This House believes that Trust Arbitration is not going to succeed in resolving trusts disputes debate

This debate occurred as part of London International Disputes Week and was chaired by Stella Mitchell-Voisin, CEO of Summit Trust International. Anthony Poulton and Richard Molesworth of Baker McKenzie argued in favour of the motion (the "House"), while Dakis Hagen KC and Stephanie Thompson, both of Serle Court Chambers, argued against (the "Opposition"). It should be noted that the views expressed by the speakers were not necessarily their own.

The theme of the motion – trust arbitration – has been brought further into the spotlight since the Volpi decision in The Bahamas. Here the Supreme Court of The Bahamas dismissed challenges to two arbitral awards regarding distributions made from numerous discretionary Bahamian trusts, brought (in the words of Mr Justice Klein) on "every conceivable ground of challenge available" under the jurisdiction's Arbitration Act. Different jurisdictions are increasingly recognising arbitration as an appropriate forum for trust disputes and legislation has been passed to provide for it, most notably in The Bahamas, Guernsey, New Zealand, the DIFC and US States such as Arizona, Florida, Idaho and Washington; nonetheless other jurisdictions have been slow to follow suit, so it seems timely to have held this debate, on the heels of the Volpi decision, as there is renewed interest in the topic at present.

Before beginning the debate, Ms. Mitchell-Voisin presented a few key priorities from the trustee perspective on trust disputes; namely – if a trustee is forced into litigation – how to achieve discretion, speed and finality. Those factors are commonly seen as potential advantages of arbitration, giving rise to the increasing interest in the market as to whether and how arbitration can succeed in resolving trusts disputes.

1. Gabrielle Volpi v Delanson Services Ltd & Others/Delanson Services v Gabrielle Volpi & Others Consolidated Appeals, 2020/APP/sts/00013, 2020/APP/sts/00018

For the motion

The creation of a trust involves a unilateral disposition, a gift, whilst arbitration requires a contract. The beneficiaries of this gift, in the context of a family trust, are likely to include children and as yet unascertained beneficiaries such as future generations who are not yet born. The central problem for trust arbitration is that in trust litigation, representatives will generally be appointed for these beneficiaries by the relevant court, but there is no effective mechanism for binding them into an arbitration agreement in the absence of express legislation which deems arbitration clauses in trusts to be binding on all of the beneficiaries.

Trust litigation is a broad label which covers, to name just a few examples, breach of trust claims; validity challenges; trustee removal applications; the court's equitable jurisdiction to set aside trustee decisions under the appropriate circumstances (i.e., the Hastings-Bass principle); and, most prominently and commonly, applications made to the court for specific directions, and / or the 'blessing' of a particular trustee decision.

Central to trust litigation are three characteristics: (i) it tends to be long-running, multi-generational and multi-jurisdictional; (ii) most trust litigation is conducted outside England & Wales (as trusts have migrated away from the onshore jurisdictions, the litigation has moved with them); and (iii) the courts have a wide supervisory jurisdiction, which tends to result in a multiplicity of applications coming before the courts when litigation rears its head. Most obviously, trustees routinely take advantage of the "Re Beddoe" jurisdiction to seek approval for spending trust funds on legal fees, at a stage when the outcome of the litigation is unknown. The question that arises therefore is whether it is possible to submit such applications to separate arbitral proceedings, or whether the conventional courts will be required to exercise their supervisory jurisdiction in any event.

Arbitration has many advantages when compared to litigation, but as with any decision there are pros and cons that need to be weighed up: it is not necessarily a practical alternative for trust disputes. Advantages of speed, confidentiality, the freedom to choose the tribunal and the ease of cross border enforcement are typical factors in favour of arbitration, but it is not always certain that these advantages will be obtainable in a trusts context, where arbitration is largely untested.

The supposed advantages of speed and confidentiality may be illusory in practice as arbitration does not guarantee straightforward solutions to these disputes. What is likely to be contentious and time consuming in conventional courts, is just as likely to be problematic in arbitral proceedings. Confidentiality – which is certainly a feature of arbitral proceedings – is not always certain if the award is challenged – as soon as the arbitral tribunal loses direct control of the process, publicity may follow – as the Volpi case shows. Moreover, in offshore jurisdictions it is common for the Courts to make confidentiality orders in the context of administrative issues, and to anonymise the names of individual family members where the circumstances justify making such an order (such as for the protection of the interests of children). Equally, the premium trust jurisdictions offshore have experienced judges and advocates who can manage the dispute under tried and tested procedural rules, with reasonable expedition. In relation to sensitive issues, which family trust disputes often throw up, the emphasis should be on justice rather than speed.

