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EDITORIAL

This issue of *Asian Dispute Review* commences with an article by Seung Chong, Dakis Hagen KC and Stephanie Thompson on the possibility of arbitrating breach of trust claims in Hong Kong. Fan Yang and Jeremy Bartlett SC follow with an article in which they discuss the novel concept of 'collaborative arbitration'. This is then followed by an article from Elizabeth Chan and Caroline Thomas, who discuss international sports arbitration and call for a specialised sports dispute resolution system in Hong Kong.

Gracious Timothy Dunna and Jatan Rodrigues then shed light on the law applicable to an international mediated settlement agreement concluded under the Singapore Mediation Convention 2018. This is followed by the In-house Counsel Focus article by Adrian Luk, who analyses the costs and benefits in arbitration of Hong Kong's third party funding (TPF) and Outcome-Related Fee Structures (ORFS) systems, which he considers still to be at their early stages of development.

The Jurisdiction Focus article for this issue is on Macao, with Charles Ho Wang Mak and Fatima Dermawan providing insights on how the Mainland China-Macao Interim Measures Arrangement 2022 charts a new course in the realm of international legal co-operation and dispute resolution, and on recent legislative developments in arbitration in Macao.

Finally, this issue concludes with the News section written by Robert Morgan.

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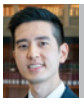

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The Arbitration of Trust Disputes in Hong Kong

Seung Chong, Dakis Hagen & Stephanie Thompson

In this article, the authors consider the extent to which disputes involving trusts may currently be arbitrated under Hong Kong law and why arbitration should be considered. Issues that may arise from such arbitrations, such as the exercise of trustees' powers to refer disputes, the binding effect of arbitral awards on beneficiaries and the enforcement of awards, are also considered. In the event that the government of the HKSAR should consider a specific statutory regime for the arbitration of trust disputes, the authors draw attention to, in particular, the trust arbitration laws of New Zealand and the Bahamas as exemplars.

Introduction

Hong Kong is a centre of wealth management, with about US$4,000 billion in assets under management. Assets held in trusts are valued at US$641 billion.[1] The government of the Hong Kong SAR recognises the importance of the wealth management industry and has recently granted tax concessions to family-owned investment vehicles.

Hong Kong is also a world-leading arbitration centre. The obvious question is whether parties may access arbitration there to resolve disputes arising out of trusts. There is no reason in principle why Hong Kong should not be open to the arbitration of such disputes. Its courts have consistently taken an expansive, pro-arbitration approach and the Hong Kong legislature continues to remove obstacles to

arbitration. For example, intellectual property (IP) rights can now be arbitrated in Hong Kong and it is not contrary to Hong Kong public policy to enforce arbitral awards concerning IP rights.[2]

In investigating this question, the authors posit a simple scenario: would it be possible to arbitrate a breach of trust claim in Hong Kong? A 'breach of trust claim' means a claim asserting that a defaulting trustee has acted in excessive execution of power or authority, for an improper purpose, in breach of the duty of adequate deliberation or in breach of the equitable duty of care, with a view to that trustee seeking a payment of equitable compensation. Of course, the universe of trust disputes is much wider than this. A focus on breach of trust claims is, however, sufficient for the purposes of the present analysis.

> "Hong Kong is … a leading world arbitration centre. The obvious question is whether parties may access arbitration there to resolve disputes arising out of trusts."

Reasons for arbitrating trust disputes

The reasons for arbitrating trust disputes are similar to those applicable in other areas, but may be more acute. Preserving confidentiality, for example, is more acute in trust disputes, not only because of the amounts involved, but also because information about beneficiaries can be relevant to future generations and risks exposing them to threats and opportunistic charmers. Although certain court processes involving trusts are commonly held in private, this is not as of right[3] and the trend globally is to hear breach of trust claims in open court. Even where proceedings are held in private, however, confidentiality is not absolute: the fact of the hearing might be disclosed or the judgment might be published with details anonymised.

> "There is no reason in principle why Hong Kong should not be open to the arbitration of such disputes. Its courts have consistently taken an expansive, pro-arbitration approach and the Hong Kong legislature continues to remove obstacles to arbitration."

In Hong Kong, maintenance and champerty remain criminal offences and torts,[4] but third party funding (TPF) of arbitration is now permitted without offending the common law rules.[5] These devices can enable less well-resourced beneficiaries to bring claims in arbitration which they could not otherwise bring in court.

