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ARBITRATION OF FAMILY SEPARATION ISSUES – A USEFUL ADJUNCT TO MEDIATION AND THE COURT PROCESS

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1 Introduction

Currently, section 2(a) of the *Arbitration Act* 42 of 1965 prohibits arbitration in respect of "any matrimonial cause or any matter incidental to any such cause". The Act was enacted almost half a century ago and is based on the old English *Arbitration Acts* of 1889 and 1950.¹ It has never been amended or overhauled, despite some investigations by the South African Law Commission and the Law Reform Commission. In 2001 the Law Commission recommended that the Act should be amended to permit arbitration in matrimonial property disputes which do not affect the rights of the spouses' children.² The Commission annexed a new Draft Bill to their report. Clause 5(1) of that Bill reads as follows: "Arbitration is not permissible in respect of any matrimonial cause or any matter incidental to any such cause, except for a property dispute not affecting the rights or interests of any minor child of the marriage." There has recently been renewed interest in the *Arbitration Act* and it was announced in the press that South Africa's outdated system of arbitration of commercial disputes is to be revamped and modernised and that a Draft Bill governing domestic and international arbitration would be presented to the Cabinet early in 2014.³ Although no specific mention of matrimonial matters was made in this announcement, it appears that comments on the content of clause 5(1) of the Draft Bill were obtained from the Law Society of South Africa's Family Law Committee.⁴

Hitherto our courts have interpreted section 2 of the *Arbitration Act* in such a way that any agreement between divorced or divorcing parties to appoint an arbitrator to

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¹ Buttler 1994 *CILSA* n 3.

² SALC *Report on Domestic Arbitration* paras 3.28-3.30.

³ Ensor 2013 <http://www.bdlive.co.za/national/2013/12/30/arbitration-system-for-commercial-disputes-to-be-overhauled>.

⁴ LSSA Family Law Committee "Submissions on Domestic Arbitration".

resolve property or children's issues would be declared invalid. In *Pitt v Pitt*⁵ an oral agreement to appoint an arbitrator to go into the proprietary rights in relation to the furniture of divorced parties was found to be in contravention of the *Arbitration Act*. In *Ressel v Ressel*⁶ the court found that a settlement agreement which contained a clause to the effect that any disputes regarding the place of access to a small boy by the mother would be referred for summary decision by an experienced advocate must have been made an order of court *per incuriam*.

The purpose of this article is to illustrate that section 2 of the *Arbitration Act* and also clause 5(1) of the Draft Bill are clearly out of sync with the demands of modern times.⁷ As far back as 1993 Cohen⁸ asked if the preclusion of matrimonial issues from arbitration in South Africa was justifiable.

Although family arbitration should not be seen as a panacea, cure or substitute for other methods of resolving family disputes,⁹ there is strong public policy favouring arbitration today. Any recommendations that arbitration should be applied to family law disputes should be anchored in an analysis of the specific character of the arbitral remedy. This article will therefore begin with a broad overview of the nature of arbitration. Secondly, the modern-day demand for family arbitration will be discussed. As will be seen, it is a particularly desirable remedy where separating parties have already opted for mediation but the process has proved unsuccessful in resolving all issues. Inherent in the demand for family arbitration are the many advantages of this form of alternative dispute resolution, which will also be touched upon. Thirdly, current trends in England, Australia, the United States of America, Canada and India will be analysed so as to identify a suitable family law arbitration model for South Africa. Special attention will be paid to decisions on which matters should be arbitrated, if family arbitration should comply only with substantive law,

⁵ *Pitt v Pitt* 1991 3 SA 863 (D) 864I.

⁶ *Ressel v Ressel* 1976 1 SA 289 (W) 291F-H.

⁷ It appears that the whole Act is in fact totally outdated: SALC *Report on Domestic Arbitration* viii-ix, para 1.17.

⁸ Cohen 1993 *De Rebus* 642. Also see Wamhoff and Burman 2002 *Social Dynamics* 162.

⁹ Walker 2008 *J Am Acad Matrimonial Law* 525; Carbonneau 1986 *U Ill L Rev* 1126; Belinkie 1991 *Conn BJ* 319.

who should act as arbitrators, whether family arbitration should be voluntary or compulsory, what the court's role in the family arbitration process should be, and whether family law arbitration should be regulated by the existing *Arbitration Act* or by a separate statute with specialised rules for family matters.

2 The nature of arbitration

Arbitration is probably the oldest form of alternative dispute resolution (ADR) and dates back to the early Greeks and Romans.¹⁰ When a dispute arose, they would agree upon a judge to settle it.¹¹ An arbitrator was once described as "the Oracle who gave people 'The Answer'".¹²

Generally defined, arbitration in South Africa today is a private process whereby the parties refer an existing or any future dispute to arbitration pursuant to an enforceable agreement between them.¹³ Section 6 of the *Arbitration Act* makes provision for the stay of legal proceedings where there is an arbitration agreement between disputing parties. Therefore, although arbitration takes place outside the court, if one party is reluctant to carry out the arbitration agreement, the other party will have to look to the court to enforce the agreement.¹⁴ In the arbitration agreement the parties may select a third person, the arbitrator, on the basis of his or her expertise in the subject-matter of the dispute.¹⁵ If the parties do not appoint or cannot agree on the appointment of an arbitrator, the court has the power to appoint one for the parties.¹⁶ In the arbitration agreement the parties may further choose their own procedural and discovery rules for the process. They may, for example, establish proceedings which are less formal and more flexible, with relaxed

¹⁰ Celli 1993 *NJ Law* 41.

¹¹ Family Law Council of Australia 2007 <http://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Discussion%20paper%20on%20arbitration%20in%20family%20law%20matters.pdf> para 2.1.

¹² Family Law Council of Australia 2007 <http://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Discussion%20paper%20on%20arbitration%20in%20family%20law%20matters.pdf> para 2.1.

¹³ Sections 1 and 3 of the *Arbitration Act* 42 of 1965 (the *Arbitration Act*); Buttler 1994 *CILSA* 121.

¹⁴ Buttler 1994 *CILSA* 121.

¹⁵ Buttler 1994 *CILSA* 121; SALC *Report on Domestic Arbitration* para 1.04. In terms of s 9 of the *Arbitration Act* the reference is to a single arbitrator unless a contrary intention is expressed in the arbitration agreement.

¹⁶ Section 12(2) of the *Arbitration Act*.

rules of evidence, and they may schedule the proceedings at mutually convenient times. If the parties have not addressed these issues, section 14 of the *Arbitration Act* sets out the powers of an arbitrator regarding the making of discovery, the delivery of pleadings and the taking of evidence. In terms of section 15(1) there should be a hearing at which each party has the right to be heard. Customarily an arbitration hearing is relatively informal, depending of course on the parties' or the arbitrator's prescriptions in this regard. The arbitrator needs to follow a process which is fair to all involved,¹⁷ which does not necessarily mean that he or she is bound by substantive law.¹⁸ The Act further prescribes that the oral evidence of witnesses should be recorded.¹⁹ After reviewing the pleadings and evidence, the arbitrator must resolve the dispute by making an award within a specified time frame.²⁰ In terms of section 24 the award must be in writing and signed by the arbitrator.²¹ An arbitrator is also allowed to make an interim award at any time within the period allowed for making an award.²² Unless the arbitration agreement provides otherwise, an award is final and is not subject to appeal on a point of law.²³ On application by any party and after notice to the other party, an award may be made an order of court in terms of section 31(1) of the Act. Section 31(3) stipulates that an award which has been made an order of court may be enforced in the same manner as any judgment or order to the same effect. In principle, however, parties usually comply with the terms of an award without the need for judicial intervention because arbitration is a consensual process and the parties have agreed that the arbitrator's decision will constitute the final and binding resolution of the dispute submitted.²⁴ Nonetheless, in terms of section 31(2) the court may correct in the

¹⁷ Buttler 1994 *CILSA* 121.

¹⁸ Buttler 1994 *CILSA* 126.

¹⁹ Section 17 of the *Arbitration Act*.

²⁰ Section 23(a) of the *Arbitration Act*, for example, makes provision for a period of four months from the date on which the arbitrator was appointed. The parties may in writing extend the time for making the award. However, ss 42 and 45 of the Draft Bill propose certain changes to the existing Act in this regard.

²¹ Although this section of the *Arbitration Act* does not make provision for a reasoned award, s 43 of the Draft Bill provides that an award must be reasoned. In s 44 of the Draft Bill provision has also been made for an award, with the consent of the arbitration tribunal, on agreed terms.

²² Section 26 of the *Arbitration Act*.

²³ Section 28 of the *Arbitration Act*. Also see Buttler 1994 *CILSA* 126. If the parties so determine, arbitration may nevertheless be non-binding.

²⁴ Belinkie 1991 *Conn BJ* 317.

award any clerical mistake or any patent error arising from any accidental slip or omission. An award may also be remitted to arbitration by the parties by agreement or by the court on good cause shown by a party or the parties to the arbitration.²⁵ An award can further be set aside by the court on the limited grounds listed in section 33(1). These grounds are where the arbitrator has misconducted himself, has committed any gross irregularity in the conduct of the proceedings or has exceeded his powers or where an award has been improperly obtained.²⁶

It is clear that arbitration is a process which lies somewhere between traditional litigation and mediation.²⁷ Like litigation, it is adjudicatory in the sense that it is referred to a third party for decision making, but like mediation it is a flexible and private process in which the parties may designate the decision maker, determine the procedures to be followed in the proceedings and select the laws which are to determine the merits of the dispute. Where an arbitration agreement specifically provides that the arbitration will be non-binding,²⁸ arbitration resembles mediation even more closely, in that the third party, acting impartially, assists parties to identify issues, reduces obstacles to communication, maximises the exploration of alternatives, and helps the parties to reach voluntary agreements.²⁹

According to the South African Law Commission, the primary object of arbitration is to achieve the fair resolution of disputes by an independent and impartial arbitral tribunal without unnecessary delay or expense.³⁰ A second object is party autonomy, which entails that the parties should be free to agree on how their dispute should be resolved, subject only to those safeguards that are necessary in the public interest.³¹ As a third object of arbitration the Commission proposed balanced powers for the

²⁵ Section 32 of the *Arbitration Act*.

²⁶ Besides these statutory powers of the court, the court also enjoys certain powers under common law such as not to enforce an arbitration agreement and to grant an interdict to prevent an arbitration from proceeding until the court has determined the validity of the proceedings. In this regard see Buttler 1994 *CILSA* 124 and the cases cited there in notes 45 and 47.

²⁷ See Family Law Council of Australia 2007 <http://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Discussion%20paper%20on%20arbitration%20in%20family%20law%20matters.pdf> para 2.8.

²⁸ As is allowed in terms of s 28 of the *Arbitration Act*.

²⁹ Baker 2011-2012 *U Mem L Rev* 846.

³⁰ SALC *Report on Domestic Arbitration* para 1.03.

³¹ SALC *Report on Domestic Arbitration* para 1.04.

court.³² It is explained that although court support for the arbitration process is essential, it is necessary to guard against abuse of the court's powers by a party to an arbitration as a delaying tactic.

3 The need for family law arbitration

It is generally accepted that the adversarial system of litigation, which works well in most other fields of our law, is not well suited to resolving family law disputes.³³ The system is not designed to deal with the huge emotional trauma and the many non-legal issues which usually accompany family law disputes, especially family separation.³⁴ It is also clear that the partisan approach or "winner-takes-all" mentality that is required from attorneys and advocates in adversarial litigation exacerbates conflict and hostility between parties³⁵ – something which is particularly detrimental to family members who will still be in an ongoing relationship, albeit it a relationship that takes a somewhat different form, after the dispute has been resolved.³⁶ The fact that litigation has become excessively expensive and is often protracted and intricate because of cumbersome procedural matters tends to exacerbate negative emotions.³⁷ Furthermore, South Africa still does not have a family court, and judges of the High Court are usually generalists with no specialised training in handling intricate and complex family law issues involving child care and contact and the financial arrangements upon divorce or family breakdown.³⁸ Our over-crowded dockets and the resulting pressure on courts to deal with cases expeditiously³⁹ also make it difficult for judges to examine their cases thoroughly. It has even been alleged that some judges of the High Court have no interest in family

³² SALC *Report on Domestic Arbitration* para 1.05.

³³ Carbonneau 1986 *U Ill L Rev* 1182; Geldenhuys, Korn and Kopping-Pavars 2009 *De Rebus* 27; Belinkie 1991 *Conn BJ* 309. Also see the comments Smith J in *G v G* 2003 5 SA 396 (Z) 412A-D.

³⁴ Tesler "Collaborative Family Law" 391; De Jong 2010 *TSAR* 515. Also see *Clemson v Clemson* 2000 1 All SA 622 (W) 627.

³⁵ Folberg, Milne and Salem *Divorce and Family Mediation* 4.

³⁶ Hastings 2005 *New Hamp BJ* 52.

³⁷ Carbonneau 1986 *U Ill L Rev* 1119-1122; Belinkie 1991 *Conn BJ* 309.

³⁸ Belinkie 1991 *Conn BJ* 310; Singer 2012 *Family Lawyer* (Part 2) 1498; Kessler, Koritzinsky and Schlissel 1997 *J Am Acad Matrimonial Law* 336.

