

# Arbitration of Trust Disputes: Two Bodies of Law Collide

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## ABSTRACT

*Once considered nothing more than “mere” estate-planning devices, trusts play a large and growing role in the international economy, holding trillions of dollars of assets and generating billions of dollars of income each year. However, the rising popularity of both commercial and noncommercial trusts has led to an explosion in hostile trust litigation, leading settlors and trustees to search for new and less expensive ways to resolve trust-related disputes.*

*One possible solution involves use of a mandatory arbitration provision in the trust itself. However, the unique, multiparty nature of trust disputes often makes this sort of arbitration highly controversial.*

*This Article considers the various issues that arise when two separate bodies of law—trust law and arbitration law—collide, using recent developments in the field of international commercial arbitration to address some of the more intransigent problems facing trust arbitration. In so doing, this Article introduces a number of new judicial decisions not previously considered in the scholarly literature and brings a uniquely comparative and international perspective to the debate regarding the jurisprudential propriety of mandatory trust arbitration.*

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## I. INTRODUCTION

Trusts and their civil law equivalents, often known as foundations or associations,<sup>1</sup> play a large and growing role in the international economy. Not only do trust vehicles hold assets valued in the trillions of dollars and generate billions of dollars each year in income, but administrators and trustees accumulate similarly massive amounts in annual fees.<sup>2</sup> With a rising number of trusts

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1. Although trusts developed historically as a common law device, civil law jurisdictions are becoming increasingly involved in this field, either through the development of their own domestic forms of trusts or the recognition of trusts formed in common law countries. See Henry Christensen III, *Foreign Trusts and Alternative Vehicles*, 1902 PLI/CORP. 323, § 4 (Aug. 18–19, 2011); Adair Dyer, *International Recognition and Adaptation of Trusts: The Influence of the Hague Convention*, 32 VAND. J. TRANSNAT'L L. 989, 1013–18 (1999) (describing attempts in some civil law countries to adopt trusts or similar devices); Dante Figueroa, *Civil Law Trusts in Latin America: Is the Lack of Trusts an Impediment for Expanding Business Opportunities in Latin America?*, 24 ARIZ. J. INT'L & COMP. L. 701, 703–07, 721–51 (2007) (comparing the Anglo-American and the Latin-American *inter vivos* trust); Frances H. Foster, *American Trust Law in a Chinese Mirror*, 94 MINN. L. REV. 602, 637–50 (2010) (describing the Chinese interpretation of American trust law); Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. REV. 434, 437–45 (1998) (contrasting the common law and civil law approaches to “trust-like relationships”); Michael Hwang, *Arbitration for Trust Disputes*, in GUIDE TO THE WORLD'S LEADING EXPERTS IN COMMERCIAL ARBITRATION 83, 84 (Legal Media Group ed., 2009) (discussing a model arbitration clause developed by the International Chamber of Commerce (ICC) for use in trust disputes); John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 629, 632–43, 669–71 (1995) [hereinafter Langbein, *Contractarian*] (describing how civil law jurisdictions confront the types of issues handled in common law jurisdictions by trusts); John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 YALE L.J. 165, 186 (1997) [hereinafter Langbein, *Commercial Trusts*] (“The Japanese have built a trust industry with assets amounting to \$2 trillion.”); Maurizio Luponi, *The Civil Law Trust*, 32 VAND. J. TRANSNAT'L L. 967, 970–73 (1999) (describing the essential elements of a trust and how these elements have been adapted in civil law countries); Julien Perrin, *The Recognition of Trusts and Their Use in Estate Planning Under Continental Laws*, 10 Y.B. PRIVATE INT'L L. 629, 630 (2008) (“[T]he increasing mobility of persons and assets fuelled the use of trusts in circumstances connected to civil law countries.”); Steven L. Schwarcz, *Commercial Trusts as Business Organizations: An Invitation to Comparatists*, 13 DUKE J. COMP. & INT'L L. 321, 322 (2003) (“[T]rusts or variations on the trust form are beginning to be embraced worldwide.”); Tina Wüstemann, *Arbitration of Trust Disputes*, in NEW DEVELOPMENTS IN INTERNATIONAL COMMERCIAL ARBITRATION 2007, at 33, 33–35 (Christoph Müller ed., 2007) (“With increasing mobility of individuals in a shrinking world, trusts are no longer confined to the Anglo-saxon world but are also often used in civil law jurisdictions.”). For ease of discussion, the term “trust” will be used to refer to both civil law and common law devices, unless otherwise indicated.

2. See David Horton, *The Federal Arbitration Act and Testamentary Instruments*, 90 N.C. L. REV. 1027, 1070 (2012) (noting irrevocable trusts in the United States “generated \$142.5 billion in income and \$3.7 billion in trustees’ fees” in 2007

moving into the international realm so as to take advantage of favorable tax laws in various offshore jurisdictions, trusts have become an issue of global importance.<sup>3</sup> Furthermore, trusts are becoming increasingly commercial in nature, leaving behind their reputation as mere estate-planning devices.<sup>4</sup>

The combination of international and commercial characteristics might suggest that arbitration would be an appropriate means of resolving trust disputes, since arbitration is very much the preferred means of resolving other types of international commercial controversies.<sup>5</sup> Indeed, such an approach might already appear to be standard procedure, given the number of trusts that currently appear in arbitrations in the United States and elsewhere.<sup>6</sup> However, the vast majority of these arbitrations cannot really be considered “trust disputes” per se, since they arise out of contractual relationships

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alone); Langbein, *Commercial Trusts*, *supra* note 1, at 177–78 (estimating in 1997 that commercial trusts held assets in the range of \$11.6 trillion, with noncommercial trusts holding an additional \$672 billion).

3. See Wüstemann, *supra* note 1, at 33–34 (noting the extent to which trust litigation has become internationalized in recent years). The expanded use of international trusts has been facilitated by the enactment of the Hague Convention on the Law Applicable to Trusts and on Their Recognition (Hague Convention on Trusts). See Convention on the Law Applicable to Trusts and on Their Recognition, July 1, 1985, 23 I.L.M. 1389, 1389–92 (1984) [hereinafter Hague Convention on Trusts]. The Hague Convention on Trusts has been ratified or acceded to by Australia, Canada, Italy, Liechtenstein, Luxembourg, Malta, Monaco, the Netherlands, San Marino, Switzerland, and the United Kingdom. See *HCCH Status Table*, HCCH, [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=59](http://www.hcch.net/index_en.php?act=conventions.status&cid=59) (last updated Aug. 17, 2010). It has been signed but not ratified by Cyprus, France, and the United States. See *id.*

4. See Langbein, *Commercial Trusts*, *supra* note 1, at 166 (“[W]ell over 90% of the money held in trust in the United States is in commercial trusts as opposed to personal trusts.”).

5. See GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 68–71 (2009) (presenting statistics that demonstrate the growing caseload of arbitral institutions and increasing popularity of international commercial arbitration).

6. Evidence of trust-related arbitration can be found in various judicial opinions. See *Laughton v. CGI Tech. & Sol’ns, Inc.*, 602 F. Supp. 2d 262, 263–64 (D. Mass. 2009) (concerning the enforceability of an arbitration clause in an agreement involving a trust); *U.S. Trust Co., N.A. v. Cavalieri*, No. HHDCV075013653S, 2008 WL 1822721, at \*1–2 (Conn. Super. Ct. Apr. 1, 2008) (concerning the arbitrability of an employment dispute involving a trust); *Delaney Elec. Co. v. Schiessle*, 601 N.E.2d 978, 980 (Ill. App. Ct. 1992) (concerning a dispute involving the trustee of a land trust); *Dallah Real Estate & Tourism Holding Co. v. Ministry of Religious Affairs, Pakistan*, [2010] UKSC 46, [1]–[2], [7] (appeal taken from Eng.) (concerning the enforceability of an arbitration clause in an agreement involving a trust); *Premium Nafta Prods. Ltd. v. Fili Shipping Co.*, [2007] UKHL 40, [3]–[5], *on appeal from* *Fiona Trust & Holding Corp. v. Privalov*, [2007] EWCA Civ 20, [2007] 1 All E.R. (Comm.) 891; *Trustees of the Edmond Stern Settlement v. Levy*, [2009] EWHC (TCC) 14, [1]–[2] (Eng.) (adjudicating an appeal from a trust arbitration).

between the trust and unrelated third parties and typically involve matters that are entirely external to the trust itself.<sup>7</sup>

However, these kinds of external, third-party disputes are not the only type of trust-related conflicts that exist, nor indeed are they the most common. Instead, “[m]ost trust disputes are internal disputes”<sup>8</sup> that address matters relating to the inner workings of the trust and involving controversies between some or all of the various parties to a trust, including trustees, protectors, and beneficiaries.<sup>9</sup>

These types of matters are quite different from external trust disputes, not only in terms of their subject matter (which can involve specialized questions of trust law), but also in terms of the manner in which arbitration arises. Arbitration with external third parties is typically based on an arbitration clause found in an individual contract made between the trust and the third party. Arbitration of internal trust disputes, on the other hand, usually arises as a result of a mandatory arbitration provision found in the trust itself.<sup>10</sup>

This latter type of arrangement is much more controversial than arbitration with an external third party pursuant to a contract existing outside the trust.<sup>11</sup> Indeed, some courts have concluded that mandatory arbitration provisions contained in a trust are

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7. Such proceedings are largely uncontroversial, particularly in jurisdictions with legislation giving trustees the explicit power to enter into nonjudicial means of dispute resolution. This type of legislation has long been available, but is becoming increasingly popular. *See infra* notes 154–77 and accompanying text.

8. Hwang, *supra* note 1, at 83. Different commentators define internal and external trust disputes differently. *See* Paul Buckle & Carey Olsen, *Trust Disputes and ADR*, 14 *TR. & TRUSTEES* 649, 651 (2008); Wüstemann, *supra* note 1, at 38.

9. *See* Hague Convention on Trusts, *supra* note 3, art. 2 (describing the legal relationships that make up a trust); UNDERHILL AND HAYTON: LAW RELATING TO TRUSTS AND TRUSTEES ¶¶ 8.157–8.167 (David Hayton et al. eds., 18th ed. 2010) [hereinafter UNDERHILL AND HAYTON] (discussing the enforceability of trusts by and against trustees, beneficiaries, and third parties); Langbein, *Contractarian*, *supra* note 1, at 664 (discussing which parties have standing to enforce a trust); Wüstemann, *supra* note 1, at 36 (distinguishing parties to an internal dispute, namely trustees, settlors, protectors, and beneficiaries, from parties who are external to the trust, including creditors and unnamed spouses and heirs).

10. Parties to an internal trust dispute could also enter into an arbitration agreement after the dispute has arisen (i.e., a submission agreement or *compromis*), but it is usually easier to obtain an arbitration agreement before legal controversies arise rather than afterward, regardless of whether the matter is related to a trust or not. *See* GARY B. BORN, INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: DRAFTING AND ENFORCING 37 (2010) (“It is difficult to negotiate a submission agreement once a concrete dispute has arisen and litigation tactics have been explored.”).

11. Although the current interest in mandatory arbitration of trust disputes makes it seem as if the procedure is relatively new, these issues have been discussed at various times in the past. *See, e.g.*, Arnold M. Zack, *Arbitration: Step-Child of Wills and Estates*, 11 *ARB. J.* 179 (1956) (discussing historical takes on the interplay between arbitration and wills and trusts law); Blaine Covington Janin, Comment, *The Validity of Arbitration Provisions in Trust Instruments*, 55 *CAL. L. REV.* 521 (1967) (describing the increase in interest toward arbitrating trust disputes in the mid-1960s).

unenforceable.<sup>12</sup> However, the potential difficulties associated with mandatory trust arbitration have not diminished the appeal of this particular procedure. Hostile trust litigation is reaching “near epidemic” levels, and many settlors and trustees view arbitration as an excellent means of limiting spiraling litigation costs.<sup>13</sup>

Anecdotal evidence suggests that relatively few trusts currently contain arbitration provisions.<sup>14</sup> However, it is unclear why this is so, given the significant amount of national and international interest in mandatory arbitration of internal trust disputes.<sup>15</sup>

One reason might be that some residual prejudice against arbitration still exists among some members of the trust bench and bar.<sup>16</sup> For example, questions have been raised about the adequacy of due process protections in arbitration as well as the ability of arbitrators to handle the kind of complex, multiparty disputes that often arise in trust law,<sup>17</sup> even though every other area of law has

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12. See *Diaz v. Bukey*, 125 Cal. Rptr. 3d 610, 614–15 (Ct. App. 2011) (holding that the arbitration clause of a trust agreement was unenforceable against a third-party beneficiary), *rev. granted*, 257 P.3d 1129 (Cal. 2011); *Rachal v. Reitz*, 347 S.W.3d 305, 310 (Tex. App. 2011) (holding that the type of trust at issue was not a contract and thus its arbitration clause was unenforceable), *rev. granted*, 2012 Tex. LEXIS 487 (Tex. June 8, 2012).

13. Lawrence Cohen & Marcus Staff, *The Arbitration of Trust Disputes*, 7 J. INT'L TR. & CORP. PLAN. 203, 203 (1999); see also AM. COLL. OF TRUST & ESTATE COUNSEL, ARBITRATION TASK FORCE REPORT 22–23 (Sept. 18, 2006) [hereinafter ACTEC], available at <http://www.mnbar.org/sections/probate-trust/ACTEC%20Arbitration%20Task%20Force%20Report-2006.pdf> (proposing alternatives to trust litigation); Georg von Segesser, *Arbitrability in Estate and Trust Litigation*, in PAPERS OF THE INTERNATIONAL ACADEMY OF ESTATE AND TRUST LAW—2000, at 21, 21 (Rosalind F. Atherton ed., 2001) (proposing arbitration as a possible solution to increased “hostile litigation in estate and trust matters”); Wüstemann, *supra* note 1, at 33–34 (discussing contemporary interest in arbitration of trust disputes).

14. See Wüstemann, *supra* note 1, at 41 (“Arbitration clauses in trust deeds still appear to be rare.”); see also Erin Katzen, *Arbitration Clauses in Wills and Trusts: Defining the Parameters for Mandatory Arbitration of Wills and Trusts*, 24 QUINNIPIAC PROB. L.J. 118, 119 (2011) (suggesting that the current law on the enforceability of arbitration clauses in trust disputes is “thin and underdeveloped”).

15. See Michael P. Bruyere & Meghan D. Marino, *Mandatory Arbitration Provisions: A Powerful Tool to Prevent Contentious and Costly Trust Litigation, but Are They Enforceable?*, 42 REAL PROP. PROB. & TR. J. 351, 352–53 (2007) (discussing deficiencies of resolving trust disputes through litigation and noting alternative solutions, including arbitration); Horton, *supra* note 2, at 1029 (“Recently . . . there has been a surge of interest in arbitration in a different field: wills and trusts.”); Katzen, *supra* note 14, at 118–19 (noting increased commentary on trust arbitration and an increase in legislative and judicial discussion of related issues); Wüstemann, *supra* note 1, at 41 (stating that Switzerland has taken a leading role regarding the arbitration of trust-related disputes).

16. See ACTEC, *supra* note 13, at 5 (discussing the “blinding prejudice” to arbitration in contemporary trusts and estates practice).

17. See Gerardo J. Bosques-Hernández, *Arbitration Clauses in Trusts: The U.S. Developments and a Comparative Perspective*, INDRET, no. 3, 2008 at 1, 5, 15, available at [http://www.indret.com/pdf/559\\_en.pdf](http://www.indret.com/pdf/559_en.pdf) (describing the hostility of nineteenth century judges toward arbitration); E. Gary Spitko, *Gone but Not Conforming: Protecting the*

overcome these kinds of worries about the legitimacy of the arbitral process.<sup>18</sup> However, the root of the problem may simply be that “[m]any trust practitioners have never encountered arbitration.”<sup>19</sup> While trust lawyers are often proud of the specialized nature of their practice, this may be one instance where the traditional isolation of the trust bench and bar has resulted in trust specialists’ not being exposed to some of the more positive advances that have been made recently in arbitration law.<sup>20</sup>

Alternatively, the minimal use of mandatory arbitration provisions in trusts may be due to concerns about the enforceability of such clauses. This hesitancy is often said to be the result of the relatively small number of judicial opinions in this area of law<sup>21</sup> and the wide publicity given to the few negative decisions that exist.<sup>22</sup> No lawyer wants his or her client to be the precedent-setting test case in a developing area of law, even if the outcome is ultimately in the client’s favor.

However, the situation may not be as problematic as is commonly believed. Indeed, there are a number of signs that mandatory trust arbitration is gaining momentum in the United States and elsewhere. For example, a growing number of jurisdictions are addressing issues relating to mandatory trust arbitration through legislative means.<sup>23</sup> Furthermore, several older cases, including *In re*

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*Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES. L. REV. 275, 307–14 (1999) (detailing concerns regarding the potential bias of the arbitrator); Wüstemann, *supra* note 1, at 40–41 (addressing concerns regarding whether arbitrators have enough expertise to handle complex trust law).

18. See BORN, *supra* note 5, at 775 (discussing the erosion of skepticism over the ability of arbitration to adequately resolve disputes); Horton, *supra* note 2, at 1039–40, 1042–44 (explaining that the nonarbitrability doctrine has been scaled back in many areas of law as the court has adopted a broad policy in favor of arbitration).

19. Cohen & Staff, *supra* note 13, at 206.

20. This isolation arises as a result of the specialized nature of trust law and procedure. See James W. Martin, *Ten Tips for Handling Complex Probate*, 84 FLA. B.J. 45 (2010) (identifying many of the elements that make trust law so complex). Some jurisdictions even require trust disputes to be brought in specialized probate or chancery courts. See WILLIAM M. MCGOVERN ET AL., WILLS, TRUSTS AND ESTATES: INCLUDING TAXATION AND FUTURE INTERESTS 626 (4th ed. 2010) (discussing the delays inherent in the probate and administration process).

21. See Katzen, *supra* note 14, at 118–19 (stating that few courts or legislatures have addressed the enforceability of arbitration clauses in wills and trusts); Wüstemann, *supra* note 1, at 34, 49 (“[T]he enforceability of arbitration clauses in trust deeds is still largely uncharted territory.”).

22. See *Diaz v. Bukey*, 125 Cal. Rptr. 3d 610, 614–15 (Ct. App. 2011) (holding that the arbitration clause of a trust agreement was unenforceable against a third-party beneficiary), *rev. granted*, 257 P.3d 1129 (Cal. 2011); *Rachal v. Reitz*, 347 S.W.3d 305, 310 (Tex. App. 2011) (holding that the type of trust at issue was not a contract and thus its arbitration clause was unenforceable), *rev. granted*, 2012 Tex. LEXIS 487 (Tex. June 8, 2012).

23. See *infra* notes 154–77 and accompanying text.

*Estate of Jacobovitz*,<sup>24</sup> *In re Meredith's Estate*,<sup>25</sup> and *Schoneberger v. Oelze*,<sup>26</sup> that have been frequently cited for the proposition that arbitration of trust disputes is impermissible, have all been abrogated legislatively or judicially, even though those subsequent decisions have not received the same kind of attention that the negative precedents have. Finally, the amount of law concerning arbitration of trust disputes is not perhaps as "thin and underdeveloped" as it is said to be, since a number of relevant judicial decisions appear to have been largely overlooked by legal commentators.<sup>27</sup>

Indeed, the perceived scarcity of what might be considered "clear" authority in this field appears to have led some judges and practitioners to adopt a view that is "more conservative towards ADR than the law actually is today," even though the lack of subject-specific precedent would normally seem to suggest "that the general principles of arbitration law . . . should apply equally to trust cases."<sup>28</sup> This observation leads to another reason why mandatory trust arbitration may appear to be a somewhat questionable proposition: very little analysis of the issues relating to the arbitration of internal trust disputes has been conducted by experts in arbitration.<sup>29</sup> Instead, most of the commentary in this field has come from the trust community.

While it is true that trust arbitration gives rise to a number of challenges not seen in other areas of law, many modern trusts do not reflect any "necessary element of the probate court, or family wealth transfer, or even of donative transfer"<sup>30</sup> that would make the

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24. Compare *In re Estate of Jacobovitz*, 295 N.Y.S.2d 527, 531 (Sur. Ct. Nassau Cnty. 1968) (holding that probate cases cannot be arbitrated), with *In re Blumenkrantz*, 824 N.Y.S.2d 884, 887 (Sur. Ct. Nassau Cnty. 2006) (holding that a trustee is bound by an arbitration clause in the trust agreement).

25. Compare *Campbell v. Detroit Trust Co. (In re Meredith's Estate)*, 266 N.W. 351, 357 (Mich. 1936) (holding that the jurisdiction of the probate court cannot be ousted by a stipulation to arbitrate), with *In re Nestorovski Estate*, 769 N.W.2d 720, 732 (Mich. Ct. App. 2009) (explicitly abrogating *In re Meredith's Estate* and holding that will contests may be resolved by arbitration).

26. See *Schoneberger v. Oelze*, 96 P.3d 1078, 1082–83 (Ariz. Ct. App. 2004) (holding that arbitration clauses are only enforceable when part of a valid contract and not as part of a trust agreement), superseded by statute, ARIZ. REV. STAT. ANN. § 14-10205 (2012) ("A trust instrument may provide mandatory, exclusive and reasonable procedures to resolve issues between the trustee and interested persons with regard to the administration or distribution of the trust."), as recognized in *Jones v. Fink*, No. 1 CA-SA 10-0262, 2011 WL 601598, ¶¶ 9–10 (Ariz. Ct. App. Feb. 22, 2011).

27. Katzen, *supra* note 14, at 118–19. These newly discovered decisions are introduced and discussed throughout this Article.

28. Cohen & Staff, *supra* note 13, at 211.

29. For example, the leading database on international arbitration, [kluwerarbitration.com](http://kluwerarbitration.com), does not appear to include any articles focusing on the arbitration of trust disputes. See KLUWER ARBITRATION, [kluwerarbitration.com](http://kluwerarbitration.com) (last visited Sept. 29, 2012) (searching for the word "trust" as a title of any piece of commentary).

30. Christensen, *supra* note 1, § 2.



participation of commercial and arbitration lawyers in this discussion inappropriate. Indeed, the large number of commercial trusts currently in use<sup>31</sup> and the significant degree of overlap between commercial trusts, corporations, and other business associations suggest that commercial lawyers should be integrally involved in the debate about mandatory arbitration of internal trust disputes.<sup>32</sup>

This is not to say that the arbitral community has been actively excluded from the discussion in any way. Instead, the problem seems to be that experts in arbitration appear somewhat unaware of the unique issues associated with mandatory trust arbitration.<sup>33</sup> In many ways, the arbitration community appears to be as isolated from other areas of practice as the trust community is.

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31. See Robert Flannigan, *Business Applications of the Express Trust*, 36 ALBERTA L. REV. 630, 631 (1998) (identifying the types of commercial trusts that can arise).

32. Numerous similarities exist between commercial trusts and other types of business associations. See Christensen, *supra* note 1, § 2; Hansmann & Mattei, *supra* note 1, at 479 (discussing the similarities between private trust law and corporate law); Langbein, *Contractarian*, *supra* note 1, at 650 (highlighting the similar traits of trusts and contracts); Paul B. Miller, *The Future for Business Trusts: A Comparative Analysis of Canadian and American Uniform Legislation*, 36 QUEEN'S L.J. 443, 452–55, 474–78, 482, 499 (2011) (discussing similarities between commercial uses of trusts in Canada and the United States); A. Joseph Warburton, *Trusts Versus Corporations: An Empirical Analysis of Competing Organizational Forms*, 36 J. CORP. L. 183, 188 (2010) (comparing trust and company law in the United Kingdom).

