

## Can and should trust disputes be arbitrated in the BVI?

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Arbitration is widely used as an alternative to court proceedings, offering parties confidentiality, flexibility and ease of enforcement. However, arbitration remains largely untested in resolving trust disputes for two main reasons.

First, the arbitral panel derives its jurisdiction from the agreement of the parties to submit their dispute to arbitration. In the context of trust disputes, beneficiaries are usually not signatories to the trust deed and there is legal uncertainty over whether an agreement to arbitrate would therefore be binding on them.

Second, most trust disputes involve remedies which arbitrators may not have the power to grant, so there is a question of whether certain trust disputes are capable of being arbitrated.

But what could be the benefits of arbitrating trusts disputes? And what are some of the legal complexities?

### Why has this topic received recent attention?

The question of whether trust disputes can and should be arbitrated has recently been put under the spotlight, on a worldwide scale, following the decision of *Gabriele Volpi v Delanson Services Ltd & Others* [2020] (*Volpi*) in the Bahamas, which was handed down on 28 December 2023. In that decision, the Bahamas Supreme Court rejected numerous challenges to two arbitration awards resolving a trusts dispute.

The Bahamas is one of the jurisdictions that have made statutory provision for arbitration of trust disputes, and the Bahamian legislation is particularly sophisticated. Given the confidential nature of arbitration, there have been very few decisions on how such statutory provisions work in practice. However, in *Volpi* the applications before the Bahamian Courts challenging the arbitral awards were open and so the judgments were public. The Supreme Court decision has received worldwide interest, being the first of its kind under the Bahamas Arbitration Act. The Court of

Appeal of the Bahamas dismissed applications for leave to appeal the decision earlier this year.

The arbitrability of trust disputes was also recently considered for the first time by the English Court in the decision of *Grosskopf v Grosskopf* [2024] (*Grosskopf*). The Court held that a claim seeking the removal of the trustee and appointment of a substitute judicial trustee could be arbitrated, notwithstanding that it was accepted that the arbitrator's power to order that relief might be limited. This decision confirms that an arbitrator's inability to grant specific relief does not make a dispute's substance incapable of arbitration, which appears to endorse trust arbitration.

## Potential benefits of arbitrating trust disputes

Many of the benefits often associated with arbitration will likely also apply in the context of trust disputes. However, the position is not definitive because arbitration in a trust context is largely untested. These benefits include the following.

### Confidentiality

One of the major benefits of arbitration is confidentiality. This is likely to be a significant attraction in respect of trust disputes, which typically involve family affairs and minors. In fact, practitioners are already noticing an increased interest in arbitration for this reason. In some jurisdictions (such as the Bahamas), while the arbitration itself is private, any court proceedings to challenge the award are public, which may lead to unwanted publicity later down the line. This is not a concern in other jurisdictions such as the BVI, where the default position is that hearings in arbitration-related court proceedings are not held in open court, so safeguarding the confidentiality of the arbitral process.

### Finality

Given the final and binding nature of arbitration, there can be limited grounds upon which the arbitral award can be appealed. This gives finality to the arbitration that is not often available with a court decision, which may be subject to numerous appeals.

### Flexibility

Arbitration generally offers more procedural flexibility which can lead to a speedier and cost-effective resolution. For example, many interim matters in an arbitration may be resolved over correspondence without requiring any formal application. This could be particularly beneficial in jurisdictions where the Judges have limited capacity and interim applications may not be listed swiftly.

### Choice of arbitrators

In complex trusts disputes, parties to an arbitration are able to engage a suitable panel of specialist arbitrators with significant trust experience. This may be a key benefit.

## Speed and cost

Whether arbitration is more cost-effective and swifter than court proceedings is likely to depend on the jurisdiction in question and the availability of the arbitrators and party representatives.

## Ease of enforcement

Arbitration awards are typically more readily enforceable in different jurisdictions following the New York Convention than court judgments. Where all of the parties have agreed to arbitrate, this will be a significant benefit if cross-border enforcement is required. However, there is currently legal uncertainty as to whether an arbitration award made in the absence of voluntary submission to the arbitration would be enforceable in a foreign jurisdiction leading to a risk of satellite litigation.

Whether arbitration is a desirable means of resolving trusts disputes will depend on the client's particular priorities. In situations where the privacy and finality are important, arbitration could be a very attractive option.

## **Potential hurdles to arbitrating trust disputes**

The foundation of an arbitral panel's jurisdiction is the arbitration agreement, defined in section 17 of the BVI Arbitration Act (which closely follows the UNCITRAL Model Law) as "an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship". An arbitration agreement must be in writing, though it may take the form of an arbitration clause in a contract or as a separate agreement.