The ability of parties to choose specialist counsel and tribunal members is particularly attractive, not only because of their expertise in trust law but also because the relevant trusts may be offshore-constituted trusts (such as STAR trusts constituted under Part VIII of the Cayman Trusts Act (2021 Revision)), in relation to which knowledge of the relevant offshore law will be essential.

A hallmark of arbitration is party autonomy. The parties can decide what is being arbitrated, the procedure and the remedies that the tribunal can award. This can lend speed to the process. It also enables the parties to consolidate disputes arising from trusts constituted in multiple jurisdictions in a single proceeding in a single forum, which can save time and costs.

Another advantage is the ability to enforce an award in any New York Convention jurisdiction. In particular, a Hong Kong award, whether institutional or *ad hoc*, can also be enforced in Mainland China.[6]

> "A hallmark of arbitration is party autonomy. The parties can decide what is being arbitrated, the procedure and the remedies that the tribunal can award. This can lend speed to the process. It also enables the parties to consolidate disputes arising from trusts constituted in multiple jurisdictions in a single proceeding in a single forum, which can save time and costs."

Practical issues encountered in trust arbitration

If there exist advantages in arbitrating trust disputes, why has this not become commonplace in Hong Kong? There are a number of technical reasons.

First, there is the question whether trust disputes are arbitrable at all. It is commonly accepted that certain subject-matter, such as those relating to family law, are not capable of being arbitrated. The Arbitration Ordinance does not itself say what is arbitrable. Instead, s 81 of the Ordinance provides that a court may set aside an award if "the subject-matter of the dispute is not capable of settlement by arbitration" under Hong Kong law or the award is in conflict with public policy. The authors consider it unlikely that a common law court in a financial centre would hold that a trust dispute is not arbitrable. Trusts are used daily in a wide range of commercial contexts (such as (*inter alia*) *Quistclose* trusts,[7] a seller holding assets on trust for a buyer post-closing and a trustee of bonds), and it is hard to imagine that a court would hold disputes arising from these trusts to be inarbitrable. In any event, s 16 of the Trustee Ordinance (Cap 29) (a provision discussed more fully below) specifically contemplates the submission to arbitration of disputes affecting a trust; it is therefore extremely unlikely that any trust dispute would be regarded as inarbitrable in Hong Kong.

The second issue is an objection that a trust is not an *agreement*, so that there is no agreement to arbitrate. This brings into question who is bound by an arbitration clause in a trust deed. An argument for saying that a beneficiary should be bound by an arbitration clause is that if he or she were to accept a benefit under the trust, then he or she should be bound by the terms of the trust.[8]

A third issue concerns how to bind minor, unborn and unascertained beneficiaries. In court proceedings concerning trust assets, the court may appoint a person to represent such beneficiaries.[9]

> "… [Section] 16 of the Trustee Ordinance (Cap 29) … specifically contemplates the submission to arbitration of disputes affecting a trust; it is therefore extremely unlikely that any trust dispute would be regarded as inarbitrable in Hong Kong."

Trust arbitration legislation

Several jurisdictions, such as New Zealand,[10] the Bahamas[11] and Guernsey,[12] have addressed these issues by passing specific legislation. In those jurisdictions, therefore, there is no debate as to arbitrability. In New Zealand, the court may enforce any provision in the terms of a trust that requires a matter to be referred to arbitration;[13] if there is no such provision, and where each party to the matter agrees, a trustee may refer the matter to arbitration.[14] Moreover, the court will appoint a representative for unascertained

beneficiaries who may agree to be bound by an arbitration agreement or award.[15] The Bahamian regime is different again and is addressed at length in one of the first published judgments on trust arbitration in the world, *Volpi v Delanson Services Ltd*.[16]

> "It is perfectly permissible for a successor trustee or a beneficiary (or group of beneficiaries) to agree with a former or outgoing trustee to submit a breach of trust claim against the latter to arbitration. Indeed, so much is explicitly set out in s 16(f) of the Trustee Ordinance …"

Is legislative reform necessary?

Is legislative reform necessary to arbitrate trust disputes in Hong Kong? Of course, if the relevant trust deed contains an arbitration clause and is governed by a foreign law which expressly provides for arbitration of trust disputes, Hong Kong parties may rely on the relevant foreign law. However, what if it does not? It is perfectly permissible for a successor trustee or a beneficiary (or group of beneficiaries) to agree with a former or outgoing trustee to submit a breach of trust claim against the latter to arbitration. Indeed, so much is explicitly set out in s 16(f) of the Trustee Ordinance, which permits trustees to "compromise, compound, abandon, *submit to arbitration,* or otherwise settle any debt, account, *claim*, or thing whatever relating to … the trust." (Emphases added.)

