

**TRUST LAW COMMITTEE**  
**ARBITRATION OF TRUST DISPUTES**

**Introduction**

1. As the Executive Committee of the Trust Law Committee (TLC) we have been invited to explore the prospects of allowing for the arbitration of trust disputes. This follows a discussion paper of 12 June 2008 prepared for the TLC by John Wood, David Brownbill QC and Christopher McCall QC. In that paper the authors concluded that, without enabling legislation, it was plainly impossible under English law for a settlor or testator validly and enforceably to require beneficiaries to submit any dispute to arbitration. They went on to discuss a number of possibilities for statutory intervention, while also emphasising the growing significance of mediation in this area of law.
2. In brief, from that platform, we now propose that the TLC should take the initiative towards promoting legislation in this regard, primarily (in our view) by suitable amendments to the Arbitration Act 1996. This proposal has received welcome support from the Law Commission. It was not included in the Commission's Eleventh Programme of Law Reform during the summer of 2011, but paragraphs 3.69 and 3.70 of their report state : —  
  

*'Support for the project*

'3.69 This project was proposed by the Trust Law Committee, a group of academics and practitioners in the field of trust law. The Department of Business, Innovation and Skills supported the Law Commission conducting research and consultative work investigating the feasibility of extending the legislative framework for arbitration to cover disputes concerning trusts.

'3.70 The Law Commission recognizes the great importance of the trust industry, and that work in this area would have the potential to generate a range of benefits. The technical nature of the work makes it suitable for the Law Commission. The project has not been taken forward solely on the grounds that the Commission does not have the capacity to include this work in its Eleventh Programme.'
3. There are aspects of trust arbitrations which may potentially affect the taxation of trust dispositions, especially in cases where the rectification or rescission of such dispositions is in issue. Discussions with H M Revenue and Customs (HMRC) is therefore needed at an early stage.

4. Our conclusion is that the most promising avenue for the Trust Law Committee to take is this : —
- (a) To promote a relatively simple amendment to the Arbitration Act 1996, giving legal validity to provisions in wills and settlements imposing a resort to arbitration, subject to one important exception, namely disputes about the validity of the trust disposition itself.
  - (b) To promote the adoption of procedural rules, by statutory instrument or otherwise, requiring arbitrations which are determinative of the rights or obligations of any beneficiary under a trust to be held in public unless (i) the interests of one or more children are involved, or (ii) all the parties, being of full capacity, agree to the contrary or (iii) the court directs the contrary.

It is intended that procedural rules to that effect would satisfy the requirements of Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms ('the Human Rights Convention'), Rome 4 November 1950 TS 71 (1953) Cmd 8969.

5. The intended benefits of such legislation would be to extend and improve the scope for alternative dispute resolution (ADR), to extend arbitration work to trust practitioners in England and Wales as litigators, advocates and arbitrators, reducing any threatened export of such work to overseas jurisdictions, and to reduce pressure on the judicial system and, accordingly, on the public purse. At the same time we are in principle keen to encourage the mediation of trust disputes and nothing in what we propose is intended to diminish or abridge the freedom of disputants to settle their differences by mediation or any other form of agreed compromise.

#### **The scope of this proposal**

6. We have come to the view that our proposal should extend in principle to all forms of trusts : public, private and commercial. We have considered excluding exclusively charitable trusts from these proposals. In addition to their public nature, charities enjoy other special features : the jurisdiction of HM Attorney-General; access to the facilitative jurisdiction of the Charity Commission; the Commission's approval jurisdiction under section 33 of the Charities Act 2006 and its encouragement of mediation. There may for those reasons be less need for legislation in regard to the arbitration of disputes relating to charitable trusts, but we have concluded that this is not a sufficient reason to exclude them from the proposals altogether. In appropriate cases the ability to choose arbitration can be expected to complement the existing

processes mentioned above, not to usurp them. We have consulted the Charity Law Association, and they have not opposed this approach.<sup>1</sup>

