COLLAS CRILL

Trust law arbitration: Watch this space

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The current position in England and Wales

The current prevailing opinion is that arbitration is not readily available as a tool in trusts disputes under the law of England and Wales. Indeed this has explicitly been stated to be the case by the Law Commission in their Programme of Law Reform where they stated that 'a clause in a trust instrument requiring disputes to be arbitrated is not binding.'[1]

But why is this something that it might be desirable to reform? What are the advantages to arbitration that could make this a popular course of action in trusts disputes?

Well, arbitration affords a degree of privacy that litigation does not necessarily offer. Arbitral proceedings and any arbitral award are generally not released to the public. It allows discussions to take place behind closed doors, which may be popular where familial conflicts are playing out.

It also provides a route to resolution that is often quicker, and more affordable than litigation. It can allow for greater flexibility, than going through the oft-overloaded court system.

The arbitrator can be selected, in a way that a judge cannot. This can mean that the decision-maker has a greater degree of expertise. Under section 37 of the Arbitration Act 1996[2], the Law governing the use of arbitrators in England, Wales and Northern Ireland, there is also a power for the arbitrator to appoint assessors to advise on technical matters, should there be any complex issues which arise. In comparison, a judge would only have the benefit of any expert witnesses put forward by the parties.

With all of these potential advantages to using arbitration as a dispute resolution method, it is perhaps unsurprising that there is concern among trust law practitioners that other jurisdictions may be chosen over England and Wales as a trust's governing jurisdiction. Why would a settlor expose the stakeholders within the trust to the risks of litigation over the confidentiality, practicality, and flexibility offered by arbitration?

How does this compare with the position in Guernsey?

In the 13th Programme, the Law Commission specifically named Guernsey, Singapore and five US States as having made provision for trust law arbitration.

However, simply having the legislation in place obviously does not mean that it has necessarily resulted in disputes being determined by way of arbitration as a matter of practice.

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As discussed in this article of ours from last year, the arbitration provisions within the Trusts (Guernsey) Law 2007 are limited in the extent to which they can actually apply to contentious trust matters, beyond full blown claims for breach of trust, and as such it appears (anecdotally) that few matters have been determined by arbitration.

What can we expect to see?

It is not that trust law arbitration has fallen between the cracks. Indeed, it has been on the Law Commission's radar for some time.

It was identified in the 13th Programme of Law Reform, printed on 13 December 2017, as being an area to consider for future potential projects, and it has gained some further traction recently.

Between March and July of 2021, the Law Commission consulted on their 14th Programme of Law Reform to determine what projects they would like to focus on in the upcoming years. Although this has taken somewhat of a back seat, with the finalised Programme having been delayed, the topics mentioned as possible future avenues to pursue give us some indication of the areas of law they are looking to develop.

Trust law arbitration was named in the 14th Programme by the Law Commission as one of the 'specific potential projects which we think might have merit'[3]. In so doing, they have invited comment from the wider legal community.

We are starting to see some key themes emerge in the responses which have been published on this matter. The appetite seems to be there for development of this area, with responses being largely positive. The benefits of arbitration, the attraction to the use of England and Wales as a governing jurisdiction for trusts and the chance to be world-leaders in this sphere are all great motivators for reform.

In order to be world-leading, there is also an openness for any reforms to be far-reaching, and the application to be broader than it is in, for example, Guernsey.

STEP, the Society of Trust and Estate Practitioners, has said that any 'legislation should enable the arbitration of all types of trust dispute... The one exception should be disputes about the validity of the will or trust itself.'[4] While the Bar Council has specified that any 'intervention should encompass all trusts, family and commercial.'[5]

This won't be easy, however, as the Law Commission and respondents have noted. Confidentiality has the potential to frustrate the aims of HMRC. Binding beneficiaries who may be unborn, minors or incapacitated has the potential to bring any such scheme into conflict with the Human Rights Act 1998, unless there is a sufficiently stringent set of safeguards in place.