The question arises whether beneficiaries who were not parties to the arbitration agreement or the arbitration (including minor and unborn beneficiaries) would be bound by the outcome or whether they would be permitted to litigate

the breach of trust claim afresh in later proceedings (a most undesirable outcome, which is likely to deter an allegedly defalcating trustee (*viz*, one who is accused of embezzling trust funds) from submitting the claim to arbitration in the first place). An initial observation is that where a trustee has properly exercised power under s 16(f) of the Trustee Ordinance to compromise a claim, the compromise is understood to bind all the beneficiaries.[17] There is no logical reason why a trustee who properly submits a claim to arbitration would not also bind the beneficiaries to the outcome of that arbitration.

> "… [W]here a trustee has properly exercised power under s 16(f) of the Trustee Ordinance to compromise a claim, the compromise is understood to bind all the beneficiaries. There is no logical reason why a trustee who properly submits a claim to arbitration would not also bind the beneficiaries to the outcome of that arbitration."

Moreover, there is no doubt that, in the case of litigation brought in the High Court in Hong Kong, beneficiaries are

generally privies of the current trustee(s) and so will be bound by the outcome, even if they are not parties.[18] This is a function of the established law that issue estoppels arising from court judgments bind not only the parties but also their 'privies'. The term 'privies' does not merely include the parties' successors-in-title but also extends to a wider class of persons who, having regard to the subject-matter of the dispute, have a "sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party": see *Gleeson v. Wippell & Co Ltd*.[19]

However, where the claim is brought by a beneficiary against, say, a former trustee or a volunteer recipient of trust property without joining the current trustee, the situation may be different: to quote the reasoning of David Richards J (as he then was) in *Pugachev v Kea Trust Company Ltd*:[20]

> "I have no difficulty in saying that there is privity of interest between trustees and a beneficiary who controls the trust and the actions of the trustees and is the sole or principal beneficiary. But, generally, a decision against only one beneficiary is not in my view binding on the trustees or through them the other beneficiaries."

Whether the same principles apply to an arbitral award as opposed to a judgment - that is, whether an arbitral award may create an issue estoppel with regard to non-party privies - is a vexed question, because the starting point is that an arbitrator cannot make an award that is binding on third parties.[21] This question has been considered by both the English High Court (*PJSC National Bank Trust v Mints*[22]) and the Court of First Instance in Hong Kong (*Parakou Shipping Pte Ltd v Jinhui Shipping and Transportation Ltd*[23]).

> "… [W]hether an arbitral award may create an issue estoppel with regard to non-party privies - is a vexed question, because the starting point is that an arbitrator cannot make an award that is binding on third parties."

In *Mints*, the issue was whether parties to court proceedings were 'privies' of parties to an LCIA arbitration in the wider sense identified in *Gleeson* and were therefore issue estopped from denying certain allegations in the English Commercial Court. Foxton J held that while it was possible for an arbitral award to bind *Gleeson*-type privies, even if they did not fall within the category of persons upon whom arbitral awards are expressly said to be binding under s 58(1) of the English Arbitration Act 1996 (namely, "the parties and … any persons claiming through or under them"; cf the slightly differently worded s 73(1) of the Arbitration Ordinance), the features of arbitration require a more restrictive approach to binding *Gleeson*-type privies.[24] Those features include the contractual nature of arbitration, which restricts the ability of third parties to participate in the arbitration and challenge any award.[25] Of course, it is arguable that beneficiaries have rights against the trustee and can claim "through" a trustee within the meaning of s 58(1) of the English Arbitration Act and s 73(1)(b) of the Arbitration Ordinance. A court may therefore not be as cautious as Foxton J was in *Mints* when considering whether beneficiaries who are not parties to

an arbitration agreement are bound by an arbitral award issued in proceedings between the incumbent trustee and an allegedly defalcating former or co-trustee.

The Hong Kong Court of First Instance in *Parakou* was considerably more liberal than Foxton J had been in *Mints*, holding that the defendants in the proceedings before it were 'privies' of a company called Galsworthy, which had been party to an earlier arbitration with Parakou, such that they could rely on the result in the arbitration to strike out Parakou's claim.[26]

Yet, there must be some risk that beneficiaries will not be bound by the outcome of an arbitral award issued between a current and former trustee. Such an argument has superficial attraction: in trust litigation, a beneficiary who is dissatisfied with the trustee's conduct of the claim against a former trustee may apply to be joined or take over conduct of the claim. Not so in arbitration. Certainly, it appears unlikely that if a beneficiary brings a breach of trust claim against a predecessor trustee, the other beneficiaries will be bound by an issue estoppel, as that is, arguably, the position with an ordinary judgment: see *Pugachev* (*supra*).

