of State Revenue issued a new Practice Note on arbitration confirming the exemption between married spouses pursuant to arbitral

[43] Matthew Shepherd, 'Family Law Property Arbitration: Progress, Reviews and How to Increase Uptake' 28 (1) *Australian Family Lawyer* 11.
[44] Ibid "*62 arbitrators [responded]…in respect of 107 arbitration cases*". This data was current as at 7 February, 2019. As at 8 March, 2019 Federal Circuit Court data recorded having made orders referring matters to arbitration in not less than 107 matters.
[45] Ibid "*There were court proceedings underway in 80 cases and none in the remaining 27*"
[46] Ibid "*Time taken from the commencement of the arbitration (defined as the signing of the agreement to arbitrate) to the issue of the award was much more variable. This was due to the usual problem of finding mutually convenient dates for parties, lawyers and the arbitrator; and the parties and lawyers needing preparation time. 28% of cases took four weeks or less, 26% took between four and eight weeks, 23% took between two and three months, 16% took between 3 to 4 months and a few took over four months"*
[47] Ibid "*Arbitral awards were issued by the arbitrators within seven days or less of the hearing in 32% of cases, between eight to fourteen days in 44%, and between fifteen and twenty-eight days in 24%".*

awards (whether the arbitral award is registered or not) and between de facto partners provided that the arbitral award is registered.

Finally, I would commend Matthew Shepherd's excellent article to you for its erudite discussion of how to broach the topic of arbitration with clients. It is a valuable and practical guide and will assist all practitioners in meeting their legislative obligations arising from section 12B.

DIRECTIONS:

THE COURT ORDERS BY CONSENT THAT:

1. Pursuant to section 13E of the *Family Law Act 1975*, the totality of proceedings between the parties pursuant to Part VIII/VIIIAB are referred to Arbitration to be conducted by an Arbitrator (being an arbitrator appearing upon the list of qualified arbitrators maintained by AIFLAM pursuant to Regulation 67B Family Law Regulations 1984) as agreed between the parties or failing agreement between the parties as to an Arbitrator within 14 days of the date of this order then the parties or either of them shall be at liberty to make application in writing to the President for the time being of AIFLAM requesting the appointment of an arbitrator.

2. Upon an Arbitrator being agreed or appointed then each party shall forthwith:

    a. Do all things, sign all documents and give all consents, authorities and instructions as are necessary to retain that Arbitrator including executing an Arbitration Agreement which, in default of agreement between the parties as to the terms of that agreement, shall be in accordance with the AIFLAM Arbitration Kit August, 2016;

    b. Fix a date for Arbitration such date to be no later than 49 days from the date of appointment of the arbitrator;

    c. Attend at such times, dates and places as nominated by the arbitrator for the purpose of conducting and completing the arbitration;

3. Within 28 days of the date of appointment of the arbitrator each party shall:

    a. Pay one half of any fees charged by the Arbitrator (including payment of funds into trust if so requested);

    b. To the extent that they have not already done so, disclose to the other party (by provision of a copy of the document to the other party) each document within their possession, custody or control and which would tend to prove or disprove any allegation of fact raised in the proceedings and, further, any document not disclosed prior to or in accordance with this order cannot be tendered, admitted or relied upon;

    c. Provide to the arbitrator and the other party:

        i. A copy of all documents which they propose to rely upon at arbitration including the application or response in accordance with which orders are sought by that party and one Affidavit of evidence per witness, such affidavit material to contain all of the evidence relied upon by that party at arbitration;

ii. A joint chronology of events setting out those matters that are agreed and where an event is alleged by one party but not agreed by the other party a reference to the evidence of each party as to that event;

iii. A joint statement of agreed facts;

iv. A summary of the findings of fact that each party urges the arbitrator to make and suggested to support the relief that is sought and identifying the paragraph numbers of the affidavit material which is suggested to support the making of such findings of fact.

4. Leave is granted to the Arbitrator and the parties to apply to relist the proceedings on 14 days' notice in the event that further Orders or directions are required and provided that in the event that such liberty is exercised then the person seeking to relist the proceedings shall:

    a. Make the request for relisting in accordance with the Federal Circuit Court protocol as to communication with chambers;

    b. Forthwith notify all other parties and/or the arbitrator of the relisting;

    c. Contemporaneous with notice of relisting serve upon all other parties a minute of orders to be sought together, in the case of the parties, such evidence as is relied upon by the party in seeking such orders.

