IAFL Webinar
Thursday 18th June 2020

Dispute resolution with focus on arbitration

Supporting Documents

Chaired by: Suzanne Kingston (England)
Panel: The Hon Diana Bryant, AO, QC (Australia), Charlotte Butruille-Cardew (France), Zenobia Du Toit (South Africa), Rachael Kelsey (Scotland)

Suggested Guidance for the conduct of a remote hearing as arbitrator or PFDR judge[1]

General

1. In the case of an arbitration hearing, the parties are in most circumstances (subject to Art. 1.4 of the relevant Rules)[2] free (pursuant to Art 9.1) to agree matters of procedure, including the form of any hearing. If they do not so agree, the question whether the hearing should proceed via videoconferencing will be a case management decision for the arbitrator as it would be for a judge in court proceedings.[3]

2. In the case of a PFDR which it is intended should proceed via videoconferencing, the parties should be asked to confirm in writing or through their solicitors that videoconferencing (i) constitutes an acceptable means of communication; and (ii) will be used as the means for conducting the hearing.

Pre-hearing preparation

3. The applicant's solicitors (or the respondent's solicitors if the applicant is not represented) ("the lead party") should be responsible for (i) the preparation of the electronic bundle of relevant documents, ordinarily in compliance with PD27A; and (ii) any electronic bundle of authorities.

4. The lead party should prepare the electronic bundle(s), usually in the following format:
    a. PDF format is to be used;
    b. all documents are to be contained, if possible, within one single PDF file;
    c. the PDF file must be searchable;
    d. pagination must be computer generated within the PDF and not hand-written:
        i. original pagination should be by section and page number i.e. A1, A2, A3…. B1, B2, B3 etc;
        ii. insertions should adopt 'legal' numbering (e.g. B13.1, B13.2, B13.3 to be inserted between B13 and B14); and
    e. each section of the bundle, and each individual document referenced in the index, should be separately bookmarked.

5. Unless the arbitrator/judge is to be responsible for setting up the remote hearing, the lead party should be responsible for doing so. In either case, the person so responsible should provide to all of the other parties the details required to attend the remote hearing as soon as they are available. In practice the arrangements are likely to be made by the arbitrator's/judge's/lead party's counsel's clerk.

6. Anybody attending the remote hearing should ensure that they have a good connection/signal to avoid a breakdown in connection.

7. The minimum recommended bandwidth for a successful remote video hearing is 1.5 Mbps in both directions, but ideally it should be at least 5 Mbps.

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[1] This document includes material drawn from (i) the Civil Justice in England and Wales Protocol Regarding Remote Hearings (20th March 2020); (ii) the Protocol For Remote Hearings in the Family Court and Family Division of the High Court (23rd March 2020); (iii) the Remote Access Family Court v4 (16th April 2020); and (iv) Byron James (via Twitter).

[2] Financial Scheme Rules (6th Edition, effective 1st January 2018) and Children Scheme Rules (4th Edition, effective 6th April 2020).

[3] See now *Re A (Children) (Remote Hearing: Care and Placement Orders)* [2020] EWCA Civ 583.

Conduct of the hearing

8. The parties should log/call into the remote platform c. 5 minutes before the hearing is due to begin.

9. Each participant's computer/tablet/phone should be set so as to identify who they are. If possible, all parties should use a computer or tablet rather than a phone.

10. Each participant should shut down all background browsers and applications on the device used for the virtual hearing (including disabling "pop up" notifications), and turn off all other devices which might either:
    a. appropriate necessary bandwidth from the device to be used to access the virtual hearing; or
    b. produce audible notifications during the hearing.

11. The arbitrator/judge should log/call into the platform at the time the hearing is due to begin.

12. Every remote hearing that is being conducted in private should start with all parties confirming that:
    a. they can see and hear everyone;
    b. they are in a private space (and, so far as is possible, that they are alone and cannot be overheard);
    c. everyone accessing the hearing is authorised to be there;
    d. they are not relaying the hearing to any third parties;
    e. subject to 15 and 16 below in the case of an arbitration hearing, they are not making any recording of the hearing; and
    f. if there are any changes to the above they shall say so as soon as possible.