"… [T]here must be some risk that beneficiaries will not be bound by the outcome of an arbitral award issued between a current and former trustee. Such an argument has superficial attraction: in trust litigation, a beneficiary who is dissatisfied with the trustee's conduct of the claim against a former trustee may apply to be joined or take over conduct of the claim. Not so in arbitration."

Whether an award binds privies (specifically, for present purposes, beneficiaries) in any subsequent proceedings depends on the law of the forum in which those proceedings are brought. The most likely fora for relitigation are jurisdictions in which a former trustee is resident or personally has assets, or which provide the governing law of the trust. However, non-common law jurisdictions may well take a restrictive approach to issue estoppel.

"Whether an award binds privies (specifically, for present purposes, beneficiaries) in any subsequent proceedings depends on the law of the forum in which those proceedings are brought. The most likely fora for relitigation are jurisdictions in which a former trustee is resident or personally has assets, or which provide the governing law of the trust."

A strategy is, however, available to reduce the risk of non-party beneficiaries relitigating matters submitted to arbitration outside of the context of specific legislation supporting trust arbitration. The agreement submitting the dispute to arbitration could be made conditional on the incumbent trustee obtaining the 'blessing' of the court to exercise its power to submit the matter to arbitration under s 16 of the Trustee Ordinance (discussed below).

All beneficiaries, including (through a representative) minor and unborn interests, could be joined to those ancillary directions proceedings. They would then be estopped from suggesting later that the breach of trust claim was otherwise

than properly submitted to arbitration. Such proceedings, being akin to a *Beddoe* application,[27] would most probably be held in private, thus protecting the confidentiality of the intended arbitration. This should go some considerable way toward preventing relitigation, since an issue estoppel would have arisen in respect of the arbitrability of the claim binding all the beneficiaries and/or it would be abusive for a beneficiary to suggest that the matter should not have been arbitrated.[28] There are several practical considerations for parties who may consider such a route, which include the following.

> "If the incumbent trustee is also the defendant to the breach of trust claim, this does not disable that person from applying for directions, but would require the surrender of his or her discretion on the question of the appropriateness of submitting the matter to arbitration (or later compromising the claims)[.]"

(1) The arbitration agreement should oblige the incumbent trustee to apply for a 'blessing' (approval) order of the court[29] (so that, for example, that person cannot sidestep the effect of an award that he or she does not like). The beneficiaries would also have standing to seek such an order.

(2) If the incumbent trustee is also the defendant to the breach of trust claim, this does not disable that person from applying for directions, but would require the surrender of his or her discretion on the question of the appropriateness of submitting the matter to arbitration (or later compromising the claims): see *Re F Trust*[30] for an example of where this happened in connection with a trustee compromising a claim by paying equitable compensation himself.

> "… [T]here would … be a strong case for treating as abusive any attempted relitigation by a beneficiary of a question which the trustee had the power to and did submit to arbitration with the blessing of the court obtained in proceedings to which that beneficiary was a party."

Such a strategy is not, however, watertight because it would be the decision to submit the matter to arbitration that the beneficiaries would be unable to go behind, rather than the arbitral award itself, but there would (in the present authors' view) thereafter be a strong case for treating as abusive any attempted relitigation by a beneficiary of a question which the trustee had the power to and did submit to arbitration with the blessing of the court obtained in proceedings to which that beneficiary was a party. The award itself is protected because a setting aside application must fall within the specific grounds in s 81 of the Arbitration Ordinance.

There is also the risk that some jurisdictions in which the parties later seek to enforce the award (eg, those in which the defendant trustee has assets) would regard the arbitration of trust disputes as being against their public policy and so refuse enforcement. In Hong Kong, that risk may be mitigated by the inclusion of a term in the arbitration agreement that the parties will support an application to enforce the award (s 84(1) of the Arbitration Ordinance) and for the court's

permission to enter judgment in the terms of the award (*ibid,* s 84(2)), albeit this could weaken the confidentiality of the process.

Conclusion

The authors leave for another day the question of what provisions Hong Kong should adopt if it should consider enacting trust arbitration legislation. The differences of approach between the Bahamian and New Zealand regimes would repay careful study.

"The authors leave for another day the question of what provisions Hong Kong should adopt if it should consider enacting trust arbitration legislation. The differences of approach between the Bahamian and New Zealand regimes would repay careful study."