7. Second, it is already feasible for any two or more persons of full capacity to enter into a valid stand-alone arbitration agreement to settle a dispute between them. In principle this can apply to a dispute between beneficiaries, or between beneficiaries and trustees, in regard to a trust in which they are interested. But the principal weaknesses of such arrangements are that (1) it is common in trust disputes that the interests of other persons may be affected, directly or indirectly, by the resolution of the dispute, such as minor, unborn and unascertained beneficiaries, not to mention HMRC, and the award will not bind those other persons; (2) the remedies generally available to an arbitrator may be less ample than those available to the courts. In addition the requirement in Article 6(1) of the Human Rights Convention for a fair trial, including the right to a public hearing, presents challenges for arbitrations. These are matters which need to be addressed.
8. We therefore concentrate here on what may be called imposed arbitration. By this we mean the operation of a trust provision, included at the choice of the settlor or testator (or the sponsoring company of an occupational pension scheme or other commercial trust), by which disputes involving trustees and beneficiaries must be dealt with by arbitration before resort may be had to the courts. Such clauses are not unknown, and American commentators in particular are apt to mention the will of George Washington, the First President of the United States, whose will included such a provision. And yet the enforceability of such a clause is, to say the least, open to question, as the discussion document mentioned in paragraph 1 above demonstrated.
9. We also mention here that our proposal would not encompass the compulsory submission to arbitration of a direct attack on the validity of the trust disposition itself, in other words a challenge to the so-called 'rocket-launcher' by which the trust is created in the first place. There is a growing body of authority defining the circumstances in which a party, who might or might not be an outsider to the trust, may invoke the jurisdiction of the courts over the validity or otherwise of a trust disposition, and we are persuaded that it would be unwise to encourage settlors and testators to compel such claims to be determined solely by an arbitrator.

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<sup>1</sup> We have not approached the Charity Commission with this proposal. Although one of our number (John Wood) is a Member of the Commission, his personal endorsement of the proposal should not be understood as representing the support of the Commission

10. Our proposal therefore relates to imposed arbitration clauses applying to disputes affecting all varieties of trusts, other than rocket-launcher disputes mentioned above. In regard to that proposal, the following three questions arise immediately : –

- (a) Is the arbitration of trust disputes a desirable process in principle?
- (b) If so, is it desirable to promote or enable it in England and Wales?
- (c) If so, would legislation be needed in order to achieve that end?

If the answers to those three questions are in the affirmative, we shall proceed to discuss what shape that legislation might in our view usefully take.

### **The merits of arbitration generally**

11. The merits of alternative dispute resolution (ADR) generally have been appreciated for some time, although not every dispute is amenable to its successful application. The Civil Procedure Rules 1998 contain specific provision requiring the parties and the court to consider the scope for ADR : CPR rule 1.4(2)(e) and 26.4. In addition paragraph 1.4.11 of the White Book contains a long and informative article on ADR, particularly mediation and the use of early mutual evaluation in the Commercial Court. Costs sanctions may be imposed on a successful party who has unreasonably refused to engage in the process : see generally White Book paragraphs 1.4.11 and 44.3.13; *Hurst v Leeming* [2003] 1 Lloyd's Rep 379; *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002 (CA); *Reed Executive v Reed Business Information* [2004] 1 WLR 3026 (CA).
12. The two principal means of ADR outside the Commercial Court are mediation and arbitration. Mediation is relatively popular and, in our experience, widely successful, sometimes surprisingly so in unpromising situations. And some trust disputes are eminently suitable for resolution by mediation. But mediation is not always ideal. In particular, as mediation becomes increasingly compulsory or ubiquitous in practice (a trend to some extent driven by the costs considerations mentioned in the previous paragraph), some hardened practitioners tend to use the process merely as a means to discover the supposed or perceived weaknesses of the other side's case. There is no viable sanction against parties, or especially their lawyers, who pay lip service to a requirement or agreement to mediate but who will not negotiate in good faith or allow their clients to do so. Sometimes all parties have such entrenched positions that even an experienced mediator can make no effective progress in bringing the parties towards a viable compromise. Sometimes there are disputed legal or factual issues of such crucial importance that all parties agree

only to the extent that those issues need to be resolved by an independent third party.

