COLLAS CRILL

Arbitration of trust disputes in England, Wales and Channel Islands: A feasible alternative?

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The obvious advantage of arbitration in the context of a trust dispute is that the very private issues typically at play can be resolved confidentially behind closed doors and the affairs of the family thus remain well out of the public eye, an outcome which cannot be guaranteed in Court proceedings.

Another clear advantage of arbitration is the timely resolution of trust disputes. The volume and complexity of matters being dealt with by judges in the offshore courts can mean that litigants are required to wait an inordinate time following trial for a judgment to be handed down by the Court. There are obvious commercial reasons why arbitrators will look to publish their awards on a more timely basis.

Guernsey has a statutory regime that facilitates the arbitration of certain trust disputes, whilst Jersey and England & Wales do not.

So is the arbitration of trust disputes encouraged in the Channel Islands? And what can England & Wales learn from the position in Jersey and Guernsey?

View from Guernsey

Despite the legislation in place, arbitration of trust disputes is not common practice in Guernsey for a number of reasons relating to the practicality of the legislation and the appetite of professionals and practitioners.

At first glance, the wording of the Guernsey trusts legislation appears to fully embrace all forms of alternative dispute resolution (ADR), not just arbitration.

However, the relevant sections of the Trusts (Guernsey) Law 2007 have very rarely been used in practice. And that is partly because they do not really go far enough to work properly.

The main limiting factor is probably that the rules only apply to full blown claims for breach of trust, and not to the whole host of other contentious actions that might fall out of a trust arrangement: removal of trustee/protector; disputes as between beneficiaries; actions founded on mistake; *Public Trustee –v- Cooper*

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applications; Beddoe applications; applications for disclosure of trust information/documents etc. None of those actions can be resolved in arbitration.

All that Section 63 of the Trusts Law provides is that claims for breach of trust can be referred to ADR and that any "settlement" will be binding on beneficiaries (even if they were not a party to the procedure, so long as they had notice). The requirement for a "settlement" (signed by all of the parties) arising out of the ADR procedure in question would seem to exclude an evaluation, adjudication, expert determination or arbitral award (all of which are included within the definition of ADR in the legislation).

If it is intended that arbitration should play a larger role in the determination of trust disputes, clearer language would be required in the Guernsey legislation regarding the lawfulness of arbitration to resolve trust disputes and the binding effect on beneficiaries, such as is present in the Malta Arbitration Act, for example: "*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, [trust officials] and any beneficiaries under the trust in relation to matters arising under or in relation to the trust.*" [The Malta Arbitration Act, Article 15A (2)]

Certainly as things stand in Guernsey there could well be an issue around the enforcement of an arbitral award. Would an arbitral award made in the absence of an *ad hoc* arbitration agreement be enforceable in foreign jurisdictions? After all, the beneficiaries who are intended to be bound by any award are not "parties" to the trust deed where the arbitration clause/agreement would reside. In an apparent nod to the requirement for an "arbitration agreement" in international arbitration legislation and the New York Convention for the enforcement of arbitral awards, the following language is used in the Bahamas legislation: "*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.*" [The Trustee Act 1998, as amended by the Trustee (Amendment) Act 2011, Art. 91A (2)]

View from Jersey

In Jersey, despite the fact that it is a pre-eminent jurisdiction for trusts and trust disputes, legislation is effectively silent on their arbitration. The Arbitration (Jersey) Law 1998 provides for local enforcement of foreign arbitral awards, including New York Convention awards, something which is a well-trodden path for an offshore jurisdiction. It also provides for domestic arbitrations.

However, neither this statute nor the Trusts (Jersey) Law 1984 address the thorny issue of whether an arbitral award, domestic or foreign, can be binding on non-parties in the context of trusts. As in Guernsey, there is no guarantee that a settlor's decision to include an arbitration clause in a trust instrument would be viewed as binding and enforceable as against the beneficiaries. A trustee which had participated in an arbitration of a trust dispute would not necessarily bind in its beneficiaries to the arbitral tribunal's decision if they did not participate, and the problem is even more acute when you consider that there may be unascertained, minor

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and unborn beneficiaries in the mix. A further complication is that the Jersey firewall provisions expressly apply to decisions of foreign arbitral tribunals just as they do to judgments of foreign courts.

The issue of arbitration, and whether to make specific statutory provision for binding arbitration clauses in trust instruments, was considered in the context of the introduction of the Trusts (Amendment No.7) (Jersey) Law 2018 as part of a consultation but ultimately rejected. It was felt by government that there was no real demand for arbitration, particularly given the well-respected judiciary and well-developed jurisprudence in the Island.

Of course, key advantages of arbitrations are the private nature of the proceedings, the flexibility of the procedure and the shorter length of time to reach an outcome as against court proceedings. However, Jersey has a form of court proceedings known as "representation" proceedings which are frequently used for trust disputes involving administrative or semi-contentious matters. These are typically held in private and the judge has a full discretion over procedural directions and timetabling. In most cases, the courts will also encourage parties to consider ADR at some point, and mediations of trust disputes are commonplace.

