Navigating the Arbitration of Internal Trust Disputes: Lessons from FamilyMart and Grosskopf

(A Primer)

Introduction

1. The arbitration of internal trust disputes has been a topic of growing interest in recent years, as settlors and trust practitioners increasingly seek to take advantage of the benefits offered by alternative dispute resolution. However, the question of whether such disputes are capable of being resolved through arbitration has remained contentious, with courts in various jurisdictions reaching differing conclusions on the matter.

2. Against this backdrop, two recent decisions - *FamilyMart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corporation* [2023] UKPC 33 and *Grosskopf v Grosskopf* [2024] EWHC 291 (Ch) - provide valuable guidance on the arbitrability of internal trust disputes and the factors that courts will consider when determining whether to grant a stay in favour of arbitration.

Historical Development of Trust Arbitration

3. The arbitration of trust disputes has historically faced significant resistance, primarily due to three fundamental concerns:

   (a) The perceived attempt to "oust" the court's jurisdiction over trusts;
   (b) Questions about binding beneficiaries who had not expressly agreed to arbitrate; and
   (c) Concerns about protecting the interests of unborn and unascertained beneficiaries.

4. As noted by Hayton in 2001, courts initially viewed arbitration clauses in trust instruments as impermissible attempts to oust their jurisdiction or as repugnant to the rights created by the settlor where they concerned the administration or execution of a trust. However, this view has evolved significantly over recent decades, paralleling the broader acceptance of arbitration in commercial matters.[1]

5. The development of trust arbitration has been marked by three key phases:
   (a) Traditional resistance (pre-1990s): Courts maintained exclusive jurisdiction over trust matters (e.g., Re Raven [1915] 1 Ch 673 in the UK, Stephenson v Barclays Bank [1975] 1 WLR 882 in Jersey);

   (b) Limited acceptance (1990s-2000s): Recognition of trustees' power to submit existing disputes to arbitration; and

[1] Hayton, "Problems in Attaining Binding Determinations of Trust Issues by Alternative Dispute Resolution", p.1

(c) Modern approach (2010s-present): Growing acceptance of mandatory arbitration clauses in trust instruments.

Advantages of Arbitration in Trust Disputes

Confidentiality and Privacy

6. One of the primary advantages of arbitrating trust disputes is the ability to maintain confidentiality and privacy:
   "A key factor influencing a settlor's decision to establish a trust, over other alternatives, is the privacy afforded to the parties under the trust. Much of the literature advocating for the adoption of legislation permitting mandatory arbitration provisions characterizes trust litigation as a process of 'washing dirty linen in public' and potentially exposing family, children, personal wealth, and commercial matters to publicity." [2]

7. Arbitration allows sensitive information about the trust and its beneficiaries to be kept out of the public domain, which can be especially important for high-profile individuals or families.

Flexibility and Expertise

8. Arbitration offers greater flexibility than court proceedings, allowing the parties to tailor the process to their specific needs.
   "[T]he parties to an arbitration can mould the process to a far greater extent than court proceedings. While the arbitral tribunal will still determine arguments concerning the appropriate procedure to be adopted (eg, whether expert evidence is necessary), the parties will have far more control over procedural matters. For instance, the parties will be free to agree on the identity of the arbitrator—so allowing a person or tribunal with the necessary expertise and experience to be nominated — and on representation without the need to satisfy licensing requirements." [3]

9. This flexibility allows for the selection of arbitrators with specialized knowledge in trust law, which can lead to more efficient and informed decision-making.

10. In addition to confidentiality, flexibility, and expertise, arbitration offers other potential benefits in the context of trust disputes. These include cost-effectiveness, as arbitration can often be less expensive than court litigation, and speed/agility, as arbitral proceedings can be conducted more efficiently than court proceedings, particularly where the courts are overburdened.

Disadvantages of Arbitration in Trust Disputes

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[2] "Trust arbitration: 99 problems and 99 solutions" (Trusts & Trustees (2020) 26 (3): 260)

[3] The Arbitration of Trust Disputes: Theoretical Problems and Practical Possibilities" (Trusts & Trustees (2015) 21 (5): 546)

Binding Beneficiaries to the Arbitration Agreement

11. One of the primary challenges in trust arbitration is ensuring that all beneficiaries, including those who are unborn, unascertained, or lacking capacity, are bound by the arbitration agreement.

12. Without proper mechanisms to bind all beneficiaries, there is a risk that some may choose to litigate their claims in court, undermining the effectiveness of the arbitration process.

Enforceability Concerns

13. Despite the growing acceptance of trust arbitration, there remains some uncertainty regarding the enforceability of arbitral awards in this context.

"Plainly, the effectiveness of any of these remedies may well depend on the extent to which the arbitral award binds all beneficiaries, including minor, unborn, unascertained beneficiaries. To that extent, the question of the scope of the relief available in arbitration is connected with the prior question of whether the arbitrator's award is binding on everyone concerned with the trust.)[4]

FamilyMart: Confirming the Arbitrability of Internal Trust Disputes

14. FamilyMart is an important case to discuss in the context of trust arbitration because it is a leading authority on the arbitrability of disputes and the meaning of "matter" under the Cayman Islands' Foreign Arbitral Awards Enforcement Act (1997 Revision) (FAAEA), which is based on the New York Convention.

15. Although it does not directly involve a trust, the principles articulated by the Privy Council are highly relevant to determining whether internal trust disputes can be referred to arbitration. The case makes clear that a matter is not excluded from arbitration simply because a party is seeking relief in the proceedings that only the court can grant.

16. In FamilyMart, the Privy Council considered whether an arbitration clause contained in a shareholders' agreement could prevent a party from pursuing a petition to wind up a company on the just and equitable ground.

17. The case involved a joint venture company, China CVS (Cayman Islands) Holding Corp ("the Company"), which was owned by two shareholders - FamilyMart China Holding Co Ltd ("FMCH") and Ting Chuan (Cayman Islands) Holding Corporation ("Ting Chuan"). FMCH held a minority stake of 40.35% in the Company while Ting Chuan was the majority shareholder with 59.65%

[4] Arbitration of Trust Disputes" (Trusts & Trustees (2012) 18 (4): 300)

18. The shareholders' agreement contained an arbitration clause requiring *"any and all disputes in connection with or arising out of this Agreement"* to be submitted to arbitration.

