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It's Arbitration, But Not As We Know It: Reflections on Family Law Dispute Resolution

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ABSTRACT

Until recently few jurisdictions have allowed arbitration of family law disputes, considering such arbitration to be contrary to public policy. But policies favouring private ordering, combined with pressures on family courts have encouraged reconsideration of the policy issues. This is notably true in common law jurisdictions. Similar developments in civil law jurisdictions are inhibited by the wording of national civil codes. Differences in substantive laws and in legal institutions also contribute to diverse assessments of the utility of arbitration: the role of the civil law notary in drawing up and dissolving a matrimonial property regime may be influential in this respect, while competitors to arbitration also include mediation, private judging, and the use of special masters and parenting co-ordinators. Where arbitration has been promoted, its scope has been limited to the financial consequences of divorce in some jurisdictions, while in others it extends also to child arrangements. Policy concerns are addressed through the development of enhanced protection for the parties to arbitration as compared to commercial cases, whether through case law or legislation. Key areas in which this has occurred include: the permissibility of an arbitration (as opposed to a submission) agreement; availability of an appeal or the intensity of review of an award; specification of the qualifications for arbitrators; and specific measures for the protection of children.

I. INTRODUCTION

According to Part 3.3 of the Family Procedure Rules applicable in England and Wales '[t]he court must consider, at every stage in proceedings, whether non-court dispute resolution is appropriate'. One such form of dispute resolution is arbitration. An Institute of Family Law Arbitration (IFLA) was established in England in 2012 with a view to promoting arbitration of family law disputes and providing a framework within which such arbitration could take place under the Arbitration Act 1996. England and Wales are not alone. The establishment of the IFLA was preceded, by a matter of months, by the setting up of the Family Law Arbitration Group Scotland (FLAGS) to further arbitration under the Scottish Arbitration Act 2010. In recent years institutions conducting or regulating family arbitration have also emerged in, *inter alia*, Germany, Spain, Australia, and Canada.¹ Arbitration of family disputes has

been a growth area for several decades in the USA and the potential for such arbitration is under discussion elsewhere.² Arbitration has many alleged advantages. These include speed, flexible scheduling, more informal procedures, the opportunity to select an appropriate expert as arbitrator, and confidentiality. Lower costs are also claimed. Although the parties have to pay the arbitrator(s), there is less wastage of costs on legal representation for repeated – and wasted – court attendance.

This article explores the development of family arbitration in the jurisdictions identified above, with occasional references to developments elsewhere. In each case the legal framework for such arbitration is provided by a general arbitration statute, essentially designed for commercial disputes, or by family arbitration legislation which constitutes an amendment of the general statute. The article does not extend to out of court dispute resolution in the context of personal, religious, or customary laws.³ Two themes are investigated: first, the factors that make arbitration a stronger or weaker competitor among other dispute resolution services, and second, the extent to which the general framework for arbitration has been, or is being, modified in the family dispute resolution context to adapt it to the specific nature of such disputes.

II. REGULATORY FRAMEWORK FOR ARBITRATION

The general regulatory framework for arbitration – which although designed for civil and commercial matters has provided the starting point for regulation of family arbitration – is broadly similar throughout the world, thanks in particular to the work of UN Commission on International Trade Law which produced the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards, establishing criteria for the enforcement of both arbitration agreements and awards,⁴ and the 1985 Model Law, which has been adopted, with various modifications, in well over 60 states.⁵ It has also promoted rules for ad hoc arbitrations and for conciliation. Countries with a long history of commercial arbitration retain their individual distinctive features,⁶ but certain characteristics of arbitration are well established.

Arbitration is founded on agreement. In essence, parties agree that they will take their dispute to a decision maker whom they trust (the arbitrator or arbitral tribunal), and abide by the decision of that person or tribunal.⁷ In recognition of this, courts and other agents of enforcement give effect to the decision (award). It is binding on the parties and can be enforced in the same way as a judgment. A core use of arbitration is in situations where technical, commercial, or professional expertise is essential to the fair resolution of the dispute. The parties can select an arbitrator in whose expert judgment they have full confidence. Arbitration has thus traditionally been important in situations where the quality of a product is at issue ('look-sniff' arbitrations), and in construction disputes.

Since agreement is the basis for arbitration, the parties' agreement is also in principle the main source of the rules governing their arbitration. Such rules may be incorporated in dispute resolution clauses in a main contract, or in submission agreements,⁸ but in practice commercial parties frequently incorporate by reference the rules of an arbitral institution so that they can benefit from the accumulated experience of that institution. The principal objective of such rules is to ensure that an

arbitral tribunal can be established, even if the respondent to the arbitration is uncooperative.⁹ This is also a major objective of national arbitration statutes, which provide a set of default rules to supply any deficiencies in the parties' agreement. Once the tribunal is established, it can itself make decisions to facilitate the smooth operation of the procedure. Arbitration statutes thus typically establish the requirements for the validity of an arbitration agreement; the relationship between courts and tribunals, in terms of judicial scrutiny of the jurisdiction of an arbitral tribunal and the scope for judicial assistance; the default rules applicable in relation to the establishment of a tribunal (and to a limited extent the conduct of the arbitration); the criteria for a valid award and grounds and procedures for challenges to an award; matters relating to enforcement; and rules on fees and costs.

A significant feature of arbitration in most jurisdictions is that it is a single instance method of dispute resolution. This is in keeping with its commercial origins: having received a ruling, the parties want to move on with their business relationships. The principal form of challenge to an arbitration award is a review on essentially jurisdictional and procedural grounds, rather than an appeal in relation to the findings of fact or law.¹⁰ Thus an award may be set aside if there was no valid and binding arbitration agreement conferring jurisdiction on the tribunal, if the tribunal ruled on matters outside the scope of any such agreement, or if there was a lack of due process.¹¹ In addition, courts may refuse to enforce an arbitral award if there is a public policy ground for doing so.¹²

Exceptions to the single instance model exist.¹³ Appeals against arbitral awards are sometimes possible in domestic arbitration even if not permitted in international arbitration,¹⁴ and some arbitral bodies also have an appellate tier.¹⁵ In keeping with the contractual basis of arbitration, legislation admitting the possibility of an appeal may permit the parties to either 'opt-in', or 'opt-out' of any appeal procedure.¹⁶ In addition, or alternatively, it may require the leave of the court before an appeal will be heard. Generally, the trend in commercial arbitration is towards a harmonization of domestic and international rules, and towards restricted review of awards. It is assumed that the parties are of equal bargaining power and their personal autonomy should be respected.

III. ARBITRABILITY OF FAMILY LAW DISPUTES

Although modern arbitration statutes usually apply to 'arbitration' generally, without restricting their application to commercial matters, they have sometimes been interpreted as excluding family arbitration (Wolfson, 2010).¹⁷ More generally, there has been an *assumption* until recently that such statutes do not apply to family arbitration.¹⁸ That assumption is now subject to challenge.

1. Defining the 'Family'

Many of the restrictions on arbitration in family cases have arisen out of the control of church and state over marriage and divorce. Case law on arbitration is also dominated by divorce cases. But the modern family takes many forms. The restrictions may well not be considered applicable in cases arising from the dissolution of a civil union, still less are they relevant to the parting of cohabitants. Nevertheless, other

public policy considerations may still discourage arbitration of such disputes, and where children are involved the state retains a strong interest irrespective of the nature of the adult relationships.¹⁹

2. The Framework Provided by National Legal Codes

In some jurisdictions, provisions of the Civil Code have proved an obstacle to family arbitration. In Spain, for example, Article 1814 CC provides: ‘No compromise²⁰ shall be possible in relation to the civil status of persons, nor in relation to matrimonial issues, nor in relation to future maintenance.’ Marfil Gómez (2010) highlights the problems of interpretation that this wording creates, and the limited role played by arbitration in family law. He considers that arbitration is permissible under this provision in the case of ‘property regimes between spouses or non-married partners’²¹ and succession. He argues that wider scope for arbitration is problematic both on grounds of the limited autonomy granted to spouses by family laws and because of the greater scope for protection of weaker parties offered by the judicial system.

Similarly, the wording of the Code of Civil Procedure has shaped debates in Germany. The relevant provisions were amended in 1998 at the time of reforms of the law relating to arbitration. Currently Article 1030 ZPO provides:

(1) Any claim under property law may become the subject matter of an arbitration agreement. An arbitration agreement regarding non-pecuniary claims has legal effect insofar as the parties to the dispute are entitled to conclude a settlement regarding the subject matter of the dispute. [official translation]

The revised provision was intended to clarify the law by drawing a distinction between patrimonial and non-patrimonial disputes and ensuring that arbitration was facilitated in the case of patrimonial disputes. However, as Gilfrich (2007) points out, after a survey of the literature on this subject, policy considerations appear to remain relevant, still requiring a case by case analysis.

Objective arbitrability, which is primarily governed by § 1030 ZPO depends notably on whether the State claims for itself a monopoly of legal protection in relation to the matter in dispute. Determination based on this criterion requires a detailed case by case investigation . . . (Gilfrich, 2007: 31) [author’s translation]

The question of the state’s claim to monopoly of legal protection is particularly pertinent, of course, in family cases.

3. State Interest

A common thread in the story of the development or advocacy of arbitration for the resolution of family law disputes is the overburdening or breakdown of the judicial system. In that sense, there is a state interest in relieving the courts of as much of their family dispute resolution function as is compatible with the requirements of

public policy. But substantial public policy grounds for retaining jurisdiction remain. As well as upholding well-established principles such as legal certainty and judicial protection of weaker parties, the state has an interest in ensuring that, as far as possible, any financial settlement between the parties does not impose welfare responsibilities on the state (Paulsson, 2013: 117). It also has an interest in ensuring that arrangements on separation or divorce are adequate to limit damage to individual family members (Gilfrich 2007: 32–75), to relieve it of the costs of caring for such individuals and to prevent wider harmful impact on society. The tension between these interests is illustrated by the following quotation, addressing the situation in the USA:

Couples themselves are not the only ones that may experience financial loss; the government and community also incur losses related to marital or relationship dissolution and conflict. For example, the Family Law Supreme Court Steering Committee (2003) indicated that family law cases account for over 40% of court filings and almost 70% of reopenings. . . . [A] single divorce case costs the state and federal governments an estimated \$30,000 in assistance for factors such as increased food stamp use, public housing, bankruptcies, and juvenile delinquency. Furthermore, it is estimated that, in 2002, the nation's 10.4 million divorces cost taxpayers in excess of \$30 billion. For example, the cost of divorce to the state of Florida in 2002 totaled almost \$2.5 billion . . . The longer a case lingers in the court system, the higher the cost to the court and the community. (Henry et al, 2009: 683)

Attitudes towards arbitration of family disputes inevitably depend on attitudes towards personal autonomy and private ordering more generally in family law.

