ASA Special Series No. 41

Sports Arbitration: A Coach for Other Players?

Elliott Geisinger
Elena Trabaldo – de Mestral

Editors

Association Suisse de l'Arbitrage
Schweiz. Vereinigung für Schiedsgerichtsbarkeit
Associazione Svizzera per l'Arbitrato
Swiss Arbitration Association

JURIS

Chapter 6

"Consent" and Trust Arbitration[1]

Tina Wüstemann[2]

1. INTRODUCTION

Most arbitration practitioners have never been involved in a trust arbitration. This is not really surprising: until recently, trust litigation and arbitration pretty much ignored each other. While trust disputes are primarily concerned with family wealth and involve individuals rather than corporations, arbitration had grown out of international commerce. Moreover, trust litigation has long been the exclusive preserve of the English legal profession as most trust jurisdictions are former English territories and as such follow developments in English law.[3]

However, with increasing mobility of individuals in a shrinking world, trusts are today no longer confined to the Anglo-Saxon world, but have gained wider international recognition. Since the ratification of the Hague Trust Convention[4] and the introduction of jurisdictional rules for international trust disputes in 2007,[5] Switzerland fully recognizes foreign trusts and Swiss courts are, if certain requirements are met, competent to adjudicate trust disputes.

---

1 This article is not intended to be a comprehensive analysis of all the complex questions which arise in the context of trust arbitration and many of the issues covered are necessarily summary in nature. The focus will be on (non-commercial) family trusts as opposed to business trusts, which in some jurisdictions are treated more like a corporation than a trust. *Cf. also* Tina Wüstemann, "Anglo-Saxon trusts and (Swiss) arbitration: alternative to trust litigation?", Trusts & Trustees, 2012, No. 4, 341-347; Tina Wüstemann, "Arbitrating Trust Disputes", Arbitration in Switzerland, in Manuel Arroyo (ed.), *Arbitration in Switzerland: The Practitioner's Guide* (Kluwer Law International 2013) 1247 - 1263; Special Issue: Trusts and Arbitration, Trusts & Trustees, 2012, no. 4, featuring articles from several authors from different jurisdictions on the subject of trust arbitration. Issues No. 1 & 2 of the Journal Trusts & Trustees 2014 contain additional papers on trust arbitration from Toby Graham, David Brownbill QC and Dr. Georg von Segesser on trust arbitration, complementing the coverage of trust arbitration in Issue no. 4 of the 2012 Journal.

2 Tina Wüstemann, LL.M., Attorney-at-Law, Partner at Bär & Karrer Ltd., Zurich.

3 Bruno Boesch, The ICC Initiative, Trusts & Trustees 2012, no. 4, 316.

4 The Hague Convention on the Law Applicable to Trusts and on their Recognition of 1985 (SR 0.221.371).

5 Articles 149a-149e of the Swiss Federal Act on International Private Law (PIL; SR 291).

Trust litigation has substantially increased during the last years, and very often, massive amounts of money are at stake. One explanation for this development is the fact that more and more settlors are leaving substantial fortunes in complex structures in different jurisdictions. Another possible reason is purely generational: many offshore-trusts were set up by the settlors in the 1960s and 1970s and today, the next generation—with its own needs and visions—takes over. Also, trusts have increasingly come under attack by "outsiders" to the trust, such as forced heirship heirs, former spouses or creditors of the settlor.[6]

Courts in offshore jurisdictions such as Cayman, Bermuda, the Channel Islands or BVI, where trust litigation usually takes place, have been criticized for being overburdened and not always fit to handle family trust disputes. One case where the shortcomings of the court became apparent was the *Thyssen* case,[7] in which the judge, a QC from Hong Kong, after a two year battle before the courts of Bermuda, resigned after a dispute with the Bermudian government about his salary. The parties were then forced to settle the dispute.[8]

Already in the 1990s, representatives mainly from the trust industry started discussing the idea of using arbitration to resolve trust disputes but it is only since the last ten years that the appetite for trust arbitration is on the increase. In 2001, the American Arbitration Association (AAA) issued specific Wills and Trust Arbitration Rules and Model Arbitration Clauses, which were up-dated in 2012.[9] The International Chamber of Commerce (ICC) followed in 2008 and introduced a model arbitration clause (and related explanatory notes) for trust disputes.[10] The ICC Commission on Arbitration and ADR (as it is now called) currently proposes to reconvene its Trusts & Arbitration Task Force with a view to draft a revised model arbitration clause (conforming with the new ICC Rules as in force since 1 January 2012) and an updated explanatory note (reflecting the last five year statutory changes and the academic developments). In parallel, a number of trust jurisdictions such as Guernsey,[11] Malta,[12] the

---

6 Tina Wüstemann, "Current Trends in International Litigation", International Estate and Tax Planning 2014, Practising Law Institute, New York, 207-220.

