



## ALTERNATE DISPUTE RESOLUTION

# Family Law Arbitration

## What's happening out there in the market?

BY **ROBERT FISHER QC**

NO-ONE DOUBTS THAT AGREEMENT IS THE BEST WAY OF resolving a dispute. Mediation is the best formal mechanism for achieving agreement. Public and private resources are rightly allocated to mediation as the first port of call when parties cannot agree. However, not all disputes can be resolved by mediation. Intractable cases require a decision-maker. Arbitration provides one.

In this country significant interest in family law arbitration (FLA) began to mount about five years ago. Much has developed since. The main players have been a number of individual arbitrators, two professional organisations – Arbitrators and Mediators Institute of New Zealand (AMINZ) and the Family Law Section of the New Zealand Law Society (FLS) – and three commercial institutions – Family Dispute Resolution Centre (FDRC), Complete Online Dispute Resolution (CODR) and FairWay. A round-up of those groups indicates the point we have reached so far.

### Individual arbitrators

Information regarding the frequency of FLA among individual arbitrators is necessarily anecdotal. However, all indications are that there has been a steady increase. Much of the increase may be due to AMINZ's creation and publication of a list of suitably qualified FLA arbitrators.

In virtually all cases the disputes dealt with by arbitrators have concerned relationship property. As well as increased publicity, growth in this area has been spurred by an appreciation of the way in which arbitrations can be expedited. Expediting is commonly achieved through the use of email and a decision given on the papers. The process can be very quick. The result is legally binding.

### AMINZ

So far AMINZ has led the charge to promote FLA among dispute resolvers and lawyers. AMINZ has included FLA presentations at most of its recent conferences, broadcast a popular FLA webinar, organised a well-attended "fish-bowl" demonstration of FLA and created a list of suitably qualified FLA arbitrators. Applicants for the FLA list are required to demonstrate knowledge of both family law and arbitration. Fourteen names have so far made it on to the

list with more in the pipeline. There is a good geographical spread between Dunedin, Christchurch, Wellington, Hamilton, Rotorua, and Auckland.

### Family Law Section

FLS is the key New Zealand organisation for family lawyers. For the most part family lawyers are the gatekeepers who decide whether a family dispute should go to court or arbitration. Some are still learning what arbitration might have to offer but understanding grows. There have been FLA presentations at recent FLS conferences. Also encouraging is the FLS Chair's membership of two specialist FLA arbitrator lists – one kept by AMINZ and the other by FDRC – and participation in the recent FLA fishbowl.

### Family Dispute Resolution Centre

FDRC is one of three commercial providers of dispute resolution services to the public.

Family law arbitration is included among the dispute resolution methods they offer. Also offered is "family law arb-med". Arb-med is an arbitration in the course of which the arbitrator conducts a mediation. FDRC maintains a list of five specialist arbitrators for these purposes.

An impressive feature of FDRC's arbitration service is that organisation's publication of a comprehensive set of rules and fees. The sum at stake determines the steps required and the fees that will be charged. The parties know what they are in for financially when they commit to the process. The fees include registration and administration fees payable to FDRC and a prescribed maximum for its arbitrators. It should be emphasised that the arbitrators appointed may in fact charge much less than the prescribed maximum.

FDRC divides its FLA arbitrations into four streams:

**Claims for less than \$250,000:** These are subject to an expedited form of arbitration without a hearing. The award is given within 45 working days of commencing



the arbitration. Total arbitration fees range from \$5,250 to \$32,250 according to the sum in dispute.

**Claims of \$250,000 to \$1 million:** These are subject to a more detailed procedure which includes a hearing and an award within 60 working days of commencement. Total arbitration fees at the top end of that scale cannot exceed \$61,000.

**Claims of \$1 million to \$2.5 million:** These are subject to more detailed procedure which includes a hearing and an award within 90 working days of commencement. Total arbitration fees at the top end of the scale cannot exceed \$93,500.

**Claims of \$2.5 million or more:** These are subject to an even more detailed procedure leading to a hearing and an award within such period as is agreed by the parties. Application of the arbitration fee scale to a claim of \$100 million would produce a theoretical maximum of \$393,500 in arbitration fees.

### Complete Online Dispute Resolution

CODR also offers an array of methods for

the resolution of family law disputes. These expressly include the arbitration of disputes over relationship property. As with FDR, CODR maintains a panel of suitably qualified arbitrators for that purpose.

CODR's major selling point is its sophisticated facility for resolving disputes online. The website is attractive and user-friendly. The platform supports a process that is speedy, inexpensive and informal. CODR also provides automated separation and relationship property agreements that can be certified by independent lawyers online.

The CODR process is essentially a med-arb – a mediation which turns into an arbitration in the absence of agreement. A potential user outlines his or her dispute. CODR suggests which of its experts will be best suited to resolving it. The expert and the parties communicate digitally. The parties and expert then take part in an audio-visual meeting to mediate the dispute. If mediation fails, the expert sets a timetable for the provision of written material from each party. There is no automatic right to discovery. A hearing is held only if the matter cannot be decided on the

papers. The expert is required to deliver his or her determination within 30 days of either the receipt of written submissions or, where applicable, the hearing.

The process seems best suited to disputes at a relatively modest level but could readily morph into a more conventional arbitration where required. Fees are not prescribed in advance. They are settled by negotiation with CODR. It aims to keep them low.

### FairWay

FairWay is one of the largest providers of dispute resolution in New Zealand. It has about 100 staff and another 110 contracted dispute resolvers. A particular strength is its provision of Family Dispute Resolution (FDR) mediations over the guardianship and care of children. Its privately funded dispute resolution services include the mediation of relationship property disputes.

Having consulted experts from England and Wales (where the coordinating institution is known as IFLA) and Scotland (where the equivalent is FLAGS), FairWay now offers family law arbitration. The arbitration can address guardianship and care of children disputes as well as relationship property. FairWay has also developed a tikanga Māori approach to family law arbitration. FairWay has representatives on the AMINZ Family Law Arbitrator panel and Arbitrators of International Family Law Arbitration panel.

### Conclusion

Family law arbitration in New Zealand is at the stage that mediation was about 30 years ago. As with mediation, change does not happen overnight. All the signs are there, however, to suggest that by now it has entrenched its role as one of the family dispute resolution services available in this country. The arbitrators and institutions are already in place. Their use can be expected to grow as family lawyers and the public become increasingly familiar with the process. ■

**Robert Fisher QC** ✉ [www.robertfisher.co.nz](http://www.robertfisher.co.nz) is a member of Bankside Chambers, former High Court Judge and the author of *Fisher on Matrimonial Property*. Since leaving the bench he has been in full-time practice as an arbitrator and mediator