33. Although two leading arbitral institutions—the International Chamber of Commerce (ICC) and the American Arbitration Association (AAA)—have both taken steps to address the special needs of parties involved in the arbitration of trust disputes, these efforts appear to be isolated events. See AAA WILLS AND TRUSTS ARBITRATION RULES (2009), available at [http://www.adr.org/cs/idcplg?IdcService=GET\\_FILE&dDocName=ADRSTG\\_004135&RevisionSelectionMethod=LatestReleased](http://www.adr.org/cs/idcplg?IdcService=GET_FILE&dDocName=ADRSTG_004135&RevisionSelectionMethod=LatestReleased); see also ICC ARBITRATION CLAUSE FOR TRUST DISPUTES, 19 ICC INT'L CT. OF ARB. BULL. 9 (2008), available at <http://www.iccdrl.com> (search “ICC Arbitration Clause for Trust Disputes” and follow “Commission Report” hyperlink). Indeed, neither the AAA Wills and Trusts Arbitration Rules nor the ICC Model Trust Clause have yet been mentioned in any judicial opinion. Furthermore, these initiatives have been largely ignored in commentary generated by the trust bar, with the AAA and ICC's recent efforts only being discussed in passing. See Horton, *supra* note 2, at 1031 (citing, without further discussion, the ICC Model Trust Clause); Katzen, *supra* note 14, at 130–32 (discussing briefly the AAA's wills and trusts reference procedures). But see Christopher P. Koch, *A Tale of Two Cities!—Arbitrating Trust Disputes and the ICC's Arbitration Clause for Trust Disputes*, 2 Y.B. INT'L ARB. 178, 199 (2012) (discussing ICC Model Trust Clause). However, the author analyzes the AAA and ICC initiatives in detail in two forthcoming articles. See S.I. Strong, *Empowering Settlers: How Proper Language Can Increase the Enforceability of a Mandatory Arbitration Provision in a Trust*, 47 REAL PROP. TR. & EST. L.J. (forthcoming 2012) [hereinafter Strong, *Enforceability*] (comparing AAA and ICC model trust clauses); S.I. Strong, *Mandatory Arbitration of Internal Trust Disputes: Improving Arbitrability and Enforceability Through Proper Procedural Choices*, 28 ARB. INT'L (forthcoming 2012) [hereinafter Strong, *Procedures*] (analyzing the effectiveness of AAA Trust Arbitration Rules). The AAA is currently in the process of revising its rules, although the scope of those changes was not known at the time this Article went to press.

This type of practical and jurisprudential segregation cannot continue. Instead, it is high time that these two areas of specialization—trust law and arbitration law—came together to address questions relating to the arbitration of internal trust disputes through inclusion of an arbitral provision in the trust instrument. Indeed, as discussed below, several recent developments in arbitration law offer new solutions to some of the more intransigent problems facing mandatory arbitration of trust disputes.<sup>34</sup> This Article therefore aims to unite the two bodies of law in a way that is useful to courts, commentators, and counsel in both fields.

The structure of the Article is as follows. First, Part II sets the stage by describing the basic requirements for a trust as well as the wide variety of commercial and other types of trusts that currently exist. This analysis is important because it identifies some of the qualities of trusts that can prove problematic for arbitration while also dispelling the myth that trusts are used only in the testamentary or estate-planning context. This discussion also provides those who do not specialize in trust law with a basic understanding of the relevant principles of law and practice, although there are some elements that trust law experts may find intriguing as well.

Part III forms the core of the Article. This discussion introduces the various problems that can arise when parties attempt to incorporate arbitration provisions into trusts and analyzes whether and to what extent mandatory trust arbitration is enforceable as a matter of law. The focus here is on: (1) the potential for arbitration to oust the jurisdiction of the courts impermissibly; (2) questions about the operability and effectiveness of the arbitration provision itself; (3) whether and to what extent the arbitration provision will be binding on the party seeking to avoid arbitration; (4) proper representation of parties, particularly those who may be unborn, unascertained, or legally incompetent at the time the dispute arises; and (5) arbitrability of internal trust disputes.<sup>35</sup> In considering these issues, the text not only focuses on solutions that have been proposed as a matter of trust law but also introduces several new ideas based on arbitration law.

Part IV pulls the various strands of discussion together and concludes the Article with some final observations. This Part also contains several suggestions about future areas of research concerning mandatory arbitration of internal trust disputes.

Before beginning, it is important to describe the parameters of the current analysis. First, this Article focuses on the enforceability of mandatory arbitration provisions found in trusts. While there are a

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34. See *infra* notes 281–320, 322–378, 433–90 and accompanying text.

35. See Cohen & Staff, *supra* note 13, at 209 (discussing necessary requirements for arbitrating future trust disputes).

number of important issues to consider with respect to both external trust disputes and internal trust disputes subject to a post-dispute submission agreement, there is insufficient space to discuss those matters here.<sup>36</sup> Therefore, this Article restricts itself to the question of whether and to what extent parties to the trust can be bound by an arbitration provision found in the trust itself.

Second, the discussion will not, for the most part, attempt to differentiate between commercial and other types of trusts. This is not because these distinctions are not important, for they very well may be.<sup>37</sup> Indeed, some jurisdictions treat business trusts as more akin to corporations than to trusts, at least in certain contexts,<sup>38</sup> and it may be that commercial trusts could or should be considered more amenable to mandatory trust arbitration than other kinds of trusts.<sup>39</sup>

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36. For example, there is a large body of law concerning the rights of creditors to attach or attack a trust, and eventually it would be useful to consider whether those issues are amenable to mandatory arbitration. See MCGOVERN ET AL., *supra* note 20, at 413–25 (discussing spendthrift provisions and other mechanisms that insulate trust assets from creditor claims); UNDERHILL AND HAYTON, *supra* note 9, ¶¶ 7.1, 16.1–19.2 (discussing how parties can collaterally attack trusts).

37. See David Fox, *Non-Excludable Trustee Duties*, 17 TR. & TRUSTEES 17, 26 (2011) (commenting on how commercial and traditional private trusts differ); Steven L. Schwarcz, *Fiduciaries with Conflicting Obligations*, 94 MINN. L. REV. 1867, 1870, 1877–78 (2010) (discussing how underlying nature of commercial and noncommercial relationships affect fiduciary obligations). *But see* Flannigan, *supra* note 31, at 630–31 (addressing only commercial trusts).

38. See Christensen, *supra* note 1, § 2 (noting that U.S. “[b]usiness trusts, although trusts for property law purposes, are taxed as corporations because they conduct a business”); see also UNDERHILL AND HAYTON, *supra* note 9, ¶ 1.133 (noting that beneficiaries of commercial trusts in England may be treated differently than beneficiaries of private family trusts).

39. Analogies in this regard could be drawn to mandatory arbitration of internal corporate disputes as a result of arbitration provisions found in the company’s corporate charter or bylaws. See Christian Borris, *Arbitrability of Corporate Law Disputes in Germany*, in ONDERNEMING EN ADR 55, 57 (C.J.M. Klaassen et al. eds., 2011) (describing arbitrability of German corporate disputes); Olivier Caprasse, *Objective Arbitrability of Corporate Disputes—Belgium and France*, in ONDERNEMING EN ADR, *supra*, at 79 (discussing arbitrability of Belgian and French corporate disputes); Gerard Meijer & Josefina Guzman, *The International Recognition of an Arbitration Clause in the Articles of Association of a Company*, in ONDERNEMING EN ADR, *supra*, at 130 (discussing the arbitrability of corporate law disputes under international law). Another issue that may be particularly important in commercial trusts involves the strong pro-arbitration policy reflected in the Federal Arbitration Act (FAA). See 9 U.S.C. §§ 1–307 (2006); Horton, *supra* note 2, at 1032, 1040–44. One commentator has taken the view that most, if not all, trusts could or should be governed by the FAA. See Horton, *supra* note 2, at 1070–73 (focusing particularly on commercial trusts). This raises the question of whether the U.S. Supreme Court’s recent decision in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (invalidating a California state law that was said to hinder arbitration under the FAA), might require any state-law limitation on the arbitration of trust disputes to be struck. Although some state courts apparently take the view that the FAA does not preempt state law in at least some regards, see *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 91–97 (Tex. 2011), numerous state statutes have been abrogated in the wake of *AT&T Mobility*. See *AT&T Mobility*, 131 S. Ct. 1740; *Coneff v. AT&T Corp.*, 673 F.3d 1155,

However, scholarly and judicial commentary has not yet begun to distinguish between the arbitrability of the two types of trusts, and proper consideration of this matter would require lengthy analysis. Therefore, these issues are for the most part excluded, although some matters are raised intermittently.

Third, trust law is becoming increasingly globalized, and this Article introduces a number of international and comparative concepts relating to the issues presented herein. In particular, the discussion describes principles of both English and U.S. law as they relate to trusts and arbitration.<sup>40</sup> However, this Article is not intended to present a comprehensive comparative analysis of the two jurisdictions. Instead, the aim is simply to use the two legal systems as exemplars of the various problems and responses that can arise in this area of law.

Having laid the foundation for the discussion, the analysis begins with an introduction to basic principles of trust law, the various types of trusts commonly used today, and the theories underlying modern trust law.

## II. AN INTRODUCTION TO TRUSTS AND TRUST LAW THEORY

Trusts constitute a very specialized field of law and practice, with very few practitioners outside the probate bar ever having been involved in drafting a trust or litigating a matter involving an internal trust dispute.<sup>41</sup> Indeed, most common law lawyers' only experience of trusts comes through law school courses focused on

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1159–61 (9th Cir. 2012); *Quilloin v. Tenet HealthSystem Phila., Inc.*, 673 F.3d 221, 233 (3d Cir. 2012); *Kilgore v. KeyBank, Nat'l Ass'n*, 673 F.3d 947, 959–61 (9th Cir.), *reh'g granted*, 2012 WL 4327662 (9th Cir. Sept. 21, 2012); *Green v. SuperShuttle Int'l, Inc.*, 653 F.3d 766, 769 (8th Cir. 2011); *Litman v. Cellco P'ship*, 655 F.3d 225, 230–31 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1046 (2012); *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1206–07 (11th Cir. 2011); S.I. STRONG, CLASS, MASS AND COLLECTIVE ARBITRATION IN NATIONAL AND INTERNATIONAL LAW (forthcoming 2013). While this issue would be most likely to affect commercial trusts, noncommercial trusts would also be affected to the extent they were governed by the FAA.

40. These two countries have been chosen for several reasons. First, England and the United States are leaders in both trust and arbitration law. As such, the principles developed in those nations have persuasive effect elsewhere in the world. *See* Miller, *supra* note 32, at 447 (discussing importance of North American trust law); *see also* Wharburton, *supra* note 32 (discussing importance of trust law in England). Second, much of the most probing analysis of mandatory trust arbitration comes from England, although some of the concepts need to be adapted for use in the U.S. legal arena. Third, the author is qualified as an English solicitor as well as a U.S. attorney and has firsthand experience practicing in London, New York, and Chicago.

41. However, commercial lawyers may have experience litigating or arbitrating an external trust dispute. *See supra* note 6 and accompanying text.

trusts in the testamentary context.<sup>42</sup> Lawyers trained in the civil law tradition may not even have had this minimal amount of exposure to trusts, since trusts developed as a creature of the common law and are still associated primarily with that legal tradition.<sup>43</sup>

While it is beyond the scope of this Article to provide a comprehensive outline of the law of trusts,<sup>44</sup> it is nevertheless useful to provide a brief introduction to this field of law so as to lay the proper foundation for more detailed discussions of mandatory arbitration of internal trust disputes. The following subparts will therefore outline what a trust is as well as the types of trusts currently in use. The discussion also summarizes some of the various theories used to describe trusts, since those theories play an important role in mandatory trust arbitration.

### A. *What Is a Trust?*

The device now known as a trust originally developed in medieval England as a means of safeguarding and transferring wealth.<sup>45</sup> Although trusts have changed over the years in both their uses and forms, some factors have remained constant, including the elements necessary to establish a trust.<sup>46</sup> While the specific requirements associated with creating a trust vary from jurisdiction to jurisdiction, one internationally recognized set of criteria can be found in the Hague Convention on the Law Applicable to Trusts and on Their Recognition (Hague Convention on Trusts).<sup>47</sup> That instrument states that:

[T]he term “trust” refers to the legal relationships created—*inter vivos* or on death—by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose.

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42. See Langbein, *Commercial Trusts*, *supra* note 1, at 165 (explaining that trusts are primarily taught as will substitutes in U.S. law schools).

43. See Hansmann & Mattei, *supra* note 1, at 435 (contrasting the role of trusts in civil law and common law jurisdictions).

44. More detailed reading on trusts and their civil law equivalents exists elsewhere. See generally WILLIAM M. MCGOVERN ET AL., *WILLS, TRUSTS AND ESTATES: INCLUDING TAXATION AND FUTURE INTERESTS* (2010) (discussing U.S. trust law); UNDERHILL AND HAYTON: *LAW RELATING TO TRUSTS AND TRUSTEES* (David Hayton et al. eds., 18th ed. 2010) (discussing English trust law); Henry Christensen III, *Foreign Trusts and Alternative Vehicles*, 1902 PLI/CORP. 323 (Aug. 18–19, 2011) (discussing civil law equivalents to the trust).

45. See Langbein, *Contractarian*, *supra* note 1, at 632–43 (providing the historical evolution of the trust).

46. See *id.* at 632–43, 669–71; see also MCGOVERN ET AL., *supra* note 20, at 369 (describing U.S. trusts and noting that “[t]he word ‘trust’ is used for many property arrangements that have little in common with each other apart from the fact that they were historically enforced . . . in the Court of Equity”); UNDERHILL AND HAYTON, *supra* note 9, ¶ 1.95 (describing English trusts).

47. See Hague Convention on Trusts, *supra* note 3.

A trust has the following characteristics—

- a) the assets constitute a separate fund and are not a part of the trustee's own estate;
- b) title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee;
- c) the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law.

The reservation by the settlor of certain rights and powers, and the fact that the trustee may himself have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust.<sup>48</sup>

Thus, the three most important persons in a trust relationship are the settlor (also called the donor), who creates and funds the trust; the trustee, who holds legal title to the property, though only for the benefit of the beneficiary; and the beneficiary, who holds equitable title to the property and receives the benefits of the trust.<sup>49</sup> All trusts must have at least one settlor, trustee, and beneficiary, although there may be more than one person in each role (for example, there may be multiple settlors, multiple trustees, and multiple beneficiaries or any combination thereof). In some cases, the same person may act in multiple roles (for example, a settlor may also be a trustee, and a trustee may also be a beneficiary).

Historically, trusts were often created to protect property from creditors, a use which continues to this day.<sup>50</sup> Trusts were also created as a means of ensuring competent administration of the corpus of the trust in cases where the beneficiary might be incapable of acting on his or her own behalf (as in cases involving a legal impediment, such as minority) or might lack the necessary qualities to act prudently (as in cases involving persons who were financially unsophisticated or had a tendency toward profligacy).<sup>51</sup>

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48. *Id.* art. 2; see also MCGOVERN ET AL., *supra* note 20, at 374–81 (describing the creation of trusts); UNDERHILL AND HAYTON, *supra* note 9, ¶ 8.1 (outlining the language that is sufficient to create a trust).

49. See MCGOVERN ET AL., *supra* note 20, at 370 (describing the elements required to create a trust); Langbein, *Contractarian*, *supra* note 1, at 632 (“The ordinary trust . . . entails a three-party relationship, in which the donor (settlor) arranges with the trustee to divide the donee’s interest between trustee and beneficiary.”). Protectors (called “enforcers” in England) may also be appointed, though typically only in situations where the settlor wishes to establish an extra layer of protection regarding the administration of the trust. See UNDERHILL AND HAYTON, *supra* note 9, ¶¶ 8.157–8.167.

50. See Langbein, *Contractarian*, *supra* note 1, at 640–43 (describing how trusts developed to safeguard property from creditors).

51. See MCGOVERN ET AL., *supra* note 20, at 389, 417–20 (describing the use of trusts to protect assets for minors and those who suffer from “improvidence, or incapacity for self-protection”); UNDERHILL AND HAYTON, *supra* note 9, ¶¶ 11.1, 11.77–11.78 (discussing protective trusts).

### B. Types of Trusts, Including Commercial Trusts

Trusts exist in a wide variety of forms. Although most trusts are created intentionally (i.e., “express trusts”), trusts may also be created by statute or by operation of law.<sup>52</sup> All express trusts can be categorized as either a living (*inter vivos*) or testamentary trust, on the one hand, and as either a revocable or irrevocable trust, on the other.<sup>53</sup>

Beyond these basic qualifications, trusts are typically defined by their purpose. Many trusts (such as dynasty trusts, marital trusts, or family trusts) are meant to pass on wealth within a family, with the quintessential example being a trust created by a parent to benefit a child after the parent’s death.<sup>54</sup> However, trusts serve other purposes as well. For example, some trusts are created entirely for charitable purposes,<sup>55</sup> while others, such as asset-protection trusts or credit-shelter trusts, appear to be primarily focused on garnering various tax savings or deterring potential creditors from reaching trust assets.<sup>56</sup>

Although family-planning trusts are perhaps the most well-known type of trust in the United States, they are not the most common. Instead, “well over 90% of the money held in trust in the United States” in recent years has been held “in commercial as

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52. Trusts created by operation of law include resulting trusts, constructive trusts, and trusts created through bankruptcy. See MCGOVERN ET AL., *supra* note 20, at 369–70; UNDERHILL AND HAYTON, *supra* note 9, ¶¶ 3.1–3.11. These trusts are not addressed in this Article, since these devices do not involve a written instrument that can include an arbitration provision.

53. A living or *inter vivos* trust comes into effect during the lifetime of the settlor, whereas a testamentary trust comes into effect only after the death of the settlor. Revocable trusts may be changed or terminated by the settlor, whereas irrevocable trusts may not. This of course means that only living trusts may be revocable. See MCGOVERN ET AL., *supra* note 20, at 369, 381.

54. See *id.* at 369–70 (discussing common reasons for using trusts); Langbein, *Commercial Trusts*, *supra* note 1, at 178 (describing the use of trusts in family wealth transfers).

55. Charitable trusts are often subject to slightly different rules than private trusts. See MCGOVERN ET AL., *supra* note 20, at 436–50 (discussing the rules governing charitable trusts). One distinctive aspect of charitable trusts is that they are typically enforceable by the attorney general, since there are no identifiable beneficiaries who can undertake that task. See UNDERHILL AND HAYTON, *supra* note 9, ¶ 8.158; Langbein, *Contractarian*, *supra* note 1, at 631 (describing the distinct character of charitable trusts). While this “public” aspect of charitable trusts may suggest that such trusts may not be amenable to arbitration, some governmental entities such as the U.S. Department of Justice and various state attorney general offices are embracing arbitration and other forms of alternative dispute resolution (ADR). See *Interagency Alternative Dispute Resolution Working Group*, ADR.GOV, <http://www.adr.gov/> (focusing on increasing use of ADR in federal government). Therefore, it may be that charitable trusts could nevertheless be made subject to mandatory arbitration.

56. See MCGOVERN ET AL., *supra* note 20, at 369–70 (describing spendthrift and other asset-protection trusts).

opposed to personal trusts.”<sup>57</sup> Commercial trusts are not limited to the United States but have become increasingly popular in other jurisdictions as well.<sup>58</sup> Thus, it has been said that “the role of trusts in intrafamily wealth transfers is today ‘relatively trivial,’ particularly when compared to the ‘enormously important’ role of trusts in the business context.”<sup>59</sup>

A brief summary of commercial trusts is useful to provide context for later discussion of this often overlooked device.<sup>60</sup> First, as a definitional matter, a commercial trust (also known as a business trust) constitutes “a trust that implements bargained-for exchange,” in contrast to the kind of donative transfers that are more common in a trust created to pass on family wealth.<sup>61</sup> Some, but not all, commercial trusts are created by statute.<sup>62</sup>

Commercial trusts are created for a variety of reasons. Some of these rationales appear largely similar to those involving noncommercial trusts and therefore suggest that the two kinds of trusts should be treated similarly in most, if not all, regards.<sup>63</sup> For

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57. Langbein, *Commercial Trusts*, *supra* note 1, at 166–67, 178 (citing figures from the mid- to late-1990s).

58. See, e.g., Robert Flannigan, *Business Applications of the Express Trust*, 36 ALBERTA L. REV. 630 (1998) (discussing the importance of commercial trusts in Canada); Langbein, *Commercial Trusts*, *supra* note 1, at 166 (arguing the extensive use of commercial trusts in the United States).

59. Christensen, *supra* note 1, § 1.

60. See Miller, *supra* note 32, at 452 (explaining the inattention generally paid to business trusts).

61. Langbein, *Commercial Trusts*, *supra* note 1, at 166–67 (contrasting commercial and noncommercial trusts).

62. See, e.g., UNIF. STATUTORY TRUST ENTITY ACT prefatory note (2009), available at <http://www.law.upenn.edu/bll/archives/ulc/ubta/2009final.htm> (representing an example of a commercial trust created by statute).

63. There is some debate in the trust community as to the extent to which the two kinds of trusts are or should be treated similarly. For example, the *Restatement of Trusts* excludes business trusts from its consideration and focuses solely on trusts as donative devices, stating that “[a]lthough many of the rules applicable to trusts are applied to business trusts, yet many of the rules are not applied . . . . The business trust is a special kind of business association and can best be dealt with in connection with other business associations.” RESTATEMENT (SECOND) OF TRUSTS, § 1 cmt. B (1959); see also Thomas P. Gallanis, *The New Direction of American Trust Law*, 97 IOWA L. REV. 215, 217 (2011) (citing RESTATEMENT (THIRD) OF TRUSTS ch. 1, intro. note (2003)). However, John Langbein states that “[n]either the text of the Restatement’s official comment, nor the reporter’s note, supplies any authority for Scott’s claim that ‘many of the rules’ of trust law do not apply to business uses of the trust.” Langbein, *Commercial Trusts*, *supra* note 1, at 166 n.6. Other authorities take no position on this issue. See David M. English, *Representing Trust and Estate Beneficiaries and Fiduciaries: The Uniform Trust Code*, SK089 ALI-ABA 191, sec. IV (2005) (noting the Uniform Trust Code (UTC) is not directed at commercial trusts but does not exclude them from consideration, either). This kind of differential treatment is somewhat disturbing, given the importance of commercial trusts to the trust industry, see Christensen, *supra* note 1, at § 1, and may inappropriately skew the analysis regarding the arbitrability of trust disputes by diminishing the emphasis on the commercial and contractual nature of the majority of trusts in use today.



example, both business and nonbusiness trusts provide protection from insolvency and some forms of taxation, while also creating a fiduciary regime that requires the application of fiduciary duties of loyalty and prudence.<sup>64</sup>

However, business trusts also have purposes that are entirely unique to the commercial realm. For example, parties to commercial trusts are able to take advantage of the trust's inherent flexibility and create relationships or procedures that might be difficult or impossible to achieve as a matter of corporate law, particularly with respect to "matters of internal governance and . . . the creation of beneficial interests."<sup>65</sup> "Transaction planners designing asset securitization trusts especially welcome the freedom to carve beneficial interests without regard to traditional classes of corporate shares," creating a wide range of "so-called tranches, each embodied in its own class of trust security."<sup>66</sup>

Interest in commercial trusts has grown exponentially in recent years due to the increased liberalization of laws regarding the use and creation of such devices.<sup>67</sup> However, commercial trusts "are a woefully under-analyzed and underappreciated form of business organization," despite their being "critically important" to various capital markets.<sup>68</sup> Indeed, many lawyers may be unaware of what constitutes a commercial trust per se. As it turns out, there are a wide variety of statutory and common law business trusts currently in use,<sup>69</sup> with some of the more common types including pension trusts, investment or unit trusts (which include mutual funds, real estate investment trusts (REITs), oil and gas royalty trusts, and asset securitization trusts), and trusts relating to the issuance of bonds.<sup>70</sup> Notably, a number of these types of trusts have been subject to

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64. See Langbein, *Commercial Trusts*, *supra* note 1, at 179–83, 189 (describing why trusts are useful in the commercial context).