7 Robert Ham, "The Thyssen Case: Swiss Law before Bermuda court", paper handed out at the 1st Annual Zurich Conference on International Trust and Inheritance Law Practice, (Zurich, 9 November 2005).

8 Tony Molloy QC and Toby Graham, Arbitration of trust and estate disputes, Trusts & Trustees, no. 4, 2012, 279.

9 AAA Wills and Trusts Arbitration Rules and Mediation Procedures, amended and effective as of 1 June 2012 (www.adr.org).

10 ICC Bulletin vol 19 No 2-2008, 9-11 and Bruno Boesch, FN 3, 322-323.

11 Pt II s. 63 Trusts (Guernsey) Law 2008.

Bahamas[13] and some US states (Florida and Arizona)[14] have recently implemented legislation for trust arbitration. Also, the UK Trust Law Committee considered in November 2011 an amendment to the UK Arbitration Act 1996[15] to make arbitration clauses in trust deeds enforceable in order not to lose out on this commercially viable business to other jurisdictions.[16] Finally, Jersey is currently considering the introduction of arbitration provisions into its trust law—so far as it concerns Jersey law governed trusts.[17]

Switzerland's importance as a center for trust services and its longstanding tradition in international arbitration makes it, in the author's view, a perfect venue for trust arbitration considering in particular the scarcely developed arbitration law and practice in several offshore trust jurisdictions.

Against this background, the present contribution deals with the specific issues which may arise in trust disputes and addresses the general features of trust arbitration before analyzing the terms and conditions of arbitration clauses in a trust context in comparison with arbitration clauses used in sports arbitration. Finally, the author concludes with an outlook on the prospects of trust arbitration.

---

12 Malta Arbitration Act, CAP 387, Section 15A.

13 The Trustee (Amendment) Act, 2011, Sections 91A, 91B and 91C. In addition to expressly enabling the arbitration of trust disputes, the new provisions also clearly specify the scope of the Arbitral Tribunal's powers by granting it all powers in relation to trusts that a domestic court enjoys. *See also* David Brownbill QC, Arbitration of Trust Disputes, Trusts & Trustees, No. 1 & 2, 2014, 30-36.

14 Ariz. Rev. Stat. Ann s. 14-10205 (West); Florida Statutes, Title XLII (Estates and Trusts), Ch731, s 731.401-Arbitration of Disputes. The American College of Trust & Estate Counsels (ACTEC), of which the author is a member, through its Arbitration Task Force, formulated a model statute for US States to allow the enforceability of arbitration clauses in wills and trust deeds, along with sample clauses to be used. The ACTEC Task Force advises to enact statutes in the states to allowing the settlors to incorporate binding arbitration provisions rather than leaving such controversies to the court. It needs to be noted that so far only Florida and Arizona have introduced legislation declaring arbitration clauses in trust deeds enforceable. Other US states have rejected arbitration clauses in trust deeds, declaring them ineffective. However, in November 2012, the Texas Supreme Court ruled in favor of enforcing an arbitration provision in an *inter vivos* trust in *Rachal v. Reitz*. This is a good decision for swinging the momentum in favor of trust arbitration in the US (http://www.supreme.courts.state.tx.us/historical/2013/may/110708.pdf).

15 Arbitration of Trusts Disputes by the UK Trust Law Committee ACTAPS Newsletter no 145, 2011, 13-15.

16 Unlike in offshore trust jurisdictions like Guernsey, Jersey and the Bahamas, who took the idea of trust arbitration up, there seems according to some trust practitioners to be currently no appetite in England for putting resource and money into this subject.

17 Georg von Segesser, A step forward: addressing real and perceived obstacles to the arbitration of trust disputes, Trusts & Trustees, No. 1 & 2, 2014, 37-51, who ranges into the laws of trust arbitration-friendly jurisdictions and addresses common reservations that many trust lawyers may have about arbitration.

