Kluwer Arbitration Blog

The 2018 ICC Arbitration Clause for Trust Disputes: Cutting the Gordian Knot of Trust Arbitration at Last?

Lucas Clover Alcolea (McGill University) · Sunday, December 2nd, 2018

Over the last century, arbitration has established itself as one of the most popular means for resolving commercial disputes[1)] and has even penetrated fields of law traditionally reserved for the courts such as antitrust/competition law, company law and even tax law.[2)] One new area of law to which arbitration can advance is the arbitration of internal disputes regarding trusts and the prospect for growth in this area has resulted in a flurry of articles by both trust and arbitration practitioners[3)] as well as the release of rules and model clauses for such disputes.[4)]

The latest development in this field occurred on the first of November in Zurich when the ICC launched a new arbitration clause for trust disputes exactly ten years after its first clause on the subject was released in 2008.[5)] The aim of this post is to analyse some of the innovations and briefly consider whether it finally resolves some of the intractable problems posed by trust arbitration or whether it could have gone further.

Updating the Classic Trust Scenario

The first improvement of the 2018 clause over the 2008 clause is the provision for protectors and other power-holders to also be bound by the arbitration clause as opposed to just the settlor, trustee and beneficiaries mentioned in the 2008 clause. This reflects the changing practice of offshore, and even onshore, trusts where complicated structures involving protectors and other power holders have become the norm driven by the settlors desire to retain greater control over the trustees and ensure that the trust fund is managed according to their will.

Deemed Acquiescence as Opposed to Conditional Grant of Benefit

The second difference, albeit perhaps not an improvement, is the changed language with regards to the binding effect of the clause on beneficiaries. In the 2018 clause the drafters appear to have opted for a theory of deemed acquiescence so that any beneficiary who claims or accepts ‘any benefit, interest or right under the Trust…’ will be deemed to be bound by it. The 2008 clause on the other hand included not only the idea of deemed acquiescence but also that of a conditional grant, i.e. as a condition for receiving benefit under the trust a beneficiary had to accept the clause. It is not entirely clear why this means of binding beneficiaries was eliminated from the 2018 clause and it might be thought that it represents a step backwards.

Explicit Confidentiality Obligations

The third difference, and a certain improvement, one finds in the 2018 clause is the explicit inclusion of confidentiality obligations regarding any arbitral proceedings rendered due to the clause and any awards or decisions rendered by the arbitral tribunal or a settlement agreement between the parties. Since one of the most important reasons for parties to consider arbitration over litigation to resolve trust disputes is the possibility of keeping matters confidential, their inclusion in the clause itself is certainly to be applauded.

No Duplication of the Rules on Joinder

As the 1998 ICC Rules did not include provisions for joinder and multi-party scenarios, the 2008 clause explicitly included such provisions but given that the new 2017 arbitration rules do so the 2018 clause removes such provisions and relies instead on those provisions in the rules themselves.

No Provision for Representing Unborn, Unascertained, Minor or Otherwise Incapable Beneficiaries

Neither the 2008 nor the 2018 clauses provide any provisions for the representation of unborn, unascertained, minor or otherwise incapable beneficiaries. As trusts may often involve children, classes whose individual members may not be known or mentally incapable individuals, and courts will be reluctant to approve of such clauses, this represents a major lacuna. In countries which are signatories to the European Convention on Human Rights it is highly likely that clauses which do not provide for the appointment of representatives for such beneficiaries are likely to breach those beneficiaries' Article 6(1) right to a fair trial. Arbitral awards rendered on the basis of such clauses are, therefore, likely to face serious enforcement challenges or be annulled on public policy grounds.

It is true that the explanatory note to the clause underlines the importance of the inclusion of a means for representing such beneficiaries in order to avoid these problems but it could have been clearer about the real risk of an unenforceable or annulled award in such cases. Moreover, it would have perhaps been advisable to provide for sample means of representation. Although it might be objected that this is not desirable in a standard arbitration clause, Lawrence Cohen & Joanna Poole do so in their suggested clause[6)] and it is therefore certainly possible.

Conclusion

The 2018 ICC Arbitration Clause is a welcome update of the 2008 clause and adds several important elements including confidentiality and provisions binding protectors and other power holders. However, it does not completely sever the Gordian knot of arbitrating trust disputes and could be improved in several respects, for example, by providing default provisions for the representation of unborn, unascertained, minor or otherwise incapable beneficiaries.

---

subscribe here. To submit a proposal for a blog post, please consult our Editorial Guidelines.

References

?1 Gary B. Born, 'Chapter 1: Overview of International Commercial Arbitration', *International Commercial Arbitration* (2nd edition, Kluwer Law International 2014), 6–224, at 93-97; Queen Mary University London, 2015 International Arbitration Survey: Improvements and Innovations in Arbitration.

?2 Loukas A. Mistelis & Stavros L. Brekoulakis, *Arbitrability: International and Comparative Perspectives* (2009, Kluwer Law International), Part II.

?3 See for example Georg Von Segesser & Katherine Bell, 'Arbitration of Trust Disputes' (2017) 35:1 *ASA Bulletin*, at 10; Lawrence Lawrence Cohen & Joanna Poole, 'Trust arbitration – is it desirable and does it work?' (2012) 18: 4 *Trusts and Trustees* 324; Nicholas Le Poidevin QC, 'Arbitration and trusts: can it be done?' (2012) 18:4 *Trusts and Trustees* 307.

?4 American Arbitration Association, Wills and Trusts; Liechtenstein Chamber of Commerce and Industry, Rules of Arbitration of Liechtenstein, 'Model arbitration clause for trusts' at 28.

?5 ICC Arbitration Clause for Trust Disputes, *ICC International Court of Arbitration Bulletin* Vol. 19 No. 2 at 9.

?6 Lawrence Cohen & Joanna Poole, 'Trust arbitration–is it desirable and does it work?' (2012) 18:4 *Trusts Trustee* 324 at 330.

This entry was posted on Sunday, December 2nd, 2018 at 1:00 pm and is filed under Arbitration,

Arbitration Awards, Arbitration Institutions and Rules, Arbitration Proceedings, ICC, ICC Arbitration, ICC Rules, International arbitration, Trust

You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.