13. In the event that the video-conferencing fails for one of all of the participants:
    a. the tribunal/parties should seek to re-establish that connection; and
    b. if that is unsuccessful, the tribunal should convene a telephone hearing to determine the appropriate next steps depending on how far the hearing has progressed.

14. The following etiquette is recommended for the conduct of the hearing:
    a. *"note taking"* participants (e.g. pupils or solicitors' assistants/paralegals) should mute their feed for the entire hearing;
    b. everyone should mute their microphone when not speaking, save
    c. when evidence is being given, when the microphones of the witness, question-asker and tribunal should be on;
    d. no-one should speak when someone else is speaking;
    e. a person should only ask to speak when invited by the tribunal; and
    f. if something urgent arises and a participant wishes to speak, he/she should visually indicate to the tribunal before doing so.

Arbitration Hearings

15. The person responsible for setting up the remote hearing should:
    a. ensure that appropriate arrangements have been made for recording (if the hearing is going to be recorded) via Lifesize, Zoom, or Microsoft Teams; and
    b. ensure that the parties know if the hearing is being recorded by the relevant platform.

16. The parties should be asked to confirm that they agree and accept that:

a. unless expressly agreed they must not record the hearing themselves;
b. it is an offence to:
    i. record the hearing (save as has already been agreed as part of any directions that have been given); or
    ii. make use of such a recording; and
c. any recording of the hearing in accordance with 15 above or with express agreement under 16.a above is not used for any purpose other than:
    i. the obtaining of legal advice;
    ii. court proceedings arising out of the arbitration; and/or
    iii. in accordance with the express written agreement of the arbitrator and other party to the arbitration.

17. Unless otherwise agreed, any hearing listed for a day should 'sit' from 10 am to 1 pm (with a break at a convenient moment between 11 am and 12 pm) and from 2 pm to 4.30 pm (with a break at a convenient moment between 3 pm and 3.30 pm).

18. Only documents that have been included in the bundle lodged for the hearing may be "*shared"* on screen without prior approval of the tribunal.

19. If oral evidence is being given the tribunal should guide witnesses in the oath or affirmation. The Mostyn J short form - *"do you swear or affirm to tell the truth, the whole truth and nothing but the truth?"* should be acceptable. There should be no expectation to hold a Holy Book.

20. Witnesses should be in a secure room, alone, with the doors closed and with measures taken to prevent interruptions and disruptions.

21. If it is not possible for witnesses to have access to a full electronic bundle consideration will need be given in advance to the documents to which the witness is likely to be referred. The parties should endeavour to agree the list of such documents (if at all possible). An electronic bundle of these copy documents should then be prepared in advance which the lead party should send to the witness.

Nicholas Allen QC
Janet Bazley QC
Andrzej Bojarski
Nigel Dyer QC
Marina Faggionato
Charles Hale QC
Suzanne Kingston
Christopher Pocock QC

6th May 2020

CBBC

CABINET D'AVOCATS

Arbitration & the impact of the global pandemic on French Courts

Introduction

Importance in Europe of alternative dispute resolution

Especially in Family Matters

Arbitration in France

Arbitral institutions are regularly created reflecting the need for a neutral, but effective, dispute resolution mechanism

Arbitration is a well-established and widely used means to end disputes. Unlike litigation, arbitration takes place out of court

Well developed in France especially in Paris which is home to the chamber of commerce's international arbitration court

All commercial disputes can be settled by arbitration. The only condition for such a dispute to be resolved by arbitration is the consent of all parties involved in the procedure.

All contracts (sale, service, cooperation, distribution, shareholders' agreements, articles of association, licences of rights, etc.) **may incorporate an arbitration clause**

However, arbitration has yet to develop in family law matters

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Is family law arbitrable in France? What sort of cases go to arbitration?

Domestic Arbitration :

1. Only available rights are arbitrable.
2. Thus, arbitration is difficult to implement in family law

International Arbitration :

There is a substantive rule on the validity of the arbitration agreement (Hetch 1972, Dalico 1993): arbitrability is not an obstacle.

The only limit is the conflict of an agreement with international public policy.

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Property Rights

Property rights issues are arbitrable

Thus, it is possible to insert an arbitration clause in the following acts: in a « PACS » (registered partnership), in a cohabitation agreement, in joint-possession agreements, or in donations.

