Kluwer Arbitration Blog

Amendments to New Zealand's Arbitration Law: Trust Disputes Are Out (For Now)

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Introduction

On 8 May 2019, the Arbitration Amendment Act 2019 (the **Amendment Act**) came into force. It amends the Arbitration Act 1996 and is a much watered-down version of the original proposal. The Amendment Act makes three changes: (i) the insertion of a new waiver sub-clause in Article 16 of Schedule 1 of the Arbitration Act (which mirrors Article 16 of the UNCITRAL Model Law); (ii) the narrowing of the grounds for setting aside an arbitral award; and (iii) the removal of the so-called "quick-draw" mechanism. These technical changes have been examined in a separate post and will not be re-examined here (see Arbitration Law Reform in New Zealand: A Lesson in Competing Values).

The Arbitration Amendment Bill initially contained two substantive proposals. The first sought to enable the arbitration of "internal" trust disputes. The second sought to further entrench the privacy of arbitration by reversing the presumption of open hearings in related court proceedings. Neither of these proposals made it into the enacted legislation. This post focuses on the potential arbitration of trust disputes in New Zealand. The rationale for seeking to amend the Arbitration Act's confidentiality regime (primarily to follow the approach in Singapore and Hong Kong) and the reasons for its rejection is not discussed here (see for example, Tidying up the Arbitration Act).

Arbitrating trust disputes: the perceived problem

In New Zealand, a country with a population of approximately 5 million people, the Law Commission estimates that there are somewhere between 300,000 to 500,000 trusts in existence. Trust disputes are not only inevitable, they present a potentially significant source of business for arbitration lawyers. The ability to arbitrate "internal" trust disputes, namely disputes arising under the four corners of the trust deed (between, for example, settlors, appointers, trustees and beneficiaries), has been debated in a number of jurisdictions. The ICC has recently updated its Model Clause for Trust Disputes. The debate continues here in New Zealand.

Many consider the arbitration of trust disputes to be contrary to public policy. Two sticking points are frequently cited.

First, a trust deed is, by definition, not a contract but a "*unilateral act of disposition*" (see Explanatory Note to ICC Model Clause). An arbitration agreement in a trust deed would usually

be agreed between the original parties to the trust, the settlor and trustees (and in some circumstances, unilaterally by the settlor only). However, beneficiaries of the trust are not parties to that agreement. The lack of consent by those non-parties to the deed affects the arbitration agreement's validity.

Second, all persons potentially affected by an award, such as unborn, unascertained or legally incompetent beneficiaries, may not be able to take part in the arbitration. An award cannot be enforced against them unless they are adequately represented. This problem stems from the nature of the underlying dispute and arises regardless of the particular dispute resolution method adopted. Procedural rules applicable to court proceedings have long provided for a court's ability to protect such persons through the appointment of an independent legal representative.

Possible solutions

In light of these identified sticking points, the proper arbitration of trust disputes requires statutory reform in two areas. First, statute needs to provide that the arbitration agreement is valid and binding on non-parties to the trust deed. Secondly, specific mechanisms must be put in place to allow for the legal representation of those unable to take part in the arbitration (which for trust disputes will usually be unborn, unascertained or legally incompetent beneficiaries).

The arbitration of internal trust disputes has already been considered in a number of jurisdictions. By way of example:

- Since 2007, an agreement to arbitrate a dispute under a will or a trust, save for a dispute concerning the validity of that will or trust, is enforceable in Florida (Florida Probate Code: General Provisions).
- In 2011, amendments to The Bahamas Trustee Act (i) deemed an arbitration clause in a trust deed to be a valid arbitration agreement between all parties (including beneficiaries of the trust) under the Arbitration Act 2009 (The Bahamas Arbitration Act); and (ii) granted an arbitral tribunal the power to appoint an independent person to represent unborn or legally incompetent beneficiaries.
- England has considered the merits of and mechanism for, arbitrating trust disputes. The Trust Law Committee, having examined legislative changes made in Florida, Guernsey and elsewhere, concluded that arbitration was both suitable and attractive for disputes arising under wills, settlements and charitable trusts. Their 2011 report recommended that the Arbitration Act 1996 (UK) be amended to allow the arbitration of internal trust disputes. Those recommendations are yet to be adopted.