³⁹ In terms of the DoJ&CD's new "Norms and Standards for the Performance of Judicial Functions" (Item 5.2.5 in GN 147 in GG 37390 of 28 February 2014), High Court cases must now be finalised within 1 year from the date of the issuing of summons.

law matters and regard these matters as less important than other cases.⁴⁰ Even so, judges with no specialised training, interest or experience in family law may be assigned to very delicate family law matters as a result of the random rotation system we have in our courts.⁴¹ Different judges may also be assigned to different matters arising from one and the same family law dispute over a period of time.⁴²

Another problem with the adversarial system of litigation is that parties fear the power of a judge, whom they have not met and over whose selection they had little or no control, who will determine the course of their and their family's lives based on a limited amount of contact and the judge's subjective observations.⁴³ In fact, the parties would like to make their own decisions on private matters that affect them directly.⁴⁴ Since the advent of no-fault divorce, they have been in a position to decide when their marriage should come to an end.⁴⁵ As parties have the option to enter into an antenuptial agreement, they are also able to determine the financial consequences of their marriage and, possibly, their divorce. It follows that parties would also like to have the freedom to tailor the procedure to be followed to meet the needs of their particular dispute.⁴⁶

To counter the problems associated with the adversarial system of litigation in family matters, to reduce the state's intrusion into the private lives of families and to give parties greater autonomy alternative dispute resolution processes have become necessary.⁴⁷ In foreign jurisdictions⁴⁸ and in South Africa as well, mediation has become the most widely accepted alternative dispute resolution procedure in family law cases.⁴⁹ Not all cases are suitable for mediation, however.⁵⁰ There may be

⁴⁰ LSSA Family Law Committee "Submissions on Domestic Arbitration" 63-64.

⁴¹ Celli 1993 *NJ Law* 42.

⁴² Singer 2012 *Family Lawyer* (Part 1) 1359.

⁴³ Belinkie 1991 *Conn BJ* 310.

⁴⁴ Scott-MacNab and Mowatt 1986 *De Jure* 322, 324; Mnookin and Kornhauser 1979 *Yale LJ* 952-958.

⁴⁵ Trengove 1984 *De Rebus* 355 says that "[a]s a result of the no-fault principle, the decision whether a marriage should be dissolved now rests largely in the hands of the parties themselves ...".

⁴⁶ Buttler 1994 *CILSA* 122.

⁴⁷ Cohen 1993 *De Rebus* 642.

⁴⁸ See paras 5.2-5.3 below.

⁴⁹ De Jong 2010 *TSAR* 517.

⁵⁰ See De Jong 2010 *TSAR* 522.

scenarios in which the parties are emotionally incapable of or unwilling to commit to an informal dispute resolution process facilitated solely by a neutral mediator.⁵¹ In those cases a more formal alternative dispute resolution process where the parties' attorneys are present throughout the process, such as arbitration, is more appropriate than mediation and may well be preferred to a long and expensive trial.⁵² There may also be situations in which the parties are indeed good candidates for mediation, but where they are unsuccessful in reaching an agreement on some or all of the issues in dispute in the mediation process. In such cases arbitration can be a useful adjunct to mediation in getting past the impasse.⁵³ For example, the arbitration of a single or preliminary issue such as the valuation of business assets or shares could be of benefit in that once the value of the property or shares has been determined the likelihood of settlement is increased.⁵⁴ Arbitration may also prove to be a satisfactory last port of call when compromise proves to be elusive for parties in the mediation process.⁵⁵ It is therefore clear that there is a definite need for arbitration – either on its own or in conjunction with mediation.⁵⁶

Further, in view of its success as an alternative mechanism to court litigation in the context of labour and commercial dispute resolution, arbitration certainly deserves consideration as a possible alternative to traditional court proceedings in family law matters.⁵⁷

It also appears that arbitration, albeit in a non-binding form, is already in use or is being advocated in certain family law matters in South Africa. In terms of section 49(1) of the *Children's Act* 38 of 2005, a children's court may before deciding any children's issue order a lay-forum hearing in an attempt to settle the matter or issue out of court. Besides the mediation offered by traditional authorities⁵⁸ and by family

⁵¹ Price 2012 *Fla BJ* 48.

⁵² Celli 1993 *NJ Law* 43; Carbonneau 1986 *U Ill L Rev* 1181.

⁵³ Price 2012 *Fla BJ* 50.

⁵⁴ Family Law Council of Australia 2007 <http://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Discussion%20paper%20on%20arbitration%20in%20family%20law%20matters.pdf> para 9.12. Also see Singer 2012 *Family Lawyer* (Part 1) 1353.

⁵⁵ Singer 2012 *Family Lawyer* (Part 1) 1353; Thorpe 2008 *Family Law* 27.

⁵⁶ Price 2012 *Fla BJ* 48, 52.

⁵⁷ Carbonneau 1986 *U Ill L Rev* 1151-1152.

⁵⁸ Section 49(1)(c) of the *Children's Act* 38 of 2005 (the *Children's Act*).

advocates, social workers, social service professionals or other suitably qualified persons,⁵⁹ lay-forum hearings may include a family group conference.⁶⁰ In this regard section 70(1) of the Act permits the children's court to set up a family group conference with the parties involved in a matter and other members of a child's family, in order to find solutions to any problem involving the child. In terms of section 70(2)(c), the children's court must consider the report on the conference when the matter is heard. It should also be noted that *Shariah* law, which will play a more prominent role if the draft *Muslim Marriages Bill*⁶¹ is enacted, encourages arbitration before resorting to a decision by Islamic authorities, specifically with regard to divorce.

Furthermore, the Department of Justice and Constitutional Development has very recently published two documents that could well set the stage for arbitration in family law matters in South Africa. The first is the new "Norms and Standards for the Performance of Judicial Functions" of the Office of the Chief Justice,⁶² which *inter alia* states in its objectives that "[t]hese norms and standards seek to achieve the enhancement of access to quality justice for all; to affirm the dignity of all users of the court system and to ensure the effective, efficient and expeditious adjudication and resolution of all disputes through the courts, where applicable".⁶³ The second is the latest "Amendment of Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa" of the Rules Board for Courts of Law,⁶⁴ which determines that the objectives of the new chapter⁶⁵ which is to be inserted in the rules are to give effect to

(1) section 34 of the Constitution of the Republic of South Africa, 1996, which guarantees everyone the right to have any dispute that can be resolved by the application of the law decided in a fair public hearing before a court or, where appropriate, *another independent and impartial tribunal or forum*; and

⁵⁹ Section 49(1)(a) of the *Children's Act*.

⁶⁰ Section 49(1)(b) of the *Children's Act*.

⁶¹ The Draft Bill is annexed to SALRC *Islamic Marriages and Related Matters Report*.

⁶² GN 147 in GG 37390 of 28 February 2014.

⁶³ Item 2. This objective is similar to some of the objectives of the *Family Procedure Rules* 2010 which set the stage for family arbitration of financial disputes in England. See para 5.1 below in this regard.

⁶⁴ GN 183 in GG 37448 of 18 March 2014.

⁶⁵ Chapter 2.

(2) the resolution of the Access to Justice Conference held in July 2011, under the leadership of the Chief Justice, towards achieving delivery of accessible and quality justice for all, that steps be taken to introduce alternative dispute resolution mechanisms, preferably court-annexed mediation or *the Commission for Conciliation, Mediation and Arbitration kind of alternative dispute resolution*, into the court system [my emphasis].⁶⁶

Lastly, as the range of family disputes and failed relationships for which the family justice system has responsibility expands – civil marriages, civil unions and customary marriages now and Muslim and Hindu marriages and domestic partnerships predictably to come – the diversion of a certain number of cases out of our overloaded court system to private arbitration becomes increasingly necessary.⁶⁷

4 The advantages of family law arbitration

Arbitration offers a number of distinct advantages as an alternative to other forms of dispute resolution.⁶⁸

The principle advantage is that the parties themselves, guided by their legal representatives (if they are represented), can select the person whom they wish to arbitrate their dispute.⁶⁹ They may choose an arbitrator in whom they can repose confidence⁷⁰ – one with experience and expertise in family law matters and even more particularly, experience and expertise related to the particular kind of controversy presented.⁷¹ The choice of one's judge is at the same time an important part of the modern trend towards "private ordering",⁷² which has at its foundation party autonomy.

Related to the principle advantage is the fact that the parties can appoint one and the same arbitrator to deal with the dispute from start to finish.⁷³ This will result in

⁶⁶ Rule 70.

⁶⁷ Also see Thorpe 2008 *Family Law* 27 with regard to the position of the family justice system in England.

⁶⁸ Singer 2012 *Family Lawyer* (Part 1) 1353.

⁶⁹ Singer 2012 *Family Lawyer* (Part 1) 1359; Kessler, Koritzinsky and Schlissel 1997 *J Am Acad Matrimonial Law* 336; Sullivan 2010 <http://www.aaml.org/sites/default/files/ARBITRATION.pdf>.

⁷⁰ Singer 2012 *Family Lawyer* (Part 2) 1498.

⁷¹ Kessler, Koritzinsky and Schlissel 1997 *J Am Acad Matrimonial Law* 336-337.

⁷² See note 44 above. See also Kessler, Koritzinsky and Schlissel 1997 *J Am Acad Matrimonial Law* 336.

⁷³ Singer 2012 *Family Lawyer* (Part 1) 1359-1360.

continuity and an informed and holistic approach by the arbitrator to all the different issues that may arise from a dispute.

Another very important advantage is the flexibility of the process.⁷⁴ Firstly, the parties may select the issues to be arbitrated.⁷⁵ For example, they may decide to appoint an arbitrator to arbitrate all the issues involved or they may decide to refer only one or more specific issues (such as the care and contact arrangements, the valuation of properties or business assets or the question of whether property or funds within a trust or company form part of the spouses' assets upon divorce) to arbitration. Secondly, the parties are able to retain control of the proceedings by deciding when, where and how the issues are to be dealt with by the arbitrator.⁷⁶ They can decide that the issues must be determined all at once or sequentially at specified intervals of time to allow for the mediation or the negotiation of other issues in the interim.⁷⁷ Hearings can be scheduled at a time of day that suits business or family commitments and at an easily accessible venue.⁷⁸ The parties can determine the level of formality of the proceedings by deciding how and when discovery should take place, what rules of evidence should apply and whether the arbitrator is to hear oral evidence or just submissions at the hearing.⁷⁹ The parties can therefore mould the process to the needs of their particular dispute.⁸⁰ In this way arbitration further promotes party autonomy.⁸¹ Because of its flexibility, arbitration can also avoid the unnecessary formality of court processes, which parties often find alienating.⁸²

⁷⁴ SALC *Report on Domestic Arbitration* para 1.04.

⁷⁵ Singer 2012 *Family Lawyer* (Part 1) 1360.

⁷⁶ Family Law Council of Australia 2007 <http://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Discussion%20paper%20on%20arbitration%20in%20family%20law%20matters.pdf> para 1.8; Singer 2012 *Family Lawyer* (Part 1) 1360; Celli 1993 *NJ Law* 42; Buttler 1994 *CILSA* 121.

⁷⁷ Singer 2012 *Family Lawyer* (Part 1) 1360; Sullivan 2010 <http://www.aaml.org/sites/default/files/ARBITRATION.pdf>.

⁷⁸ Singer 2012 *Family Lawyer* (Part 1) 1360.

⁷⁹ Singer 2012 *Family Lawyer* (Part 2) 1496; Kessler, Koritzinsky and Schlissel 1997 *J Am Acad Matrimonial Law* 338-339.

⁸⁰ Buttler 1994 *CILSA* 121; SALC *Report on Domestic Arbitration* para 1.04

⁸¹ Kessler, Koritzinsky and Schlissel 1997 *J Am Acad Matrimonial Law* 337.

⁸² Family Law Council of Australia 2007 <http://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Discussion%20paper%20on%20arbitration%20in%20family%20law%20matters.pdf> paras 1.13 and 5.30; Kessler, Koritzinsky and Schlissel 1997 *J Am Acad Matrimonial Law* 337.

The fact that arbitration is a private and confidential process is also regarded as a plus.⁸³ Since hearings take place at a private venue of the parties' choice there is no possibility of media access, and parties do not have to worry about exposing their matrimonial disputes, faults and finances to the public gaze. It is also easier for an arbitrator to ease the high levels of tension and animosity between parties in a personal, private and relaxed setting.⁸⁴

Although arbitration is a private and less formal process, it nevertheless maintains some formality and preserves traditional notions of an opportunity to be heard on the merits.⁸⁵ Further, the parties may retain attorneys and advocates throughout the process for advice, preparatory work and representation at hearings.⁸⁶ The legal representatives can address and prevent power imbalances and deal with difficult legal issues. It is said that "lawyers with years of litigation skills honed in the courtroom can utilize many of those same skills quite effectively in an arbitration".⁸⁷

A frequently cited advantage of arbitration is that it can significantly speed up the process as there will be no long waiting period for a court date with the attendant courtroom, calendar or tactical delays.⁸⁸ Disputes that would require days or weeks of piecemeal hearings in the court can frequently be resolved in a much shorter time in arbitration.⁸⁹ Added benefits are consequently that there is less need for interim proceedings and the updating of valuations of particular assets and financial resources.⁹⁰ Parties would also be allowed to maximise their assets and financial

⁸³ Singer 2012 *Family Lawyer* (Part 2) 1498; Sullivan 2010 <http://www.aaml.org/sites/default/files/ARBITRATION.pdf>.