2. TRUST DISPUTES

2.1 The Parties

In each trust relationship, there is a *settlor* who wants to protect and preserve his assets for the next generations under the control of a trustee for the benefit of beneficiaries, typically the settlor himself or his relatives. Apart from the trustee, the settlor may appoint a so-called *protector* to monitor the trustee's activities. While the *beneficiaries* have a strong (financial) interest in the trust assets, they play no part in the creation of the trust: they do not negotiate the trust deed nor do they select the trustee. From their point of view, they are "forced" into a relationship with the trustee and each other, rather than having agreed to be involved. Due to the different interests and positions of these key players, various disputes may arise. Trust disputes do, however, not only arise between these "*insiders*" but also with "*outsiders*" to the trust such as (ex-)spouses, forced heirship heirs or creditors of the settlor who try to attack the trust, to claw back trust assets or to question its validity.

In the context of trust *litigation*, it is important to be aware of the *role of the court* of the state whose law governs the trust. Apart from its judicial function, the court has in addition a supervisory function in relation to the administration of the trust, mainly for protecting the beneficiaries but also to provide guidance to the trustee. A trustee may for example ask the court for directions as to the (i) interpretation of an unclear provision in the trust deed (*constructive summonses*) or (ii) in relation to the conduct of his trusteeship (*directive summonses*).

2.2 Types of Trust Disputes

Trust[18] disputes are distinctively different from traditional commercial disputes in international arbitration: they concern individuals rather than corporations and often they are multi-party

---

[18] Trust is a concept developed by English equity courts during the 12th and 13th century. The trust is governed by the provisions of the trust deed and absent any specific provisions, general principles of common law apply, supplemented by local statutory trust law. While many (offshore) trust jurisdictions—mainly former territories or colonies of the British Empire—have developed their own trust law, they often follow the developments in English law. As such, they have adopted many British trust statutes or enacted similar legislation and the decisions of the British courts are highly persuasive for them. *But cf.* Jonathan Harris, Trusts & Trustees, 2011 No. 4 236, who notes that many offshore jurisdictions, which had previously tended to follow the English common law lines of authority, now find themselves increasingly departing from them in the pursuit of effective-asset protection legislation designed to attract trusts business to the local jurisdiction.

disputes. Trust disputes come in all forms and shapes and can be divided into three broad categories:

i) **Third Party Disputes** concern the trustee's external relationship with third parties, e.g. contracts with investment advisors.

ii) **Trust Disputes** concern external claims by creditors, (forced heirship) heirs or (ex-)spouses trying to attack or vary the trust. An example is the *Thyssen case*,[19] mentioned above, in which Baron Heini Thyssen argued before the Bermuda Court that the trust he set up to protect his business violated Swiss inheritance law to regain control of the trust assets. In this category falls also the Werner K. Rey case,[20] in which the district court of Zurich decided in 1999 that the financier Werner K. Rey did not respect the integrity of his Guernsey family trust and that the trust was thus a "sham" with the result that the substantial trust assets became part of Werner K. Rey's personal estate in bankruptcy. Trust assets worth billions are currently the subject matter of Swiss divorce proceedings between a Russian oligarch and his wife, in what could end up being the biggest divorce settlement ever in history. On 19 May 2014 the Geneva family court ordered that Mr. Rybolovlev must pay more than CHF 4 billion to Elena Rybolovleva. The judgment at the time of writing this article is not final yet; there are two levels of appeals possible.[21]

iii) **Beneficiaries' Disputes** or so-called **Internal Disputes** concern the relationship between the beneficiaries and the trustee. In this kind of disputes, which are basically disputes about the terms of the trust, the validity of the trust is not generally questioned. The ICC Trust Arbitration Clause applies to such Internal Trust Disputes.[22] Such disputes may

---

19 *Cf.* Robert Ham, FN 7.

20 Judgment of the Zurich District Court of 14 February 1994, ZR 98, 1999, Nr. 52, 225-259.

21 Decision of the Swiss Federal Supreme Court 5A_259/2010 *[Rybolovlev v. Rybolovleva]* of 26 April 2012. *Cf. also* Tina Wüstemann/Delphine Pannatier, Trusts in the context of Swiss Divorce Proceedings, Trusts & Trustees, 2011, No. 9, 883-882; Tina Wüstemann/Debora Gabriel, International Trust and Divorce Litigation in Switzerland, (Goodman/Harper/Hamlin/Matthews/Gale/Fudakowska, Burgess eds.), second edition, Jordans, 2013, 266-275. *See also* http://www.independent.co.uk/news/world/europe/worlds-most-expensive-divorce-costs-russian-billionaire-dmitry-rybolovlev-27bn-9400148.html.