19. Relations between the shareholders broke down, alleging various acts of mismanagement and misconduct by Ting Chuan, FMCH filed a petition in the Cayman Islands Grand Court under Section 92(e) of the Companies Act (2022 Revision) seeking to wind up the Company on the just and equitable ground.

20. In the alternative, FMCH sought a share purchase order under Section 95(3) of the Companies Act requiring Ting Chuan to sell its shares to FMCH. Ting Chuan applied for a stay of the winding up petition under Section 4 of the Foreign Arbitral Awards Enforcement Act (1997 Revision) ("FAAEA") on the basis that the substantive complaints relied upon by FMCH to justify the winding up fell within the scope of the arbitration agreement.

21. FMCH presented a petition to wind up the Company on the just and equitable ground, alleging that it had lost trust and confidence in the conduct and management of the Company's affairs by Ting Chuan. Ting Chuan applied for a stay of the winding up proceedings under section 4 of the Foreign Arbitral Awards Enforcement Act (the Cayman Islands equivalent of section 9 of the English Arbitration Act 1996).

22. At first instance, the Grand Court granted the stay, but the Cayman Islands Court of Appeal overturned that decision. The Court of Appeal held that the just and equitable winding up jurisdiction was reserved exclusively to the court and could not be delegated to an arbitral tribunal. In the Court of Appeal's view, as a winding up petition required the court to conduct a wide-ranging inquiry into whether it was just and equitable to wind up the company based on all the relevant circumstances as they exist at the date of the hearing, this was an indivisible issue incapable of being hived off to arbitration. Bifurcating that inquiry between the court and an arbitral tribunal would risk inconsistent findings and undermine the statutory scheme.

23. The Privy Council, allowing the appeal, held that the matters in dispute between the parties fell within the scope of the arbitration agreement and were, in principle, capable of being resolved through arbitration.

24. The Privy Council's analysis focused on the court's statutory jurisdiction to wind up a company under the Companies Act, rather than its inherent jurisdiction to supervise the administration of trusts.:

    "Matters, such as whether one party has breached its obligations under a shareholders' agreement or whether equitable rights arising out of the relationship between the parties have been flouted, are arbitrable in the context of an application to wind up a company on the just and equitable ground and the arbitration agreement

is not inoperative because the arbitral tribunal cannot make a winding up order." (para 33) (Lord Hodge)

25. The Board proceeded to identify five specific matters raised in the petition, the first two of which it held were suitable for determination by arbitration:

    a) *Whether FMCH had lost trust and confidence in Ting Chuan and in the conduct and management of the Company's affairs; and*
    b) *Whether the fundamental relationship between FMCH and Ting Chuan had irretrievably broken down.*

26. While accepting that the ultimate discretionary remedy of ordering the winding up of a company is reserved to the court, the Board held that there was no reason in principle why an arbitral tribunal could not determine the underlying factual disputes between the parties that are relied upon to justify the winding up, such as whether one shareholder has breached the shareholders' agreement or violated the other's equitable rights.

27. The Board clarified that a dispute will be arbitrable in this context as long as it constitutes a "matter" within the meaning of Section 4 of the FAAEA, which implements Article II(3) of the New York Convention in Cayman law, and that "matter" falls within the scope of the arbitration agreement.

28. The Board adopted a two-stage test for determining whether a "matter" exists and falls within the arbitration clause: (i) the court must identify what "matters" have been raised or will foreseeably be raised in the court proceedings; and (ii) the court must then determine whether each of those "matters" falls within the scope of the arbitration agreement.

29. Importantly, the Board clarified that a "matter" is a substantial factual or legal issue relevant to a claim or defence in the court proceedings that is susceptible of determination by an arbitral tribunal as a discrete dispute. An issue will not constitute an arbitrable "matter" if it is merely peripheral or incidental to the overall dispute.

30. <u>The Board held that an arbitral tribunal could determine both of those issues in a manner that would bind the shareholders inter se even though the tribunal could not make an ultimate winding up order.</u>

31. The winding up petition would then have to be stayed under Section 4 of the FAAEA to allow those issues to be resolved in arbitration. After the arbitration is completed, the court would retain jurisdiction to decide, taking into account the tribunal's findings on the arbitrated issues: (i) whether it is just and equitable that the Company be wound up; (ii) whether FMCH should be granted a share purchase order and if so at

what price; and (iii) whether, if such alternative relief is not appropriate, the Company should be wound up.

32. The remaining three matters - whether it was just and equitable to wind up the Company, whether FMCH should be granted alternative relief in the form of a share buy-out, and whether a winding up order should be made - were held to fall within the exclusive jurisdiction of the court. However, the Board emphasised that this did not render the entire dispute unarbitrable:

    "The determination of matters (1) and (2) will be an essential precursor to the court's formation of its opinion whether it is just and equitable to wind up the Company, which in turn is the threshold for giving a remedy under section 95 of the Companies Act . . . The Board is satisfied that it is appropriate to grant such a stay." (para 103)

33. FamilyMart shows that a wide range of internal trust disputes are, in principle, capable of being resolved through arbitration, notwithstanding the court's inherent supervisory jurisdiction. The mere fact that an arbitral tribunal cannot grant all of the remedies available to a court (such as a winding up order) does not render the underlying dispute unarbitrable. Instead, the court will look to the substance of the matters in dispute and determine whether they are suitable for determination by arbitration, with any remaining issues to be dealt with by the court in due course.

34. While FamilyMart dealt with the interpretation of the term "matter" in the context of a shareholders' agreement under the FAAEA, the principles articulated by the Privy Council are equally applicable to the arbitrability of internal trust disputes. The decision in Grosskopf v Grosskopf [2024] EWHC 291 (Ch) illustrates how these principles can be applied in the trust context.

35. In Grosskopf, the court took a similarly broad approach to the interpretation of "matter" under section 9 of the Arbitration Act 1996, finding that allegations of breach of trust and mismanagement of trust assets were arbitrable, even though the ultimate remedy of appointing a judicial trustee was reserved for the court. This demonstrates that the key principles in FamilyMart, such as the focus on identifying the substance of the dispute and the distinction between the arbitrability of substantive issues and the availability of certain remedies, are equally relevant in the context of trust arbitration.