⁸⁴ Carbonneau 1986 *U Ill L Rev* 1166; Celli 1993 *NJ Law* 42; Sullivan 2010 <http://www.aaml.org/sites/default/files/ARBITRATION.pdf>.

⁸⁵ Celli 1993 *NJ Law* 44.

⁸⁶ Singer 2012 *Family Lawyer* (Part 2) 1496. Although there is nothing to stop parties from representing themselves in an arbitration, it is recommended that they should at least have taken independent legal advice before committing themselves to the process.

⁸⁷ Kessler, Koritzinsky and Schlissel 1997 *J Am Acad Matrimonial Law* 338.

⁸⁸ Carbonneau 1986 *U Ill L Rev* 1153; Buttler 1994 *CILSA* 121; Family Law Council of Australia 2007 <http://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Discussion%20paper%20on%20arbitration%20in%20family%20law%20matters.pdf> para 5.30; Sullivan 2010 <http://www.aaml.org/sites/default/files/ARBITRATION.pdf>; Kessler, Koritzinsky and Schlissel 1997 *J Am Acad Matrimonial Law* 337; Singer 2012 *Family Lawyer* (Part 2) 1497.

⁸⁹ Celli 1993 *NJ Law* 42.

⁹⁰ Family Law Council of Australia 2007 <http://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Discussion%20paper%20on%20arbitration%20in%20family%20law%20matters.pdf> para 1.10; Singer 2012 *Family Lawyer* (Part 2) 1497.

resources by getting access to them sooner.⁹¹ Furthermore, the time in which children are victims of the stress and tension occasioned by a lack of certainty as to the outcome may be reduced.⁹²

Closely linked to the advantages of flexibility and an expedited process are claims that arbitration is less costly than litigation.⁹³ Although it is true that the ability of parties to streamline the process and avoid the delays that may occur in the formal court process could result in a saving of overall costs, it should be borne in mind that arbitration may involve a lot of extra costs. These include the arbitrator's fees, the hire of a venue, and the cost of a transcription service if it is required.⁹⁴ Nevertheless, it is said that the time saved in combination with the other advantages of arbitration easily justifies the money spent on these extras.⁹⁵ Moreover, costs can be minimised by holding arbitrations in inexpensive places such as the arbitrator's office or chambers or a community centre.⁹⁶

The finality of an award in the case of binding arbitration is another real benefit to parties.⁹⁷ In the event of impasse, it is to be preferred to obtaining the opinion of a jointly instructed neutral expert, which one or both of the parties may not accept, leaving them back at the starting point. If both parties are prepared to agree to be bound by the award of an arbitrator on a matter of impasse, matters can nonetheless be finalised and there will be no gnawing anxiety and prolonged uncertainty, which can drain both parties.⁹⁸

⁹¹ Family Law Council of Australia 2007 <http://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Discussion%20paper%20on%20arbitration%20in%20family%20law%20matters.pdf> para 1.10.

⁹² Kessler, Koritzinsky and Schlissel 1997 *J Am Acad Matrimonial Law* 337.

⁹³ Singer 2012 *Family Lawyer* (Part 2) 1497; Celli 1993 *NJ Law* 42; Family Law Council of Australia 2007 <http://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Discussion%20paper%20on%20arbitration%20in%20family%20law%20matters.pdf> para 1.8; Kessler, Koritzinsky and Schlissel 1997 *J Am Acad Matrimonial Law* 337.

⁹⁴ Carbonneau 1986 *U Ill L Rev* 1153.

⁹⁵ Sullivan 2010 <http://www.aaml.org/sites/default/files/ARBITRATION.pdf>; Thorpe 2008 *Family Law* 27.

⁹⁶ Family Law Council of Australia 2007 <http://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Discussion%20paper%20on%20arbitration%20in%20family%20law%20matters.pdf> paras 5.12, 5.30.

⁹⁷ Zurek 2006 *Hamline J Pub L and Pol'y* 368; McGill 2007 *J L & Social Pol'y* 55.

⁹⁸ Singer 2012 *Family Lawyer* (Part 2) 1497.

It is claimed that arbitration, which is a system largely unbound by precedent and somewhat free from judicial review, is well suited to the resolution of family disputes, which are essentially fact-oriented.⁹⁹

It is consequently not difficult to grasp that arbitration, as a private and flexible procedure which is intended to avoid the formalities, delays, expense and irritation of routine litigation, is far less traumatic and antagonistic and more user-friendly for disputing parties.¹⁰⁰ It is said that "[f]ive people sitting around a conference table compare[s] quite favourably to the sterile formality of a courtroom with an isolated, black-robed fact finder".¹⁰¹

Lastly, in addition to all the benefits for disputing family members, the use of arbitration to resolve disputes is in the public interest because it helps to relieve pressure on our overloaded court system.¹⁰² If used effectively, arbitration also substantially relieves the cost to society of resolving complex family disputes in the courts, thus permitting a better allocation of public resources.¹⁰³

5 Trends in foreign jurisdictions

5.1 England

In England the *Family Procedure Rules* 2010, which came into force on 6 April 2011,¹⁰⁴ established a comprehensive modernised code of family procedure for all courts.¹⁰⁵ For the first time it incorporated the "overriding objective" into family proceedings in England of dealing with a case justly,¹⁰⁶ meaning:

- (a) ensuring that it is dealt with expeditiously and fairly;
- (b) dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues;
- (c) ensuring that the parties are on an equal footing;

⁹⁹ Kessler, Koritzinsky and Schlissel 1997 *J Am Acad Matrimonial Law* 337.

¹⁰⁰ Sullivan 2010 <http://www.aaml.org/sites/default/files/ARBITRATION.pdf>. Belinkie 1991 *Conn BJ* 310.

¹⁰¹ Kessler, Koritzinsky and Schlissel 1997 *J Am Acad Matrimonial Law* 337.

¹⁰² Thorpe 2008 *Family Law* 27; Buttler 1994 *CILSA* 121.

¹⁰³ *SALC Report on Domestic Arbitration* para 1.03.

¹⁰⁴ Ferguson 2013 *J Soc Wel & Fam L* 117.

¹⁰⁵ National Archives 2010 <http://www.legislation.gov.uk/uk/sj/2010/2955/memorandum/contents>.

¹⁰⁶ R 1.1(1) of the *Family Procedure Rules* 2010. See also *AI v MT* 2013 EWHC 100 (Fam) para 21.

- (d) saving expense; and
- (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

Under rule 1.4 the court is under an obligation to further the overriding objective by actively managing cases, *inter alia* by encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate, and facilitating the use of such a procedure. Part 3 of the Rules sets out the court's powers to encourage and facilitate the use of alternative dispute resolution¹⁰⁷ and provides *inter alia* that it must consider, at every stage of the proceedings, whether alternative dispute resolution is appropriate¹⁰⁸ and may adjourn the proceedings at any stage for such a specified period as it considers appropriate to enable alternative dispute resolution to take place.¹⁰⁹ These rules set the stage for family arbitration in England.

Although arbitration has had a long and successful history in commercial and other civil cases in England, it became available for the resolution of financial or property disputes upon relationship breakdown only on 22 February 2012 under a new scheme established by the Institute of Family Law Arbitrators (IFLA).¹¹⁰ IFLA was formed by the Chartered Institute of Arbitrators, the Family Law Bar Association and the family lawyers' group, Resolution, in association with the Centre for Child and Family Law Reform.¹¹¹ The family arbitration scheme (IFLA Scheme) is governed by the *Arbitration Act* 1996 and the *Family Arbitration Rules*,¹¹² which together form a self-contained code for family arbitrations of financial disputes.¹¹³ However, only Part 1 of the *Arbitration Act*, which covers arbitration pursuant to an arbitration agreement, is likely to be relevant to family arbitration.¹¹⁴ The Rules were devised by family lawyers in conjunction with experienced commercial arbitrators to make the

¹⁰⁷ R 3.1 of the *Family Procedure Rules*.

¹⁰⁸ R 3.2 of the *Family Procedure Rules*.

¹⁰⁹ R 3.3 of the *Family Procedure Rules*.

¹¹⁰ Singer 2012 *Family Lawyer* (Part 1) 1353; FamilyArbitrator date unknown *Overview* <http://www.familyarbitrator.com/family-arbitration/overview>.

¹¹¹ FamilyArbitrator date unknown <http://www.familyarbitrator.com/family-arbitration/overview>; IFLA date unknown <http://ifla.org.uk/>.

¹¹² The Rules can be accessed at FamilyArbitrator date unknown <http://www.familyarbitrator.com/family-arbitration/the-rules> (the Rules).

¹¹³ Singer 2012 *Family Lawyer* (Part 1) 1356.

¹¹⁴ FamilyArbitrator date unknown <http://www.familyarbitrator.com/family-arbitration/the-rules>.

procedure suitable for specifically financial or property disputes with a family background.¹¹⁵ Financial and property disputes arising from parenting disputes (or disputes between those sharing parental responsibility) are included in the scope of the IFLA Scheme,¹¹⁶ but disputes directly concerning the care or parenting of children are specifically excluded.¹¹⁷

Under the IFLA Scheme parties can refer a family financial or property dispute to arbitration by entering into an agreement to arbitrate in accordance with Form ARB1.¹¹⁸ The agreement must be signed by both parties or their legal representatives and submitted to IFLA.¹¹⁹ IFLA has set up a panel of arbitrators who are experienced family law professionals, are members of the Chartered Institute of Arbitrators and have received specific training in arbitrating family disputes.¹²⁰ Only specialist family legal practitioners may therefore act as arbitrators.¹²¹ If the parties do not agree to nominate a particular arbitrator from the panel, IFLA will appoint a sole arbitrator from the panel whom it considers appropriate having regard to the nature of the dispute, any expression by the parties of a preferred geographical location, area of experience or expertise of the arbitrator, and any other relevant circumstances.¹²² In terms of article 3 of the Rules, an arbitrator is obliged to decide the substance of the dispute only in accordance with the law of England and Wales. In terms of article 13.2 an arbitrator's award must be delivered in writing and must contain sufficient reasons to show how and why the arbitrator has reached the decisions contained in it.¹²³ While it is intended that awards should be final and binding,¹²⁴ there seem to be certain awards under the IFLA Scheme that will merely be "semi-final" and "semi-binding". In this regard, a distinction needs to be drawn between awards where the court has a discretionary responsibility for the order in question and awards where the court has no such responsibility.

¹¹⁵ FamilyArbitrator date unknown <http://www.familyarbitrator.com/family-arbitration/the-rules>.

¹¹⁶ Article 2.1 (c) of the Rules.

¹¹⁷ Article 2.3(c) of the Rules.

¹¹⁸ Article 4.1 of the Rules.

¹¹⁹ Article 4.1 of the Rules.

¹²⁰ Article 4.2 of the Rules.

¹²¹ Singer 2012 *Family Lawyer* (Part 1) 1354.

¹²² Article 4.3 of the Rules.

¹²³ Also see Singer 2012 *Family Lawyer* (Part 1) 1359.

¹²⁴ Article 13.3 of the Rules.

If the award is on a dispute in respect of which the court has a discretionary and supervisory role as it has, *inter alia*, with claims for financial provision, property adjustment or pension sharing upon divorce¹²⁵ and claims for the financial provision for children,¹²⁶ the parties would first have to apply to the court for a consent order to confirm the award and give effect to it.¹²⁷ It is apparent that most awards made in terms of the IFLA Scheme would fall into this category.¹²⁸ While in these instances neither party can be prevented from asking the court to make an order which differs from the terms of an award, it is nonetheless anticipated that only in rare circumstances would the court decline to uphold an award, given the parties' agreement at the outset to be bound by it¹²⁹ (and the change brought about in English law by the decision in *Radmacher (formerly Granatino) v Granatino*).¹³⁰ Although not immediately final and binding, awards in these instances can nonetheless be regarded as "semi-final" and "semi-binding" as it would be paternalistic and patronising for the courts to override the parties' agreement to submit their disputes to arbitration and to be bound by an arbitrator's award.¹³¹

If the award is on a dispute in respect of which the court does not have a supervisory role, as for instance where the dispute involves purely declaratory property claims between unmarried couples, it is final and fully binding on the parties and may be enforced, with leave of the court, as though it were a court order.¹³² However, in terms of Part 1 of the *Arbitration Act* such an award may still be challenged by a limited number of routes and subsequently a court may set it

¹²⁵ In terms of s 25 of the *Matrimonial Causes Act* 1973.

¹²⁶ Schedule 1 to the *Children Act* 1989.

¹²⁷ Articles 13.3 (b) and 13.4 of the Rules.

¹²⁸ FamilyArbitrator date unknown <http://www.familyarbitrator.com/family-arbitration/overview>.

¹²⁹ Singer 2012 *Family Lawyer* (Part 2) 1500; FamilyArbitrator date unknown <http://www.familyarbitrator.com/family-arbitration/overview>. Cf Ferguson 2013 *J Soc Wel & Fam L* 128, who asks if it is not misleading to present awards as being enforceable when they are contingent upon judicial practice.

