John G Walton
Commercial Barrister and Mediator

ARBITRATION OF TRUSTS DISPUTES

Are we there yet?

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Trust Disputes

In my article on the Arbitration Amendment Act 2019 in the last issue of *LawTalk* (8 May 2019), I referred to the transfer of various provisions in relation to arbitrating trust disputes from the Arbitration Amendment Bill to the Trusts Bill. A logical approach, as the Trusts Bill deals with the wholesale reform of trust law; the Trustee Act being relatively untouched since it was passed in 1956.

As already reported elsewhere on a number of occasions, New Zealanders seem to love family trusts. Sadly, when trust disputes arise, the breakdown in family relationships is only exacerbated by the glare of publicity and the delay inherent in the courts process. While there is a legitimate public interest in the law in this area, the prurient interest in the private affairs of the wealthy is harder to justify. Arbitration, with the ability to appoint a decision maker expert in the field, privacy in the process and (hopefully) less delay than the alternatives, is ideal for such disputes.

Technically, despite the recent Rinehart decisions out of Australia (most recently, the High Court of Australia today), arbitration sits uncomfortably with trust disputes, primarily due to the fact that settlors tend to be the sole parties to trust deeds, making it hard to establish any agreement to arbitrate between the disputing parties, and the rights of all beneficiaries need to be protected – those unborn or otherwise unascertained and those lacking legal capacity.

Arbitration Amendment Bill 2017

The Arbitration Amendment Bill, as originally drafted, proposed three critical changes – (1) validating arbitration provisions in trust deeds by deeming them to be arbitration agreements under the Arbitration Act 1996; (2) dealing with the appointment of representatives for unascertained beneficiaries, and those lacking legal capacity; and (3) providing for the approval of settlement agreements by the arbitral tribunal. The rationale for the amendments was that, despite the legal vacuum over enforceability, many trust deeds contain arbitration provisions; and that most settlors, trustees and beneficiaries would prefer not to have their disputes aired in public.

BANKSIDE CHAMBERS
Level 22, 88 Shortland Street, Auckland 1010, New Zealand
phone +64 9 308 0514 | fax +64 21 696 161 | mobile +64 21 473 656 | email john@johnwalton.co.nz | www.johnwalton.co.nz

Trusts Bill 2017

The alternative dispute resolution provisions of the Trusts Bill appear to have suffered from a paucity of time for those involved to consider the provisions proposed in the Arbitration Amendment Bill that the Select Committee dealing with the latter had referred to them. As a result, clauses 137-142A of the Trusts Bill lack that clarity required of legislation of this type. In particular a number of changes are needed to ensure that the good intentions that lay behind the provisions do not create an unintended and adverse consequence to the ability of other jurisdictions to recognise and enforce a New Zealand based award. Not to put too fine a point on it, those good intentions are not immediately apparent from a casual reading of the Bill.

There are four areas of particular concern:

(1) Conflating arbitration, a binding determinative process, with mediation, a consensual process, under the umbrella of *ADR process* fails to recognise the fundamental differences between the two.

Judicial oversight for arbitral proceedings (dealt with in the 2006 amendments to the UNCITRAL Model Law and adopted in NZ in the Arbitration Amendment Act 2007) should be expressly limited to the appointment of the representatives for unascertained beneficiaries and those lacking legal capacity. Protections for due process, public policy and the like are already contained in the Model Law provisions adopted in Schedule 2 of our Act.

For mediation, the case for oversight of mediated agreements is more sensible. This distinction in the Bill, however, is far from clear.

(2) The separate definitions of *external* and *internal* matters provide a distinction in search of a purpose.

The difficulty with arbitration provisions in trust deeds is not that disputes may arise variously between trustees, settlors, beneficiaries and third parties, but that the only party to a trust deed is the settlor. The issue is not the disputants but the fact that there are no parties to an agreement to arbitrate. Forcing third parties, including putative beneficiaries not recognised by the trustees, into arbitration is a novel concept which may benefit from judicial direction, but in the main those disputes will go to arbitration anyway by agreement after the dispute has arisen.

(3) The Bill seeks to provide for enforceability by deeming trust dispute awards as *arbitral awards* under the Arbitration Act.

While an arbitral award is to be recognised as binding and enforceable as a judgment of the court under article 35 of Schedule 1 to the Arbitration Act, its legitimacy, particularly when it comes to foreign enforcement, is derived from the *agreement to arbitrate*, itself, under article II of the 1958 New York Convention on the Recognition and Enforcement of Foreign Awards. Without an agreement to arbitrate between the

disputing parties, enforcement under article IV will be problematic, notwithstanding the deeming provisions in the Bill in relation to the award.

(4) Party autonomy, and the right of the parties to refer a dispute to arbitration on its own terms, has been central to arbitration for centuries. Clause 138 enables trustees to refer disputes to an ADR process with the agreement of the parties (which would be the case under the existing law); the more critical issue is that where arbitration is provided for in a trust deed to deal with *intra partes* disputes, under clause 140(1) the court "may" enforce that provision.

On what basis the court may not enforce the arbitration provision is not covered. So, while a settlor may include arbitration in the trust deed, a dispute would not be arbitrable as of right in terms of section 10 of the Arbitration Act, nor would any parallel proceedings in court be stayed under article 8. The discretion is left with the court, with no guidance on how that discretion is to be applied and none of the clarity over the limits of judicial involvement offered in section 3. This question will be litigated with some enthusiasm by those wanting to disrupt the arbitral process.

Furthermore, clause 139 provides that while the court may appoint representatives for beneficiaries not yet ascertained or lacking legal capacity and the expectation is that those representatives will participate in the arbitration, they may reject the arbitral award after it has issued. Coming hard on the heels of the amendments to the provisions of articles 16 and 34 in the Arbitration Amendment Bill to reduce the opportunity for unsuccessful litigants to avoid inconvenient awards, this reservation looks very odd.

Overall, the proposals appear to overlook the protections, and oversight already offered by the courts, in articles 34 & 36 of Schedule 2 to the Arbitration Act for setting aside arbitral awards and refusing recognition; the proposed provisions appear to hedge their bets. These protections were agreed, and the level of judicial oversight limited, in the development of the UNCITRAL Model Law. This lack of confidence in the highly developed and international accepted approach to arbitration is troubling.

At the time of writing, the Bill is yet to be considered by the Committee of the Whole House, and to have its second reading (it is No 5 on the Order Paper). The Bill is long, complex and commendable in its efforts to reform the law of trusts, but the ADR provisions need review. The ADR section is a small part of the Bill, and the issues with it easily rectified. Rectifying them after the event will not be so easy, as the progress of the Arbitration Amendment Bill has shown.

In answer to the question proposed above, no we most definitely are not "there yet".