4. Arbitration and the Dejudicialization of Divorce

In many jurisdictions, a divorce can only be granted once issues relating to property, maintenance, and child arrangements have also been resolved. If at the same time a court judgment is necessary to dissolve a marriage there is therefore a disincentive to take such issues to arbitration: they are intimately linked with the divorce or legal separation itself. That being so, it is not surprising that advocacy of arbitration as a method of dispute resolution in family law matters is in fact occurring in parallel with the dejudicialization of divorce in uncontested cases. This is particularly true for countries in which the authority to grant a divorce is being conferred on notaries: the arguments in favour of notaries acting as mediators and arbitrators are being rehearsed at the same time, facilitating resolution of disagreements that might stand in the way of an out of court divorce.

In Ecuador,²² Peru,²³ and Brazil,²⁴ for example, notaries can issue a divorce in non-contentious cases where there are no minor or disabled children involved. The parties have to provide documents proving the existence of the marriage to the notary, and also their agreement on the matters that need to be resolved for the divorce to be granted. The notary will then inform the registry office, to ensure that the change in status is publicly recorded.²⁵ Columbia²⁶ and Cuba²⁷ have even gone

further than this and permit notarial divorces in cases where minor or disabled children are involved.²⁸ A similar process of dejudicialization is also taking place in Eastern Europe. The years 2009–2010 proved to be an explosive time in this respect. The new Notaries Act and Family Law Act in Estonia granted notaries ‘vital statistics’ competencies including the celebration of marriages and the grant of divorces in uncontested cases.²⁹ It also permitted notaries to act as mediators and arbitrators, in response to which a mediation and arbitration tribunal of the Chamber of Notaries has been established (Andresen, 2009). In Latvia³⁰ and Romania³¹ notaries were given the authority to grant divorces in uncontested cases, even where there are children involved.

Notarized divorce was proposed in France in 2007 but not pursued.³² On the other hand, the dissolution of a civil union can take place through the offices of a notary in France³³ or Quebec.³⁴ Administrative forms of divorces are also available in some states, such as Mexico,³⁵ Portugal,³⁶ and Romania.³⁷

5. Country Overview

In countries where arbitration of some family disputes is accepted as permissible, patrimonial claims, such as those relating to the liquidation of a matrimonial regime, are the least controversial, being closest to the existing domain of arbitration. The position in Spain and Germany, and the influence of the wording of, respectively, the Civil Code and the Code of Civil Procedure has already been noted. Similar wording can be found in codifications in other jurisdictions.³⁸ In these states, to the extent that arbitration takes place at all, it is limited to matters of property division. Elsewhere the matter may be regulated by specific legislation on family arbitration. In Australia the Family Law Act 1975 was amended in 1991 to permit arbitration by the Family Law Act 1975, but it is expressly limited to property, maintenance, and financial matters.³⁹

English law on the subject is at an early stage of evolution. There is no legislative framework beyond the Arbitration Act 1996, so the question of arbitrability depends entirely on case law. Family disputes were assumed to be non-arbitrable⁴⁰ on the basis of the ruling in *Hyman v Hyman* that ‘the power of the Court to make provision for a wife on the dissolution of her marriage is a necessary incident of the power to decree such a dissolution, conferred not merely in the interests of the wife, but of the public, and the wife cannot by her own covenant preclude herself from invoking the jurisdiction of the court or preclude the court from the exercise of that jurisdiction’.⁴¹ The issue in that case was the interpretation of a deed of separation, but the implications for arbitration are obvious. Recent case law has revised this stance, however. Courts have favoured giving effect to an agreement that the parties have come to themselves for the resolution of their financial affairs following divorce, in the absence of overriding public policy concerns, or a vitiating factor such as undue pressure or the exploitation of a dominant position to secure an unreasonable advantage.⁴² In the wake of *Radmacher v Granatino*⁴³ courts now ‘recognise the weight that should now be given to autonomy, and thus to the choices made by the parties to a marriage . . .’.⁴⁴ This new respect for personal autonomy emboldened family lawyers in England and Wales to proceed with establishment of the IFLA, an

initiative which has received significant support from members of the judiciary, whether speaking in a judicial or extra-judicial capacity.⁴⁵ The IFLA currently restricts its offer of arbitration to ‘financial and property disputes’ arising out of a marriage, civil partnership, or cohabitation.⁴⁶ According to David [Hodson \(2013\)](#), one of the principal initiators of the scheme:

The decision was taken at a very early stage not to include children matters in arbitration at the time of the launch. This was after consultation with the Ministry of Justice. There was a perception that children law matters involve very different considerations including different personnel who may need to be involved in adjudications. There would be reference to hearing the voice of the child and possibly even representation of the child. It may yet be appropriate but it was felt that the IFLA Scheme would be better to succeed initially dealing with financial matters where there may initially be greater demand.

Nevertheless, following judicial endorsement and the conduct of over 50 arbitrations under the IFLA Rules, the IFLA is now considering whether to include disputes relating to child arrangements within the Rules.

In most US states arbitration of disputes relating to division of assets and alimony has been well established for decades, but additionally in some states disputes relating to child support and child arrangements have been found to be arbitrable – whether as a result of case law or legislation.⁴⁷ In a number of states the possibility of arbitration of child arrangements has been specifically considered but rejected.⁴⁸ In general, the profile of family arbitration in the USA has been raised by the fact that the American Academy of Matrimonial Laws produced a Model Family Arbitration Act in 2005 (the Model Act), moreover, the Uniform Law Commission is currently drafting a Uniform Law.

The situation similarly differs from province to province in Canada ([Morris, 2004](#)).⁴⁹ ‘Family matters’ are specifically declared to be non-arbitrable in Quebec by Article 2639 of the Civil Code.⁵⁰ In Ontario the Family Law Act 1990 defines family arbitration as ‘an arbitration that (a) deals with matters that could be dealt with in a marriage contract, separation agreement, cohabitation agreement or paternity agreement under this Part’ (section 51). These matters include ownership in or division of property; support obligations; the right to direct the education and moral training of their children, and in some cases the right to custody of or access to their children, and ‘any other matter in the settlement of their affairs’.⁵¹ In British Columbia the Family Law Act Regulations 2012 make it clear that arbitration extends to child arrangements.⁵² Finally, it should be noted that FLAGS (Scotland) does not attempt to restrict arbitration under its aegis to financial and property disputes ([Nicholson, 2010](#)), but so far the number of arbitrations under the FLAGS Arbitration Rules is very small.

IV. SIMILAR CONCERNS: DIFFERENT PATHWAYS

Any full comparison of family law dispute resolution would have to extend into differences in substantive law, which may reduce the incidents of disputes, and into

family and religious cultures which may provide a support network for separating couples and ways of dissipating or suppressing conflict. The focus here is more limited: it highlights the competing claims of different dispute resolution professionals involved in family law disputes, their relationship to the surrounding legal culture, and the challenges created by an acceptance that family law disputes are arbitrable. Some states adopt a 'purist' approach to arbitration: they do not modify their general arbitration legislation – or modify it to a very limited extent – and restrict the potential for family arbitration. But they may have other dispute resolution mechanisms that provide advantages claimed for arbitration (Section IV.1). On the other hand, in states which have adopted a more liberal approach to arbitration of family disputes, amendments to legislation or creative court rulings have sought to accommodate the special features of family law (Section IV.2).

1. Alternative Methods of Dispute Resolution

The position in California may be used as an illustration of the difficulties of appreciating the role of arbitration in the light of diverse institutional arrangements. California is identified in writings on family arbitration as taking a restrictive approach. In practice this means that although arbitration concerning property division and spousal support is permitted, *binding* arbitration in relation to child arrangements is not.⁵³ A number of other court appointed or private professionals may nevertheless be involved in dealing with family disputes, and may fulfil similar roles to those of an arbitrator.⁵⁴

As a starting point, mediation is mandatory in custody and visitation disputes as a pre-condition to a court order,⁵⁵ and the vast majority of disputes concerning child arrangements are settled by this means (Germane et al, 1985). But mediation in this context can also have some unusual features. Thus in Ventura County, for example, parents who participate in mediation relating to child arrangements are assigned to a Child Custody Recommending Counsellor (CCRC), who is typically a specialist in family therapy or social work. The CCRC can gather information from the parties themselves and from the children. They can also obtain information from anyone with knowledge about alleged domestic violence without the parent's permission and may check criminal records (Fletcher, 2013). The CCRC's job is to 'help parents create a plan that is in the best interests of their child or children'.⁵⁶ If the parents cannot agree, however, the CCRC will make a written recommendation to the judge and this recommendation is typically implemented.⁵⁷

The courts or the parties themselves may also seek specialist assistance in the proceedings making or implementing decisions on child arrangements. The assistance is usually obtained through the court appointment of a custody evaluator⁵⁸ or a referee,⁵⁹ who – like an arbitrator – may be a non-lawyer with the desired professional expertise.⁶⁰ The role of a Custody Evaluator is to assist in 'determining the health, safety, welfare, and best interest of children with regard to disputed custody and visitation issues'.⁶¹ The Family Code and the Rules of Family Procedure specify the qualifications and ethical commitments required of such an appointee.⁶² The reference procedure is much more general and can serve a much broader range of functions, being used in both civil and commercial contexts. In family law disputes a

suitably qualified referee, usually referred to as a Special Master, may assist in resolving disputes on patrimonial issues such as the division of matrimonial property, or concerning child arrangements.

A general reference under Code of Civil Procedure section 638 shares some of the features of arbitration: the whole dispute is taken outside the normal litigation process, and such a reference can only take place with the agreement of the parties. But in the case of a general reference the court appoints the Special Master, who has an obligation to apply the state's rules of substantive and procedural law, and the decision of a Special Master stands as a decision of the court and can be appealed in the same way.⁶³ In high conflict family disputes, the reference procedure is used in California to appoint a parenting co-ordinator,⁶⁴ an approach that is also being adopted in other US states.⁶⁵ But Berg's comment on this phenomenon is illuminating:

The use of a 'special master', a private-hire quasi-judicial officer, in addressing issues present in a high-conflict divorce is rapidly becoming more the norm than the exception. Across the country, professionals (not just lawyers) are assuming the role to acquire quasi-judicial immunity while performing the function of a parenting coordinator or parenting consultant. (Berg, 2007)

The threat of litigation against the professional involved in assisting a couple to resolve disputes over child arrangements favours the integration of such professionals into court processes. In a society where that threat is less of a concern, out of court processes may more easily be promoted.