¹³⁰ *Radmacher (formerly Granatino) v Granatino* 2010 UKSC 42. In this case at para 78 it was held that the rule in England that pre- and post-nuptial agreements are contractually void has become obsolete and that the court should give effect to a nuptial agreement which is freely entered into by parties, unless it would not be fair to hold the parties to their agreement in the circumstances prevailing. The need to recognise the parties' autonomy and the manner in which they would like to regulate their financial affairs was subsequently underlined in *V v V* 2011 EWHC 3230 (Fam) para 36.

¹³¹ Singer 2012 *Family Lawyer* (Part 2) 1502.

¹³² Section 66(1) of the *Arbitration Act* 1996. See Singer 2012 *Family Lawyer* (Part 2) 1500.

aside, vary it, confirm it in part only and/or remit it to arbitration for further consideration. Under section 67 of the *Arbitration Act*, an award may be challenged on the ground that the arbitrator did not have substantive jurisdiction. Furthermore, under section 68 an award may be challenged on the ground of a serious irregularity affecting the arbitrator, the proceedings or the award. A serious irregularity is one falling within a list of irregularities which to the satisfaction of the court has caused or will cause substantial injustice to the applicant.¹³³ Included in this list is failure by the tribunal to deal with all the issues that were put to it, uncertainty or ambiguity as to the effect of the award, and the fact that the award was obtained by fraud or contrary to public policy. Lastly, under section 69, there is a right of appeal to the court on a question of law, unless the parties have agreed to exclude it, as they are entitled to do.¹³⁴ The appeal can be brought only by agreement of all parties to the arbitration or with the court's leave.¹³⁵ Leave to appeal will be granted only under stringent cumulative requirements.¹³⁶

Despite the fact that the IFLA Scheme expressly excludes disputes concerning the care or parenting of children, the English High Court in *AI v MT*¹³⁷ recently¹³⁸ endorsed separating parties' proposal to refer all disputes, including financial and child-related issues, to a process of arbitration before the New York *Beth Din*.¹³⁹ In this case the husband, a Canadian citizen, and the mother, a British citizen, were both observant orthodox Jews. They agreed in the course of an application under the 1980 *Hague Convention on Civil Aspects of International Child Abduction* to enter into binding arbitration before a senior rabbi of the New York *Beth Din*

¹³³ Section 68(2) of the *Arbitration Act* 1996.

¹³⁴ Section 69(1) of the *Arbitration Act* 1996. See also Singer 2012 *Family Lawyer* (Part 2) 1499.

¹³⁵ Section 69(2) of the *Arbitration Act* 1996.

¹³⁶ In terms of s 69(3) of the *Arbitration Act* 1996 these requirements are: "(a) that the determination of the question will substantially affect the rights of one or more of the parties; (b) that the question is one which the tribunal was asked to determine; (c) that, on the basis of the findings of fact in the award – (i) the decision of the tribunal on the question is obviously wrong, or (ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and (d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question".

¹³⁷ *AI v MT* 2013 EWHC 100 (Fam).

¹³⁸ The judgment was delivered on 30 January 2013.

¹³⁹ *AI v MT* 2013 EWHC 100 (Fam) para 15.

regarding all aspects of their marital breakup.¹⁴⁰ At the start of the hearing an agreed draft order was put before the court providing for the dismissal of the proceedings for the summary return of the children to Canada on the basis of an order reciting the agreement reached by the parties as to the process to be followed.¹⁴¹ Baker J did not consider the terms of the draft order lawful because the parties had ignored the principle that the court's jurisdiction to determine issues arising out of the marriage, or concerning the welfare and upbringing of the children, cannot be ousted by agreement.¹⁴² Yet having regard to the parties' devout religious beliefs and wish to resolve their disputes through the rabbinical court, and acknowledging that it is always in the interests of parties to try to resolve disputes by agreement wherever possible, including disputes concerning the future of children and ancillary relief upon divorce, he indicated that the court would in principle be willing to endorse a process of non-binding arbitration.¹⁴³ The court stated that although the outcome of the arbitration was likely to carry considerable weight with the court, it would not be binding and would not preclude either party from pursuing applications to the court in respect of any of the matters in issue.¹⁴⁴ The issues covered in the arbitration included not only the future of the children but also the parties' finances, the granting of a get and an interim contact issue.¹⁴⁵ After the *Beth Din* had ordered in connection with the interim issue that the husband should have staying contact with the children in Canada for five nights, the wife petitioned the court for an urgent telephone hearing.¹⁴⁶ Baker J then confirmed the *Beth Din's* interim award and said: "I do attach weight to the *Beth Din's* decision. However, if I were independently of the view that it was not in the child's best interests I would unhesitatingly say so and refuse to order it, notwithstanding the very great respect this Court has for the deliberations of the *Beth Din*."¹⁴⁷ In the end it took the *Beth Din* two years to finalise all outstanding issues between the parties.¹⁴⁸ Upon being requested to consider the

¹⁴⁰ *AI v MT* 2013 EWHC 100 (Fam) paras 8, 10.

¹⁴¹ *AI v MT* 2013 EWHC 100 (Fam) para 11.

¹⁴² *AI v MT* 2013 EWHC 100 (Fam) para 12.

¹⁴³ *AI v MT* 2013 EWHC 100 (Fam) para 12.

¹⁴⁴ *AI v MT* 2013 EWHC 100 (Fam) para 15.

¹⁴⁵ *AI v MT* 2013 EWHC 100 (Fam) para 16.

¹⁴⁶ *AI v MT* 2013 EWHC 100 (Fam) para 17.

¹⁴⁷ *AI v MT* 2013 EWHC 100 (Fam) para 18.

¹⁴⁸ *AI v MT* 2013 EWHC 100 (Fam) para 22.

terms of a draft order based on the arbitration award, the court endorsed the arbitration process concerning both children and financial arrangements.¹⁴⁹ In its judgment the court referred to the IFLA Scheme and the *Family Procedure Rules* 2010¹⁵⁰ and mentioned that the resolution of the issues between the parties by arbitration was largely in accordance with the overriding objective of the *Family Procedure Rules*.¹⁵¹ The court felt that as far as the children were concerned, the outcome achieved by the *Beth Din* award, as subsequently refined by the parties through further negotiation and agreement, was manifestly in the interests of their welfare.¹⁵² It was therefore unnecessary for the court to embark on any lengthy analysis of the best interests of the children. In this regard the court also pointed out that arbitration is in line with the principle underpinning the *Children Act* 1989, namely that the primary responsibility for children rests with their parents, who should be entitled to raise their children without the intrusion of the state save where the children are suffering, or likely to suffer, significant harm.¹⁵³ In short, it is up to parents to agree on how their children should be brought up and, if they cannot agree, they should be entitled to choose how their disagreement should be resolved without state intervention, unless one or both parents invoke the help of the court or the children are suffering or are likely to suffer significant harm as a result of their parents' actions.¹⁵⁴ As far as the financial settlement between the parties was concerned, the court also found the terms of the agreement to be unobjectionable.¹⁵⁵

It therefore seems that both awards made in binding, or at least "semi-binding", financial and property arbitration in terms of the IFLA Scheme and awards made in non-binding religious arbitration on all aspects of divorce are likely to be treated by

¹⁴⁹ *AI v MT* 2013 EWHC 100 (Fam) paras 23, 37.

¹⁵⁰ *AI v MT* 2013 EWHC 100 (Fam) paras 20, 21, 31.

¹⁵¹ *AI v MT* 2013 EWHC 100 (Fam) para 37.

¹⁵² *AI v MT* 2013 EWHC 100 (Fam) para 37.

¹⁵³ *AI v MT* 2013 EWHC 100 (Fam) para 32. This principle in turn is in line with Art 8 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1950), which provides that everyone has the right to respect for private and family life, and the concept of personal autonomy which underpins that right.

¹⁵⁴ *AI v MT* 2013 EWHC 100 (Fam) para 32.

¹⁵⁵ *AI v MT* 2013 EWHC 100 (Fam) para 37.

English courts as a lodestone or something of magnetic importance, which will not readily be deviated from.

5.2 Australia

Arbitration has a long history in Australia in a general commercial context.¹⁵⁶ In family law matters, it was introduced together with mediation as additional methods of alternative dispute resolution on 27 December 1991 by the *Courts (Mediation and Arbitration) Act* 1991, which inserted new provisions into the *Family Law Act* 1975.¹⁵⁷ In contrast to mediation, which was an immediate success and enjoyed rapid uptake, arbitration got off to a very slow start.¹⁵⁸

The 1991 amendments to the *Family Law Act* established a system of court-annexed compulsory arbitration,¹⁵⁹ as well as a system for the registration of the awards of private, consensual arbitration.¹⁶⁰ Arbitration was available for property and spousal maintenance matters only, despite the Family Law Council's recommendation that compulsory arbitration should include proceedings concerning child welfare and related matters.¹⁶¹ The scheme provided for the review of awards by the Family Court of Australia, either *de novo* in the case of compulsory arbitrations¹⁶² or on matters of law for consensual arbitrations.¹⁶³ The reason for the different treatment of awards made in consensual and in compulsory arbitration was that if parties voluntarily entered into a consensual arrangement whereby a third party was chosen to determine their dispute, then that determination should be more final than a

¹⁵⁶ Family Law Council of Australia 2007 <http://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Discussion%20paper%20on%20arbitration%20in%20family%20law%20matters.pdf> para 3.1.

¹⁵⁷ Division 2 of Part 3A. See also Family Law Council of Australia 2007 <http://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Discussion%20paper%20on%20arbitration%20in%20family%20law%20matters.pdf> para 4.1.

¹⁵⁸ Family Law Council of Australia 2007 <http://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Discussion%20paper%20on%20arbitration%20in%20family%20law%20matters.pdf> para 4.2.

¹⁵⁹ Section 19D of the *Family Law Act* 1975.

¹⁶⁰ Section 19E of the *Family Law Act* 1975.

¹⁶¹ Family Law Council of Australia 2007 <http://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Discussion%20paper%20on%20arbitration%20in%20family%20law%20matters.pdf> para 4.7.

¹⁶² Section 19G of the *Family Law Act* 1975.

¹⁶³ Section 19F of the *Family Law Act* 1975.

determination made by a court-imposed referral to arbitration.¹⁶⁴ The 1991 scheme, however, never became a practical reality.¹⁶⁵

In 2000 further amendments were made to the *Family Law Act*¹⁶⁶ so as to remove the option of court-ordered compulsory arbitration and to concentrate on consensual private arbitration as an option for resolving matrimonial property and financial disputes.¹⁶⁷ The 2000 scheme is effectively still the one in operation today, although in 2006 a few minor amendments were made to the *Family Law Act* which defined arbitration and rearranged the sections of the Act dealing with arbitration.¹⁶⁸ In terms of section 10L(1), arbitration is now defined as a process in which parties to a dispute present arguments and evidence to an arbitrator, who makes a determination to resolve the dispute. Although this is not apparent from the definition, arbitration under the Act is always consensual – the parties can agree to submit a dispute to arbitration or the court may refer a dispute to arbitration with the consent of the parties.¹⁶⁹ Despite the discussion of plans to include child custody disputes within the scope of arbitration,¹⁷⁰ only disputes about property or financial matters and spousal or *de facto* partner maintenance can be arbitrated at present.¹⁷¹

According to regulation 67B to the *Family Law Act*, an arbitrator must be a legal practitioner who is either accredited as a family law specialist or has practised as a legal practitioner for at least five years with a minimum of 25% of the practitioner's work done during the five years relating to family law matters. In addition, an arbitrator must have completed specialist arbitration training conducted by a tertiary institution or professional association of arbitrators and his or her name must be

¹⁶⁴ Family Law Council of Australia 2007 <http://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Discussion%20paper%20on%20arbitration%20in%20family%20law%20matters.pdf> para 4.13.

¹⁶⁵ Family Law Council of Australia 2007 <http://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Discussion%20paper%20on%20arbitration%20in%20family%20law%20matters.pdf> para 1.18.

¹⁶⁶ By the *Family Law Amendment Act* 2000 and the *Family Law Amendment Regulations* 2001.

¹⁶⁷ Family Law Council of Australia 2007 <http://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Discussion%20paper%20on%20arbitration%20in%20family%20law%20matters.pdf> para 4.14.

¹⁶⁸ The current provisions for arbitration are set out in Division 4 of the *Family Law Act* 1975.

¹⁶⁹ Sections 13E and 13F of the *Family Law Act* 1975.

¹⁷⁰ Arbitration Media Watch 2010 *ADRJ* 137.

