Family Property Arbitration:
Exploring the New Potential

Prof. Patrick Parkinson AM

October 2017

Introduction

Arbitration has been possible in property cases under the under the Family Law Act for 25 years. When it was introduced by amendments to the Family Law Act in 1991, it was hoped that it would provide another avenue for diverting appropriate cases away from the court system. However, it went unused until amendments were made in 2000 to facilitate private arbitration. Further amendments were made in 2006. Arbitration can now only be undertaken on a voluntary basis.

Section 13A(1)(c) of the Family Law Act provides that an object of the legislation is "to encourage people to use, in appropriate circumstances, arbitration to resolve matters in which a court order might otherwise be made, and to provide ways of facilitating that use."

Legal Aid Queensland has operated a property arbitration scheme since 2001 with considerable success. As the Family Law Council observed in its 2008 letter of advice to the Attorney-General, the success of that scheme "shows that where an appropriately resourced model can be applied to meet the needs of certain stakeholders, arbitration can be an effective and useful process for resolving disputes" ('Arbitration of Family Law Property and Financial Matters', 2008, p.7).

However, apart from this arbitration has, until recently not been much utilized. There have been various attempts to get arbitration going elsewhere in Australia and in the private profession. Perhaps the most systematic attempt was made from 2005 onwards (Australian Family Lawyer, Special Issue, *Arbitration Under the Family Law Act*, September 2005). A program was later launched in Melbourne. It does not appear to have gained much traction. This is despite the widespread acceptance of arbitration as a means of resolving commercial disputes.

One of the reasons for the slow take up of arbitration may have been a lack of an appropriate framework. Although amendments to the Family Law Regulations in 2001

filled in a lot of the detail, they left to Rules of Court some significant issues such as the processes surrounding the issue of subpoenas.

New Rules of Court which came into effect on April 1 2016 address the lacunae in the regulatory framework, and in promulgating these Rules, the Family Court has made it clear that it wants to support the use of effective and timely arbitration. It can be expected now that judges will encourage arbitration in more straightforward cases, given the considerable work pressures on the Family Court and Federal Circuit Court. Some judges in the Federal Circuit Court are already doing so, and arbitrations have begun to occur particularly in Sydney and Brisbane.

What is arbitration under the Family Law Act?

There are two kinds of arbitration under the Act.

a) court-referred arbitration under s.13E.
b) party-initiated arbitration. This is arbitration agreed between the parties without court referral. In the Act it is known by the rather bureaucratic term 'relevant property or financial arbitration matters'. It used to be called 'private arbitration' prior to 2006.

This distinction is made in s. 10L which provides:

(1) ***Arbitration*** is a process (other than the judicial process) in which parties to a dispute present arguments and evidence to an arbitrator, who makes a determination to resolve the dispute.

(2) Arbitration may be either:

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

(b) ***relevant property or financial arbitration*** --which is arbitration (other than section 13E arbitration) of:

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

(ii) any part of such proceedings; or

(iii) any matter arising in such proceedings; or

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

In both cases the arbitral award takes effect as if it were a decree of the court (s.13H).

An arbitration need not be of all aspects of the proceedings. The court could refer one part of the proceedings to arbitration, for example, determining the value of a business or asset, or determining issues of fact which need to be resolved before settlement can be reached. Sometimes, for example, parties are in agreement about the overall percentage split but cannot agree on the balance sheet. Arbitration could be used to settle that issue. Another example is where there is an argument about whether the parties were in a de facto relationship, which is best resolved before the parties go to the expense of preparing a full-blown property application and response. Arbitration therefore has the potential to be very useful as part of the litigation process to help narrow the issues which a judge may need to determine, as well as being an alternative to litigation through the courts.