What about **disputes relating to both property rights and nonproprietary matters?** It is possible to include an arbitration clause on property rights aspects. For extra-patrimonial matters, the arbitrator will have to stay the proceedings.

However, as long as no divorce proceedings have been initiated, it is **not possible**, under French law, **to compromise on any eventual compensatory benefit**. Similarly, it is not possible to compromise on any **future inheritance** under French law.

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What do you need to have or do to enhance your arbitration scheme?

The area of availability of rights has been extended by the **contractualisation** movement.

Family law **has increasing use of alternative dispute resolution methods**: conciliation, mediation and participatory procedure agreements. Thus, why not make greater use of arbitration?

Similarly, it seems the legislator is currently encouraging **out of court dispute resolution methods**. However as the legislator's will is to rule out the intervention of the judge, this applies to both the state judge and the arbitral judge.

Also, in an amicable divorce the spouses are not parties to a dispute that has arisen since they agree on the breakdown of the marriage and its consequences. In the absence of a dispute, their case can't be arbitrated. On the other hand, out of court settlements of litigious divorce would open up a new field for arbitration

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The recent developments in French family law, the growing autonomy left to individuals in matters of personal status, the contractualisation of family relations, the withdrawal of the judge on "essential missions", and the promotion of alternative means of settling family disputes, make family law arbitration the focus of both the legal doctrine and legal practitioners.

In order, to implement arbitration in family law matters it would be essential **to redefine the distinctions between available and unavailable rights,** patrimonial and extra-patrimonial rights and to determine exactly what can be subject to arbitration and what cannot.

Implementing family law arbitration **still raises some specific questions** such as the idea that implementing arbitration could lead to the creation of a two-tier justice: one for the rich, with arbitration, the other for the poor, sent back to the public service of justice.

Therefore, there is still a long way to go before family arbitration takes hold in France, but some initiatives have emerged in order to promote family arbitration.

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Arbitration : the future of family law?

A recently constituted arbitral tribunal for family matters offers to settle disputes regarding child maintenance, joint custody issues as well as resolution of conflicting issues before an amicable divorce.

It is true that the use of arbitration has **many advantages for family matters**: the **expeditiousness** of the dispute resolution, the **freedom** to constitute the arbitral tribunal in the light of its experience and of its skills set, the **confidentiality** in the handling of the case, the possibility of a **change of scenery** for the litigation and the possibility for the judge to **decide according to equity**.

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However, as of now arbitration is not often used in matters of family law.

If some legal practitioners believe arbitration will become an efficient way to settle disputes in family law, there is no guarantee that this will be the case, particularly since arbitration will, for now, necessarily be limited to property rights issues.

What is different now that we are in a global pandemic?

During the lockdown all courts have been closed.

During these two months, very few cases have been dealt with.

When it comes to family law, two types of cases have been given priority: those involving **domestic violence** and those dealing with **international chil dren abduction**. All other cases were postponed *sine die*.

Courts are reopening progressively, with each court deciding how it will deal with the consequences of the current health crisis and how to resume its judicial activity.

There will thus be important differences in treatments between cases.

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Are there any beneficial impacts that have come from the lockdown?

This may serve **as an incentive for the French government to act and try to improve the judicial process**.

It will probably also encourage more and more lawyers to carefully consider whether or not an **alternative method of dispute resolution may be preferable**. Arbitration might then be considered as a future alternative in family law matters.

This may also be the starting ground for a reflection with **respect to organizing remote hearings, either by telephone or through videoconference**.

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Charlotte Butruille-Cardew
Cabinet CBBC

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Arbitration – from small beginnings to now stop the evolution of arbitration and lesson learned

Suzanne Kingston

2 June 2020

1

Quick recap

- Arbitration is a form of dispute resolution
- Importantly it ends in adjudication
- Parties agree to be bound by the decision of the arbitrator

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Why is arbitration so important?