¹⁷¹ Section 10L(2) of the *Family Law Act* 1975.

included in a Law Council of Australia list of practitioners.¹⁷² An arbitrator must determine a dispute in accordance with the *Family Law Act* and ensure that the parties are afforded procedural fairness.¹⁷³ At the conclusion of the arbitration, the arbitrator must make an award which includes a statement outlining the reasons for the award, any findings of fact, and the evidence on which those findings were based.¹⁷⁴ It appears that an award by a qualified arbitrator is binding on the parties as it may subsequently be registered in the Family Court or the Federal Magistrates Court, and upon registration the award has the same effect as an order of the court.¹⁷⁵ A party may, however, apply on the grounds of questions of law for the review of an award by the Family Court or the Federal Magistrates Court.¹⁷⁶ In addition, a court in which an award is registered may set aside or vary the award if it was obtained by fraud, is void, voidable, unenforceable or impracticable, if the arbitration was affected by bias, or if there was a lack of procedural fairness in the way in which the arbitration process was conducted.¹⁷⁷

Voluntary arbitration under the *Family Law Act* has, however, not been embraced as a mainstream dispute resolution mechanism by litigants, the legal profession and the courts, and it appears that qualified arbitrators have had little work to do until now.¹⁷⁸ The Family Law Council of Australia has subsequently been asked to look at changes to court processes or other changes that could be made to promote voluntary arbitration in family law property proceedings.¹⁷⁹ At this stage, it is the opinion of the Council that compulsory arbitration, ordered by the court in appropriate cases and supported by a clear structure and by measures designed to give litigants, the legal profession and the courts confidence in the system, would be

¹⁷² This list is currently maintained by the Australian Institute of Family Law Arbitrators and Mediators (AIFLAM).

¹⁷³ Reg 67I to the *Family Law Act* 1975.

¹⁷⁴ Reg 67P to the *Family Law Act* 1975.

¹⁷⁵ Section 13H of the *Family Law Act* 1975.

¹⁷⁶ Section 13J of the *Family Law Act* 1975.

¹⁷⁷ Section 13K of the *Family Law Act* 1975.

¹⁷⁸ Family Law Council of Australia 2007 <http://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Discussion%20paper%20on%20arbitration%20in%20family%20law%20matters.pdf> paras 1.20, 4.21.

¹⁷⁹ Family Law Council of Australia 2007 <http://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Discussion%20paper%20on%20arbitration%20in%20family%20law%20matters.pdf> para 1.24.

a necessary first step in creating a climate in which voluntary arbitration can develop.¹⁸⁰ To ensure that such a system of discretionary court-ordered arbitration is constitutionally valid, it is proposed that an arbitrator's award should be non-binding and that each party should have a right to a hearing *de novo*.¹⁸¹ However, subject to a party's right to a hearing *de novo*, it is proposed that the court's role should nevertheless be to give effect to an arbitrator's award if the court considers it to be just and equitable, proper or just to do so, or to reject the award only if it appears that the law and rules of court in relation to the arbitration have not been followed so that the award has not been validly made.¹⁸² To reduce the number of ill-founded applications for a hearing *de novo*, it is lastly suggested by the Family Law Council that there should be some cost implications for an applicant who is not successful in bettering his or her position in such a new hearing.¹⁸³

5.3 United States

Initially arbitration by agreement under American federal and state law was a reasonably isolated practice, confined mainly to business transactions, maritime law issues, construction contracts involving builders and architects, agreements among professionals, labour disputes and international commercial matters. In the past decade or two, however, it has become very prevalent in family law.¹⁸⁴ A number of states have relatively new legislation or rules of court related to family law arbitration.¹⁸⁵ Of these, some are based on general commercial arbitration statutes, which in their turn are modelled on the *Federal Arbitration Act 1925*¹⁸⁶ and/or the *Uniform Arbitration Act 2000*, commonly known as the *Revised Uniform Arbitration*

¹⁸⁰ Family Law Council of Australia 2007 <http://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Discussion%20paper%20on%20arbitration%20in%20family%20law%20matters.pdf> paras 1.21, 8.8.

¹⁸¹ Family Law Council of Australia 2007 <http://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Discussion%20paper%20on%20arbitration%20in%20family%20law%20matters.pdf> para 7.24.

¹⁸² Family Law Council of Australia 2007 <http://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Discussion%20paper%20on%20arbitration%20in%20family%20law%20matters.pdf> paras 7.5, 7.20, 7.14.

¹⁸³ Family Law Council of Australia 2007 <http://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Discussion%20paper%20on%20arbitration%20in%20family%20law%20matters.pdf> para 7.26.

¹⁸⁴ Walker 2008 *J Am Acad Matrimonial Law* 649.

¹⁸⁵ Walker 2008 *J Am Acad Matrimonial Law* 589, 631.

¹⁸⁶ Title 9, US Code, Ss 1-14, was first enacted February 12, 1925 (43 Stat. 883).

Act.¹⁸⁷ Because general arbitration statutes are often ill-suited to the unique issues that arise in family law disputes involving property division, spousal maintenance and children, the American Academy of Matrimonial Lawyers published a *Model Family Law Arbitration Act (Model Act)* in March 2005. The *Model Act* was developed as an alternative to litigation in contested marital dissolution issues¹⁸⁸ and as a benchmark for the option of family law arbitration by agreement.¹⁸⁹ Although it follows general commercial arbitration legislation most of the time, the *Model Act* contains significant differences to effectuate policies unique to family law disputes.¹⁹⁰ A few states have since used or are contemplating using the *Model Act* as a guide in framing their family law arbitration legislation.¹⁹¹ Then there are many states that have relatively longstanding, well-established programmes tied to general alternative dispute resolution, which includes family law arbitration.¹⁹² Because of the different foundations for family law arbitration in the various states, there are many differences in the way this new kind of arbitration is practised across the United States of America. Only general trends, with emphasis on the *Model Act*, will be described below.

Family law arbitration in the United States of America is mostly voluntary¹⁹³ and the process is usually initiated by the parties' signing an agreement to arbitrate.¹⁹⁴ After filing the agreement to arbitrate with the court, the parties must designate an arbitrator.¹⁹⁵ Most family law arbitration involves a single impartial arbitrator.¹⁹⁶ In this regard, section 111 of the *Model Act* provides that if the parties to an agreement to arbitrate agree on a method of appointing an arbitrator, that method must be

¹⁸⁷ This Act was recommended for immediate enactment in all 50 states by the National Conference of Commissioners on Uniform State Laws: Zurek 2006 *Hamline J Pub L and Pol'y* 367.

¹⁸⁸ Editorial 2005 *Buff LJ* 4.

¹⁸⁹ Walker 2008 *J Am Acad Matrimonial Law* 652.

¹⁹⁰ Walker 2008 *J Am Acad Matrimonial Law* 588.

¹⁹¹ Walker 2008 *J Am Acad Matrimonial Law* 524, 632.

¹⁹² Walker 2008 *J Am Acad Matrimonial Law* 589.

¹⁹³ One exception is Oregon, which provides for mandatory domestic relations arbitration if the only contested issue is the division or other disposition of property between parties: Walker 2008 *J Am Acad Matrimonial Law* 619.

¹⁹⁴ Belinkie 1991 *Conn BJ* 317; Carbonneau 1986 *U Ill L Rev* 1151.

¹⁹⁵ See eg s 2(b) of Chapter 5 entitled "Family Law Arbitration" of the *Indiana Code* 34-57.

¹⁹⁶ Walker 2008 *J Am Acad Matrimonial Law* 554. Some state statutes also make provision for the appointment of a panel of three arbitrators, eg s 600.5073(1) of Chapter 50B entitled "Domestic Relations Arbitration" of the *Revised Judicature Act* 1961 (*Michigan Domestic Relations Arbitration Statute*).

followed. If, however, the agreed-upon method fails and/or the parties cannot agree on an arbitrator, a court may, upon a party's application, appoint an arbitrator. Although the *Model Act* requires no qualifications for the appointment of an arbitrator, the statutes of some states list qualifications if the parties cannot agree on an arbitrator and the court has to appoint one.¹⁹⁷ It appears that in some states the arbitrators appointed by the court must be family law specialists with sufficient experience (and sometimes with training in domestic violence issues),¹⁹⁸ while in other states arbitrators may also be other professionals licensed and experienced in the subject matter of a specific dispute.¹⁹⁹ In terms of section 115 of the *Model Act*, an arbitrator must conduct hearings as he or she "considers appropriate for a fair and expeditious disposition of the proceeding". In terms of section 119(c), he or she must give a reasoned award; that is, one that recites the arbitrator's findings of fact and conclusions of law.²⁰⁰ It further appears from section 129 of the *Model Act* that disputes must be resolved in accordance with a specific state's family law legislation.

As regards the issues that can be assigned to arbitration, there is generally no problem with parties' referring property division and spousal maintenance to binding arbitration.²⁰¹ In other words an arbitrator's award on these issues is final and enforceable like any other civil judgment.²⁰² An award on property division and spousal maintenance is reviewable only on limited statutory grounds as in the case of general arbitration under the *Revised Uniform Arbitration Act*.²⁰³ In terms of section 123(a) of the *Model Act* such traditional grounds for review include circumstances where an award was procured by corruption, fraud or other undue means; where there was evident partiality by an arbitrator, or misconduct prejudicing a party's rights; where the arbitrator exceeded his or her powers; or

¹⁹⁷ See eg s 45(c) of Chapter 50 Section 3 entitled "Family Law Arbitration Act" of the *North Carolina General Statutes*.

¹⁹⁸ See eg s 600.5073(2) of *Michigan Domestic Relations Arbitration Statute*.

¹⁹⁹ See eg s 2D of Chapter 40 Article 4-7 entitled "Binding Arbitration Option; Procedure" of the *New Mexico Statutes*.

²⁰⁰ Walker 2008 *J Am Acad Matrimonial Law* 565.

²⁰¹ Belinkie 1991 *Conn BJ* 311; Celli 1993 *NJ Law* 41; Kessler, Koritzinsky and Schlissel 1997 *J Am Acad Matrimonial Law* 341.

²⁰² Section 125 of the *Model Family Law Arbitration Act* 2005.

²⁰³ Kessler, Koritzinsky and Schlissel 1997 *J Am Acad Matrimonial Law* 341.

where the arbitrator refused to postpone a hearing on a showing of sufficient cause or refused to hear evidence substantial and material to the controversy.

The position regarding child custody, visitation and child support is somewhat complicated and there seem to be two main approaches. First, some states completely ban the arbitration of all children's issues²⁰⁴ or of child custody and visitation specifically.²⁰⁵ This is the position despite the fact that section 101 of the *Model Act* provides that parties may refer all issues arising from a marital separation or divorce, except the divorce itself, to arbitration. Courts in such jurisdictions will absolutely refuse to enforce an agreement between parents to arbitrate custody and visitation or any children's issues for that matter.²⁰⁶ Secondly, other states allow the arbitration of children's issues, but subject the arbitrator's award to a special broad judicial review.²⁰⁷ In these jurisdictions courts will enforce parents' agreement to arbitrate children's issues, but subject the award to a hearing *de novo*, if one party applies for it.²⁰⁸ There is no unanimity between jurisdictions as to what the degree or standard of review should be, but it seems that an award on children's issues will be reviewed completely²⁰⁹ if one parent or guardian so requests and will only be upheld if it is in the best interests of the child.²¹⁰ Under this approach, an award for custody may be reviewed by a public judge in less than compelling, and indeed casual, circumstances to ensure that the best interests of the child were properly considered.²¹¹ It has therefore been said that in children's issues an arbitrator's award is enforced in a token fashion only²¹² and that it is not as "fixed and final, unchangeable and unappealable" as awards in general commercial arbitration.²¹³ In

²⁰⁴ Including child support.

²⁰⁵ Such as California, Connecticut, Delaware, Florida, Pennsylvania, South Carolina.

²⁰⁶ See eg *Kelm v Kelm* 68 Ohio St 3d 26 (Sup. Ct. 1993); *Glauber v Glauber* 600 NYS 2d 740 (App Div 1993); *Biel v Biel* 366 NW 2d 404 (Wis Ct App 1983).

²⁰⁷ Such as Colorado, Georgia, Michigan, Missouri, New Jersey, New Mexico and North Carolina. The *Model Act* also provides for a *de novo* hearing/judicial review for child issue awards: Zurek 2006 *Hamline J Pub L and Pol'y* 406.

²⁰⁸ See eg *Miller v Miller* 620 A 2d 1161 (Pa App Div 1993); *Crutchley v Crutchley* 293 SE 2d 793 (NC 1982); *Rustad v Rustad* 314 SE 2d 275 (NC Ct App 1984); *Faherty v Faherty* 477 A 2d 1257 (NJ 1984).

²⁰⁹ Which is essentially repeating the process.

²¹⁰ Walker 2008 *J Am Acad Matrimonial Law* 605; Snover 2006 *Mich BJ* 21; Celli 1993 *NJ Law* 42.

²¹¹ Zurek 2006 *Hamline J Pub L and Pol'y* 365.

²¹² Imbrogno 2003 *Cap U L Rev* 416.

²¹³ Sullivan 2010 <http://www.aaml.org/sites/default/files/ARBITRATION.pdf>.

addition to traditional grounds for review, parties can always ask the court to vacate or modify a child custody, visitation or support award if it is not in the best interests of the child.