In addition, private judging plays a significant role in California, in part as a means for wealthy litigants to avoid publicity, and in part because of cutbacks in financial support for the public courts. Article 6, section 21 of the California Constitution provides: 'On stipulation of the parties litigant the court may order a cause to be tried by a temporary judge who is a member of the State Bar, sworn and empowered to act until final determination of the cause.' Private (temporary) judges are frequently judges who have retired from the public court system.⁶⁶ The parties can select the judge they consider most suited to their case, and the proceedings will (usually) take place outside a court room but under the relevant California laws and procedures.⁶⁷ There are additional formal requirements. A private judge will sign the same oath of office administered to Superior Court judges.⁶⁸ Furthermore, under the California Rules of Court proceedings before a private judge should be open to the public.⁶⁹ These proceedings result in a judgment, rather than an arbitral award, but like the general reference procedure they include elements, such as choice of (specialist) adjudicator, scheduling of hearings to suit the parties, *de facto* a certain level of privacy, and the fact that payment for the performance of their functions is also provided by the parties, that lead to a blurring of the lines between arbitration and litigation.

Each of the dispute resolution mechanisms in California discussed above thus demonstrates some of the features alleged to be advantages of arbitration, and each takes pressure off the judicial system: the mediator, expert, or judge is outside the public system and their costs are paid by the parties. Elsewhere, of course, there are

also many competitor services that provide alternatives to, or overlap with, arbitration. Court procedures may have become more streamlined and flexible in order to manage family disputes, leading to a lack of demand for arbitration. Mediation of family disputes is widely promoted in many jurisdictions. Private or state funded services offering family counselling and parenting advice and assistance may be found satisfactory without the need to achieve any binding decision.

The success of mediation as a method of dispute resolution can be seen as a counterpoint to the apparently limited uptake of arbitration in Germany and Australia. In Germany, although mediation has only recently been regulated by statute (the *Mediationsgesetz*⁷⁰) some of the German *Länder* have experimented with in-court mediation and conciliation since it was first introduced in the Landgericht Göttingen in 2002 (Hirsch, 2006). These schemes are widely considered by the judiciary to be successful, and have been integrated into the new legislation. Further factors which have promoted in-court mediation are low costs and ease of access. Parties can benefit from several hours of court time at a cost that would only by one hour of time from an out of court mediator (Greger, 2008). In that connection, it is also noteworthy that as part of the overall package of measures under the *Mediationsgesetz* provision has been made for funding to support extra-judicial mediation. No such funding exists for arbitration.

In Australia, too, mediation is a popular method of dispute resolution in family cases. Regulation of mediation was introduced by the same reforms that also introduced family arbitration in 1991, but, in contrast to arbitration, funding was made available to support mediation initiatives. It was an ‘immediate, rapid success’ (Family Law Council, 2007: 40). Other initiatives have also contributed to the family dispute resolution culture in Australia. The Family Court has sought to develop a ‘less adversarial approach’, and family counselling services have been provided within the Family Court of Australia since it was established in 1976. The contribution of counselling professionals has been appreciated by the judiciary and policymakers (Moloney et al, 2013). In 2006, with the objective of improving the uptake of counselling and mediation services, and effecting ‘a cultural shift away from litigation and towards co-operative parenting’,⁷¹ government funded Family Relationship Centres (FRCs) were established throughout Australia to ‘act as highly visible entry points into the service system’ (Moloney et al, 2013) – operating within the community and not being linked to litigation. They provide information, referral, advice, and dispute resolution services to separating and separated families, as well as referring intact families on to counselling where required.⁷² Engaging in family mediation (renamed Family Dispute Resolution) is now a requirement before parents can apply for parenting orders.⁷³

The success of the FRCs, combined with the ‘less adversarial’ approach for those cases than nevertheless proceed to litigation, leaves arbitration somewhat squeezed between the two.⁷⁴ A proposal for the introduction of court-ordered arbitration, mooted in a Law Council Discussion Paper (Family Law Council, 2007), did not find favour with stakeholders (Wade, 2008) and was dropped. Further evidence of the perception that arbitration is of limited utility can be found in a report by the Community Services and Health Industry Skills Council (2012) as to the advisability of mediation for property and spousal maintenance disputes. The report indicates

that there is a market for such mediation and that concerns about the lack of adequate legal knowledge of mediators dealing with these issues be addressed by changes in mediation training programmes.

A final ‘competitor’ deserving a mention in this context is the civil law notary. As noted above, a number of legal systems are dejudicializing divorce and authorizing notaries to grant a divorce in uncontested cases. Notaries have a wide range of competences. Their expertise lies in the area of voluntary jurisdiction and in particular property transactions. Their particular value stems from their contribution to ‘preventive justice’, whereby the state provides citizens with protective mechanisms at the time of transacting business, or making provision in respect of personal and family matters, in order to avoid later litigation to the greatest extent possible. As bearers of public authority and part of the state machinery of justice, they do not act as party representatives, but as neutral third parties with a professional obligation to provide objective advice to all those concerned in a given transaction. They thus play a central role in drafting marriage contracts and drawing up plans for the liquidation of a matrimonial regime – whether at the request of the parties or on appointment by the court.⁷⁵ In recent years they have been emphasizing their role as neutral third party, undertaking training in mediation and arbitration, and trying to expand their role in family dispute resolution. This move can be seen as part of a general campaign to shore up the competitive position of the profession.⁷⁶ Although presented as an obvious extension of the notary’s neutral role – being a ‘natural mediator’ – Lesseliers (2012: 83) comments that

Notaries are skilled negotiators: they often have to reconcile conflicting interests in order to reach an agreement. Indeed a notarial recommendation is always agreement-orientated. A notary strives for accordance. If this fails, he will refer the parties to their lawyers.

However, as soon as these negotiations occur within a *conflictual context* (e.g. in a divorce or a division of an estate), many notaries are at a loss. In this case, they have to draw back on personal experience or intuition.

Irrespective of the extent to which notaries have successfully exercised a mediatory role in the past, their intention to compete in the modern market for (family and commercial) dispute resolution services is serious. Arbitration and mediation tribunals have been established by notaries’ chambers and the competences conferred on them in some jurisdictions in relation to divorce are likely to enhance their competitive position in family dispute resolution.

The above brief survey highlights the obvious point that each legal system has its own culture of family law and of dispute resolution which will influence the likelihood of conflicts arising, and the methods of resolution preferred. Government policy – notably expressed in financial support for preferred initiatives – and judicial support are important, but so is the wider legal and social culture. Ultimately, the strength of arbitration as a competitor in the market for dispute resolution services has more to do with the merits or demerits of alternative methods of dispute resolution than with the alleged advantages of arbitration itself.

2. Modification of the Principles of Arbitration

If arbitration has not proved acceptable, or successful, in some states because alternative methods of dispute resolution appear more apt, it must also be observed that states that have embraced (or are in the process of embracing) family arbitration have not uncritically adopted the approach to regulation found in statutes designed for commercial arbitration. The following discussion highlights the way in which, where arbitration is accepted in the context of family law, its principles have nevertheless been modified. Such modification may take place through the mechanism of case law, through limited provisions inserted into an existing arbitration or family law statute, or through a separate family arbitration statute.

Special features of family law dispute that have been found to impact on the method of dispute resolution include:

- A. an imbalance of power;
- B. the fact that the parties are not repeat players and so are less familiar with the system and dispute resolution methods than commercial parties;
- C. the involvement of third parties – in particular children;
- D. the state's interest in families and the existence of significant mandatory regulation; and
- E. the fact that marriage is a special type of contract – notably because of its length and the fact that it can be expected to pass through many vicissitudes.

A. Power Imbalance

Sterk (1980), in addressing the circumstances in which public policy should prevent enforcement of arbitration agreements, identified two such instances. The first was where a statute was enacted to protect one class of contracting parties from imposition of contractual terms by another class of contracting parties with greater bargaining power.

[I]t may be that public policy should prevent enforcement of arbitration clauses in contracts between parties of the two classes. This public policy rests not on the legal nature of the dispute between the parties, but *on the principle that arbitration agreements should not be enforced when there is substantial reason to believe that one party has never willingly agreed to relinquish the right to seek relief from the courts.* (Sterk, 1980: 543) [emphasis added]

This consideration is addressed by statutory or institutional rules in a number of states. It is one of the reasons why there is a reluctance to enforce arbitration clauses in marital contracts, since real agreement can more easily be ensured in cases where the dispute has already arisen.⁷⁷ In Canada, amendments to family law and arbitration legislation to adapt it to the requirements of family disputes have introduced qualification and training requirements for arbitrators and other family dispute resolution professionals, and in particular training in respect of screening for domestic violence.⁷⁸ The British Columbia Arbitration Act section 2.1(3) also specifically

provides that an arbitration agreement or award should not be enforceable if, at the time when the parties entered into the agreement:

- (a) a party took improper advantage of the other party's vulnerability, including the other party's ignorance, need or distress; . . .

Elsewhere, although screening for domestic violence is often required as a pre-condition to mediation, power imbalances are perceived as less of a threat in arbitration, in the light of the quasi-judicial role of the arbitrator, and the possibility of legal representation of the parties. Under Michigan Compiled Laws section 600.5072, arbitration is not recommended for cases involving domestic violence, but the exclusion can be waived if the party concerned is informed on the record concerning (a) the arbitration process, (b) the suspension of the formal rules of evidence, and (c) the binding nature of arbitration. Arbitration will go ahead if the court and the party's attorney have checked that the waiver is 'informed and voluntary'.

B. Parties' Lack of Experience

In addition to the need to ensure that one party does not take advantage of the vulnerability of another in the context of family arbitration, there is also the wider issue that both parties may lack familiarity with the law and legal processes and so should be provided with guarantees that their dispute is being handled in a correct and professional manner.