5. Leave is granted to vacate the future listing of the proceedings upon the arbitrator's award being registered with the Court or upon Terms of Settlement being filed and Orders made in Chambers.

Court Forms

Accessible at http://www.familyCourt.gov.au/wps/wcm/connect/fcoaweb/forms-and-fees/Court-forms/form-topics

- Application in an Arbitration

  Last updated on Apr 01, 2016

- Response to an Application in an Arbitration

  Last updated on Apr 01, 2016

- Subpoena in an Arbitration

  Last updated on Jan 01, 2017

- Notice of Request to Inspect - Arbitration

  Last updated on Jan 01, 2017

- Form 6 - Application for Arbitration

  Last updated on Apr 01, 2016

- Form 7 - Application relating to relevant Property or Financial Arbitration

  Last updated on Apr 01, 2016

- Form 8 - Application to register arbitration award

  Last updated on Apr 01, 2016

- Form 9 - Application to register decree affecting registered arbitration award

  Last updated on Apr 01, 2016

Arbitration Agreement

What This Agreement Does

A. Arbitration is Defined

B. Parties Agreement to Arbitrate

C. Appointment of the Arbitrator

D. Role of the Arbitrator

E. Costs of the Arbitration

F. Conduct of the Arbitration

G. Confidentiality of Arbitration

H. Settlement of Dispute and Termination of the Arbitration

I. Exclusion of Liability and Indemnity

J. Law to be Applied

K. Legal Advice

THIS AGREEMENT is made on the date specified in Schedule A

BETWEEN

Party 1 (as the case may be) who is identified in the Schedule A who is represented by the lawyer referred to in Schedule A

and

Party 2 (as the case may be) who is identified in the Schedule A who is represented by the lawyer referred to in Schedule A

(who together are referred to as "**the parties to the dispute**")

and

The **Arbitrator** who is identified in the Schedule A

ARBITRATION

Arbitration is 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.

Arbitration is authorised and facilitated by the Family Law Act 1975, the Family Law Regulations 1984 and the Family Law Rules 2004 and may be either:

- **Section 13E arbitration** --which is arbitration of Part VIII proceedings, or Part VIIIAB proceedings (other than proceedings relating to a Part VIIIAB financial agreement), carried out as a result of an order made under section 13E (referred to as "**Court ordered arbitration")**; or;
- **Relevant property or financial arbitration** --which is arbitration (other than section 13E arbitration) of:

    (i) Part VIII proceedings, Part VIIIA proceedings, Part VIIIAB proceedings, Part VIIIB proceedings or section 106A proceedings; or

    (ii) any part of such proceedings; or

    (iii) any matter arising in such proceedings; or

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

(Referred to as "**Private arbitration"**)

AGREEMENT TO ARBITRATE

1. The parties to the dispute agree to submit their dispute to arbitration and for that purpose they desire to appoint the Arbitrator to hear arguments and evidence and make a determination to resolve the dispute according to law.

APPOINTMENT OF ARBITRATOR

2. The Arbitrator is appointed on terms and conditions contained in the agreement to conduct the arbitration.

3. The parties to the dispute acknowledge that prior to the appointment of the Arbitrator, the parties and/or their lawyers met with the Arbitrator to settle the terms of this agreement and to prepare the **arbitration plan** which forms part of this agreement in **Schedule A**. The arbitration plan may be changed by consent of the parties or by the direction of the Arbitrator in order to effectively and efficiently conduct the arbitration.

4. This agreement has been entered into by the parties to the dispute with the benefit of their own legal advice about its effect and consequences.

5. The parties to the dispute acknowledge that, unless they otherwise agree in writing or they resolve the dispute by consent, the arbitration;

   (a) will proceed in accordance with the procedure set out in this agreement;

   (b) will result in an award which is capable of registration under the Family Law Act in the Family Court of Australia, the Federal Circuit Court of Australia or the Family Court of Western Australia (as the case may be) and, once registered, the award has the same effect as if it were a decree made by the Court which can only be set aside, varied or appealed in circumstances referred to in Sections 13J and 13K of the Family Law Act.

ROLE OF THE ARBITRATOR

6. The parties to the dispute acknowledge that the Arbitrator is bound by the oath of office and that the adherence to the oath is a term of this agreement.