The two kinds of arbitration

(a) Court-referred arbitration

Court-referred arbitration is only in relation to matters under Part VIII and Part VIIIAB (de factos). Section 13E provides:

> 13E Court may refer Part VIII proceedings or Part VIIIAB proceedings to arbitration
>
> (1) With the consent of all of the parties to the proceedings, a court exercising jurisdiction in:
>
> (a) Part VIII proceedings; or
>
> (b) Part VIIIAB proceedings (other than proceedings relating to a Part VIIIAB financial agreement);
>
> may make an order referring the proceedings, or any part of them, or any matter arising in them, to an arbitrator for arbitration.
>
> (2) If the court makes an order under subsection (1), it may, if necessary, adjourn the proceedings and may make any additional orders as it thinks appropriate to facilitate the effective conduct of the arbitration.

An application for an order under section 13E must be made jointly by all parties to the proceeding (Reg 67D).

Once a court has made an Order by consent under s.13E, the parties are committed to the arbitration and one party cannot simply change his or her mind. This is because, like a consent order in property matters, the referral to arbitration is made by Order of the Court. It can only be revoked if the court has power so to do. It is far from clear that the court has the power.

There might appear to be such a power in the Federal Circuit Court Rules to terminate an arbitration. Rule 27.03 provides:

> **Court may end mediation or arbitration**
>
> (1) The Court may:
>
> (a) end a mediation or arbitration at any time; or
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> (b) terminate the appointment of a mediator or an arbitrator; or
>
> (c) appoint a new mediator or arbitrator to replace a mediator or an arbitrator.
>
> (2) If the Court appoints a new arbitrator, the Court may order:
>
> (a) that the new arbitrator must treat any evidence given, or any record, document or anything else produced, or anything done, in the course of the arbitration as if it had been given, produced or done before or by the new arbitrator; or
>
> (b) that any interim award made in the course of the arbitration is to be taken to have been made by the new arbitrator; or
>
> (c) that the new arbitrator must adopt and act on any determination made by the previous arbitrator.

However, the heading to the relevant Chapter is "Proceedings other than family law or child support". An earlier Chapter deals with family law and child support proceedings and the power to terminate a mediation or arbitration is nowhere to be found in that Chapter.

The Family Law Rules do not specifically give a power to terminate an arbitration, despite extensive provisions in those Rules dealing with arbitration matters.

b) Party-initiated arbitration

This is possible in Part VIII proceedings, Part VIIIA proceedings (arguments about binding financial agreements), Part VIIIAB proceedings (disputes between former factos), Part VIIIB proceedings (issues about superannuation) or section 106A proceedings (execution of instruments by order of the Court.)

Party-initiated arbitration therefore has broader scope than court-referred arbitration. The limitations on court-referred arbitration may be because originally, in the 1991 legislation, the court had the power to make arbitration compulsory and so it was limited to Part VIII proceedings. There is no rational basis for now maintaining a distinction between the scope of court-referred and party-initiated arbitration. Both are consensual.

Party-initiated arbitration is perhaps preferable because it gives more scope to tailor the arbitration to the needs of the parties; but court-referred arbitration may also be useful in circumstances where the judge, with cooperation from the parties, wants to case-manage a particular aspect of the case using arbitration to deal with some aspect of the litigation.

Whether or not the arbitration is court-referred, the Court can make orders to facilitate the arbitration. This is so under s.13E(2) in relation to court-referred arbitration. Section 13F provides, in relation to party-initiated arbitration:

> A court that has jurisdiction under this Act may, on application by a party to relevant property or financial arbitration, make orders the court thinks appropriate to facilitate the effective conduct of the arbitration.

Such an application may be made by any party to the application or by the parties jointly (Reg 67E). An example of a facilitative order might be providing the arbitrator with photocopy access to documents which were subpoenaed prior to the commencement of the arbitration.

Who can be an arbitrator?

According to the Family Law Regulations, the arbitrator must be an Australian legal practitioner who satisfies the minimum requirements (specialist accreditation or five years in practice, including at least 25% in family law) and who has done an arbitration course.

Reg 67B provides that the person must be a "legal practitioner". In the Legal Profession Uniform Law, (s.6) "Australian legal practitioner" means an Australian lawyer who holds a current Australian practising certificate. For this reason, the arbitrator will need a practising certificate. That could be an issue in relation to retired judges.

AIFLAM maintains a list of trained arbitrators on behalf of the Law Council of Australia and that list can be searched by location.

What must an arbitration agreement contain?

