

The ICC initiative

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Abstract

This article examines the appointment, remit, and findings of the ICC Commission's taskforce on trusts and arbitration.

Trusts and arbitration has come a long way since the ICC Commission on arbitration, in October 2006, appointed a taskforce to examine the issue. There was, at the time, as little surprise at the lack of interest hitherto in the resolution of trust disputes by way of arbitration as there was at the desire to remedy this and to expand the ever growing province of arbitration.

Trust litigation and arbitration had been two different walks of life that had very much ignored each other. Understandably so, trusts were concerned primarily with family assets, arbitration had grown out of international commerce. Trusts were a device for asset holding, management, and distribution confined to countries with an English legal tradition, of which the courts had made sense since the Middle Ages. The growth of international commerce since the early 20th century, between parties with very different legal and judicial background, had turned arbitration into a natural means of dispute adjudication. And whereas trust and estate had been the turf of individual if not smaller law practices, international commerce was embraced by the ever bigger international law firms.

All of this was changing, though. The trust was gaining ground outside of its traditional territory as a means of estate and tax planning; people from a civil law background were discovering a new tool of *démembrement de propriété*. Trusts were being increasingly used in connection with international securities issues, shareholder arrangements and joint ventures, too. An international convention on the law applicable to trusts and on their recognition had been concluded, signed, and ratified by several countries outside of the trust realm.¹ Celebrity families had been bogged down in well publicized court proceedings, with obvious shortcomings, which were lengthy and obscenely costly. Most importantly perhaps, trust users, ie settlors and beneficiaries, from non-trust countries were growing more confident, less willing to accept that disputes among themselves and with trustees had to be handled in remote not to say random jurisdictions, in accordance with arcane if not alien procedural rules. In other words, globalization was compelling reconsideration.

Interestingly, perhaps the idea of this ICC taskforce had come from the French National Committee. French courts had been struggling with the concept of trust for a while, analysing it not satisfactorily in terms of *fiducie* and the like, though a 2005 court decision did establish a precedent acknowledging the idiosyncrasy of trusts, including especially, in the case of discretionary trusts, the non-attribution of income and gains arising in the trust to either the settlor or the beneficiaries. France had signed and ratified the Hague Convention.²

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1. The Hague Convention on the law applicable to trusts and on their recognition of 1985, signed by 14 and ratified by 11 countries: Australia, Canada, Cyprus, France, Hong Kong, Italy, Liechtenstein, Luxembourg, Malta, Monaco, The Netherlands, UK, United States San Marino, Switzerland.

2. The recently enacted set of French rules on the taxation of trusts with French resident settlor, beneficiaries or real property (transfer tax and wealth tax) may be seen by some as the death knell of trusts in France; the fact is, though, that these rules display a thorough acquiescence to the trust and its features (still without imputation of income and gains arising), in a leading civil law jurisdiction.

The brief of the trusts and arbitration taskforce set up by the ICC Commission on arbitration was:

to study and identify specific issues related to ‘trusts & arbitration’ and, if appropriate, to prepare a report; and to study the possibility of suggesting a draft ICC model arbitration clause to be included in the trust deed and, if deemed appropriate, to propose such clause and to prepare an explanatory note.

Thirty seven members were nominated to the taskforce by 15 national committees. The taskforce met three times under the chair of a seasoned international arbitrator³ and the author of this article. Members exchanged comments and suggestions between the meetings. A letter to the national committees was sent out in the Spring of 2008. This triggered further comments and suggestions. A model arbitration clause together with an explanatory note were eventually approved in ICC Commission on arbitration plenary session and published in the *ICC Bulletin* 19(2) (2008) 9–11.

There was some doubt as to the suitability of the International Chamber of Commerce to enquire into dispute resolution in the field of trusts, which was not a usual ICC preoccupation.⁴ First, though, it was held, trust services had evolved into a significant industry involving major commercial players and, second, given its multi-national and multi-cultural fabric the ICC was well-suited for the task.

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The working group did not think it necessary to prepare an academic study, as there had been several articles on the subject matter—there has been a fair

amount of thinking and rethinking and writing in the meantime.

Quite rapidly the members of the working group came to agree on:

- (i) the interest of arbitration as a means of resolving trust disputes, (ii) the appropriateness of the ICC rules, with no need to adopt specific new arbitration rules, and (iii) the need to provide an adapted trust arbitration clause for inclusion of trust deeds

(Letter to national committees). There were hurdles, but these could be overcome, with the right precautions.