Grosskopf: Interpreting the Scope of "Matter" under Section 9 of the Arbitration Act 1996

36. The approach taken by the Privy Council in FamilyMart is broadly consistent with that adopted by the English courts when considering applications for stays under section 9 of the Arbitration Act 1996. This was demonstrated in the recent case of *Grosskopf v Grosskopf* [2024] EWHC 291 (Ch) (albeit a decision of the Chancery

Master), which involved a claim by a trust beneficiary seeking the appointment of a judicial trustee in place of the existing trustees.

37. It arose from a dispute between the claimant beneficiary, Chaim Grosskopf, and the defendant trustees, Yechiel Grosskopf and Jacob Grosskopf, of the M Grosskopf 1974 Settlement Trust ("the Trust") established by the parties' father, Myer Grosskopf.

38. In 2017, the parties entered into an arbitration agreement referring to the Beth Din of the Federation of Synagogues in London *"any and all disputes and differences between them regarding the above issue and any other issue arising in connection with this for determination by way of Din Torah"*. "The above issue" was defined as "a claim about full disclosure of the estate/assets of the late R'Myer Grosskopf".

39. The claimant subsequently commenced an arbitration against the defendant trustees seeking extensive disclosure regarding the Trust assets and the defendants' management of the Trust. The Beth Din issued several interim awards granting some of the claimant's disclosure requests. However, the claimant remained dissatisfied and in 2018 filed a Part 8 claim in the England and Wales High Court seeking wide-ranging relief including an inquiry into Trust property, an account of Trust property, profits, and income received by the defendants, and other ancillary orders ("the first claim").

40. The defendants applied for a stay of the first claim under Section 9 of the Arbitration Act 1996 on the basis that the matters raised fell within the scope of the arbitration agreement.

41. The stay application in the first claim came before Master Pyle who delivered a judgment on 6 November 2018 holding that the arbitration agreement encompassed the matters in dispute in the first claim.

42. In particular, Master Pyle accepted the defendants' submission that the arbitration agreement extended beyond narrow questions of disclosure to include disputes regarding the substance of the claimant's complaints about the management and administration of the Trust.

43. While Master Pyle did not make a final order staying the first claim due to concerns he had about certain procedural aspects of the Beth Din arbitration, the parties subsequently compromised the defendant's appeal by agreeing to a final order staying the first claim.

44. The present proceedings were commenced by the claimant in December 2022 by way of a Part 8 claim seeking the appointment of a judicial trustee under Section 1(1) of the Judicial Trustees Act 1896 in place of the defendant trustees ("the judicial trustee claim"). The claim was premised on various allegations of misconduct and mismanagement of Trust assets by the defendants. The complaints largely mirrored

grievances the claimant had previously raised in the arbitration which had either been rejected in the Beth Din's interim awards or were still pending final determination.

45. Master Clark, granting the stay, held that the matters in dispute between the parties fell within the scope of the arbitration agreement and were, in principle, arbitrable.

46. Master Clark held that the factual matters relied upon by the claimant to justify the appointment of a judicial trustee, including the various allegations of breach of trust and mismanagement of Trust assets, were plainly arbitrable. The fact that the ultimate remedy of appointing a judicial trustee was reserved to the court did not change that conclusion.

47. Master Clark also held that Master Pyle's prior decision on the stay application in the first claim gave rise to an issue estoppel barring the claimant from arguing that the relevant matters fell outside the scope of the arbitration agreement.

48. In those circumstances, the arbitration agreement was fully operative and the judicial trustee claim had to be stayed under Section 9 of the Arbitration Act 1996 to allow the underlying disputes to be resolved in the Beth Din arbitration.

49. In reaching this conclusion, the Master emphasised the broad interpretation to be given to the term "matter" in section 9(1):
"A 'matter' is not the same as a cause of action. The court must ascertain the substance of the dispute or disputes. That involves looking at the pleadings but not being overly respectful to the formulations in those pleadings which may be aimed at avoiding a reference to arbitration by artificial means . . . A matter is a substantial issue that is legally relevant to a claim or a defence or foreseeable defence in the legal proceedings, and is susceptible to be determined by an arbitrator as a discrete dispute." (para 61)

50. Applying this approach, the Master identified the primary complaints made by the claimant - namely, that the defendants had procured the disposal of assets at an undervalue, approved disadvantageous lending to connected parties, and excessively remunerated themselves as directors.

51. These matters were held to lie *"at the heart of the legal proceedings"* and were *"matters which the parties accept fall within the scope of the arbitration agreement"* (para 96). The fact that the tribunal could not itself appoint a judicial trustee did not render the underlying dispute unarbitrable:

"The fact that an arbitrator may not have power to remove a trustee or make a vesting order does not alter this position. An arbitrator could give effect to a claim for removal by ordering the trustee to resign, to appoint a new trustee and to convey the trust property to that person." (para 72)

52. Grosskopf confirms that the English courts will take a broad, substance-over-form approach when determining the scope of "matter" under section 9 of the 1996 Act. The mere fact that a claimant has framed their claim in a particular way (such as seeking the appointment of a judicial trustee) will not prevent the court from staying the proceedings in favour of arbitration, provided that the underlying dispute falls within the scope of the arbitration agreement and is, in principle, arbitrable.

53. The decisions in FamilyMart and Grosskopf demonstrate that courts are increasingly willing to recognize the arbitrability of internal trust disputes, focusing on the substance of the disagreement between the parties rather than the form of the relief sought. In both cases, the courts expressed a clear preference for treating factual disputes as "matters" capable of being resolved through arbitration, even if the ultimate remedy sought, such as a winding-up order or the appointment of a judicial trustee, falls within the exclusive jurisdiction of the court. This approach correctly recognizes that the arbitrability of a substantive dispute is not necessarily determined by the availability of a particular remedy. It also gives proper effect to the parties' autonomy in agreeing to submit their disputes to arbitration, while preserving the court's supervisory jurisdiction over trusts. In my view, this is a welcome development that strikes an appropriate balance between the competing interests at stake in trust arbitration.