13. In these cases especially, and we believe in many other cases as well, arbitration is in principle a valuable alternative resource. The chief features which make it valuable appear to us to be as follows : —
- (a) The arbitration proceedings are confidential. This feature, which is often crucially important in the context of disputes concerning family trusts, is shared by mediation but not by litigation.
  - (b) The parties can select an appropriately qualified and experienced arbitrator, or panel of arbitrators. In some overseas jurisdictions this has been regarded as a factor of extreme importance, especially in territories where there is no significant professional experience of trust practice. The judiciary in such a territory may not be seen as possessing sufficient expertise for the purpose.
  - (c) The timing and timetable of arbitrations are matters for the parties, their representatives and the arbitrator(s) alone. General delays in court timetables become irrelevant. The proceedings can therefore normally be concluded in a relatively short time.
  - (d) Unless special agreement is reached to the contrary, there is a limited right of appeal from the award of the arbitrator, leading again to a more rapid final conclusion of the dispute. This is a two-edged sword, as many swords are.
  - (e) Features (c) and (d) above can sometimes operate to keep costs down.
14. The disadvantages of proceeding by arbitration, without statutory authorisation, are essentially those mentioned in paragraph 6 above, namely that the award is not binding on non-parties, and statutory remedies may not be available.

### England and Wales

15. All those advantages and disadvantages apply, to a greater or lesser extent, in England and Wales as in other jurisdictions. Most speak for themselves, though factor (b) in paragraph 13 above is less significant than in some overseas jurisdictions.
16. There is a further positive reason for adopting arbitration in the trust field in England and Wales, namely that there is already a strong and respected legal history of arbitration here (for contractual disputes), coupled with still well-

respected legal professions offering the required expertise (as litigators, advocates and as arbitrators) to conduct trust arbitration at every level, together with an internationally respected statute, the Arbitration Act 1996. It is legitimate to hope and expect that, if that Act were capable of amendment so as to incorporate trust disputes within its ambit (which we believe to be the case), that would add significantly to the attraction of arbitration, and of arbitration clauses in settlements and wills, for settlors and testators abroad as well as at home.

17. It should also be borne in mind that, in terms of value of assets held in trust, the vast majority are trusts of a commercial nature, including (but by no means limited to) pension schemes.
18. Moreover there is a danger that overseas jurisdictions may take over, or seek to take over, arbitration work which would or could more appropriately be arbitrated in England and Wales if the legislation permitted it. This would be harmful to the development of trust law in this country, and potentially harmful to the British economy, not to mention the legal profession and those other professions with an interest in trusts (particularly accountants, investment managers and actuaries). A number of overseas jurisdictions have already taken steps to enact legislation designed to enable or facilitate the arbitration of trust disputes, and unless progress in the same direction is made here, English trust law and practice are in danger of suffering. Some would say that they have already suffered.
19. One of the more significant jurisdictions to have enacted legislation of this kind is the State of Florida. In 2005 Bridget A Logstrom (of Minnesota), Bruce M Stone and Robert W Goldman (both of Florida) published a valuable article advocating legislation for the arbitration of trust disputes under the title *Resolving Disputes with Ease and Grace* : 31 ACTEC Journal 235. The article drew attention to the advantages and disadvantages of arbitration in this field and also discussed whether legislation was necessary to authorise imposed arbitration, concluding that in practice it was. It went on to outline the terms which the statute would need to contain, procedural rules, together with several sample arbitration clauses for inclusion in trust instruments.
20. Stone and Goldman appear then to have been influential in persuading the Florida legislature to accept their proposals. With effect from 1 July 2007 the legislation includes the following enabling provision : —

*'731.401 Arbitration of disputes*

- '(1) A provision in a will or trust requiring the arbitration of disputes, other than disputes of the validity of all or part of a will or trust, between or among the beneficiaries and a fiduciary under the

will or trust, or any combination of such persons or entities, is enforceable.

- '(2) Unless otherwise specified in the will or trust, a will or trust provision requiring arbitration shall be presumed to require binding arbitration under s. 44.104.'

It will be seen that this provision excludes what we have called rocket-launcher disputes from the ambit of arbitration but otherwise includes all types of trust disputes. The reference to section 44.104 has the effect of providing the parties with a statutory procedural code for the arbitration as a default setting.

21. As Logstrom, Stone and Goldman describe in the article cited (*Resolving Disputes with Ease and Grace* : 31 ACTEC Journal 235 at page 237), the following are examples of disputes in which arbitration will typically be advantageous:—

- (a) Fee disputes, including fiduciary and legal fees;
- (b) Prudent investment disputes;
- (c) Document construction;
- (d) Principal and income disputes, including adjustment powers;
- (e) Trust terminations or severances;
- (f) Accounting disputes;
- (g) Declaratory relief in general.