In commercial arbitration, arbitral institutions play an important role in facilitating the establishment of an arbitral tribunal and ensuring the quality of the arbitrators (e.g. by having a panel of arbitrators from which a selection may be made). The experience of the institution can supplement the parties' lack. Similarly, in the context of family arbitration a number of institutions devoted to family law arbitration have been established, such as the IFLA in England and Wales, FLAGS (Family Law Arbitration Group Scotland) in Scotland, FLAG in British Columbia, Arbifam in Spain, and AIFLAM (Australian Institute of Family Law Arbitrators and Mediators) in Australia. There are also several standing family arbitral tribunals in Germany, each with their own institutional rules (including, *inter alia*, the well-established *Süddeutsches Familienschiedsgericht* in Munich; *CooperATION Familien-Schiedsgericht* in Nordrhein-Westfalen; and – though with a broader remit – the *Schlichtungs- und Schiedsgerichtshof Deutscher Notare*). There is, nevertheless, little regulation of the qualifications required of an arbitrator in the commercial context: it is open to the parties to specify the skills and qualifications they desire. By contrast, in the context of family law arbitration, legislators have begun to stipulate the qualifications required of arbitrators and other dispute resolution professionals. These may include the range of appropriate qualifications (typically in law, mental health, or social work), the number of years of professional practice in a family context, and specified levels of dispute resolution training.

By way of example, reg. 67B of the Australian Family Law Regulations 1984 specifies that a person may be an arbitrator if the person is a legal practitioner and has either been accredited as a family law specialist by a State or Territory legal professional body or has practised as a legal practitioner for at least five years and, as

a minimum, 25 per cent of their practice has been in family law matters. The regulations also require an arbitrator to have completed a specialist arbitration training course either at a tertiary institution or a professional association of arbitrators. Their name must be included in a list maintained by the Law Council of Australia, or by a body nominated by the Law Council of Australia. AIFLAM has been nominated by the Law Council of Australia as the body competent to maintain the list of arbitrators.⁷⁹

C. Third Parties

Since relatively few states permit the arbitration of family disputes over child arrangements, the position of the child as a third party to the dispute is little discussed. In the USA, debates about whether child arrangements should be arbitrable turn on public policy arguments and the question of how far arbitration deprives the state of its *parens patriae* role: the power of the state to intervene against an abusive or negligent parent.⁸⁰

There is statutory authority in British Columbia for the arbitration of '(a) parenting arrangements; (b) contact with a child; (c) child support [subject to certain restrictions]'.⁸¹ Similarly in Ontario the Family Law Act, section 51 defines 'family arbitration' as 'an arbitration that, (a) deals with matters that could be dealt with in a marriage contract, separation agreement, cohabitation agreement or paternity agreement under this Part, . . .'. Under ss. 52–53 of the Act, marriage and cohabitation agreements can deal with

- a. ownership in or division of property;
- b. support obligations;
- c. the right of the parties to direct the education and moral training of their children, but not the right to custody of or access to their children; and
- d. any other matter in the settlement of their affairs.

This contrasts with separation agreements (section 54), which apply to former cohabitants, and can deal with the above matters but also with matters of custody and access.

Clearly the concept of arbitration as a method of purely *inter partes* dispute resolution has been abandoned in this context. Nevertheless, as explored further in the next section, the best interests of the child remain at the forefront of debate and case law on the subject of arbitration of child arrangements. By contrast, while there is no specific legislation on family arbitration in Germany, and case law is very limited, academic discussions emphasize the fact that the child is a third party to the arbitration agreement, and draw consequences from this for the role of arbitration and the potential requirement to ensure the child has its own legal representation (Gilfrich, 2007: 51ff and literature there cited in relation to claims for child support; more generally as to hearing the voice of the child in the context of family dispute resolution, Walker and Lake-Carroll, 2014). In this context it is perhaps of some interest to note that in Colombia and Cuba, where the authority to issue a divorce certificate has been granted to notaries, the attendance of a representative of the Office of State

Counsel is required in cases involving minor or disabled children, if in the opinion of the notary ‘the terms proposed in the application for divorce might be harmful to the interests of minors or disabled children’ (Gómez, 2010). Safeguards for children are thus built into the dejudicialized process.

D. Mandatory Legislation

The existence of mandatory protective legislation gives rise to two related but distinct issues: (a) a requirement to apply the mandatory rules, (b) judicial scrutiny to ensure that those rules have been applied.

It is repeatedly stated in US writings on arbitration that arbitrators do not apply rules of substantive law, and this has been cited as a factor militating against the extension of arbitration to family law disputes, and in particular disputes concerning child arrangements (see e.g. Spitko (2000) and, more nuanced, Kessler et al (1997), but for an empirical analysis challenging the claim that arbitrators do not apply the law see Drahozal (2006)). However, an examination of legislation regulating family arbitration reveals that some states do require the application of mandatory rules of law. Thus, for example, under the Indiana Code 34-57-2, arbitrators must comply with child support and parenting time guidelines established by the Indiana Supreme Court, and with statutory directions on property division, while under Michigan MCL 600.5078 an ‘arbitrator shall not include in the award a child support amount that deviates from the child support formula developed by the state friend of the court bureau’.⁸² On the other hand, the North Carolina Family Law Arbitration Act,⁸³ refrains from imposing these specific obligations on arbitrators, and aligns itself more closely with the wording of the RUAA.⁸⁴

Although legislation tends to focus on the application of the mandatory rules of the seat of arbitration, there are also examples of regulation of choice of law issues. Thus New Mexico permits agreements to arbitrate to ‘set forth any standards on which an award should be based, including the law to be applied’. When it comes to child support issues, however, the agreement must provide that New Mexico law will apply.⁸⁵ At the time of writing, section 4 of the Draft Uniform Family Law Arbitration Act provides that ‘the law of this state other than this [act], including its choice-of-law principles, governs the family law dispute subject to arbitration under this [act]’, although a previous draft attempted to create a specific choice of law rule based on the existence of a significant relationship between the jurisdiction whose law was chosen and any party or the agreement (subject to public policy considerations).

As an additional factor to concentrate the arbitrator’s mind on his or her role as part of the state apparatus of justice, some recent legislation ensures that the state is involved in the appointment process. Thus in Indiana, domestic relations arbitrators are required to take an oath to support and defend to the best of their ability the constitution and laws of Indiana and the USA.⁸⁶ Elsewhere, too, legislation may require the application of domestic rules of law or of acceptable foreign laws. The issue came to the fore in Canada in 2004 as a result of concerns about shari’a arbitration. A high profile debate on the topic led to the amendment of the Ontario Arbitration Act 1991 to impose an obligation on the arbitral tribunal to apply ‘the substantive

law of Ontario, unless the parties expressly designate the substantive law of another Canadian jurisdiction, in which case that substantive law shall be applied',⁸⁷ and to stipulate that the decision of a third party in a procedure where another law was applied would not be enforceable.⁸⁸ A principal concern was to avoid an obligation to enforce arbitration awards in which Islamic laws had been applied, although the legislation has a much wider impact than that (see further Kennett, 2015; Korteweg and Selby, 2012).

More recently, the British Columbia Arbitration Act 1996 has been amended with a view to promoting family arbitration, a move which is also supported by the British Columbia Family Law Act 2011. The Arbitration Act (section 2.1) stipulates that in the event of a conflict between the Family Law Act and the Arbitration Act, it is the Family Law Act that prevails. It also makes mandatory the application of certain rules and principles and notably the obligation to consider the best interests of the child.⁸⁹ This is further reinforced by section 8(3) of the BC Family Law Act 2011 which requires a family dispute resolution professional consulted by a party to a family law dispute to advise the party that agreements and orders respecting guardianship, parenting arrangements, and contact with a child must be made in the best interests of the child only. Similarly, in Australia, the Family Law Regulations 1984 establish that an arbitrator must determine the dispute in accordance with the Family Law Act and ensure that the parties are afforded procedural fairness.⁹⁰

Although there is no statutory regulation of the matter, the sensitivity of family law issues, and the fact that English law applies in family cases over which English courts can exercise jurisdiction, prompted the IFLA to include specific provision in its Arbitration Rules. According to Article 3

The arbitrator will decide the substance of the dispute only in accordance with the law of England and Wales. The arbitrator may have regard to, and admit evidence of, the law of another country insofar as, and in the same way as, a Judge exercising the jurisdiction of the High Court would do so.⁹¹

E. Setting Aside and Appeals

Ultimately perhaps the most significant feature of legislation and practice in relation to family law arbitration is the stance that has been adopted on the finality of the award. As explained in the introduction, arbitral awards in the context of commercial arbitration are, as a general rule, final.

The picture alters when arbitration is extended to family law disputes. Concerns about the reality of the agreement become more prominent, and where child arrangements are arbitrable it is also commonly suggested that court supervision is essential to ensure that any award is in the best interests of the child – thus indirectly imposing on the arbitrator an obligation to comply with 'best interests' standards. Arbitral awards in family disputes are therefore sometimes not final.

Again the USA makes a useful starting point, because of its long history of family arbitration. Although the law varies from state to state, it is common for arbitration concerning the distribution of property and financial arrangements on separation or

divorce to proceed under a state's general legislation regulating arbitration, with its limited grounds for review (Spitko, 2000: 1165, who also notes that some states treat child support in the same way). But, special considerations apply in cases involving child support payments and child arrangements. The courts have asserted their jurisdiction as *parens patriae* to be the ultimate decision maker in disputes involving children (Fox, 2010; Kessler et al, 1997; Philbrick, 1983; Schlissel, 1992; Spitko, 2000; Wilson, 1996; Zurek, 2005).

A significant number of states accept the possibility of arbitration of child arrangements being subject to review. But the threshold considerations calling for review and the extent of review vary (Walker, 2008).⁹² Thus a timely challenge to an arbitral award relating to child arrangements may of itself be sufficient to give rise to a *de novo* rehearing.⁹³ Other states require at least *prima facie* evidence that the award is not in the best interests of the child before ordering a full rehearing. In North Carolina, N.C. Gen. Stat. section 50–54(a)(6) currently provides that an award may be set aside if the court ‘determines that the award for child support or child custody is not in the best interest of the child’.⁹⁴ The Act also makes it clear that this determination is only made if the award is challenged – the court is under no obligation to review the award – and that the burden of proving that the award is *not* in the best interests of the child is on the party seeking to have the award set aside.⁹⁵ In yet other states the principles governing review are unclear.⁹⁶ It may be based on the facts already found by the arbitrator,⁹⁷ or on a transcript of the arbitration hearings. In some states, therefore, legislation on family arbitration has imposed on the tribunal various requirements that facilitate review of an award. Indiana permits particularly extensive use of arbitration: in fact even dissolution of the marriage may be made by arbitral award. However, arbitrators must provide written findings of fact and law, and either party can also request a full transcript of the proceedings. The arbitral award is entered as a judgment, and may then be appealed in the same way as any civil judgment.⁹⁸ The distinction between this approach and the appointment of a Special Master or private judge under the law of California becomes rather small.