There was no reason why the real or perceived advantages of arbitration acknowledged in international commercial arbitration would not apply to the resolution of international trust disputes: first and foremost perhaps, confidentiality, but equally the selection of the adjudicator and the choice of the most appropriate procedural rules, and also the limited means of appeal. All of which are supposed to bring about time and therefore cost savings. The selection of the adjudicator, the arbitrator or arbitrators, and the choice of the applicable procedural rules (with any given discretion left to the arbitral tribunal), thereby sparing settlor and beneficiaries what often appears to them as random jurisdiction with alien procedural rules, seemed very compelling. It is a fact that, leaving aside beneficiaries, settlors from non-trust countries have scant knowledge and receive little advice at the time of execution of the trust deed and more often than not are in for a great surprise and, sometimes, a bruising experience when resorting to the courts.

It did not escape the taskforce that many trust jurisdictions had developed over the years and in statute a series of sophisticated rules designed to duly attract and bind the numerous different actors and subjects involved, in relation to a broad range of

3. Alexis Mourre.

4. Meanwhile, the new ICC Arbitration and ADR Rules, effective 1 January 2012, have done away with any restriction of the use of the ICC institutional arbitration system to mere commercial disputes (see art 2 (iv)).

issues. Inasmuch as the reservation of trust litigation practitioners went to the arbitrability of trust disputes, it was noted, however, that other issues had been deemed not arbitrable in the past, yet over time arbitration had gained recognition there too, to wit, labour and, more interestingly, competition. The idea of ‘ousting the jurisdiction of the ordinary courts’ in itself did not seem anathema to the working group.

True, trust deeds were very different creatures to contracts,⁵ but there had been various theories under English law on which to reconcile arbitration agreements contained in trust deeds with the English Arbitration Act 1996, including especially the deemed acceptance theory.⁶ The fact that trust disputes often concerned unborn or unascertained beneficiaries, who needed due representation, was not seen as an insurmountable obstacle either.

The working group was particularly alert to the many and various laws potentially applicable and, therefore, to the potential conflicts: the law of the subject matter (the trust), *lex causae*, (as chosen or not by the settlor⁷), any law that the parties would have selected to govern the arbitration agreement separately from the trust (pursuant to the principle of severability of the arbitration agreement), the law of the seat of arbitration, *lex arbitri*, the national law determining the personal status of persons involved not of age and, to a lesser extent, the law of the country or countries where the award would have to be enforced, in the light of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.⁸

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The members of the taskforce with more of an arbitration bent were probably surprised by the sheer scope of possible trust disputes. This is reflected in the explanatory note, paragraph 3. The working group’s reference was the very broad range of internal trust issues listed and covered in The Hague Convention Article 8. There was controversy whether certain matters, not disputes strictly speaking, actually lent themselves to arbitration such as directions and construction summonses and applications concerning the appointment, retirement, and removal of trustees (both within the ambit of The Hague Convention), and requests for information by beneficiaries. Hence, the caution about statutory jurisdiction provisions in the explanatory note, paragraph 10.

The working group was acutely aware of the traditional supervisory function of the courts of the state whose law governs the trust, not to say, as some would contend, of the cardinal part played by the courts in the very existence of the trust. So there was clearly ground if not authority—save of course for legislation that an arbitration agreement contained in a trust instrument be dealt with as an ordinary arbitration agreement—for an antagonistic respondent or other concerned parties to challenge the jurisdiction of an arbitral tribunal and commence parallel court proceedings in the trust jurisdiction.

For the international arbitration practitioner, perhaps not fully appreciative of the above hurdle from another vantage, the defining and taxing issue of trusts and arbitration was the attraction of non-signatories to arbitration or the extension of arbitration to non-signatories, namely, most beneficiaries and, obviously, unborn or unascertained beneficiaries. A free and clear agreement to arbitrate lies at the heart of the extraordinary means of dispute resolution that arbitration is.

5. True also, the standard suggested ICC general model arbitration clause does refer to ‘contract’, reading:

All dispute arising out of or in connection with the present contract shall be finally settled . . .

6. See L Cohen and M Staff, ‘The Arbitration of Trust Disputes’ (1999) 7(4) *Journal of International Trust and Corporate Planning*.

7. See Hague Convention, arts 6 and 7.

8. Most countries are signatories, including preferred trust jurisdictions such as Bermuda, Bahamas, Cayman Islands, Guernsey, and Jersey.