65. *Id.* at 183 (explaining usefulness of trusts in the commercial context); see also UNDERHILL AND HAYTON, *supra* note 9, ¶ 1.99.

66. Langbein, *Commercial Trusts*, *supra* note 1, at 183 (citation omitted). "A tranche is simply a slice of a deal, a payment stream whose expected return increases with its riskiness." *Id.* at 183 n.109.

67. See UNIF. STATUTORY TRUST ENTITY ACT (concerning liberalizing moves by individual U.S. states); Langbein, *Commercial Trusts*, *supra* note 1, at 187–88 (noting liberalization of legislation regarding business trusts).

68. Miller, *supra* note 32, at 444. For more information on these trusts, see UNDERHILL AND HAYTON, *supra* note 9, ¶¶ 1.135, 1.138; Langbein, *Commercial Trusts*, *supra* note 1, at 168–76; Miller, *supra* note 32, at 447.

69. For a list of the various types of trusts recognized by the U.S. Internal Revenue Code, see Christensen, *supra* note 1, § 2.

70. See Langbein, *Commercial Trusts*, *supra* note 1, at 168–76 (describing various types of commercial trusts in the United States).

arbitration of internal trust disputes in the United States and elsewhere.<sup>71</sup>

Interestingly, the increased use of the commercial trust has led to a sharpening of the debate about the theoretical nature of trusts. While the ideological divide currently reflected in the legal literature mirrors a similar split seen in the early twentieth century, the issue has become particularly pressing in light of the current discussion about mandatory trust arbitration. Although theory can often seem entirely divorced from the practice of law, this is one instance where the manner in which a device is conceptualized can make a difference in how it is treated in court.<sup>72</sup>

### C. *The Theoretical Basis of Trusts*

#### 1. The Donative Theory of Trusts

The first and perhaps most prevalent theory of trusts holds that such devices are primarily donative in nature. This approach is evident in both England and the United States, with one of the leading treatises on English trust law stating that “[a] trust is not a contract but a unilateral transfer of assets to a person prepared to accept the office of trustee with the benefits and burdens attached to such office.”<sup>73</sup>

Although this statement would seem conclusive, the same treatise also indicates that general principles of trust law and theory can be overcome by statute.<sup>74</sup> In reaching this conclusion, the authors specifically mention the Arbitration Act 1996, England’s national statute on arbitration, noting that the Act gives parties the ability to contract out of judicial determinations of legal issues.<sup>75</sup> Thus, while

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71. See *Hastings v. Wilson*, 516 F.3d 1055, 1059 (8th Cir. 2008) (discussing use of arbitration in context of a pension trust); *Bortrager v. Cent. States, Se. & Sw. Areas Pension Fund*, 425 F.3d 1087, 1089 (8th Cir. 2005) (discussing arbitration of dispute regarding withdrawal liability under a pension benefit trust); *Contract Servs. Emp. Trust v. Davis*, 55 F.3d 533, 535 (10th Cir. 1995) (discussing use of arbitration in a case involving an employee benefit trust fund); *Reeves v. Tarvizian*, 351 F.2d 889, 890–92 (1st Cir. 1965) (involving arbitration of claims relating to pension trust); *Stender v. Cardwell*, No. 07-CV-02503-REB-MJW, 2009 WL 3416904, at \*2 (D. Colo. Oct. 20, 2009) (involving arbitration of an umbrella partnership REIT (UPREIT)); see also *Law Debenture Trust Corp. v. Elektrim Fin.* [2005] EWHC. 1412, [38]–[47] (Ch.) (Eng.) (involving dispute relating to a trust).

72. See Langbein, *Commercial Trusts*, *supra* note 1, at 185–86 (describing debate about whether commercial trusts should be framed as donative or contractual).

73. UNDERHILL AND HAYTON, *supra* note 9, ¶ 11.83.

74. See *id.* ¶¶ 11.1, 11.79.

75. See Arbitration Act 1996, c. 23, § 69 (Eng.), available at <http://www.legislation.gov.uk/ukpga/1996/23/contents> (detailing the process for appealing an arbitral award to court); see also UNDERHILL AND HAYTON, *supra* note 9, ¶¶ 11.79.

the donative theory of trusts may predominate in England as a general matter, it may have diminished applicability in cases involving mandatory arbitration, having been superseded, as it were, by statute.

The donative theory of trusts is also reflected in the United States, most visibly in the *Restatement of Trusts*.<sup>76</sup> Interestingly, U.S. adoption of the donative theory of trusts is a relatively recent innovation, appearing for the first time in the early days of the twentieth century, when the first *Restatement of Trusts* was published.<sup>77</sup> Prior to that time, courts and commentators in the United States appear to have been more accepting of the contractual aspects of trusts, at least as it applied to arbitration.<sup>78</sup>

Interestingly, the donative theory of trusts does not have to be considered antithetical to mandatory trust arbitration. Indeed, a number of the reasons enunciated by Austin Scott, the reporter of the first *Restatement*, as justifying the characterization of trusts as donative could be seen as entirely consistent with mandatory arbitration of internal trust disputes.<sup>79</sup> For example, Scott is said to have embraced the donative theory of trusts because he was worried that a more contractual approach would bring the enforcement of trusts out of the realm of equity and into the common law.<sup>80</sup> This was problematic for Scott because “that fusion might remove the law of trusts from the nurturing hand of the specialist equity bench, and indeed, that fusion might cause trust litigation to be subjected to jury trial.”<sup>81</sup> “Thus, for Scott, having the *Restatement* deny the contractarian character of the trust was a means of buttressing the jury-free preserve of equity judges.”<sup>82</sup> Of course, another way to remove a dispute from jury consideration and put it in the hands of a decision maker with special expertise in trust law and procedure is to put it into arbitration.<sup>83</sup>

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76. See Langbein, *Commercial Trusts*, *supra* note 1, at 166 (citing the *Restatement* as characterizing trusts as “a branch of the law of gratuitous transfers”).

77. See Langbein, *Contractarian*, *supra* note 1, at 627, 644–65 (describing the debate involving the contractarian and donative theories of trust).

78. See ACTEC, *supra* note 13, at 13 (noting early courts that found agreements to arbitrate future disputes enforceable).

79. Interestingly, the first *Restatement* is said to have adopted the donative approach to trusts not because that theory prevailed as a matter of jurisprudential discourse (indeed, the contractarian approach had numerous supporters at that time, including Frederic W. Maitland), but simply because that was the model favored by Scott. See Langbein, *Contractarian*, *supra* note 1, at 627, 644–45 (noting Scott had long favored the donative approach to trusts).

80. See *id.* at 648–50 (noting that Scott’s fear did not come to pass).

81. *Id.* at 648.

82. *Id.* at 649.

83. See *infra* notes 137–41 and accompanying text (considering benefits of arbitration of trust disputes).

One of the few U.S. decisions to consider the theoretical nature of trusts in the context of arbitration is *Schoneberger v. Oelze*.<sup>84</sup> Although the decision has been superseded by statute, the case nevertheless provides a useful demonstration of how legal theory applies in practice.<sup>85</sup>

*Schoneberger* arose out of claims for breach of trust and related torts brought by the beneficiaries of two related family trusts against the trustees.<sup>86</sup> The trusts contained a provision stating that “[a]ny dispute arising in connection with this Trust, including disputes between Trustee and any beneficiary or among Co-Trustees” was to be arbitrated.<sup>87</sup> The beneficiaries initially filed their suit in court, but the trustees moved for arbitration on the grounds that the arbitration clause in the trusts constituted “provisions in a written contract” in conformity with statutory requirements for arbitration, or, alternatively, that the beneficiaries “were equitably estopped from objecting to arbitration as they were affirmatively seeking benefits under the Trusts.”<sup>88</sup> The beneficiaries alleged in response that “the arbitration provisions were unenforceable because the Trusts were not contractual agreements” and that, “as non-signatories to the Trust documents, they had never agreed to arbitrate their claims against the defendants.”<sup>89</sup>

In deciding in favor of the beneficiaries, the Arizona Court of Appeals held that “the duties of a trustee stem from duties implied by law’ and the relationships that arise out of a trust ‘are not contractual.”<sup>90</sup> Therefore:

The legal distinctions between a trust and a contract are at the heart of why [the beneficiaries] cannot be required to arbitrate their claims against the defendants. Arbitration rests on an exchange of promises. . . . In contrast, a trust does not rest on an exchange of promises. A trust merely requires a trustor to transfer a beneficial

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84. See 96 P.3d 1078 (Ariz. Ct. App. 2004) (holding that trusts were not written contracts requiring arbitration), *superseded by statute*, ARIZ. REV. STAT. ANN. § 14-10205 (2012), *as recognized in* Jones v. Fink, No. 1 CA-SA 10-0262, 2011 WL 601598 (Ariz. Ct. App. Feb. 22, 2011) (confirming that *Schoneberger* was superseded by statute to the extent that the case required consent as a precondition to arbitration).

85. Several other U.S. courts have adopted the *Schoneberger* analysis, but most of those decisions have been subject to vigorous dissents or have been appealed to higher courts. See Diaz v. Bukey, 125 Cal. Rptr. 3d 610, 614–15 (Ct. App. 2011) (citing *Schoneberger*), *rev. granted*, 257 P.3d 1129 (Cal. 2011); Rachal v. Reitz, 347 S.W.3d 305, 310–11 (Tex. App. 2011) (discussing *Schoneberger*), *rev. granted*, 2012 Tex. LEXIS 487 (Tex. June 8, 2012); see also *In re Calomiris*, 894 A.2d 408, 409–10 (D.C. 2006) (adopting *Schoneberger* analysis in the context of wills); Robsham v. Lattuca, 797 N.E.2d 502 (Mass. App. Ct. 2003) (unpublished table decision) (holding that the trusts at issue were not enforceable as contracts).

86. *Schoneberger*, 96 P.3d at 1079–80.

87. *Id.* at 1080.

88. *Id.*

89. *Id.* at 1080–81.

90. *Id.* at 1082 (citations omitted).

interest in property to a trustee who, under the trust instrument, relevant statutes and common law, holds that interest for the beneficiary. The “undertaking” between trustor and trustee “does not stem from the premise of mutual assent to an exchange of promises” and “is not properly characterized as contractual.”<sup>91</sup>

## 2. The Contract Theory of Trusts

Just as the donative theory of contract law has its champions, so, too, does the contractual theory. Thus, for example, one of the leading commentators on U.S. trust law has said that:

[A]lthough the typical trust implements a donative transfer, it embodies a contract-like relationship in the underlying deal between the settlor and the trustee about how the trustee will manage the trust assets and distribute them to the trust beneficiaries. The difference between a trust and a third-party beneficiary contract is largely a lawyers’ conceptualism.<sup>92</sup>

Under this approach, the trust is viewed as “a deal, a bargain about how the trust assets are to be managed and distributed.”<sup>93</sup> Therefore:

When . . . we enforce a trust, even the conventional donative or personal trust, we are already in the realm of contract-like behavior. That is why not much turns on the distinction between donative and commercial trust. In the commercial setting, the typical wealth-holder, instead of transferring property for his widow and orphans, is an investor buying shares in an asset pool for the investor’s own benefit. In

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91. *Id.* at 1083 (citation omitted). Interestingly, the Arizona court was influenced as much by the precise language of the state statute on arbitration as it was by judicial precedent characterizing trusts as donative instruments. The statute indicates that:

A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.

ARIZ. REV. STAT. § 12-1501 (2003); *see also Schoneberger*, 96 P.3d at 1083 (focusing on the word “contract”). Some judges have noted that arbitration statutes contemplating arbitration “agreements” rather than “contracts” may yield different results. *See Rachal v. Reitz*, 347 S.W.3d 305, 312–13 (Tex. App. 2011) (Murphy, J., dissenting) (explaining that an “agreement” is broader than a “contract”), *rev. granted*, 2012 Tex. LEXIS 487 (Tex. June 8, 2012). This suggests that parties may be able to determine whether a particular jurisdiction has adopted a contractual or donative approach to trusts by considering whether claims against a trustee must be framed in terms of breaches of trust or fiduciary duty or whether they may be classified as breaches of contract. *Compare Schoneberger*, 96 P.3d at 1082–83 (stating “[a] trustee who fails to perform his duties . . . is not liable to the beneficiary for breach of contract” (citations omitted)), *with Stender v. Cardwell*, No. 07-cv-02503, 2009 WL 3416904, at \*2 (D. Colo. Oct. 20, 2009) (involving breach of contract of an UPREIT).

92. Langbein, *Commercial Trusts*, *supra* note 1, at 185 (citation omitted).

93. Langbein, *Contractarian*, *supra* note 1, at 627.

either case, the wealth-holder places property at the trustee's disposal in reliance upon the safeguards of the trust form.<sup>94</sup>

Certainly, when the trust is used to fulfill "commercial usages, the contractarian character of the trust is transparent,"<sup>95</sup> a conclusion that suggests it may be particularly appropriate to enforce a mandatory arbitration provision in a commercial trust.<sup>96</sup> However, the contractual theory of trusts can apply in most noncommercial contexts as well, since even if the contractarian approach is considered "unsuitable for the two-party declaration of trust, . . . such an observation in no way invalidates the contract approach to the more traditional three-party trust where the grantor does not act as the trustee."<sup>97</sup>

The contract theory of trusts is attractive to proponents of mandatory trust arbitration for a variety of reasons.<sup>98</sup> While these issues will be discussed further below, it is nevertheless interesting to note that prior to the adoption of the first *Restatement of Trusts*, U.S. courts appear to "have had little difficulty upholding testamentary arbitration clauses," often doing so "by drawing analogies to contract law."<sup>99</sup> Furthermore, several recent judicial opinions appear to adopt this approach. For example, in *Stender v. Cardwell*, a federal district court allowed arbitration of various claims associated with the breach of a declaration of trust in an umbrella partnership REIT.<sup>100</sup> Although the analysis was somewhat cursory, the court framed the

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94. Langbein, *Commercial Trusts*, *supra* note 1, at 186.

95. Langbein, *Contractarian*, *supra* note 1, at 631.

96. Indeed, several courts have already done so. *See* *San Juan v. Corporación para el Fomento Económico de la Ciudad Capital*, 597 F. Supp. 2d 247, 248–49 (D. P.R. 2008) (holding the parties to their agreement to abide by certain arbitration rules); *Robin v. Doran*, No. 392456, 2010 WL 728558, at \*1 (Mass. Land Ct. Mar. 3, 2010) (enforcing mandatory arbitration provision in bylaws of condominium trust); *see also supra* note 71 (listing cases in which internal trust disputes related to commercial trusts were subject to arbitration).

97. Bruyere & Marino, *supra* note 15, at 362; *see also* Langbein, *Contractarian*, *supra* note 1, at 627, 645 (describing trusts in contractual terms). The two-party declaration trust, also known as a self-declarative trust, arises when a settlor declares him or herself to be the trustee of certain identified property for the benefit of another person rather than naming another person to act as trustee. *See* MCGOVERN ET AL., *supra* note 20, at 374; UNDERHILL AND HAYTON, *supra* note 9, ¶¶ 12.7–12.13. Notably, self-declarative trusts are never used in the commercial context and are rare in the noncommercial realm. *See* MCGOVERN ET AL., *supra* note 20, at 374–75; Langbein, *Contractarian*, *supra* note 1, at 672 (suggesting self-declarative trusts to be "little used" because they eliminate the management services of third-party trustees, which is what most modern settlors want from a trust).

98. *See infra* notes 260–320 and accompanying text (considering contract theory of trusts as a matter of arbitration law).

99. ACTEC, *supra* note 13, at 13.

100. *See Stender v. Cardwell*, No. 07-cv-02503, 2009 WL 3416904, at \*2 (D. Colo. Oct. 20, 2009) (holding that plaintiffs' claim for breach of a contract remained subject to arbitration despite plaintiffs' amended complaint mentioning claims for breach of other contracts).

action as a breach of contract, rather than a breach of fiduciary duty, thus suggesting more of a contractual approach rather than a donative approach.<sup>101</sup> Other courts have also upheld arbitration provisions found in commercial trusts based on contractual rationales.<sup>102</sup>

Contract-based analyses also appear in the context of family trusts. Thus, for example, the court in *In re Ismailoff* ruled that an arbitration provision found in an irrevocable *inter vivos* trust was “enforceable at the election of any one of the four trustees.”<sup>103</sup> *In re Ismailoff* is particularly interesting because the opinion states that the settlor “executed an agreement with her four children (trustees) creating an irrevocable *inter vivos* trust.”<sup>104</sup> The reference to “an agreement” suggests either that the settlor drafted a trust that incorporated certain contractual elements not normally found in trusts or that the court simply characterized a standard *inter vivos* trust as being contractual in nature.<sup>105</sup> Given the sparseness of the published opinion, it is impossible to know which situation actually arose. Nevertheless, the decision demonstrates that judges are willing to view trusts in a contractual light, even if it is unclear whether settlors need to adopt any special drafting techniques to help achieve that outcome.<sup>106</sup>

Contract theories do not appear as attractive to English courts or commentators. Indeed, there are no known advocates of that particular approach to trusts, as a general proposition. Nevertheless, a settlor of an English trust might be able to create contractual obligations in a trust if

a settlor, on behalf of himself and the beneficiaries deriving their interests through him, expressly contracts in the trust instrument with the trustee, on behalf of itself and its successors in title, that in consideration of undertaking the office of trustee (for the benefit of the

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101. See *id.* (“Plaintiffs in this putative class action lawsuit assert, *inter alia*, that defendants breached a contract—to wit, a declaration of trust.”).

102. See *San Juan v. Corporación para el Fomento Económico de la Ciudad Capital*, 597 F. Supp. 2d 247, 248–49 (D. P.R. 2008) (deferring to arbitrator to decide procedural disputes in arbitration on the basis that the parties’ contract to settle dispute through arbitration was enforceable).

103. *In re Ismailoff*, No. 342207, 2007 N.Y. Slip Op. 50211(U), at \*1 (Sur. Ct. Nassau Cnty. Feb. 1, 2007).

104. *Id.* at \*2.

105. See Strong, *Enforceability*, *supra* note 33 (discussing drafting techniques to assist in overcoming problems associated with the need for a contract); see also *infra* notes 260–320 and accompanying text (describing and evaluating the interpretation of trusts based on their contractual qualities).

106. Further reading is available on how best to draft an enforceable arbitration provision in a trust. See *infra* note 499 (providing a list of sources regarding “best practices” in drafting of trust arbitration provisions).

settlor, the beneficiaries and itself) any breach of trust claim against the trustees shall be referred to arbitration.<sup>107</sup>

Thus, English law may permit parties to overcome certain theoretical difficulties through careful drafting.<sup>108</sup> Furthermore, even though this approach currently seems to be limited to claims associated with breach of trust, it might be possible to extend the technique to address other sorts of internal disputes.<sup>109</sup> Settlers of U.S. trusts might also be able to use similar techniques to increase the enforceability of a mandatory trust provision in a trust governed by U.S. law.

While the contractual theory of trusts is often seen in the United States as being in conflict with the donative theory, not every country experiences this kind of jurisprudential tension. Instead, a number of jurisdictions—particularly certain civil law nations that have adopted their own domestic version of the trust—view trusts through an exclusively contractual lens, often upholding mandatory arbitration provisions in trusts as a matter of course.<sup>110</sup>

### 3. Other Theories of Trusts

Although U.S. commentary focuses primarily on the contractual and donative theories of trusts, several other theories also exist. For example, a court or arbitrator might rely on the intention theory of trusts, which views “the intention of the settlor as the law of the trust.”<sup>111</sup> Though somewhat similar to the contractual theory of trusts, this approach suggests that “[t]he relative weight of the rights at issue in a will [or trust] dispute” favor upholding the settlor’s intent vis-à-vis arbitration, since the settlor’s “right to dispose of her property as she sees fit is indisputably superior to the right of an intestate heir or beneficiary under a prior will [or trust] to receive the

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107. UNDERHILL AND HAYTON, *supra* note 9, ¶ 11.84.

108. This is just one of the ways a settlor can increase the enforceability of a mandatory arbitration provision through appropriate language in the trust. *See* Strong, *Enforceability*, *supra* note 33 (discussing various ways to improve the enforceability of an arbitration provision through proper drafting).

109. *See infra* notes 162–69 and accompanying text (weighing the pros and cons of the UTC’s suggestions for which disputes could go to arbitration).

110. *See* Figueroa, *supra* note 1, at 704–05 (describing Latin American jurisdictions that view arbitration from a contractual perspective); *see also* FRANZ T. SCHWARZ & CHRISTIAN W. KONRAD, *Austria*, in *THE VIENNA RULES: A COMMENTARY ON INTERNATIONAL ARBITRATION IN AUSTRIA* 1, 19–20 (2009); Christian Duve, *Arbitration of Corporate Law Disputes in Germany*, in *ARBITRATION IN GERMANY: THE MODEL LAW IN PRACTICE* 957, 1002 (Karl-Heinz Böckstiegel et al. eds., 2007) (discussing German views regarding the contractual nature of arbitration agreements); Koch, *supra* note 33, at 195–96 (discussing Germany, Spain, Bolivia, Honduras, Peru, and Malta).

111. Bosques-Hernández, *supra* note 17, at 8; *see also* Stephen Wills Murphy, *Enforceable Arbitration Clauses in Wills and Trusts: A Critique*, 26 OHIO ST. J. ON DISP. RESOL. 627, 652–57 (2011).



testator's [or settlor's] property."<sup>112</sup> While any conditions imposed under this theory "have to be lawful and not contrary to public policy, . . . an arbitration clause, generally speaking, is not against public policy."<sup>113</sup>

Decision makers might also consider "the benefit approach, which means that the beneficiaries of a trust ha[ve] to take the whole disposition including conditions and restrictions imposed by the settlor."<sup>114</sup> Rather than characterizing a conveyance as contractual or donative, this theory views trusts in a more equitable light, essentially estopping beneficiaries from accepting some, but not all, of the benefits of a trust. Interestingly, the concept of estoppel is also available in arbitration law,<sup>115</sup> which suggests that this theory might be particularly appropriate in cases involving mandatory arbitration of trust disputes. Indeed, one U.S. court has apparently already relied on estoppel to extend the effects of an arbitration provision in an external contract to include matters internal to the trust.<sup>116</sup>

Having described various background matters concerning trusts, it is time to consider issues relating directly to the arbitration of trust disputes. These matters are taken up in the following Part.

### III. ARBITRATION OF TRUST DISPUTES

#### A. *Benefits of Arbitration*

Arbitration is well-known as offering many benefits to parties. However, it is important to consider whether and to what extent these positive attributes also extend to trust disputes, since it would be unwise to adopt a procedure that is ill-suited to the types of claims that are expected to arise.<sup>117</sup> Indeed, specialists in arbitration agree

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112. Spitko, *supra* note 17, at 299.

