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More Reasons to Trust Arbitration in the Bahamas: Examining the Key Takeaways From Gabriele Volpi v. Delanson Services Limited & 2 Others

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On 28 December 2023, the Supreme Court of the Commonwealth of the Bahamas (the **"Court"**) delivered a consolidated judgment in *Gabriele Volpi* v. *Delanson Services Limited & 2 others* and *Delanson Services Limited* v. *Matteo Volpi and 2 others* (**"Judgment"**), resolving a longstanding trust dispute between Italian-Nigerian billionaire, Gabriele Volpi ("Gabriele") and his son, Matteo Volpi ("Matteo"). This post examines the main takeaways from a decision that spotlights the Bahamas as a leading light for trust arbitration in the Caribbean and beyond.

Background

According to the Judgment, between 2006 and 2012, Gabriele settled three family trusts on nearly identical terms. The trusts held his various investments, allegedly worth billions of US dollars, and its beneficiaries included Gabriele himself and his relatives, including his son, Matteo, who was involved in Gabriele's businesses until the end of 2015. Delanson Services Limited ("Delanson") was the trustee of these trusts. The relationship between Matteo and Gabriele soured towards the end of 2015 when Matteo withdrew from Gabriele's businesses and in October 2016, Delanson distributed the entirety of the trusts to Gabriele, as settlor of the trusts, on the ground that it was necessary to protect the underlying assets.

Matteo challenged Delanson's distribution on the ground that it constituted a breach of the trust and was for an improper purpose before an arbitral tribunal comprising Dr Georg von Segesser (Presiding Arbitrator), the Rt. Hon. Lord Neuberger of Abbotsbury, and Professor Avv. Alberto Malatesta. Relevantly, Gabriele filed a counterclaim seeking, *inter alia*, to set aside the trust on the grounds of mistake. In a partial award issued on 13 June 2020, a majority of the tribunal rejected Gabriele's counterclaim and set aside Delanson's distribution to Gabriele based on a breach of the trusts and for an improper purpose. On 26 August 2020, the tribunal issued an additional partial award clarifying certain aspects of its earlier decision based on an application by Gabriele pursuant to article 39 of the UNCITRAL Rules and s. 79 of the Arbitration Act applicable in the Bahamas (**"Bahamas Arbitration Act"** or the **"Act"**).

In June and September 2020, Gabriele and Delanson (the **"Applicants"**) filed applications before the Court seeking to set aside both the partial and additional partial awards respectively. The

challenges, which were "made under all of the available gateways for a challenge and include multiple sub-grounds and complaints," led to the Judgment – a 168-page decision dismissing the applications in their entirety and upholding the partial and additional awards. As discussed below, the Judgment provides clarity on key arbitration-related issues such as the arbitrability of trust disputes and the scope of recourse available against Bahamas-seated awards.

Trust Disputes are Arbitrable in the Bahamas

Bahamas is one of a handful of jurisdictions that expressly provide for the arbitration of trust disputes, and this decision reaffirms its ambition to lead the way in this regard. Others include Guernsey, Malta, and certain U.S. states, such as Florida and Missouri. The Trustees Act applicable in the Bahamas (the "**Trustees Act**") (s. 91A) provides that arbitration agreements in trust instruments are enforceable and sets out the powers of an arbitral tribunal under such an instrument (s. 91B). Notwithstanding this, the Applicants challenged the tribunal's substantive jurisdiction on several grounds, notably that Gabriele's 'mistake' counterclaim was not arbitrable [126]. Matteo disagreed. Gabriele made this challenge for the first time in his submissions and did not raise it before the arbitral tribunal nor include it as a ground in his application.

Gabriele argued that he established the trusts under a mistake that was grave enough to justify them being set aside [189]. Consequently, he argued that there was a dispute relating to the validity of the trusts, and that such disputes are not arbitrable under s. 91 of the Trustees Act. He contended that the Trustees Act only permits arbitrations relating to disputes "between trustees, beneficiaries, or power holders in their capacity as such" and "does not apply to a claim by a settlor or donor of the trust" [191]. In response, Matteo argued that Gabriele should be precluded from making this challenge given that it was not made before the arbitral tribunal. On the substance, Matteo argued that the intent of the Trustees Act was not to exclude settlor claims and that the legislation's silence in this regard should not be read as prohibiting the terms of the trust deeds (which he argued provided for the arbitration of settlor claims) [224-25].