Similarly in Michigan, a transcript of hearings may be made if the case concerns child arrangements or child support, if the arbitration agreement provides for it, or a court makes an order to that effect.⁹⁹ The default position is that a reasoned award must be provided, and if the parties agree on child arrangements or child support during the arbitration, their agreement must be placed on the record under oath and included in the arbitral award.¹⁰⁰ The court must not vacate or modify an award unless it finds that the award is *adverse* to the best interests of the child.¹⁰¹ In *MacIntyre v MacIntyre*,¹⁰² the Michigan Supreme Court concluded that a *de novo* evidentiary hearing was not required if the record of the arbitration was sufficiently detailed to enable the court to make an independent determination without a hearing. An award confirmed by the court may be appealed in the same way as any other judgment.¹⁰³

The right of the courts to determine the best interests of the child in order to exercise its *parens patriae* authority is not uncontested. An alternative strain of reasoning relies on the constitutional right to parental autonomy (Spitko, 2000; Zurek,

2005). This argument draws strength from the 2000 decision of the US Supreme Court in *Troxel v Granville*.¹⁰⁴ In that case it was stated that the Fourteenth Amendment to the Constitution – under which no State shall ‘deprive any person of life, liberty, or property, without due process of law’ – has a substantive component that ‘provides heightened protection against government interference with certain fundamental rights and liberty interests’.¹⁰⁵ And these interests include, notably, the interest of parents in the care, custody, and control of their children.¹⁰⁶

This approach was embraced by the Supreme Court of New Jersey in *Fawzy v Fawzy*¹⁰⁷ in 2009. Citing *Troxel* and the case law discussed therein it stated:

Deference to parental autonomy means that the State does not second-guess parental decision making or interfere with the shared opinion of parents regarding how a child should be raised. Nor does it impose its own notion of a child’s best interests on a family. Rather, the State permits to stand unchallenged parental judgments that it might not have made or that could be characterized as unwise. That is because parental autonomy includes the ‘freedom to decide wrongly. (Part IV)

The court concluded that the narrow scope of judicial review applicable under the state’s Arbitration Act should apply except where a party could provide prima facie evidence that the arbitral award threatened harm to the child.¹⁰⁸ In such a case, if the court then found that such harm existed, it would then undertake a best interest analysis to determine what child arrangements should be made.

Summarizing the above position therefore, an examination of state laws reveals (at least) the following options for review of arbitral awards involving child arrangements:

- i. Any challenge leads to a *de novo* evidential hearing;
- ii. A challenge must be based on prima facie evidence that the award is not in the best interests of the child(ren);
- iii. A challenge must be based on prima facie evidence that the award is harmful to the child(ren).

In the latter two cases the court may

- i. conduct a *de novo* rehearing,
- ii. review the findings of the arbitrator if there is a reasoned award, or
- iii. review the transcript evidence if it exists, and
 - a. there is a legal requirement to provide a reasoned award/transcript, at least in cases involving child arrangements; or
 - b. there is no legal requirement to provide such a reasoned award/transcript.

The shifts in thinking that are taking place, in academic circles if not at grass roots level, can also be observed in drafting differences between the AAML (American Association of Matrimonial Lawyers) Model Act and the Draft Uniform Law. Both

of these include grounds for setting aside an arbitral award derived from the general grounds in the Revised Uniform Arbitration Act, but in addition make special provision for child custody and support cases. Thus section 123 of the Model Act of 2005 states:

(a) Upon [motion] to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if:

...

(7) the court determines that the award for child support or child custody is not in the best interest of the child. The burden of proof at a hearing under this subsection is on the party seeking to vacate the arbitrator's award;

[...]

The best interests of the child standard is used, but with a presumption that the award complies with that standard (see also [Spitko, 2000: 1177](#)). The proposed Uniform Family Law Arbitration Act has undergone numerous redrafts, at one time adopting the parental autonomy approach of New Jersey. At the time of writing, however, the draft provides for vacatur of an award determining 'custodial responsibility, [parental status,] or child support' if it is '*clearly erroneous* under law of this state other than this [act] based on the record of the arbitration hearing and any facts that have arisen since the hearing' – emphasizing the deference to be given to an award while still allowing states to develop their own policies in this respect.

Apart from the special provision for child custody and support, the Model Act and draft Uniform Law only permit an award to be set aside on the basis of the general grounds of procedural unfairness also applicable to commercial arbitration. Thus there is no provision for review of the merits of the decision in cases concerned with matrimonial property and spousal maintenance. The Model Act does, however, include in a further possibility of review in section 123(a)(9)

[I]f the parties contract in an agreement to arbitrate for judicial review of errors of law in the award, the court shall vacate the award if the arbitrators have committed an error of law prejudicing a party's rights.

Under this provision the parties can, essentially, contract for a right of appeal on a point of law. This possibility has been controversial as a matter of general arbitration law, and has been rejected by the US Supreme Court in cases falling with the FAA (Federal Arbitration Act),¹⁰⁹ but since this applies in maritime transactions and those involving interstate commerce, family law arbitrations will be decided under state law and state courts may therefore reach a different conclusion ([Walker, 2008: 536](#)).

The question of how far arbitral awards should be final in family arbitration has also vexed Australian lawyers and policymakers. Since, however, arbitration is limited to financial and property matters, a narrower set of issues arise. Under the current

section 13J an award made in consensual arbitration may be reviewed, on application by a party, on questions of law.¹¹⁰ The court may make such decrees as it thinks appropriate, including affirming, reversing, or varying the award.¹¹¹ There have been suggestions that this limited scope for review has affected the willingness of parties to try arbitration (Family Law Council, 2007: para. 4.3; Wade, 2008: 9).

Turning to Canada, the legislation in Ontario regulating *domestic* arbitration does provide for appeals if the parties agree to this,¹¹² or for an appeal on a point of law with the leave of the court.¹¹³ But in addition to the general grounds for setting aside an award, section 46(1)(10) of the 1991 Arbitration Act provides that an award may be set aside where it is a family arbitration award that is not enforceable under the Family Law Act 1991, while section 59(6) of the latter Act establishes extensive formal criteria that must be met before an award is enforceable. An arbitrator is also required to comply with any regulations made under the Arbitration Act, 1991, and reg. 2 of Regulation 134/07 requires that any arbitration agreement contain a choice by the parties from the range of appeal options. The recent amendments to the law in British Columbia to promote family arbitration also contain certain amendments to the Arbitration Act 1996. Under section 31(3.1) a party may appeal 'on any question of law, or on any question of mixed law and fact, arising out of the award'.¹¹⁴ In addition, under section 2.1(3), an award arising from a family law dispute, may be set aside or replaced by the court under the Family Law Act if the court is satisfied that one or more of the following circumstances existed when the parties entered into the agreement:

- a. a party took improper advantage of the other party's vulnerability, including the other party's ignorance, need, or distress;
- b. a party did not understand the nature or consequences of the agreement;
- c. other circumstances that would, under the common law, cause all or part of a contract to be voidable.

Furthermore, under section 30(4) a court may change, suspend, or terminate all or part of an award, in respect of a family law dispute, for any reason for which an order could be changed, suspended, or terminated under the Family Law Act.

Although family law arbitration is in its infancy in the England, an application to confirm an award has been considered by Sir James Munby, the President of the Family Division – though not in a contested case.¹¹⁵ In *S v S* he stated:

Where the parties have bound themselves, as by signing a Form ARB1, to accept an arbitral award of the kind provided for by the IFLA Scheme, this generates, as it seems to me, a single magnetic factor of determinative importance.¹¹⁶

In cases where the parties sought a consent order, he noted that the judge was not 'obliged to play the detective'.

[T]he combination of (a) the fact that the parties have agreed to be bound by the arbitral award, (b) the fact of the arbitral award (which the judge will of

course be able to study) and (c) the fact that the parties are putting the matter before the court *by consent*, means that it can only be in the rarest of cases that it will be appropriate for the judge to do other than approve the order.¹¹⁷

By contrast, where one or other party was seeking to resile from the arbitrator's award, an application should be made to the court using the 'notice to show cause' procedure.¹¹⁸ Sir James asserted that the court would adopt 'an appropriately robust approach'.

Where the attempt to resile is plainly lacking in merit the court may take the view that the appropriate remedy is to proceed without more ado summarily to make an order reflecting the award and, if needs be, providing for its enforcement. Even if there is a need for a somewhat more elaborate hearing, the court will be appropriately robust in defining the issues which are properly in dispute and confining the parties to a hearing which is short and focused.¹¹⁹

Although the IFLA scheme is limited to financial disputes, it is noteworthy that Baker J in *AI v MT* – which predates *S v S* – granted a consent order in a case where the parties' agreement was based on an award issued by the Beth Din of America which involved certain child arrangements.¹²⁰ In this much broader context, Baker J also approved the idea of an award 'as a lodestone . . . pointing the path to court approval',¹²¹

F. Length and Vicissitudes of Relationship

A common way of agreeing to arbitration in commercial contracts is through an arbitration clause in the main contract. This raises the question whether it should be possible to include an arbitration clause in a marriage contract. Some of the states or arbitration institutions that have addressed the issue have decided against this on the basis that marriage is (often) a very long contract and much more comprehensive and less predictable than commercial contracts. It is therefore considered unreasonable to enforce an arbitration clause in such a contract. Among those states that have taken up a position on the issue, several have specified that only submission agreements should be enforced.¹²² In other jurisdictions, the procedural rules may disclose an underlying assumption that such an agreement will only be entered into once a dispute has arisen.¹²³ This is not, however, a universal view. Some US states are willing to enforce arbitration clauses in pre- and post-nuptial agreements.¹²⁴ At the time of writing the draft Uniform Law makes pre-nuptial arbitration agreements unenforceable, but does allow the option of enforceable post-nuptial agreements.¹²⁵ There is no specific rule on this point in the Australian legislation on family arbitration, and some lawyers include arbitration clauses in binding financial agreements for married and *de facto* couples.¹²⁶ Similarly in Germany, arbitration clauses may in principle be included in a marital contract, including a pre-nuptial agreement, although in practice they are rare (Gilfrich, 2007: 94–105). Gilfrich highlights the fact that Articles 138 and 242 of the Civil Code enable such agreements to be scrutinized to ensure they are not the product of a power imbalance. In addition, one of the

safeguards for weaker parties in the context of a marital contract is the fact that such agreements must be notarized. Gilfrich further notes that the parties may want to appoint a notary as arbitrator (102–3), and that professional rules prevent the notary drawing up the marital contract from also being nominated as arbitrator (105).