Indeed, the ICC's standard form arbitration clause[6], a form of which has been in place since 2008[7], makes no provision for any such beneficiaries. In these respects, the Law Commission will likely have to be at the forefront in ensuring that any such issues are dealt with in sufficient detail.

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Perhaps it is only while these potential sticking points remain unexplored in any great detail, but the general movement seems to be in favour of the amendment of the existing Arbitration Act, rather than the introduction of any new legislation to deal solely with the question of trust law arbitration.

In September of this year, the Law Commission launched a review of the Arbitration Act 1996. Although they did not take this opportunity to consider the introduction of trust law arbitration in any greater detail (and indeed have confirmed that this is beyond the scope of the current review), they once again reiterated that this was on their radar and that the 14th Programme, once released, was expected 'to consider the scope for introducing trust law arbitration, alongside wider work on modernising trust law.' [9]

Impact on the offshore jurisdictions

Although this might not seem initially relevant to the offshore jurisdictions, the Arbitration (Guernsey) Law 2016[10] and the Arbitration (Jersey) Law 1998[11] both draw heavily from the Arbitration Act.

While we may be at the 'forefront' for now (in theory, if not necessarily put into practice), such amendments to the law in England and Wales as have been proposed would surpass the efforts of the Channel Islands. We can hope that, by ironing out the current issues with trust law arbitration in England and Wales, any lessons learnt by the Law Commission may similarly be learnt locally, such that we could see any amendments or new legislation reflected in our local legislation, ensuring our place on the global stage of trusts law is retained.

In the meantime, there may be developments stemming from sources closer to home. As part of the consultation for the Trusts (Amendment No. 7) (Jersey) Law 2018, the inclusion of an arbitration clause in a trust instrument that would be binding on beneficiaries was considered. However, this was dismissed as unnecessary at the time, due to a lack of demand[12].

In Guernsey, we understand that a working group has been set up to consider amendments to the Trusts (Guernsey) Law 2007. As part of the changes they are considering, they are looking at proposals which could make arbitration a more effective tool for determining trust-related disputes.

These proposals include expanding the application of arbitration in trust disputes to encompass disputes between any of the parties, not just those involving trustees, and making it explicit that arbitral awards will be binding on beneficiaries.

The language of the existing provisions might be tweaked to bring them more into line with the Hague Convention – presumably to aid enforceability. New provisions might be introduced to permit the use of the Court (for example, for *ex parte* applications for administrative directions) without risk of contravening an arbitration agreement; but also to enable an administration application in relation to a trust (as opposed to a dispute) to be determined by an arbitral tribunal.

As a jurisdiction, there is untapped potential with the current drafting of the local laws, and it seems that there is a movement in progress to take better advantage of the possibilities.

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While it is unclear at the moment precisely what the Law Commission may do with the arbitration of trust disputes in England and Wales, or indeed what developments may be seen closer to home, there is growing momentum for a full and thorough consideration of the issue.

When it comes to trust law arbitration... watch this space.

[1] Thirteenth Programme of Law Reform, Law Commission, 13 December 2017

[2] Arbitration Act 1996, s. 37

[3] Generating Ideas for the Law Commission's 14th Programme of Law Reform, Some Ideas for Possible Projects, March 2021

[4] STEP Consultation Response: Law Commission 14th Programme of Law Reform, 30 July 2021

[5] Bar Council response to the Law Commission consultation on the 14th Programme of Law Reform, 6 August 2021

[6] ICC Arbitration Clause for Trust Disputes And Explanatory Note, October 2018

[7] ICC Arbitration Clause for Trust Disputes, ICC International Court of Arbitration Bulletin Vol. 19 No. 2, 2008

[8] Review of the Arbitration Act 1996, Law Commission, 22 September 2022

[9] Review of the Arbitration Act 1996, A Consultation Paper, Consultation Paper 257, September 2022

[10] Arbitration (Guernsey) Law 2016

[11] Arbitration (Jersey) Law 1998

[12] Jersey: Trusts (Amendment No. 7) (Jersey) Law 20[■] What's Not Included, David Dorgan of Appleby, hosted on Mondaq, 24 January 2017

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