ARBITRATION AMENDMENT BILL: IS TRUST ARBITRATION ON ITS WAY?

By Jeremy Johnson, Partner, Wynn Williams

Introduction

The Justice Select Committee has recently been considering the Arbitration Amendment Bill (Bill) which passed through its first reading in April 2017.

The Bill intends to make three changes to the Arbitration Act 1996 (Act):

a. introducing provisions that validate arbitration clauses in trust deeds and makes them binding arbitration agreements as well as giving arbitrators the power to appoint representatives to act for minor, unborn and unascertained beneficiaries;

b. reversing the presumption of open hearings in High Court proceedings related to arbitrations; and

c. preventing parties from resisting arbitral awards on a jurisdictional basis not raised sufficiently early in the arbitration process.

On 22 February 2018 the Justice Select Committee heard from submitters on the Bill including AMINZ, the Law Society and Sir David Williams KNZM QC.

It also heard from the Ministry of Justice which produced a department report (Report) that recommended the Bill not proceed. Further submissions, to enable those interested to respond to the Report, were then called for.

This article looks at the Report and its contentions as they relate to trust arbitration. It then sets out why the Bill should proceed rather than, as suggested by the Report, relying on the provisions in the Trusts Bill also before the Justice Select Committee.

It is hoped that the Justice Select Committee will allow the Bill to proceed in order to better facilitate the arbitration of trust disputes in New Zealand.

The Report's concerns

The Report's concerns about the Bill appear to be:

a. the Trusts Bill makes ADR, which includes arbitration, more clearly available and effective in resolving trust disputes;[1]

b. trusts law is highly complex and has developed over centuries with the High Court exercising an inherent jurisdiction to supervise trusts and it is not appropriate for an arbitral tribunal to fulfil an aspect of this role. [2]

Unfortunately the Report is not accurate in relation to these two points and it is inconsistent with the views of the English Trust Law Committee on the same matters. Each of these issues will be addressed in turn.

Comparison between the Bill and the Trusts Bill Provisions

The Report says that the Trusts Bill contains better and more comprehensive provisions relating to the arbitration of trust disputes. In particular [43] of the Report says "the Trusts Bill makes ADR, which includes arbitration, more clearly available and effective in resolving trust disputes".

That is not the case; the Trusts Bill creates a more cumbersome process as this comparison shows:

a. the Trusts Bill requires court approval before an arbitration of a trust dispute can occur[3] – the Bill does not require court approval;

b. the Trusts Bill sees the court appoint the arbitrator and also sees the court appoint any representative of unborn, minor and unascertained beneficiaries – the Bill does not leave arbitrator choice to the parties (or general law) and the appointment of a representative to the arbitrator; and

c. the Trusts Bill does not mandate arbitration when an arbitration clause is in a trust deed in contrast the Bill mandates arbitration where an arbitration clause is included in a trust deed.[4]

The Trusts Bill provisions are unrealistic. Few parties will apply to the court for an arbitration; it will lead to delay, additional cost and, until a series of judicial decisions dealing with when a court will order arbitration, uncertainty of outcome.

It is also unclear if the court must also approve arbitral awards given the requirement for a court to approve an ADR settlement and the definition of ADR settlement used in the Trust Bill. If that is the case then an arbitral process becomes entirely pointless given the court must approve the outcome.

The Trusts Bill provisions actually undermine arbitration and are contrary to New Zealand's previously arbitration friendly approach. The Trusts Bill does not do what the Report represents it does.

Consistency with the law of trusts and court supervision

Contrary to the Report the Bill is more consistent with the basic law of trusts than the Trusts Bill. That is because this Bill automatically validates arbitration clauses in trust deeds whereas the Trusts Bill does not.

Adhering to the terms of a trust deed has been described as a fundamental duty of trustees.[5] Yet the Trusts Bill only recognises this in relation to when the settlor excludes arbitration of trust disputes. It does not recognise this when the settlor mandates the arbitration of trust disputes.

In this regard the Trusts Bill demonstrates howit is not pro-arbitration and how it is not consistent with this fundamental tenet of trust law. By giving effect to the trust deed – if it includes an arbitration clause – the Bill is both pro-arbitration and more consistent with trust law.

