

Resolving Trusts Disputes in the UAE (Part 1)

Patrick Dillon-Malone S.C. - Senior Counsel - International Litigation Group / Litigation
- Dubai International Financial Centre

Over the past few years a statutory framework for the governance of trusts has been established in each of Dubai International Financial Center (DIFC) law (Trust Law, DIFC Law No. 4 of 2018), UAE federal law (Trust Law 2020) and Abu Dhabi Global Market (ADGM) law (Trusts (Special Provisions) Regulations 2016 read together with the Beneficial Ownership and Control Regulations 2018 as amended). The jurisdiction of each of the DIFC Courts, the onshore UAE civil courts and the ADGM Courts in respect of trusts and trust-related disputes falling within their remit are complemented by their supervisory jurisdiction over trust-related arbitrations seated in their respective jurisdictions.

With the advent of this patchwork of new trust regimes, it is a good time to ask, what are the types of trust disputes that can arise and what are the remedies available to settlors, beneficiaries and trustees for resolving internal and external disputes relating to the scope, validity and administration of trusts in the UAE.

This article considers the types of applications and proceedings that typically arise in relation to trusts, and addresses the question of whether a trust-related dispute is likely to be arbitrable, or whether it must naturally be resolved in court. The way in which each statutory regime more specifically accommodates and provides tailored relief for trusts disputes will be the subject of a follow-up article in the next Law Update.

Trust Disputes and Trust-Related Proceedings and Applications

Proceedings involving trustees include third party disputes, trust disputes and beneficiaries' disputes. Most litigation between the trust and third parties involves the trustee rather than the beneficiaries, for the reason that any contract is in the name of the trustee (in the case of a contractual claim), the relevant property is held in the name of the trustee (in the case of a proprietary claim) and the relevant tortious duty is owed by or to the trustee (in the case of a tortious claim). Although, as between the trustee and the beneficiaries, the beneficial ownership clearly lies with the beneficiaries and, as far as the outside world is concerned, this is generally not material.

It is not unusual for trust-related disputes to cross over or be some combination of the above types of dispute. For instance, a proprietary claim by a third party to assets on the basis that they should never have formed part of the trust fund is a trust dispute, even though brought by the third party against the trustee; or, for example, proceedings to determine the proper construction of the deed of trust may well in practice be a dispute between some beneficiaries and the trustee as to how the fund should be administered.

There is a further class of cases where third parties claim against one or more of the beneficiaries on the basis that the assets of the trust belong not to the trustees but to the beneficiary in question, as for example under mandatory rules of property ownership in a foreign jurisdiction.

It is often helpful to consider if a trust-related dispute is an internal dispute as between beneficiaries or

between beneficiaries and the trustee, where the privacy and discretion of arbitration or even mediation may be a critical consideration, or whether it is a dispute with external features that makes it unsuitable for private mediation or arbitration.

Applications and proceedings that are said to be 'internal' include applications for the construction of a trust deed (so-called 'construction summonses'); applications for the removal of trustees or protectors; applications by trustees for directions (known in common law courts as Beddoe applications); applications by trustees to approve a certain course of action (known as blessing applications), as well as actions for rescission or rectification of the trust deed, actions against the trustee for breach of trust, and disputes between beneficiaries.

Certain disputes with third parties may also lend themselves to arbitration, for example contractual disputes as between the trustee on behalf of the trust and a third party where the dispute falls within a valid arbitration agreement binding on the trustee.

However, there are also a range of so-called 'rocket-launcher' external disputes, involving a direct attack on the validity of the trust deed or of a will or other instrument under which the trust is created. Typically, these external challenges are advanced on grounds of undue influence, or lack of capacity, or breach of inheritance rights, including under forced heirship regimes, or for breach of any vested community interest in property within the trust.

Most of these challenges have in common the idea that the challenger has a superior vested right to participate in the bounty of the testator or settlor of the trust. Generally speaking, these types of dispute are not appropriate for arbitration.