113. Bosques-Hernández, *supra* note 17, at 11; *see also* Charles Lloyd & Jonathan Pratt, *Trust in Arbitration*, 12 TR. & TRUSTEES 4, 18 (2006) (describing how arbitration is no longer subject to certain policy-based criticisms).

114. Bosques-Hernández, *supra* note 17, at 8.

115. *See infra* notes 270–80, 299–304 and accompanying text (analogizing deemed acquiescence and conditional transfer to estoppel).

116. *See Zisman v. Lesner*, No. 6:08-cv-1448, 2008 WL 4459029, at \*3–4 (M.D. Fla. Sept. 29, 2008) (holding that equitable estoppel would allow an arbitration provision to bind a nonparty to the arbitration agreement).

117. Other commentators and working groups have also considered these matters. *See* ICC ARBITRATION CLAUSE FOR TRUST DISPUTES, 19 ICC INT'L CT. OF ARB. BULL. 9, explanatory notes 1–2 (2008), *available at* <http://www.iccdrl.com> (search "ICC Arbitration Clause for Trust Disputes" and follow "Commission Report" hyperlink) (suggesting that advantages of arbitration are as relevant in trust disputes as they are in other kinds of disputes); ACTEC, *supra* 13, at 5 (considering whether informal means of dispute resolution would be superior to litigation of trust disputes); Bosques-Hernández, *supra* note 17, at 6 (considering the advantages of arbitration in estate

that although arbitration offers significant advantages over litigation, arbitration may not be appropriate in every dispute.<sup>118</sup>

First, parties are said to favor arbitration because it is faster and more cost-effective than litigation.<sup>119</sup> This is an equally important issue for settlors and trustees who are increasingly troubled by the amount of time and money that is spent on hostile trust litigation.<sup>120</sup> Controversies involving international trusts may be particularly at risk for increased litigation costs, since many offshore trusts are located in jurisdictions that give rise to extensive discovery disputes and lengthy appeals, including appeals to the Privy Council in London.<sup>121</sup> Since arbitration limits the availability of both discovery and judicial appeals, arbitration seems well-suited to the needs of parties to trust disputes.<sup>122</sup>

Second, parties often prefer arbitration because it offers a private and confidential means of resolving legal controversies.<sup>123</sup> Interestingly, settlors and trustees may have an even higher desire for these protections than actors in other fields do. For example, settlors in both the testamentary and commercial contexts often adopt the trust form precisely because a trust provides more privacy than any of the other alternatives.<sup>124</sup> One would naturally expect

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planning compared to litigation); Buckle & Olsen, *supra* note 8, at 649 (discussing reasons that arbitration might not be the best mechanism for addressing certain types of trust disputes).

118. See BORN, *supra* note 10, at 13–15 (warning against making blanket choices in favor of either arbitration or litigation, since both mechanisms have strengths and weaknesses depending on the circumstances).

119. See JULIAN D.M. LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION ¶¶ 1-28 to -30 (2003) (agreeing with the assumption that arbitration is generally quicker than litigation in national courts, but noting that arbitration is not necessarily more cost-effective than court proceedings).

120. See Cohen & Staff, *supra* note 13, at 203–04 (discussing size and scope of hostile trust litigation).

121. See Wüstemann, *supra* note 1, at 40 (explaining causes of discovery expenses in offshore trust litigation). The Judicial Committee of the Privy Council hears appeals from Crown dependencies, such as Jersey, Guernsey, and the Isle of Man, as well as various Commonwealth nations and overseas territories, including popular jurisdictions for offshore trusts such as the Bahamas, Bermuda, the Cayman Islands, and the British Virgin Islands. See *Role of the JCPC*, JUDICIAL COMM. OF THE PRIVY COUNCIL, <http://www.jcpc.gov.uk/about/role-of-the-jcpc.html> (last visited Sept. 2, 2012).

122. See BORN, *supra* note 5, at 1876–78 (noting that the scope of disclosure is less than the scope of discovery); LEW ET AL., *supra* note 119, ¶ 1-20 (explaining that arbitral awards are subject to limited grounds of review).

123. See LEW ET AL., *supra* note 119, ¶¶ 1-26 to -27 (recognizing that one of the advantages of arbitration is its confidential process). Notably, privacy and confidentiality are not guaranteed as a matter of national or international arbitration law, which means the parties must make specific provision for these attributes in their arbitration agreement. See BORN, *supra* note 5, at 2253.

124. See MCGOVERN ET AL., *supra* note 20, at 370 (noting that settlors choose trusts because of their private and confidential nature); Frances S. Foster, *Trust*

settlors to want the same degree of confidentiality in their dispute resolution processes. Professional trustees have also been said to prefer the privacy of arbitration because public forms of dispute resolution can damage not only the trustees' own personal reputations but also the reputation of the trust industry as a whole.<sup>125</sup>

Although arbitral concepts of privacy and confidentiality may be attractive to parties to trust disputes, there are some potential problems in this regard. Trust controversies are considered to proceed *in rem*, which means that a broad range of actual and potential parties may seek to join or be joined to the action.<sup>126</sup> The possibility of multiparty proceedings could create potential difficulties with respect to both the provision of notice and the opportunity to participate in the arbitration. While there are ways of addressing both these issues,<sup>127</sup> parties to trust disputes need to be aware of possible deviations from the common expectation of arbitral privacy, confidentiality, and bilateral proceedings.<sup>128</sup>

Third, parties in other fields often choose arbitration because of its procedural flexibility.<sup>129</sup> Party autonomy is equally valued in trust cases, since many settlors choose the trust form precisely because of its structural flexibility. Given that many settlors are already predisposed toward autonomy, it would be unlikely for them not to want to exercise a similar amount of control over the procedures used to resolve any disputes associated with the trusts they have created.<sup>130</sup> Parties to international disputes may be particularly attracted to this aspect of arbitration, since settlors and beneficiaries are often ill at ease with judicial procedures used in the countries where offshore trusts are located and would appreciate a dispute

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*Privacy*, 93 CORNELL L. REV. 555, 563, 610–11, 615 (2008) (describing scope, nature, and reason for privacy of trusts).

125. See Cohen & Staff, *supra* note 13, at 204–05 (explaining that publicly litigated claims can negatively affect the reputations of both trust professionals and the trust industry).

126. See Horton, *supra* note 2, at 1036 (explaining that “all affected individuals” must be given “a chance to be heard” in resolution of probate matters).

127. See Strong, *Procedures*, *supra* note 33 (manuscript at 60–63) (discussing ways of addressing various challenges associated with multiparty arbitration).

128. Notably, confidentiality, privacy, and bilateral proceedings are not required elements of arbitration. See generally Gary B. Born & Claudio Salas, *The U.S. Supreme Court and Class Arbitration: A Tragedy of Errors*, 2012 J. DISP. RESOL. 21, 41–42 (2012) (noting arbitration need not be bipartite); S.I. Strong, *Does Class Arbitration “Change the Nature” of Arbitration?* Stolt-Nielsen, AT&T, and a Return to First Principles, 17 HARV. NEGOT. L. REV. 201, 246 n.220 (2012).

129. See LEW ET AL., *supra* note 119, ¶ 1-11 (noting that “[p]arty autonomy is the ultimate power determining the form, structure, system and other details of the arbitration”).

130. See Langbein, *Contractarian*, *supra* note 1, at 650, 662 (explaining that party autonomy “is not wholly unrestrained” in trust law).

resolution process that provides procedural predictability and familiarity.<sup>131</sup>

Again, however, potential problems exist. For example, some courts and commentators have suggested that the lack of procedural formality that is said to typify arbitration<sup>132</sup> could lead to violations of the substantive or procedural rights of the parties to a trust dispute.<sup>133</sup> Special concerns arise with respect to unborn, unascertained, or legally incompetent beneficiaries.<sup>134</sup> However, these concerns appear largely misplaced given the wide range of procedural protections that exist under contemporary rules of arbitration.<sup>135</sup> Furthermore, it is always possible to modify existing arbitral processes to meet the unique needs of parties to trust disputes.<sup>136</sup>

Fourth, commercial actors often use arbitration so that they can choose a decision maker who holds particular expertise in the subject matter at issue.<sup>137</sup> Given that trust law can be quite specialized as a matter of both procedural and substantive law, settlors would be expected to value this particular attribute of arbitration at least as much as parties to other types of disputes do.<sup>138</sup>

Interestingly, this may be one area where certain members of the trust bench and bar are unaware of precisely how beneficial

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131. See Wüstemann, *supra* note 1, at 41–42 (explaining that settlors, beneficiaries, and trust companies typically prefer an arbitration-friendly jurisdiction to an unfamiliar jurisdiction's dispute resolution process).

132. This is something of a misconception, since many arbitrations, especially those in the international realm, reflect a high degree of procedural formality. See BORN, *supra* note 5, at 1744, 1746 (describing how international arbitration procedures can closely resemble commercial court proceedings in major matters).

133. See *In re Revocation of Revocable Trust of Fellman*, 604 A.2d 263, 265–67 (Pa. Super. Ct. 1992) (concluding that arbitration may not be appropriate to determine the competency of a settlor); Horton, *supra* note 2, at 1076 (suggesting some claims may not be appropriate for arbitration).

134. See *infra* notes 399–432 and accompanying text.

135. See BORN, *supra* note 5, at 1763–64 (describing range of procedural protections in arbitration).

136. Some arbitral institutions take the view that their existing rules are sufficiently flexible to address any trust-related issues, while other organizations have created special rules dedicated to trust arbitrations. See AAA WILLS AND TRUSTS ARBITRATION RULES (2009), available at [http://www.adr.org/cs/idcplg?IdcService=GET\\_FILE&dDocName=ADRSTG\\_004135&RevisionSelectionMethod=LatestReleased](http://www.adr.org/cs/idcplg?IdcService=GET_FILE&dDocName=ADRSTG_004135&RevisionSelectionMethod=LatestReleased) (providing model rules for trust arbitrations); ICC ARBITRATION CLAUSE FOR TRUST DISPUTES, 19 ICC INT'L CT. OF ARB. BULL. 9, explanatory notes 4–6 (2008), available at <http://www.iccdri.com> (search "ICC Arbitration Clause for Trust Disputes" and follow "Commission Report" hyperlink) (noting that the ICC's Rules of Arbitration are sufficiently flexible for trust disputes); Strong, *Procedures*, *supra* note 33 (manuscript at 5) (discussing AAA's specialized rules of trust arbitration).

137. See BORN, *supra* note 5, at 78–81, 1364–65 (noting that parties to an arbitration typically choose experts in specific disciplines to serve on the arbitral tribunal).

138. See Spitko, *supra* note 17, at 296–97 (discussing how settlors and testators may value a decision maker with particular expertise).

arbitration can be. For example, concerns have occasionally been raised about the competence of arbitrators vis-à-vis trust disputes, particularly with respect to whether arbitrators are able to handle the kind of complex, multiparty claims commonly associated with trusts.<sup>139</sup> As it turns out, these criticisms are remarkably similar to those made in the early days of arbitration, when hostility to anything other than judicial resolution of disputes was rife.<sup>140</sup> Over the years, the arbitral community has created numerous methods of addressing these types of concerns, which means that it is unlikely that trust arbitration will run into any difficulties with respect to the competence of arbitrators.<sup>141</sup> Instead, parties to trust arbitration are much more apt to reap the benefits associated with an arbitral regime that has had decades to grow and mature.

The preceding four points apply equally to both national and international disputes. However, parties to international disputes have a fifth and final reason to prefer arbitration over litigation. Enforcement of foreign judgments is a difficult and notoriously unpredictable undertaking, since it is based primarily on principles of comity.<sup>142</sup> Parties to arbitration have a much easier time enforcing foreign arbitral awards because the process is almost exclusively governed by various multilateral treaties, the most prominent of which is the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).<sup>143</sup> These international conventions reflect a strong bias in favor of enforcement of arbitration agreements and awards, which allows parties to an international trust arbitration to obtain final resolution of their disputes much more quickly, efficiently, predictably, and cost-

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139. See *id.*; Wüstemann, *supra* note 1, at 35, 40–41. Other concerns relate to whether the appointment mechanism will guarantee the absence of any bias or procedural unfairness and whether arbitrators are bound to apply the law. See Wüstemann, *supra* note 1, at 40–41.

140. See ACTEC, *supra* note 13, at 4–7 (discussing the “blinding prejudice” to arbitration in contemporary trust and estates practice); BORN, *supra* note 5, at 78–81, 1364–65 (outlining the types of arguments made against arbitration in the early days of the procedure);

141. See BORN, *supra* note 5, at 78–81, 1364–65 (noting that a party’s ability to choose the arbitrators ensures the decision makers are “competent, experienced and available”).

142. See *id.* at 91–101 (discussing the relative ease with which arbitral awards may be enforced internationally).

143. See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2518, 330 U.N.T.S. 3 [hereinafter New York Convention]. The New York Convention, which currently has 147 state parties, revolutionized global commerce by creating a neutral, reputable, predictable, and effective means of resolving international legal disputes. See *Status: 1958—Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, UNCITRAL, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html) (last visited Sept. 29, 2012) [hereinafter *New York Convention Status*].

effectively than parties to an international trust litigation can.<sup>144</sup> Both the United States and England are parties to the New York Convention, as are many of the more popular jurisdictions for offshore trusts (including Jersey, Guernsey, Bermuda, the Bahamas, and the Cayman Islands), either as independent contracting states or as territories of a contracting state.<sup>145</sup>

However, some potential problems again arise. Parties hoping to benefit from the New York Convention's pro-enforcement regime must first ensure that the dispute in question is covered by the Convention.<sup>146</sup> Claims regarding the internal operations of a trust might experience some difficulties in this regard if a particular jurisdiction does not consider trust disputes to be (1) commercial in nature or (2) capable of settlement by arbitration.<sup>147</sup>

The first issue, commerciality, is disposed of relatively easily, since most, if not all, trusts can be considered "commercial" as a matter of arbitration law.<sup>148</sup> Commercial trusts obviously pass muster, since they are expressly created for business purposes.<sup>149</sup> However, most noncommercial trusts would likely fall within the prescribed definitions as well, since many jurisdictions' definitions of commercial activity are so broad as to cover almost any transaction involving money.<sup>150</sup> Therefore, parties should be aware of this requirement but should not be unduly concerned by it.

The second concern—namely, whether a trust dispute is capable of settlement by arbitration—is much more complicated. The issue here relates to the concept of arbitrability, which considers which disputes can be heard in arbitration and which are reserved to the exclusive purview of the courts.<sup>151</sup> This concept is central to the

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144. See BORN, *supra* note 5, at 91–101 (noting pro-enforcement bias of the New York Convention).

145. See *New York Convention Status*, *supra* note 143 (listing the 147 state parties to the New York Convention).

146. See New York Convention, *supra* note 143, art. I (describing the scope of application of the New York Convention).

147. See *id.* arts. I(3), II(1), V(2)(a) (noting the applicability of the New York Convention to commercial disputes and to disputes that are "capable of settlement by arbitration").

148. Notably, this requirement only applies in cases where the state party has made an express declaration limiting its obligations under the New York Convention to cases involving commercial disputes. See *id.* art. I(3) (declaring that any state may "apply the Convention only to differences arising out of legal relationship, whether contractual or not, which are considered as commercial under the national law of the State making such declaration"). Approximately one-third of the state parties to the New York Convention have made a declaration limiting their obligations under the Convention to commercial disputes. See *id.*; BORN, *supra* note 5, at 261 n.295.

149. See *supra* notes 69–70 and accompanying text.

150. See Horton, *supra* note 2, at 1068–73 (concluding that almost all wills and trusts involve interstate commerce).

151. See Stefan Michael Kröll, *The "Arbitrability" of Disputes Arising from Commercial Representation*, in ARBITRABILITY: INTERNATIONAL AND COMPARATIVE

debate about mandatory trust arbitration and is discussed in detail below.<sup>152</sup>

Despite several areas of potential concern, arbitration appears to be as attractive to parties to trust disputes as to parties in other areas of law. As a result, it is not surprising that many settlors favor mandatory arbitration of internal trust disputes.<sup>153</sup> However, several problems arise in this regard. First among these is the fact that trustees appear to have more power to initiate arbitration than settlors do under existing law. This issue is discussed in the next subpart.

### B. Trustees' Powers to Arbitrate

Although the contemporary debate about mandatory arbitration of trust disputes sometimes makes the process sound as if it is a recent innovation, arbitration of trust disputes has long been permitted in both England and the United States, frequently as a result of statutes that either implicitly or explicitly permit the trustee to enter into arbitration agreements with respect to matters external to the trust.<sup>154</sup> While arbitration agreements with external third parties have sometimes led to the arbitration of internal trust disputes,<sup>155</sup> at this point the paradigm for trust-related arbitration

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PERSPECTIVES 317, ¶ 16-7 (Loukas A. Mistelis & Stavros L. Brekoulakis eds., 2009) (defining arbitrability as those disputes amenable to arbitration). The term is used in this Article in its international sense. In the United States, arbitrability refers not only to the question of what issues are reserved to the courts as a matter of law but also to matters relating to the scope of the arbitration agreement as a matter of party intent. See BORN, *supra* note 5, at 767 (describing the nonarbitrability doctrine).

152. See New York Convention, *supra* note 143, arts. II(1), V(2)(a) (limiting applicability of the New York Convention to disputes involving matters “capable of settlement by arbitration”); see also *infra* notes 434–90 and accompanying text.

153. See von Segesser, *supra* note 13, at 21 (describing the privacy and confidentiality of arbitration as a major advantage over litigation); Wüstemann, *supra* note 1, at 33–34 (noting disagreement as to whether arbitration is appropriate for trust disputes under English law).

154. See Horton, *supra* note 2, at 1033–38 (describing the history of testamentary arbitration); see also Bruyere & Marino, *supra* note 15, at 355–56, 362 (discussing trustees' power to resolve trust disputes through mediation and arbitration); David J. Hayton, *Problems in Attaining Binding Determinations of Trust Issues by Alternative Dispute Resolution*, in PAPERS OF THE INTERNATIONAL ACADEMY OF ESTATE AND TRUST LAW—2000, *supra* note 13, at 11, 11 (discussing trust disputes that “involve the beneficiaries, whether such disputes concern the internal trustee-beneficiary relationship or the claims of third parties to impeach the trust”); Gail E. Mautner & Heidi L.G. Orr, *A Brave New World: Nonjudicial Dispute Resolution Procedures Under the Uniform Trust Code and Washington's and Idaho's Trust and Estate Dispute Resolution Acts*, 35 AM. C. TR. & EST. COUNS. J. 159, 159 (2009) (discussing the UTC's nonjudicial dispute resolution procedures).

155. For example, arbitration of an external trust dispute under an arbitration agreement with a third party could permit or require arbitration with a beneficiary in cases where the trustee has a conflict of interest that might affect the trustee's ability

involves a matter arising out of a bilateral commercial relationship between the trust and some external third party, such as an agent or advisor.

Although detailed consideration of external trust disputes is beyond the scope of this Article, there are two reasons why it is necessary to undertake a brief discussion of statutes commonly used to allow the trustee to arbitrate with third parties. First, some of this legislation is ambiguous as to whether it refers only to arbitration initiated by trustees or whether it applies equally to arbitration mandated by the trust agreement itself.<sup>156</sup> Since some courts could interpret the statutes as providing a basis for mandatory arbitration of internal trust disputes, it is useful to at least introduce the various provisions.

Second, this type of legislation suggests the possible scope of issues that might be amenable to arbitration arising out of arbitral clauses found in trust instruments. This conclusion is based on the fact that legal issues that are subject to arbitration in one context cannot be said to be inherently nonarbitrable in another.<sup>157</sup> Therefore, courts considering the enforceability of arbitration provisions found in trusts may be able to rely on these statutes to help determine whether certain issues are arbitrable.<sup>158</sup>

A few examples should be sufficient to demonstrate the range of legislation that is currently in force. One approach, found in the Uniform Trust Code (UTC),<sup>159</sup> simply indicates that “interested

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or inclination to proceed with an arbitration against the third party. See *In re Blumenkrantz*, 824 N.Y.S.2d 884, 888–89 (Sur. Ct. Nassau Cnty. 2006) (allowing a beneficiary to represent the trust in an arbitration when a conflict of interest arose with the trustee). Arbitration of internal trust matters may also result in cases where (1) a side agreement that includes an arbitration provision has been explicitly incorporated by reference into a trust or (2) a side agreement that includes an arbitration provision explicitly refers to disputes arising out of an associated trust. See *Decker v. Bookstaver*, No. 4:09-CV-1361, 2010 WL 2132284, at \*1–2 (E.D. Mo. May 26, 2010) (enforcing an arbitration provision found in an account agreement); *New S. Fed. Sav. Bank v. Anding*, 414 F. Supp. 2d 636, 639 (S.D. Miss. 2005) (granting plaintiff’s motion to compel arbitration where a home loan was accompanied by a deed of trust rider); *Meijer & Guzman*, *supra* note 39, at 148 (discussing incorporation by reference in the context of arbitration provisions found in a company’s articles of association).

156. See *infra* notes 163–68 and accompanying text.

157. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985) (noting that courts cannot claim that certain matters are “inherently insusceptible to resolution by arbitration, as these same courts have agreed that an undertaking to arbitrate . . . [such] claims entered into *after* the dispute arises is acceptable”).

158. See *infra* notes 434–90 and accompanying text.

159. See UNIF. TRUST CODE (amended 2010), available at [http://www.uniformlaws.org/shared/docs/trust\\_code/utc\\_final\\_rev2010.pdf](http://www.uniformlaws.org/shared/docs/trust_code/utc_final_rev2010.pdf) (providing a “national codification of the law of trusts”). The UTC has been adopted by twenty-four U.S. states in whole or in part. See *Trust Code*, UNIF. LAW COMM’N, [http://uniformlaws.org/Act.aspx?title=Trust Code](http://uniformlaws.org/Act.aspx?title=Trust%20Code) (last visited Sept. 29, 20120) (listing the states that have enacted the UTC).



persons may enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust.”<sup>160</sup> Although such agreements are “encouraged,” they are “valid only to the extent that [they do] not violate a material purpose of the trust and include[ ] terms and conditions that could be properly approved by the court under this [Code] or other applicable law.”<sup>161</sup>

The range of arbitrable issues described under the UTC is quite broad and includes:

- (1) the interpretation or construction of the terms of the trust;
- (2) the approval of a trustee’s report or accounting;
- (3) direction to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary or desirable power;
- (4) the resignation or appointment of a trustee and the determination of a trustee’s compensation;
- (5) transfer of a trust’s principal place of administration; and
- (6) liability of a trustee for an action relating to the trust.<sup>162</sup>

Notably, a number of these items relate to internal matters of trust construction and administration. As such, the UTC extends the concept of arbitrability of trust disputes from straightforward contract matters involving external third parties to those involving key issues of substantive trust law.

However, the UTC fails to address some important concerns. For example, the drafters were purposefully vague when it came to describing how these sorts of nonjudicial agreements could arise.<sup>163</sup> Because the term “interested persons” is defined as meaning “persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court,”<sup>164</sup> the UTC provides no guidance as to whether the settlor can require mandatory arbitration through inclusion of an arbitration provision in the trust.<sup>165</sup>

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160. UNIF. TRUST CODE § 111(b).

161. *Id.* § 111(c); *id.*, cmt.

