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Arbitration and trust disputes: a Bermuda perspective

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Resolving disputes by arbitration is a widely utilised alternative to court proceedings, offering the parties to a dispute the benefit of privacy and flexibility. Notwithstanding that, this method of alternative dispute resolution (**ADR**) does not lend itself neatly to resolving trust disputes for two main reasons. First, arbitration derives its jurisdiction from an agreement of the parties to the dispute to arbitrate. Trust disputes will often involve parties (usually beneficiaries) who are not party to the trust instrument, and therefore the agreement to arbitrate will not be binding on them. Second, most trust disputes involve remedies which are founded in statute or the court's inherent supervisory jurisdiction over trusts. Arbitrators may lack the requisite authority to grant such relief.

Because trusts are a creature of the court's equitable jurisdiction, courts in Commonwealth jurisdictions have historically guarded their supervisory role of trusts to the exclusion of ADR, including arbitration. The question of whether trust disputes are capable of being arbitrated has not been considered by the Bermuda courts to date, however, comparable trust jurisdictions are shifting away from the exclusionist approach and embracing arbitration as a method of resolving trust disputes. Legislatures are also intervening with laws facilitating, and in some cases, imposing requirements to use ADR to resolve trust disputes.

This article summarises the approaches in other jurisdictions and considers the current position in Bermuda, absent local precedent and statutory intervention.

Recent developments in the English courts

The Bermuda courts will often follow the lead of the English courts absent local precedent. There has been uncertainty under English law as to whether an agreement to arbitrate contained in a trust instrument is binding on beneficiaries who are not party to the instrument, absent statutory intervention. There has also been uncertainty as to whether an arbitrator can award relief which is conferred by statute on the courts (such as vesting orders, or orders varying trusts).

The English High Court has recently weighed in on the latter issue, holding that an agreement between the claimant beneficiary and the defendant trustees was enforceable, and the beneficiary's claim that a judicial trustee ought to be appointed in place of the defendant trustees was capable of being submitted to arbitration, despite the appointment of a judicial trustee being a statutory remedy of the court.[1] Master Clark noted that private trusts regularly resolve issues out of court without the need to invoke the supervisory jurisdiction (such as where a complaint is made against a trustee and the trustee agrees to step down) and it is not much of a further step to envisage the trustee and beneficiary agreeing that the trustee will step down if the grounds of complaint are made out at arbitration. The court noted that such a course might be taken to preserve the privacy of the trust and its affairs, and would not have a prejudicial impact on the other beneficiaries, who would retain the right to invoke the supervisory jurisdiction of the court if they considered themselves prejudiced. It also held that the arbitrator could impose effective remedies in

1 *Grosskopf v Grosskopf* [2024] EWHC 291 (Ch)

spite of the remedy of appointing judicial trustees sitting with the court. The arbitrator could, for example, direct that the defendant trustees stand down and seek the appointment of new trustees by the appointor. These remedies could be enforceable. The court did acknowledge that if the appointor did not so appoint, a court ordered appointment would be required.

The English High Court did not go as far to say that non-parties to the arbitration agreement could be bound to an arbitration agreement. Absent statutory intervention, therefore, the view of the Executive Committee of the STEP Trust Law Committee that it is "plainly impossible" for the settlor to require beneficiaries to arbitrate likely rings true.

Statutory intervention in the Commonwealth

Examples of such statutory intervention appear in a number of Commonwealth trust jurisdictions. The Bahamas has legislated to enable the effectiveness of arbitration clauses in trust instruments as binding arbitration agreements. It provides that all "parties to a trust" (including any trustee, beneficiary or power-holder of or under the trust) are considered parties to the arbitration agreement. It further provides that the arbitral tribunal may exercise all powers of the court, whether statutory or under its supervisory jurisdiction. New Zealand's Trusts Act 2019 has introduced an ADR regime with different rules governing "internal" or "external" matters.[2] External matters may be referred to arbitration with agreement of the parties to the matter absent an arbitration agreement in the trust instrument. Beneficiaries are not considered parties to external matters. For internal matters, a court may enforce an arbitration clause in a trust instrument or otherwise submit the matter to arbitration provided the terms of the trust instrument do not indicate a contrary intention. Unascertained or incapacitated beneficiaries must be represented by a court-appointed legal representative.

Bermuda's approach

The Bermuda courts have regularly shown themselves to be pro-arbitration. There is a long line of authority confirming that arbitration agreements will be firmly upheld. The courts have not, however, been asked to uphold arbitration agreements in respect of trust disputes. It is also not an area of trust reform that the legislature or industry bodies are progressing.

The reason for that is likely to be the Bermuda courts' willingness to recognise that the private interests of private trusts who come to the Bermuda courts for guidance or relief ought to be protected. The court will regularly grant confidentiality orders anonymising the names of the trust and parties to the proceeding, which is usually a key feature of arbitration. In a similar vein, the Bermuda court can often be flexible in procedure when exercising its supervisory jurisdiction. These features make Bermuda an attractive jurisdiction for trusts.

Nevertheless, it is highly possible that there are cases in the future where the court may be unwilling to protect the parties' privacy, and/or require the parties to adhere to strict procedure. In such a case, the parties may benefit from the privacy and flexibility arbitration offers. Absent statutory intervention, Bermuda is likely to follow the English approach in *Grosskopf* which accords with Bermuda's general pro-arbitration approach.

2 Internal matters involve co-trustees or trustees and beneficiaries; external matters involve trustees and third parties.

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