1 As at 31 December 2022. *Source*: Hong Kong Securities and Futures Commission (SFC), *Asset and Wealth Management Activities Survey 2022* (August 2023), available at https://www.sfc.hk/-/media/EN/files/COM/Reports-and-surveys/AWMAS-2022_E.pdf.

2 Part 11A of the Arbitration Ordinance (Cap 609).

3 See, for example, *V v T and A* [2014] EWHC 3432.

4 Subject to certain exceptions, they are indictable offences punishable under s 101I of the Criminal Procedure Ordinance (Cap 221).

5 Part 10A of the Arbitration Ordinance (Cap 609). *Editorial note*: For further commentary, see Adrian Luk, *To Fund or not to Fund: The Costs of Hong Kong's Third Party Funding and Outcome-Related Fee Structures* (*infra*, pp 143-151).

6 Supreme People's Court, *Notice of Relevant Issues on the Enforcement of Hong Kong Arbitral Awards in the Mainland*, Fa [2009] No 415.

7 *Editorial note:* A *Quistclose* trust (so named after *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567, House of Lords) in which money lent for a specific purpose is held in a resulting trust for the lender where the purpose becomes impossible to fulfil.

8 See L Alcolea, *Arbitration of Trust Disputes* (2022, Edward Elgar), Chapter 3, for an expansive discussion.

9 Rules of the High Court (Cap 4A), Order 15, r 13.

10 Trusts Act 2019.

11 Trustee Act 1998.

12 Trusts (Guernsey) Law 2007.

13 Trusts Act 2019, s 145(1). This applies only to internal matters ie, where the parties are a trustee and one or more beneficiaries, or a trustee and one or more other trustees.

14 *Ibid*, s 143.

15 *Ibid*, ss 142 and 144. This applies only to internal matters.

16 Consolidated Appeals 2020/APP/sts/00013, 2020/APP/sts/00018, 28 December 2023 (Supreme Court of the Commonwealth of the Bahamas).

17 See Lynton Tucker, Nicholas Le Poidevin & Master Brightwell, *Lewin on Trusts* (20th Edn, 2023, Thomson Reuters/Sweet & Maxwell), at [49-004].

18 *Ibid*, [41–068]-[41–069]. The authors explain that there is an exception to this rule where a beneficiary has a demonstrably separate interest from that of the other beneficiaries, such as where one class will not benefit from any compensation recovered or will have their interests defeated, or where the trustee-plaintiff does not act in the proceedings in the interests of the beneficiaries. See also *Gleeson v J Wippell & Co Ltd* [1977] 1 WLR 510 at 515H, per Megarry V-C: "… [I]n relation to trust property I think there will normally be a sufficient privity between the trustees and their beneficiaries to make a decision that is binding on the trustees also binding on the beneficiaries, and vice versa."

19 *Supra* (note 18), at 514-515, per Megarry V-C.

20 [2014] EWHC 3547 (Ch), at [32].

21 *Vale SA & Ors v Benjamin Steinmetz & Ors* [2021] EWCA Civ 1087, at [31] (Court of Appeal, England & Wales).

22 [2022] EWHC 871 (Comm).

23 [2011] 2 HKLRD 1.

24 *Ibid*, at [24] and [26]-[27].

25 *Ibid*, at [27](i), (iii).

26 At [92], per Reyes J, applying the policy stated by the Hong Kong Court of Appeal in *China North Industries Investment Ltd v Shum*, Civ App No 321 of 2006 (21 December 2007), at [47]-[48], per Stock JA, that a person should not be twice vexed for the same reason.

27 *Editorial note*: So named after *Re Beddoe, Downes v Cottam* [1893] 1 Ch 547 (Court of Appeal, England & Wales). A *Beddoe* order enables trustees to obtain directions from the court approving their participation in litigation in their capacity as trustees and ordering that they will be indemnified from the trust funds in respect of the costs of the litigation.

28 See *Denaxe Ltd v Cooper* [2024] 2 WLR 142 on the function of *res judicata* and the doctrine of abuse of process in preventing relitigation of matters submitted by trustees to the court for directions.

29 In Hong Kong, this would be under Order 85, rule 2 of the Rules of High Court (Cap 4A). *Editorial note*: As to the origin and application of 'blessing' orders, see *Public Trustee v Cooper* [2001] WTLR 90; Mourant, *Trustee Decision-Making and the Role of the Court: 'Blessing' Applications* (March 2024), available at https://www.mourant.com/media---guides/mourant---trustee-decision-making-and-the-role-of-the-court---blessing--applications.pdf.

30 [2012] JRC 201 (Royal Court, Jersey).