Arbitration of trust disputes

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Abstract

This article is based on the text of David Brownbill QC’s paper presented at the TIAETL meeting in Shanghai in May 2013.

The need for legislation

Types of trust dispute

1. Trusts can be involved in a variety of disputes:
   (1) Trustees and third parties
       Claims by or against the trustees under a contract entered into between the parties or based on tort or some other matter concerning the trustee’s external relationships and not concerning the relationship between the trustee and the beneficiaries as such.
   (2) Trustees and beneficiaries
       Claims between trustees and beneficiaries in their capacities as such and concerning the relationship between them, such as:
       – a breach of duty by the trustee;
       – the exercise of a power by a trustee, or another power holder (a protector or a beneficiary holding a power of appointment);
       – the construction of the trust instrument;
       – rectification: where the issue is one of administration or affects only the trustee’s position;
       – the appointment, retirement or removal of trustees.
   (3) Beneficiaries inter se
       Claims to have the beneficial provisions of the trust deed rectified or to have the exercise of a power set aside.
   (4) Beneficiaries/trustees and third parties
       Claims questioning the trusts upon which the assets are held or seeking to have deeds rectified or dispositions to the trustee set aside (eg for mistake, fraud, misrepresentation, lack of capacity, fraud on creditors) or claiming a proprietary interest in the assets (tracing of third party property, community or other jointly owned property), or seeking to vary the trusts under Matrimonial Causes Act 1973 or Inheritance (PF&D) Act 1975.

Impediments to arbitration

2. The impediments to the arbitration of ‘internal’ trust disputes are well known, the main ones being:
   (i) usurping the role of the court;
   (ii) empowering the arbitral tribunal to make the necessary awards;
   (iii) representation of minors and unascertained beneficiaries;
   (vi) binding all parties to an arbitration;
   (v) ensuring the enforceability of an arbitral award;

3. The issues underlying these problems will be discussed by Toby Graham. As I think will be clear, the scope for development of the common law in...
relation to trust arbitration, particularly in regard to the usurpation of the court and the representation of minors and unborns, is likely to be very slow, if it develops at all. Legislation will be needed to make any real progress.

The statutory solutions

4. A number of jurisdictions, by statute, have made provision in some form for the arbitration of trust disputes. These include Florida, Arizona, Guernsey, Malta, and The Bahamas. Florida, Arizona, and Malta have each enacted provisions that appear to deal with the problems of usurpation and enforceability. In Guernsey, section 63 of the Trusts (Guernsey) Law facilitates the resolution of a limited range of issues by arbitration (and mediation). The Bahamas has adopted a very different approach and in this note I will concentrate on the Bahamian provision.

The Bahamas

5. By an amendment to the Trustee Act 1998, an entirely permissive but comprehensive regime has been introduced which, if successful, should obviate any need to involve the court for any purpose, in an internal trust dispute.

Deemed arbitration agreement

91A. Arbitration of trust disputes.

(1) The object of this section is to enable any dispute or administration question in relation to a trust to be determined by arbitration in accordance with the provisions of the trust instrument.

(2) Where a written trust instrument provides that any dispute or administration question arising between any of the parties in relation to the trust shall be submitted to arbitration (“a trust arbitration”), that provision shall, for all purposes under the Arbitration Act, have effect as between those parties as if it were an arbitration agreement and as if those parties were parties to that agreement.

6. Central to the Bahamian approach is the decision to link the entire trust arbitration process to arbitration under the existing Arbitration Act 2009. Two critical elements arise here:

(a) First, the crucial significance of the arbitration agreement. At the heart of all ordinary arbitration is the agreement to arbitrate. It is this agreement that gives life to the arbitration, that justifies the exclusion of the parties, and that governs almost every aspect of the arbitration.