7. The Arbitrator warrants being qualified as an arbitrator within the meaning of Section 10M of the Family Law Act and he/she meets the prescribed requirements in Regulation 67B of the Family Law Regulations 1984.

8. Notwithstanding any other provision in this agreement, the Arbitrator will ensure that each party is accorded procedural fairness and that the Arbitrator will not allow him/herself to knowingly be affected by bias.

9. The Arbitrator shall not;

   (a) accept any other appointment in relation to any legal proceedings between the parties to the dispute except an appointment as an arbitrator to be made subsequent to the present arbitration and to be the subject of a separate agreement;

   (b) be called to give evidence by either party to the dispute in relation to any matter raised before or during the arbitration except to give evidence in any action where this agreement is sought to be enforced or interpreted or as otherwise he/she may lawfully be required by a Court to give such evidence.

   (c) discuss any aspect of the dispute or arbitration with the lawyer of either party without informing the other practitioner of the substance of such conversation, unless such conversation is for the purpose of making administrative arrangements PROVIDED THAT if the parties have agreed to adopt a mediation procedure as part of the arbitration, this sub-clause is not breached by the Arbitrator speaking about substantive issues to any party or their lawyer in the absence of the other during such mediation procedure.

   (d) disclose to any person who is not a party to this agreement or a lawyer practitioner or other professional advisor or witness for any party to the arbitration any information about the arbitration, the dispute, the parties to the dispute or their business or private affairs which he/she learns in the course of acting as Arbitrator, unless specifically authorised in writing by the affected party or required to do so by the operation of the law.

10. The Arbitrator shall declare any known interest in the dispute or knowledge of any party to the dispute or a witness to be called or any other matter which may reasonably affect his/her appointment as arbitrator or give the impression to a reasonable person with a knowledge and understanding of legal proceedings that

he/she is not an impartial arbitrator and in the event that no declaration is made, he/she warrants that he/she is not in possession of any knowledge or information which would disqualify him/her from acting as the Arbitrator PROVIDED THAT if the Arbitrator knows or has socialised with any professional or expert witness who customarily gives evidence in legal proceedings, the Arbitrator is relieved from the obligation to make such disclosure unless he/she is of the opinion that he/she cannot do justice between the parties if the evidence or credibility of such witness is to be challenged in the arbitration.

11. In the event that the Arbitrator makes the declaration referred to in the previous paragraph, the parties may, by agreement, waive their rights to object to the Arbitrator continuing in his/her role in which case the Arbitrator shall be entitled to enter upon or continue the arbitration.

THE COST OF ARBITRATION

12. The parties to the dispute shall be jointly and severally liable for the Arbitrator's fees and disbursements and the parties to the dispute may agree between themselves how those fees are to be paid.

13. If the arbitration is terminated without the delivery of an award the costs and disbursements paid to the Arbitrator shall be costs in the cause to be determined by the trial judge at the completion of any trial in relation to the dispute.

14. The Arbitrator shall be entitled to charge the following fees and disbursements (GST inclusive) which are specified in Schedule A comprised of;

    (a) a Basic Composite Fee to cover [*here insert services covered by this fee*]

    (b) a Daily Fee.

    (c) Travel and/or accommodation

    (d) Room Hire

15. The Arbitrator's fees and charges are due and payable;

    (a) 7 days from the date that the award is delivered to the parties or to the lawyers for each of the parties; or

    (b) 7 days after the parties agree in writing, or apply to the Court for orders by consent, to resolve the dispute; or

(c) Immediately upon the arbitration being suspended or terminated for any reason other than those stated in the previous two sub-paragraphs, or, the matter being referred to the Court pursuant to Regulation 67K;

16. To better secure the payment of the Arbitrator's fees and disbursements each party shall pay into a nominated trust account described in Schedule A to be held upon trust for the Arbitrator in accordance with this agreement;

(a) That party's share of the sum estimated for the Arbitrator's costs and disbursements in Schedule A; and

(b) That party's share of any additional costs and disbursements of the Arbitrator over and above that which has been estimated in the Arbitration Plan as and when the service giving rise to such costs or disbursements is performed.

17. In the event that no trust account is available for the purpose of the previous paragraph, the parties to the dispute and the Arbitrator shall make alternative appropriate arrangements to secure the Arbitrator's fees and disbursements, and such alternative arrangements shall be described in Schedule A.