The agreement of the settlor, the trustees, and protectors was hardly a problem; they would have executed the trust instrument containing the arbitration clause, and one could see to it that future trustees and protectors did, too.⁹ As regards non-signatory beneficiaries, a mechanism was required to bind them. The taskforce naturally considered the views of English trust practitioners proponent of arbitration and found the deemed acceptance theory persuasive. It was noted that a similar approach had gained ground among Swiss authors, who had recognized unilateral arbitration clauses in last wills and statutes of foundations, that would apply in a trust context as well¹⁰ (without prejudice to the written form requisite under Swiss law). The mechanism to bind non-signatory beneficiaries, whether existing, unborn or unascertained, adopted by the working group and used for the model clause, stemming from the deemed acquiescence theory, reads:

As a condition for claiming, being entitled to or receiving any benefit, interest or right under the trust, any person shall be bound by the provisions of this arbitration clause and shall be deemed to have agreed to settle all disputes arising out of or in connection with the trust in accordance with this arbitration clause

The agreement of the settlor, the trustees, and protectors was hardly a problem; they would have executed the trust instrument containing the arbitration clause, and one could see to it that future trustees and protectors did, too

Whether this would effectively extend jurisdiction over the concerned beneficiaries had to be verified under the *lex arbitri*, the explanatory note cautions.

And under the *lex causae*, too, as far as the risk of parallel proceedings was concerned—the possibility of not removing the jurisdiction of the courts over certain matters, eg the appointment/removal of arbitrators, was suggested.

It was felt that under The Hague Convention the broad range of issues covered by Article 8 and the power of the settlor to unilaterally choose the law applicable to the trust under Article 6, without any restrictions as to jurisdiction, carried the power to unilaterally not only prorogate any state courts as exclusive forum but to provide for arbitration.¹¹

Possible forfeiture clauses, whereby a beneficiary loses their entitlement under the trust if they resort to the ordinary courts instead of arbitration, were also discussed as a practical way of reducing the likelihood of a beneficiary seeking to challenge an arbitration clause. The working group did not think it necessary, though, whether to include this in the model clause or to condone it in the explanatory note.

For the international arbitration practitioner, an unambiguous agreement to arbitrate may not be enough, as under certain national arbitration laws, with the understanding of the New York Convention, the arbitration agreement need be in writing. The taskforce was reminded, however, first, that the requisite of written form was not a requisite of validity but of evidence and, second, that this requisite was generally abating, to wit the United Nations Commission on International Trade Law Working Committee working towards mitigating the requirement of written form under both the UNCITRAL model law and under the New York Convention.¹²

Unborn or unascertained beneficiaries and minor beneficiaries, separately from the issue of their attraction to arbitration as non-signatories, raised the

9. The relevant provision of the ICC model arbitration clause reads:

The settlor hereby agrees to the provisions of this arbitration clause and the trustees, any protector and their successors in office, by accepting to act under the trust, also agree or shall be deemed to have agreed to the provisions of this arbitration clause. Accordingly they all agree to settle all disputes arising out of or in connection with the trust in accordance with this arbitration clause.

10. T Wüstmann, 'Anglo-Saxon Trusts and (Swiss) Arbitration: Alternative to Trust Litigation?' *IFC Review Newsletter* 07 April 2010 (article features very comprehensive bibliography).

11. Interestingly, in Switzerland, party to The Hague Convention, when enacting the enabling legislation (see in particular art 149 b (1) PIL) the matter was not specifically addressed.

12. Art II (2) and Article VI (1) (a).

question of their representation. Whereas under English and English derivative laws, it would usually be the trustee who would represent the interest of such beneficiaries, or a representative (also called litigation friend) would be appointed for them by the court, the laws of many other countries, in relation to minors, provide for their representation by their parents or a guardian, and foreign systems of representation could not run against the mandatory or *ordre public* nature of such provisions—incapacity is indeed a motive for refusing enforcement under the New York Convention.¹³ The taskforce thought that the matter of the representation of unborn and unascertained beneficiaries was probably best dealt with by the arbitral tribunal along the same lines as a court would in the relevant trust jurisdiction, not heeding any *lex arbitri*. The explanatory note contains a brief general caution on the matter of representation of minors and unborn and unascertained beneficiaries.¹⁴

The multi-party character of trust disputes is a distinct feature of trust disputes. As a first consequence, it was thought best if not necessary that the arbitral tribunal be appointed by the ICC Court of arbitration, the administrative body of ICC arbitration, and not by the parties.¹⁵ Bringing all parties concerned to the proceedings is another requirement; it goes to the effectiveness if not the validity of the eventual decision. Although it was appreciated that all parties concerned had to be brought in a timely way, it was not thought appropriate to burden the arbitral tribunal with a duty to notify these parties; this was left essentially to the claimant and to any other concerned parties. The taskforce thought, as regards joinders, that a distinction had to be made between joinders prior to and joinders after the

signature of the terms of reference¹⁶—the constitution of the tribunal is not dependent on the terms of reference, but the terms of reference set the frame and course of the proceedings. As put in the Letter to the national committees:

If a request for joinder (whether by a party claiming to be a beneficiary or to participate in the arbitration or by a party to the arbitration claiming that the award should be made opposable to a non-party beneficiary) is made prior to signature of the terms of reference, the group believes that the rules provide sufficient guidance.