V. CONCLUSIONS

Internationally changes in family relationships, and especially the increase in cohabitation outside marriage, which is typically of shorter duration than marriage, and in divorce cases, is putting huge pressures on the court system. There is a desire to find ways to lighten the case load, and also a strong belief that the formal litigation procedure is not the best approach to the resolution of family disputes. Although the differences in legal culture, and the varied mix of institutions involved in family dispute resolutions, make it inappropriate to look for the 'better law' among those studied, across the range of jurisdictions it is possible to see certain common features emerging. These include strong encouragement of mediation and counselling with a view to enabling the parties to reach agreement on the terms on which their marriage or civil union is dissolved or their cohabitation ceases. For a certain range of families mediation is found to work well, but in others domestic violence or other power imbalances may render mediation inappropriate.

In many jurisdictions there is significant public funding for mediation, but this is restricted to an initial meeting or a strictly limited number of hours. The trend is towards making the parties bear the costs not only of their legal representatives, but also the neutral third party to whom their dispute is referred – whether that third party is a private judge, special master, arbitrator, mediator, or other professional. Arrangements not labelled as arbitration, may include the privacy, flexibility of scheduling, relaxation of procedures, and (subject to the comments in the next paragraph) choice of dispute resolution professional that is proclaimed as an advantage of arbitration. They are becoming increasingly common in the context of disputes over property and finances, but are more controversial where child arrangements are concerned.

Turning more specifically to the regulation of arbitration, several core features that are found in general arbitration statutes have regularly been altered in the family law context, leading to new 'hybrids'. First, the parties' free choice of dispute resolution professional is limited by a variety of quality control mechanisms – those eligible to serve as arbitrators range from a court approved professional, through members of an arbitration institution, to professionals who have certain professional qualifications and years of relevant experience.

Secondly, there is, typically, a strict obligation to apply the law of the seat of arbitration,¹²⁷ in contrast to the much more fluid situation in commercial arbitrations where the choice of a foreign law is possible, or the parties may agree to have their dispute resolved according to the arbitrator's assessment of what is fair and reasonable (*ex aequo et bono*). This in part reflects the fact that many of the states considered apply the law of the forum in divorce cases. But it also reflects a desire to ensure that formal rules of state law are observed, rather than equitable or religious principles.

Thirdly, courts want to retain some powers of scrutiny over the decisions made through these mechanisms. Legislation or case law may therefore impose obligations on the decision maker to keep a record of hearings and give reasons for the decision, to facilitate later review. This requirement is, not surprisingly, particularly marked where decisions on child arrangements can be referred to private dispute resolution professionals. Some states have simply expanded the grounds of review of an arbitral award in family cases. Others permit an appeal against an award. Either way, there is a filter mechanism that leads to a reduction in the cases to come before the ordinary courts.

Insofar as comparisons between jurisdictions may be of interest in this new and rapidly developing field, the title ‘arbitration’ conferred on a particular dispute resolution procedure, therefore needs to be treated with caution as it does not in fact reveal very much about the operation of that procedure – but also the comparator’s net needs to be cast wide if it is to capture the complexity of the various interacting forms of family dispute resolution.

NOTES

- 1 See further at IV.B.2.
- 2 See for example Resolution 13 of the 6th World Congress on Family Law and Children’s Rights, available at <<http://www.lawrights.asn.au/images/stories/world%20congress%202013%20resolutions.pdf>> accessed 14 June 2014.
- 3 Such dispute resolution often does not meet the criteria to constitute binding arbitration under a general arbitration statute (see generally Ahmed and Luk, 2012; Boyd, 2004; Helfand, 2011; Kennett, 2015; Korteweg and Selby, 2012; Shachar, 2008).
- 4 There are 156 states who are parties to the 1958 New York Convention. The framework created by the Convention makes arbitration particularly popular in international disputes because foreign arbitral awards are more easily enforceable than foreign judgments.
- 5 The texts and status of these instruments can be found at <http://www.uncitral.org/uncitral/uncitral_texts/arbitration.html> accessed 12 June 2014.
- 6 This is notably true of England and Wales, France, Switzerland, and the USA.
- 7 Or panel of persons.
- 8 That is, agreements referring a dispute to arbitration after it have arisen.
- 9 The rules may therefore deal with such matters as the composition of a tribunal, the appointment procedure, the seat of the arbitration, notification procedures, etc.
- 10 In the USA, for example, s. 23 of the Revised Uniform Arbitration Act 2000 (RUAA) provides quite a detailed set of grounds for annulment of the award (vacatur). A comparable set of grounds is provided by Art. 34 of the UNCITRAL Model Law. The Model Law provides the basis for the legislation governing arbitration in a number of the non-US states where family arbitration is permitted, including Scotland, Australia, Canada, Germany, Spain, Chile, Peru, Venezuela, Honduras, and Guatemala.
- 11 For example, if there was bias, corruption, fraud, arbitrator misconduct, or otherwise lack of proper opportunity for one of the parties to obtain a hearing. These grounds are more explicit in the RUAA than the Model Law, but may be regarded as aspects of public policy (and some Model Law states have introduced modifications to the Model Law dealing with these issues, e.g. Singapore: International Arbitration Act s. 24)
- 12 Public policy is not an explicit ground for vacating an award under the RUAA (or its predecessor the Uniform Arbitration Act 1956 (UAA), on which much of the state legislation on arbitration in the USA is still based) but it is nevertheless recognized in federal case law: *W.R. Grace & Co. v Local Union 759*, *International Union of United Rubber Workers* 461 U.S. 757 (1983); *United Paperworkers International Union v Misco, Inc.* 484 U.S. 29 (1987) requiring violation of ‘some explicit public policy’ that is ‘well defined and dominant, and is to be ascertained by reference to the laws and legal precedents, and not from general considerations of supposed public interests’.

- 13 Notably in England (Arbitration Act 1996 s. 69), although an appeal requires the leave of the court, can be contractually excluded by the parties, and is only permissible if the applicable law is English law. The Hong Kong Arbitration Ordinance 2011 (Cap. 609) has an opt-in (rather than an opt-out) for appeals irrespective of whether the arbitration is domestic or international (Sch. 2).
- 14 For example, in Australia it is possible for the parties to 'opt-in' to an appeal under s. 34A of the Uniform Commercial Arbitration Law, but not under the International Arbitration Act 1974. Singapore has adopted legislation analogous to s. 69 of the English Arbitration Act 1996 for domestic arbitration, but excludes appeals in international arbitration. See also the Ontario Arbitration Act 1991 s. 45 (cf. the International Commercial Arbitration Act which incorporates the Model Law) and the British Columbia Arbitration Act 1996, s. 35 (cf. the International Commercial Arbitration Act 1996, another Model Law act).
- 15 See for example, the JAMS (Judicial Arbitration and Mediation Services) Optional Appeal Procedure (2003) and the AAA (American Arbitration Association) Optional Appellate Arbitration Rules (2013). The possibility of parties agreeing to an appeal procedure under the aegis of the AAA or JAMS is a response to the restrictive approach taken by the US Supreme Court to the grounds for review of arbitral awards falling within the scope of the FAA (e.g. *Hall Street Associates, L.L.C. v Mattel, Inc.*, 552 U.S. 576 (2008)). Prior to *Hall Street* many courts enforced provisions in arbitration agreements authorizing appeals against an arbitral award (or 'expanded review' allowing an award to be vacated for error of law). Federal courts can no longer do so. State courts are still divided on this issue: see [Griffith \(2013\)](#), reviewing the position in several states. For the position in family arbitration, see [Griffith \(2013: 30\)](#).
- 16 See Ontario Arbitration Act 1991 s. 45; British Columbia Arbitration Act 1996 s. 31.
- 17 Wolfson's paper was prepared in the context of s. 2(2) of the British Columbia Commercial Arbitration Act which stated '(2) A provision of an arbitration agreement that removes the jurisdiction of a court under the *Divorce Act* (Canada) or the *Family Law Act* has no effect'. Amendments to the legislation in 2012 now make it clear that family arbitration is permissible.
- 18 The widespread nature of this assumption can be illustrated by references to the non-arbitrability of family law disputes in various international, comparative, and general texts such as [Catala \(1994\)](#), [Hanotiau \(2002\)](#), [Mistelis and Brekoulakis \(2009: 15\)](#), and [Paulsson \(2013: 117\)](#).
- 19 See further at below at III.3. See also [Paulsson \(2013: 117\)](#).
- 20 In the sense of an out of court settlement.
- 21 'los regímenes económicos entre cónyuges o parejas extramatrimoniales'.
- 22 *Ley Notarial 2006/62* of 28 November 2006 (Art. 18.22) added by Art. 6 *Ley 2006/62 RO* 40c of 28 November 2006.
- 23 *Ley 29.227/2008* of 15 May 2008 in conjunction with *Decreto Supremo 009-2008-J.U.S.* of 12 June 2008.
- 24 *Ley 11.441/07* of 4 January 2007 amending *Ley 5.869/1973* of 11 January 1973 (Code of Civil Procedure) and *Resolución 35* of 24 April 2007 of the *Consejo Nacional de Justicia*.
- 25 See also the possibility of notarial divorce in Honduras under Arts 243–7 of the *Código de Familia* and Arts 53–9 of the *Código del Notariado*.
- 26 Art. 34, *Ley Antitrámites 962/2005* of 8 July 2005 and *Decreto 4436* of 28 November 2005.
- 27 *Decreto-Ley 154/1994* of 6 September 1994.
- 28 For the situation generally in Latin America see the comparative accounts in [Pérez Gallardo \(2009\)](#) and [Santos Belandro \(2011\)](#).
- 29 See Art. 29 of the Notaries Act 2002, as amended by the Act to Amend the Notaries Act and the Acts Related to it (RT I 2009, 27, 164); Art. 64 of the Family Law Act 2008 (RT I 2009, 60, 395) in conjunction with Art. 3.8 of the Vital Statistics Registration Act 2009 (RT I 2009, 30, 177).
- 30 Arts 325–39 of the Notariat Law of 9 June 1996 (as amended on 28 October 2010).
- 31 Arts 375–8 (New Civil Code), which entered into force on 1 October 2011.
- 32 It was discussed in detail but given a negative evaluation by the [Guinchard Commission](#) which reported to the Minister of Justice in July 2008 ([Guinchard and France Ministère de la Justice, 2008](#)).
- 33 Arts 515–7 CC.
- 34 Arts 521.12–521.16 CC.
- 35 Art. 272 *Código Civil para el Distrito Federal en Materia Común y para Todo la Republica en Materia Federal; Reglamento del Registro Civil*, Arts 76–82.
- 36 Art. 14, *Ley 272/2001* of 13 October 2001.
- 37 See Arts 375–8 of the NCC and Government Decision no. 64/2011 on approval of the methodology for unitary application of the provisions on civil status matters.