18. If the parties to the dispute and the Arbitrator agree upon a venue which needs to be hired or a professionally produced transcript, the cost of the venue hire and the transcript shall form part of the total cost of the arbitration.

19. Whenever an estimate of costs or disbursements is given by the Arbitrator, such estimate shall not limit the ability of the Arbitrator to charge for actual work performed in accordance with this agreement even if the estimate turns out to be incorrect.

20. For the purpose of State Laws dealing with the disclosure and estimates of legal costs and Costs Agreements, this agreement is to be taken to be a costs disclosure and costs agreement (however those expressions may be described in the applicable legislation).

CONDUCT OF THE ARBITRATION

21. The parties to the dispute shall by themselves their servants or agents comply with any direction, interim award or a reasonable request of the Arbitrator. The manner in which an arbitration may be conducted is set out in **Schedule B**.

22. Each of the parties to the dispute will cause the Arbitrator to be provided with

such material as is determined by the Arbitrator to be relevant to the arbitration.

23. The parties to the dispute will behave in a civil manner towards each other and towards every other person involved in the arbitration process.

24. In the event that a procedural direction of the Arbitrator is not complied with the Arbitrator;

    (a) may suspend the arbitration; and

    (b) if the failure to comply exceeds 28 days, must, in the case of a Court Ordered arbitration, refer the matter to the Court that ordered the arbitration; and;

    (c) if the failure to comply exceeds 28 days, must, in the case of a Private Arbitration, terminate the arbitration.

25. The parties to the dispute shall, unless otherwise agreed or excused by the Arbitrator, attend at the arbitration venue and remain there during the course of the arbitration hearing, including any adjourned or re-convened arbitration hearing.

26. If any party to the dispute is a body corporate it shall be represented at the arbitration hearing by an officer or other person who is authorised to compromise the dispute without reference to superior authority.

27. Each party to the arbitration may be represented by a lawyer who shall attend at and participate in the arbitration hearing. In the event of the lawyer being a barrister, that practitioner shall be bound by the terms of this agreement to the same extent as the solicitor instructing him or her is so bound.

28. The parties to the dispute (or their lawyers) shall in consultation with the Arbitrator arrange a venue for the arbitration hearing, such venue being suitable for the type of arbitration hearing which is contemplated. The cost of such venue and any ancillary services provided thereat shall be borne equally between the parties to the dispute unless otherwise agreed in writing and the venue and its cost are described in Schedule A.

29. Each party to the dispute hereby binds their legal personal representatives, legal practitioners, servants or agents to adhere to the terms of this agreement and to comply with any lawful direction given by the Arbitrator.

30. All communications with the Arbitrator may take place at his/her business address or by email at his/her email address. All communications with the parties to the dispute shall be via their lawyers' business addresses or via their email.

CONFIDENTIALITY OF ARBITRATION

31. The parties to this agreement agree that the arbitration is confidential and no evidence shall be called or given by any party to the dispute of anything which took place in the course of the arbitration other than for the purpose of registering, reviewing or enforcing the award or as required by law.

32. The Arbitrator's notes, working papers, computer files and records and audio recording of any proceeding are private to the Arbitrator and no party to the dispute, their servants or agents shall be entitled to inspect, examine, copy or subpoena for production in any legal proceedings any such notes working papers computer files or recordings.

33. The parties to the dispute or their lawyers or their servants or agents shall not disclose to any person not involved in the arbitration any communication information or document flowing from the arbitration process unless such disclosure is made with the written consent of the parties to the dispute or because of the operation of the law.

34. Notwithstanding any confidentiality provisions in this agreement any party to this agreement may give such evidence with respect to the agreement, the conduct of the arbitration and any statement made in the course of the arbitration as may be necessary in any action to;

    (a) conduct any litigation about the validity of the award;

    (b) enforce or interpret this agreement; or

    (c) recover any fees due to the Arbitrator

35. Each party to the dispute and the Arbitrator shall be entitled to make an audio recording of the arbitration hearing upon the following terms and conditions;

    (a) Recordings shall not be made in secret. Each party to the dispute is entitled to make a private recording only upon revealing to the other parties and the Arbitrator their intention to do so;

(b) Any party wishing to make a recording shall be limited to the use of a dictation machine or similar device using an internal microphone. No microphones or other recording equipment are to be set up in the hearing room without consent of all parties and the Arbitrator;

(c) The audio recording shall be for the use of the party making it and shall only be used for the purpose of the arbitration or any legal challenge thereto and for no other purpose;

(d) Any audio recording made by the Arbitrator shall form part of the Arbitrator's private notes.