- Resolution of family disputes at crisis point (even before COVID-19)
- Government has attempted to divert suitable cases away from the court system to dispute resolution
- Even more important now in the COVID-19 era
- Judicial support for arbitration and general encouragement

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Financial scheme launched in 2012

- Financial arbitration does NOT cover
- status of the relationship
- insolvency
- third-party intervention unless by agreement

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Children arbitration scheme launched in 2016

- Children arbitration does not cover
- status of the child
- abduction
- adoption
- surrogacy

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Children arbitration scope extended April 2020 to include external relocation to certain jurisdictions

- Temporary or permanent leave to remove to a country which is signatory to the 1980 Hague convention
- or the 1996 Hague convention
- or for so long as the United kingdom remains bound by the provisions of Brussels 11A regulation, temporary or permanent removal of a child to the jurisdiction of another member of the EU to which the regulation also applies

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Is it successful?

- Current statistics
- Number of arbitrators trained
- Selection of arbitrators

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The Building Blocks for Successful Arbitration Scheme

- IFLA - the Institute of Family Law Arbitrators - http://ifla.org.uk/
- IFLA is a not-for-profit organisation dealing with governance, training and complaints
- Training scheme established at the Chartered Institute for Arbitration
- The rules continuously evolved to deal with new situations
- Accredited arbitrators are encouraged to work together and the Forum for Family Arbitrators (FFA) has been established for that purpose

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Judicial encouragement absolutely key

- S v S (2014) EWHC 7 Munby J
- Practice guidance 23 November 2015 Sir James Munby (finance)
- Practice guidance 26 July 2018 Sir James Munby (children)

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COVID-19

- Arbitration actively encouraged by both HHJ Tolson and Macdonald J
- Remote arbitration
- Suggested guidance - launch 12 June. Appended to the slides. Authors:
  - Andrzej Bojarski
  - Charles Hale QC
  - Christopher Pocock QC
  - Janet Bazley QC
  - Marina Faggionato
  - Nicholas Allen QC
  - Nigel Dyer QC
  - Suzanne Kingston

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Perceived problems

- How to deal with the choice of arbitrator
- How to win hearts and minds
- Ensuring everybody understands the binding nature of arbitration
- Is it more expensive? Fixed fee?
- Can arbitration be challenged?

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The benefits

- The parties select decision maker and continuity of decision making
- Flexibility
- Control and pacing
- Confidentiality
- Informality
- Possibility of dealing with discrete issues

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Marketing

- Proper accreditation
- Fee structure
- Webinars/podcasts
- Spreading the word

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The sorts of cases that might be suitable for arbitration

- Variation of maintenance
- Discrete issues
- A failed court mediation
- Speedy resolution necessary e.g. Christmas contact

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A retrospective – what I wish I'd known

- Purpose and conduct of precommitment meetings
- Checklist for preliminary meetings
- How to draft the award/determination
- Peer group meetings/support/supervision
- Marketing ideas
- Best sorts of cases referred to arbitration
- It takes time

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Thank you

If you have any questions or would like to speak to one of our team, we'd love to hear from you.

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16

ARBITRATION IN SOUTH AFRICA

Presented by Zenobia du Toit
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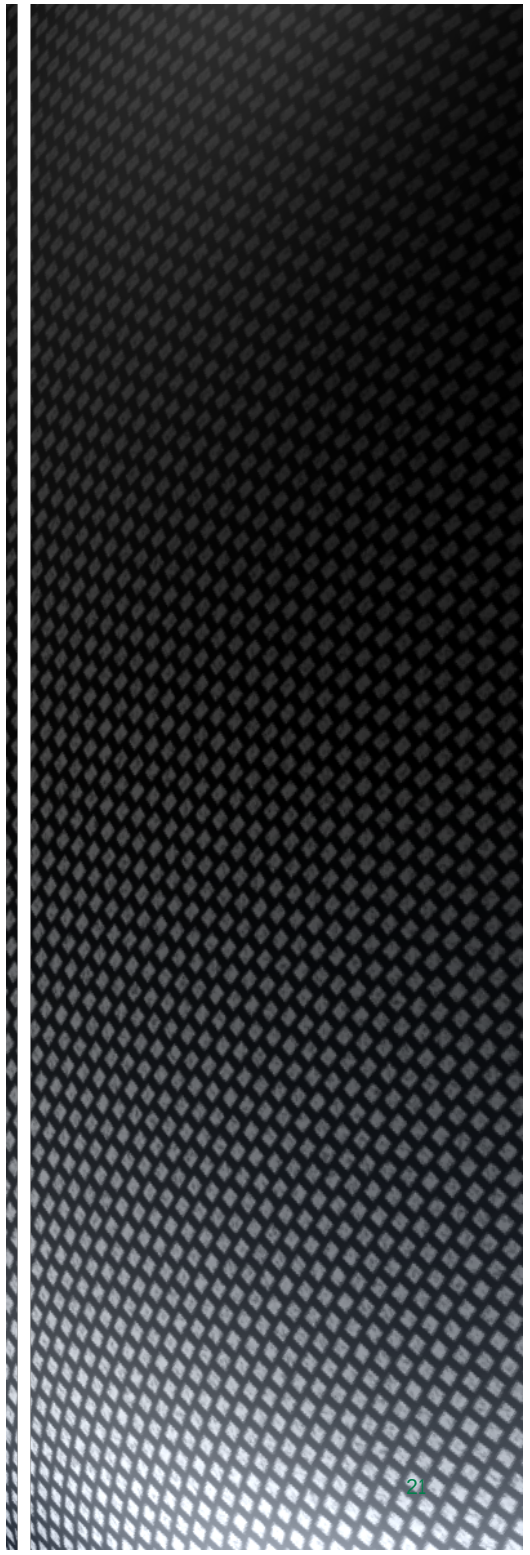