Reg 67F specifies that an arbitration agreement must be in writing, and give details of the arrangements agreed by the parties in relation to the payment of the costs of the arbitration. It must also include a statement to the effect that each party agrees to pay his or her agreed share of the costs of the arbitration within 28 days, or another

specified period agreed by the parties and the arbitrator, after an award has been made.

The agreement must include the following information (Reg 67F(3)):

(a) the name, address and contact details of each party to the arbitration;
(b) the name of the arbitrator;
(c) the date, time and place at which the arbitration is to be conducted;
(d) the issues to be dealt with in the arbitration;
(e) the estimated time needed for the arbitration;
(f) information about how the arbitration will be conducted (for example, information about the exchange of documents and witness statements, scheduling and receiving expert evidence
(g) the circumstances in which the arbitration may be suspended or terminated;
(h) the estimated costs of the arbitration, including the costs of any disbursements that may be incurred in respect of the arbitration (for example, hire of a venue for the arbitration).

There are various mandatory provisions if the parties do not have an arbitration agreement (Regs 67G and 67H) but it is likely that arbitrators will have standard term arbitration contracts.

The conduct of the arbitration

There is a limited amount of prescription in the legislation. Reg 67I provides that an arbitrator must determine the issues in accordance with the Act and must conduct an arbitration with procedural fairness (for example, giving each party to the arbitration a reasonable opportunity to be heard and to respond to anything raised by another party). The arbitrator must also inform each party in writing of anything that could lead to direct or indirect bias in favour of or against any party. Arbitrators must also take an oath to preserve confidentiality (Reg 67J). The terms of that oath also set out the exceptions to confidentiality.

If the parties consent to this, an arbitrator is not bound by the rules of evidence but may inform himself or herself on any matter in any way that he or she considers appropriate (Reg 67O).

There are also provisions which address the situation where a party does not comply with the arbitrator's directions (s.67K) or the arbitrator considers that the person lacks capacity (s.67L). The arbitrator's power to enforce directions are limited in party-initiated arbitration. Essentially it is limited to suspending the arbitration. However, the arbitration agreement might allow for at least some cost penalties in this instance: for example, the arbitrator's fee might be payable by the defaulting party notwithstanding the suspension of the arbitration. In the case of court-referred arbitration, the matter can be referred back to the judge.

Regulation 67M provides that a party to an arbitration may appear in person, or be represented by a legal practitioner.

The powers of the arbitrator

The Regulations give to the arbitrator the power to compel witnesses or the production of evidence. Reg 67N provides:

Attendance of persons to give evidence

(1) An arbitrator conducting an arbitration may require a person (whether a party to the arbitration or not):

(a) to attend the arbitration to give evidence; or

(b) to produce documents; or

(c) to attend the arbitration to give evidence and produce documents.

(2) A party to an arbitration may apply to the court for the issue of a subpoena requiring a person (whether a party to the arbitration or not):

(a) to attend the arbitration to give evidence; or

(b) to produce documents; or

(c) to attend the arbitration to give evidence and produce documents.

(3) An application under subregulation (2) must be made in accordance with the applicable Rules of Court.

Until now, there have been no such rules for subpoenas. That is one of the lacunae filled by the new Rules.

The new arbitration rules

The Family Law Amendment (Arbitration and Other Measures) Rules 2015 came into effect on April 1st 2016. The Explanatory Statement accompanying the new rules provides the background:

> To date arbitration in family law has rarely been utilised notwithstanding that ss 10L(2)(b) and 13E of the Act provide for consensual arbitration of certain types of financial disputes… To facilitate effective and timely arbitration between people who wish to arbitrate rather than litigate their financial disputes the Judges have exercised their rule making powers to address certain gaps, in particular in relation to disclosure and subpoenas, which were seen as impediments to efficacious arbitration.

The Rules amend the Family Law Rules 2004 to insert a new Chapter 26B on arbitration.