36. Upon agreement the parties to the dispute may arrange for a transcript of the proceedings to be made by a commercial transcript provider. In the event that the parties agree upon a transcript being made;

(a) The cost of such transcript will be borne in accordance with the agreement of the parties to the dispute;

(b) The parties to the dispute will arrange for the Arbitrator to be provided with a copy of the transcript (including a running transcript and copy audio or video recordings, where available) in both electronic and hard copy form as soon as one is reasonably available, whereupon that material becomes the property of the Arbitrator;

(c) The transcript shall be confidential and shall not be used for any purpose other than to facilitate the expeditious conduct of the arbitration or any review of the award or other process in the Court associated with the arbitration;

(d) Unless the parties to the dispute otherwise agree, the transcript and all recordings used in the making of the transcript shall be destroyed when the award is handed down.

37. Any information or document disclosed by a party to the other party or to their servants or agents pursuant to the duty of disclosure shall only be used for the purpose of the arbitration and upon the expiration of 28 days from the registration of the award each party will either;

(a) Return all documents (including copies) belonging to or sourced from the other party or from any person who produced documents under subpoena

to the owner; or;

(b) With the consent of the owner of the documents, destroy all copies of the documents.

38. All documents provided to the Arbitrator shall upon the expiration of 28 days from the registration of the award either;

(a) Be returned to the party tendering the document; or

(b) With the consent of the owner of the documents be destroyed; or

(c) Be dealt with in a way which is agreed by the parties.

SETTLEMENT OF DISPUTE AND TERMINATION OF THE ARBITRATION

39. In the event that the parties to the dispute reach agreement, they may apply to the Arbitrator for a consent award or, at their election, they may apply to the Court for orders to be made by consent or enter into a Binding Financial Agreement pursuant to Part VIIIA or Part VIIIAB of the Family Law Act.

40. The arbitration will come to an end when;

(a) The Arbitrator delivers the final award;

(b) The parties to the dispute by written agreement terminate the arbitration;

(c) The parties to the dispute apply to the Court for consent orders dealing with the totality of the dispute and such order is made;

(d) The parties inform the Arbitrator that they have entered into a binding financial agreement pursuant to Part VIIIA or VIIIAB of the Family Law Act which deals with all matters in dispute;

(e) The Arbitrator determines that he/she must disqualify himself/herself from any further participation in the arbitration;

(f) The Arbitrator is incapable of continuing with the arbitration by reason of ill health, mental or physical impairment or death;

(g) A party to the dispute dies or becomes incapable of managing their own affairs by reason of physical or mental impairment;

(h) A lawyer certifies in writing that, based upon medical evidence, that

lawyer's client (being a party to the dispute) has lost the capacity to give instructions to any legal practitioner.

41. The Arbitrator shall deliver an award within 28 days after the conclusion of the last day of the arbitration hearing.

42. When the arbitration is terminated by the delivery of a final award, if either party identifies a minor mathematical or other mistake in the award which can be cured under the "slip rule" which is applied to legal proceedings, such party may bring the matter to the attention of the Arbitrator and all other parties to the dispute. If the Arbitrator agrees that an award can be so rectified, he/she may deliver a supplementary award by which the final award is varied.

43. To facilitate the making of a supplementary award, the terms of this agreement are revived to permit the Arbitrator to discharge his/her responsibilities.

44. Any supplementary award delivered under the previous paragraph shall be so marked by the Arbitrator as to identify the changes made and shall contain reasons for the decision. A supplementary award will stand in the place of the original award as if it were the final award.

EXCLUSION OF LIABILITY AND INDEMNITY

45. The Arbitrator and his/her servants or agents shall not be liable to any party to the dispute for any act or omission in the performance of the Arbitrator's obligations under this agreement.

46. The parties to the dispute hereby jointly and severally indemnify the Arbitrator against any claim for any act or omission in the performance of his/her duties under this agreement howsoever arising. Without limiting the generality of the foregoing, the parties to the dispute will jointly and severally indemnify the Arbitrator for any costs and legal expenses incurred by him/her in appointing solicitors and counsel to act on his/her behalf in any proceedings arising from the arbitration or from the terms of this agreement where it is prudent or necessary for the Arbitrator to be legally represented.