162. *Id.* § 111(d); *see also id.*, cmt.; Mautner & Orr, *supra* note 154, at 161 (discussing § 111 of the UTC as it relates to nonjudicial dispute resolution).

163. *See* UNIF. TRUST CODE § 111, cmt. (failing to define an “interested person” with specificity).

164. *Id.* § 111(a).

165. The UTC contains a second provision regarding the arbitration of trust disputes, but that language is also ambiguous with regard to mandatory trust arbitration. The reference appears in the section describing the trustee’s specific powers and states that the trustee has the ability to “resolve a dispute concerning the interpretation of the trust or its administration by mediation, arbitration, or other procedure for alternative dispute resolution.” *Id.* § 816(23). However, the powers listed in § 816 are not necessarily exclusive to the trustee and were included merely as a convenience to parties, who were understood to want a single section compiling specific powers found elsewhere in the UTC. *See id.* § 816 cmt. (concluding that “the demand of

Other sections of the UTC are equally unhelpful in this regard. For example, the UTC appears to reserve certain activities to the exclusive jurisdiction of the court, which could be taken to mean that arbitration of these matters is prohibited.<sup>166</sup> However, there is more than one way to read exclusive jurisdiction clauses when considering questions of arbitrability.<sup>167</sup> Furthermore, the commentary published with the UTC explicitly states that “[s]ettlors wishing to encourage use of alternate dispute resolution may draft to provide it” and refers interested parties to the American Arbitration Association (AAA) Wills and Trusts Arbitration Rules for sample language.<sup>168</sup> This of course suggests that mandatory arbitration is possible under the UTC, at least with respect to some issues.

Although the UTC is not perfect, it nevertheless constitutes a significant step forward with regard to the arbitration of trust disputes. However, some individual U.S. states go even further. For example, the states of Washington and Idaho have enacted statutory provisions indicating that:

The “matters” that may be addressed and resolved through a nonjudicial procedure are broadly defined and include any issue, question, or dispute involving: (i) the determination of any class of creditors, devisees, legatees, heirs, next of kin, or other persons interested in an estate, trust, nonprobate asset, or with respect to any other asset or property interest passing at death; (ii) the direction of a personal representative or trustee to do or to abstain from doing any act in a fiduciary capacity; (iii) the determination of any question arising in the administration of an estate or trust or with respect to any nonprobate assets or any other asset or property interest passing at death, including, without limitation, questions relating to the construction of wills, trusts, community property agreements, or other writings, a change of personal representative or trustee, a change of the situs of a trust, an accounting from a personal representative or trustee, or the determination of fees for a personal representative or trustee; (iv) the grant to a personal representative or trustee of any necessary or desirable power not otherwise granted in the governing instrument or given by law; and (v) the amendment, reformation, or conformation of a will or trust instrument to comply with statutes and

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third parties to see language expressly authorizing specific transactions justified retention of a detailed list”).

166. See *id.* § 111(e) (declaring that “[a]ny interested person may request the court to approve a nonjudicial settlement agreement”); see also *id.* § 105(b)(13)–(14) (discussing the court’s power to take action “in the interests of justice”).

167. See *infra* notes 434–90 and accompanying text.

168. UNIF. TRUST CODE § 816(23) cmt.; see also AAA WILLS AND TRUSTS ARBITRATION RULES (2009), available at [http://www.adr.org/cs/idcplg?IdcService=GET\\_FILE&dDocName=ADRSTG\\_004135&RevisionSelectionMethod=LatestReleased](http://www.adr.org/cs/idcplg?IdcService=GET_FILE&dDocName=ADRSTG_004135&RevisionSelectionMethod=LatestReleased) (providing specialized rules for arbitration of trust disputes). The author has analyzed the AAA Wills and Trusts Arbitration Rules and the AAA’s proposed model arbitration clause elsewhere. See Strong, *Enforceability*, *supra* note 33 (analyzing the AAA Wills and Trusts Arbitration Rules); Strong, *Procedures*, *supra* note 33 (discussing the AAA Model Trust Clause). The AAA is in the process of revising its rules, which may affect the model clause as well.

regulations of the Internal Revenue Code in order to achieve qualification for deductions, elections, and other tax requirements.<sup>169</sup>

This language is obviously quite expansive. However, the Washington and Idaho statutes suffer from the same problem as the UTC, namely ambiguity with respect to who may invoke these provisions.<sup>170</sup>

English law takes a somewhat different approach to nonjudicial settlement of trust disputes. While most U.S. statutes focus on the type of claims that may be settled by arbitration—thus leaving open the question of whether the arbitration agreement in question may be made only by the trustee after the creation of the trust or whether the settlor can include enforceable arbitration provisions in the trust itself—English law explicitly states that powers relating to nonjudicial dispute resolution are limited to the trustee. Thus, the Trustee Act 1925 states that trustees may

compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's or intestate's estate or to the trust;

and for any of those purposes may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things as to [the trustee or trustees] seem expedient, without being responsible for any loss occasioned by any act or thing so done by him or them if he has or they have discharged the duty of care set out in section 1(1) of the Trustee Act 2000.<sup>171</sup>

Although the English statute is limited as to who may authorize the arbitration, the language is quite broad with respect to the types of claims that can be made in arbitration (“any debt, account, claim, or thing whatever relating to . . . the trust”).<sup>172</sup> This suggests that most, if not all, trust-related issues are inherently arbitrable in England, a position that may be very useful if English courts come to recognize that settlors have the power to require arbitration of disputes relating to trusts.<sup>173</sup>

One question that arises with respect to provisions that explicitly or implicitly authorize only the trustee to initiate arbitration is whether the trustee's discretion in that regard can or should be influenced by an express direction in the trust indicating that the trustee must seek to arbitrate any and all disputes arising out of or in

169. Mautner & Orr, *supra* note 154, at 163; *see also* IDAHO CODE ANN. §§ 15-8-101, 15-8-103 (2009); WASH. REV. CODE ANN. §§ 11.96A.010, 11.96A.030 (West 2006).

170. These two statutes also speak merely of the types of issues that may be arbitrable, not how arbitration can arise. *See* IDAHO CODE ANN. §§ 15-8-101, 15-8-103 (discussing resolution of trust-related disputes through nonjudicial means); WASH. REV. CODE ANN. §§ 11.96A.010, 11.96A.030 (same).

171. Trustee Act, 1925, § 15(f) (U.K.), *amended by* Trustee Act, 2000 (U.K.), *available at* <http://www.legislation.gov.uk/ukpga/Geo5/15-16/19>.

172. *Id.* § 15.

173. *See supra* notes 75, 212–13 and accompanying text.

connection with the trust.<sup>174</sup> As it currently stands, statutes regarding nonjudicial settlement procedures do not seem to include any requirement that the trustee be acting at the settlor's direction, although a trustee would of course have to follow an explicit instruction from the settlor in this regard if such a requirement were included in the trust.<sup>175</sup> Thus, whether a particular trust dispute is made subject to arbitration currently appears to be largely a matter of discretion on the part of the trustee. This appears somewhat anomalous, since it means that trustees have more power to initiate arbitration than settlors do. While this approach may be consistent with what is often a significant grant of discretion given to trustees under most trusts and as a matter of trust law,<sup>176</sup> it appears somewhat out of step with the fundamental concept that trusts are to be interpreted so as to effectuate the desires of the settlor.<sup>177</sup>

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174. One practice that has not apparently been tested is whether the trustee could, immediately upon taking office, attempt to obtain a stand-alone pre-dispute arbitration agreement involving all of the beneficiaries and covering some or all of the types of internal trust disputes that could arise. This technique would appear to comply with principles of trust law that allow arbitration of trust disputes that are subject to an arbitration agreement that exists outside of the trust itself. While various difficulties could arise, including whether and to what extent such an agreement could reflect the consent of unborn, unascertained, or legally incompetent beneficiaries, there may be ways to bind such persons to the agreement through use of special or virtual representatives or legal guardians. See *infra* notes 399–432 and accompanying text. If trustees could be held to this sort of duty, it might be one way to give effect to the settlor's intent regarding the use of arbitration. See *Masonry & Tile Contractors Ass'n of S. Nev. v. Jolley, Urga & Wirth, Ltd.*, 941 P.2d 486, 491 (Nev. 1997) (construing a clause to impose a nonmandatory duty of arbitration on trustees).

175. See UNDERHILL AND HAYTON, *supra* note 9, ¶ 43.1 (describing the duty of a trustee to obey the directions of the settlor unless deviation is sanctioned by an appropriate authority).

176. See MCGOVERN ET AL., *supra* note 20, at 565 (explaining that the UTC grants broad powers to trustees); UNDERHILL AND HAYTON, *supra* note 9, ¶¶ 57.1–63.10 (describing the nature and limits of a trustee's power, discretion, and duties).

177. See MCGOVERN ET AL., *supra* note 20, at 385 (“The UTC tries to effectuate the settlor's intent to the maximum extent possible.”); UNDERHILL AND HAYTON, *supra* note 9, ¶¶ 43.1–43.2 (describing the trustee's duty to follow the settlor's directions and detailing the narrow circumstances in which a trustee may deviate from those terms); Bosques-Hernández, *supra* note 17, at 10 (quoting the *Restatement (Third) of Property: Wills and Other Donative Transfers* to establish the primacy of the settlor's intent); see also *supra* notes 111–16 and accompanying text (elaborating on the concept of the intent of the settlor being the most important guidepost in trust law). Notably, even if courts did take the view that trustees could be bound by an explicit direction in the trust requiring a trustee to attempt to arbitrate any disputes relating to the trust, that would still provide no guarantee that arbitration would result in any particular case, since the settlor's instructions would not bind anyone other than the trustee. Therefore, the settlor's desire for arbitration could be thwarted if any party opposed arbitration. This is precisely opposite to the result that would be obtained under mandatory arbitration, where arbitration proceeds unless all parties agree otherwise. See *In re Ismailoff*, No. 342207, 2007 WL 431024, at \*1 (Sur. Ct. Nassau Cnty. Feb. 1, 2007) (noting that a mandatory arbitration clause in a trust was enforceable at the election of any one of the parties).

### C. Settlers' Powers to Compel Mandatory Trust Arbitration

#### 1. Legislation in Favor of Mandatory Trust Arbitration

These sorts of limitations on settlor autonomy have led a number of jurisdictions to enact legislation explicitly recognizing the enforceability of a mandatory arbitration provision located in the trust instrument itself. For example, in 2008, Arizona passed a law stating that “[a] trust instrument may provide mandatory, exclusive and reasonable procedures to resolve issues between the trustee and interested persons or among interested persons with regard to the administration or distribution of the trust.”<sup>178</sup> This enactment, which was promulgated in response to the decision in *Schoneberger v. Oelze* denying the enforceability of an arbitration clause found in a trust,<sup>179</sup> is to be construed broadly to include “any matter involving the trust’s administration, including a request for instructions and an action to declare rights.”<sup>180</sup>

Florida has also made statutory provision for the arbitration of many, though not all, types of trust disputes. That enactment, passed in 2007, indicates that:

(1) A provision in a will or trust requiring the arbitration of disputes, other than disputes of the validity of all or a 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.<sup>181</sup>

Legislative reforms have also taken place outside the United States.<sup>182</sup> For example, Guernsey, one of the leading jurisdictions for

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178. ARIZ. REV. STAT. ANN. § 14-10205 (2012).

179. See *Schoneberger v. Oelze*, 96 P.3d 1078, 1083 (Ariz. Ct. App. 2004) (holding that the arbitration clauses contained in the documents establishing trusts did not bind the beneficiaries of those trusts because the beneficiaries never agreed to the arbitration clauses, since trusts, unlike contracts, are not based upon the exchange of promises), *superseded by statute*, ARIZ. REV. STAT. ANN. § 14-10205 (2012), *as recognized in* *Jones v. Fink*, No. 1 CA-SA 10-0262, 2011 WL 601598, at \*2 (Ariz. Ct. App. Feb. 22, 2011) (holding that § 14-10205 superseded *Schoneberger* and requires all parties interested in a trust to abide by any reasonable mandatory arbitration provision in that trust).

180. *Jones*, 2011 WL 601598, at \*3 (emphasis omitted) (citing § 14-10201 of the Arizona Revised Statutes to support a broad interpretation of the word “administration” in § 14-10205); see also *infra* note 193 and accompanying text (describing the contours of judicial involvement in trust administration).

181. FLA. STAT. ANN. § 731.401 (West 2010). See generally FLA. STAT. ANN. § 44.104 (West 2012) (regarding arbitration).

182. Several civil law nations have enacted legislation that appears to permit arbitration of trust disputes. For example:

offshore trusts, enacted a statute in 2007 discussing the resolution of certain actions by alternative dispute resolution (ADR), including arbitration.<sup>183</sup> That law states that:

(1) Where -

(a) the terms of a trust direct or authorise, or the Court so orders, that any claim against a trustee founded on breach of trust may be referred to alternative dispute resolution (“ADR”),

(b) such a claim arises and, in accordance with the terms of the trust or the Court’s order, is referred to ADR, and

(c) the ADR results in a settlement of the claim which is recorded in a document signed by or on behalf of all parties,

the settlement is binding on all beneficiaries of the trust, whether or not yet ascertained or in existence, and whether or not minors or persons under legal disability.

(2) Subsection (1) applies in respect of a beneficiary only if -

(a) he was represented in the ADR proceedings (whether personally, or by his guardian, or as the member of a class, or otherwise), or

(b) if not so represented, he had notice of the ADR proceedings and a reasonable opportunity of being heard,

and only if, in the case of a beneficiary who is not yet ascertained or in existence, or who is a minor or person under legal disability, the person conducting the ADR proceedings certifies that he was independently represented by a person appointed for the purpose by a court of law.

“Notice” in paragraph (b) means 14 days’ notice or such other period as the person conducting the ADR proceedings may direct.

Austrian arbitration law recognizes . . . ways of granting arbitrators the authority to decide a dispute by arbitration. Section 581(2) ZPO [Zivilprozeßordnung or Code of Civil Procedure] grants such an authority to arbitral tribunals that are set up in a manner permitted by law, either by testamentary disposition or by other legal transactions that are not based on the agreement of the parties. Authority is also granted to tribunals provided for by articles of incorporation.

SCHWARZ & KONRAD, *supra* note 110 (citations omitted). Germany takes a similar approach, in that:

[Section] 1066 ZPO [Zivilprozeßordnung or Code of Civil Procedure] requires arbitral tribunals to be legitimized by a testamentary disposition or other non-contractual dispositions. Thus, [§] 1066 ZPO encompasses situations in which an arbitration clause has a binding effect on an individual who is not a signatory of an arbitration agreement and did not agree to a contractual arbitration agreement.

Duve, *supra* note 110, at 1003.

183. See The Trusts (Guernsey) Law, 2007, c. 2, § 63, available at <http://www.guernseylegalresources.gg/article/97619/Trusts-Guernsey-Law-2007> (detailing the arbitrability of trust disputes); see also Buckle & Olsen, *supra* note 8, at 652–55 (discussing Guernsey legislation regarding arbitration and mediation of trust disputes).

(3) A person who represents a beneficiary in the ADR proceedings for the purposes of subsection (2)(a) is under a duty of care to the beneficiary.

(4) For the avoidance of doubt, the ADR proceedings need not be conducted in Guernsey or in accordance with the procedural law of Guernsey.

(5) In this section -

“ADR” includes conciliation, mediation, early neutral evaluation, adjudication, expert determination and arbitration, and “proceedings” includes oral and written proceedings.<sup>184</sup>

Although the statute relates only to a limited range of claims (i.e., claims brought against a trustee for breach of trust), it specifically contemplates the possibility that the arbitration can be mandated through a provision included in the trust instrument itself.<sup>185</sup> The statute, which has extraterritorial application, also expressly indicates that beneficiaries of the trust may be bound by the outcome of the arbitration.<sup>186</sup> Similar reforms may soon follow in other offshore jurisdictions as various nations seek to obtain a competitive advantage in the battle for trust-related business.<sup>187</sup> Indeed, the Bahamas are currently in the process of enacting legislation that is even broader than that currently in place in Guernsey.<sup>188</sup>

## 2. Elements Required for Mandatory Trust Arbitration Under Common Law Principles

As useful as these types of statutes are, they are still relatively rare, at least in common law jurisdictions. Most legislation relating to the arbitration of trust disputes is either ambiguous as to who has the ability to initiate arbitration or gives that power only to the

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184. The Trusts (Guernsey) Law, 2007, c. 2, § 63.

185. *See id.* (allowing use of arbitration provision in trusts).

186. *See id.* (detailing conditions in which the results of ADR will bind trust beneficiaries).

187. *See* Neil Hartnell, *Trustee Act's Reform 'Bold, Innovative,'* TRIB. (Bah.), Oct. 25, 2011, at 1B, available at <http://ufdc.ufl.edu/UF00084249/03124> (discussing pending amendments to Bahamian trust law designed to make Bahamian trusts more appealing); *see also* Nadia J. Taylor & David Brownbill, *Arbitration of Trust Disputes: The New Statutory Regime in the Bahamas*, 18 TR. & TRUSTEES 358, 358–62 (2012) (discussing new statutory scheme in the Bahamas).

188. *See* Trustee (Amendment) Bill 2011, § 18, available at [http://www.bacobahamas.com/PDF/Trustee%20\(Amendment\)%20Bill%202011%20-%2015%20April%202011.pdf](http://www.bacobahamas.com/PDF/Trustee%20(Amendment)%20Bill%202011%20-%2015%20April%202011.pdf); *see also* Hartnell, *supra* note 187 (discussing pending amendments to Bahamian trust law, including an amendment that would allow arbitration of trust disputes); Taylor & Brownbill, *supra* note 187 (discussing statutory scheme in the Bahamas).

trustee.<sup>189</sup> Courts are therefore left with little guidance on how to address matters relating to mandatory trust arbitration.

Fortunately, commentators have been busy in this area of law, providing numerous critiques of the various issues. Much of the analysis comes from outside the United States and thus has yet to be considered in the context of U.S. law.

The literature tends to follow a relatively standard framework and considers whether:

- (1) the court's jurisdiction is being ousted in an unacceptable fashion;
- (2) the clause purporting to be an arbitration clause is an agreement that is both (a) operable, effective and capable of being performed and (b) covers the dispute at issue;
- (3) the clause is binding on the party seeking to avoid arbitration;
- (4) all interested parties, including unascertained, unborn, and legally incompetent beneficiaries, are properly represented in the proceeding; and
- (5) the subject matter of the dispute is arbitrable.<sup>190</sup>

These five factors overlap to a considerable extent,<sup>191</sup> so it is impossible to conduct a rigorously segregated assessment of each separate element. Nevertheless, it is useful to track the standard form of analysis, so as to better understand the various challenges to mandatory arbitration from a trust law perspective. Furthermore, by following the preestablished structure, it is possible to consider new ways that arbitration law might contribute to the debate about the propriety of mandatory trust arbitration. Therefore, each of the five factors will be introduced separately below.

#### a. No Impermissible Ouster of the Court's Jurisdiction

Courts have traditionally exercised uniquely broad powers over the administration of trusts,<sup>192</sup> making concerns about the possible ouster of judicial jurisdiction particularly pressing. Indeed, many nonspecialists may be surprised to learn about the extent of the courts' control over trust-related issues. For example, it has been said that:

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189. See *supra* notes 154–77 and accompanying text (discussing statutes that govern arbitration of trust disputes).

190. See Cohen & Staff, *supra* note 13, at 209 (outlining factors for determining whether an arbitration provision in a trust should be enforceable).

191. See *id.* (listing the factors and noting that they are intertwined with each other).

192. See MCGOVERN ET AL., *supra* note 20, at 552–55 (discussing scope of judicial authority over trust administration); Langbein, *Contractarian*, *supra* note 1, at 662 (detailing the role of the judiciary in trust administration).



Trust procedure law may be described as a three-tier structure. The routine phase is periodic judicial accounting. The accounting informs the beneficiaries, enabling them to enforce their rights. The accounting also provides closure for trustees on current installments of these long-duration undertakings. Because, however, judicial accountings can be costly and clumsy, drafters sometimes prefer to alter the default regime in favor of nonjudicial accountings.

The second procedural level, for situations of uncertainty or dispute, is judicial instruction. The trust tradition has been precocious in allowing the parties, typically the trustee, early resort to authoritative judicial guidance.

Finally, if litigation arises, it is tried to the judge, sitting without a jury.<sup>193</sup>

Most, if not all, of the existing analysis regarding mandatory arbitration of trust disputes has focused on the third type of dispute, which is of course most analogous to arbitration. However, significant and somewhat different questions arise with respect to the arbitration of accounting and instruction procedures. The following discussion therefore begins with an analysis of arbitration as a litigation substitute, since some of the issues raised in that context are equally applicable to matters raised with respect to the other two types of trust procedures. The text then goes on to address special concerns relating to judicial accounting and instruction.

#### i. Arbitration as a Litigation Substitute

In order to determine whether arbitration impermissibly ousts the jurisdiction of the court, it is necessary to understand the basis for the courts' extensive powers over trust-related matters. Several possible rationales exist. One stems from a concern that allowing the dispute to be resolved through any other means could disadvantage one or more of the parties, typically through the nonapplication of a mandatory provision of law.<sup>194</sup> However, an evaluation of the principles motivating mandatory rules of trust law suggests that none of these rules would be offended by arbitration. This is because:

Apart from the anti-dead-hand rules, the mandatory rules of trust law have a prevalently intent-serving purpose. They facilitate rather than prohibit; their policy is cautionary and protective. These rules force the settlor to be precise about the tradeoffs between benefiting the trustee and benefiting the beneficiary; hence they aim to clarify and channel,

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193. Langbein, *Contractarian*, *supra* note 1, at 662 (citation omitted); *see also* UNIF. TRUST CODE § 202 (amended 2010), *available at* [http://www.uniformlaws.org/shared/docs/trust\\_code/utc\\_final\\_rev2010.pdf](http://www.uniformlaws.org/shared/docs/trust_code/utc_final_rev2010.pdf) (describing judicial jurisdiction over trustees and beneficiaries); MCGOVERN ET AL., *supra* note 20, at 552–55 (describing courts' involvement in trust administration).

194. *See* Cohen & Staff, *supra* note 13, at 215–17 (discussing an instance in which an arbitration provision that purported to remove statutorily granted jurisdiction of the courts was held to be invalid); Kröll, *supra* note 151, ¶¶ 16-5, 16-8 to -65 (discussing how mandatory statutory protections affect the arbitrability of disputes in various jurisdictions).

rather than to defeat the settlor's intent. Trust terms that would excuse bad faith, or dispense with fiduciary obligation, or conceal the trust from its beneficiaries would make the trust obligation illusory, effectively allowing the trustee to loot the trust. . . . The intent-serving mandatory rules merely require a settlor who has such an improbable intent to articulate it unambiguously, in order to prevent the settlor from stumbling into that result through misunderstanding or imposition. Accordingly, apart from the anti-dead-hand rules, the mandatory rules of trust law have only the modest aspiration of truth in labeling.<sup>195</sup>

Anti-dead-hand rules can be set aside as having little, if anything, to do with arbitration, since they typically focus on (1) issues relating to future interests, as reflected in the Rule Against Perpetuities and similar provisions that give effect to the desire to promote the alienability of land, and (2) the principle that the trust must benefit the beneficiaries.<sup>196</sup> Rules requiring the settlor to indicate clearly his or her intentions regarding the relationship between the trustee and the beneficiaries are also not hindered by arbitration, not only because arbitration does not affect the balance of power between parties (instead providing only an alternative means of dispute resolution), but also because arbitration clauses already need to be clear to be enforceable as a matter of arbitration law.<sup>197</sup> Therefore, an arbitration provision that clearly reflects the settlor's desires would not appear to oust the jurisdiction of the court in any impermissible manner vis-à-vis the various mandatory rules of law. Instead, arbitration would actually effectuate the intent of the settlor in accordance with the central aim of trust law, which holds that courts are meant to give effect to the intent of testators and settlors, unless doing so would contravene positive law or public policy.<sup>198</sup>

Another rationale relating to the broad jurisdictional powers of the court focuses on the idea that access to the courts is necessary as a means of helping protect the beneficiaries from overreaching from the trustee. Thus, for example, it is usually "a non-excludable feature

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195. John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105, 1126–27 (2004). Some concerns exist about whether and to what extent arbitration can be used to eliminate the trustee's fiduciary obligations. These issues are considered at length in Strong, *Procedures*, *supra* note 33.

