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Trust Disputes Non-Arbitrable in India

Mohit Mahla · Monday, March 27th, 2017

Coincidentally, at the same time last year, the world witnessed two historical developments. *First*, Donald J. Trump was elected as the 45th president of the United States. *Second*, in an attempt to curb black money (a move, the result of which is still to be evaluated), the Modi-led Government demonetised 500 and 1000 currency notes in India. Even before, interestingly, the Supreme Court of India through its judgment in *Shri Vimal Kishor Shah & Ors.* v. *Mr. Jayesh Dinesh Shah & Ors.* ("***Vimal Kishor Shah***") [2016 (8) SCALE 116] in effect has demonetised arbitration of trust disputes in India.

From being typically charitable in nature to becoming an effective commercial vehicle for succession and estate planning, trusts in India have evolved with time. With the growing complexity of trust deeds and the constantly evolving nature of trusts, came the inevitable raven – "disputes". Resolving trust disputes through arbitration – which comes with the usual advantages over litigation, such as confidentiality, party autonomy, limited curial review, costs and time benefits – seemed to be an attractive option. That being said, arbitration of trusts disputes raises issues that make trusts disputes non-arbitrable in many jurisdictions including India.

The question of arbitrability of disputes arising out of trust deeds was considered by the Supreme Court of India in *Vimal Kishor Shah.* The court was hearing an appeal against an order of the High Court of Bombay appointing an arbitrator to hear disputes arising out of a family trust deed. The arbitration agreement in that deed provided for arbitration of any disputes between trustees; trustees and beneficiaries; and beneficiaries, it held that disputes arising out of trust deeds are non-arbitrable under the Arbitration and Conciliation Act, 1996 (the "***Arbitration Act***"). The Supreme Court, however, ignored certain important facets of modern-day-arbitrations which are problematic. A few of those problems are the following.

A trust deed is not an Arbitration Agreement

The Supreme Court concluded that a trust deed cannot be construed as an agreement let alone an arbitration agreement within the meaning of Section 7 of the Arbitration Act (which is based on Article 7 of UNCITRAL Model Law on International Commercial Arbitration, 1985). The Supreme Court found that trust deeds are not signed by the beneficiaries and, thus, beneficiaries under a trust deed containing an arbitration clause cannot be regarded as a "*party*" to the arbitration agreement under the Arbitration Act. In reaching such a conclusion, the Supreme Court has ignored the following points:

First, the signature of the parties to an arbitration agreement cannot be regarded as a decisive factor in determining its validity and enforceability. In the past, however, courts and arbitral tribunals strictly interpreted the writing requirement of arbitration agreements. Now, however, the writing requirement is interpreted more liberally by various jurisdictions. The courts in U.S.A, Singapore and even in India have clarified that the mere absence of a signature will not affect the existence of a valid and binding arbitration agreement. [See *Seawright* v. *Am. Gen. Fin., Inc*., 2007 U.S. App. (6th Cir. 2007); *Malini Ventura* v. *Knight Capital Pte. Ltd and others* [2015] SGHC 225; *Govind Rubber Ltd*. v. *Louids Dreyfus Commodities Asia Ltd.* (2015) 13 SCC 477]. Further, both, Option I (on which Section 7 of the Arbitration Act is based upon) and Option II of the 2006 version of Article 7 of the UNCITRAL Model Law on International Commercial Arbitration do not have a writing requirement. This removes one of the difficulties faced in arbitration of trust disputes–especially in respect of disputes involving beneficiaries.

Second, in reaching the conclusion that a beneficiary of a trust cannot be regarded as a "*party*" to the arbitration agreement under the Act, the Supreme Court ignored the intention of the legislature behind the recent amendment to Section 8 of the Arbitration Act. As a result of the amendment, Section 8 now provides a reference to arbitration could be sought not only by a party to the arbitration agreement but also by "*persons claiming through or under*" a party to an arbitration agreement. Thus, the purpose was to bring parties who are not signatories to an arbitration agreement – but whose rights and liabilities are still affected by the underlying agreement – into the ambit of "*party*" to the arbitration agreement. Beneficiaries of a trust can plausibly be regarded as "*persons claiming through or under*" the settlor who is a party to an arbitration agreement and, thus, can be bound by an arbitration agreement contained in a trust deed.