47. A minor or technical breach of the obligations imposed by this agreement upon the Arbitrator shall not render the agreement voidable by any party.

48. The parties acknowledge that pursuant to Section 10P of the Family Law Act an Arbitrator has, in performing the functions of an arbitrator, the same protection

and immunity as a Judge of the Family Court has in performing the functions of such a Judge.

49. Any mediation conducted in the course of the arbitration shall be part of the arbitration and this agreement shall apply to such mediation and all things done and said during such mediation as if they had been done or said during the arbitration.

LAW TO BE APPLIED

50. This agreement shall be interpreted and construed in accordance with the Family Law Act and the Family Law Regulations 1984 and the Family Law Rules 2004

51. If any doubt arises about procedural matters the Arbitrator shall apply the Family Law Rules 2004 to resolve the issue in doubt (so long as the applications of the said Rules is not inconsistent with this agreement) and for that purpose, the Arbitrator is taken to have the same power as a Judge of the Family Court applying the said Rules.

52. The parties to the dispute acknowledge and confirm that the power granted to the Arbitrator to resolve the dispute includes a power to award costs under Section 117 (2) of the Family Law Act including;

    (a) The costs of that part of the proceedings which were dealt with by the Court before the matter was referred to arbitration where no costs order was made or the question of costs was expressed to be reserved to the trial Judge or generally;

    (b) The costs of each party in relation to the arbitration including the Arbitrator's fees and disbursements;

    (c) The costs of each party's legal representation (whether fixed on a party-party, solicitor own client or indemnity basis) which are properly recoverable when a costs order is made by a Court.

53. Any indulgence or forbearance granted by the Arbitrator to either party to the dispute shall not render any part of this agreement void or voidable.

54. Any substantial alterations to this agreement shall be evidenced in writing signed by all the parties to the agreement.

55. All Schedules to this agreement are incorporated herein and form a part of this

agreement.

LEGAL ADVICE

56. The parties to the dispute acknowledge that prior to entering into this agreement they received independent legal advice from their own lawyers about the terms and effect of this agreement and about the nature and extent of their rights and obligations hereunder, or, one or both of the parties to the dispute were advised by the Arbitrator to seek such independent legal advice and have decided not to do so.

57. Where any act under this agreement or in the arbitration is to be performed by a lawyer for a party to the dispute that party warrants and acknowledges that they have authorised their lawyer to carry out such act and they will be bound thereby.

58. The parties to this agreement have signed this agreement and agreed to be bound by its terms.

SIGNED by the said **Arbitrator**)

In the presence of)
……

……..…….. …….

SIGNED by the said **Party 1**)

In the presence of)
……

……..…….. …….

SIGNED by the said **Party 2**)

In the presence of)
……

……..…….. …….

ARBITRATION AGREEMENT SCHEDULE A

Paragraph Number	**Description**	
	Date of Agreement	
	Party 1's Name	
	Party 1's Address	
	Party 1's Lawyer	
	Party 1's Lawyer's Address/Contact Details	
	Party 2's name	
	Party 2's Address	
	Party 2's Lawyer	
	Party 2's Lawyer's Address/Contact Details	
	Arbitrator's Name	
	Arbitrator's Address	
	Type of Arbitration	**Court Ordered or Relevant Property or Financial Arbitration** *(delete whichever is not applicable)*
14(a)	**Basic Composite Fee**	
14(b)	**Daily Fee**	
14(c)	**Any travel or accommodation specifically agreed between the parties.**	
14(d)	**Room Hire**	

16	**Nominated Trust Account**	
17	**Alternative arrangement to secure Arbitrator's fees**	

…….……..……...

….……..……...

Party 1 Party 2

…….……..……...

Arbitrator

ARBITRATION PLAN	
Outline of Issues in Dispute	
Type of arbitration *(on the papers full hearing etc)*	
Date of Arbitration Hearing	
Venue	
Daily Cost of Venue	
Application of rules of evidence (Reg 67O)	
Transcript	
Cost of Transcript	
Date for Compliance with all directions	
Estimated Time Needed for the Arbitration	
Estimated Total Arbitrator's Costs and Disbursements	

PRELIMINARY DIRECTIONS

(Suggested Only – Change to Fit Each Case)

1. That the parties exchange lists of documents required to be provided by ……..(insert date)…….

2. That the documents on the lists so exchanged;

   (a) Be provided for inspection and copying; or

   (b) If not available, an explanation be provided for the unavailability;

   by……..(insert date)……..