1. HOW FAR HAS ARBITRATION DEVELOPED IN SOUTH AFRICA?

Section 2 of the Arbitration Act, 42 of 1965 currently reads:-

2. A reference to arbitration shall not be permissible in respect of –
   (a) Any matrimonial cause or any matter incidental to such cause; or
   (b) Any matter relating to status.

Ressel v Ressel 1976(1) SA289(W) –
the court jealously guards what is good or not good for a child.

Cool Ideas 1186 v Hubbard ao 2014(4) SA474(CC) –
it is often, but not always, contrary to public policy for a court to enforce a commercial arbitration award that is at odds with a statutory prohibition.

AB v VJB 2016(5) SA210(SCA) –
financial disputes arising from a divorce order incorporating a settlement agreement and not incidental to the matrimonial cause can be arbitrated.

1. HOW FAR HAS ARBITRATION DEVELOPED IN SOUTH AFRICA CONT.?

2001 SA Law Reform Commission (SALRC) Report on arbitration.

- Recommended that the Arbitration Act be amended to permit arbitration in matrimonial disputes, but excluding the interests of children.
- Matters which the parties cannot dispose of by agreement are not arbitrable.
- Never implemented

2013 SALRC, Department of Justice and Constitutional Development (DOJCD) workshopped and the SALRC moved the issue to the investigation of family dispute resolution specifically. (Project 100D)

2016 SALRC issue paper 31, Project 100D, was distributed.

- Extensive submissions were received, also from Family Law Arbitration of South Africa (FLAFSA), the LSSA (Law Society of South Africa) and the Cape Law Society.
- FLAFSA proposed that S.2 of the Arbitration Act be amended to permit arbitration in family law matters. Initially disputes relating to children were excluded from the proposal. FLAFSA was formed after liaison with Suzanne Kingston of IFLA and with much monitoring and assistance by her, and later also Rachael Kelsey.

1. HOW FAR HAS ARBITRATION DEVELOPED IN SOUTH AFRICA CONT.?

- FLAFSA's submission was also made to the Department of Justice and Constitutional Development (DOJCD).

- The submission was later amended to include disputes relating to children, but with endorsement of the court's judicial authority as upper guardian of children, which could not be ousted. Pro bono arbitration as part of the offer to be provided.

Issues arising:-

1. The court as upper guardian of children.
2. What safeguards to protect children.
3. The law that should be applied.
4. Arbitrator accreditation, training and practice supervision standards
5. Options for review of arbitral awards involving children.
   - De novo hearing supported by evidence.
   - Based on prima facie evidence award not in child's best interests or harmful to child.
6. Court may conduct a de novo hearing; or review the findings if a reasoned award or no legal requirement to provide reasoned award or transcript.
7. Voice of children – guardian, curator ad litem, mental health expert, Family Advocate, legal representative.

1. HOW FAR HAS ARBITRATION DEVELOPED IN SOUTH AFRICA CONT?

-

- FLAFSA proposed law of South Africa to be applied. Issues for discussion arose relating to religious marriages such as Muslim, Hindu or Jewish marriages.