Even in respect of 'internal' disputes, as a matter of practicality and principle it is often difficult to resolve the issues in contest without resort to the natural and overarching supervisory jurisdiction of the courts over the proper administration of trusts.

For example, it is the natural domain of the court in its supervisory jurisdiction to decide on the protection of an arbitrator by giving its blessing to a proposed course of action, for example where a significant transaction or liquidation of assets, a potential conflict of interest or a decision not to abide by professional advice or submissions on behalf of any class of beneficiaries, may be engaged.

Similarly, a trustee typically brings a Beddoe application before the courts when he or she is unable to obtain an indemnity from a beneficiary to pursue or defend a claim against a third party and therefore seeks directions from the court permitting the claim to be brought, defended or continued (with the consequence that the costs incurred will be costs in the administration of the trust).

Other examples of the natural bias in trust-related disputes towards judicial adjudication include:

- the public interest and frequent necessary involvement of state tax authorities in trust-related proceedings;
- the protection of adult beneficiaries' rights to information by statute and at common law (where the scope and content of a trustee's duty will vary according to whether the beneficiary has an interest in possession or a future interest, whether vested by remainder or contingent);
- claims by beneficiaries against directors of corporate trustees, based on derivative claim principles and known as "dog-leg claims"; and
- applications by trust protectors who are appointed to watch over long-term trusts, and who play a part in adapting those trusts to factual and legal changes and assisting in continuity and avoiding disputes.

Many trusts disputes will also have multiple strands, and it will be appropriate to resolve all aspects together in the one judicial forum.

Enforceability of Trusts-Related Awards in International Arbitration

Even allowing for the broadest construction of the concept of an “arbitration agreement” under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, it is generally recognised that in the absence of special statutory provision there are significant obstacles to imposing arbitration clauses on the beneficiaries of trusts.

Not least, the beneficiaries may be minors, or as yet unborn, or otherwise unascertained, and more generally there is some forceful comparative authority that the right of access to court to ensure the proper governance of trusts is part of the core irreducible rights of beneficiaries, to the extent that statutory deeming provisions or forfeiture/conditions precedent clauses in trust instruments may not be operative (or recognised as operative in an international recognition and enforcement context).

The manner in which international arbitration practice is developing in respect of trusts, including by statutory intervention in many leading trust and offshore financial jurisdictions, is beyond the scope of this short article. However, as a broad observation, it may be said that the trend of legislative reform and international standard-setting (including by the ICC Model Arbitration Clause for Trust Disputes) is towards the greater arbitrability of trust-related disputes. This is being achieved through a variety of mechanisms and deeming provisions whilst preserving significant islands of competence, for example the rocket-launcher disputes mentioned above, that are the natural and exclusive preserve of the courts.

Against that backdrop, the following are examples of disputes in which arbitration will typically be advantageous:

- fee disputes, including fiduciary and legal fees
- prudent investment disputes
- document construction
- principal and income disputes, including adjustment powers
- trust terminations or severances
- accounting disputes
- declaratory relief in general (where contentious enforcement unlikely to arise), and
- issues relating to the appointment, removal and retirement of trustees, together with the terms of indemnity for outgoing trustees in respect of tax and other outgoings

Conclusion

Having regard to the variety and types of proceedings and applications that typically arise in trust-related disputes, it can be anticipated that the growth of trusts for the management of private wealth in the UAE and in the wider Middle East is likely to result in increased trusts-related litigation before the civil and commercial courts of the UAE. In Part 2 of this article, to follow, the more precise statutory remedies and the reliefs available to stakeholders under the DIFC, onshore UAE and ADGM trusts regimes will be further explored.

For further information, please contact [Patrick Dillon-Malone SC](mailto:p.malone@tamimi.com), International Disputes Group (p.malone@tamimi.com) or [Richard Catling](mailto:r.catling@tamimi.com), Partner, Corporate and Commercial (r.catling@tamimi.com).