(b) Secondly, if the statutory route to trust arbitration is to be adopted it must be


2. Arizona Revised Statutes, Title 14, s 14-10205:

Alternative dispute resolution

A trust instrument may provide mandatory, exclusive and reasonable procedures to resolve issues between the trustee and interested persons or among interested persons with regard to the administration or distribution of the trust.

3. Malta Arbitration Act 15A.

(2) It shall be lawful for a settlor of a trust to insert an arbitration clause in a deed of trust and such clause shall be binding on all trustees, protectors and any beneficiaries under the trust in relation to matters arising under or in relation to the trust.

(3) In the cases referred to in the preceding subarticles, the right of a party to seek directions of the Court of voluntary jurisdiction in terms of the Trusts and Trustees Act shall not be limited by any such clause and notwithstanding the provisions of this Act, the said Court shall not be bound to stay proceedings in terms of article 15(3) or otherwise, but shall enjoy a discretion to do so until such time as it determines that the matter is of a contentious nature, in which case it shall stay the proceedings and shall refer the parties to arbitration.

4. Sections 91A, 91B and 91C.

recognized that we are still dealing with what is a non-contractual arbitration regime. In the absence of an arbitration agreement the existing body of arbitration law, both statutory and judicial, will not be available in a trust arbitration, save only by analogy with all the uncertainty that implies.

7. The solution has been to deem a provision in a trust instrument to be an arbitration agreement for the purposes of the Arbitration Act 2009. In this way the existing statutory and common law arbitration regime is engaged and immediate solutions are provided to the problems of binding the relevant parties to the arbitration, the scope of arbitral powers and the enforcement of arbitral awards.

8. This is not new: it reflects the solution adopted in the English Arbitration Act 1996 in relation to what is called ‘statutory arbitration.’ This refers to statutorily imposed arbitrations of certain classes of dispute. In relation to these there is also a deemed arbitration agreement which applies for the purposes of the Arbitration Act 1996, subject to certain qualifications.

**Parties to the deemed arbitration agreement**

‘the parties’ in relation to the trust’ means any trustee, beneficiary or power holder of or under the trust, in their capacity as such.

9. The deemed arbitration agreement is made between ‘the parties in relation to the trust’, defined as the trustee, the beneficiaries and any ‘power holder’ under the trust. This last expression refers to the holder of a power of appointment or other power under the trust and includes a protector. It does not matter whether the power holder holds the power in a fiduciary capacity. It will be noted that this does not include the settlor, as such, and reflects the traditional equity analysis that a trust is the equitable equivalent of a gift and once made, the donor/settlor as such has no further role in the trust unless some power or right is reserved.

**The scope of the arbitration**

10. The limitation of the arbitration to disputes arising between the parties to the trust also reflects the essential fact that trust arbitration is, necessarily, concerned with internal trust disputes. This excludes challenges to the validity of the trust and disputes between the trustees and third parties.

11. The scope of the legislation in respect of internal matters is substantially widened by the reference to ‘any dispute or administration question’ in section 91A. An ‘administration question’ is defined to mean any relief or question in respect of which proceedings could be brought under Order 74 of the Rules of the Supreme Court (the equivalent of the old Order 85 RSC, now CPR 64, in England), the Trustee Act 1998 (including applications to vary a trust under section 70 Trustee Act 1998; authorizing dealings under section 71 Trustee Act 1998; and to obtain the opinion, advice, or direction of the Court on a matter concerning the administration of the trust under section 77 Trustee Act 1998) or the Purpose Trusts Act.

**Binding all parties**

12. The means of achieving a result binding on all parties is disarmingly simple. A person cannot, of course, be forced to take part in an arbitral or any other process. The new legislation does not attempt to do this but, by engaging the
Arbitration Act 2009, any person falling within the scope of an arbitration clause will be encouraged to join in the process in two ways: by means of the automatic stay on court proceedings brought in breach of the arbitration provision (section 9 of the Arbitration Act 2009⁸) and by means of the enforcement of an arbitration award as if it were a judgment of the court (section 88 of the Arbitration Act 2009⁹).