The Arbitration and Alternative Dispute Resolution (ADR) Rules 2012, Article 7, provide even better guidance.

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In the case of a request for joinder after signature of the terms of reference, the situation is more complex. Although thought generally undesirable, such late joinders had to be accommodated; and the then ICC Rules of Arbitration did not stand in the way. The Arbitration and ADR Rules 2012, which contain a whole new chapter, Multiple parties, Multiple contracts, and Consolidation (Articles 7–10), are amenable to the specific joinder provisions contained in the fourth and final paragraph of the model clause, subject to a couple of minor amendments.¹⁷

The New York Convention was generally not considered a deterrent or significant hurdle. The

13. New York Convention art V (1) (a).

14. Explanatory note, para 7 *in fine*.

15. Model clause, first paragraph.

16. The terms of reference remain an important feature of ICC arbitration under the Arbitration and ADR Rules 2012.

17. Suggested new joinder provisions to be inserted in ICC arbitration clause:

If, at any time, any person requests to participate in arbitral proceedings already pending under the present arbitration clause, or if a party to arbitral proceedings pending under this arbitration clause desires to cause any person to participate in the arbitration, the requesting party shall present a request for joinder to the Secretariat of the Court setting forth the reasons for the request. It is hereby agreed that if the Court is *prima facie* satisfied that a basis for joinder may exist, any decision as to joinder shall be taken by the Arbitral Tribunal itself. When taking a decision on the joinder, the Arbitral Tribunal shall take into account all relevant circumstances, including, but not limited to, the provisions of the trust and the stage of the proceedings. It is further agreed that the Court may reject the request for joinder if it is not so satisfied, in which case there shall be no joinder. In case of a joinder after the signature or approval of the Terms of Reference, an amendment to the same will be made either through signature by the parties and the Arbitral

Convention, an extraordinary achievement half a century ago under the auspices of the United Nations, is an undertaking by the now vast majority of countries to recognize an unambiguous agreement, in writing, by parties desirous of departing from ordinary jurisdiction and submitting to arbitration any difference arisen between them (Article II) and to enforce arbitral awards rendered pursuant to such an agreement (Articles III and IV). The Convention does not lay down the written form as a condition of validity of the arbitration agreement; only it allows a contracting state to refuse enforcement ('enforcement of the award may be refused') when such an unambiguous written agreement cannot be proven (Article V (1) (a)). The Convention does not stand in the way of the enforcement of an arbitral award rendered pursuant to a unilateral arbitration agreement in a country where this form of arbitration agreement (no written form required) is admissible.¹⁸

Inasmuch as arbitral awards would be enforced primarily against the trustee, arbitration acquiescent trustees are obviously the key. A trustee, confident about the validity of an arbitration agreement (under *lex arbitri*) and not worried about the actual enforcement of any foreseeable award pursuant to such an agreement, would still want to be satisfied that, in the event, there is no significant risk of parallel court proceedings.

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Legislative action to treat an arbitration clause in a trust deed as a valid arbitration agreement for the

purpose of the local arbitration act would remove that risk altogether. To wit, section 63 of Trusts (Guernsey) Law 2007, confined, seemingly, to Guernsey law trusts and to breach of trust claims, however, and complete new regime under Bahamian Trustee (Amendment) Act, 2011, came into force on 30 December 2011 more radical and therefore meaningful.

What the ICC taskforce did was to put the case that, from an international arbitration perspective, as distinguished from a trust law point of view, arbitration was a workable alternative means of international trust dispute resolution. If one shared the view that an arbitration clause contained in a trust instrument did not pass the test of a valid agreement under the relevant law and statutory court jurisdiction could not be set aside (save for legislation to that effect), there was a risk of someone upsetting arbitration that had to be assessed taking into account all of the circumstance of the matter. The model clause and explanatory note pointing to the areas of potential exposure paved the way by providing a practical tool to go about it.

The working group felt that, in relation to international trust disputes, arbitration could become if not the preferred avenue of resolution, as it was in international commerce, but available as a sound alternative. There was demand. Jurisdictions not willing to adjust might lose their appeal.

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Tribunal or through approval by the Court, pursuant to Article 7 of the ICC Arbitration and ADR Rules. It is agreed that in such a case, the Court may take whatever measures that it deems appropriate with respect to the advance on costs for arbitration.

18. New York Convention art VII (1).