Dismissing Gabriele's arguments and enshrining Bahamas' policy as a jurisdiction for trust arbitrations, the Court rightfully agreed with Matteo that the failure of the legislation to make a specific reference to settlor disputes could not be taken to render such claims non-arbitrable, and went on to enumerate several provisions which demonstrate that "[p]arliament intended to create a regime that was permissive and supportive of the arbitration of trust disputes" [279-80]. The existence of a specific legislation that gives effect to trusts arbitration should put it beyond doubt that the intention is for these disputes to be arbitrable. Unless settlor claims are expressly excluded, it stands to reason that the Trustees Act will give force to an arbitration agreement which purports to submit a settlor claim to arbitration (as was the case in the relevant trust instruments).

Appeals on Points of Law are Only Available When Parties Opt-In

The Applicants had initially sought and obtained leave to appeal errors of law in the partial and additional awards as part of their challenge. Although the Court recalled its initial decision, the Court considered the scope of its power to grant leave to appeal errors of law under s. 91 of the Bahamas Arbitration Act in its Judgment [31]. This provision of the Act was based on Section 69(2) of the UK Arbitration Act 1996 (the **"English Arbitration Act"**) which expressly provides

for appeals on points of law to be brought with leave of court. This was however, deleted from s. 91(2) of the Bahamas Arbitration Act upon enactment.

For context, Section 69(2) of the English Arbitration Act provides that:

> (2) An appeal shall not be brought under this section except—
>
> (a) with the agreement of all the other parties to the proceedings, or
>
> (b) with the leave of the court.

Section 69(3) of the English Arbitration Act goes further to set out the relevant test to be applied by the court in determining whether to grant leave. Section 91(2) of the Bahamas Arbitration Act, on the other hand, provides that:

> (2) An appeal shall not be brought under this section except with the agreement of all the other parties to the proceedings.

The parties agreed that, unlike the English Arbitration Act, the Bahamas Arbitration Act did not expressly provide for appeal on points of law to be brought with the leave of court [330], but nonetheless maintained opposite views on whether the court was empowered to grant leave absent parties' consent.

The Applicants argued that the Act empowers the Court to grant leave on the application of a party irrespective of whether Matteo consented to this power. It contended that this power was based on the Court's "*residual power"* to grant leave based on s. 92(8) of the Act [325] which, in setting out 'supplementary provisions' governing challenges and appeals provides that:

> The court may grant leave to appeal subject to conditions to the same or similar effect as an order under subsection (6) [which provides for the award of security for costs] or (7) [which provides for payment of money due under an award into court] but this does not affect the general discretion of the court to grant leave subject to conditions.

Matteo, on the other hand, argued that the consent of the parties was a prerequisite for this power to be available to the Court, relying heavily on the deleted section 69(2)(b) and s.69(3) of the English Arbitration Act [324].

Dismissing the Applicants' arguments, the Court correctly held that appeals on points of law could only be brought with parties' express opt-in [371-72]. The Court relied on the 'leading provision doctrine' which provides that where there is a conflict between statutory provisions, the more specific provision should be afforded primacy. The Court also, *inter alia*, agreed with Matteo that, as the terms of s. 91 contained no guidance on the applicable test in determining whether to grant leave, it was improbable that parliament intended to empower the court to grant leave to appeal while conveniently omitting the requisite test contained in s. 69(3) of the English Arbitration Act. The latter reason *inter alia* lends credence to the correctness of this decision. Given that the Bahamas Arbitration Act was modelled after the English Arbitration Act, the exclusion of the test (in addition to the provision which empowers the Court to grant leave) in the Bahamas Arbitration Act, renders it highly improbable that the legislative intention was to retain this power.

Conclusion

The Judgment reaffirms the Bahamas' position as a key jurisdiction for trust arbitrations. It confirms the country's pro-arbitration approach by upholding the narrow scope for challenges to awards and emphasizing the importance of party consent in arbitration. Furthermore, parties can take comfort in the fact that the Bahamas Arbitration Act was modelled after the English Arbitration Act, a legislation which has served as a model arbitration legislation for decades. Accordingly, the Judgment serves as a testament to the Bahamas' ambition to become a leading arbitration jurisdiction in the Caribbean and beyond, especially for trust disputes.

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