13. The invocation of the Arbitration Act 2009 in this way both ensures that a party cannot frustrate the arbitral process and operates to encourage the party to join in the process, as it faces a binding decision whether it does or not and, absent its own representation, may be made against its interests.

**Adapting the Arbitration Act 2009**

14. To enable Arbitration Act 2009 to be applied to a trust arbitration it is necessary to adapt the legislation in a number of ways. This is dealt with in Schedule 2 of the Trustee Act that provides that the Arbitration Act is to apply subject to a series of adjustments.

15. Perhaps the most significant of these is in Paragraph 4, which provides that references in the Arbitration Act to matters to be agreed between the parties to an arbitration agreement take effect as if those matters were to be determined as provided in the trust instrument. This reflects a necessary shift from ‘party autonomy’ to ‘settlor autonomy’. This schedule also adapts the costs provisions in the Arbitration Act so as to provide for trustee’s costs.

**Powers of the tribunal**

16. Section 70 of the Arbitration Act 2009 enables the widest powers to be given to a tribunal and, by default, clothes the tribunal with some critically important powers.

70. Remedies

1. The parties are free to agree on the powers exercisable by the arbitral tribunal as regards remedies.

2. Unless otherwise agreed by the parties, the tribunal has the following powers.

3. The tribunal may make a declaration as to any matter to be determined in the proceedings.

4. The tribunal may order the payment of a sum of money in any currency.

5. The tribunal has the same powers as the court -

   a. to order a party to do or refrain from doing anything;

   b. to order specific performance of a contract (other than a contract relating to land);

   c. to order the rectification, setting aside or cancellation of a deed or other document.

17. For the purposes of a trust arbitration section 91B of the Trustee Act 1998 makes additional provision for the powers of the tribunal, subsection (2) providing:

‘(2) The arbitral tribunal . . . may, in addition to all other powers of the tribunal, at any stage

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⁸. Section 9(1) of the Arbitration Act:

‘A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.

⁹. Section 80—Effect of award

(1) Unless otherwise agreed by the parties, an award made by the tribunal pursuant to an arbitration agreement is final and binding both on the parties and on any persons claiming through or under them.

Section 88 - Enforcement of the award

(1) An award made by the tribunal pursuant to an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.
in a trust arbitration, exercise all the powers of the Court (whether arising by statute (including this Act), under the inherent jurisdiction of the Court or otherwise) in relation to the administration, execution or variation of a trust or the exercise of any power arising under a trust.’

18. The settlor is free to limit or expand the powers of the tribunal as he wishes.

**Representation of minors and unascertained persons**

19. It will be a rare family trust that does not have any minor, incapacitated or unascertained beneficiaries. Insofar as their interests might be affected by the dispute in such a way that those interests cannot be protected separately, they will need to be represented in the arbitration.

20. It would be a relatively simple matter in a trust instrument to provide a mechanism for the appointment of a person who could represent the interests of minor etc beneficiaries at an arbitration and to provide that by such representation any award would be binding on those beneficiaries, including any pre-award compromise of the arbitration.

21. Whilst it appears that some things can be achieved by this route, representation at a binding arbitration may, and compromise out of court of the dispute almost certainly will, impermissibly usurp the role of the court. The court guards the interests of minor and unascertained beneficiaries jealously.

22. Exactly what should be done in these cases raises a very difficult policy issue. The court’s protective stance is born of experience: whilst the cat is away, the mice will play; if advantage can be taken it probably will. Options might include an independent person (or persons, where there are competing interests) appointed under a mechanism provided for in the trust instrument or to clothe the arbitral tribunal with powers similar to those of the court to appoint representatives.