The freedom to select arbitrators may also be difficult to achieve in circumstances where there are minors or unascertained beneficiaries. The tribunal would need to be constituted in order to appoint representatives for these parties, and therefore it would be too late at that stage for those parties to have any say in the appointment of tribunal members. In order for all parties to be treated fairly, it may therefore be preferable for none of the parties to choose arbitrators, to avoid the risk of only some of the parties having the right to do so and therefore a perceived procedural advantage. In those circumstances, one of the key advantages of arbitration – the choice of tribunal members - would be lost.

As regards enforcement, there are also questions as to whether a trusts arbitration award would be enforceable outside the jurisdiction of the trust under the arrangements provided for in the New York Convention. This would be a real issue in a case like Volpi, where the trust assets had been distributed out and were no longer in the jurisdiction of the trustee. The New York Convention provides that each Contracting State will recognise arbitration agreements where they are agreements in writing under which the parties undertake to submit their disputes to arbitration. It also provides that arbitral awards issued in one Contracting State will be recognised and enforced in other Contracting States, save where certain limited exceptions apply. The issue with trusts disputes is that the arbitration agreement would likely be included in the trust deed, to which the beneficiaries are not party. Such a clause relies upon local legislation for its efficacy – such legislation being required to "deem" the beneficiaries to be bound. As such, there is a real risk that the arbitration agreement would not be an arbitration agreement within the meaning of the New York Convention. If so, this would give rise to two potential risks: (i) first, beneficiaries could commence proceedings in another jurisdiction on the basis that they are not bound by the arbitration agreement, leading to parallel proceedings; and (ii) second, any arbitral award may not be enforceable in other jurisdictions under the New York Convention.

In addition, there is a practical issue around lawyers advising clients to include arbitration agreements in trust deeds. Typically, this advice is being given by private client lawyers, few of whom will have practical experience of the impact of the difference between litigation and arbitration on trust disputes and the issues that may arise. This requires specialist advice, to ensure that settlors are making informed decisions and understand the potential advantages and disadvantages of their decision.

Against the motion

The case presented by the Opposition rested on four key points:

1.. Confidentiality

Confidentiality cannot necessarily be maintained in trusts litigation and in fact the norm is for breach of trust claims to take place in public. The notorious Wong, Crociani and Thyssen family trust disputes (and many others) have often featured in major newspapers with salacious reportage. It is not in the interests of trustees or family members to have their names in the press. Arbitration can provide a confidential avenue to have these disputes heard. In the Bahamian legislation, confidentiality in arbitration is enforced by way of liability in damages for any breach of confidentiality.

Concerns may arise on this point when enforcement of an award is resisted or the award is challenged, as this involves going to court. However, in England the presumption is that these proceedings will be heard in private, and the court will generally only publish a judgment where it is possible to do so without disclosing confidential information. While (somewhat unusually) the opposite presumption applies in The Bahamas and New Zealand, it may be that their legislatures consider amending the default position to increase confidentiality and encourage further arbitration.

2. Neutrality

Neutrality arises through the ability of parties to choose (i) the forum / jurisdiction of their dispute and (ii) the specific arbitrators of their dispute. These arbitrators are neutral parties who are generally selected based on their experience of the type of dispute in question.

3. Choice of representative

From a practical perspective, while local lawyers in offshore jurisdictions have much experience in litigation, clients often want UK barristers to represent them, especially in those jurisdictions where the judges and local advocates may have less familiarity with trust related cases. However, these barristers may not be able to practice or appear in some offshore jurisdictions and / or certain requirements may need to be met. This is not an issue in arbitration where the parties are free to choose who represents them.

4. Speed

Arbitration is commonly viewed as a faster alternative to litigation. The Volpi arbitration was conducted in five days within a year of it being commenced. The Bahamian judiciary may have taken three and a half years to decide the challenge, but this was due to delays with the local court system rather than the format of arbitration itself. When choosing a seat in the arbitration clause, if speed is the priority then certain jurisdictions can be chosen – it is no secret which jurisdictions deliver judgments faster. Speed and finality is important to clients. Any settlor, when creating the trust, would hate to see their family in a protracted dispute over many years, causing irreconcilable rifts. Through arbitration, family disputes can be solved more swiftly, and with greater finality, allowing the family to 'move on'. Speed and justice are not mutually exclusive.

Unborn / unascertained beneficiaries

In response to the concern raised around the issue of unascertained and unborn beneficiaries by the House, the Opposition explained that when drafting a trust deed, a settlor could insert either a condition precedent or a forfeiture clause that would have the practical effect of binding beneficiaries to an arbitration agreement. For example, it could be a condition of benefiting under the trust that the potential beneficiary submits any dispute to arbitration, and the trustee would be obliged to agree under the terms of the trust. Alternatively, a forfeiture clause may provide that any beneficiary would forfeit their interest in the trust if they were to bring a dispute via any medium other than arbitration. Alternatively, even if a trust deed did not include an arbitration agreement, the parties could agree to an ad hoc arbitration agreement after a dispute arises if it is in all parties' interests to do so.