3. That by ……..(insert date)……. the parties;

   (a) Agree on the value of any asset;

   (b) Agree on a single expert to value such asset;

   (c) In the absence of agreement, obtain their own valuation of any asset in dispute.

4. That the applicant deliver to the arbitrator and the responded by ……..(insert date)…….;

   (a) all affidavits, a statement of financial circumstances or a statement of evidence in chief upon which he/she relies; and

   (b) a memorandum including an outline of what award he/she seeks, what findings should be made by the arbitrator, a brief chronology and a list of assets and liabilities;

5. That the respondent deliver to the arbitrator and the applicant by ……..(insert date)…….:-

   (a) all affidavits or statements of evidence in chief a statement of financial circumstances upon which he/she relies; and;

   (b) a memorandum including an outline of what award he/she seeks, what findings should be made by the arbitrator, a brief chronology and a list of assets and liabilities;

6. That the legal practitioners for each of the parties communicate with each other before the arbitration hearing with a view to preparing a joint list of assets and liabilities indicating clearly where the differences lie.

7. That an arbitration hearing take place at the (Venue) on a date convenient to all of the parties as soon as practicable after the ……..(insert date)……. at which any evidence or cross-examination which may be necessary can be heard.

(Please delete or amend directions as applicable)

……..……..……...
….……..……...

Party 1 Party 2

……..……..……...

Arbitrator

SCHEDULE B

Manner in which the Arbitration May be Conducted

1. **A fully contested hearing** at which the arbitrator acts as if he/she were a Judge of the Court and the hearing is conducted as if it was a hearing in Court with the application of the applicable Rules of Court (with the arbitrator having the right to vary or dispense with the operation of such rules); or

2. **A modified fully contested hearing** where the procedure is modified so that the arbitrator may;

   (a) actively direct, control and manage the conduct of the arbitration;

   (b) seek to limit the issues by suggesting to the parties to the dispute that concessions on the evidence or matters of practice and procedure may be appropriately made;

   (c) conduct a hearing and deliver an award on a single issue with such award forming a part of the final award, if necessary;

   (d) give directions about the matters in relation to which the parties are to present evidence;

   (e) give directions about who is to give evidence in relation to each issue in dispute;

   (f) give directions about how evidence is to be given and in particular;

   (g) that particular evidence is to be given orally;

   (h) that particular evidence is to be given by affidavit or a sworn statement;

   (i) the order in which evidence is to be given including any evidence in reply;

   (j) that evidence in relation to a particular matter not be presented by a party to the dispute;

   (k) that evidence of a particular kind not be presented by a party to the dispute;

   (l) limiting the time for the giving of evidence;

   (m) limiting cross-examination of a particular witness or all witnesses in

general;

(n) limiting the number of witnesses who are to give evidence in the arbitration.

(o) if the arbitrator considers that expert evidence is required—give directions about:

(i) the matters in relation to which an expert is to provide evidence; and

(ii) the number of experts who may provide evidence in relation to a matter; and

(iii) how an expert is to provide the expert's evidence;

(p) ask questions of, and seek information or the production of evidence from, parties, witnesses and experts (whether they are formally giving evidence or not) on matters relevant to the arbitration;

(q) give general directions about practice and procedure with a view to ensuring that the proceedings are not protracted and the costs to the parties to the dispute are minimised and are proportional to the matters in issue;

(r) with the consent of both parties (which consent is signified by the inclusion of this sub-clause in this schedule) dispense with the operation of the rules of evidence, the Evidence Act 1995 (Commonwealth) and inform himself/herself of matters relevant to the dispute by such means as he/she considers appropriate;

(s) seek answers to questions (whether orally or in writing) at any time from either or both parties on any issue which appears relevant to the arbitrator;

(t) give directions about the use of written submissions including directions about;

(i) length of written submissions;

(ii) limiting the time for oral argument;

(iii) time allowed for written submissions

(iv) the order in which submissions will be prepared

(u) with the consent of all parties, suspend the arbitration at any time and conduct a mediation of the dispute in accordance with paragraph 12 m. of this agreement without thereafter being disqualified from continuing with the arbitration if the mediation does not result in a settlement; or;

3. **An arbitration on the papers** where;

(a) The parties agree upon all relevant facts; and

(b) The arbitrator is asked to prepare an award upon the acceptance of the agreed facts; or;