22 *See* FN 9.

arise e.g. if it is not clear whether someone falls within a class of beneficiaries (e.g. is an illegitimate child of the settlor a beneficiary of the trust?). They may further concern the exercise of discretion by a trustee (e.g. did a beneficiary receive a large enough distribution from the trust?) or breach of trust claims (e.g. alleged mismanagement by the trustee of the trust assets). A famous example of such an Internal Trust Dispute is the Pritzker family feud where the actress Liesel Pritzker of the Chicago Pritzker family, who hold their USD 15 billion empire including the Hyatt hotel chain in trusts, sued her own father Robert Pritzker, who was the trustee of her trust, claiming that he looted her trust funds of USD 1 billion. The dispute was settled in 2005 after a court battle of three years.[23]

Most trust deeds contain a choice of law clause but no jurisdiction clause.[24] In many offshore trust jurisdictions, courts are competent to deal with trust disputes if the trust in question has been established and is governed by the local law of the respective jurisdiction even though the parties and the facts of the case may be unrelated to that jurisdiction. Trust users such as settlors, trust companies and beneficiaries from non-trust countries are today less willing to accept that disputes among themselves have to be litigated in remote jurisdictions in accordance with foreign procedural rules merely because the law of that jurisdiction happens to govern the trust. Accordingly, there appears to be a tendency to include jurisdictional rules in trust deeds in order to determine in advance a convenient forum for trust disputes.[25]

3. TRUST ARBITRATION

There is consensus today among trust practitioners that the advantages acknowledged in international arbitration equally apply to the resolution of international trust disputes: First, confidentiality to avoid potential humiliation and reputation risks, but equally the

---

[23] http://articles.chicagotribune.com/2005-06-12/news/0506120282_1_penny-pritzker-jay-pritzker-family-businesses.

[24] David Brownbill QC and Edward Cumming of XXIV Old Buildings: International Trust Litigation: Choosing your Battleground?, Who's Who Legal100, March 2014, http://whoswholegal.com/news/ukbar/article/31247/%20franco-vigliano (last visited 15 May 2014).

[25] *Cf.* Article 149 b(1) PIL, which foresees the possibility that the settlor prorogates a Swiss court to adjudicate internal trust disputes. Another question, however, is whether the foreign trust court - in particular in its supervisory function – would recognize the jurisdiction of the Swiss courts rather than assert its own jurisdiction in that regard.

selection of the expert adjudicator and the choice of the most appropriate procedural rules seem very compelling.

For an arbitrator to assume jurisdiction over a trust dispute there must be (i) a valid arbitration agreement, (ii) the representation of all interested parties (including unborn, minor and unascertained beneficiaries) and (iii) the subject matter of the dispute must be *arbitrable*.

From the range of problems identified in the context of trust arbitration, the primary hurdle is whether a beneficiary can be compelled to arbitration on the basis of an arbitration clause in a trust deed.

4. THE ARBITRATION CLAUSE IN A TRUST CONTEXT

The establishment of a trust is not considered as a contract nor is a trust akin to a corporation. Rather, the settlor, *by unilateral act*, transfers property into the trust, i.e. to the trustee—be it his stake in a family business, an art collection or valuable real estate portfolio—and confers rights and obligations on the other parties to a trust such as a trustee, a protector or a beneficiary.

Despite the fact that a trust deed is not a contract nor a corporation, following the principle of severability of the arbitration clause, a trust deed may contain an arbitration clause provided the clause is worded as such in the trust instrument.

4.1 Settlor, Trustees, Protectors

Settlor, trustee(s) and protector(s) execute and sign the trust deed containing the arbitration clause when accepting office and they can see to it that future trustees or protectors do so, too. They have thus explicitly (or in exceptional cases when appointed by the court, impliedly) accepted the arbitration clause when accepting office. This is also the approach followed by the ICC Arbitration Clause for Trust Disputes:[26]

> ...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... [emphasis added].

---

[26] *See* FN 9.