We agree, and add that 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, are in our experience increasingly numerous and contentious, and also suitable for arbitration.

22. Singapore has introduced enabling legislation of a closely similar kind, together with promotional material showing that Singapore is actively promoting itself as an international arbitration centre, with trust disputes included. This is instructive, given that few trusts established by non-Singaporean settlors and testators choose Singapore law as the proper law of their trusts.

23. Closer to home geographically is Guernsey, where a similar strategy has been adopted, but linking arbitration to mediation. Article 63 of the Trusts (Guernsey) Law 2007 provides that, if the trust instrument authorizes trust disputes to be referred to mediation or arbitration, then a settlement reached by

either of those means is binding on all beneficiaries who are represented at the mediation or arbitration or who have been given notice of it and have a reasonable opportunity of being heard. For a minor beneficiary, and for unborn and unascertained beneficiaries, this applies only if the mediator or arbitrator certifies that they were independently represented.

24. In our view the Florida example offers the simpler model for England and Wales to adopt, given the existence of the Arbitration Act 1996, provided that procedural means are available to ensure that the award is binding on non-parties in an appropriate way, and provided that the procedure satisfies the requirements of Article 6(1). Mr Brownbill has followed up the work done for the discussion paper mentioned above by assisting professionally in drafting proposed legislation for consideration by the Bahamas legislature. The strategy which he has adopted is similar to that in Florida.

#### The need for legislation

25. We have mentioned that Messrs Wood, Brownbill and McCall concluded in their discussion paper that it was not possible for a settlor or testator validly to impose an arbitration clause. They described this as not open to question. Their principal reason, if we may paraphrase it, was that the trust concept is itself the creature of the courts (historically the courts of equity), exercising judicial discretions as described by the Privy Council in *Schmidt v Rosewood Trustees* [2003] 2 AC 709, so that the legal rights of beneficiaries and trustees can validly be determined only by the courts.
26. We naturally have no intention to challenge that conclusion. In particular we take it as a given that the trust relationship is not one of contract (though sometimes there is a contract between settlor and trustees at inception), so that legislation authorising *contracts* to impose arbitration has no application to trust disputes : see *Schoneberger v Oelze* 96 P.3d 1078 (Ariz 2004), a decision of the Court of Appeals in Arizona.
27. Some commentators have relied on arguments to the contrary. The most significant such argument is based on the proposition that beneficiaries become entitled to their interests only by virtue of the settlor's or testator's voluntary disposition, and that their benefactor should in principle be entitled to impose whatever terms he wishes on their enjoyment of those interests. Even Danckwerts J in *In re Wynn* [1952] Ch 271, while refusing to uphold a clause in a will making decisions of the executors and trustees binding in all cases, on the ground that it would oust the jurisdiction of the court, said at page 276 (in a passage where, however, he may have been merely explaining or expanding on counsel's submissions, rather than expressing views of his own) : —



‘It also may be said that beneficiaries under a will take what they take purely by the bounty of the testator, and it might be said that, as they are not entitled to anything of right apart from the provisions of the will, they must take their benefits subject to the conditions which are contained in the will and abide by them. Therefore, it may be asked, if that is so, why cannot the testator impose on the beneficiaries under his will conditions which require them to abide by the decision of the trustees as to various matters?’

28. Even so, it is clear from the *Wynn* case (above) that it is not open to a settlor or testator wholly to oust the jurisdiction of the court. The analysis must presumably be that the beneficiaries’ interests do not derive their validity solely from the benefaction of their settlor or testator but also at a higher level from the principles of law and equity by which the courts have elected to enforce them.
29. We conclude on the basis of what we have written that the arbitration of trust disputes in England and Wales would indeed be desirable, and that it would need legislation. In short we answer all three questions posed in paragraph 10 above in the affirmative sense. Before turning to a more detailed analysis of the legislation which would be needed, however, we need to consider the effect of Article 6(1) of the Human Rights Convention.

