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Alternative Dispute Resolution Methods to Resolve Trust Disputes

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The lack of privacy in court proceedings, and the fact that they will always carry a degree of uncertainty, is prompting high net worth individuals to seek alternative ways of resolving disputes over high value trusts.

Traditionally, trusts disputes tend to be resolved through court proceedings. This is because administration of trusts is subject to supervision by the court, generally by the court where the trust is administered, or the court whose law governs the trust.

Provided a beneficiary can demonstrate a genuine potential of them benefiting from the trust, they will likely be able to invoke the court's supervisory jurisdiction to obtain information about the administration of the trust or hold the trustees to account for decisions taken. Trustees can invoke the court's supervisory jurisdiction to obtain directions for major decisions concerning the trust, or where they face litigation with a third party.

There are certain weakness to court proceedings, not least because court judgments are often tricky to enforce. This is particularly an issue given the frequent need for non-monetary relief in trust disputes. Common law courts, except for those in Canada, do not generally enforce the non-monetary judgments of foreign courts, and many civil jurisdictions simply do not enforce foreign court judgments at all.

Whilst the courts of some jurisdictions have developed strong expertise in applications and disputes involving trusts (which can often be a factor supporting the establishment of a trust structure in one jurisdiction over another), many courts do not have this expertise, or may view trusts with suspicion.

In addition, court proceedings tend to be public and, for numerous reasons, trustees and beneficiaries may not want the fact nor details of a dispute to be in the public domain. Most jurisdictions are committed to the notion of open justice and there has been a growing trend towards transparency in court proceedings concerning trusts.

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For example, In V. v T, A in 2014 the English High Court ruled that a variation of trust application should not be heard in private, despite the application disclosing sensitive commercial information relating to an operating company owned by the trust. The Court did impose an anonymity order to shield the young beneficiaries from the knowledge of the family’s extensive wealth.

Whilst it remains the case that in jurisdictions like England and Wales certain trust applications will be held in private, this will not be the case where trustees are involved in third party disputes.

What, then, are the alternatives to court proceedings for the resolution of trust disputes?

ARBITRATION

Arbitration awards are often easier to enforce cross-border (under the New York Convention) than court judgments, but arbitration tends to be very little utilised in trusts.

In the United States, trusts are viewed as contracts, so it is likely that an arbitration clause will be binding on trustee and beneficiaries in the United States. Outside the United States, however, trusts are not treated, nor viewed, as contracts. This makes it less likely that an arbitration clause in a non-US trust will be upheld and binding on the beneficiaries, as they are not technically parties to the trust deed.

Arbitration awards are much easier to enforce crossborder than court orders are. However, because of the unreliability of an arbitration clause in a trust being upheld, there are problems commencing arbitration proceedings in the first place.

Many trusts are discretionary and dynastic, and the representation of minors and unborns in arbitration proceedings, though not impossible, is therefore problematic.

MEDIATION

Mediation is a formal negotiation facilitated by an independent negotiator. In many jurisdictions, mediation cannot be imposed on parties without their consent. There are exceptions: parties in England and Wales may be penalised in costs post-trial if they unreasonably refuse to mediate; and in some Canadian provinces the court routinely appoints a mediator whose report on mediation efforts is a mandatory step

in the court process.

The strongest benefit of mediation is that it is confidential: neither party can refer to discussions or documents used in the mediation process.

On the negative side, the outcome is not binding unless the parties sign a written settlement agreement. It can be expensive, and timing is everything: mediate too soon and the parties may not fully understand their position; leave it too late and positions may be so entrenched, or so much money may have been expended, that a resolution by mediation is impossible.

EXPERT DETERMINATION

This is a binding process that is often used to determine disputes of a specialist or technical nature. The parties appoint one or more experts in a particular field to determine the dispute, based on agreed terms of reference (TOR).

In a commercial situation, the parties will often include a clause in contracts that provides for certain disputes to be resolved by expert determination, where the scope for dispute about the law or facts is likely to be limited.

In a trusts context, disputes over the valuation of assets, such as shares, would be suitable for expert determination. It does, however, have broader application, such as the resolution of a third party trust dispute requiring determination of matters of law and quantum.

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The key advantages of expert determination are as follows:

- The process is flexible, informal and speedier than court, as the parties can effectively control the process and the timetable for resolution.
- The parties can choose the expert, rather than find out who the presiding judge is hours before the trial.
- The time frame for the process can be agreed by the parties and expert.
- Provided the expert agrees, the determination can be dealt with by reference to the papers and written submissions where appropriate, avoiding the need for a hearing and oral evidence from witnesses.
- The parties’ submissions and the outcome are confidential.

Expert determination is a viable and cost effective alternative to court proceedings, but there are some dangers that require careful navigation.

The determination is final and binding on the parties. There is no right of appeal unless the TOR provide for it, although this is usually confined to cases of “manifest error”. It is imperative to ensure that the issues which need to be determined have been framed properly, and to thoroughly vet the proposed expert, before committing to their appointment.

Like mediation, one party cannot force the other to agree to expert determination: all parties must agree to be bound. This can have complications for trustees who want to engage in expert determination with a third party but owe obligations to the beneficiaries.

In order for expert determination to work effectively, the following steps should be taken:

- The beneficiaries must agree that the matter be resolved by expert determination.
- Alternatively, the court must authorise the trustees to proceed down this route, particularly if the beneficial class includes minors and unborns.
- Provisions should be made in the TOR to
    - Permit the trustees to disclose the determination to its beneficiaries, and
    - Enforce the expert determination at court in the event of non-compliance.

There are obvious advantages for trustees to use expert determination in appropriate cases, and it should certainly be considered as an option.