The reason for the unwillingness to enforce an arbitrator's award on children's issues as final and binding is to be found in the role of the court as *parens patriae*, or super parent, in protecting the best interests of children when their welfare is at risk.²¹⁴ Because divorce is viewed as a *per se* harmful event to children, courts feel that they are justified in assuming the position of the final protector of children upon divorce and in restricting the rights of parents to arbitrate children's issues privately or to submit any such issues to binding arbitration.²¹⁵ Other concerns are that the best interests of children will be given short shrift in alternative dispute resolution proceedings such as arbitration, which are by definition closed, unguided by the rule of law, and expeditious,²¹⁶ or where there is no properly regulated group of well-trained and highly competent family law arbitrators.²¹⁷ It is simply assumed that the court is in the best position to protect the best interests of the child.²¹⁸

It is doubtful, however, that the court necessarily has superior wisdom or special knowledge regarding what is best for children.²¹⁹ It is contended that a child psychologist or an experienced teacher would probably be in a better position than a judge to consider a child's best interests.²²⁰ Furthermore, parents are indeed allowed to privately agree, whether through negotiation between their legal representatives or through mediation, on children's issues in a separation or settlement agreement, and such agreements are rarely reviewed by the courts.²²¹ It may therefore rightly be asked if arbitration awards do not deserve the same respect.²²² It is also pointed out that when courts invoke the *parens patriae* authority to thwart or hinder child

²¹⁴ Baker 2011-2012 *U Mem L Rev* 832; Zurek 2006 *Hamline J Pub L and Pol'y* 359-360; Imbrogno 2003 *Cap U L Rev* 413; Kessler, Koritzinsky and Schlissel 1997 *J Am Acad Matrimonial Law* 341, 351; Celli 1993 *NJ Law* 42.

²¹⁵ Baker 2011-2012 *U Mem L Rev* 832, 840, 842-844, 848.

²¹⁶ Imbrogno 2003 *Cap U L Rev* 422.

²¹⁷ Kessler, Koritzinsky and Schlissel 1997 *J Am Acad Matrimonial Law* 351.

²¹⁸ Baker 2011-2012 *U Mem L Rev* 849.

²¹⁹ Johnston 2000 *U Ark Little Rock L Rev* 457.

²²⁰ Zurek 2006 *Hamline J Pub L and Pol'y* 360.

²²¹ Celli 1993 *NJ Law* 42.

²²² Celli 1993 *NJ Law* 42.

custody arbitration, they are acting under an inadequately explained assumption that the doctrine requires this conclusion.²²³ The modern doctrine of *parens patriae*, in actual fact, allows the state to act only under compelling, case-specific circumstances.²²⁴ For the sake of the child, the state must be allowed to enter the zone of familial privacy when the child has been abandoned or grossly neglected.²²⁵ However, when a child is the focus of fit parental care and is generally receiving his or her parents' love and devoted affection, the state must give due deference and special weight to the decisions of the parents, including their decision to submit a custody, visitation or child support dispute to binding arbitration.²²⁶ It follows that the broad common-law rule requiring *de novo* review of arbitral awards concerning children's issues infringes upon the fundamental right of parents to parent.²²⁷

There are a few American cases in which it was held that all children's issues, including child custody and visitation, can be referred to binding arbitration subject to only limited judicial review. In *Dick v Dick*²²⁸ the Michigan Court of Appeals explicitly departed from an enormous body of law which consistently holds that a court's *parens patriae* duties supersede the right of parents to contract for arbitration of their custody dispute. In the fairly recent case of *Fawzy v Fawzy*²²⁹ the New Jersey Supreme Court unanimously held that parties may submit child custody disputes to binding arbitration. The court recognised the principle that parents may submit custody issues to arbitration in the exercise of their parental autonomy and found that arbitration with a fact-finder of the parties' own choosing may be less antagonistic than litigation, and may minimise the harmful effects of divorce litigation on the family.²³⁰ The court further stated that the right of parents to make decisions regarding custody, parenting time and other child-welfare issues between themselves, without state interference, does not evaporate when a marriage breaks

²²³ Zurek 2006 *Hamline J Pub L and Pol'y* 360.

²²⁴ Zurek 2006 *Hamline J Pub L and Pol'y* 396.

²²⁵ Zurek 2006 *Hamline J Pub L and Pol'y* 396-397.

²²⁶ Zurek 2006 *Hamline J Pub L and Pol'y* 397, 405.

²²⁷ Zurek 2006 *Hamline J Pub L and Pol'y* 405.

²²⁸ *Dick v Dick* 534 NE 2d 185 (Mich Ct App 1995).

²²⁹ *Fawzy v Fawzy* 199 NJ 456 (2009).

²³⁰ *Fawzy v Fawzy* 199 NJ 456 (2009) paras 18-19. See also Jones 2009 *NJ Law* 23.

down.²³¹ According to the court an arbitrator's award should be subject to the limited grounds of review and appeal that pertain in the case of an arbitrator's award in general commercial arbitration, unless a *prima facie* case is made that the arbitrator's decision threatens to harm the child.²³² The court further set out certain procedural prerequisites for binding custody arbitration, including the stipulation that an agreement to arbitrate must be in writing or recorded in accordance with certain statutory requirements²³³ to establish in clear and unmistakable terms that the parties understood and knowingly waived their rights to a judicial determination; the writing or recording must reflect the litigants' awareness of the specific issues that would be subject to the arbitrator's decision; a record of all documentary evidence admitted into the proceeding must be kept; all testimony at the proceeding must be recorded verbatim; and the arbitrator must set forth findings of fact and conclusions of law, with a focus on the best interest of the child, in a written or recorded statement.²³⁴ If an arbitration proceeding deviates from these procedural requirements, the arbitrator's award may be vacated by a reviewing court upon application.²³⁵

The reasoning in *Fawzy* regarding the standard of court review in children's matters is in line with what some American commentators propose. According to Kessler, Koritzinsky and Schlissel²³⁶ a court should have the power to refuse to confirm an arbitrator's award on children's issues only if the award is contrary to public policy, that is "where an error by the arbitrator is 'so gross' as to shock the court's conscience". Zurek²³⁷ is also in favour of this standard whereby clearly erroneous findings may be overturned, which he feels would be consistent with the strong national and state policies which encourage arbitration in the United States. He proposes the following revised standard of review for awards on children's issues for inclusion in section 123(a)(7) of the *Model Act*:

²³¹ *Fawzy v Fawzy* 199 NJ 456 (2009) para 25. See also Jones 2009 *NJ Law* 23.

²³² *Fawzy v Fawzy* 199 NJ 456 (2009) paras 27-31.

²³³ Section 2A:23B-1 of the *New Jersey Revised Statutes*.

²³⁴ *Fawzy v Fawzy* 199 NJ 456 (2009) paras 33-35.

²³⁵ Jones 2009 *NJ Law* 24.

²³⁶ Kessler, Koritzinsky and Schlissel 1997 *J Am Acad Matrimonial Law* 350-351.

²³⁷ Zurek 2006 *Hamline J Pub L and Pol'y* 409.

A court has authority to overturn or modify an arbitral tribunal's written and reasoned award determining child custody, if: (1) the arbitral tribunal clearly abused its discretion and the child has resultantly been severely harmed emotionally or physically; (2) the challenging party proves with clear and convincing evidence that the custodial parent is unfit to parent; [or] (3) ... the arbitral tribunal's findings of fact concerning the best interests of the child are clearly erroneous. The burden of proof at a hearing under this subdivision is on the party seeking to vacate the arbitral tribunal's award.²³⁸

One last important aspect of family law arbitration in the United States is to be found in section 124A of the *Model Act*, which declares that a court or an arbitrator may modify alimony, post-separation support, child support or child custody awards under the same conditions stated in a jurisdiction's law for such modifications.²³⁹

5.4 Canada

Canadian politicians and policy makers have recognised the importance of setting up alternative dispute resolution processes to encourage more collaborative and timely resolution of family disputes.²⁴⁰ Mediation was the first initiative in this respect, followed in the last few years by other initiatives, such as arbitration. Today all Canadian provinces except Quebec allow the parties to a family dispute to go to arbitration under their provincial arbitration Acts.²⁴¹ All of the Acts provide roughly the same scheme for private adjudication. That is, the parties choose an arbitrator, agree on the terms of the arbitration agreement, and bind themselves to accept the arbitrator's decision. Arbitration would generally arise from a pre-existing agreement to go to arbitration, unless it is based on the specific terms of an arbitration agreement entered into after the dispute has arisen.²⁴² Arbitrators may be asked to resolve family law disputes such as those involving spousal or child support or both, custody of or access to children, and property division.²⁴³

²³⁸ Zurek 2006 *Hamline J Pub L and Pol'y* 408-409.

²³⁹ Also see Walker 2008 *J Am Acad Matrimonial Law* 574.

²⁴⁰ Cyr, Stefano and Desjardins 2013 *Family Court Review* 528.

²⁴¹ Fidler and Epstein 2008 *Journal of Child Custody* 56; Cyr, Stefano and Desjardins 2013 *Family Court Review* 528.

²⁴² ADR Institute of Alberta date unknown <http://www.adralberta.com/arbitration.asp>.

²⁴³ Ministry of the Attorney General, Ontario 2010 http://www.attorneygeneral.jus.gov.on.ca/english/family/arbitration/general_information.asp.

Most arbitration is designed to be binding²⁴⁴ – an award binds the parties unless it is set aside or varied by a court.²⁴⁵ If the arbitration agreement so provides, a party may appeal an award to the court on a question of law, on a question of fact or on a question of mixed law and fact.²⁴⁶ If the arbitration agreement does not provide that the parties may appeal an award to the court on a question of law, a party may appeal an award to the court on a question of law with leave, which the court would grant only if it is satisfied that "(a) the importance to the parties of the matters at stake in the arbitration justifies an appeal, and (b) determination of the question of law at issue will significantly affect the rights of the parties".²⁴⁷ On appeal the court may confirm, vary or set aside the award or may remit the award to arbitration. On a party's application, the court may also set aside an award on certain specified grounds such as the legal incapacity of a party, an invalid arbitration agreement, the fact that the subject-matter of the arbitration cannot be the subject of arbitration under the law, the fact that the applicant was treated manifestly unfairly and unequally in the arbitration process, and arbitrator fraud or bias.²⁴⁸

Because of the decision-making role of an arbitrator, family law arbitrators must meet high training and practice standards. From 1 January 2014 all family law arbitrators in British Columbia, for example, must meet new minimum training and practice standards as set out in the regulations to the *Family Law Act* 2011.²⁴⁹ They must be a lawyer, psychologist or social worker by profession, have at least ten years' experience in a family-related field, and take specified training in arbitration, family law, decision-making, skills development, and family violence.²⁵⁰

In Ontario the government passed the *Family Statute Law Amendment Act* 2006 to amend *inter alia* the *Family Law Act* 1990 and the *Arbitration Act* 1991 in connection with family arbitration. The statute and a new regulation under the *Arbitration Act*²⁵¹

²⁴⁴ ADR Institute of Alberta date unknown <http://www.adralberta.com/arbitration.asp>.

²⁴⁵ See eg s 37 of the *Arbitration Act, Revised Statutes of Alberta* 2000 (Chapter A-43).

²⁴⁶ See eg s 44(1) of the Alberta *Arbitration Act*.

²⁴⁷ See eg s 44(2) of the Alberta *Arbitration Act*.

²⁴⁸ See eg s 45 of the Alberta *Arbitration Act*.

²⁴⁹ Reg 347/2012 s 5 to the *Family Law Act* 2011 (British Columbia).

²⁵⁰ Justice BC date unknown <http://www.justicebc.ca/en/fam/help/arbitrators/index.html>.

²⁵¹ Reg 134/07 to the *Family Statute Law Amendment Act* 2006 (Ontario).

came into operation on 30 April 2007.²⁵² Under this legislation, family arbitrations based on non-Canadian law and principles – including religious principles – will have no legal effect and will not be enforceable by the courts.²⁵³ The reason for this exclusion of the parties' choice to apply religious or foreign law in arbitration proceedings is that it was feared that some religious principles, particularly Sharia law, may discriminate against women, may not respect the principle of the best interests of the children, may not respect equality principles, and may not be compatible with Ontario family law.²⁵⁴ Therefore, although people in Ontario may still turn to a religious official or someone knowledgeable in the principles of their religion to help them resolve a family dispute, any decision by the arbitrator based on religious principles would not be a valid family arbitration award under the law.²⁵⁵ In terms of the new statute and family law regulation, it is further no longer an option for the parties to waive a right of appeal in their arbitration agreement.²⁵⁶ It would appear that the right to waive the right of appeal was removed because arbitration is still an unregulated profession and to ensure compliance with the new regime, which stipulates that the arbitrator must not apply religious or foreign law.²⁵⁷ Other changes brought about by the amendments relate to certain prescriptions regarding the content of family arbitration agreements,²⁵⁸ the qualifications of arbitrators,²⁵⁹ the records to be kept by arbitrators²⁶⁰ and reports by the arbitrator about the award.²⁶¹ The records to be kept by arbitrators include certificates of independent legal advice given to the parties before the arbitration, declarations regarding screening for power imbalances and domestic violence conducted by the arbitrator or someone else, and the arbitrator's award and written reasons for it.²⁶² The information about the award that arbitrators are required to report to the

²⁵² Ministry of the Attorney General, Ontario 2010 http://www.attorneygeneral.jus.gov.on.ca/english/family/arbitration/general_information.asp.

²⁵³ Section 3 of the *Family Statute Law Amendment Act* 2006 and Reg 134/07 s 2.

²⁵⁴ McGill 2007 *JL & Social Pol'y* 50-51; Fidler and Epstein 2008 *Journal of Child Custody* 57.

²⁵⁵ Ministry of the Attorney General, Ontario 2010 http://www.attorneygeneral.jus.gov.on.ca/english/family/arbitration/general_information.asp.

