Conference Notes: A Matter of Trusts*

A thought leadership event organised by the Singapore International Commercial Court (SICC) and the Singapore International Dispute Resolution Academy (SIDRA) (in association with White & Case). (5 August 2019; Supreme Court Building Viewing Gallery)

I. Introduction

1. The SICC and SIDRA recently concluded a thought leadership event on dispute resolution options for trust disputes. The key issue was: given the increasing prevalence of alternative forms of dispute resolution ("**ADR**"), why was there still uncertainty as to whether trust disputes were amenable to ADR (and in particular, arbitration)? The distinguished panellists[1] provided a stimulating discussion of the various conceptual and practical difficulties faced in submitting trust disputes to arbitration.

2. The panel started by pointing out that the field of trusts was a rich, open-ended canvas, extending beyond simple traditional estate planning and wills. In fact, many types of commercial financing structures involved different types of trusts. Disputes arising from these structures clearly had the potential to be resolved by international commercial arbitration. Yet, this potential remained untapped.

3. *First*, from an international perspective, arbitration was the product of both common and civil law. But among arbitration practitioners, only the small subset of common law practitioners were familiar with trusts. Even then, practically speaking, there was a "schism" in the legal profession. In the United Kingdom, for instance, practitioners that specialised in the "grubby" world of commercial practice were traditionally kept separate from the more "refined" Chancery practitioners that specialised in equity (i.e. trusts). Law firms also often separated the two practice areas. Thus, there were two distinct bodies of practitioners that often do not communicate. This led to a lack of cross-fertilisation of ideas, resulting in knock-on effects on arbitration. Consequently, while there was increasing civil law recognition of the concept of trusts, international commercial arbitration was still dominated by practitioners who largely had no interest in or familiarity with trusts.

4. *Furthermore*, regarding the financing elements, there was no universal appetite for arbitration. This is because banks and lenders desired quick results, to which arbitration did not always readily commend itself. Trustees and settlors, too, generally wished to confer immediate benefits due to *e.g.*, implications on tax. Accordingly, it was often the international commercial courts that first came to mind when parties looked for an expedient dispute resolution forum. It was harder for arbitration to take root in such a setting. But the central problem was that the particular juridical characteristics of a trust dispute render it conceptually difficult to reconcile with arbitration. Several issues arose from these characteristics.

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[1] In order of seating, the panel speakers were: **Lord Jonathan Mance**, International Judge of the SICC; Ms **Mary Walker**, Barrister, 9 Wentworth Chambers; **Cavinder Bull SC**, CEO, Drew & Napier LLC; Mr **Robert Kirkness**, Barrister, Thorndon Chambers (Moderator); **Toby Landau QC**, Barrister, Essex Court Chambers Duxton; Mr **Andrew Butler**, Barrister, Thorndon Chambers; Ms **Julie Raneda**, Partner, Schellenberg Wittmer; and Ms **Hazel Tang**, Counsel, International Chamber of Commerce.

II. Issues in resolving trust disputes with arbitration

5. Three main issues were discussed by the panel were:
   (a) consent;
   (b) the arbitrator's competence to make findings and order remedies; and
   (c) recognition and enforcement of arbitration awards.

A. Consent

6. A trust was traditionally not considered an agreement or contract. Yet, arbitration required consent by the parties. Consequently, how do beneficiaries actually consent? Can they be characterised as parties to the agreement? And what about beneficiaries who are either (a) not yet ascertained, (b) not yet born, or (c) lack the legal competence to consent?

7. A possible answer could lie in the concept of "deemed acquiescence". The United States had, for instance, developed the doctrine of "direct benefits estoppel", where beneficiaries that claim under a trust are estopped from denying the very conditions that come with it.

8. However, while the 2018 ICC Arbitration Model Clause incorporated this concept,[2] it was unclear whether such clauses could be recognised and enforced under the 1958 New York Convention.[3] Furthermore, where European Union Member States were concerned, there was also the legal issue of whether deemed acquiescence contravened the basic right to public justice under Article 6 of the European Convention on Human Rights.