196. See Langbein, *supra* note 195, at 1110 n.33 (discussing rationales for anti-dead-hand rules, including the desire to account for the desires of the beneficiaries of the trust).

197. Indeed, some commentators have noted that the requirement for clarity is higher with respect to arbitration agreements than with respect to other types of agreements. See BORN, *supra* note 5, at 585 (discussing rationales for the requirement that arbitration agreements be in writing).

198. See UNDERHILL AND HAYTON, *supra* note 9, ¶ 43.1(1) (describing the trustee's duty to fulfill the terms of the trust and the very limited circumstances in which a trustee or a court may deviate from those terms); Janin, *supra* note 11, at 528 (discussing the tension that arises when a testator includes an arbitration provision in a will).

of a trust that the trustee's administration of the fund must be, directly or indirectly, subject to the supervision of the court."<sup>199</sup>

When considering the scope and corpus of the trustee's accountability, trust law often speaks of the "irreducible core" duties of a trustee.<sup>200</sup> Core duties typically cannot be delegated to another person without express authorization in the trust instrument,<sup>201</sup> which means that courts and commentators must consider whether mandatory arbitration of trust disputes impermissibly infringes on the trustee's rights and responsibilities.<sup>202</sup>

Notably, commentators have concluded that:

[T]here is nothing in the concept of the irreducible core that necessarily precludes compulsory arbitration. The principle is that the trustee must be sufficiently accountable so that his status as the non-beneficial owner of the assets vested in him is practically real. Seen solely from the point of the irreducible core concept, effective accountability does not mean that the trustees can be accountable only to the court rather than to some other body which has power to enquire into the trustees' administration of the fund and to require them to abide by the terms of the trust instrument.<sup>203</sup>

Furthermore, objections from the beneficiaries "would only have weight if the beneficiaries were denied any effective means of

199. Fox, *supra* note 37, at 22.

200. The definition of the irreducible core duties of a trustee varies by jurisdiction. *See id.* at 26 (noting that different jurisdictions apply different mandatory rules to trusts).

201. *See* UNDERHILL AND HAYTON, *supra* note 9, ¶¶ 51.1–51.42 (describing the limitations on a trustee's power to delegate responsibility and the duties of care that accompany such delegations). This may be more of an English law concept, since U.S. law typically adopts a relatively liberal stance toward the delegation of trustee duties. *See* MCGOVERN ET AL., *supra* note 20, at 561 (discussing the contours of a trustee's power to delegate and the changes in that power as the law has evolved).

202. Interestingly, this concern may be related to the fact that historically, trustees often acted as arbiters of certain types of disputes, such as those arising between beneficiaries. *See* Cohen & Staff, *supra* note 13, at 211–15 (discussing cases in which executors or trustees attempted to act as arbitrators); Fox, *supra* note 37, at 24 (discussing nondelegable trustee duties). Therefore, some of the early hostility toward arbitration of internal trust disputes may have been based on the fact that when trustees acted as arbitrators, they were either (1) acting as judges in their own cause and/or (2) limiting or eliminating the court's ability to review the propriety of the trustee's decisions and actions, since arbitral awards are subject to only limited forms of review. *See infra* notes 223–24 and accompanying text (discussing the boundaries of judicial review of arbitral awards). Most, if not all, of these concerns disappear in contemporary forms of arbitration because a trustee would never be permitted to act as an arbitrator in a dispute arising out of the trust in question. Instead, arbitrators must be entirely independent of both the parties and the dispute. *See* INT'L BAR ASS'N [IBA], GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION explanation to general standard 2(d) (2004) (stating that the requirement that an arbitrator be disinterested in the outcome of the arbitration proceeding is nonwaivable), available at [http://www.ibanet.org/Publications/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx#conflictsofinterest](http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#conflictsofinterest) (follow "English" hyperlink); BORN, *supra* note 5, at 1465–92 (discussing concepts of arbitrator neutrality and independence).

203. Fox, *supra* note 37, at 24.

enforcing their interests against the trustees. If the ADR procedure had effective machinery for enforcing the outcome of the determination against the trustees, then it seems that this objection would not hold.”<sup>204</sup>

Issues relating to the impermissible ouster of the court could also appear to stem from concerns about overreaching on the part of the settlor.<sup>205</sup> For example, it is said that settlors “cannot deprive the beneficiary of his right to apply to the court about the proper administration of the trust, or for directions about the construction of the trustee’s powers and how they should be exercised.”<sup>206</sup> However, concerns about overreaching by the settlor appear to be more properly addressed as an arbitrability issue rather than a concern about the ouster of the court’s jurisdiction and are therefore discussed below.<sup>207</sup>

When considering the concept of the irreducible core, courts not only look at whether “there remains a sufficient inner core of duties owed to the beneficiaries to enable a trust to subsist,” they also consider whether there is anything about the trust that impermissibly ousts “the jurisdiction of the court to determine matters of law.”<sup>208</sup> There are several ways to consider this issue. One focuses on whether the matter in question falls under a provision in the trust or probate code that appears to grant exclusive jurisdiction to the courts. This type of concern goes to the question of arbitrability and is discussed below.<sup>209</sup>

Another way to analyze this type of issue would be to look at the governing arbitration law to determine whether and to what extent it permits questions of law to be decided in arbitration.<sup>210</sup> For example, the English Arbitration Act 1996 states that parties can appeal an arbitral award on a question of law.<sup>211</sup> However, parties may

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204. *Id.* at 25; see also ACTEC, *supra* note 13, at 13–14 (discussing situations in which courts have deemed arbitration of trust-related disputes to be contrary to public policy, including situations involving trustees who have an interest in the outcome).

205. See *Schoneberger v. Oelze*, 96 P.3d 1078, 1083–84 (Ariz. Ct. App. 2004) (noting a settlor “may not unilaterally strip trust beneficiaries of their right to access the courts absent their agreement”), *superseded by statute*, ARIZ. REV. STAT. ANN. § 14-10205 (2012), *as recognized in* *Jones v. Fink*, No. 1 CA-SA 10-0262, 2011 WL 601598, at \*2 (Ariz. Ct. App. Feb. 22, 2011).

206. Fox, *supra* note 37, at 23 (footnote omitted).

207. See *infra* notes 433–90 and accompanying text (discussing arbitrability issues in trust arbitration); see also *Schoneberger*, 96 P.3d at 1083–84 (holding that a settlor cannot bind beneficiaries to arbitration without their agreement).

208. UNDERHILL AND HAYTON, *supra* note 9, ¶ 48.1(3).

209. See *Cohen & Staff*, *supra* note 13, at 215–17 (discussing exclusive jurisdiction of probate courts); see also *infra* notes 433–90 and accompanying text (discussing arbitrability of trust disputes).

210. See UNDERHILL AND HAYTON, *supra* note 9, ¶¶ 11.1, 11.79 (suggesting some trust-related disputes can be decided pursuant to an arbitration statute).

211. Arbitration Act 1996, c. 23, § 69 (Eng.), *available at* <http://www.legislation.gov.uk/ukpga/1996/23/contents>; see also BORN, *supra* note 5, at 2646–47 (explaining the limitations on the power of English courts to review arbitral

expressly contract out of this particular provision, thus prohibiting judicial appeal on questions of law.<sup>212</sup> Experts in English trust law have suggested that this aspect of the Arbitration Act 1996 acts as a permissible ouster of the jurisdiction of the court on matters of trust law.<sup>213</sup>

Other national and international laws clearly prohibit courts from reviewing questions of law that have been decided by an arbitral tribunal in any circumstances.<sup>214</sup> Thus, for example, parties to an international dispute may not object to enforcement of a foreign arbitral award under the New York Convention on the grounds that the arbitrators misapplied or ignored the law.<sup>215</sup> A similar result arises in countries that have based their national arbitration statutes on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (Model Arbitration Law).<sup>216</sup>

Interestingly, the U.S. Federal Arbitration Act (FAA) is silent on whether parties may appeal an arbitral award on a question of law.<sup>217</sup> Although most courts and commentators take the view that judicial appeals on points of law violate the principle of arbitral finality,<sup>218</sup> some U.S. judges have been known to vacate an arbitral award if the arbitral tribunal was believed to have decided the issue

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awards); BRUCE HARRIS ET AL., *THE ARBITRATION ACT 1996: A COMMENTARY* 332–42 (3d ed. 2003) (discussing § 69 of the Arbitration Act 1996).

212. See Arbitration Act 1996, c. 23, § 69 (allowing parties to opt out of their statutory right to appeal an arbitral award).

213. See UNDERHILL AND HAYTON, *supra* note 9, ¶¶ 11.1, 11.79 (offering the Arbitration Act 1996 as an example of a statute that permits institutions other than the courts to decide questions of law in a trust dispute); see also Arbitration Act 1996, c. 23, § 69 (allowing parties to contract out of the arbitration appeals process).

214. See BORN, *supra* note 5, at 2638–55, 2865–70 (discussing widespread limitations on judicial review of arbitral awards under national and international law).

215. See New York Convention, *supra* note 143, art. V (enumerating the situations in which a court may decline to enforce an international arbitration award).

216. See UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, U.N. Comm'n on Int'l Trade Law, 18th Sess., Annex I, U.N. Doc. A/40/17 (June 21, 1985), revised by Rep. of the U.N. Comm'n on Int'l Trade Law, 39th Sess., June 17–July 7, 2006, Annex I, art. 34, U.N. Doc. A/61/17, U.N. GAOR, 61st Sess., Supp. No. 17 (2006) [hereinafter MODEL ARBITRATION LAW] (enumerating the situations in which a court may refuse to enforce a domestic arbitral award); BORN, *supra* note 5, at 2562–64, 2865–69 (discussing the narrowly construed, specifically enumerated grounds for annulling an arbitral award under the Model Arbitration Law and the New York Convention).

217. See 9 U.S.C. §§ 1–307 (2006); see also BORN, *supra* note 5, at 2639–46 (noting FAA's silence regarding review on a question of law). Very few U.S. state statutes address this issue, either. See LARRY E. EDMONSON, *DOMKE ON COMMERCIAL ARBITRATION* §§ 39:13, 39:16 (2011) (discussing U.S. state law regarding vacatur of an arbitral award).

218. See BORN, *supra* note 5, at 64–65 (noting that a key benefit of international arbitration is the ability to obtain a final decision from the arbitral panel).

in manifest disregard of the law.<sup>219</sup> This creates an interesting situation for mandatory trust arbitration, since the doctrine of manifest disregard could be seen as providing a judicial escape valve that would overcome any concerns about arbitration impermissibly ousting the court's jurisdiction over trust-related matters.

However, the analysis does not end there. In 2008, the U.S. Supreme Court questioned the continued viability of the doctrine of manifest disregard in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, only to suggest two years later in *Stolt-Nielsen, S.A. v. AnimalFeeds International Corp.* that the doctrine may still survive.<sup>220</sup> This has created some confusion in the arbitral community, although it has resulted in few practical problems, since the doctrine of manifest disregard has always been very narrowly drawn and has been successful only on very rare occasions.<sup>221</sup>

However, judicial foreclosure of manifest disregard of law as a means of overturning arbitral awards does not create any special problems for mandatory trust arbitration. Instead, the decision to eliminate that ground of review simply demonstrates a policy choice in favor of arbitral finality, similar to that taken in other jurisdictions that hold that the parties to arbitration may agree to forego the right to judicial appeal of the merits of a dispute.<sup>222</sup> Since there is no reason to believe that U.S. courts would, could, or should take a view of arbitral finality in trust disputes that is different than that taken in any other kind of dispute, the elimination of the doctrine of manifest disregard as a matter of U.S. arbitral law should not affect the development of mandatory trust arbitration in any way.

Even though arbitration law typically forbids courts from reviewing the substance of an arbitral award, courts may nevertheless review an arbitral award for procedural improprieties relating to the arbitral process.<sup>223</sup> Although these grounds are

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219. See *Telenor Mobile Commc'ns AS v. Storm LLC*, 584 F.3d 396, 407 (2d Cir. 2009) (discussing the contours of the doctrine of "manifest disregard" in U.S. arbitration law); BORN, *supra* note 5, at 2639–46 (explaining the doctrine of manifest disregard and the uncertainty surrounding its continued validity).

220. See *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1768 n.3 (2010) (explicitly refusing to rule on whether the manifest disregard standard remains valid); *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 590 (2008) (indicating that the grounds for vacatur enumerated in the FAA constitute the only means of vacating an arbitral award under federal law).

221. See BORN, *supra* note 5, at 2639–46 (discussing the case law concerning manifest disregard and noting the standard is extremely high).

222. While parties in England must specifically contract out of that right, the principle remains the same. See Arbitration Act 1996, c. 23, § 69 (Eng.), available at <http://www.legislation.gov.uk/ukpga/1996/23/contents> (providing that parties can seek judicial review of arbitral awards on questions of law unless the arbitration agreement indicates otherwise).

223. See BORN, *supra* note 5, at 2638–55 (explaining the scope of judicial review in arbitration).

described as “limited,” they cover many important procedural rights and give courts the ultimate authority over the enforcement of an arbitral award.<sup>224</sup>

Interestingly, arbitration’s longstanding emphasis on procedural rather than substantive review should not create any problems for mandatory trust arbitration because most, if not all, of the trust community’s concerns about the impermissible ouster of the courts appear to be based on the need to ensure procedural fairness.<sup>225</sup> These reservations can be addressed in one of two ways: either the procedure in question must ensure that the trustee is accountable to some neutral external agent,<sup>226</sup> or the settlor must demonstrate that he or she took adequate care in setting up alternative dispute resolution procedures in the trust instrument.<sup>227</sup> Critically, neither of these processes is undermined by arbitration, given the availability of judicial review of arbitral proceedings after the conclusion of the arbitration.<sup>228</sup> For these reasons, commentators have concluded that arbitration agreements do not oust the jurisdiction of the court in an impermissible manner but instead “merely postpone the involvement of the court until after an arbitration has been carried out.”<sup>229</sup>

## ii. Special Issues Regarding Judicial Accounting and Instruction

The preceding discussion focused on whether arbitration constitutes an impermissible ouster of the courts at the final stage of a dispute. However, judicial jurisdiction over trusts also encompasses two other procedures: “periodic judicial accounting,” which “informs the beneficiaries, enabling them to enforce their rights” and “provides closure for trustees on current installments of these long-duration undertakings,” as well as “judicial instruction,” which gives “the parties, typically the trustee, early resort to authoritative judicial guidance” in “situations of uncertainty or dispute.”<sup>230</sup> Neither of these

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224. See 9 U.S.C. § 10 (2006) (detailing when an arbitral award may be vacated); Arbitration Act 1996, c. 23, §§ 67–68 (describing the grounds for judicial review of arbitral awards); New York Convention, *supra* note 143, art. V (detailing the circumstances in which a court may refuse to enforce an arbitral award); BORN, *supra* note 5, at 2649–55, 2865–70 (discussing the scope of judicial review of arbitral awards).

225. See Fox, *supra* note 37, at 25 (discussing the modern policy of allowing courts to review arbitration and trust administration decisions to ensure that the arbitrators and trustees acted in good faith, regardless of the content of the documents empowering the arbitrators and trustees).

226. See *id.* at 24 (explaining that trustees must be accountable to an outside party to ensure that trustees do not use trust assets for their own benefit).

227. See Langbein, *supra* note 195, at 1126–27 (explaining that the main purpose of trust law is to ensure that the settlor’s wishes are clearly expressed so that they may be properly carried out, almost regardless of what those wishes might be).

228. See *supra* notes 223–24 and accompanying text (discussing scope of judicial review of arbitral awards).

229. Lloyd & Pratt, *supra* note 113, at 18.

230. Langbein, *Contractarian*, *supra* note 1, at 662 (footnotes omitted).

two matters has been specifically discussed in the legal literature on mandatory trust arbitration, and the courts appear split on how to address such matters. For example, one court invalidated an arbitration provision found in a side agreement with an external third-party advisor on the grounds that arbitration would “unacceptably divest the court of continuing jurisdiction in this matter,”<sup>231</sup> while another court upheld arbitration in somewhat similar circumstances but retained the power to hear questions of interpretation of the contract under a split-jurisdiction clause.<sup>232</sup>

The first procedure—judicial accounting—could give rise to difficulties because it may contemplate a continuing supervisory role for the adjudicator, and arbitration does not typically provide long-term oversight of ongoing relationships.<sup>233</sup> Instead, arbitration is used to resolve discrete disputes. However, the same can be said of courts: in most instances, courts do not provide continuing oversight of private relationships, but instead adjudicate individual cases or controversies. Trust law constitutes a limited exception to this general rule, allowing courts in some jurisdictions to provide oversight to trusts on a continuing basis.<sup>234</sup> In other jurisdictions, beneficiaries may apply to the court for an order requiring the trustee to provide an accounting.<sup>235</sup>

At first, these procedures might appear problematic for arbitration. However, possible solutions exist within the current arbitral regime. For example, some fields—most prominently, the construction industry—use dispute review boards (also known as dispute resolution boards) to resolve issues that may arise between parties to a long-term contract.<sup>236</sup> Members of the review board are appointed at the beginning of the parties’ contractual relationship and continue in that capacity for the duration of the contract,

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231. Estate of Proceeding for the Appointment of a Guardian for Charlotte Radcliffe, N.Y. L.J., July 20, 2007, at 36 (Sur. Ct. N.Y. Cnty. July 13, 2007).

232. See *Radian Ins., Inc. v. Deutsche Bank Nat’l Trust Co.*, 638 F. Supp. 2d 443, 458 (E.D. Pa. 2009) (involving a commercial trust with a split-jurisdiction clause).

233. Not all jurisdictions require continuing supervision from the courts, although some do. See UNIF. STATUTORY TRUST ENTITY ACT § 201(b), cmt. (2009), available at <http://www.law.upenn.edu/bll/archives/ulc/ubta/2009final.htm> (“Contrary to the trust statutes in some States, the Uniform Trust Code does not create a system of routine or mandatory court supervision.”).

234. See *id.* § 201(b) (stating that “[a] trust is not subject to continuing judicial supervision unless ordered by the court”).

235. See UNDERHILL AND HAYTON, *supra* note 9, ¶¶ 56.1, 87.2–87.6 (noting that trustees may be ordered by the court to provide the amount and status of trust property at the beneficiary’s request). Duties of accounting exist with respect to commercial as well as other types of trusts. See *id.* ¶ 56.65 (noting scope of duty to account).

236. See Rebecca Golbert, *The Global Dimension of the Current Economic Crisis and the Benefits of Alternative Dispute Resolution*, 11 NEV. L.J. 502, 517–18 (2011) (noting that dispute resolution boards are widespread in the construction field).



allowing panelists to gain an ongoing familiarity with the parties and the nature of their relationship, while also providing a quick and cost-efficient means of resolving small disputes before they escalate into something more serious. Although some dispute review boards only operate in an advisory capacity, other panels render binding decisions.<sup>237</sup>

Trusts often reflect the same kind of relational characteristic seen in long-term commercial contracts,<sup>238</sup> and a similar type of standing dispute resolution mechanism could be used in the trust context to deal with ongoing issues such as judicial accounting. Because the members of the board would be either appointed by a neutral body (such as an arbitral institution) or by both proponents of the trust or accounting procedure (i.e., the trustee) and those whose interests would be expected to be adverse to the trust or the accounting procedure (i.e., the beneficiaries), such a process would comply with contemporary requirements for procedural fairness and would allow the trustee to be held accountable to the beneficiaries.<sup>239</sup>

The second procedure—judicial instruction—runs into potential difficulties because arbitration typically does not involve the granting of advisory opinions.<sup>240</sup> However, several possible solutions again arise under existing arbitration law. For example, some countries, most notably England, allow courts to make determinations on preliminary points of law without robbing the arbitral tribunal of its jurisdiction over the merits of the dispute.<sup>241</sup> Alternatively, courts could view requests for judicial instruction as akin to requests for declarative or injunctive relief. This latter option would be very useful, since numerous countries allow arbitrators to render awards providing for these kinds of remedies.<sup>242</sup>

Some concerns could arise relating to the fact that parties could seek instructions from the arbitral tribunal on numerous occasions. However, there is no requirement that arbitration be used only once

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237. See *Standard ICC Dispute Boards Clauses*, INT'L CHAMBER OF COMMERCE, <http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Dispute-Boards/Standard-ICC-Dispute-Boards-Clauses/> (last visited Oct. 6, 2012) (offering clauses for both binding and nonbinding decisions).

238. See Langbein, *Contractarian*, *supra* note 1, at 631, 654 (stating that “[m]ost trusts are well understood as relational contracts” that “contemplate[] long duration”).

239. See Michael A. Marra, *The Construction Industry Guide to Dispute Avoidance and Resolution*, 567 PLI/REAL 525, 541–42 (2009) (noting neutrality of dispute resolution board members and outlining selection process); see also *supra* notes 199–204 and accompanying text (discussing trustee accountability in arbitration).

240. See BORN, *supra* note 5, at 247 (stating that arbitrators resolve actual, not hypothetical, disputes).

241. See Arbitration Act 1996, c. 23, § 45 (Eng.), available at <http://www.legislation.gov.uk/ukpga/1996/23/contents> (noting scope of judicial power to address a preliminary point of law).

242. See BORN, *supra* note 5, at 2478–79 (noting that arbitrators have broad remedial powers).

by a particular set of parties. Instead, certain long-term contracts may give rise to a number of different arbitral proceedings over the course of the parties' relationship. Decisions may be rendered by the same tribunal (under the auspices of a standing dispute review board or through the reappointment of the same arbitrators that heard the first matter) or by a series of different tribunals.<sup>243</sup> However, in either case, arbitrators must take care to ensure that an award constitutes final resolution of either the entire issue or of a particular matter that can be severed from other outstanding issues, so that the award will be considered immediately enforceable.<sup>244</sup>

Another possibility is that requests for judicial instruction could be framed as requests for interim or provisional relief. Again, most jurisdictions allow arbitrators to render awards providing for this type of remedy.<sup>245</sup> Framing requests for judicial instruction in this light could lead to an interesting analytical quirk. Arbitration law has traditionally considered courts and arbitral tribunals to exercise concurrent jurisdiction over requests for interim or provisional relief.<sup>246</sup> Although requests are supposed to go to the arbitral tribunal whenever possible, the arbitral community decided that courts should retain the ability to hear these matters, so as to avoid hardship to the parties in cases where the tribunal has not yet been appointed or the request for relief exceeds the powers of the tribunal, as in cases where an order has to be directed to a third party.<sup>247</sup> If requests for judicial instruction are considered to be a type of provisional or interim relief, judges would still be able to hear certain urgent matters if it were

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243. If the parties contemplate a series of related disputes over the lifetime of the trust, it may be beneficial to consider whether and to what extent a later tribunal can consider arguments or facts presented in the first arbitration, lest problems arise with respect to confidentiality and the preclusive value of that earlier proceeding or any combination thereof. *See infra* notes 249–56 and accompanying text (discussing ability of an arbitrator to resolve discrete matters in ongoing arbitration).