Implications for Trust Practitioners

54. The decisions in FamilyMart and Grosskopf have important implications for trust practitioners and disputants alike. First and foremost, they confirm that a wide range of internal trust disputes are, in principle, capable of being resolved through arbitration, notwithstanding the court's inherent supervisory jurisdiction over trusts. This includes disputes concerning alleged breaches of duty by trustees, the exercise of powers by trustees or other power holders, and the interpretation of trust instruments.

The Approach to Determining Arbitrability: FamilyMart – a steady shopping cart?

55. The Board's key findings can be distilled into the following six principles:

    a. *Courts should refer disputes to arbitration if they fall within the scope of a valid arbitration agreement unless statute or public policy renders the disputes non-arbitrable or incapable of settlement by arbitration*[5].

[5] When advising on the arbitrability of trust disputes, three key considerations emerge from recent jurisprudence:
The scope of arbitrable matters must be assessed through the two-stage test established in FamilyMart:

(a) Identifying the matters raised or foreseeably to be raised in court proceedings; and
(b) Determining whether such matters fall within the scope of the arbitration agreement [FamilyMart at [58]-[59]].

56. The starting point of the Board's analysis was the observation that the Cayman Islands, like many countries, has enacted legislation (in the form of Section 4 of the FAAEA) giving effect to Article II(3) of the New York Convention. That provision requires Contracting States to refer disputes to arbitration when seized of a matter in respect of which the parties have made an arbitration agreement unless the court finds the agreement is null and void, inoperative, or incapable of being performed.

57. Importantly, the Board noted that the enactment of Article II(3) must be viewed in the context of the almost universal respect courts across jurisdictions now afford to party autonomy in deciding how disputes should be resolved. Arbitration agreements are no longer seen as an impermissible attempt to oust the jurisdiction of the courts but rather as an expression of the parties' free choice that must be given effect except in limited circumstances prescribed by statute or justified by compelling public policy considerations.

58. The Board approvingly cited commentary to the effect that courts interpreting domestic legislation implementing Article II(3) should follow a uniform international approach aimed at promoting the efficacy of arbitration agreements rather than imposing local restrictions on arbitrability based on domestic preconceptions.

59. This international pro-arbitration outlook must guide the overall approach of courts to applications for referrals to arbitration.

b. *Determining arbitrability involves a two-stage test: (i) identifying the "matters" in the legal proceedings; and (ii) ascertaining if those matters fall within the scope of the arbitration clause.*

60. Building on this foundation, the Board then established an important two-stage framework for courts to follow when analyzing arbitrability in a particular case:

61. *First*, the court must identify what "matters" have been raised or will foreseeably be raised in the court proceedings based on a close review of the pleadings and an assessment of the underlying controversies between the parties.

62. *Second*, the court must determine in relation to each such "matter" whether it falls within the scope of the arbitration agreement based on the standard principles of contractual construction.

63. This two-stage test provides a structured roadmap for determining whether a dispute referred to the courts is in reality an arbitrable matter the parties have agreed to submit to arbitration. It helpfully distinguishes the objective question of identifying the true "matters" in dispute from the separate question of whether those matters, as a matter of construction, engage the arbitration agreement.

c. *A "matter" is a substantial issue legally relevant to a claim or defense that is capable of being determined by an arbitrator as a discrete dispute.*[6]

64. In order for an issue to constitute an arbitrable "matter", the Board clarified it must satisfy the following cumulative criteria:

i. *The issue must raise a substantial factual or legal question rather than being merely peripheral or incidental to the overall dispute between the parties. Minor or technical points that have no material bearing on the resolution of the parties' differences will not qualify as separable "matters".*

ii. *The issue must have legal relevance to a claim or defense, whether asserted or foreseeable, in the court proceedings in the sense of being properly raised for determination in those proceedings. An issue with no legal significance to the matters before the court will by definition fall outside the scope of the stay jurisdiction regardless of whether it engages the arbitration clause.*

iii. *The issue must be susceptible of being determined by an arbitral tribunal as a discrete dispute in a manner that is binding on the parties inter se. In other words, it must be capable of being hived off to arbitration as a self-contained sub-dispute rather than being inextricably bound up with the wider issues before the court.*

65. Through these parameters, the Board struck an important balance between avoiding an excessively narrow construction of "matters" that would undermine the efficacy of arbitration agreements and an overly broad interpretation capturing peripheral grievances the parties cannot have intended to submit to arbitration.

66. The focus is on substantial issues between the parties engaging their legal rights or liabilities that can be fairly resolved through the arbitral process.

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[6] The economic interest test under Swiss law, while not directly applicable in other jurisdictions, provides a useful comparator for assessing the potential scope of arbitrability in trust disputes. Article 177(1) of the Swiss Private International Law Act permits arbitration of "any dispute involving an economic interest," which has been interpreted to encompass a wide range of trust-related issues, including:" This encompasses:

(a) Claims and entitlements originating in family law
(b) Inheritance and succession matters
(c) Property law disputes
[von Segesser, "Arbitration of Trust Disputes", p.26]

The modern approach recognizes that most aspects of trust disputes that give rise to economic consequences are arbitrable. Even information rights disputes may be arbitrable where such information is sought as a preliminary step to prepare a possible claim or exercise control over the trust [von Segesser, p.26].

d. Not every issue raised in court proceedings in connection with a dispute within an arbitration clause is arbitrable. The court must evaluate the substance and relevance of the issue and exercise judgment.[7]

67. Importantly, the Board rejected an absolutist view that every issue referenced in court proceedings is necessarily caught by an arbitration clause applicable to the overall dispute. Picking up on well-established principles developed in other leading arbitration jurisdictions like Singapore and Australia, the Board cautioned that peripheral or incidental issues with no material impact on the parties' rights or the outcome of the court proceedings will not qualify as separable "matters" even if they broadly relate to the subject matter of the arbitration agreement.

68. The Board emphasized that determining whether a particular issue rises to the level of an arbitrable "matter" requires a careful evaluative exercise involving considerations of substance and degrees rather than a mechanistic litmus test.