#### Article 6(1) of the Human Rights Convention

30. One of the characteristics of arbitral procedure is that the proceedings are confidential and private. And yet Article 6(1) of the Human Rights Convention, confers amongst other things the right to a public hearing : —
- ‘(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.’
31. The language of the article presents difficulties of construction. Do *all* trust disputes fall within the phrase ‘the determination of his civil rights’? (The

answer to that question is No, seeing that *Beddoe* applications, at least, do not : *In re Trusts of X Charity* [2003] 1 WLR 2751. Similarly as Lord Oliver wrote in *Marley v Mutual Security Merchant Bank* [1991] 3 All ER 198 at page 201g : ‘... it should be borne in mind that in exercising its jurisdiction to give directions on a trustee’s application the court is essentially engaged solely in determining what ought to be done in the best interests of the trust estate and *not in determining the rights of adversarial parties*’.) Is an arbitration merely *authorized* by statute ‘established by law’? To what extent does the second sentence apply to the hearing, even though linked verbally to the pronouncement of the judgment?

32. Despite those areas of doubt, however, it is clear that the article applies if the civil rights and obligations of the applicant are in issue, there is a dispute as to those civil rights and obligations, and the proceedings are determinative of those civil rights and obligations. Those conditions will not necessarily be present in the context of every trust dispute, but they will be present often. The right conferred by Article 6(1) is a right to a hearing which is fair, held in public, takes place within a reasonable time, and is conducted by an independent and impartial tribunal established by law. The apparently unqualified requirement to pronounce judgment in public is, however, not unqualified. If the hearing is in private, because the interests of justice so require, then the manner of publication may be appropriate to the hearing in question, and it may be appropriate to give judgment in private as well : *In re Trusts of X Charity* (above).
33. In our view arbitrations are no less likely than the courts to produce a hearing which takes place within a reasonable time. Indeed one of the attractions of arbitral proceedings is expected to be their relative speed. But compliance with Article 6(1) presents at least two other challenges. The first is to ensure that arbitrators can in practice be relied on to satisfy the description of an independent and impartial tribunal, and the second is to respond to the requirement of a public hearing. To take an extreme example, if a testator were to impose not only an arbitration clause but also his own chosen arbitrator (say a business associate of the testator and of his eldest son, having no professional qualification), a hearing in private before that arbitrator would not satisfy Article 6(1).
34. In England the private nature of an arbitration is not laid down by statute. Instead, as a matter of common law it is implied in an arbitration agreement that —

- (a) Strangers to the agreement should be excluded from the hearing and conduct of the arbitration under the agreement : *Oxford Shipping Co Limited v Nippon Yusen Kaisha, The Eastern Saga* [1984] 2 Lloyd's Rep 373;
  - (b) The parties must not disclose or use for any other purpose any documents prepared for and used in the arbitration, or any evidence given in the arbitration : *Dolling-Baker v Merrett* [1990] 1 WLR 1205 (CA).
35. The requirement for a public hearing under Article 6(1) is not absolute. The text of the article itself acknowledges that 'the interests of juveniles' and 'the protection of the private life of the parties' may require the private pronouncement of the judgment. It also recognizes that there may be 'special circumstances' where publicity may prejudice the interests of justice. These may prove important exceptions to the requirement of publicity in the present context.
36. Additionally the right to a public hearing may be waived, theoretically even in regulatory or quasi-criminal contexts : —
- (a) In *Deweere v Belgium* (1980) 2 EHRR 439, Mr Deweer was a retail butcher facing prosecution for alleged breaches of pricing regulations. Under threat of a significant period of closure for his business he waived his right to a tribunal hearing (which would have been public) and made a 'friendly settlement' involving payment of a fine. The Court of Human Rights in Strasbourg held that Mr Deweer had not effectively waived his right under Article 6(1) to a hearing in public, because the circumstances amounted to 'Hobson's Choice'. (This phrase expressed Sir Andrew Morritt C's assessment of the facts : see the *Stretford* case (below) at paragraph 50.) But in the course of the Strasbourg judgment arbitration was explicitly mentioned : —
 

'In the Contracting States' domestic legal systems a waiver of this kind is frequently encountered . . . in civil matters notably in the shape of arbitration clauses in contracts . . . the waiver . . . does not in principle offend against the Convention.'
  - (b) This was confirmed in *Stretford v Football Association Limited* [2007] 2 Lloyd's Rep 33 (CA). In this case Mr Stretford was a player's agent, appealing against the Judge's refusal to grant a stay of disciplinary proceedings brought against him by FIFA. He had obtained a FIFA licence which expressly required him to abide by the rules and

regulations of FIFA, and those regulations themselves included an arbitration clause. It was held that this did not infringe Article 6(1).