- 38 For example, in Brazil Art. 852 *Codigo Civile* prohibits any resolution by agreement of disputes relating to status, personal matters of family law, and any other matter that is not 'strictly patrimonial'. See also Paulichi and Benhossi (2012: 174–5, 181–2). In France, arbitration is permissible in relation to rights that are 'capable of being compromised' (Art. 2059 CC). For the arguments in favour of extending the scope of family arbitration in France, see Catala (1994). The rules on arbitration in the Austrian Code of Civil Procedure, which were amended in 2006, draw heavily on the German Code but expressly exclude family law matters from the scope of arbitration.
- 39 S.10 L-P.
- 40 This was recently affirmed (though in the context of concerns about arbitration under Islamic family law), by Lord Bach in the House of Lords in response to a parliamentary question: 'The Government have no plans to amend the provisions of the Arbitration Act 1996. Arbitration is not a system of dispute resolution that may be used in family cases': HL 24 November 2008, vol. 705, col. WA247.
- 41 *Hyman v Hyman* [1929] AC 601 per Lord Hailsham LC. See also *Dean v Dean* [1978] Fam 161; *Edgar v Edgar* [1980] 1 WLR 1410; *Camm v Camm* (1983) 4 FLR 577; and *Xydhiis v Xydhiis* [1999] 1 FLR 683.
- 42 *X v X (Y and Z Intervening)* [2002] 1 FLR 508; *Smith v McInerney* [1994] 2 FLR 1077; and *Radmacher v Granatino* [2010] UKSC 42.
- 43 [2010] UKSC 42.
- 44 *V v V (Prenuptial Agreement)* [2011] EWHC 3230 (Fam), [2012] 1 FLR 1315, per Charles J at para. 36.
- 45 For early support, see Lord Justice Thorpe (2008). In 2014 family arbitration was given the endorsement of the President of the Family Court both in his ruling in *S v S* (Financial Remedies: Arbitral Award) [2014] EWHC 7 (Fam), [2014] 1 FLR 1257 and in successive issues of his 'View from the President's Chamber' (Courts and Tribunals Judiciary website), where he has expressed the intention to make changes to the Family Procedure Rules and to guidance to facilitate arbitration: see <<http://www.judiciary.gov.uk/publications/view-from-presidents-chambers/>> accessed 15 June 2014. Amendments to the rules to accommodate arbitration have also featured in the Final Report of the Financial Remedies Working Group (15 December 2014), which was established by the President of the Family Division in June 2014. For cases discussing the weight to be given to arbitral awards in family cases, see below, text accompanying notes 115–21. This enthusiasm is nevertheless considered by some to be premature, and further deliberation as to the role of party autonomy in family matters is urged (Ferguson, 2013)
- 46 IFLA Rules, Art. 2.1.
- 47 These include notably North Carolina, Indiana, Michigan, New Mexico, Texas, and New Jersey. As discussed further below (at note 102), precise information on the attitudes of states towards arbitration of child arrangements is not always clear. A state is unlikely to prohibit arbitration: the question is whether an arbitral award is binding or whether a party can simply demand a *de novo* rehearing.
- 48 States rejecting binding arbitration of child arrangements include New York (*Glauber v Glauber*, 600 N.Y.S.2d 740, 743 (N.Y. 1993)); Florida (*Toiberman v Tisera*, 998 So. 2d 4, 15 (Fla. reach 2008)(citing Fla. Stat. Ann. s. 44.104(14)(West 2011)); Ohio (*Pulfer v Pulfer*, 673 N.E.2d 656, 659 (Ohio Ct. App. 1996); *Kelm v Kelm* 749 N.E.2d 299, 301 (Ohio 2001)); Connecticut (Gen. Stat. Conn. Chapter 909, section 52–408) and California (*In re Marriage of Goodarzirad* 185 Cal.App.3d 1020 (1986); *In re Marriage of Berezna & Heminger* 110 Cal.App.4th 1062 (2003)). In *Kelm v Kelm* the Ohio court concluded that child support disputes should be arbitrable, but not those relating to custody and visitation.
- 49 In practice, it seems that a few lawyers in Ontario undertake arbitrations, and there is growing interest in arbitration in British Columbia. Elsewhere in Canada, little or no activity has been observed (Wolfson, 2010: 6–7).
- 50 This does leave some scope for a restricted definition of 'family matters'.
- 51 See ss 52–54, 59.
- 52 B.C. Reg. 347/2012, reg. 5.
- 53 See cases cited at note 45. If arbitration takes place, issues relating to child arrangements may be tried *de novo* in the courts.
- 54 This account does not pretend to be comprehensive as to professionals and other service providers who may be involved in family dispute resolution. It simply highlights the principal actors, other than family judges, who fulfil some functions overlapping with arbitration.
- 55 Cal. Civ. Code s. 4607.

- 56 Web page for the Superior Court of California, County of Ventura, Divisions, Family Law, Family Mediation: Child Custody Recommending Counseling <<http://www.ventura.courts.ca.gov/family.html>> accessed 26 April 2014.
- 57 Cal. R. Ventura Sup. Ct. Rule 9.34. Although in general mediators in California are not required to have specified qualifications, in the context of child custody mediation, they must have the same minimum qualifications as a counsellor of conciliation in the Family Conciliation Court: see Cal. Fam. Code 1815 and 3164 and Rule 5.210 of the 2014 California Rules of Court. This includes a master's degree in psychology, social work, family counselling, or a related subject, at least two years of experience in counselling or psychotherapy, training in domestic violence issues, and meeting continuing professional development obligations.
- 58 Under Family Code s. 3111 and Evidence Code s. 730.
- 59 Under Code of Civil Procedure s. 638 or 639, Evidence Code s. 730 and/or Code of Civil Procedure s. 1280ff.
- 60 Commonly a psychiatrist, psychologist, or social worker.
- 61 2014 California Rules of Court, Rule 5.220(b).
- 62 See Family Code s. 3110ff. and 2014 California Rules of Court, Rules 5.220, 5.225, and 5.230.
- 63 Code of Civil Procedure ss 644–5. See also [Carbone \(2006\)](#). Although not concerned with family law *Sy First Family Ltd. Partnership v Andy Cheung* 83 Cal.Rptr.2d 340 (1999) explains the difference between arbitration and a reference (special master) procedure.
- 64 Parenting co-ordinators deal with the details of child arrangements, and can be accessed at short notice by one or both the parties to help them to deal with the day to day problems that arise. Rather than just making findings to form the basis of a court order, they have an on-going role in implementing any orders made. They are typically mental health professionals who have experience of working with high conflict families in divorce, but they may also be attorneys ([Stahl, 1995](#)).
- 65 In the absence of any specific legislation on parenting co-ordination, appointments to fulfil this role are also made under other legislation, such as that governing the appointment of mediators. Indeed the lines between mediation and parenting co-ordination seem to be blurred in the case of the CCRC described above.
- 66 The requirement of retirement was introduced in 2003 after it became apparent that some judges were delaying their public court cases in order to preside over more lucrative private cases: see [Kasindorf \(2003\)](#). Attorneys can also act as private judges: 2014 California Rules of Court, Rule 2.814.
- 67 It is open to the parties to agree to modify the strict rules of evidence and procedure: [Robbins \(2010\)](#).
- 68 2014 California Rules of Court, Rule 2.830ff. See further [Robbins \(2010\)](#).
- 69 Rule 2.834. A private judge has to file with the court information that will enable members of the public to attend hearings. [Robbins \(2010\)](#) comments that she has never received a request from a member of the public to attend a trial.
- 70 The Gesetz zur Förderung der Mediation und anderer Verfahren der außergerichtlichen Konfliktbeilegung vom 21.7.2012 (BGBl I, 1577) inserted new provisions on the procedure before the *Güterichter* into the Code of Civil Procedure (art. 278(s) ZPO) and other legislation dealing with specific types of dispute (e.g. art. 36 FamFG).
- 71 Parliament of the Commonwealth of Australia, House of Representatives (2004–2005). *Family law amendment (shared responsibility) bill 2005: Explanatory memorandum 1*.
- 72 Government funding covers free advice and up to three hours of dispute resolution services. Thereafter a fee may be charged.
- 73 Subject to screening for family violence.
- 74 For Less Adversarial Trials and the Child Responsive Program operated by the Family Court of Australia, see the court's publications at <<http://www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/Publications/Family+Court+of+Australia+publications/>> accessed 21 March 2014.
- 75 See for example Art. 255 of the French Code Civil.
- 76 There is a continuing effort to expand the range of expert services provided by the profession, and to argue for exclusive competence in relation to its core functions, in order to secure its continued existence ([Shaw, 2006, 2007](#)). For a comparison with the Netherlands, which has considerably deregulated the notary profession in response to pressures from its competition authority, see [Kuijpers et al \(2005\)](#), and for an empirical analysis of reforms of the profession in Portugal, see [Tavares and Rodrigues \(2013\)](#).
- 77 Issues concerning pre- and post-nuptial agreements are considered further at pp. IV.2.F.