69. While the Board emphasized that courts should not take an overly absolutist view and treat every peripheral issue as arbitrable, they did note at para 66 that where an arbitration agreement covers some but not all matters in dispute, fragmentation of proceedings may be unavoidable to give effect to the parties' bargain. The Board suggested that in such cases, effective case management by the court and arbitral tribunal can help mitigate any disadvantages caused by the splintering of the dispute:

> *"But, where, on a proper interpretation of the arbitration agreement, the parties have contracted to refer to arbitration disputes which do not extend to all the matters raised in the legal proceedings, giving effect to the parties' contract will involve fragmentation of the disputes. The disadvantages caused by such fragmentation can be mitigated by effective case management by both the court and the arbitral panel."*

70. The court must apply its judgment and common sense to assess the true significance of the issue in the context of the overall dispute and the legal proceedings before it. This exercise should be guided by a recognition that rational commercial parties generally intend arbitration to be the primary forum for resolving the real differences between them and are unlikely to have envisaged a fragmentation of their dispute into a series of satellite arbitrations dealing with points of peripheral importance.

e. An arbitration agreement can "catch" discrete issues even if the court retains exclusive jurisdiction to grant the ultimate remedy sought.

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[7] The distinction between "subject matter non-arbitrability" and "remedial non-arbitrability" is crucial:
(a) Subject matter non-arbitrability arises where disputes are excluded from arbitration by statute or public policy;
(b) Remedial non-arbitrability occurs where certain remedies lie beyond the jurisdiction parties can confer on arbitrators [FamilyMart at [72]].

71. One of the key findings of the Board in FamilyMart was that an arbitration agreement can encompass aspects of a dispute before the court even if the ultimate remedy sought in the proceedings falls within the exclusive jurisdiction of the court and cannot be granted by an arbitral tribunal.

72. Applying this principle to the context of the just and equitable winding up petition before it, the Board drew a distinction between the arbitrability of the factual matters relied upon to justify the winding up (such as whether there had been a breakdown of trust and confidence between the shareholders) and the non-arbitrability of the final discretionary remedy of ordering the company to be wound up.

73. The Board grounded this distinction in the implied limitation on the powers of an arbitral tribunal constituted by a private arbitration agreement. As the Board explained, by agreeing to refer certain matters to arbitration, parties cannot vest the arbitral tribunal with greater powers than those possessed by an ordinary contracting party.

74. They cannot, for example, agree to confer on the tribunal a statutory power to wind up a company or appoint a receiver as those powers are reserved to the courts as part of their public functions and engage the rights of third parties. The jurisdiction of an arbitral tribunal to grant declaratory or dispositive relief derives from the consent of the parties to the arbitration agreement and cannot exceed what the parties themselves could agree to.

75. However, this limitation on the remedial jurisdiction of an arbitral tribunal does not necessarily infect the arbitrability of the substantive disputes capable of engaging the relevant court powers. The underlying factual and legal issues relevant to whether the statutory or equitable threshold for exercising those powers has been met can be arbitrable "matters" even if the grant of the ultimate remedy remains within the exclusive purview of the court.

76. The public policy underpinning the reservation of particular remedies to the court (such as the orderly winding up of companies and the protection of creditors) does not always mandate that every aspect of a dispute potentially engaging those remedies must be resolved in court. The reality is more nuanced and depends on the nature of the issues in dispute and whether they are truly bound up with the rationale for exclusive judicial jurisdiction.

    f. *Arbitration agreements should be construed broadly to uphold party autonomy, but peripheral issues may be found to fall outside the scope of the agreement.*[8]

[8] Certain matters remain exclusively within court jurisdiction:
(a) Making winding up orders [FamilyMart at [81]]
(b) Approving compromises affecting unborn or incapacitated beneficiaries [Hayton, p.3]

77. Finally, the Board in FamilyMart affirmed the well-established principle that arbitration agreements should be construed broadly and purposively to give effect to the commercial intention of the parties to submit their disputes to arbitration.

78. The starting assumption should be that rational commercial parties intend their arbitration agreement to encompass all disputes arising in their relationship rather than to bifurcate between different forums absent clear language to the contrary.

79. At the same time, the Board implicitly accepted that despite this expansive interpretative approach, an arbitration agreement cannot be stretched to capture truly peripheral or incidental issues between the parties that on a reasonable reading fall outside its scope.

80. The parties' agreement to arbitrate is still ultimately a matter of contract and is subject to the inherent limitations of language and intention.

81. An unduly broad construction of an arbitration agreement risks overriding rather than upholding party autonomy by forcing parties to arbitrate matters they cannot, on any sensible reading, have envisaged referring to arbitration.

82. The outer limits of an arbitration agreement will always be a highly fact-specific question of construction taking into account the language used by the parties and their presumed commercial purposes. But the key lesson from FamilyMart is that issues should only be characterized as non-arbitrable if they are minor or technical points with no material relevance to the overall dispute. Significant disagreements between the parties impacting their legal rights and obligations will almost invariably fall within the scope of any broadly-worded arbitration clause even if there are bona fide arguments as to arbitrability at the margins. The interpretative scales are weighted firmly in favor of arbitrability.

83. Having laid down these cardinal principles, the Board in FamilyMart had little difficulty concluding that the two key issues raised by FMCH in support of its just and equitable winding up petition were prima facie arbitrable matters caught by the wide language of the shareholders' agreement arbitration clause.

84. The issues of whether FMCH had lost trust and confidence in Ting Chuan's management of the Company's affairs and whether the fundamental relationship between the two shareholders had broken down were not merely peripheral grievances but substantial questions going to the heart of the parties' dispute.

(c) Exercising statutory supervisory powers over trustees

85. While the grant of a final winding up order undoubtedly fell within the exclusive jurisdiction of the Cayman courts, that did not change the fact that these crucial anterior matters were capable of being determined by an arbitral tribunal in a manner that would be binding on the two shareholders as parties to the arbitration agreement.

86. By clearly delineating between the respective domains of arbitral tribunals and courts in this context, the Board struck a workable balance between upholding the efficacy of arbitration agreements and preserving the courts' irreducible supervisory jurisdiction.