- (c) On the other hand the waiver, if it is to be effective, must be truly voluntary : *ibid* paragraph 48; *Di Placito v Slater* [2004] 1 WLR 1605 (CA) at paragraph 51. And if the waiver is not voluntary in that sense, the tribunal must offer the guarantees set forth in Article 6(1) : *Bramelid and Malmstrom v Sweden* Comm Report 12.12.83 para 30 DR 38 pp 18, 38.

37. There are also indications from the Strasbourg jurisprudence that not every stage of the decision-making process must individually satisfy the requirements of Article 6(1). For example, in the context of town and country planning, the power of the Secretary of State to 'call in' or 'recover' an application to determine it himself was held not to be incompatible with Article 6(1), despite an admission in that case that the Secretary of State was not independent or impartial : *R (Alconbury Developments) v Environment Secretary* [2003] 2 AC 295 (HL). Part of the reason for this decision was that the Secretary of State's decision is amenable to judicial review.
38. From this it might be tempting to suggest that, even if an arbitration is held in private, Article 6(1) will automatically be satisfied by a right of appeal which will itself be public and conducted by an independent and impartial tribunal. It would have to be conceded that the right of appeal under section 69 of the Arbitration Act 1996 is on a point of law only (with sections 67 and 68 dealing with substantive jurisdiction and serious irregularity respectively), but then that is no different in substance from the judicial review available in the planning field.
39. We acknowledge that some right of appeal is necessary and may be significant, but in our view it would be wrong to assume that it automatically cures any deficiencies in the first-instance procedure. The *Alconbury* decision depended not only on the availability of judicial review but also on the procedure which is followed in planning applications before and after the intervention of the Secretary of State. Lord Slynn said this at paragraph 46 : —

'The fact that an inquiry by an inspector is ordered is important. This gives the applicant and objectors the chance to put forward their views, to call and cross-examine witnesses. The inspector as an experienced professional makes a report, in which he finds the facts and in which he makes his recommendations. He has of course to take account of the policy which has been adopted in, eg the development plan but he provides an important filter before the Secretary of State takes his decision and it is significant that in some 95 per cent of the type of cases with which the House is

concerned the Secretary of State accepts his recommendation. The Divisional Court had evidence that other steps are taken to ensure that the contentions of the applicant and the objectors are adequately considered.'

It was also recognised that planning questions, like other issues with a strong political overlay, are routinely decided as administrative decisions by officials, throughout Europe.

40. In short planning is a special case. Also, in *Alconbury* (above) the issue was not the public nature of the hearing but the independence of the decision-maker. We do not therefore regard the availability of an appeal under section 69 of the 1996 Act as constituting an automatic satisfaction of the requirements of Article 6(1). The assumption must be that the requirements of the article must be satisfied by the arbitration itself.
41. A closer analogy to arbitration is a determination by the Pensions Ombudsman under section 146 of the Pensions Schemes Act 1993. Here too an appeal on a point of law only is available : section 151(4). Under section 149(3)(a) oral hearings are to be in public, but this is qualified by the words 'except in such cases as may be specified in the rules'. The rules in question are the Personal and Occupational Pension Schemes (Pensions Ombudsman) (Procedure) Rules 1995 (SI 1995/1053), where rule 12(1) provides : —
- '(1) All hearings by the Pensions Ombudsman shall be in public except where by reason of the disclosure of any matter that relates to intimate personal or financial circumstances, is commercially sensitive, consists of information communicated or obtained in confidence or concerns national security, it is just and reasonable for the hearing or any part thereof to be in private.'
42. These exceptions are different from those provided by Article 6(1) itself, and the question has arisen (though not judicially decided) whether rule 12(1) is in every respect compatible with the article. A previous holder of the office of Pensions Ombudsman took advice on the point in the form of an opinion from Ms Monica Carss-Frisk of counsel (dated 15 September 2000), and his office has published it online : [www.pensions-ombudsman.org.uk/publications/doc/article6opinion 060801.pdf](http://www.pensions-ombudsman.org.uk/publications/doc/article6opinion%20060801.pdf). It is notable that, although counsel concluded that the procedure was 'broadly compliant', she did not rely on the parties' right of appeal in arriving at that conclusion.
43. Besides, on the question of public hearings, her view was qualified. After referring to rule 12(1) cited above, and its grounds for holding a private hearing, she wrote in paragraph 53 of her Opinion : 'I am concerned that some

of these grounds do not fit easily within the exceptions set out in Article 6(1)'.  
She then continued : —

