# ARBITRATION IN FAMILY LAW: A PRIVATE APPROACH TO RESOLVING DOMESTIC DISPUTES

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## A. INTRODUCTION

***By Part 3.3 of the Family Procedure Rules*** [1]that are in effect in England and Wales, "the court must consider whether ***non-court dispute resolution*** is appropriate at every stage in proceedings." Arbitration is one type of such conflict settlement process. To encourage ***family law arbitration a***nd provide a framework for such arbitration under the ***Arbitration Act of 1996,*** the ***Institute of Family Law Arbitration (IFLA***) [2]was founded ***in England in 2012.*** Wales and England are not in isolation. A few months before the formation of the IFLA, the ***Family Law Arbitration Group Scotland (FLAGS)*** was established to facilitate arbitration by the ***Scottish Arbitration Act of 2010***. Institutions managing or overseeing family arbitration have recently surfaced, among other places, in Germany, Spain, Australia, and Canada. Family dispute arbitration has been on the rise in the USA for several decades, and there are discussions about the possibility of such arbitration abroad.

Arbitration is said to have various benefits. These include the ability to choose a suitable expert to serve as the arbitrator, quickness, flexibility in scheduling, more casual procedures, and confidentiality. There are also claims of lower costs. Even though the arbitrator(s) must be paid by the parties, there is less expense waste on legal counsel due to fewer needless court appearances.

## B. REGULATORY FRAMEWORK FOR ARBITRATION

Although intended for civil and commercial matters, the general regulatory framework for arbitration has served as the foundation for the regulation of family arbitration worldwide. This is largely due to the efforts of the ***UN Commission on International Trade Law,*** [3]which produced the ***1958 New York Convention*** on ***the Recognition and Enforcement of Arbitral***

[1] Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law', 'Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law' (Theoretical inquiries in law7 April 2008)
[2] It's Arbitration, but Not as We Know It: Reflections on Family Law Dispute Resolution', 'It's Arbitration, but Not as We Know It: Reflections on Family Law Dispute Resolution' (International Journal of Law, Policy and the Family7 April 2016)
[3] Family Arbitration—an Exercise in Sensitivity', 'Family Arbitration—an Exercise in Sensitivity' (Family Law Quarterly7 April 1969)

***Awards***[4], which established standards for the enforcement of arbitration agreements and awards, as well as the 1985 Model Law, which has been ratified. The concept of arbitration is based on agreement; parties essentially agree that they will take their dispute to a decision maker they trust (the arbitrator or arbitral tribunal) and abide by the decision of that person or tribunal. With various modifications, it has been implemented in well over 60 states. It has also promoted rules for ***ad hoc arbitrations*** [5]and for conciliation.

Since the foundation of arbitration is agreement, the parties' agreement serves as the primary source of the rules that regulate their arbitration as well. Such rules may be included in submission agreements or dispute resolution sections in primary contracts, but in actuality, commercial parties usually include the rules of an arbitral institution by reference to take use of the institution's collective experience. Thus, arbitration statutes generally set forth the conditions necessary for an arbitration agreement to be deemed valid, the relationship between courts and tribunals, including the extent of judicial scrutiny of an arbitral tribunal's jurisdiction and the default rules that apply to the establishment of a tribunal and, to a lesser extent, the arbitration's conduct, the standards for a legitimate award, the grounds and procedures for contesting an award, issues about enforcement, and rules regarding fees and costs.

## C. ARBITRABILITY OF THE FAMILY LAW DISPUTES

### *DEFINING THE FAMILY*

Numerous limitations on arbitration in family law issues stem from the state's and church's jurisdiction over marriage and divorce. Divorce cases also predominate in arbitration case law. However, there are various types of modern families. The limitations might not be significant in situations involving the dissolution of a civil partnership, much less when cohabitants are splitting up. However, other public policy factors might potentially dissuade arbitration of these kinds of disputes.

[4] Family Arbitration—an Exercise in Sensitivity', 'Family Arbitration—an Exercise in Sensitivity' (Family Law Quarterly7 April 1969)

[5] Arbitration. A Promising Avenue for Resolving Family Law Cases?', 'Arbitration. A Promising Avenue for Resolving Family Law Cases?' (Pepp. Disp. Resol. LJ7 April 2018)

## ***FRAMEWORK PROVIDED BY NATIONAL LEGAL CODES***

Family arbitration has been hampered in several jurisdictions by Civil Code rules. "No compromise shall be possible about the civil status of persons, nor about matrimonial issues, nor future maintenance," states ***Article 1814 CC of the Spanish Civil Code. Marfil Gómez (2010)*** draws attention to the ambiguities this phrasing raises and the restricted function arbitration serves in family law. He believes that "property regimes between spouses or non-married partners" ***qualify for arbitration*** under this clause.

Parallel to this, discussions in Germany have been influenced by the language of the Code of Civil Procedure. When the law about arbitration was reformed in ***1998,*** **the** pertinent sections were changed. As of right now, ***Article 1030 ZPO offers:***

(1) An arbitration agreement may be used to address any property law claim. Insofar as the disputing parties are entitled to resolve the dispute's subject matter, an arbitration agreement about non-pecuniary claims is legally binding.