The Rules cover two main issues. The first is the duty of disclosure. Each party has a duty to the arbitrator and each other party to give timely full and frank disclosure of relevant information including financial information (Rule 26B.01(1)). The requirements about what must be disclosed in an arbitration (26B.01(2)) mirror Rule 13.04 with respect to court proceedings. There are also similar rules concerning the disclosure of documents and the use to which they are put (compare Rules 26B.02 and 26B.03 with Rules 13.07 and 13.07A).

Rule 26B.04 provides for the production of documents, equivalent to Rule 13.08:

(1) A party to an arbitration may, by written notice, require another party to the arbitration to provide a copy of, or produce for inspection, a document referred to:
(a) in a document provided by a party to the arbitration to another party to the arbitration; or
(b) in correspondence prepared and sent by or to another party to the arbitration.

Again, mirroring the general rules, there are provisions dealing with claims of privilege and objections (Rules 26B.05 and 26B.06) and making provision for inspections (Rule 26B.08). A party may also give the other party a list of documents which either need to be produced or an explanation given if they are not under that party's control ((Rule 26B.07).

Rule 26B.09 provides that either a party to the arbitration, or the arbitrator, may apply to the court to enforce disclosure requirements. Rule 26B.10 allows the court to order

a party requiring disclosure to pay the costs of so doing, to contribute to those costs or to give security for costs, as long as compliance with the duty of disclosure would be oppressive.

The second area the rules cover is subpoenas. These powers need to be read together with Reg 67N which gives the arbitrator the power to compel witnesses or the production of documents. The provisions in the new Rules back this up with the power to apply to the court. Rule 26B.14 provides:

> The court may, on application, issue a subpoena requiring a person:
> (a) to attend an arbitration to give evidence; or
> (b) to produce documents to the court in relation to an arbitration; or
> (c) to produce documents to the court in relation to an arbitration and attend the arbitration to give evidence.

These rules cover, inter alia:

- The process for issuing a subpoena in an arbitration.
- The requirements for service of a subpoena.
- The obligation to pay conduct money.
- When compliance is not required and
- The process of objection when orders that a subpoena be wholly or partly set aside or other relief are sought.

The Explanatory Statement says this about the subpoena provisions:

> The amendments harmonise the approach to the production of documents under subpoenas with the approach of the Federal Circuit Court Rules 2001 (the Federal Circuit Court Rules) to streamline the process and reduce the number of court appearances. …The amendments are based on the provision of an administrative production day consistent with the approach of the Federal Circuit Rules rather than listing the subpoena for hearing at the time of issue. The approach is contingent upon service, compliance by the named person, the absence of any objection and the issuing party filing a notice of request to inspect. Child welfare, criminal, medical or police records are precluded from automatic copying, notwithstanding that there is no objection, but may be inspected. A person whose medical records are subpoenaed may inspect the documents prior to inspection by the parties, lawyers or independent children's lawyer in order to determine whether to object to inspection or copying of the records. Objections are listed for hearing by the court.

When can an arbitral award be challenged?

An arbitration award can be challenged on various grounds after it has been registered in court.

One of the issues which has undoubtedly led to resistance to the use of arbitration is that there are limited rights of review. Before considering this issue, it is important to observe what the bases for challenge are. There are several.

First, it is important to note that an arbitral award only takes effect once registered. That registration is on the application of a party. If neither choose to register it, the award does not take effect as if it were a decree of the court. There could be circumstances where neither party is happy with the outcome and choose not to register it. There could be other circumstances in which a party who is unhappy with the outcome makes an offer to resolve the issues in different terms to the arbitral award. If that alternative offer is acceptable to the other party, they may choose to seek Consent Orders to give effect to their agreement instead.

Second, there is a right to review the arbitral decision on a question of law (s.13J). it is important to note the exact wording of the section because it does not say, in terms, that the award can only be overturned for an error of law. Section 13J provides:

> (1) A party to a registered award made in section 13E arbitration or relevant property or financial arbitration may apply for review of the award, on questions of law, by:
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> (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.
>
> (2) On a review of an award under this section, the judge or Federal Circuit Court of Australia may:
>
> (a) determine all questions of law arising in relation to the arbitration; and
>
> (b) make such decrees as the judge or Federal Circuit Court of Australia thinks appropriate, including a decree affirming, reversing or varying the award.