87. The FamilyMart principles provide a clear and consistent framework for courts to apply when faced with applications to stay proceedings in favor of arbitration. The analysis shows that even in areas like insolvency and company law that were traditionally seen as non-arbitrable, there is significant scope for giving effect to arbitration agreements without compromising the integrity of the statutory scheme or the courts' role. It is an approach that gives primacy to party autonomy while still policing the boundaries of arbitrability in a principled way.

The Limits of Arbitrability in Internal Trust Disputes

88. While Grosskopf illustrates the scope for arbitrating even disputes relating to the trusteeship itself, Master Clark's judgment also highlights some of the limits of arbitrability in this context flowing from the unique nature of the trust structure. One key limitation is that an arbitration agreement between a trustee and beneficiary cannot bind other beneficiaries who are not parties to the agreement. As Master Clark noted, a dispute over the identity of the trustees may impact the rights of all beneficiaries, but only those who have consented to arbitration can be compelled to resolve the matter through that process.

89. This is an important structural constraint on the arbitrability of internal trust disputes that arises from the fact that beneficiaries, unlike shareholders in a company, do not have a direct contractual relationship with each other or the trustees.

90. Beneficiaries who are not parties to the relevant arbitration agreement can only be bound to an arbitral resolution of an internal trust dispute based on deemed acquiescence or estoppel, which are likely to be established only in limited circumstances. In most cases, non-signatory beneficiaries will retain the right to bring independent claims in court against the trustees regardless of the outcome of an arbitration commenced by another consenting beneficiary.

91. Master Clark rightly concluded that the possibility of parallel court proceedings by other beneficiaries does not by itself render a dispute between the trustee and a particular beneficiary non-arbitrable as a matter of principle. The risk of inconsistent decisions in this context is a practical hazard for the trustee who may be exposed to duplicative claims rather than a reason for negating the validity of the arbitration agreement. It may be a factor the court considers when exercising its discretionary case management powers, but it is not a bar to arbitrability under Section 9 of the Arbitration Act 1996 if the underlying dispute otherwise falls within the scope of a binding arbitration clause.

92. Nevertheless, the fact that an arbitral resolution of an internal trust dispute will not always definitively determine the matter as against all interested parties is a significant limitation that does not arise in the corporate context where shareholders are deemed to have submitted to the articles of association and any arbitration agreement contained therein. It means that the efficacy of arbitration as a means of resolving trust disputes may be constrained where there is a wide class of beneficiaries who cannot realistically be joined to the arbitration agreement. This is particularly so in the context of disputes involving the appointment or removal of trustees given the importance of ensuring that any successor trustee has an indefeasible title to the trust assets as against all beneficiaries.

93. It is important to note that the privity limitations of the trust structure, as discussed above, can pose significant challenges for the arbitrability of internal trust disputes. The fact that non-signatory beneficiaries may not be automatically bound by an arbitral resolution of an internal dispute, and the consequent risk of parallel court proceedings, is a practical constraint that settlors and trustees must carefully consider when deciding whether to include arbitration clauses in trust deeds. While the possibility of parallel proceedings does not necessarily render a dispute non-arbitrable as a matter of principle, it may influence the court's exercise of its discretionary case management powers and the overall effectiveness of arbitration as a means of resolving trust disputes.

So, what would I look for when called upon to advise?

94. Arbitrability: In FamilyMart, Lord Hodge stated:
"Matters, such as whether one party has breached its obligations under a shareholders' agreement or whether equitable rights arising out of the relationship between the parties have been flouted, are arbitrable in the context of an application to wind up a company on the just and equitable ground and the arbitration agreement is not inoperative because the arbitral tribunal cannot make a winding up order." (para 33)

95. Scope of the arbitration agreement: The scope of the arbitration agreement is crucial in determining whether a particular dispute is subject to arbitration. As demonstrated in Grosskopf, the court will take a broad, substance-over-form approach to interpreting the term "matter" under section 9 of the Arbitration Act 1996. Master Clark held:

> *"A 'matter' is not the same as a cause of action. The court must ascertain the substance of the dispute or disputes. That involves looking at the pleadings but not being overly respectful to the formulations in those pleadings which may be aimed at avoiding a reference to arbitration by artificial means . . . A matter is a substantial issue that is legally relevant to a claim or a defence or foreseeable defence in the legal proceedings, and is susceptible to be determined by an arbitrator as a discrete dispute." (para 44)*

96. Examine the language of the arbitration clause and consider whether the underlying dispute falls within its scope, regardless of how the claim is framed.

97. ICC Task Force on Trusts and International Arbitration[9] published the following model arbitration clause to be included in trust deeds for disputes arising thereunder:
"All disputes arising out of or in connection with this Trust [as defined in the trust instrument] shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.

The settlor, the original trustee(s) and the original [protector(s)] [other original power-holder(s)] hereby agree to the provisions of this arbitration clause, and each successor trustee and [protector] [other powerholder], by acting or agreeing to act under the Trust, also agree, or shall be deemed to have agreed, to the provisions of this arbitration clause.

Any beneficiary claiming or accepting any benefit, interest or right under the Trust, shall be bound by, and shall be deemed to have agreed to, the provisions of this arbitration clause.

Subject to the law governing the Trust and without prejudice to any other confidentiality obligation that may apply:
a) the arbitral proceedings, including the fact that they are taking place, have taken place or will take place, are private and confidential; and
b) any award or decision rendered by the arbitral tribunal or any settlement agreement between the parties shall be kept confidential and shall not be disclosed to any person, except to the extent that disclosure is required by law or pursuant to any rule, requirement or request of any regulatory or governmental authority or stock

[9] The ICC Arbitration Clause for Trust Disputes reviewed in light of the ICC Arbitration Rules as revised in 2012 and subsequently amended in 2017. https://iccwbo.org/news-publications/arbitration-adr-rules-and-tools/icc-arbitration-clause-trust-disputes-explanatory-note Accessed 17 October 2024

exchange, or is necessary or advisable in the administration of the Trust or for the implementation or enforcement of the award or decision."[10]

98. The above key elements, on analysis, include:

(a) Scope provision: *"All disputes arising out of or in connection with the trust created hereunder"*
(b) Deemed agreement language: *"Any beneficiary claiming or accepting any benefit, interest or right under the Trust shall be bound by, and shall be deemed to have agreed to, the provisions of this arbitration clause"*
(c) Confidentiality provisions: *Addressing both proceedings and awards*