## ***STATE INTEREST***

The overcrowding or disintegration of the legal system is a recurring theme in the narrative of the introduction or promotion of arbitration as a means of resolving family law conflicts. Accordingly, the state has an interest in absolving the courts of as much of their family dispute resolution role as is consistent with public policy demands. However, there are still compelling public policy reasons to maintain jurisdiction. The state has an interest in making sure that, to the greatest extent feasible, established values like judicial protection of weaker parties and legal certainty are upheld. The state is not forced to fulfill welfare obligations by any financial settlement between the parties Additionally, it has a stake in making sure that separation or divorce agreements are sufficient to minimize injury to specific family members, relieve it of the financial burden of providing care for them, and avoid broader negative effects on society. The following remark, which discusses the ***circumstances in the USA, demonstrates the conflict between these interests.***

## ***ARBITRATION AND THE REJUDICIZATION OF DIVORCE***

Divorce is not often granted until property, maintenance, and child support issues have also been settled in many jurisdictions. Due to their close ties to the divorce or legal separation process, there is an incentive to avoid taking these kinds of disputes to arbitration if a court

order is required to end a marriage. Given this, it should come as no surprise that the dejudicialization of divorce in uncontested cases and the promotion of arbitration as a means of resolving disputes in family law cases are happening concurrently. In nations where notaries have the jurisdiction to grant divorces, this is especially true: the grounds in favor of notaries.

Notaries can grant divorces in non-contentious instances in Ecuador, Peru, Brazil, and Ecuador, for example. The parties must give the notary proof of their marriage as well as an agreement detailing the issues that need to be settled for the divorce to be approved. After that, the notary will notify the registry office to make sure the status change is officially documented. Even further, notarial divorces in situations involving underage or disabled children are permitted in ***Columbia and Cuba. Eastern Europe*** is likewise experiencing a dejudicialization movement identical to this one. In this regard, it proved to be extremely productive. Notaries in Estonia now have the authority to perform "vital statistics," such as officiating marriages and awarding divorces in uncontested cases, thanks to the new ***Notaries Act and Family Law Act.*** Additionally, it allowed notaries to serve as arbitrators and mediators; as a result, the Chamber of Notaries formed a mediation and arbitration tribunal. Notaries have the power to award divorces in uncontested situations, even where children are involved, ***in Latvia and Romania.***

## ***SETTING ASIDE AND APPEALS***

In the end, the position taken on the finality of the decision may be the most important aspect of the law and practice surrounding family law arbitration. In the context of commercial arbitration, arbitral rulings are typically final, as the introduction explains.

When family law matters are included in arbitration, the situation changes. A growing number of people express doubts about the agreement's validity, and in cases where child arrangements are subject to arbitration, it is frequently suggested that court oversight is necessary to guarantee that any decision is in the child's best interests. This obliquely places responsibility for adhering to "best interests" ***standards on the arbitrator.*** For this reason, arbitral judgments in family cases are not always final. Once more, the USA is a helpful place to start due to its lengthy history of family arbitration. While state laws differ, it is typical for arbitration pertaining to property division and financial agreements following a separation or divorce to be handled under the general arbitration laws of the state, which have few grounds for appeal which also notes that some states treat child support in the same way). However, there are particular factors to consider when it comes to ***child support and custody agreements***. In issues

involving children, the courts have maintained their jurisdiction ***as parens patriae, meaning they are the last arbiter..***

## D. LENGTH AND VICISSITUDES OF RELATIONSHIP

Including an arbitration clause in the main contract is a standard approach for parties to commercial transactions to consent to arbitration. This begs the question of whether a marriage contract can have an arbitration clause in it. Because marriage is (typically) a considerably longer and more thorough contract than commercial contracts, some states or arbitration institutes that have considered the subject have decided against this. Therefore, enforcing an arbitration clause in such a contract is deemed irrational. Several states that have voiced their opinions on the matter have declared that only submission agreements are to be The Australian statute on family arbitration does not have a clear regulation on this matter, although some solicitors do incorporate arbitration clauses in legally enforceable financial agreements for de facto and married couples. Similar to this, arbitration clauses are uncommon in reality in Germany but are permissible in theory to be inserted in marital contracts, including prenuptial agreements. upheld.

Gilfrich draws attention to the fact that these kinds of agreements can be examined to make sure they aren't the result of an imbalance of power by using ***Articles 138 and 242 of the Civil Code.*** Furthermore, the requirement that marital agreements be notarized serves as one of the protections for the less powerful partners in the context of such agreements. Gilfrich adds that professional regulations prohibit the notary who drafts the marital contract from being nominated as an arbitrator and that the parties may wish to designate a notary as the arbiter.

## E. CONCLUSION

Global shifts in family dynamics, particularly the rise in extramarital cohabitation—which is usually for a shorter period than marriage—and divorce-related cohabitation are placing enormous strain on the legal system. Both a desire to reduce the number of cases handled and a firm conviction that the formal litigation process is not the most effective means of resolving family conflicts exist. It is inappropriate to search for the "better law" across the jurisdictions under study due to the disparities in legal cultures and the diverse range of institutions participating in family dispute resolutions; yet, certain commonalities may emerge. Among them are fervent recommendations for therapy and mediation to empower the parties to There is substantial public financing available for mediation in many countries, however, it is only available for the first meeting or a very limited number of hours. It is becoming more common practice to require the parties to pay for both their legal counsel and the impartial third party that hears their case, whether that third party be a private judge, special master, arbitrator, mediator, or another expert. The ***privacy, scheduling flexibility, procedural relaxation, and*** ( the option to select the dispute resolution specialist that arbitration is touted as having are examples of arrangements that are not classified as arbitration.