244. Partial final awards are permitted as a matter of arbitration law and are subject to immediate enforcement. *See* Arbitration Act 1996, c. 23, § 47(2)(b) (stating the tribunal may make an award as to part of the claims submitted to it for decision); BORN, *supra* note 5, at 2430–33 (distinguishing partial final awards from other types of interim or interlocutory awards).

245. *See* BORN, *supra* note 5, at 1946–61 (describing the modern trend confirming the power of arbitrators to issue provisional relief); *see also* Arbitration Act 1996, c. 23, § 39 (noting the arbitral tribunal's power to order relief on a provisional basis).

246. *See* BORN, *supra* note 5, at 1972–73, 2050 (“[A] request for provisional measures . . . may properly be directed to a national court, as well as to an arbitral tribunal.”).

247. *See id.* (noting that many institutional rules allow applications for provisional relief from national courts prior to the formation of the arbitral tribunal and in “appropriate circumstances” or “exceptional cases”).

necessary to do so.<sup>248</sup> Since jurisdiction is concurrent, arbitration cannot oust the jurisdiction of the court.

Taken together, these observations suggest that arbitration does not result in any impermissible ouster of judicial jurisdiction with respect to accounting or instruction procedures. This conclusion is bolstered by *Roehl v. Ritchie*, a 2007 decision from the California Court of Appeal that involved the arbitration of an accounting procedure.<sup>249</sup> The arbitrator there had rendered a series of awards pursuant to an arbitration provision contained in a family trust, with the precise issue at bar being whether and to what extent the arbitrator was able to amend or correct a prior award in a subsequent award.<sup>250</sup>

In answering that question, the court demonstrated no conceptual difficulty with allowing an arbitrator to address a series of ongoing accounting issues involving a trust.<sup>251</sup> To the contrary, the court noted that the utilization of “a multiple incremental or successive award process as a means, in an appropriate case, of finally deciding all submitted issues” was entirely proper.<sup>252</sup> Furthermore, the court noted that:

“[T]he ongoing and changing nature of trust administration” may require ongoing proceedings “for instructions, to settle accounts, to fix compensation . . . [and] to allow, compromise or settle claims.” The arbitrator did not abuse his discretion in fashioning a remedy to resolve ongoing matters relating to Trust administration costs and fees.<sup>253</sup>

This conclusion appears appropriate. If provisions regarding judicial oversight of trust disputes are primarily intended to “make the trustees realistically accountable for the administration of the trust and the beneficiaries’ interest practically enforceable,”<sup>254</sup> then arbitration is as capable of fulfilling that function in controversies

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248. The arbitral community has recently developed a variety of procedures by which parties can obtain expedited arbitral relief on matters that must be addressed prior to the constitution of the full tribunal, thus offering additional alternatives to parties seeking immediate provisional relief. *See id.* at 1971–72 (discussing the procedures for obtaining urgent provisional relief adopted by the ICC, the Netherlands Arbitration Institute, and the London Court of International Arbitration).

249. *See Roehl v. Ritchie*, 54 Cal. Rptr. 3d 185, 190 (Ct. App. 2007) (noting scope of arbitrator’s duties), *declined to extend by Diaz v. Bukey*, 125 Cal. Rptr. 3d 610 (Cal. Ct. App. 2011), *rev. granted*, 257 P.3d 1129 (Cal. 2011); *see also Zisman v. Lesner*, No. 6:08cv1448Orl31DAB, 2008 WL 4459029, \*3–4 (M.D. Fla. Sept. 29, 2008) (involving a request for accounting); *In re Blumenkrantz*, 824 N.Y.S.2d 884, 887–88 (Sur. Ct. Nassau Cnty. 2006) (same).

250. *See Roehl*, 54 Cal. Rptr. 3d at 190–98 (discussing series of arbitral awards).

251. *See id.* (noting that arbitration awards may contemplate future proceedings).

252. *Id.* at 194 (emphasis omitted) (citation omitted).

253. *Id.* at 195; *see also* Arbitration Act 1996, c. 23, § 48 (Eng.), *available at* <http://www.legislation.gov.uk/ukpga/1996/23/contents> (noting tribunal’s power to create remedies).

254. Fox, *supra* note 37, at 26.

involving judicial accounting or instruction as it is in matters that resemble litigation. The parties' access to justice is adequately protected,<sup>255</sup> and courts retain the ultimate ability to review arbitral awards for violations of the parties' procedural rights.<sup>256</sup> Therefore, arbitration does not appear to unacceptably oust the court's jurisdiction for any of the three types of judicial procedures that can arise with respect to trusts.

b. An Arbitration Clause That is Operable, Effective, and Capable of Performance

The second issue to consider involves the arbitration provision itself. For a mandatory arbitration clause found in a trust to be enforceable, "the clause purporting to be an arbitration clause . . . [must be] an agreement which is not inoperable, ineffective or incapable of being performed."<sup>257</sup> Furthermore, there must "actually [be] a dispute within the scope of the clause."<sup>258</sup>

The second of these two requirements is easily disposed of. Issues regarding the scope of an arbitration agreement have long been decided by arbitrators pursuant to the doctrine of *competence-competence* (*Kompetenz-Kompetenz*), which describes the ability of an arbitral tribunal to decide its own jurisdiction.<sup>259</sup> As a result, allowing arbitral tribunals to determine whether a particular dispute falls within the scope of an arbitration provision found in a trust does not seem problematic in any way.

The first of these two requirements—i.e., the need to establish that the arbitration clause that appears in the trust is operable, effective, and capable of being performed—gives rise to much more significant concerns. Most courts and commentators consider these issues solely from the perspective of national law. However, recent developments in international arbitration suggest some new solutions to some of the more intransigent problems in this area. The following discussion considers the relevant concerns under both national and international law, although it should be noted that some of the innovations in the international realm affect domestic disputes as well.

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255. See ACTEC, *supra* note 13, at 15 (discussing constitutional issues in arbitration).

256. See *supra* notes 223–24 and accompanying text (discussing scope of judicial review of arbitral awards).

257. Cohen & Staff, *supra* note 13, at 209.

258. *Id.*

259. See BORN, *supra* note 5, at 852–83 (discussing doctrine of *competence-competence*).

i. Solutions Suggested Under National Law

Because arbitration is considered “a creature of contract,”<sup>260</sup> many jurisdictions require an arbitration agreement to reflect certain contractual qualities.<sup>261</sup> Therefore, if the language invoking arbitration is located within a larger document, as would be the case with mandatory arbitration provisions in trusts, then that larger document must typically meet the formal requirements for a contract.<sup>262</sup>

Trusts run into two difficulties in this regard. First, trusts are typically only signed by the settlor, not by other parties.<sup>263</sup> Second, trusts do not involve the exchange of consideration, which is problematic in jurisdictions that hold that “[a]rbitration rests on an exchange of promises.”<sup>264</sup> Although the signature and consideration requirements have proven fatal to mandatory arbitration of trusts on occasion,<sup>265</sup> courts and commentators have identified a number of ways to overcome both problems. However, the approach varies according to the party’s relationship to the trust.

Issues relating to trustees are the simplest to address. In these situations, a settlor can explicitly create a contractual relationship with the trustee, either using language in the trust itself or a side agreement.<sup>266</sup> Although the problem of consideration remains, that

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260. See Thomas J. Stipanowich, *Arbitration and the Multiparty Dispute: The Search for Workable Solutions*, 72 IOWA L. REV. 473, 476 (1987) (discussing the consensual nature of arbitration).

261. See BORN, *supra* note 5, at 640–42 (noting contractual elements of arbitration). This approach is not universal. Some states, such as Spain, have been said to have “abandon[ed] the traditional strictly contractual or bilateral approach of the arbitration.” Bosques-Hernández, *supra* note 17, at 10; see also Koch, *supra* note 33, at 196 (noting extent of adherence to contractual notion of arbitration).

262. See BORN, *supra* note 5, at 661–64 (discussing contractual elements of arbitration). Interestingly, the analysis could turn on whether the arbitration statute in question requires an “arbitration contract” or an “arbitration agreement,” which ostensibly encompasses a broader range of relationships. See *Rachal v. Reitz*, 347 S.W.3d 305, 313–14 (Tex. App. 2011) (Murphy, J., dissenting) (describing the differences between an “agreement” and a “contract”), *rev. granted*, 2012 Tex. LEXIS 487 (Tex. June 8, 2012).

263. Oral trusts are permitted in some cases, but are increasingly rare. See UNDERHILL AND HAYTON, *supra* note 9, ¶ 12.1 (noting that an oral declaration is sufficient to create a trust in certain situations).

264. *Schoneberger v. Oelze*, 96 P.3d 1078, 1083 (Ariz. Ct. App. 2004), *superseded by statute*, ARIZ. REV. STAT. ANN. § 14-10205 (2012), *as recognized in Jones v. Fink*, No. 1 CA-SA 10-0262, 2011 WL 601598 (Ariz. Ct. App. Feb. 22, 2011).

265. See *Diaz v. Bukey*, 125 Cal. Rptr. 3d 610, 612–13 (Ct. App. 2011) (holding a trust was not a contract and therefore could not give rise to an enforceable arbitration agreement), *rev. granted*, 257 P.3d 1129 (Cal. 2011); *Rachal*, 347 S.W.3d at 309 (Tex. App. 2011) (holding that proof of agreement to arbitrate was insufficient due to lack of a signature and that consideration is a fundamental element of every valid contract);

266. The trustee then can be required to sign the document in question. See Strong, *Enforceability*, *supra* note 33 (manuscript at 19) (describing how to draft an enforceable arbitration provision in a trust). One U.S. case involves the situation where

concern can be addressed in one of three ways, by either (1) paying the trustee for his or her efforts (indeed, it is rare for a trustee to act gratuitously these days);<sup>267</sup> (2) deeming the trustee to have consented to the terms of the trust when he or she accepted the trust appointment;<sup>268</sup> or (3) concluding that there is no need for mutual consideration in cases involving an agreement to arbitrate in the context of a trust.<sup>269</sup>

Issues relating to beneficiaries are more difficult to resolve, since beneficiaries neither sign the trust instrument nor accept any burdens thereunder. However settlors could attempt to draft a trust deed

in such a way that benefiting from the trust would be deemed an agreement to submit trust disputes to arbitration. By accepting the gifts or invoking any rights under the trust deed, the beneficiaries would be deemed to agree to settle any dispute in accordance with the arbitration agreement contained in the trust deed.<sup>270</sup>

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the trustee—who was also a beneficiary—signed a deed of trust that included an arbitration provision. See *Lo v. Aetna Int'l Inc.*, No. 3:99CV195, 2000 WL 565465, \*1–2 (D. Conn. Mar. 29, 2000) (holding Lo could not be bound to the arbitration agreement in her capacity as a beneficiary). However, the case was governed by Hong Kong law, and no Hong Kong authority was submitted suggesting “that by signing in her capacity as Trustee, [Lo] legally bound her and all other beneficiaries to arbitration. In the absence of any legal authority, the Court decline[d] to conclude that Ms. Lo’s signature as Trustee reflected her agreement to arbitrate this dispute” as beneficiary. *Id.* at \*4.

267. See UNDERHILL AND HAYTON, *supra* note 9, ¶ 54.1 (describing instances in which a trustee may charge for his or her time); Langbein, *Contractarian*, *supra* note 1, at 639 (discussing the historical need for legislation to ensure trustee compensation).

268. See ICC ARBITRATION CLAUSE FOR TRUST DISPUTES, 19 ICC INT’L CT. OF ARB. BULL. 9 (2008), available at <http://www.iccdri.com> (search “ICC Arbitration Clause for Trust Disputes” and follow “Commission Report” hyperlink) (declaring that trustees shall be deemed to have agreed to provisions of an arbitration clause by accepting to act under the trust); UNDERHILL AND HAYTON, *supra* note 9, ¶ 11.83; Cohen & Staff, *supra* note 13, at 218 (noting that accepting the office of trustee leads to certain corresponding rights and burdens); Wüstemann, *supra* note 1, at 44 (noting that if an arbitration agreement in a trust states that, by accepting office, the trustees and protectors are deemed to have agreed to an arbitration agreement, the agreement will likely cover any future trustees or protectors).

269. See *New S. Fed. Sav. Bank v. Anding*, 414 F. Supp. 2d 636, 643 (S.D. Miss. 2006) (noting that “[m]utuality of obligations is not required for a contract to be enforceable under Mississippi law. Accordingly, this court is not persuaded that the agreement to arbitrate contained in the Deed of Trust is deficient”); Horton, *supra* note 2, at 1050 (suggesting that the U.S. Supreme Court has described the FAA “as facilitating goals that do not require an arbitration clause to be moored within a ‘contract’ or to be a ‘contract’ itself”).

270. Wüstemann, *supra* note 1, at 45. This approach has been embraced by the ICC. See ICC ARBITRATION CLAUSE FOR TRUST DISPUTES, 19 ICC INT’L CT. OF ARB. BULL. 9 (2008), available at <http://www.iccdri.com> (search “ICC Arbitration Clause for Trust Disputes” and follow “Commission Report” hyperlink) (“As a condition for . . . receiving any benefit . . . under the trust, any person . . . shall be deemed to have agreed to settle all disputes arising out of or in connection with the trust in accordance with this arbitration clause.”).

This technique is known in England as “deemed acquiescence,” whereby beneficiaries who receive some sort of benefit under the trust are considered bound by the terms of the instrument, including any mandatory arbitration clause contained therein.<sup>271</sup> Under this doctrine, “any beneficiary (even an unborn or unascertained one) who derives his entire interest in the trust from the settlor, and whose rights and obligations under the trust are hence determined by the trust deed, is deemed to acquiesce to the arbitration provision.”<sup>272</sup>

The United States has adopted a similar approach under a theory known as “conditional transfer.”<sup>273</sup> Under this doctrine, provisions found in the trust are binding on beneficiaries to the extent that the beneficiary’s “rights” in the corpus of the trust are seen as “wholly derivative” of the settlor’s “right to pass her property to the persons of her choosing.”<sup>274</sup> The settlor is considered capable of conditioning receipt of any benefits on compliance with arbitration provisions contained in the trust because the beneficiary’s “rights” in the trust are contingent on the wishes of the settlor.<sup>275</sup>

These theories are not limited to the United States and England. Courts in civil law countries such as Switzerland have used similar

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271. Buckle & Olsen, *supra* note 8, at 655–56; *see also* David Hayton, *Future Trends in International Trust Planning*, 13 JORDANS J. INT’L TR. & CORP. PLAN. 55, 72 (2006) (explaining how deemed acquiescence allows unborn or unascertained beneficiaries to enter an agreement). This approach relies in part on language found in the Arbitration Act 1996 stating that an arbitration agreement binds any person claiming “through or under” a party to the agreement. Arbitration Act 1996, c. 23, § 58(1), *available at* <http://www.legislation.gov.uk/ukpga/1996/23/contents>; *see also id.* § 82(2) (defining a party to an arbitration agreement as including “any person claiming under or through a party to the agreement”); Lawrence Cohen & Joanna Poole, *Trust Arbitration—Is It Desirable and Does It Work?* 18 TR. & TRUSTEES 324, 328 (2012) (arguing that § 82(2) of the Arbitration Act 1996 includes a beneficiary of a trust). Thus it has been said that:

A trust beneficiary may only claim under or through the settlor, who is himself party to and bound by the arbitration clause. As the beneficiary can have no better title to the trust property than the settlor, he must be equally bound by the arbitration clause and taken to have acquiesced to the arbitration agreement.

Hwang, *supra* note 1, at 84.

272. Buckle & Olsen, *supra* note 8, at 655–56.

273. *Am. Cancer Soc’y, St. Louis Div. v. Hammerstein*, 631 S.W.2d 858, 864 (Mo. Ct. App. 1981) (noting “a beneficiary takes only by benevolence of the testator, who may attach lawful conditions to the receipt of the gift”); *Tennant v. Satterfield*, 216 S.E.2d 229, 232 (W. Va. 1975) (stating the general rule that a beneficiary who accepts benefits under a will is bound to adopt the whole content of the will).

274. Spitko, *supra* note 17, at 300.

275. *See id.* (discussing derivative or contingent rights).

techniques to bind beneficiaries to arbitration provisions found in the trust instrument.<sup>276</sup>

As useful as deemed acquiescence and conditional transfer are, they do not eliminate all concerns relating to the operability and effectiveness of an arbitration provision found in a trust. Because these doctrines are derived from the settlor's consent to arbitration, difficulties can arise in situations where the settlor's consent to the trust, and therefore to arbitration, is in doubt (i.e., in cases that challenge or deny the existence of the trust altogether).<sup>277</sup> This issue is discussed below.<sup>278</sup>

Interestingly, deemed acquiescence and conditional transfer resemble certain theories used in arbitration law to consider whether the benefit or burden of an arbitration agreement can or should be extended to various nonsignatories. Arbitration law allows courts and arbitrators to extend an arbitration agreement to nonsignatories in cases involving "agency (actual and apparent), alter ego, implied consent, 'group of companies,' estoppel, third-party beneficiary, guarantor, subrogation, legal succession and ratification or assumption."<sup>279</sup> Deemed acquiescence and conditional transfer could easily be analogized to implied consent, estoppel, or third-party beneficiaries in the arbitral context. Legal succession and ratification might also apply in cases involving a successor trustee or protector. While this analysis suggests a useful overlap between trust law and arbitration law, caution should nevertheless be exercised, since U.S. courts appear somewhat split as to the application of arbitral principles regarding nonsignatories in the context of a trust dispute.<sup>280</sup>

## ii. Solutions Suggested Under International Law

Although the techniques suggested above may be sufficient to eliminate concerns about the effectiveness and validity of an arbitration provision arising in a trust, certain international

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276. See Wüstemann, *supra* note 1, at 45–46 (noting that under Swiss law, a beneficiary may be required to accept benefits subject to certain conditions, such as an arbitration provision).

277. See Horton, *supra* note 2, at 1073–74 (noting that the scope of an arbitration provision is limited to parties who have agreed (or can be deemed to have agreed) to be bound by its terms).

278. See *infra* notes 329–78 and accompanying text.

279. BORN, *supra* note 5, at 1137; see also Thomson-CSF, S.A. v. Am. Arbitration Ass'n, 64 F.3d 773, 776 (2d Cir. 1995) ("[W]e have recognized five theories for binding nonsignatories to arbitration agreements: 1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and 5) estoppel.").

280. Compare Zisman v. Lesner, No. 6:08-cv-1448-Orl-31DAB, 2008 WL 4459029, at \*3–4 (M.D. Fla. Sept. 29, 2008) (discussing exceptions allowing nonsignatories to compel arbitration), with Diaz v. Bukey, 125 Cal. Rptr. 3d 610, 613 (Ct. App. 2011) (holding an arbitration provision in a trust was unenforceable because beneficiaries did not consent to its terms), *rev. granted*, 257 P.3d 1129 (Cal. 2011).



developments relating to form requirements in arbitration shed additional light on these issues. Form requirements in arbitration exist as a matter of both national and international law, and serve two different purposes. “First, some form requirements are relevant to the validity of an arbitration agreement: if these requirements are not satisfied, then the agreement to arbitrate is invalid. Second, other ‘form requirements’ are in reality jurisdictional conditions that must be satisfied in order for a particular legislative instrument . . . to apply . . . .”<sup>281</sup> Both of these types of requirements must be considered in cases involving mandatory trust arbitration.

The analysis begins at the international level. According to the New York Convention:

Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.<sup>282</sup>

That provision goes on to indicate that “[t]he term ‘agreement in writing’ shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.”<sup>283</sup>

If a trust is a contract, then the requirements of the New York Convention are obviously met by an arbitration provision found in the trust.<sup>284</sup> However, the New York Convention does not define what “a contract” is, which means the issue will be determined by reference to domestic law. This is of course problematic, given the uncertainty regarding the contractual nature of trusts.<sup>285</sup> Debate also exists as to whether the New York Convention requires a contract containing an arbitration provision to be signed by the parties in question.<sup>286</sup>

281. BORN, *supra* note 5, at 581.

282. New York Convention, *supra* note 143, art. II(1).

283. *Id.* art. II(2).

284. *See id.* (defining the term *agreement in writing* to include an arbitral clause and an arbitration agreement).

285. *See supra* notes 92–110, 260–69 and accompanying text.

286. *See* U.N. Comm. on Int’l Trade Law, *Settlement of Commercial Disputes: Preparation of Uniform Provisions on Written Form for Arbitration Agreements*, ¶¶ 11–14, U.N. Doc. A/CN.9/WG.II/WP.139 (Dec. 14, 2005) [hereinafter *UNCITRAL Note*] (noting differing levels of adherence to the New York Convention’s form requirements); S.I. Strong, *What Constitutes an “Agreement in Writing” in International Commercial Arbitration? Conflicts Between the New York Convention and the Federal Arbitration Act*, 48 STAN. J. INT’L L. 47, 72–74 (2012) (discussing signature requirement under domestic and international law). One U.S. court has decided that a trust does not fall under the New York Convention because of problems relating to the absence of signatures. *See* *Lo v. Aetna Int’l Inc.*, No. 3:99CV195 JBA, 2000 WL 565465, at \*4 (D. Conn. Mar. 29, 2000) (holding a party who had signed a trust including an arbitration agreement in her capacity as a trustee could not be held to have agreed to arbitrate in her capacity as beneficiary).

Although the New York Convention's definition of "an agreement in writing" appears clear on its face, certain problems have arisen in practice.<sup>287</sup> For example:

It has been repeatedly pointed out by practitioners that there are a number of situations where the parties have agreed to arbitrate (and there is evidence in writing about the agreement), but where, nevertheless, the validity of the agreement is called into question because of the overly restrictive form requirement. The conclusion frequently drawn from those situations is that the definition of writing, as contained in . . . [various] international legislative texts, is not in conformity with international contract practices and is detrimental to the legal certainty and predictability of commitments entered into in international trade.<sup>288</sup>

Concerns about "overly restrictive form requirement[s]" would also seem relevant in the context of trust arbitration, since strict application of contractual requirements currently bars arbitration of disputes in situations where the settlor's intent to require arbitration is clear.<sup>289</sup> The question therefore is whether the international arbitral community's proposed solution to the problem of "overly restrictive form requirements" could be usefully applied directly to international trust disputes and, by analogy, to domestic disputes.

As it turns out, efforts undertaken by the international community may in fact be helpful to mandatory trust arbitration. The issue has been addressed as follows. In 2006, UNCITRAL published a recommendation directed at the various state parties to the New York Convention (UNCITRAL Recommendation),<sup>290</sup> stating that UNCITRAL "[r]ecommends that article II, paragraph 2, of the [New York Convention] be applied recognizing that the circumstances described therein are not exhaustive."<sup>291</sup> This means that the term "agreement in writing" can be considered to include more than just an "arbitral clause in a contract" or a standalone "arbitration agreement,

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287. See New York Convention, *supra* note 143, art. II.