4. **A combination of the above, with the parties agreeing upon the elements of the practice and procedure in the arbitration plan.**

Powers of the Arbitrator

5. The Arbitrator may do any of the following things;

(a) meet with the parties to the dispute in the presence of their legal practitioners;

(b) adjourn any arbitration hearing and set a date for the resumption of the hearing;

(c) meet with the legal practitioners for the parties in the absence of the parties for the purpose of making administrative arrangements and making procedural directions;

(d) pursuant to section 34 of the Acts Interpretation Act (1901), administer the oath to any witness who gives evidence in the arbitration and to accept any evidence contained in an affidavit or statement sworn for the purpose of the arbitration or any Court proceedings;

(e) make interim awards in relation to any matter of practice and procedure including but not limited to;

(i) production of documents;

(ii) interim costs including security for costs;

(iii) arbitration funding awards;

(f) with the consent of the legal practitioners, speak with either party during a hearing otherwise than in the course of that party giving evidence;

(g) take into account anything said by either party during the arbitration (whether that party was under oath or not and whether the statement is made in the course of giving evidence or otherwise) or any conduct witnessed by the arbitrator which is relevant to the determination of the dispute;

(h) meet or otherwise communicate with the parties' legal practitioners at any time in order to;

(i) make administrative arrangements for the effective conduct of the arbitration;

(ii) deal with applications for adjournment, extension of time or other minor procedural matters;

(iii) vary the manner in which the arbitration is to be conducted;

(i) direct who can be present from time to time at the venue where the arbitration is conducted and who can be present in the arbitration hearing room from time to time (provided that nothing in this sub-paragraph shall authorize the exclusion of any party to the dispute or their legal practitioners without their consent);

(j) inspect any documents forming part of the Court record in proceedings commenced in any Court by the parties to the dispute or either of them provided that he/she shall identify all documents so inspected to both parties and afford them an opportunity of inspecting same;

(k) conduct any view as may be agreed to be necessary by the parties to the dispute or which the arbitrator determines to be necessary after hearing submissions from each party to the dispute on that issue;

(l) express a preliminary opinion or view about the likely outcome of the arbitration or a part thereof without thereafter having to disqualify himself/herself from further hearing the arbitration;

(m) with the consent of the parties to the dispute, suspend the arbitration for the purpose of permitting the parties to the dispute to resolve the dispute or any part thereof by consent through mediation or otherwise and in

particular the arbitrator is entitled (without entering into a separate mediation agreement);

(i) act as a mediator when the arbitration is suspended to assist the parties in reaching an agreement on how the dispute or any part thereof should be resolved;

(ii) to conduct private discussions with each party in the presence of their legal practitioners and seek from each party their best offer of compromise;

(iii) if the issue to be resolved involves two witnesses compromising a question of valuation or other such expert evidence, to conduct private discussions with each witness in the presence of the legal practitioner for the party calling such witness and seek to attain a compromise of the conflict;

(iv) inform the parties of any preliminary views he/she has formed about the possible outcome of the arbitration or any part thereof;

(v) to resume the arbitration if a resolution does not appear possible or likely without being called upon to disqualify himself/herself for any alleged bias;

(vi) hear and determine any application for him to disqualify himself/herself from further acting as the arbitrator;

(vii) terminate the arbitration if he/she is of the opinion that notwithstanding his/her ability to put matters out of his/her mind it is not possible for him/her to continue with the arbitration unaffected by bias.

(n) invite the parties at any time during the arbitration to modify in writing the terms of this agreement or enter into an arbitration agreement with any other person pursuant to the Commercial Arbitration legislation of the State where the arbitration is taking place in order to better facilitate the efficient conduct of the arbitration and resolve all issues raised by the dispute;

(o) conduct a hearing and make an interim award on any specific issue which can be decided before the making of a final award;

(p) continue with the arbitration on an undefended basis and proceed to make an award if, after a mediation pursuant to sub paragraph m. hereof, one party decides not to participate further in the hearing;

(q) continue with the arbitration on an undefended basis and proceed to make an award if a Court confronted with similar facts and circumstances would proceed on an undefended basis.

(r) make a costs award at any stage of the proceedings upon such terms and conditions as he/she considers appropriate having regard to the matters contained in Section 117 of the Family Law Act.

……..……...
….……...

Party 1 Party 2

……..……...

Arbitrator