

# Arbitration and trust disputes



## Alternative dispute resolution is a viable option for trust disputes in The Bahamas

By Theominique Nottage

Among The Bahamas' arsenal of financial products and services is the Bahamian trust, which serves as one of the more favoured tools in wealth management, attracting individuals and corporate entities alike to The Bahamas.

The Bahamian trust benefits from The Bahamas' strong jurisprudential foundation, rooted in the English common law, coupled with innovative statutory reform like the *Trustee Amendment Act, 2011* (the Act). Through the Act, The Bahamas introduced the possibility of resolving trust disputes through arbitration. Arbitration is an alternative form of dispute resolution that has become more popular in recent years as a means to avoid extended and costly litigation proceedings due to the level of party autonomy, its confidential character and its speedy nature.

Section 91A of the Act enables any dispute or administration question in relation to a trust to be determined by arbitration in accordance with the provisions of the trust instrument, thus providing for the incorporation of arbitral clauses in trust instruments. While the provision for the resolution of trust disputes by arbitration

was an exciting development in 2011, in more recent years, that excitement has increased two-fold due to the application of the law in the decision of the Bahamian Court in *Volpi v Delansou Services Limited and another* [2018] 1 BHS J. No. 195.

In October 2006, Gabriele Volpi (GV) settled the Winter and Summer Trusts, appointing Delansou Services Limited (DSL) as trustee for both of the trusts. Several years later, in March 2012, GV settled the Spring Trust in similar terms to the Winter and Summer Trusts, also with DSL as trustee. The objects of the discretionary powers in the Winter, Summer and Spring Trusts (the Trusts) included GV, his children and descendants.

In October 2016, DSL made a distribution of all (or the majority) of the assets of the Trusts to GV. DSL then executed a termination of trusts in January 2017. In response, GV's son, Matteo Volpi (MV) commenced litigation proceedings, alleging that DSL was in breach of the Trusts as it had improperly distributed the entirety of the Trusts to GV. MV also contended that GV was liable to account for the assets received from the distribution. The Court had to determine *inter alia* whether the matter ought to proceed to arbitration

and therefore the action should be stayed.

Ultimately, the Court determined that the trust instruments contained valid arbitral clauses. The clauses required that any dispute (other than a dispute relative to the validity of the Trusts): (i) that related to the establishment or effects of the Trusts; (ii) or between the settlor or trustee; (iii) or between protectors or between the parties to the trust (which included the beneficiaries), should be determined by arbitration. Consequently, the Court was constrained to order the action stayed and direct the matter to proceed to arbitration.

The *Volpi* decision creates an opportunity for The Bahamas to develop a niche area in the field of trusts arbitration as it already seeks to develop itself as a competitive international arbitration centre by the steps it has taken to incorporate the *UNCITRAL Model Law on International Commercial Arbitration*. Moreover, according to respected arbitral institution the International Chamber of Commerce (the ICC), in the last decade, there has been an increased demand to resolve trust disputes through arbitration. This demand has led the ICC to issue an updated *ICC Arbitration Clause for Trust Disputes and Explanatory Note*, which is to act as guidance to trust practitioners when including arbitral

clauses in trust instruments. Interestingly enough, the arbitral clause that was at the centre of the *Volpi* decision is consistent with the standard created by the ICC. In effect, The Bahamas is ahead of the pack in terms of providing a viable option for the resolution of trust disputes.

As one of the few jurisdictions that has legislation to support the resolution of trust disputes through arbitration, and now with the precedent created by virtue of the *Volpi* decision, The Bahamas' legitimacy as a well-regulated international financial centre (IFC) is reinforced in that it demonstrates that Bahamian courts will support the proper construction, interpretation and application of trust instruments in accordance with The Bahamas' statutory regime.

It also reflects The Bahamas' determination to protect and strengthen its long-standing and established reputation as a leading IFC seeking to add value for individuals and corporate entities alike.



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