99. The effectiveness of such clauses depends on several factors:
(a) Compliance with formal requirements of applicable arbitration law
(b) Proper incorporation of deemed acquiescence mechanisms
(c) Clear provision for representation of protected parties
(d) Recognition under the relevant trust law

100. When comparing the ICC clause with other models, such as the Liechtenstein Rules[11], key distinctions emerge:

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[10] Scope of "all disputes" covered by the clause
The clause is intended to cover internal trust disputes only, between trustees, power-holders, and beneficiaries. External disputes with third parties are not covered.
The clause allows trustees to seek ex parte directions from courts as long as this is not contested by any party bound by the arbitration clause. If the trustee's wish to seek directions is itself disputed, then it must be referred to arbitration. (paras 5-9)

Agreement to arbitrate
By assuming their responsibilities, trustees and power-holders are presumed to have consented to the arbitration clause. Beneficiaries are deemed to have agreed when they obtain benefit from the trust. (paras 12-13)

Representation of minor, unborn and unascertained beneficiaries
The trust should include a mechanism to appoint litigation friends and representatives for incapacitated or unascertained beneficiaries in the arbitration, to ensure any award is binding on them. (paras 14-15)

Confidentiality
Given the importance of confidentiality in most trust disputes, the model clause includes confidentiality provisions within the clause itself. (para 17)

[11] In comparison, the Liechtenstein Rules of Arbitration offer a more detailed model clause that explicitly addresses issues such as the existence and scope of beneficial interests, the designation of beneficiaries, and the appeal of trustee decisions. While both model clauses provide useful guidance, their effectiveness in a given case will depend on factors such as compliance with the formal requirements of the applicable arbitration law, proper incorporation of deemed acquiescence mechanisms, clear provisions for the representation of protected parties, and recognition under the relevant trust law. Ensuring proper representation of parties who cannot represent themselves, such as unborn, unascertained, or legally incapacitated beneficiaries, is a crucial consideration in trust arbitration. Potential solutions include virtual representation (allowing certain beneficiaries to represent the interests of others with similar rights), the appointment of special representatives by the arbitral tribunal, the court, or a designated third party, and statutory frameworks specifically addressing representation in trust arbitration. The most appropriate

(a) Scope of covered disputes
(b) Treatment of beneficiary consent
(c) Mechanism for binding future parties
[von Segesser, p.37]

101. Mandatory arbitration clauses[12]: The enforceability of mandatory arbitration clauses in trust deeds has been the subject of much debate.

102. It is now clear that carefully drafted clauses, which provide for proper representation of beneficiaries' interests, can be effective. Counsel should consider the specific wording of any mandatory arbitration clause and advise on its likely enforceability.

103. Representation of beneficiaries[13]: Ensuring proper representation of beneficiaries, particularly minors, unborn, and unascertained beneficiaries, is a key challenge in trust arbitration.

104. A crucial consideration in trust arbitration is ensuring proper representation of parties who cannot represent themselves. Three main categories require special attention:

(a) Unborn and unascertained beneficiaries

(b) Minor beneficiaries

(c) Legally incapacitated beneficiaries

Various mechanisms have emerged to address representation issues:

105. *Virtual Representation*: This concept allows certain beneficiaries to represent the interests of others with similar interests. As explained in Hayton's analysis, virtual representation can operate where:

(a) Living persons would constitute the class if the relevant event had occurred

(b) A living person represents future interests that would pass to their heirs

(c) The first-takers represent subsequent interest holders

[Hayton, p.10-11]

approach will depend on the specific circumstances of the case and the applicable trust law, but practitioners should be aware of the various options available and advise their clients accordingly.

[12] "The Enforceability of Arbitration Clauses in Trusts" (The Cambridge Law Journal, 74 [2015], pp 450-479)
[13] "Trust arbitration: 99 problems and 99 solutions" (Trusts & Trustees (2020) 26 (3): 260)

106. *Special Representatives*: An alternative approach involves appointing independent representatives specifically for the arbitration. This may be achieved through:

(a) Appointment by the arbitral tribunal

(b) Appointment by a court

(c) Appointment by a designated third party (e.g., protector)

[von Segesser, p.29-30]

107. *Statutory Frameworks:* Several jurisdictions have enacted specific legislation addressing representation in trust arbitration:

(a) Bahamas: Section 91B of the Trustee Act grants arbitral tribunals the same powers as courts to appoint representatives

(b) Guernsey: Trust law requires independent representation certified by courts

(c) Malta: Arbitration Act explicitly addresses binding nature of arbitration on beneficiaries

[von Segesser, p.33-34]

108. Academics have explored potential solutions:

a. "The inclusion of representation provisions in the trust deed would appear to be the simplest means of solving the representation problem and is the one adopted by section 91B(4) of the Bahamas Trustee Act which states that 'The terms of a trust may provide for the appointment of one or more persons to represent the interests of any person (including a person unborn or unascertained) or class in a trust arbitration.'" (p. 269)

b. The article also suggests that "the arbitral tribunal could apply the system of representation orders provided in Rules 19.6–19.7A of the Civil Procedure Rules (CPR) by analogy." (p. 270)

109. Counsel should advise on the most appropriate means of representing beneficiaries' interests in the arbitration process.

110. Remedies and the court's supervisory jurisdiction: While arbitral tribunals have broad powers to grant relief, they may lack the ability to order certain remedies reserved for the court, such as the appointment of a judicial trustee.

111. However, as noted in FamilyMart, this does not necessarily render a dispute unarbitrable. In Grosskopf, Master Clark:
"The fact that an arbitrator may not have power to remove a trustee or make a vesting order does not alter this position. An arbitrator could give effect to a claim for removal by ordering the trustee to resign, to appoint a new trustee and to convey the trust property to that person." (para 72)

112. Counsel should consider the nature of the relief sought and whether it can be effectively granted through arbitration, taking into account the court's ongoing supervisory jurisdiction over trusts[14].