Third, the Supreme Court has failed to appreciate the common law doctrine of "*Direct Benefits Estoppel* or *Deemed Acquiescence*" the foundation of which is that a party is estopped from avoiding or bound by arbitration if it knowingly seeks the benefits of the agreement containing the arbitration clause. [See *McArthur* v. *McArthur*, 224 Cal. App. 4th 651 (Cal. App. 1st Dist. Mar. 11, 2014)], where the court applied the doctrine of direct benefits estoppel and prevented a trust beneficiary who was getting benefits under a trust, from avoiding the arbitration provision of that trust]. Beneficiaries of a trust should not be allowed to *cherry-pick* from a trust deed, parts which are suitable and avoid the parts which are not suitable and should ideally be bound by the arbitration agreement contained in the trust document if they have derived any benefits from the trust.

Implied bar of exclusion of applicability of the Act under the Indian Trusts Act, 1882

The Indian Trusts Act, 1882 (the "***Trusts Act***") is the legislation governing private trusts in India. The Trusts Act encompass provisions about various aspects of trusts, i.e., the creation of trust, duties, and liabilities of trustees, rights and powers of trustees, rights and liabilities of the beneficiary, and so on. The Trusts Act empowers the civil courts in respect of certain legal remedies, but it nowhere provides, however, the civil courts' exclusive jurisdiction to adjudicate disputes arising between the settlor, trustees and beneficiaries. The Supreme Court, while accepting there is no express bar on arbitration of disputes under the Trusts Act, found that there was an implied bar of exclusion of applicability of the Act for deciding trust disputes. By doing so, the Supreme Court has added yet another category of disputes to the list of six *well-recognized examples* of disputes considered non-arbitrable as identified by the Supreme Court in the case of *Booz Allen & Hamilton Inc*. v. *SBI Home Finance Ltd. & Ors.*, (2011) 5 SCC 532 ("***Booz Allen***"). However, the Supreme Court failed to appreciate the general arbitrability test (though not being

rigid or inflexible) in *Booz Allen.* According to that case, “generally and traditionally all disputes relating to rights in personam are considered to be amenable to arbitration; and all disputes relating to rights in rem are required to be adjudicated by courts and public tribunals, being unsuited for private arbitration.” Trust disputes concern rights in personam and, therefore, based on the general arbitrability test laid down under *Booz Allen* should not have been regarded as non-arbitrable.

Further, a blanket ban on arbitration of disputes arising out of trust deeds would also mean that separate arbitration agreements entered into between the beneficiaries to resolve disputes between themselves are now non-arbitrable, a consequence – which was highly undesirable.

Conclusion

Arbitration could be an effective mean to resolve trust disputes, especially due to its private and confidential nature which is an important consideration in disputes arising in the context of family trusts in India. However, unless reconsidered, *Vimal Kishor Shah* has clearly made all trust disputes (even those between the beneficiaries) non-arbitrable in India. To cure the harm done by *Vimal Kishor Shah,* legislative amendments to the pre-independence era’s Trusts Act are desirable. As a suggestion, the Trusts Act could be amended to include a provision that where a written trust instrument provides for any dispute arising between any of the parties (including the beneficiaries) to the trust, would be submitted to arbitration. That provision should have effect as between those parties as if it were an arbitration agreement and as if the parties were parties to that arbitration agreement. Guidance in this regard could be taken from the legislative amendments made in the Florida Probate Code (Section 731.401 of Chapter 731) or Guernsey Trust Law (Section 63) to facilitate arbitration of trust disputes. However, until allowed legislatively, trust disputes remains non-arbitrable in India.

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