This means that in Jersey court proceedings you have the best of all worlds, in the sense of adaptable and proportionate proceedings run by expert judges which generally preserve the confidential nature of family affairs, and which result in a binding decision as against the beneficiaries. It remains to be seen how the courts would react in the event that a trust instrument included an arbitration clause and a party sought to rely on it. While this might seem unlikely in trusts established under Jersey law for the reasons given, this might be a situation which arises after the proper law of a trust has been changed to Jersey law from that of another jurisdiction, such as the Bahamas.

Reform in the Channel Islands?

Notwithstanding Jersey lacking legislation which permits the arbitration of trust disputes, and the Guernsey legislation having seemingly failed to encourage parties to resolve such disputes by way of arbitration, there seems to be little appetite for reform of the islands' respective regimes.

Beyond those raised above, there are a number of perceived "disadvantages" to arbitrating trust disputes which might explain why reform in this area has not been prioritised.

1. Judgments from Channel Island courts are cited as leading authorities in relation to trust matters all around the world. Arbitration would lead to a decrease in the number, quality and variety of caselaw in this area. There is a concern that with the advent of arbitration, the standing of the Guernsey and Jersey courts in the international trusts community would therefore diminish.
2. The Royal Courts of Guernsey and Jersey remain the exclusive domain of Guernsey and Jersey Advocates, and the passage to local qualification is not straightforward. In the case of an arbitration, there would be no such restrictions on who might represent a party to a trust dispute.

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For now, at least, it appears that the Royal Courts of Guernsey and Jersey will remain the fora of choice for resolution of trust disputes in the Channel Islands, despite the perceived advantages in arbitrating such disputes.

View from England & Wales

Whilst the issue is not judicially settled, the prevailing view is that an arbitration clause in an English law trust deed is not capable of binding the beneficiaries under the trust. This was the position reflected in the 13th Programme of Law Reform of the Law Commission, which expressly stated that "*a clause in a trust instrument requiring disputes to be arbitrated is not binding.*"

Argument for change

A paper was prepared by the Executive Committee of the Trust Law Committee ("**TLC**") of the Society of Trust and Estates Practitioners ("**STEP**") in April 2012, which proposed that the Arbitration Act 1996 be expressly amended to confirm the enforceability of arbitration provisions in trust instruments. The TLC paper noted that the merits of resolving disputes by way of arbitration mean that it is desirable for settlors to be able to elect to make use of it as a method of dispute resolution, describing it as "*a valuable alternative resource.*"

Concerns were also raised that as arbitration provisions in trust deeds are binding in some other jurisdictions, these jurisdictions may be more attractive venues for the arbitration of disputes that could more appropriately be arbitrated in England and Wales. The paper noted that this would be to the detriment of the development of trust law within England and Wales.

The Law Commission Programme noted that "*the introduction of trust law arbitration would increase the competitiveness of the trust law services industry and create a new branch of business in the arbitration sector*".

Challenges and arguments against

The Law Commission Programme noted that any future project amending the Arbitration Act to permit binding arbitration clauses in trust deeds would "*engage several complex issues; for example compliance with human rights law, the need to take into account any interests of HMRC in the outcome of arbitration proceedings, and whether any change in the law should extend to all types of trust (including charitable trusts).*"

The TLC Executive Committee Paper noted that consideration would need to be given to ensuring the protection of interests of minor beneficiaries or unborn and unascertained beneficiaries, as is provided for in the Guernsey legislation. This is particularly important, as failure to give proper protection in this way is likely to lead to any arbitral award not being enforceable under Article 5 of the New York Convention – removing one of the main attractions of resolving disputes in arbitration. That is even before considering broader New York Convention enforcement issues, such as those sought to be addressed by Article 91A(2) of the Bahamian Trustee Act 1998, as amended by the Trustee (Amendment) Act 2011.

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Whilst the TLC Paper suggested that a failure to permit the arbitration of trust disputes would be to the detriment of the development of trust law in England, it seems questionable whether this is true, given the confidentiality which attaches to arbitral awards. In fact, as outlined earlier, the shift to arbitration could in fact be seen to restrict the development of trust law, rather than enhance it.

In short, this is not an easy question to resolve – not least due to "*the cross-governmental nature*" of the issue, as noted by the Law Commission Programme. It is for these reasons that the potential changes to the Arbitration Act 1996 have been on the radar of STEP and the Law Commission since very shortly after the Act became law, and there are yet to be solid steps towards any change in the statute.

Conclusions

Whilst there are clear advantages to the arbitration of trust disputes, not least the confidentiality which seems ideally suited to matters of that nature, the challenges of devising an effective system which protects the interests of all parties whilst facilitating enforcement of awards around the world are, at the moment, a seemingly insurmountable obstacle to the arbitration of trust disputes becoming commonplace in all three jurisdictions.

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