Further, there are statutory provisions already in effect – for example in England and Wales - that may arguably bind the beneficiaries in relation to a trust arbitration. The agreement submitting the dispute to arbitration could be conditional on the incumbent trustee obtaining the blessing of the court to exercise its power to submit the matter to arbitration under section 15 of the Trustee Act. If a “compromise” under s. 15 of the Trustee Act is understood to bind all beneficiaries (a fortiori when blessed by a court with all relevant parties joined), then the same can apply to the submission of a dispute to arbitration.

In addition, it is arguable that any arbitral award in England at least would be binding on beneficiaries: s. 58(1) of the England and Wales Arbitration Act provides that the final award would be binding on the parties and any persons claiming through or under them. If, say, a successor trustee brought a breach of trust claim against a former trustee, the beneficiaries as persons “claiming through” the trustee may be bound by the award.

Conclusion

On the one hand, arbitration remains relatively untested as a method for trust dispute resolution and its processes may be inapt for the particular characteristics of trust disputes. The existing system works, with courts that have hundreds of years of precedent and procedural experience available to them. Time would be better spent reforming the system from within rather than looking to other forms of dispute resolution which themselves do not provide certain solutions.

On the other hand, arbitration can provide speed, finality and confidentiality to many disputes, including trust cases in the right circumstances. Arbitration should not be overlooked solely on the basis that it has not often been done before. While not many private client lawyers may have in-depth knowledge of its procedural processes, given they have the ability and flexibility to learn about the nuances of various jurisdictional processes, they can apply the same skills to master the differences between arbitration and litigation procedure, for the benefit of the whole industry and the families it serves.

Should you have any follow up questions on any of the topics covered here, please do reach out to our panel.

Written by George Rix, Trainee Solicitor, Baker McKenzie

Contacts

Anthony Poulton
Partner
Baker McKenzie

+44 20 7919 1760

anthony.poulton
@bakermckenzie.com

Anthony Poulton is a partner in Baker McKenzie's Dispute Resolution team and chair of the Trusts Disputes group in London. Anthony specialises in advising clients engaged in disputes related to private wealth, succession, trusts and private banking, where he acts for trustees, executors, protectors, beneficiaries and interested third parties. He has extensive experience advising clients in relation to managing risks associated with exposure to wealth-related controversy, including dealing with corporate and family governance.

Richard Molesworth
Counsel
Baker McKenzie

+44 20 7919 1310

richard.molesworth
@bakermckenzie.com

Richard Molesworth is a Senior Associate in the Baker McKenzie Dispute Resolution team based in London and he specialises in international arbitration, with a particular focus on joint venture disputes and post M&A disputes. He has advised on and appeared in arbitrations administered under many of the most common arbitration rules, including LCIA, ICC, SIAC and UNCITRAL rules, and seated in a number of different arbitral seats, including London, Dubai, Vienna and Cairo.

Dakis Hagen KC
Barrister
Serle Court

DHagen
@serlecourt.co.uk

Dakis Hagen KC specialises in Chancery litigation, both commercial and traditional. His cases usually involve international structures, most often trusts and estates. His cases mostly concern large international settlements, but he also undertakes domestic work including the trusts elements of divorce cases. The international nature of Dakis' practice has meant that he is instructed both by London solicitors and also directly from overseas (including from the USA, the Caribbean, Singapore, Hong Kong, Bermuda, Luxembourg, Ireland, Switzerland, Gibraltar and the Channel Islands). He has appeared as leading counsel in courts in the Cayman Islands, BVI, Bermuda and Gibraltar as well as frequently in London. He is currently co-chairman of the Trusts and Estates Litigation Forum.

Stephanie Thompson
Barrister
Serle Court

+44 20 7242 6105

SThompson
@serlecourt.co.uk

Stephanie Thompson has a broad commercial chancery practice, with a focus on civil fraud, offshore trust litigation and domestic trust and probate litigation. She has a particular interest in cases with foreign law elements and has experience in offshore jurisdictions including Bermuda, The Bahamas, the BVI, the Cayman Islands, Jersey, Guernsey and New Zealand. She also has a developing arbitration practice and has appeared in arbitrations under the UNCITRAL, ICC and LCIA Rules, including arbitrations concerning trusts and foundations.

Stella Mitchell-Voisin
CEO
Summit Trust International SA

+41 22 707 8399

smv
@summittrustgroup.com

Stella Mitchell-Voisin became one of the founding partners of what is now known as Summit Trust International SA in 1999, for whom she is now CEO. Stella has a wide range of experience of trust and company management including fine art, bloodstock, commercial and residential property, private equity, family offices and private trust companies. Stella is an associate of the London Institute of Banking and Finance (ACIB) and a Member of the Society of Trust and Estate Practitioners (STEP). She is a regular tutor for the International STEP certificate and diploma courses.