113. Enforcement and challenges to arbitral awards: The enforceability of arbitral awards in trust disputes may be subject to challenges, particularly in cases involving mandatory arbitration clauses or issues of beneficiary representation[15]. In England and Wales some potential enforcement issues arise, note the limited grounds for challenging awards under the Arbitration Act 1996:

"Plainly, the effectiveness of any of these remedies may well depend on the extent to which the arbitral award binds all beneficiaries, including minor, unborn, unascertained beneficiaries. To that extent, the question of the scope of the relief available in arbitration is connected with the prior question of whether the arbitrator's award is binding on everyone concerned with the trust."

114. For settlors and trustees, this highlights the importance of carefully considering the inclusion of arbitration clauses in trust deeds. Such clauses can offer significant advantages over court litigation, including greater confidentiality, flexibility, and scope for expert determination. However, they also come with certain limitations - most notably, the inability of arbitral tribunals to grant certain remedies (such as the appointment of a judicial trustee) which fall within the exclusive jurisdiction of the court.

115. When drafting arbitration clauses, it is therefore essential to consider the types of disputes that may arise and the remedies that may be sought. In some cases, it may be appropriate to carve out certain matters (such as the removal of trustees) from the scope of the arbitration agreement, so as to preserve the parties' ability to seek relief from the court.

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[14] It is worth noting that a party arguing for the arbitrability of a trust dispute may also seek to rely on a severability clause in the trust instrument, if present. Such a clause could potentially allow the arbitration provision to be read down or severed in relation to any impermissible remedies, while remaining enforceable with respect to all other arbitrable disputes between the parties. To the best of my knowledge, this argument has not been widely tested in the courts, but it may offer an additional avenue for parties seeking to enforce arbitration agreements in the trust context.

[15] "Arbitration of Trust Disputes" (Trusts & Trustees (2012) 18 (4): 300)

116. In others, it may be possible to draft the clause in such a way as to confer certain powers on the arbitral tribunal (such as the power to appoint a replacement trustee), subject to the overriding supervisory jurisdiction of the court.

Conclusion

117. The arbitration of internal trust disputes has long been a topic of uncertainty and debate, with courts in various jurisdictions reaching differing conclusions on the arbitrability of such disputes.

118. The recent decisions of the Privy Council in FamilyMart and the English High Court in Grosskopf provide welcome clarity on this issue, confirming that a wide range of internal trust disputes are, in principle, capable of being resolved through arbitration:

a. *Courts should give effect to arbitration agreements in the trust context unless statute or compelling public policy considerations render the matters in dispute non-arbitrable. The scope for arbitration in this field is wider than traditionally assumed and extends even to some issues relating to the trusteeship itself.*

b. *Arbitrability is to be determined by a two-stage test focused on identifying the objective "matters" in dispute and ascertaining whether those matters fall within the scope of the arbitration agreement. Only substantial issues with a material legal or factual bearing on the ultimate outcome are likely to qualify as separable arbitrable matters.*

c. *An arbitration agreement can "catch" discrete issues between the parties even if the court retains exclusive jurisdiction to grant the ultimate remedy sought in the legal proceedings. The arbitrability of the substantive dispute is not necessarily infected by the inarbitrability of the final relief.*

d. *Arbitration agreements should be construed broadly to promote arbitration, but an expansive interpretative approach cannot override the inherent limits of the contractual language and the parties' presumed intentions. Peripheral grievances with no real impact on the controversy are unlikely to be arbitrable.*

e. *The privity limitations of the trust structure mean that non-signatory beneficiaries will not automatically be bound by an arbitral resolution of an internal dispute. The prospect of parallel court proceedings by other beneficiaries is a practical constraint that settlors and trustees must navigate when adopting arbitration clauses.*

119. While these decisions do not provide a definitive answer to all of the questions surrounding the arbitration of trust disputes, they do offer valuable guidance for trust practitioners and disputants alike. By emphasising the broad scope of "matter" under section 9 of the Arbitration Act 1996, and the substance-over-form approach to be taken when determining the arbitrability of disputes, they pave the way for a greater use of arbitration in the resolution of internal trust disputes.

120. At the same time, the decisions serve as a reminder of the ongoing supervisory role of the court in the administration of trusts, and the limitations of arbitration in certain circumstances. Trust practitioners and disputants must therefore carefully consider the specific circumstances of each case when deciding whether to include arbitration clauses in trust deeds or to pursue arbitration as a means of resolving disputes.

121. Ultimately, the successful resolution of internal trust disputes will require a collaborative approach between settlors, trustees, beneficiaries, and the courts. By providing greater clarity on the role of arbitration in this context, the decisions in FamilyMart and Grosskopf represent an important step forward in this regard.

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Table of Authorities

Primary Sources

UK Supreme Court and Privy Council

Court of Appeal

High Court

Historic Cases

Legislation

Primary Legislation

Arbitration Act 1996

Insolvency Act 1986

Matrimonial Causes Act 1973

Trustee Act 1925

International Conventions (as implemented in UK law)

Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention)

Hague Convention on the Law Applicable to Trusts and on their Recognition 1985

Secondary Sources

Hayton D, Matthews P and Mitchell C, Underhill and Hayton: Law Relating to Trusts and Trustees (19th edn, LexisNexis 2016)

Born GB, International Commercial Arbitration (3rd edn, Kluwer Law International 2021)

Davies PS and Foxton D, 'Arbitration matters in the Privy Council and Supreme Court' (2024) 140 LQR 337

Strong SI, 'Arbitration of Trust Disputes: Two Bodies of Law Collide' (2012) 45 Vanderbilt Journal of Transnational Law 1157

Lardner G and others, 'FamilyMart v Ting Chuan: The Privy Council determines that matters underlying a just and equitable winding up petition are arbitrable' (2023) South Square Digest, December 2023

ICC Task Force on Trusts and International Arbitration, 'ICC Arbitration Clause for Trust Disputes' (2008) 19(2) ICC International Court of Arbitration Bulletin

Trust Law Committee, 'Arbitration of trust disputes' (2012) 18(4) Trusts & Trustees 301

Comparative Materials

Tomolugen Holdings Ltd v Silica Investors Ltd [2015] SGCA 57; [2015] 1 SLR 373 (Singapore)

Cayman Islands:

- Companies Act (2022 Revision)
- Foreign Arbitral Awards Enforcement Act (1997 Revision)

Guernsey:

- Trust (Guernsey) Law 2007