

# FAMILY LAW ARBITRATION IN SOUTH AFRICA

1. The arbitrator will decide the substance of the dispute with the law of South Africa
2. The parties may be invited to stay the court proceedings pending the outcome of the arbitration
3. The terms of a proposed consent order will be drafted to reflect the decision and directions contained in the arbitrator's award. The parties will apply for an order to court to reflect the award by consent. It would only be in the rarest of cases that it will be appropriate for a Judge not to approve the order. The draft orders would obviously be in terms of the South African Law and the available statutory relief.
4. Privacy and confidentiality of the award may be maintained.

# Scope of Family Law Arbitration Scheme

- **Financial –**

Does not cover

- Status of the relationship
- Insolvency
- Third party intervention unless by agreement

- **Children -**

Does not cover

- Abduction
- Adoption
- Surrogacy
- Relocation to non-Hague countries

# Applicable law

- Substantive law
- South African law
- Welfare of the child

# Appointment of arbitrator

- Engagement form
  - Retainer
  - Communication with parties
  - Preliminary meeting
  - Procedure and hearing

# Managing the arbitration

- Main options for arbitration
  - Documents only
- Hearing
- General form of civil litigation process
  - The alternative procedure
- Interim applications available

# Short-cuts for saving time

- Openings / skeletons / closings in writing
- Witness statements

# Decision Making

- Identifying issues
- Dealing with points of law
- Evaluating evidence
- Writing reasons
- The order must be logical
- Main issues before lesser issues
- Decisive issues before consequential issues

# The Award

- In writing
- Signed by arbitrator
- Containing reasons
- Stating seat of arbitration
- Stating date of award



# Scheme an award / determination

- Jurisdiction
- Dispute / issue
- Procedure
- Issues
- Evidence
- Analysis / reasons
- Operative award
- Formalities

# Why now?

- Resolution of family disputes at crisis point
- Courts cannot cope with the volume of cases
- Government has attempted to divert suitable cases away from the court system to ARB
- Judicial support and encouragement
- Confidentiality

# Judicial encouragement elsewhere of arbitration

- Sir Hugh Bennett

“In my estimation the advantages so outweigh what I said, very inaccurately, to be disadvantages, that I confidently predict that within the near future family finance arbitration will compliment the court system just as private medicine compliments the National Health Service.”

# Perceived problems

- Appeals
- Grounds
  - Lack of substantive jurisdiction
  - Serious irregularity and substantial injustice as a consequence
- Appeal on point of law, not fact

# Benefits for your clients

- Parties select decision maker and continuity of decision maker
- Flexibility
- Control and pacing
- Confidentiality
- Informality
- Possibility of dealing with discreet issues
- Speed