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ARBITRATION IN TRUST DISPUTES – THE GOOD AND BAD

As Jersey plans to introduce changes to its trusts law, Damian Evans, Partner, Walkers Jersey, and Paul Buckle, Group Partner, Walkers Guernsey, take a look at how arbitration may play a larger role

As businesses in the Channel Islands peer anxiously over Brexit’s shoulder and ‘The Donald’ storms into the White House amid protests in the United States, the world’s communities have never felt so divided.

The Government of Jersey, in the context of trusts law (and proposing to follow Guernsey’s lead), has started consultation on possible amendments to its Trusts (Jersey) Law 1984, which would allow a settlor to include within the trust instrument a clause that requires all or any disputes relating to the trust to be adjudicated upon by an arbitrator. This would signify a momentous change in the manner in which trust disputes are resolved in Jersey – avoiding hostile Court proceedings in favour of arbitration.

The proposals would mean that the decision of the arbitrator would be binding against the settlor, trustee, successor trustees and protectors, and also on beneficiaries (including those beneficiaries as yet unidentified or who are children).

The primary advantage of arbitration is that trust disputes (whether between beneficiaries or between beneficiaries and trustees) can be resolved privately and confidentially and the private affairs of the trust be kept away from the public glare of a hostile dispute in Court.

There are, however, disadvantages to the proposed amendments:

● Whether or not such an arbitration clause could legally bind a beneficiary who is not, in ordinary circumstances, a party to the trust instrument is unclear.

● Where parties are already in dispute, there’s the risk that such disputes will flow over into the process of selecting one or more arbitrators, thereby creating a resolution process that may take longer than the adversarial Court process itself.

● There’s also a risk that the arbitration process could prove more costly than litigation through the Jersey Courts because of the need to pay for one or more arbitrators who are specialists in the field of trusts for the duration of the case (as well as legal advisers).

● The courts of Jersey and Guernsey are the location for some of the most intricate and advanced trust litigation in the world – the judgments from the Channel Islands’ judges are cited as leading authorities in courts around the world. Arbitration may lead to a decrease in the number, quality and variety of cases before the Channel Islands’ courts, with a risk that Jersey trust law as a separately identifiable body of legal principles will diminish.

● It’s unclear whether an arbitration award made in the absence of a voluntary submission to arbitration will be enforceable in a foreign jurisdiction.

In its consultation paper, the Jersey Government has stated: ‘Whilst Jersey naturally wishes to be at the vanguard of new developments for the trusts industry, [it] has concluded that it is not desirable to impose enforced arbitration in the trusts context, certainly at this time.’

In times of increasing uncertainty, whether imposed arbitration will become part of Jersey’s trust law remains to be seen. A final decision is pending and it will likely become clear in the early part of this year.

What is clear is that a settlor who chooses to include an arbitration clause in a trust instrument (whether it is legally binding or not) is giving a strong indication to those who may ultimately benefit from the trust itself that hostile litigation is a course of last resort, with alternative dispute resolution (ADR) being preferable in all circumstances.

Whilst the proposed Jersey model doubtless has Guernsey’s rules for trusts and ADR in mind, it has, perhaps sensibly, not gone as wide.

The Guernsey rules embrace all forms of ADR, not simply arbitration, but seem to have rarely, if ever, been used in practice. The reason for that is probably the cumbersome process for representing minor and unborn beneficiaries, and the fact the rules are limited to claims arising from breaches of trust.

The Jersey model, therefore, is probably a better one – and one which is more likely to result in Jersey being a centre for trust arbitration, as is the case for the Bahamas, for example.