Read literally, if a review of an arbitral award is sought on a 'question' of law, then the judge may determine that legal question and has a broad discretion, having done so, to make a decree 'affirming, reversing or varying the award'. The interpretation of this will need to be clarified, but it is possible to read it in such a way that even if the judge concludes that there is no error of law, or that the arbitrator reached a decision which

was open to him or her considering the width of the decision-maker's discretion under the Family Law Act, the award should still be varied in some way.

Third, there are other grounds for setting aside the award. Section 13K provides:

> (1) If an award made in section 13E arbitration or relevant property or financial arbitration, or an agreement made as a result of such arbitration, is registered in:
>
> (a) the Family Court; or
>
> (b) the Federal Circuit Court of Australia; or
>
> (c) a Family Court of a State;
>
> the court in which the award is registered may make a decree affirming, reversing or varying the award or agreement.
>
> (2) The court may only make a decree under subsection (1) if the court is satisfied that:
>
> (a) the award or agreement was obtained by fraud (including non-disclosure of a material matter); or
>
> (b) the award or agreement is void, voidable or unenforceable; or
>
> (c) in the circumstances that have arisen since the award or agreement was made it is impracticable for some or all of it to be carried out; or
>
> (d) the arbitration was affected by bias, or there was a lack of procedural fairness in the way in which the arbitration process, as agreed between the parties and the arbitrator, was conducted.

It follows from this that an arbitral award may be less final, and more open to challenge, than perhaps the profession has thought.

Whether the limited grounds for review or setting aside represent an advantage or disadvantage may depend on the amount at stake. For many people, what they most need is a decision from someone they can trust and respect which is final. That way they can move on with their lives. If the arbitral award is made by a respected and experienced decision-maker (and many arbitrators may have decades more experience in family law than newly appointed judges), then the constraints upon review may not be of great moment. Both sides get a reasonably high degree of finality and, importantly, the other party is bound by the same constraints.

In its work on arbitration a decade ago, the Family Law Council found that the narrowness of review rights were an important consideration for practitioners considering whether to recommend consensual arbitration to their clients. In particular, there was general support for the proposition that parties should be able to go to consensual arbitration and agree that review should be by way of a rehearing de

novo rather than limited to appeal on a question of law.

What if there were a right of hearing de novo as occurs in other courts? It is worth looking at this from the client's perspective. He or she ought to know the following:

1. If there is a need to go to trial, how long is it likely to be before he or she gets trial dates?
2. On those dates, will that case be the only case listed?
3. What fees will be payable to the court for the hearing?
4. What is that person's legal representation at the trial likely to cost?
5. What other costs are likely to be incurred between now and then for correspondence with the other side, trial preparation and consultations?
6. Does the judge have a lot of experience in dealing with family property issues?
7. How long will the client be likely to wait for a judgment after the trial has concluded?
8. If one party appeals, how much is the appeal likely to cost?
9. How long will it be before the appeal court hears the matter?
10. How long is the client likely to wait for a judgment after the appeal hearing has concluded?
11. If the appeal is allowed, will the appeal court decide the case itself or send it back to a trial judge to hear the case again?
12. If the case has to be heard again, go back to question 1.

Lawyers may wish to preserve the widest appeal rights. Their clients ought to be aware of how long the process might take and what level of cost might be involved. Arbitration offers a way out of the swamp. It may not be perfect justice, but whoever thinks that is obtained from the court system?

If the lawyer wants to keep as many options open as possible, the best option might be to use someone with the capacities to be an arbitrator to conduct a neutral evaluation – with recommendations to both parties.

Can a person object to registration?

May a person may object to the registration of the award? The Regulations indicate that this is possible, but the basis for so doing is unclear. Reg. 67Q is as follows:

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

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

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

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

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

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

Note: For the effect of registration, see subsection 13H(2) of the Act.

Because the legislation only provides for an arbitration award to be challenged *after* it has been registered in court, and the regulations do not indicate the basis for objection, it is necessary to go back to some basic principles to understand what this right to "bring to the attention of the court any reason why the award should not be registered" might mean.