- SALRC argued that arbitrators should not necessarily be limited to experienced family lawyers as this may increase the complexity and formality of the process and use adversarial tools of litigation. Suggestions were psychologists, valuators, financial experts, a lay third party, religious leaders, and elders from the community. However, quality and training of arbitrator critical to viability process.

Questions arising:-

- Special policy considerations;
- Special nature of family law disputes;
- Revised standard of review and/or appeal;
- Separate Rules for Family Law Arbitration from commercial arbitration may be necessary;
- Provision of counsel for children and/or how children should be involved or heard;
- What law should apply;
- Who should be arbitrators;
- Involvement of Family Advocate in considering and monitoring awards;
- Despite court's powers to hear matters de novo, the court's role should be to give effect t o an arbitrator's award if just and equitable.

1. HOW FAR HAS ARBITRATION DEVELOPED IN SOUTH AFRICA CONT.?

- SALRC concluded although not universal appeal, arbitration should be encouraged, awards to be enforceable for those choosing this private ADR mechanism.

- SALRC proposed draft legislation and workshopped the draft across South Africa in March 2020.
  - No arbitration award regarding the rights or interests of a child may come into effect unless confirmed by a High Court.

  - Must be in best interests of child.

  - Family law arbitration will fall under the Arbitration Act 1965, with amendments required by context and the Act to be amended to allow Family Law Arbitration.

1. HOW FAR HAS ARBITRATION DEVELOPED IN SOUTH AFRICA CONT?

-

- Workshops February 2020 submissions to which FLAFSA and the CLSA commented extensively:-
  - For separate legislation relating to Family Law Arbitration due to special nature of family law and flexible processes to be applied.
  - Court upper guardian of children; awards relating to children to be sanctioned by court; Family Advocate to receive notice of arbitration and award to report if necessary.
  - Arbitration and mediation separate but parallel and complementary processes.
  - Experienced family law legal practitioners / academics / retired judges with at least 10 years experience and with ongoing training and monitoring to be arbitrators. Adherence to a code of conduct. Experts may be involved to assist arbitrators.

- Review and appeal procedures discussed. Appeals:-
  - Lack of substantive jurisdiction.
  - Serious irregularity and substantial injustice as a consequence.
  - On point of law, not fact – legal error.

- FLAFSA's draft rules for family law arbitration, requirements for arbitrators, and matters to be arbitrated discussed. All family law matters, including but not limited to domestic relationships, the best interests of children, the proprietary consequences of divorce, maintenance claims, etc.

2. WHAT CASES ARE BEING DEALT WITH

- <u>Informal arbitrations:-</u>
  - Have occurred in regard to discreet issues, mainly in financial disputes (including children's maintenance disputes).

  - Awards have been incorporated in settlement agreements. The agreements have again been incorporated in divorce court orders.

  - FLAFSA has trained arbitrators (with the valuable assistance of Suzanne Kingston), the arbitrators have written exams, which have been marked by a retired judge.

3. EFFECT OF GLOBAL PANDEMIC

- Delivery of justice initially ground to almost a complete halt.

- The courts were in lockdown, with reduced staff only.

- The hearing of a limited number of matters falling within the categories of exceptions were facilitated, and access to court buildings were limited.

4. VIRTUAL PROCEDURES

- Problem areas:-

  - Resources to equip courts for remote or electronic hearings are limited.
  - Other than the Gauteng Court little progress in digitalization of courts

- Judicial directives:-

  - Dress code – need not robe for virtual hearings, but appropriate dress.
  - Only matters regarded as urgent and fully within certain categories will be attended to, for example, in family law matters, domestic violence matters, urgent maintenance matters, urgent matters relating to the best interests of children etc.
  - Exchange of hard copies shall be minimized.
  - Options to proceed with cases with minimal contact shall be investigated.

- Duty Judge can in discretion issue directives re:-

  - Submission heads of argument
  - Hearing on papers
  - Oral evidence
  - Remote hearing on digital platforms
  - Postponement
  - Physical hearing, subject to certain conditions
  - Judicial case management

4. VIRTUAL PRECEDURES CONTINUED

- Result:-

    - Huge bottleneck of cases and large backlog of cases to be heard / dealt with.
    - Delivery of and access to justice delayed.
    - ADR can assist and ADR mechanisms besieged.

