

The Arbitration (Guernsey) Law 2016 – A New Hope

Introduction

The introduction of a new arbitration law in Guernsey has been expected for some time, with Guernsey's current legislation being perceived as out of date and failing to properly facilitate an effective and efficient process. It is hoped that The Arbitration (Guernsey) Law 2016 ("the 2016 Law") will address the shortfalls of the present legislation and encourage more parties to arbitrate their disputes in Guernsey.

The Approach to Arbitration in Guernsey

Arbitration is an often overlooked process for the resolution of commercial disputes in Guernsey, and while the provision of Arbitration clauses in commercial contracts appears to have increased in recent years, there remains an obvious reluctance for parties to arbitrate here, with mediation being the favoured form of ADR.

One of the key reasons for the avoidance of arbitration is that the legislation is deemed outdated and unhelpful. The primary source of domestic arbitration law is the Arbitration (Guernsey) Law, 1982 ("the 1982 Law") which is considerably out of line with the provisions of contemporary legislation in other jurisdictions, where arbitration is a well-utilised method of dispute resolution.

It certainly is not the case that arbitration is considered to be inferior to other forms of dispute resolution, and indeed the legislation in force at present was clearly passed with the intention of promoting arbitration as a useful means of avoiding costly and time consuming litigation. The 1982 Law deals with domestic arbitration proceedings and the enforcement of particular foreign arbitration awards, and the (English) Arbitration (International Investment Disputes) Act 1966 was incorporated into domestic Guernsey law by the Arbitration (International Investment Disputes) (Guernsey) Order 1968 ("the Order").

Guernsey is also a party to the New York Convention (the UK having extended the territorial application of the Convention to Guernsey in April 1985) and enforcement of Convention awards was facilitated by the 1982 Law, which also provides for the enforcement of awards by parties to the Geneva Convention and the Protocol on Arbitration Clauses of 24 September 1923. With regards enforcement, a domestic arbitration award can be enforced in the same way as a Royal Court judgment and, while leave of the Court must first be granted, the Royal Court's active encouragement of ADR means that it is likely to enforce an arbitration award.

However, despite such facilitative legislation and a clear intention to make arbitration accessible in Guernsey, the perception remains that the 1982 Law does not serve to support the arbitration process as it should. One of the key attractions of arbitration is the likely costs saving when compared with litigation and, where the power of the arbitral tribunal is limited, there is a risk of procedural error and thus wasted time and costs. For this reason, parties have typically avoided arbitrating in Guernsey.

The Introduction of the 2016 Law

In view of calls for a reform of the law in this area (and a recent acknowledgement by the judiciary that increased flexibility could be offered by amending the 1982 Law or enacting new legislation), the States of Guernsey has recently approved legislation which will more closely reflect the provisions of the English Arbitration Act 1996 and the UNCITRAL Model Law on International Commercial Arbitration. The 2016 Law seeks to considerably improve upon the 1982 Law by, amongst other things, codifying well-established legal rules and principles, increasing party autonomy, increasing the powers of the tribunal and restricting judicial intervention.

The intention is to align the arbitration procedures in Guernsey more closely with those jurisdictions in which arbitration is more readily exploited, using a comprehensive and efficient framework to facilitate the process. It is hoped that, once the 2016 Law is in force, we will see commercial parties placing more confidence in the process and agreeing to arbitration clauses which specify Guernsey as the seat of arbitration.

Importantly, the 2016 Law includes provisions which permit a party to apply to the Royal Court for a stay of Court proceedings where there is an arbitration agreement/clause. Further, section 63 of the Trusts (Guernsey) Law, 2007 contains provisions which explicitly provide for the arbitration of actions brought by beneficiaries against trustees. Such provisions are not typical of trust legislation in other offshore jurisdictions and, while the arbitration (or other form of ADR) need not be conducted in Guernsey, the ability to arbitrate effectively and efficiently in this jurisdiction will make it an attractive alternative to litigation.

Conclusion

Being a well regulated and highly regarded jurisdiction for fiduciaries, investment funds, banking and asset management, it is axiomatic that a high quantity of legal agreements are regulated by Guernsey law and/or involving Guernsey entities. Many such agreements will include arbitration clauses and, accordingly, we are likely to see an increase in parties seeking to arbitrate in Guernsey once the 2016 Law comes into force.

The States of Guernsey has confirmed to Babbé LLP that the 2016 Law has now received Royal Assent following consideration by the Privy Council in October 2016. Section 94 of the 2016 Law provides that it shall come into force on the 28th day after the date of its registration on the records of the Island of Guernsey, which is expected to be at the next sitting of the Full Court on 14 November 2016. We can therefore expect to see the 2016 Law coming into force before the end of the year.

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