'54. In particular, the holding of a hearing in private where it is just and reasonable to do so because disclosure of any matter relates to financial circumstances, or is commercially sensitive, or consists of confidential information, may not be compatible with Article 6(1). In some cases, it may be that the interests of the private life of a party require a hearing (or part of a hearing) to be held in private where intimate financial circumstances, or confidential information, will be disclosed, but this will not inevitably be so.'

In the fifth line of that quotation we think that counsel may have meant to write 'the interests *or* the private life of a party . . .' or 'the interests of *juveniles or the protection* of the private life of a party' or words to some such effect.

44. In our view counsel was right to entertain those doubts, and in the context of arbitrations we conclude that the combination of (i) an appeal on a point of law only and (ii) hearings in private would *prima facie* lead to direct conflict with Article 6(1). This conflicts with the common-law position on arbitrations summarised in paragraph 34 above. And yet we believe that a possible resolution of that conflict lies in two ideas derived from Article 6(1) and the Strasbourg jurisprudence and a third derived from English trust-law itself : —
- (a) The first is that parties of full capacity are free to waive their right to publicity (see above).
  - (b) The second is that, to the extent that the interests of beneficiaries other than disputants of full age are involved in an arbitration, the likelihood is that they are minor beneficiaries. And if their rights and obligations are being determined — without which Article 6(1) does not apply at all — their interests, as 'interests of juveniles' may remove the obligation of a public hearing and allow the principle of confidentiality to take priority.
  - (c) The third is that ultimately the administration of trusts lies in the judicial discretion of the courts : *Schmidt v Rosewood Trustees* [2003] 2 AC 709 (PC).

### Conclusions on Article 6(1)

45. To a degree the challenges of Article 6(1) can be met, in our view reasonably satisfactorily and without special provisions, in the case of arbitrations

involving beneficiaries who are all of full capacity. Legislation could, if thought fit, provide that arbitrators must be chosen, directly or indirectly, by the parties, and that appropriate publicity must be provided unless the parties agree otherwise. Then this element of agreement by the parties would operate as a valid waiver of their rights under Article 6(1).

46. Further, a trustee would be bound by a mandatory arbitration clause in a will or settlement, even without explicit legislative provisions. If he were an original trustee of a settlement, there would be the required element of voluntary agreement in the contract of settlement between him and the settlor. In other cases he would voluntarily, or exceptionally under an order of the court (or under an earlier arbitration award), have implicitly accepted the arbitration clause when accepting the office of trustee. This would be no less voluntary than the decision of Mr Stretford to obtain a FIFA licence (please see above).
47. But it is clear to us that beneficiaries, generally not being parties to the instrument of trust and not claiming by virtue of any contract to which they are party, cannot be said voluntarily to waive their rights under Article 6(1), unless indeed they do so explicitly in the context of an ad hoc proposal for arbitration. At the same time the majority of arbitrations would involve either (1) parties all of full capacity, who could validly waive the requirement of a public hearing, or (2) a mixture of parties of full capacity and minor beneficiaries, for whose benefit confidentiality in the judgment and (we would argue) confidentiality in the hearing are permitted under the article.
48. A difficulty would remain if the parties to an arbitration were to include an adult but recalcitrant beneficiary insisting on publicity out of truculence or perversity. The possibility of a beneficiary adopting such a stance cannot be ruled out and would need to be addressed or at least borne in mind. It is partly by reason of this potential difficulty that we propose a power for the Court to intervene so as to restrict publicity in the interests of justice in any particular case (please see paragraph 52 below).
49. We have considered a further linked question relating to Article 6(1), though it is not specific to arbitrations. This relates to the compromise of a dispute, in this case the compromise of an arbitrated dispute, where the rights or obligations of non-parties, including possible minor and unborn beneficiaries, are affected. In the High Court this situation may be dealt with by CPR rule 19.7. There may be questions whether these procedural provisions might lead to infringements of Article 6(1) rights, but subject to that we believe that it would be satisfactory for powers to the same effect being available to arbitrators as they are to the courts.