- ADR during pandemic

    - Increased demand
    - Increasingly discreet issues have been dealt with in ADR, including in arbitration
    - Remote arbitration (zoom, Microsoft office, etc)
    - Arbitrator issues directives regarding manner of hearing, written or oral submissions, heads of argument, procedures remotely.
    - Issues – evidence of the parties or witnesses where demeanor not observed.

5. ARBITRATION IN FUTURE

- Hope for family law arbitration in separate Act incorporated under family law legislation.
- Repeal of S.2 of current Arbitration Act.
- Real progress in entrenching arbitration as alternative ADR process.
- An alternative to expensive extended litigious court proceedings in order to achieve fair resolution by an impartial arbitrator without delay or unnecessary expense.
- It is flexible and private where parties may craft the procedures, identify issues, limit time periods, maximize the exploration of alternatives, and assists the parties in reaching agreement at speed.
- It creates party autonomy subject to public interest issues and balances powers.
- There are no specially dedicated family law judges handling intricate and complex family law issues, although there is a dedicated family court stream at regional court level.
- Courts are overcrowded.
- Discrete issues may be heard quickly, which may encourage settlement overall.
- Less need for interim proceedings, updating of valuations or evaluations, reinventing financial information and leakage of financial resources.

SOUTH AFRICA

1. How far has arbitration developed in South Africa?

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    - No arbitration award regarding the rights or interests of a child may come into effect unless confirmed by a High Court.
    - Must be in best interests of child.
    - Family law arbitration will fall under the Arbitration Act 1965, with amendments required by context and the Act to be amended to allow Family Law Arbitration.

- Workshops February 2020 submissions to which FLAFSA and the CLSA commented extensively:-

    - For separate legislation relating to Family Law Arbitration due to special nature of family law and flexible processes to be applied.

    - Court upper guardian of children; awards relating to children to be sanctioned by court; Family Advocate to receive notice of arbitration and award to report if necessary.

    - Arbitration and mediation separate but parallel and complementary processes

    - Experienced family law legal practitioners/academics/retired judges with at least 10 years experience and with ongoing training and monitoring to be arbitrators. Adherence to a code of conduct. Experts may be involved to assist arbitrators.

- Review and appeal procedures discussed. Appeals:-
    - Lack of substantive jurisdiction
    - Serious irregularity and substantial injustice as a consequence
    - On point of law, not fact – legal error.
    -

- FLAFSA's draft rules for family law arbitration, requirements for arbitrators, and matters to be arbitrated discussed. All family law matters, including but not limited to domestic relationships, ART, the best interests of children, the proprietary consequences of divorce, maintenance claims, etc.

Informal arbitrations:-

- Have occurred in regard to discreet issues, mainly in financial disputes (including children's maintenance disputes)
- Awards have been incorporated in settlement agreements. The agreements have again been incorporated in divorce court orders.
- FLAFSA has trained arbitrators (with the valuable assistance of Suzanne Kingston), the arbitrators have written exams, which have been marked by a retired judge.

Global pandemic

Delivery of justice initially ground to almost a complete halt.
The courts were in lockdown, with reduced staff only.
The hearing of a limited number of matters falling within the categories of exceptions were facilitated, and access to court buildings were limited.

Problem areas:-

- Resources to equip courts for remote or electronic hearings are limited

- Other than the Gauteng Court little progress in digitalization of courts

Judicial directives:-

- Dress code – need not robe for virtual hearings, but appropriate dress.
- Only matters regarded as urgent and fully within certain categories will be attended to, for example, in family law matters, domestic violence matters, urgent maintenance matters, urgent matters relating to the best interests of children etc.
- Exchange of hard copies shall be minimized.
- Options to proceed with cases with minimal contact shall be investigated.

Duty Judge can in discretion issue directives re:-

  - Submission heads of argument
  - Hearing on papers
  - Oral evidence
  - Remote hearing on digital platforms
  - Postponement
  - Physical hearing, subject to certain conditions
  - Judicial case management

Result:-

- Huge bottleneck of cases and large backlog of cases to be heard / dealt with
- Delivery of and access to justice delayed
- ADR can assist and ADR mechanisms besieged.