²⁵⁶ Section 3 of the *Family Statute Law Amendment Act* and Ontario Reg 134/07 s 2.

²⁵⁷ Fidler and Epstein 2008 *Journal of Child Custody* 57.

²⁵⁸ Reg 134/07 s 2 (Ontario).

²⁵⁹ Reg 134/07 s 3 (Ontario).

²⁶⁰ Reg 134/07 s 4 (Ontario).

²⁶¹ Reg 134/07 s 5 (Ontario).

²⁶² Reg 134/07 s 4 (Ontario).

Attorney General includes the date and length of the hearing leading to the award, the matters addressed in the arbitration, details of the parties and of any children, custody and access arrangements and child support awarded, spousal support awarded and property division awarded.²⁶³

The Ontario *Family Statute Law Amendment Act* and the family arbitration regulation have, however, been criticised. Although the new legislation represents a well-intentioned legislative attempt to protect the vulnerable, it severely erodes existing arbitration policy, which prioritises a party's right to select the process, the expert, and the applicable law.²⁶⁴ Most importantly, it rejects the parties' right to choose any law for use in family arbitration.²⁶⁵ It is further regretted that yet another new specialised category of arbitration, namely family arbitration, was introduced to the ever-expanding arbitration field, which already includes domestic arbitration, commercial arbitration, consumer arbitration and international commercial arbitration.²⁶⁶ Family arbitration is now more regulated than other domestic arbitration.²⁶⁷ Unlike other domestic contracts, a family arbitration agreement must be entered into after the original dispute has arisen and with independent legal advice.²⁶⁸ Matters are further complicated in that the rules relating to the form of the arbitration agreement and the process for entering into the agreement are now split between the *Family Law Act* and the *Arbitration Act*.²⁶⁹ Parties will have to consult both Acts to ensure that a resulting award is enforceable.²⁷⁰ The fact that parties may no longer elect to waive the right of appeal to a court has the effect of preventing any award from being completely final.²⁷¹ The ability to keep a family arbitration award private and confidential will be reduced owing to the reporting obligation of an arbitrator in terms of the new regulation.²⁷² All the new requirements will further have an impact on the cost of arbitration and the time it takes to

²⁶³ Reg 134/07 s 5 (Ontario).

²⁶⁴ McGill 2007 *J L & Social Pol'y* 50.

²⁶⁵ McGill 2007 *J L & Social Pol'y* 51-52.

²⁶⁶ McGill 2007 *J L & Social Pol'y* 49.

²⁶⁷ McGill 2007 *J L & Social Pol'y* 54.

²⁶⁸ McGill 2007 *J L & Social Pol'y* 53.

²⁶⁹ McGill 2007 *J L & Social Pol'y* 52.

²⁷⁰ McGill 2007 *J L & Social Pol'y* 55.

²⁷¹ Fidler and Epstein 2008 *Journal of Child Custody* 57.

²⁷² McGill 2007 *J L & Social Pol'y* 57.

complete an arbitration – the parties will bear an additional cost for independent legal advice and power imbalance or domestic violence screening.²⁷³ Furthermore, since a family arbitration agreement must be entered into after the dispute has arisen, it is less likely that entering into an agreement will be quick and easy.²⁷⁴ It therefore appears that many of the traditional advantages of arbitration have been curbed by the new legislation in Ontario. On the other hand, the special nature of family law may possibly require extra regulatory measures so as to ensure that principles such as the best interests of children and the fundamental rights of the parties are adhered to. In this regard it is significant that the *Family Statute Law Amendment Act*²⁷⁵ makes family law principles superior to arbitration principles if there is conflict between the two.²⁷⁶

5.5 India

In India structured public and community-based arbitration forums are utilised to deal with domestic violence perpetrated against women by partners and close family members.²⁷⁷ These forums, which have evolved spontaneously and independently, have the ability to transform one woman's private complaint into a community-wide concern. The arbitration process is based on a fundamental perspective that decisions can be more effectively enforced if the community is involved.²⁷⁸ One of these forums is "Shalishi", a traditional system of arbitration utilised extensively by the group, the Sharmajibee Mahila Samity in West Bengal.²⁷⁹

The women who arbitrate at this forum are from the local socio-cultural milieu.²⁸⁰ Along with sensitivity to women's issues and an understanding of violence, they also draw upon an intuitive cultural sense of the beliefs, value and normative codes of that area. Apart from being an inexpensive, accessible forum, the fact that the decision-making involves taking time to think of the best solution, rather than

²⁷³ McGill 2007 *J L & Social Pol'y* 57.

²⁷⁴ McGill 2007 *J L & Social Pol'y* 57.

²⁷⁵ Section 2.1(2) of the *Family Statute Law Amendment Act* 2006 (Ontario).

²⁷⁶ Also see McGill 2007 *J L & Social Pol'y* 58.

²⁷⁷ Bhatla and Rajan 2004 *New Agenda* 66-67.

²⁷⁸ Bhatla and Rajan 2004 *New Agenda* 68.

²⁷⁹ Bhatla and Rajan 2004 *New Agenda* 67.

²⁸⁰ Bhatla and Rajan 2004 *New Agenda* 70.

focusing on polarised positions of absolute right and wrong, and includes the possibility of renegotiating if the decision does not work out, adds to the acceptance of this forum.²⁸¹ It appears that these forums in India are perceived among community members as transparent, non-partisan, objective, and arenas where "justice" is done.²⁸²

6 Arbitration model envisaged for South Africa

6.1 Which matters should be arbitrated?

Although it is not challenged that divorce itself is a dispute regarding status which parties are not entitled to dispose of through arbitration,²⁸³ there seems to be no justification for excluding from arbitration any matter incidental to a matrimonial cause.²⁸⁴ In all the jurisdictions investigated above,²⁸⁵ arbitration has become available in recent years for the resolution of some or all family disputes incidental to divorce or family separation. The blanket prohibition on arbitration in respect of matrimonial and related matters contained in section 2(a) of our existing *Arbitration Act* is therefore clearly not in keeping with modern trends in other jurisdictions.

As regards the specific matters that may be referred to arbitration upon or after divorce, there appear to be two main approaches in foreign jurisdictions. Firstly, some of them, principally England²⁸⁶ and Australia,²⁸⁷ limit the use of arbitration to property and spousal maintenance matters while excluding most or all children's issues. Secondly, other jurisdictions, notably Canada²⁸⁸ and also a number of states in the United States of America,²⁸⁹ make provision for the referral of all matters incidental to divorce or family breakdown, including children's issues, to arbitration. Another jurisdiction that adopts the second approach is India, where even family

²⁸¹ Bhatla and Rajan 2004 *New Agenda* 69.

²⁸² Bhatla and Rajan 2004 *New Agenda* 69.

²⁸³ Section 2(b) of the *Arbitration Act* 42 of 1965.

²⁸⁴ Cohen 1993 *De Rebus* 642.

²⁸⁵ Para 5 above.

²⁸⁶ See para 5.1 above.

²⁸⁷ See para 5.2 above.

²⁸⁸ See para 5.4 above.

²⁸⁹ See para 5.3 above.

violence matters are resolved through arbitration.²⁹⁰ It is my submission that the second approach is to be preferred. For various reasons, parties should be able to refer to arbitration all matters arising from divorce or family breakdown, including the division of assets, the provision of maintenance for spouses and children and arrangements regarding the care of and contact with children.

Because all of the issues arising from divorce or family breakdown are intrinsically linked,²⁹¹ they should all be considered together by one and the same decision-maker. For this very reason arbitration, where the parties can appoint the same arbitrator to deal with all the different issues that may arise from a dispute from start to finish, is particularly suited to resolving family disputes arising from divorce or family breakdown.²⁹² It follows therefore that it would be undesirable for an arbitrator to deal with financial matters only and not with children's issues as well. As a matter of fact, it would be well-nigh impossible for an arbitrator to make an award on a financial matter such as which party is to retain or stay on in the matrimonial home without the award also having an effect on the interests of children involved in the matter.²⁹³ The scope of clause 5(1) of the Draft Bill, which proposes to permit family law arbitration in respect of property disputes that do not affect the rights or interests of any minor child of a marriage,²⁹⁴ is therefore too narrow as it will effectively limit family arbitration to childless couples or couples whose children are all majors.

Another argument for the inclusion of children's issues among the matters which may be referred to arbitration relates to the reluctance of our High Court to interfere with parental responsibilities and rights.²⁹⁵ In terms of the High Court's position, parents are allowed to make their own decisions regarding the care of and contact with their children in settlement agreements and parenting plans and these agreements and plans are routinely approved by our courts with a minimum of court interference. In principle, parents should therefore also be allowed to agree that an

²⁹⁰ See para 5.5 above.

²⁹¹ Burman, Dingle and Glasser 2000 *SALJ* 123; De Jong 2012 *Stell LR* 229.

²⁹² See para 4 above.

²⁹³ *SALC Report on Domestic Arbitration* para 3.29.

²⁹⁴ See para 1 above.

²⁹⁵ See Heaton *South African Family Law* 303.

arbitrator who is well versed in family law and children's matters will make the initial determination of care and contact and that they will be bound by any decision the arbitrator makes.²⁹⁶ Stated differently, if parties are legally permitted to agree to a substantive resolution of a care and contact dispute, why can they not agree to a process to resolve the same care and contact dispute? The end product, whether it is a settlement agreement, a parenting plan or an arbitrator's award, should, however, still be subjected to the Family Advocate's right of intervention in terms of section 4 of the *Mediation in Certain Divorce Matters Act* 24 of 1987.²⁹⁷ Consequently, an arbitrator's award regarding care and contact should also be submitted to the office of the Family Advocate²⁹⁸ so that it can be monitored in the same way as settlement agreements or parenting plans are.

Moreover, although the High Court is the upper guardian of all minor children,²⁹⁹ I am inclined to argue that, because South Africa is still without a family court, it would be more appropriate to have a properly educated and experienced arbitrator to determine what is in the best interests of a child rather than a High Court judge, who may never in his or her life have practised family law.³⁰⁰ It is also a fact that the adversarial system of litigation, which still forms the basis of divorce proceedings in the High Court and the divorce court today,³⁰¹ exacerbates the harmful effects of divorce on children and minimises the chances of children's maintaining a meaningful relationship with both their parents after divorce.³⁰² Therefore, enforcing agreements to arbitrate all disputes, including children's issues, would help to reduce the stress experienced by the children involved, as well as the damage to their mental health, and also to mitigate the adversarial feelings associated with the litigation of all these disputes.³⁰³

²⁹⁶ Also see Kessler, Koritzinsky and Schlissel 1997 *J Am Acad Matrimonial Law* 345.

²⁹⁷ Cohen 1993 *De Rebus* 642.

²⁹⁸ In terms of reg 3(3) to the *Mediation in Certain Divorce Matters Act* 24 of 1987.

²⁹⁹ *Calitz v Calitz* 1939 AD 56; *S v L* 1992 3 SA 713 (E). See also Heaton *South African Family Law* 302.

³⁰⁰ Also see Zurek 2006 *Hamline J Pub L and Pol'y* 413.

³⁰¹ Schäfer 1984 *De Rebus* 17; Schäfer 1988 *THRHR* 297.

³⁰² Kessler, Koritzinsky and Schlissel 1997 *J Am Acad Matrimonial Law* 342-343.

³⁰³ See also Zurek 2006 *Hamline J Pub L and Pol'y* 412; Kessler, Koritzinsky and Schlissel 1997 *J Am Acad Matrimonial Law* 342-343.

6.2 Choice of law or strict adherence to substantive law?

Since arbitrators receive their authority from private and not public sources, they are not bound to apply the governing law if the parties provide in their agreement to arbitrate that the dispute is to be resolved according to some other law, such as foreign law or religious law. The question is, however, whether family law arbitration can or should achieve substantive predictability as to results by making awards strictly and exclusively according to the governing law.³⁰⁴

If we are to go by the example set by the IFLA Scheme in England, the *Family Law Act* in Australia, the *Model Act* in the United States of America and the recent legislation in the province of Ontario in Canada,³⁰⁵ arbitrators should be obliged to resolve family matters strictly in accordance with South African law, and awards based on any other law should have no legal effect and be unenforceable. However, cognisance should also be taken of the decision of the English High Court in *AI v MT*³⁰⁶ and the criticism of the recent legislation in Ontario regarding the parties' freedom to choose religious law or foreign law in arbitration proceedings.³⁰⁷ Furthermore, seeing that the resolution of family disputes is essentially fact-oriented (depending largely on the unique facts of each particular case), substantive predictability and the doctrine of *stare decisis* may be illusory and even undesirable in the context of decisional family law.³⁰⁸ Consequently, it is submitted that parties should be able to choose any law for use in family arbitration and arbitrators should not be obliged to adhere to substantive law, provided, however, that their awards are not against public policy. No inroads should ever be made on the fundamental rights of any party or the best interests of children³⁰⁹ by an arbitral award.

³⁰⁴ Carbonneau 1986 *U III L Rev* 1160.

³⁰⁵ See paras 5.1-5.4 above.

³⁰⁶ *AI v MT* 2013 EWHC 100 (Fam).

³⁰⁷ See respectively para 5.1 and para 5.4.

³⁰⁸ Carbonneau 1986 *U III L Rev* 1160.