**The recommended proposal**

50. In this final section we summarise the provisions which would in our view need to be enacted in order to give effect to clauses imposing arbitration. In short our emphasis is on adopting the existing provisions of the Arbitration Act 1996, and modifying those provisions only where necessary or desirable. This has the advantage of incorporating much of the juridical infrastructure contained in or implicit in the 1996 Act, such as the duty to act fairly and impartially : see section 33. We therefore suggest legislation along the following lines : —
- (a) A substantive provision giving legal validity to any arbitration clause in a settlement, will or other non-charitable trust. This could be similar to the Florida provision set out in paragraph 20 above, and it could be inserted into the Arbitration Act 1996. We see no reason in principle why such a provision should not be made to apply to an arbitration clause in a pre-existing trust, and in our experience many such trusts (though not all) will have sufficient powers for trustees or other appointors to add the necessary administrative provision.
  - (b) Consideration could be given to providing a default arbitration clause for all settlements and trusts, even existing ones, unless expressly excluded by the settlor or testator (or other sponsor).
  - (c) Authority for the arbitrator to exercise all the statutory and other powers and to award all remedies available to the courts, including the giving of directions to trustees. This could involve the addition of suitable provisions to section 48 of the 1996 Act.
  - (d) A mechanism for creditors and minor, unborn, unascertained and incapacitated beneficiaries to be bound. The simplest solution is to make general provision for all trusts arbitrations, (i) giving the arbitrator authority to appoint and remove litigation friends to represent the interests of parties lacking full capacity, (ii) giving the arbitrator power to make appropriate representation orders and (iii) providing that persons represented under such orders will be bound by the award. All such provisions could be adopted from the CPR.
  - (e) Provision that the award is enforceable in the same way as a court order. This can borrow from section 66 of the Arbitration Act 1996.
  - (f) Provision for appeal in accordance with sections 67 to 69 of the 1996 Act.



51. It would also be desirable to provide default procedural rules. Again the 1996 Act provides a starting-point, with (in this context) sections 15–29 and 33–41. It is at this point that the preferred means of satisfying the requirements of Article 6(1) would need to be added. Our starting point here is that the requirement of publicity in Article 6(1) cannot be ignored. It needs to be recognised, even if it is modified or abridged in some way (as we recommend that it should be). Our view is that an arbitration determinative of the rights and obligations of persons under a trust will be held in public unless (i) the interests of juveniles are involved or (ii) the interests of juveniles are not involved and the parties being of full capacity agree otherwise or (iii) the court directs otherwise on the application of any of the parties.
52. This third and last exception would leave scope for the court to deal with the recalcitrant beneficiary whom we have predicated in paragraph 48 above. The court may then indeed be persuaded in any given case that publicity is the right option. But we suggest that the legislation could be expressed so as to allow the court, in a proper case and in the exercise of its *Schmidt v Rosewood Trustees* discretion, to override a party's demand for publicity by reference to the final words of Article 6(1) itself, namely '... special circumstances where publicity would prejudice the interests of justice'.
53. The arbitrator's award will not be binding on HMRC, unless indeed HMRC become party to the arbitration (which can be assumed to be as rare or as frequent an event as in litigation). We would expect to see a number of arbitrations dealing with claims to rectify and rescind trust dispositions, and the outcome of the arbitration in such cases may well affect the tax consequences of the dispositions in question. And yet the award will not be binding on HMRC. There is no general solution to this problem, any more than there is where HMRC are not party to court proceedings. At the same time we suggest that it would be appropriate and indeed essential to involve HMRC in discussions about the proposal straight away, so that their views can be taken into account from the outset in formulating the terms of any proposed legislation and procedural rules.

Sir Peter Gibson, Chairman

Professor Paul Matthews, Deputy Chairman

John Wood, Honorary Secretary

Robin Ellison

Simon Jennings

Christopher McCall QC

Simon Taube QC

Mark Herbert QC

Henry Frydenson

25 November 2011