The first point to observe is that the Regulations are subject to the head legislation. If any regulation is inconsistent with the terms of the legislation it will be invalid to the extent of that inconsistency. Section 13H does not give any party to an arbitration a right to object to registration, and it only gives the Court power to review the arbitration award (on the various grounds given) after it has been registered. So the right to "bring to the attention of the court any reason why the award should not be registered" must be interpreted in a way that is consistent with the legislation's provision that powers of review be exercised in relation to *registered* awards.

Secondly, as a matter of general principle, Australian courts will only deal with orders of another court if the orders are registered (see e.g. s.111CT). It is the registration that gives the Court jurisdiction to deal with it by enforcement or otherwise.

Thirdly, before any legal document can create rights and obligations, the conditions precedent for legal validity must be satisfied. Unless and until the conditions precedent for a valid contract are satisfied, there is no contract to interpret or enforce. Unless a court, other than a superior court of record, has jurisdiction to make an order, any orders it purports to make are a nullity (see Enid Campbell, 'Inferior and Superior Courts of Record' (1997) 6 *Journal of Judicial Administration* 249.)

It follows that the most sensible interpretation of the right to "bring to the attention of the court any reason why the award should not be registered" is that a person may argue that an award should not be registered because one of the conditions precedent for legal validity have not been met. Examples might be:

- The objecting party did not consent to the arbitration
- The 'arbitrator' is not qualified in accordance with the Regulations
- The arbitration purports to deal with matters that are outside of the scope of matters that may legally be arbitrated.

If such matters were made out, then there would be no legally valid arbitration award to register, review or set aside. If the arbitration award is valid on its face – that is, the conditions precedent for it to be described as an arbitration award under the Family Law Act are met – then it should be registered, and objections to its enforcement be dealt with in accordance with sections 13J and 13K – the power to review awards or set them aside.

CGT and stamp duty relief

Finally, it is necessary to consider CGT and stamp duty. CGT rollover applies to arbitral awards in the same way as court orders or binding financial agreements. See Income Tax Assessment Act 1997 s.126.5(1)(e).

The position in relation to exemption from stamp duty for interspousal transfers is more complex. The exemption may not apply to arbitration. Section 68 of the Stamp Duties Act 1991 (NSW), for example, exempts transfers pursuant to binding financial agreements, court orders and other agreements between the parties following relationship breakdown, but does not refer to arbitral awards. However, if the arbitration award is registered and a document to that effect emanates from the court, it does seem to be accepted as a court order. The position may vary from state to state.

Another option is to deal with it either in the arbitration agreement, or the arbitral award, or both. The agreement or award could specify that in the event that an issue of stamp duty arises, the parties will agree to enter into a binding financial agreement to give effect to the arbitral award and if a person fails to do so, he or she would be liable to pay the relevant duty payable. The award could be in similar terms.

Conclusions

It is surprising that there has not been more use of arbitration given the inefficiencies and delays in the court system. Arbitration has of course been widely used in other areas of the law. Apart from the issue of appeal rights, reasons may include a natural conservatism amongst lawyers or clients, the lack of a system for organising arbitration, or just a fear of the unknown amongst family law professionals. Another factor which may have inhibited agreement to arbitrate is that often one party has an incentive to delay – for example the parent occupying the family home while the other pays the mortgage.

There are good reasons for us to consider arbitration now. A hearing could take place within weeks and a decision handed down shortly thereafter. The parties could agree on their own arbitrator. An arbitration could be conducted with a brief hearing for clarification of issues and submissions. Such a hearing could take place in the evening or at a weekend if everyone agreed, or by videoconference. Importantly, a hearing date and time would be dedicated and protected. There would be no other matters requiring attention before the commencement of the hearing or in competition for a hearing.

The Alternative Courtroom (www.alternativecourtroom.com.au) offers a complete arbitration service with highly respected arbitrators at a low fixed cost. At present, it will only conduct in-person arbitration hearings in Canberra, Melbourne and Sydney but can do so for people anywhere by phone or video-conference where the hearing is essentially on the papers.

It remains to be seen whether now, finally, arbitration will find its place in the sun.