23. Both of these options have been adopted in the Bahamian legislation. Subject to any such limitations in the trust instrument, section 91B makes comprehensive provision for the appointment of representative parties and of persons to act on behalf of minors and other persons under a disability. These provisions are intended to replicate the powers of the court, thus sub-section (3) provides that the tribunal has the same powers to appoint persons to represent the interests of any person or class as the court has under the relevant Rules of the Supreme Court.

91B (3) Without prejudice to subsection (2), and to any provisions made pursuant to sub-section (4), the tribunal has the same powers to appoint one or more persons to represent the interests of any person (including a person unborn or unascertained) or class in a trust arbitration as the court has under Order 15 rule 14 of the Rules of the Supreme Court in relation to proceedings before the court.

(5) Where an appointment is made under subsection (3) or (4) —
(a) the approval of the tribunal is required in relation to a settlement affecting the person or class represented;
(b) the tribunal may approve a settlement where it is satisfied that the settlement is for the benefit of the person or class represented;
(c) any award given in the trust arbitration shall be binding on the person or class represented by the person or persons appointed.

24. Similar provisions are made in relation to guardians ad litem and litigation friends.

(6) A person under a disability may not —
(i) bring or make a claim in a trust arbitration except by his next friend;
(ii) defend, make a counterclaim or intervene in a trust arbitration except by his guardian ad litem; or
(iii) take any step in a trust arbitration except by his next friend or guardian ad litem, unless otherwise ordered by the tribunal.

(8) Subject to subsection (7), the tribunal may appoint a suitable person to be a next friend or guardian ad litem, may terminate an appointment, and may give directions for the service of documents upon a person under a disability.
(9) Where a next friend or guardian ad litem has been appointed under subsection (7) or subsection (8), no settlement affecting the person under a disability shall be valid, without the approval of the tribunal.

25. These powers are supplemented by a further provisions enabling the settlor to create his own representation regime under which the settlor may make his own choice of representative or institute his own mechanism for the selection of a representative (sometimes referred to as ‘virtual representation’) so as to avoid the time and costs involved in making an application to the tribunal.

(4) The terms of a trust may provide for the appointment of one or more persons to represent the interests of any person (including a person unborn or unascertained) or class in a trust arbitration.

(7) The terms of a trust may provide for the appointment of a next friend or guardian ad litem, for the cessation of an appointment, and for the service of documents upon a person under a disability.

**Enforcement of an award**

26. It was noted above that, under section 88 of the Arbitration Act 2009, an arbitral award may be enforced as if it were a judgment of the court. This means that there should be no difficulty in enforcing an award within the Bahamas. This should resolve most issues regarding enforcement given that the trustee is most likely to be situated in the Bahamas, as will be the trust property, in many instances. However, in other situations it may well be necessary to enforce an award outside of the jurisdiction. The difficulty in such cases is that the benefit of the New York and Geneva Conventions (which provide for the international enforcement of arbitral awards) is unlikely to be available (unless very liberally construed) as these are limited to agreement based arbitrations. It may be necessary, therefore, to have the award recognized, or recognized and enforced, depending on its nature, by recognition and enforcement of rights under or by virtue of the trust itself, the award simply dictating the terms of the trust, the rights of the parties, or the manner in which the trustee or other party ought to proceed. Inevitably, this will be a more complex and difficult task than enforcement of an award under the Conventions.

**Seat of the arbitration**

27. The jurisdictional limits of the legislation lie in the concept of the ‘seat’ of the arbitration. This is the place in which the arbitration is anchored with reference to a particular judicial system whose law will govern the arbitration process (not necessarily the law which will be applied to resolve the dispute). Applications to the court, in the rare event they are possible, will be to the courts of the place of the seat. The concept of the seat has nothing to do with the place where the arbitration takes place and it is perfectly possible for the arbitration to be held in another
country. As with all other countries, the local Bahamian arbitration law applies primarily only where the seat of the arbitration is the Bahamas—see section 4(1). Certain, limited sections of the Arbitration Act apply regardless of the seat.

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