In the context of a trust dispute, the arbitration agreement would typically be contained in the trust deed and signed by the trustee and the settlor. Due to this, it is not clear whether the arbitration agreement is binding on beneficiaries who are not signatories. A recent roundtable discussion, hosted by the BVI Arbitration Group in association with the BVI Arbitration Centre, considered legal theories which might arguably extend the binding effect of arbitration provisions to non-signatories. These theories rest on the beneficiaries being required to take the burden of the trust, as well as the benefit. For example, it may be possible to insert a condition precedent or a forfeiture clause in the trust deed, with the practical effect of binding beneficiaries to an arbitration agreement. It could be a condition of benefiting under the trust that the potential beneficiary submits any dispute to arbitration. A forfeiture clause could provide for the forfeiture of a beneficiary's interest in the trust if they were to bring a dispute under a mechanism not involving arbitration.

It may also be possible to seek to argue any arbitration is binding on non-signatories in light of the statutory provisions already in place. For example, the deemed acceptance theory rests on the fact that the beneficiaries claim "under or through" a settlor, who is party to the trust deed. In accordance with section 71 of the BVI Arbitration Act, an award is final and binding "both on the parties and any person claiming through or under any of the parties". (This wording is essentially the same as section 58 of the English Arbitration Act which provides that an arbitral award is "final and binding both on the parties and on any persons claiming through or under them.")

While there are cogent legal theories which could seek to bind beneficiaries to an arbitration agreement, they have not yet been tested before the English or BVI Courts, and the legal position is far from certain.

In addition to the above, there is still a question mark over the arbitrability of certain trusts disputes. Trust disputes often involve remedies which cannot be granted by an arbitral tribunal, such as the replacement of trustees. While the English decision of *Grosskopf* appears to have confirmed the Court's pro-arbitration approach to this issue, that decision is subject to appeal.

It should be noted that at the time of the *Grosskopf* decision, the leading authority on the non-arbitrability of insolvency disputes (an analogous situation) was *Salford Estates (No.2) Ltd v Altomart Ltd* [2014] (*Salford Estates*). *Salford Estates* had held that any disputed debt upon which a winding up petition was based had to be resolved by arbitration, however hopeless or non-genuine that dispute was. *Salford Estates* was recently overturned in the BVI and England and Wales by the Privy Council in *Sian Participation Corp v Halimeda International Ltd* [2024] which confirmed that where there is no genuine dispute as to the underlying debt, the Court can simply proceed determine the winding up proceedings.

## Jurisdictions' responses to the challenges

The approach adopted by several jurisdictions is to introduce legislation supporting trust arbitration into their Trusts Acts. While a few have, by statute, made provision in some form for the arbitration of trust disputes (including Florida, Malta, Guernsey and the Bahamas), the Bahamas legislation is by far the most comprehensive.

The Bahamas legislation is effective because:

1. by way of a deeming provision, it treats non-parties "as if those parties were parties to that agreement"
2. it expressly gives the tribunal the same powers of the Court (including powers to remove and appoint trustees, or direct the exercise of powers)
3. it has express provisions for the representation of parties, including minors and unborns as well as parties under a disability, and grants powers to the tribunal to appoint litigation friends

## The future

It is clear that clients are increasingly interested in exploring arbitration as the mechanism for resolving their trust disputes. As matters stand, the Bahamas' trusts legislation is leading the field on this, providing a sophisticated and workable framework for arbitrating trust disputes. It has yet to be seen whether other jurisdictions, such as the BVI, will follow suit and introduce a similar statutory regime providing for the arbitration of trust disputes in the future. But by doing so, the BVI could strengthen its arbitration offering and see an increase in trust arbitration in the future.

Clients will no doubt also consider the possibility of ad hoc arbitrations where a dispute arises that does not involve issues of arbitrability or non-signatories. In many cases, it is harder to agree on a method to resolve a dispute after it has arisen. However, in trust and family disputes, all parties may have the same interest in preserving privacy.

## BVI - the jurisdiction of choice for arbitration

The BVI stands out as a jurisdiction of choice for arbitration. As a British Overseas Territory in an UNCITRAL jurisdiction, the BVI offers a robust legal framework for facilitating arbitration. The BVI is also a party to the New York Convention, and its arbitration legislation supports parties' own choice of representatives; and the rules provide flexibility as to where hearings take place. Further, the BVI Courts have developed a strong reputation and made clear their support for arbitration, including by the confidentiality of court proceedings relating to arbitration. The BVI International Arbitration Centre offers state of the art facilities to conduct arbitration.

## How Ogier can help

Ogier has one of the largest Dispute Resolution teams across our jurisdictions, advising on technical, strategic and procedural aspects across the spectrum of contentious commercial issues and disputes. Our team has experience in all matters relating to international arbitral proceedings, and we have a pedigree in local and cross-border trust dispute resolution. Our trusts disputes specialists form part of Ogier's Trusts Advisory Group, working seamlessly alongside Ogier's non-contentious private client and corporate lawyers.

For more information or to find out how Ogier can advise you in this area, contact a member of the team listed below.

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