The Report has a clear focus on the need for court supervision of arbitrations (for example at [46]). It is this that seems to drive both:

a. the need for court approval of arbitrations; and

b. the court's role in appointing arbitrators and representatives for minor, unborn and unascertained beneficiaries.

This focus is misplaced. For example the Report states:

> *[t]rusts are a creation of equity and common law developed over many centuries. The law of trusts is highly complex and specialised for this reason, and the High Court historically exercises an inherent jurisdiction to supervise and intervene in the administration of a trust.*

This is a sweeping generalisation made without context. In fact:

a. there are a number of areas of the law – such as maritime insurance law – where development of the law was court led yet arbitration is considered appropriate;

b. the ability of the High Court to exercise inherent jurisdiction over trusts is simply an expression of the courts general role in vindicating the rights of parties in commercial and other relationships. The same objection is not raised in relation to the law of contract although the same generalisation could be made; and

c. the proposed court supervision in the Trusts Bill is primarily procedural (approval of arbitration and appointment of the arbitrator) substantive oversight is passed to the arbitrator on appointment.

The objection that court supervision of trust arbitration is required – to the extent of needing court approval before you can arbitrate - because it involves a trust is therefore, incorrect and not even carried through into the Trusts Bill.

It is, also, not a position even supported by the courts. For example in the case of Welker v Rinehart[6] - which was the dispute between Gina Rinehart and her children about various trusts – the New South Wales Supreme Court (in a judgment upheld on appeal) said in relation to a dispute resolution clause in a dispute about removing a trustee that:[7]

> *...there is no reason why a dispute between beneficiaries and a trustee, including an application by beneficiaries for removal of the trustee, could not be referred to arbitration and, a fortiori, mediation...If anything, public policy encourages the private resolution of disputes concerning family matters, and there is no reason why this should not include family trusts.*

A similar approach was taken by Lord Denning in In re Tuck's Settlement Trust[8] where he said:

> *I see no reason why a testator or settlor should not provide that any dispute or doubt should be resolved by his executors or trustees, or even by a third party...If two contracting parties can by agreement leave a doubt or difficulty to be decided by a third person, I see no reason why a testator or settlor should not leave the decision to his trustees or to a third party.*

In addition the argument that court supervision of trust disputes is required is entirely circular; court supervision of trust disputes can only be required if it is assumed that trust disputes are not arbitrable to begin with.[9]

That raises the question of what the underlying concerns of Report writers actually are? Is it that arbitrators – generally senior lawyers and retired judges – are incapable of selecting appropriate representatives for minor, unborn and unascertained beneficiaries and only an active judge can?

Or is it that arbitrators – again being senior lawyers and retired judges - will "get the law wrong"?

Such concerns are already dealt with via the Arbitration Act by way of:

a. the provisions relating to the setting aside and resisting enforcement of arbitral awards (especially where there are breaches of natural justice); and

b. the provisions relating to appeals on questions of law.

This important aspect of the court's jurisdiction was recognised in Welker by the New South Wales Court of Appeal when Bathurst CJ said:[10]

> *[t]he supervisory jurisdiction of the court is not ousted. It continues to have the supervisory role conferred upon it by the relevant legislation, in this case the Commercial Arbitration Act.*

It is acknowledged that trust disputes are unique and do require special provisions. That is provided for by way of allowing the arbitrator to appoint representatives for those who cannot represent themselves. If an arbitrator proceeded without making such an appointment then any award made would not be binding on them anyway which is the ultimate protection.

The Trust Law Committee

Finally the Report is inconsistent with the 2011[11] report of the Trust Law Committee (**TLC**). The TLC was set up in the summer of 1994 as a group of leading academics and practitioners dedicated to researching

weaknesses of trust law in England and Wales and ways of improving it.

The TLC is based at King's College, London. At the time the report was done in 2010 members included Sir Peter Gibson, Professor Paul Matthew, John Wood, Christopher McCall QC, Mark Herbert QC, Simon Taube QC, Simon Jennings, Robin Ellison and Henry Freydenson.