ADR during pandemic

- Increased demand
- Increasingly discreet issues have been dealt with in ADR, including in arbitration
- Remote arbitration (zoom, Microsoft office, etc)
- Arbitrator issues directives regarding manner of hearing, written or oral submissions, heads of argument, procedures remotely.
- Issues – evidence of the parties or witnesses where demeanor not observed.

FUTURE

- Hope for family law arbitration in separate Act incorporated under family law legislation
- Repeal of S.2 of current Arbitration Act
- Real progress in entrenching arbitration as alternative ADR process.
- An alternative to expensive extended litigious court proceedings in order to achieve fair resolution by an impartial arbitrator without delay or unnecessary expense.
- It is flexible and private where parties may craft the procedures, identify issues, limit time periods, maximize the exploration of alternatives, and assists the parties in reaching agreement at speed.
- It creates party autonomy subject to public interest issues and balances powers.
- There are no specially dedicated family law judges handling intricate and complex family law issues, although there is a dedicated family court stream at regional court level.
- Courts are overcrowded.
- Discrete issues may be heard quickly, which may encourage settlement overall
- Less need for interim proceedings, updating of valuations or evaluations, reinventing financial information and leakage of financial resources.

Mandatory ADR In California

By Rod Firoozye

1. No Evidence of Fault in CA Divorce

In 1969 California became the first State in the United States to enact "No Fault Divorce."

Then Governor, Ronald Regan, had signed this law likely because his first wife, Jane Wyman, had unfairly accused him of "mental cruelty" to obtain a divorce in 1948.[1]

Since then, any evidence of "fault" of a Party is generally inadmissible in divorce proceedings [Cal. Fam. Code § 2335].

However, there are certain exceptions to this general inadmissibility of fault evidence. One area specifically relates to the use of ADR in family proceedings.

2. ADR in California

The most common form of ADR in California is mediation, whereby a neutral third party assists the Parties to resolve their disputes.

Every Court in California has some form of Court provided mediation. All custody matters are required to go to mediation before a final determination [Cal. Fam. Code § 3160 et seq]. These custody mediations are frequently provided with the assistance of court personal from a specific division of the Court referred to as Family Court Services (FCS).

FCS custody mediations can either be confidential, or they may be recommending and non-confidential.

For financial matters, mediation is not mandatory, however most California courts have some form of mediation before Parties can go to trial on any issues. These types of mediations may be referred to as "Mandatory Settlement Conferences."

However, many California attorneys also retain the services of private mediators both for custody matters or financial matters. These types of private mediations can be in addition to Court provided services or in lieu of the Court services.

3. Failure to Negotiate Properly – 271 Sanctions

One of the issues faced by many divorcing parties is where one party purposefully drags out a case and does not make proper efforts to timely settle any disputes.

In response to this issue, California maintains various laws that protect against bad acts in family proceedings.

One such law is Family Code Section 271 which is an extremely powerful mechanism, as it holds parties accountable for bad behavior based on failure to negotiate in good faith.

[1] See https://www.nationalaffairs.com/publications/detail/the-evolution-of-divorce

Pursuant to Section 271, a Court can award monetary "*sanctions against a party who frustrates the policy to promote settlement and cooperation in family law litigation*."[2]

Therefore, pursuant to this Section evidence of bad faith actions by a Party may be received by the Court to determine if the other party acted inappropriately.

There are other laws that allow the shifting of fees or issuance of fees in other circumstances as well – such as making false allegations of child abuse or neglect (Cal. Fam. Code §3027.1).

However, Section 271 is a big hammer that usually pushes a party to pursue ADR and to make reasonable settlement proposals.

About the Author: Rod Firoozye is a family law litigator and mediator and has previously testified as an expert witness in the areas of spousal support and application of California family law. He has practiced law since 1996 in Silicon Valley and has been a certified family law specialist since 2004. Mr. Firoozye is also a Fellow of IAFL and American Academy of Matrimonial Lawyers (AAML). He has been regularly selected as a Super Lawyer by San Francisco Magazine since 2007. For more information please see: www.lawrf.com.

[2] See Fam. Code Section 271: https://codes.findlaw.com/ca/family-code/fam-sect-271.html