9. Moreover, it was suggested that deemed acquiescence did not seem to operate on the basis that the benefit was conditional on a true acceptance. On the contrary, acceptance was said to be deemed as following on from the benefit. The benefit was therefore a given, and the acquiescence was a "tag-on" of some sort. To put it another way: if everyone accepted that beneficiaries who are not yet identified, born, or lacked the competence to consent, are still beneficiaries, that demonstrated that the benefit was independent of any assent or agreement. Of course, the problem could be more apparent than real. Trusts which arose in most commercial settings are bargained for; and those transactions, while interconnected and complicated, would likely have the necessary consent characteristic of arbitration.

B. The Arbitrator's competence to make findings and order remedies

10. The panel recognised that there was uncertainty over whether the powers historically enjoyed by the court were "delegated" to arbitral tribunals. While courts have traditionally exercised their supervisory function over trust disputes in a wide variety of ways (including the power to remove trustees, vest property in the trustee, and even vary the trust terms), these powers were not usually expressly covered by the terms of a trust. If so, would an arbitrator enjoy that power by default? What findings could he or she make? And even if the arbitrator did enjoy that power, would the arbitrator (a)

[2] The relevant portion of the 2018 ICC Arbitration Model Clause reads: "Any beneficiary claiming or accepting any benefit, interest or right under the Trust, shall be bound by, and shall be deemed to have agreed to, the provisions of this arbitration clause."

[3] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)

recognise that he possesses those powers, (b) be comfortable with granting the remedies, and (c) grant those remedies appropriately?

11. Therefore, clarity was needed, possibly through legislation. While New Zealand had recently passed the Trusts Act of 2019, the provisions did not go so far as to confer powers in specific terms to the arbitrator. Moreover, New Zealand had decided that arbitrators could not determine issues concerning the validity of trusts.

12. Ultimately, trust disputes will require the arbitrator to decide if he has the power to make certain findings, and award the consequential remedies. This must lead to practical considerations about the expertise of the arbitrator – including whether he knows enough about trusts and, by extension, whether arbitrators who are well-versed in this field are readily available.

C. Recognition and enforcement

13. Finally, there was the possibility that all the difficulties above relating to consent and powers would be re-opened at the stage of recognition and enforcement. Consequently, the resolution would depend on which jurisdiction the relevant assets were in. This was described as a major disincentive to using arbitration, since there would be always be an inherent risk to the finality of an arbitral ruling on a trust dispute. Furthermore, it was suggested that even if the ICC Model Clause purported to bind persons who were not party to the arbitration agreement, it would likely not be enforceable under the New York Convention. Indeed, the evidential requirements under the New York Convention (*eg*, the need for the parties' signature) were unlikely to be fulfilled.

IV. Litigation?

14. Given these difficulties, did the benefits of arbitration still exist in the context of trust disputes? After all, parties could simply litigate. Indeed, it was suggested that arbitration's purported advantages of party autonomy and procedural flexibility were overrated. For instance, arbitration institutional rules which gave parties the right to determine, *e.g.*, how long they had to submit pleadings, have led to protracted disputes. If neutrality of the decision-maker was an issue, choice of court clauses existed to safeguard the parties. As to the purported benefits of cost and speed: arbitrators must be paid, and they were potentially very expensive.

15. In this respect, it was suggested that the SICC avoided these conceptual problems. The trust dispute would simply be a question of jurisdiction decided in the usual way (via service and the doctrine of *forum non conveniens*). The SICC also managed to provide parties with confidentiality and the full range of remedies usually sought.

V. Concluding thoughts

16. The panel gave a thought-provoking and interesting discussion about the various difficulties faced in submitting trust disputes to arbitration. As these issues are likely to remain for now, it will be interesting to see how they are dealt with in the future.