- 78 For Ontario, see the Arbitration Act 1991, s. 58 and Ontario Regulation 134/07. Certain mandatory terms must be included in a family arbitration agreement, including a signed statement by the arbitrator that the parties were separately screened for power imbalances and domestic violence, that the arbitrator has considered the results of the screening, and that they will continue to do so throughout any arbitration conducted. The amendments to the Act were introduced in 2006 in reaction to concerns about religious arbitration. For a thorough summary of all the issues in the debate, both real and imaginary, see Korteweg and Selby (2012). For British Columbia, see the Family Law Act 2011, ss 1, 8–9, 245 and the Family Law Act Regulation (B.C. Reg. 347/2012) s. 5.
- 79 AIFLAM website, <<http://www.aiflam.org.au/history.php>> accessed 15 March 2014. See also e.g. Indiana: Ind. Code Ann. s. 34-57-5-2; Michigan: Mich. Comp. Laws Serv. s. 600.5073; British Columbia: Family Law Act Regulation (B.C.Reg. 347/2012) s. 5; Ontario: O. Reg. 134/07, s. 3 (requiring arbitrators to have the 'training approved by the Attorney General for the arbitrator or class of arbitrators, as set out on the Ministry's website').
- 80 Discussed further below at text accompanying notes 110–31. Wisconsin Statutes 802.12(3)(d) provides a rare example of specific provision for safeguarding the interests of the child: 'The parties, including any guardian ad litem for their child, may agree to resolve any of the following issues through binding arbitration'.
- 81 Family Law Act Regulation (B.C. Reg. 347/2012) s. 5(3).
- 82 This is subject to exceptions.
- 83 NCGS s. 50.41ff.
- 84 But cf. below at text accompanying notes 94–5 for the approach adopted in North Carolina to review of arbitral awards.
- 85 New Mexico Statutes Annotated 1978 s. 40-4-7.2.N.
- 86 Indiana Code 34-57-2.
- 87 S. 32(4)
- 88 Ss 1 and 2.2(1). The same wording is also found in the Family Law Act 1990, ss 51 and 59.2(1).
- 89 S. 2(2.1)(b). See also s. 37 of the BC Family Law Act 2001.
- 90 Reg. 67l.
- 91 Specifically motivated by a desire to ensure that arbitration does not become a site for gender discrimination or abuse, with religious arbitration as an implicit but not explicit concern, Baroness Cox has more than once submitted a Private Members' Bill – the Arbitration and Mediation Services (Equality) Bill – to Parliament (for discussion, see [Ekelhaar, 2012](#)).
- 92 Walker provides a state by state analysis of approaches to family arbitration, based on survey responses. Unfortunately this information is often obscure on crucial points of detail as to the approach to child arrangements and court review. The states discussed below are those where there is legislation and/or case law relating to arbitration of child arrangements, and whose stance is reasonably clear.
- 93 This does not render the arbitration irrelevant, insofar as the parties may comply with an arbitral award without a court order, or may have the award registered with a court by consent. See Colorado Revised Statutes s. 14-10-128.5 – *de novo* rehearing at the discretion of the court if an application is made within 35 days of date of award; California, *In re Marriage of Goodarzirad* (1986) 185 Cal.App.3d 1020; *Armstrong v Armstrong* (1976) 15 Cal.3d 942; *In re Marriage of Berezna & Heminger* (2003) 110 Cal.App.4th 1062.
- 94 N.C. Gen. Stat. ss 50–54(a)(6). Two further additional grounds are included: an award may be set aside if:

(7) The award included punitive damages, and the court determines that the award for punitive damages is clearly erroneous; or

(8) If the parties contract in an arbitration agreement for judicial review of errors of law in the award, the court shall vacate the award if the arbitrators have committed an error of law prejudicing a party's rights.

- 95 NC ss 50–54(c) makes it clear that if an award is vacated on this ground, the court 'may proceed to hear and determine all issues'.
- 96 Maryland: *Kovacs v Kovacs*, 633 A.2d 425,431 (Md. Ct. Spec. App. 1993) – 'a chancellor cannot adopt an arbitration award that concerns the beneficial interests of children without first exercising independent judgment to determine whether the best interests of the children are met by that award'; Georgia:

- O.C.G.A. s. 19-9-1.1 provides: 'The arbiter's decisions shall be incorporated into a final decree awarding child custody unless the judge makes specific written factual findings that under the circumstances of the parents and the child the arbiter's award would not be in the best interests of the child. In its judgment, the judge may supplement the arbiter's decision on issues not covered by the binding arbitration'. Barry Edwards (2008) suggests that the ambiguity in this provision should be resolved by reference to practice elsewhere, citing *MacIntyre v MacIntyre* 472 Mich 882; 693 NW2d 822 (2005), a decision of the Michigan Supreme Court (see further below). In Pennsylvania, the Superior Court held in *Miller v Miller* 620 A.2d 1161 that 'the trial court must review the decision of the arbitrators in light of the best interests of the child. However, if the court following its review finds that the arbitrators' award is in the best interests of the child, the court may adopt the decision as its own'. Again the decision does not make it explicit as to whether the court limits itself to an examination of the reasoning of the arbitrators.
- 97 Implicit in the wording of Wisconsin Statutes 802.12(3)(e).
- 98 Indiana Code s. 34-57-5.
- 99 Michigan Compiled Laws s. 600.5077.
- 100 Michigan Compiled Laws ss 600.5078(1)–600.5078(2).
- 101 Michigan Compiled Laws s. 600.5080(1).
- 102 472 Mich 882; 693 NW2d 822 (2005).
- 103 Mich. Comp. Laws Serv. s. 600.5082.
- 104 530 US 57 (2000), opinion of O'Connor J. at 65. The case concerned a dispute between the mother and paternal grandparents of two girls. The grandparents wished to continue to have visitation rights after the death of their son, the girls' father. The mother wanted to curtail those rights, particular when she married and her new husband adopted the girls. The breadth of the statute subject to review (permitting '[a]ny person' to petition for visitation rights 'at any time' and authorizing state superior courts to grant such rights whenever visitation might serve a child's best interest) was a significant factor in the decision of the Supreme Court.
- 105 *ibid.* at 720; see also *Reno v Flores*, 507 U. S. 292, 301–2 (1993).
- 106 Citing *Meyer v Nebraska*, 262 U. S. 390, 399, 401 (1923); *Pierce v Society of Sisters*, 268 U. S. 510, 534–5 (1925); *Prince v Massachusetts*, 321 U. S. 158 (1944); *Stanley v Illinois*, 405 U.S. 645, 651 (1972); *Wisconsin v Yoder*, 406 U.S. 205, 232 (1972); *Quilloin v Walcott*, 434 U.S. 246, 255 (1978); *Parham v J.R.*, 442 U.S. 584, 602 (1979); *Santosky v Kramer*, 455 U.S. 745, 753 (1982); *Washington v Glucksberg*, 521 U.S. 702, 719 (1997).
- 107 199 N.J. 456 (2009).
- 108 See further Spitzko (2000) and Fox (2010). To ensure that the courts will have the ability to review an arbitral award concerning child arrangements properly, the Supreme Court mandated compliance with additional procedural requirements. In addition to the general rules governing arbitration under N.J.S.A. 2A:23B-1 to 32, arbitration concerning child arrangements requires that a record of all documentary evidence be kept; that all testimony be recorded verbatim; and that the arbitrator state in writing or otherwise record his or her findings of fact and conclusions of law with a focus on the best interests standard. Failure to comply with these procedural guidelines may lead to the award being set aside. Cf. more recently, however, *Johnson v Johnson* 204 N.J. 529, 9 A.3d 1003 (2010), a case conducted under the New Jersey Alternative Procedure for Dispute Resolution Act, N.J.S.A. 2A:23A-1 to -19. The arbitrator kept a thorough, but not verbatim, record. The Supreme Court concluded that the record was sufficient to allow review of the allegation of harm, and that no harm had been shown.
- 109 See above at note 14.
- 110 Family Law Act 1975 (Cth) s. 13J(1). Review may be by (a) a single judge of the Family Court; or (b) a single judge of the Family Court of a State; or (c) the Federal Circuit Court of Australia.
- 111 S. 13J(2)
- 112 S. 45(2) and (3).
- 113 S. 45(1).
- 114 Cf. the more restrictive position under domestic commercial arbitration, allowing an appeal if the parties consent to this, or the court gives leave: s. 31(1) of the BC Arbitration Act 1996.
- 115 Application was made in the Guildford County Court, but transferred to the High Court for a high profile ruling and guidance.
- 116 [2014] EWHC 7 (Fam) at para. 19. The idea of a 'magnetic factor' is drawn from decisions on s. 25 of the Matrimonial Causes Act 1973, which lists eight factors to which the court should have regard in deciding whether to make the financial orders with which the section is concerned. The origin of this line of case law is *White v White* [1999] Fam 304; [1999] 2 W.L.R. 1213 (affirmed, [2001] 1 AC 596)

- where Thorpe LJ noted: 'Although there is no ranking of the criteria to be found in the statute, there is as it were a magnetism that draws the individual case to attach to one, two, or several factors as having decisive influence on its determination.' The idea of an arbitral award as a magnetic factor having decisive influence on the court's decision was suggested by Sir Peter Singer (2012) and approved in both *S v S* and *AI v MT* [2013] EWHC 100 (Fam).
- 117 At para. 21. In contrast to the situation in the USA, there is an assumption here that any award will be reasoned. For a critical view, see Ferguson (2014).
- 118 As utilized in *Dean v Dean* [1978] Fam 161, *Xydhias v Xydhias* [1999] 1 FLR 683, *X and X (Y and Z Intervening)* [2002] 1 FLR 508, and *S v S (Ancillary Relief)* [2008] EWHC 2038 (Fam), [2009] 1 FLR 254.
- 119 *S v S* [2014] EWHC 7 (Fam) para. 26.
- 120 There was no attempt to obtain recognition of a foreign arbitral award.
- 121 *AI v MT* [2013] EWHC 100 (Fam), per Baker J at para.31 – again quoting Singer (2012).
- 122 See e.g. Ontario, Family Law Act 1990, s. 59.4; British Columbia, Arbitration Act 1996, s. 2.1(1); Michigan, implicit in Michigan Compiled Laws s. 600.5071.
- 123 The IFLA ARB1 Form is the standard form for an arbitration agreement and is for use once a dispute has arisen.
- 124 This is, for example, explicit in North Carolina (N.C.G.S. s. 50-42), and see also Con. Gen. Stat. s. 46b-66(c). For Colorado, Colo. Rev. Stat. s. 14-10-128.5 seems to suggest that only submission agreements are enforceable, but cf. *In re Marriage of Popack*, 998 P.2d 464, 467 (Co. App. Ct. 2000) where the court found valid an agreement to 'arbitrate all matters related to [the parties'] marriage, present or future'.
- 125 Section 6(c) of the 2015 Annual Meeting Draft.
- 126 Although such agreements are only binding if strict criteria are met: Family Law Act 1975, in particular ss 90B and 90G.
- 127 Or, in Canada, also of another province.

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