The New Zealand approach

The proposed amendment to the Arbitration Act

The Arbitration Amendment Bill contained a clause entitled "*Validity of Arbitration Clauses in Trust Deeds*". The bill sought to deem arbitration agreements in trust deeds as valid and binding on all trustees, guardians and any beneficiaries for the purposes of the Arbitration Act. It also gave a tribunal the same powers as the High Court to appoint representatives for minors, unborn or unascertained beneficiaries. Any award issued would then be subject to the same curial safeguards provided for in the Arbitration Act, such as the ability to apply to set aside the award.

These proposals generated criticism. For example, the Arbitration Amendment Bill was perceived

as undermining the High Court's supervisory jurisdiction over trusts. It was suggested that adequate safeguards would be needed for unascertained and legally incompetent beneficiaries, including that the court "*scrutinise any award before making an order recognising or enforcing it*" (2018 Supplementary Report).

The amendments were being debated in tandem with a major overhaul to New Zealand's trust laws. Ultimately, the Ministry of Justice recommended removing the trust arbitration proposals from the Arbitration Amendment Bill given the parallel debate on the Trusts Bill. This was a decision based on expediency not policy. That decision has been, in this author's view, rightly criticised for assuming incorrectly that the Trusts Bill contains the same proposals that were removed from the Arbitration Amendment Bill (see below and also Arbitration Amendment Bill: Is Trust Arbitration on its Way). Although it is not unreasonable for the relevant changes to form part of a new Trusts Act, those changes must nevertheless be "fit for purpose". In their current form, the proposed amendments potentially complicate rather than facilitate the arbitration of trust disputes.

The Trusts Bill

The Trusts Bill was first tabled on 1 August 2017. The Justice Committee issued its Final Report on the bill in October 2018 and on 9 May 2019 the bill passed its second reading. It is expected to pass into law sometime this year. The bill seeks to enable greater use of alternative dispute resolution methods (including arbitration and mediation) for trust disputes, save for disputes regarding the trust's validity.

As presently drafted, the Trusts Bill is inadequate for a number of reasons (see also The Arbitration of Trust Disputes: are we there yet?). For example:

- The bill does not expressly deem an arbitration agreement in a trust deed to be valid. Rather, it focuses on deeming an award issued in a trust dispute an "arbitral award" under the Arbitration Act (see clauses 137 and 142 of the bill). This does not address the absence of agreement which renders the enforcement of the award vulnerable to challenge.
- Although a party can now apparently commence arbitral proceedings without permission (that was not the case in the original draft), clause 140(1) of the Trusts Bill provides that a court "*may at the request of a trustee or a beneficiary or on its own motion*" enforce an arbitration agreement. It is unclear when or on what basis a court may "*on its own motion*" decide (or refuse) to enforce an arbitration agreement.
- The High Court retains the power to appoint representatives for unascertained or incapacitated beneficiaries, to the exclusion of the arbitrator. The retention of court involvement potentially dilutes the benefits of a standalone arbitral process and may result in the under-utilisation of arbitration because of the potential cost of requiring a court order to appoint a representative.

Contrary to the recommendations made with respect to the Arbitration Amendment Bill, there is no provision for court approval (or scrutiny) of an arbitral award. That proposal may deserve further consideration.

Conclusion

In its current form, the Trusts Bill falls short of facilitating the effective arbitration of trust disputes. It is hoped that the issues identified above (and elsewhere) are fixed before the bill's third reading later this year. The potential arbitration of trust disputes remains a live issue in New

Zealand. Should the arbitration of trust disputes be permitted (even if subject to some judicial oversight), it could pave the way for the arbitration of other disputes that have traditionally been considered non-arbitrable, such as insolvency disputes.

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