

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

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SUMMARY

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

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

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