The work of the TLC is well respected in England including by its Law Commission.

The TLC report supported amendment to the (English) Arbitration Act 1996 to give validity to provisions in wills and settlements imposing a resort to arbitration (except disputes about the validity of the trust).[12]

Interestingly the TLC was not concerned with any of the objections raised by the Report; indeed they do not appear to have been mentioned. Instead it emphasised the desirability of the arbitration of trust disputes and did not require additional court supervision as proposed by the Report.[13]

Of particular relevance is paragraph [16] which said:

> *[t]here is a further positive reason for adopting arbitration in the trust field in England and Wales, namely that there is already a strong and respected legal history of arbitration here (for contractual disputes), coupled with still well-respected legal professionals offering the required expertise (as litigators, advocates and as arbitrators) to conduct trust arbitration at every level, together with an internationally respected statute, the Arbitration Act 1996. It is legitimate to hope and expect that, if that Act were capable of amendment so as to incorporate trust disputes within its ambit (which we believe to be the case), that would add significantly to the attraction of arbitration, and of arbitration clauses in settlements and wills, for settlors and testators abroad as well as at home.*

The same applies to New Zealand.

Conclusion

It is unfortunate that the Ministry of Justice, through the Report, has adopted such a negative view of the Bill and of the value of allowing the arbitration of trust disputes.

It is hoped that the Justice Committee in its report will set aside the objections of the Report and allow the Bill to proceed so that New Zealand can join other jurisdictions such as Arizona, Florida, Missouri, New Hampshire and South Dakota in facilitating the arbitration of trust disputes.

End Notes

1 Paragraph [42] of the Report.

2 Paragraph [46] of the Report.

3 It is unlikely the provision saying it can occur 'where all parties agree' will ever be used as that will require a fixed trust without any unborn, minor or unascertained beneficiaries which are rare.

4 Such provisions are common in New Zealand. They are also common in history – for example George Washington's will included such a clause.

5 *Smith v Hugh Watt Society Inc* [2004] 1 NZLR 537 (at para 62).

6 *Welker v Rinehart* (No 2) [2011] NSWSC 1238; *Rinehart v Welker* [2012] NSWCA 95.

7 *Welker v Rinehart* (No 2) [2011] NSWSC 1238 at [25].

8 *In re Tuck's Settlement Trust* [1978] 1 Ch 49.

9 HW Tang and Paul Tan, '*Singapore: Trust Disputes and Arbitration*' in Arbitration of Trust Disputes, (Oxford University Press, 2016) at [15.15].

10 *Rinehart v Welker* [2012] NSWCA 95 at [175]. The Commercial Arbitration Act is the equivalent of New Zealand's Arbitration Act 1996.

11 Originally published in 2010 and then updated.

12 Paragraph [4] of the TLC report. The TLC also recommended a provision requiring public hearings unless all the parties agreed otherwise, the interests of one or more children were involved or the court directed to the contrary. That was proposed to take into account Article 6(1) of the European Convention on Human Rights which does not apply in New Zealand. Further such a provision would be of limited effect in New Zealand given that most trusts are wide discretionary trusts and the interests of children will regularly be involved in the dispute.

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Clients report 'superb advice' from Wynn Williams, where 'the response times are excellent and the advice is always on point and can be trusted'. 'His counsel is wise', say clients of Christchurch-based head of dispute resolution Jeremy Johnson, who is 'in a league of his own, excellent to deal with; clients trust his impressive legal knowledge'. He advised Church Property Trustees on negotiations with the Crown concerning ChristChurch Cathedral. He also represented an investor in Mako Holdings Limited in a High Court action to recover NZ$4m provided to the company in the form of unsecured loans, which centres on allegations of breach of directors' duties and reckless trading.

Jeremy is a Fellow of the Arbitrators' and Mediators' Institute of New Zealand for Arbitration; he is the youngest person to have achieved this distinction. He is also a Fellow of the Chartered Institute of Arbitrators. Jeremy also received the Sir Ronald Davison Award for excellence in arbitral award writing. He is available to appear as counsel in arbitrations and to take appointments as an arbitrator.

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