³⁰⁹ As guaranteed by ss 9, 10 and 28(2) of the *Constitution of Republic of South Africa*, 1996.

6.3 Who should act as arbitrators?

Our current *Arbitration Act* gives no indication of who should act as arbitrators and it sets no qualifications for arbitrators.

In some of the jurisdictions investigated above,³¹⁰ the office of family arbitrator is reserved for experienced legal practitioners who specialise in family law and have undergone specific training in arbitrating family disputes. In addition, they are usually required to be members of a governing body which keeps a list of all accredited arbitrators. In other jurisdictions it appears that family arbitrators could also be other professionals licensed and experienced in the subject matter of a specific dispute, including psychologists and social workers.³¹¹ In India, even lay women from the local community may act as arbitrators.³¹²

The restriction of family arbitrators to legal practitioners may have the result of increasing the complexity and formality of the arbitration process as advocate, attorney or retired-judge-arbitrators might resort to the customary tactics of adversarial litigation, thereby transforming divorce arbitration into a privately instituted court proceeding.³¹³ Involving only legal practitioners in arbitration could also reduce the time and costs saved by the process.³¹⁴ This restriction would also exclude the possibility of the arbitrator's having specialist non-legal experience, which may be desired by the parties.³¹⁵

It is therefore my opinion that arbitrators need not necessarily be limited to experienced family law practitioners – although they would certainly be the best qualified to handle the arbitration of all issues arising from divorce or family

³¹⁰ Ie England, Australia and some states in the USA.

³¹¹ Ie some states in the USA and Canada.

³¹² See para 5.5 above.

³¹³ Carbonneau 1986 *U Ill L Rev* 1163; Family Law Council of Australia 2007 <http://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Discussion%20paper%20on%20arbitration%20in%20family%20law%20matters.pdf> para 10.7.

³¹⁴ Family Law Council of Australia 2007 <http://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Discussion%20paper%20on%20arbitration%20in%20family%20law%20matters.pdf> para 10.7.

³¹⁵ Family Law Council of Australia 2007 <http://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Discussion%20paper%20on%20arbitration%20in%20family%20law%20matters.pdf> para 10.7.

breakdown from start to finish in a holistic manner. Where parties want to refer only one or more specific issues, such as care and contact arrangements, the valuation of properties or business assets, to arbitration, the arbitrator could be someone with specialist technical knowledge in the area of the dispute, such as a psychologist, valuator or a remuneration expert, or even a lay third party who has the respect of the parties, such as a religious leader or an elder from the community.

Nonetheless, the quality of the designated arbitrator is critical to the viability of the process and anyone who serves as an arbitrator must have received specific training in arbitration.³¹⁶ Furthermore, where family law practitioners act as arbitrators they need to rein in their adversarial tendencies and pursue the issues of divorce through equitable accommodation in order to facilitate arbitral dispositions.³¹⁷

6.4 Should arbitration be compulsory or consensual?

In terms of the current *Arbitration Act*, the reference to arbitration takes place in terms of a written agreement between the parties.³¹⁸ In all the jurisdictions examined, family arbitration is also voluntary.³¹⁹ However, it appears that the voluntary arbitration of property and spousal maintenance matters has not been embraced as a mainstream dispute resolution mechanism in Australia, despite having been on the statute-book for more than a decade.³²⁰ This is quite understandable as an agreement to arbitrate is not likely to be forthcoming from spouses whose relationship remains emotionally tense and dominated by disagreement. On the other hand, spouses who are capable of collaborating on the selection of such an adjudicatory mechanism probably do not need it as they could probably reach an agreeable out-of-court settlement through lawyer negotiations. It would therefore appear that arbitration, in its consensual form, might be a token remedy.³²¹ For this reason the Family Law Council of Australia is of the opinion that

³¹⁶ Family Law Council of Australia 2007 <http://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Discussion%20paper%20on%20arbitration%20in%20family%20law%20matters.pdf> para 10.9.

³¹⁷ Carbonneau 1986 *U III L Rev* 1163.

³¹⁸ Sections 1 and 3 of the *Arbitration Act* 42 of 1965.

³¹⁹ See note 193 regarding the position in the state of Oregon in the USA.

³²⁰ See para 5.2 above.

³²¹ Carbonneau 1986 *U III L Rev* 1156.

compulsory arbitration ordered by the court in appropriate cases should be introduced so as to create a climate in which voluntary arbitration can develop. It is proposed that a similar system of discretionary court-ordered family arbitration should be considered for implementation in South Africa, provided that a proper degree of court review is determined to ensure that the system is constitutionally valid.³²²

6.5 What should the role of the court be in family law arbitration?

Although arbitration is predominantly a matter of contract, being concerned with the rights, duties and relationships flowing from the arbitration agreement, it is also concerned with the relationship between the court and the arbitration process.³²³ Primarily judicial contact with the arbitration process comes after the arbitrator's decision has been made and the award has been delivered.³²⁴ Awards may be confirmed, corrected or vacated.

In terms of our existing legislation, arbitral awards are not subject to review by the court on the merits of the dispute but only as regards procedural and jurisdictional issues.³²⁵ This is in line with the trend in commercial arbitration towards limiting rather than increasing the courts' role.³²⁶ The question is, however, whether this standard of review would be appropriate for awards made upon family separation which might have an effect on the best interests of the children involved in a matter and also on the fundamental rights of the parties, especially the weaker party.³²⁷

From an examination of the degree of review operative in or proposed for family law arbitration in the foreign jurisdictions discussed above, it emerges that the choices as to the form of judicial scrutiny are firstly *de novo* review, secondly review limited to manifest errors of law which would be contrary to public policy, and lastly a form of review based strictly on jurisdictional and procedural due process violations. When

³²² Also see para 6.5 below.

³²³ Buttler 1994 *CILSA* 121.

³²⁴ Belinkie 1991 *Conn BJ* 317.

³²⁵ See para 2 above.

³²⁶ Buttler 1994 *CILSA* 120.

³²⁷ See note 309 above.

determining a suitable standard of court review for family law arbitration in South Africa, it should be borne in mind that excessive review would jeopardise the viability and autonomy of the arbitration process, making its determinations completely vulnerable to judicial second-guessing, while laxity of review may well trigger constitutional challenges.³²⁸ In the light of this, the last option, which is effectively the one prescribed by our current Act, is not suitable for family law arbitration where special policy considerations such as the best interests of children, equality and non-discrimination apply.³²⁹ Further, the first option of hearing *de novo* would indeed result in doing things twice. The decision in the *Fawzy* case and the American commentators' proposal for the second option,³³⁰ the clearly erroneous standard together with certain procedural prerequisites for binding arbitration, therefore appear to have much merit. However, if family law arbitration is to be made compulsory in the discretion of the court in appropriate cases, the scales are tipped in favour of a hearing *de novo*, but with the provisos proposed by the Family Law Council of Australia.³³¹ Therefore, despite a party's right to a hearing *de novo*, the court's role should nonetheless be to give effect to an arbitrator's award if the court considers it to be just and equitable, proper or just to do so. As is the case in England,³³² an award should serve as a lodestone that points the path to court approval. Further, to reduce ill-founded applications for a hearing *de novo*, there should be some cost implications for an applicant who is not successful in bettering his or her position on review.

6.6 Should family arbitration be regulated in a separate Act?

If South Africa is to enact family law arbitration, it becomes important to establish whether this unique form of arbitration should be regulated by the existing *Arbitration Act*, in a freestanding statute or rules tied to the *Arbitration Act*, or in an entirely separate statute.

³²⁸ Carbonneau 1986 *U Ill L Rev* 1157.

³²⁹ See *GF v SH* 2011 3 SA 25 (NGP) 29F-30J. Although this case was overturned on appeal in *SH v GF* 2013 6 SA 621 (SCA), the appeal did not deal with the considerations that determine public policy in family law matters.

³³⁰ See para 5.3 above.

³³¹ See para 5.2 above.

³³² See para 5.1 above.

It appears from the position in the United States that general commercial law arbitration statutes are often ill-suited to resolving the unique issues that arise in family law disputes involving children, spousal maintenance and property division.³³³ It further appears from the position in the province of Ontario in Canada that matters are complicated when rules relating to the form of the arbitration and the process for entering into the agreement are split between two Acts.³³⁴ This might also become a problem in England, where the IFLA Scheme is governed by general arbitration legislation and the Family Arbitration Rules.³³⁵ Consequently, it is my opinion that in order to cater for the special nature of family law disputes,³³⁶ the special policy considerations that need to be applied and specifically the revised standard of review,³³⁷ separate family law arbitration legislation is indeed necessary.

7 Conclusion

As was illustrated above, arbitration, either on its own or in conjunction with mediation, is certainly a viable option for the resolution of family law disputes in South Africa. Although family law arbitration will not have universal appeal or common application, it should be encouraged and enforceable for those who choose this private alternative dispute settlement technique to resolve their family disputes. Hopefully, the necessary stimulus for the introduction of family law arbitration will be found in the recently published "Norms and Standards for the Performance of Judicial Functions" of the Office of the Chief Justice³³⁸ and the "Amendment of Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa" of the Rules Board.³³⁹ To my mind, there is no reason why in time it should not become the practice for parties to include an arbitration clause in their antenuptial contracts in the same way as this is included in commercial agreements.

³³³ See para 5.3 above.

³³⁴ See para 5.4 above.

³³⁵ See para 5.1 above.

³³⁶ See para 3 above.

³³⁷ See para 6.5 above.

³³⁸ GN 147 in GG 37390 of 28 February 2014. See para 3 above.

³³⁹ GN 183 in GG 37448 of 18 March 2014. See para 3 above.

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LIST OF ABBREVIATIONS

ADR	Alternative dispute resolution
ADRJ	Australasian Dispute Resolution Journal
AIFLAM	Australian Institute of Family Law Arbitrators and Mediators
Buff LJ	Buffalo Law Journal
Cap U L Rev	Capital University Law Review
CILSA	Comparative and International Law Journal of Southern Africa
Conn BJ	Connecticut Bar Journal
DoJ&CD	Department of Justice and Constitutional Development
Fla BJ	Florida Bar Journal
Hamline J Pub L and Pol'y	Hamline Journal of Public Law and Policy
IFLA	Institute of Family Arbitrators
J Am Acad Matrimonial Law	Journal of the American Academy of Matrimonial Lawyers
J L & Social Pol'y	Journal of Law and Social Policy
J Soc Wel & Fam L	Journal of Social Welfare and Family Law
LSSA	Law Society of South Africa
Mich BJ	Michigan Bar Journal

New Hamp BJ	New Hampshire Bar Journal
NJ Law	New Jersey Lawyer
SALC	South African Law Commission
SALJ	South African Law Journal
SALRC	South African Law Reform Commission
Stell LR	Stellenbosch Law Review
THRHR	Tydskrif vir die Hedendaagse Romeins Hollandse Reg
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
U Ark Little Rock L Rev	University of Arkansas Little Rock Law Review
U Ill L Rev	University of Illinois Law Review
U Mem L Rev	University of Memphis Law Review
Yale LJ	Yale Law Journal

ARBITRATION OF FAMILY SEPARATION ISSUES – A USEFUL ADJUNCT TO MEDIATION AND THE COURT PROCESS

M de Jong*

SUMMARY

For over half a century now, section 2(a) of the *Arbitration Act* 42 of 1965 has prohibited arbitration in respect of matrimonial and related matters. In this article it will be illustrated that this prohibition is clearly incompatible with present-day demands. Today there is a strong tendency in public policy towards alternative dispute resolution processes such as arbitration. As any recommendations that arbitration should be applied to family law disputes must be anchored in an analysis of the specific character of the arbitral remedy, the article begins by giving a broad overview of the nature of arbitration. This is followed by a discussion of the present-day demand for family arbitration, which examines the problems experienced with the adversarial system of litigation in resolving family law disputes, party autonomy, the development of alternative dispute resolution processes such as mediation and arbitration, the special synergy between mediation and arbitration, the success of arbitration in other fields of law and possible forerunners for family arbitration in South Africa. Inherent in the demand for family law arbitration are the many advantages of arbitration, which are also touched upon. Thirdly, current trends in England, Australia, the United States of America, Canada and India are analysed so as to identify a suitable family law arbitration model for South Africa. Special attention is paid to the matters that should be referred to arbitration – for example, should it be confined to matrimonial property and financial disputes or extended to all matters incidental to divorce or family breakdown, including children's issues? Other questions examined include whether family arbitration should comply with substantive law only, who should act as arbitrators, whether family arbitration should be voluntary or compulsory, what the court's role in the family arbitration

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process should be, and whether family law arbitration should be regulated by the existing *Arbitration Act* or by a separate statute with specialised rules for family matters. Lastly, it is concluded that although family arbitration will not have universal appeal or common application, it should be encouraged and enforceable for those who choose this private alternative dispute settlement technique to resolve their family disputes.

KEYWORDS: Family law arbitration; *Arbitration Act 42 of 1965*; party-autonomy; alternative dispute resolution; divorce process; problems with the adversarial system of litigation; agreement to arbitrate; arbitration process; advantages of arbitration; party autonomy; choice of law; family financial and property disputes; children's issues upon divorce; arbitrator qualifications; arbitral awards; court review of arbitral awards.