288. U.N. Secretary-General, *Settlement of Commercial Disputes: Possible Uniform Rules on Certain Issues Concerning Settlement of Commercial Disputes: Conciliation, Interim Measures of Protection, Written Form for Arbitration Agreement*, ¶ 7, U.N. Doc. A/CN.9/WG.II/WP.108/Add.1 (Jan. 26, 2000) [hereinafter *UN SG Report*]; see also *UNCITRAL Note*, *supra* note 286, ¶ 17 (highlighting diverse national approaches to form requirement).

289. *UN SG Report*, *supra* note 288, at ¶ 7; see also *Diaz v. Bukey*, 125 Cal. Rptr. 3d 610, 614–15 (Ct. App. 2011) (holding a trust was not a contract and therefore the arbitration provision contained in the trust was unenforceable), *rev. granted*, 257 P.3d 1129 (Cal. 2011); *Rachal v. Reitz*, 347 S.W.3d 305, 310 (Tex. App. 2011) (describing the distinctions between a trust and a contract under Texas law), *rev. granted*, 2012 Tex. LEXIS 487 (Tex. June 8, 2012).

290. See UNCITRAL, Rep. on its 39th Sess., June 19–July 7, 2006, Annex II, U.N. Doc. A/61/17 [hereinafter *UNCITRAL Recommendation*].

291. *Id.* ¶ 1; see also New York Convention, *supra* note 143, art. II(2) (defining an "agreement in writing").

signed by the parties.”<sup>292</sup> Instead, the UNCITRAL Recommendation encourages widespread relaxation of existing form requirements.<sup>293</sup>

Because the UNCITRAL Recommendation is suggestive rather than mandatory, it need not be applied by national courts.<sup>294</sup> However, the Recommendation should nevertheless be given serious consideration by judges in the United States and elsewhere, since established principles of international law indicate that courts construing an international treaty should take into account “the postratification understanding’ of signatory states,” which would include documents such as the UNCITRAL Recommendation.<sup>295</sup>

The UNCITRAL Recommendation applies to all arbitration agreements and awards falling under the New York Convention and is therefore relevant to most, if not all, international trusts.<sup>296</sup> There are two times when courts will have the opportunity to consider the UNCITRAL Recommendation in the context of a trust dispute: (1) at the initial stage of the dispute, when a party seeks to enforce an arbitration agreement, and (2) at the end stage, when a party seeks to enforce an award under the Convention.<sup>297</sup> That means that courts facing either a motion to compel arbitration or a motion to enforce an arbitral award under the New York Convention can rely on the UNCITRAL Recommendation to adopt a flexible, pro-arbitration approach to the definition of an “agreement in writing.”<sup>298</sup>

Having said that, the UNCITRAL Recommendation does not provide any detailed information about what can be considered an “agreement in writing” under this more expansive reading of the New

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292. New York Convention, *supra* note 143, art. II(2) (defining an “an agreement in writing”).

293. *See infra* notes 305–20 and accompanying text.

294. However, early reports suggest that the UNICTRAL Recommendation has been well-received in a number of countries. *See* Strong, *supra* note 286, at 78–79 (“The UNCITRAL Recommendation has been well-received by a variety of countries, either resulting in affirmative reforms or the reinforcement of existing approaches to article II(2).”).

295. Vienna Convention on the Law of Treaties, art. 31(3)(a), *adopted and opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (discussing the relevance of “any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions”); *see also* Medellin v. Texas, 552 U.S. 491, 507 (2008); UNCITRAL Recommendation, *supra* note 290 (recommending proper means of interpreting the New York Convention’s writing requirement).

296. Of course, the arbitration would have to take place in a New York Convention contracting state for the Convention to apply, but with 147 state parties, that is very likely. *See* New York Convention, *supra* note 143, art. I(1), II(1) (designating the scope of application of arbitration agreements under the Convention); *New York Convention Status*, *supra* note 143 (listing states that have ratified or acceded to the New York Convention).

297. *See* New York Convention, *supra* note 143, art. I(1), II(1) (noting points at which the “agreement in writing” definition applies).

298. *Id.* art. II(1); *see also* UNCITRAL Recommendation, *supra* note 290 (“[I]n interpreting the Convention, regard is to be had to the need to promote recognition and enforcement of arbitral awards . . .”).

York Convention.<sup>299</sup> Nevertheless, some guidance may be sought from a report put together by a UNCITRAL working group in 2005, just prior to the formal approval of the Recommendation.<sup>300</sup> That report indicated that a number of countries allowed parties to rely on part performance (estoppel) and incorporation by reference to offset the strict application of the writing requirement, among other things.<sup>301</sup> This suggests that the concepts of deemed acquiescence and conditional transfer (which incorporate principles of estoppel) could fall within the expansive approach to form requirements advocated by the UNCITRAL Recommendation, thus allowing international trust arbitration to benefit from the pro-enforcement bias of the New York Convention.<sup>302</sup> Indeed, this appears somewhat consistent with existing U.S. precedent, since one U.S. court has already used principles of equitable estoppel to overcome the technical absence of a “writing” in a trust-related dispute.<sup>303</sup> Incorporation by reference has also been used to allow arbitration of internal trust matters based on an arbitration provision found in a side agreement.<sup>304</sup>

Parties and courts seeking additional guidance on how to interpret the UNCITRAL Recommendation can also look to the 2006 version of the Model Arbitration Law for assistance.<sup>305</sup> UNCITRAL was working on the revisions to the model law at the same time it was drafting the UNCITRAL Recommendation and clearly intended the two documents to be read together.<sup>306</sup> Indeed, it appears that the UNCITRAL Recommendation was meant to liberalize form requirements in the international realm, while revisions to Article 7 of the Model Arbitration Law were meant to have a similar effect at the national level.<sup>307</sup>

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299. New York Convention, *supra* note 143, art. II(2); UNCITRAL Recommendation, *supra* note 290.

300. See *UNCITRAL Note*, *supra* note 286.

301. See *id.* ¶¶ 16–21.

302. See New York Convention, *supra* note 143, art. II (describing form requirements under the New York Convention); UNCITRAL Recommendation, *supra* note 290 (recommending that the form requirements of the New York Convention be considered “not exhaustive”).

303. See *Zisman v. Lesner*, No. 6:08-cv-1448-Orl-31DAB, 2008 WL 4459029, at \*3–4 (M.D. Fla. Sept. 29, 2008) (discussing nonsignatories’ use of equitable estoppel as a means of compelling arbitration under a trust).

304. *Decker v. Bookstaver*, No. 4:09-CV-1361, 2010 WL 2132284, at \*3–4 (E.D. Mo. May 26, 2010) (compelling arbitration of a trust dispute based on an arbitration provision found in a side agreement).

305. See generally MODEL ARBITRATION LAW, *supra* note 216.

306. See G.A. Res. 61/33, U.N. GAOR, 61st Sess., Supp. No. 17, U.N. Doc. A/61/453 (Dec. 18, 2006) (noting that the similarities between the revised Model Arbitration Law and the UNCITRAL Recommendation help promote uniformity in international commercial arbitration).

307. See *UNCITRAL Note*, *supra* note 286, ¶¶ 8–9, 35–37 (discussing the objectives of the New York Convention and Article 7 of the Model Arbitration Law).

Article 7 of the revised Model Arbitration Law contains the definition of an arbitration agreement and therefore addresses the same issues as Article II of the New York Convention.<sup>308</sup> Notably, UNCITRAL proposed two different alternatives with respect to the revised version of Article 7, and both include certain innovations that could affect mandatory trust arbitration.<sup>309</sup>

For example, both Option I and Option II of the revised version of Article 7 of the Model Arbitration Law eliminate the need for the parties to have signed the arbitration agreement in question.<sup>310</sup> This obviously removes one of the primary problems facing mandatory trust arbitration, particularly with respect to disputes involving beneficiaries.<sup>311</sup>

However, Option II goes even further in its relaxation of form requirements, stating that an “[a]rbitration agreement’ is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.”<sup>312</sup> Because Option II does not mention the need for the arbitration provision to appear in a contract, jurisdictions adopting this provision would likely have few, if any, problems enforcing a mandatory arbitration provision found in a trust.

The most direct benefits of the relaxed form requirements in the revised Model Arbitration Law will be felt by parties to an arbitration proceeding in a jurisdiction that has adopted the 2006 version of the Model Arbitration Law.<sup>313</sup> Although neither the United States nor England have adopted the Model Arbitration Law, seven U.S. states

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308. See New York Convention, *supra* note 143, art. II(2) (defining an “agreement in writing”); *UNCITRAL Note*, *supra* note 186, ¶ 8 (discussing efforts made by the Working Group to reconcile the provisions of the Model Arbitration Law and the New York Convention); MODEL ARBITRATION LAW, *supra* note 216, art. 7 (defining “arbitration agreement”).

309. See MODEL ARBITRATION LAW, *supra* note 216, art. 7 (defining “arbitration agreement”).

310. See *UNCITRAL Note*, *supra* note 286, ¶¶ 11–12 (“By requiring either a signature or an exchange of documents, the form requirement ensures that the parties’ assent to arbitration is expressly recorded.”); MODEL ARBITRATION LAW, *supra* note 216, art. 7 (defining “arbitration agreement”); Meijer & Guzman, *supra* note 39, at 143–45 (describing the effect of the two versions of the Model Arbitration Law on the writing requirement).

311. See *supra* notes 260–65 and accompanying text.

312. MODEL ARBITRATION LAW, *supra* note 216, art. 7, option II.

313. The Model Arbitration Law has been adopted, in whole or in part, by sixty-six countries, not including a number of territories and dependencies. See *Status: 1985—UNCITRAL Model Law on International Commercial Arbitration, with Amendments as Adopted in 2006*, UNCITRAL, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html). (last visited Oct. 17, 2012). Seventeen of the sixty-six countries have adopted the 2006 version of the Model Arbitration Law. See *id.*

have.<sup>314</sup> However, the impact of the Model Arbitration Law extends beyond arbitrations seated in a Model Arbitration Law jurisdiction.<sup>315</sup>

Under Article VII(1) of the New York Convention, parties to an international arbitration may take advantage of any national law that provides an easier route to enforcement than that set forth in the Convention.<sup>316</sup> Notably, this includes provisions regarding form requirements.<sup>317</sup> Therefore, parties seeking to enforce an arbitral award in a jurisdiction that has adopted the 2006 version of the Model Arbitration Law will also be able to rely on these relaxed form requirements.<sup>318</sup>

The innovations reflected in the UNCITRAL Recommendation and the Model Arbitration Law bode well for the future of both commercial and trust arbitration.<sup>319</sup> However, settlors should nevertheless exercise caution and make sure that any arbitration provisions located in a trust comply with currently existing rules regarding form requirements and operability of the arbitration agreement. This can be particularly challenging in international disputes, since drafters need to “ensure that formal and substantial validity requirements for a valid ‘arbitration agreement’ are met for both the *lex arbitri* and law governing the arbitration agreement.”<sup>320</sup>

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314. See *id.* (referring to the 1985 version of the Model Arbitration Law). One U.S. state, Florida, has adopted the 2006 version of the Model Arbitration Law. See *id.*

315. See MODEL ARBITRATION LAW, *supra* note 216, art. 35 (discussing the scope of the “recognition and enforcement” of the Model Arbitration Law).

316. See New York Convention, *supra* note 143, art. VII(1) (“The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States . . .”). In fact, the second paragraph of the UNCITRAL Recommendation reinforces the importance of this provision, stating that UNCITRAL

[r]ecommends also that article VII, paragraph 1, of the [New York Convention] should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement.

UNCITRAL Recommendation, *supra* note 290.

317. See UNCITRAL Note, *supra* note 286, ¶¶ 24–36 (discussing national laws regarding form requirements).

318. See New York Convention, *supra* note 143, art. VII(1) (allowing parties to rely on national law to enforce an arbitration agreement or award); MODEL ARBITRATION LAW, *supra* note 216, art. 7 (defining arbitration agreements).

319. See SCHWARZ & KONRAD, *supra* note 110 (describing form requirements under Austrian law); Duve, *supra* note 110, at 1002 (describing form requirements under German law). See generally UNCITRAL Recommendation, *supra* note 290; MODEL ARBITRATION LAW, *supra* note 216.

320. Hwang, *supra* note 1, at 84; see also Meijer & Guzman, *supra* note 14, at 125 (discussing choice of law concerns relating to validity of arbitration agreements). It is also wise to consider the law of the state where enforcement of the award will likely take place. See Martin Platte, *An Arbitrator’s Duty to Render Enforceable Awards*, 20 J. INT’L ARB. 307, 313 (2003) (“If and when the parties draw the tribunal’s attention to a

c. An Arbitral Clause That is Binding on the Party Seeking to Avoid Arbitration

The third issue to discuss is whether an arbitration clause found in a trust can be considered binding on the party seeking to avoid arbitration.<sup>321</sup> Rather than focusing on the form of the arbitration provision, this concern focuses on whether there is adequate consent to support arbitration. This question can be considered from two perspectives: that of the settlor and that of parties other than the settlor. Each is addressed in turn.

i. Settlor Consent

In some ways, it may seem strange to ask whether a settlor has consented to arbitration, since the settlor is the one who created the trust with the mandatory arbitration provision in the first place. However, settlor consent is essentially what is at issue when a party challenges a trust on grounds such as undue influence, lack of capacity, fraud, duress, forgery, or mistake, since the claim is that neither the underlying document (i.e., the trust) nor the arbitration agreement found in the trust ever came into effect.<sup>322</sup> Challenges to trusts based on incapacity and similar concerns are made relatively frequently, so this is a concern that will arise with some regularity.

The first thing to note is that those who seek to impeach an arbitration provision in a trust based on a challenge to the trust itself may only do so if the challenge denies the existence of the trust in its entirety.<sup>323</sup> If a party bases its claim on any portion of the trust, then the arbitration clause will remain in effect, since it is impossible to make a claim under the trust while simultaneously denying its validity.<sup>324</sup>

Some commentators distinguish clearly between the arbitration of challenges to the trust and the arbitration of disputes arising under the trust, stating that:

[A]n arbitrator whose authority to adjudicate a . . . [trust] dispute derives from a clause in the . . . [trust] itself should have no authority to

specific jurisdiction as a likely place of enforcement, the tribunal should consider the law of this place as well.”).

321. See Cohen & Staff, *supra* note 13, at 209 (listing requirements for courts to consider in deciding if an arbitration provision in a trust is enforceable).

322. See Horton, *supra* note 2, at 1040, 1060 (discussing questions relating to settlor competence); Katzen, *supra* note 14, at 123 (“[W]hen the consent of the donor is uncertain, as is typically the case in will contests, the validity of the will or trust document becomes an issue.”).

323. See Horton, *supra* note 2, at 1063–64 (comparing a trust with an arbitration clause with a gift that can either be given up entirely or accepted with “strings attached”).

324. See *id.* at 1074–75 (stating that a person should not be able to bring a claim under a trust while simultaneously attempting to invalidate its arbitration clause).

decide a claim that the . . . [trust] is invalid on grounds of improper execution, lack of mental capacity, undue influence or testamentary fraud. Such a view would give the arbitrator the sole authority to interpret the . . . [trust's] provisions but not to hear challenges to the . . . [trust's] validity.<sup>325</sup>

This approach is consistent with the analytical approach used outside the context of mandatory arbitration, in that courts faced with claims of undue influence, lack of capacity, fraud, duress, and mistake in other areas of trust law are just as likely to invalidate the entire trust as they are to sever the offending provision.<sup>326</sup> Indeed, one court considering arbitration of a trust dispute appears to have adopted precisely this type of all-or-nothing approach after it was “faced with an arbitration agreement in which no single provision [could] be stricken to remove the unconscionable taint.”<sup>327</sup> Because the impropriety was said to permeate the entire arbitration agreement, the court struck the arbitration provision in its entirety.<sup>328</sup>

This approach would, of course, be highly problematic if it were applied to mandatory trust arbitration, since claims regarding lack of capacity, fraud, duress, or mistake could routinely invalidate arbitration provisions found in trusts. However, this is another area where arbitration law might provide a useful framework for analysis.

Courts and commentators considering arbitration in other areas of law recognized early on that the effectiveness of the arbitral regime would be put in jeopardy if parties could avoid arbitration simply by alleging that lack of capacity, fraud, duress, forgery, or mistake not only invalidated the substantive agreement but also impeached any

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325. Spitko, *supra* note 17, at 303; *see also* Katzen, *supra* note 14, at 123–24 (“Courts dealing with this issue in the context of contracts have presumed the validity and enforceability of an arbitration clause, despite challenges to the contract in its entirety, unless the arbitration clause is specifically contested.”).

326. *See* Katzen, *supra* note 14, at 123–24 (claiming that “courts often void entire testamentary instruments, or, at a minimum, the dispositive sections” when it is too difficult to separate clauses that were created through improper means from those that were not).

327. Flores v. Transamerica HomeFirst, Inc., 113 Cal. Rptr. 2d 376, 385 (Ct. App. 2001).

328. *See id.* (“We do not believe justice would be served by an effort to save the arbitration agreement by removing post hoc offending provisions . . .”). Notably, the precedential value of this decision is somewhat dubious, since the dispute involved a loan secured by a deed of trust on real property, an arrangement which some jurisdictions consider to be akin to a mortgage. *See* AMY MORRIS HESS ET AL., THE LAW OF TRUSTS AND TRUSTEES: A TREATISE COVERING THE LAW RELATING TO TRUSTS AND ALLIED SUBJECTS AFFECTING TRUST CREATION AND ADMINISTRATION: WITH FORMS § 29 (3d ed. 2007). However, it has been said that “[m]ost of the rules that apply to ordinary trusts also apply to deeds of trust.” *Id.*



arbitration agreement located within the underlying contract.<sup>329</sup> The arbitral community therefore developed the principle of separability, which, in general terms, states that challenges to the validity or existence of the contract in which an arbitration agreement is found do not affect the validity or existence of the arbitration agreement itself.<sup>330</sup> This proposition holds true even in cases where the claims question the quality or existence of the consent of the signatories, as is the case in challenges based on lack of capacity, fraud, duress, forgery, and mistake.<sup>331</sup>

While the basic principle of separability can be stated succinctly, the doctrine's precise parameters vary somewhat according to national law. Some countries take the view that the only time a claim will be heard by a court is if the party challenges the validity of the arbitration agreement itself (as opposed to the document in which the agreement is found) or if the party has specifically given the issue of validity to the court.<sup>332</sup> Other jurisdictions—most particularly the United States—make further distinctions in their application of the principle of separability.<sup>333</sup>

The separability analysis in the United States is based on two U.S. Supreme Court decisions, *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*<sup>334</sup> and *Buckeye Check Cashing Inc. v. Cardegna*.<sup>335</sup> The essential holding of *Prima Paint* is that “claims of fraudulent inducement, directed at the underlying contract and capable of rendering it voidable, [do] not impeach the arbitration clause contained in that contract.”<sup>336</sup> *Buckeye Check Cashing* extended this basic principle to “cases involving claims that the underlying contract was void or illegal.”<sup>337</sup> Thus, “a challenge to the

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329. See LEW ET AL., *supra* note 119, ¶¶ 6-9 to -22, 9-68 to -74 (“Separability protects the integrity of the agreement to arbitrate and plays an important role in ensuring that the parties’ intention to submit disputes is not easily defeated.”).

330. See *id.* ¶ 6-9 (“The essence of the doctrine is that the validity of an arbitration clause is not bound to that of the main contract and vice versa.”).

331. See *id.* ¶¶ 6-9 to -22.

332. See BORN, *supra* note 5, at 322–43, 359–91 (discussing international adherence to the doctrine of separability).

333. One way in which the United States differs from other countries is in the way it intermingles the analysis of separability and jurisdictional competence. See *id.* (discussing the difference between “issues of substantive validity” of the arbitration agreement and “issues of *competence-competence*,” and the allocation of jurisdictional authority between arbitrators and U.S. courts.).

334. 388 U.S. 395 (1967).

335. 546 U.S. 440 (2006).

336. BORN, *supra* note 5, at 363.

337. *Id.*; see also *Buckeye Check Cashing*, 546 U.S. at 440 (holding that an arbitrator may decide the overall illegality of a contract containing an arbitration clause).

validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.”<sup>338</sup>

Although *Buckeye Check Cashing* expressly held that the analysis was to be the same regardless of whether the underlying contract was said to be void or voidable, “U.S. courts have adopted different approaches to the effects of the separability presumption depending on whether (a) the validity, legality, or continued effectiveness of the underlying contract is challenged; or (b) the existence of the underlying contract is challenged.”<sup>339</sup> The first category of cases—which includes matters concerning “fraudulent inducement, fraud, lack of consideration, illegality . . . [and] mistake”—can be heard by the arbitrator,<sup>340</sup> although the decision to give the issue to the arbitral tribunal does not constitute a final determination of the merits of the issue, since the arbitrators may ultimately decide that the challenge successfully impeaches the arbitration agreement.<sup>341</sup> Instead, this aspect of separability simply reflects a decision about jurisdictional competence and who—the court or the arbitrator—is to hear the argument about the substantive validity of the arbitration agreement.<sup>342</sup> This is also the approach used for trust-related disputes that do not involve challenges to the capacity of the settlor.<sup>343</sup>

Cases involving challenges to the existence of the underlying contract are more difficult, since *Buckeye Check Cashing* only addressed contract validity and not the question of whether any agreement between the parties was ever concluded.<sup>344</sup> As it currently stands, no consensus exists in the United States as to whether “claims of lack of capacity or authority, directed at the underlying contract, also necessarily impeach the associated agreement to arbitrate.”<sup>345</sup> A similar amount of discord exists with regard to the question of who—the court or the arbitral tribunal—has the jurisdictional authority to decide issues relating to the continued existence of an arbitration agreement found in a contract that has been challenged on grounds such as lack of capacity or authority, lack of consent, duress, or forgery.<sup>346</sup> This means that a court could order the parties to arbitration to decide whether the arbitration agreement

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338. *Buckeye Check Cashing*, 546 U.S. at 449. This holding applies “regardless of whether the challenge is brought in state or federal court.” *Id.*

339. BORN, *supra* note 5, at 365.

340. *Id.* at 367–69.

341. *See id.* at 365–69 (discussing procedural aspects of arbitrability determination).

342. *See id.* (discussing jurisdictional competence).

343. *See id.* (explaining that challenges to validity of a contract as a whole must be heard by an arbitrator when there is an arbitration clause).

344. *See id.* at 370–71 (discussing *Buckeye Check Cashing*).

345. *Id.* at 372.

346. *See id.* at 372–73 (discussing jurisdictional issues).

exists even in cases where the underlying contract never came into existence, although the opposite is also possible.<sup>347</sup>

The unpredictability of this approach has led to numerous criticisms,<sup>348</sup> and these issues will doubtless continue to develop over the coming years. However, the question for this Article is what effect, if any, the U.S. separability analysis has on trust disputes.<sup>349</sup> Only a few courts have addressed this issue, but the decisions already demonstrate the same kind of difficulties that arise in disputes outside the trust context.

So far, three alternatives appear to exist. First, some courts take the view that the standard separability analysis does not apply to trust disputes. For example, *Spahr v. Secco* considered what effect, if any, the alleged mental incapacity of the settlor might have on the arbitration of a dispute related to the trust.<sup>350</sup> After reviewing relevant precedent regarding separability, the court concluded that:

[T]he analytical formula developed in *Prima Paint* cannot be applied with precision when a party contends that an entire contract containing an arbitration provision is unenforceable because he or she lacked the mental capacity to enter into the contract. Unlike a claim of fraud in the inducement, which can be directed at individual provisions in a contract, a mental capacity challenge can logically be directed only at the entire contract.<sup>351</sup>

Because challenges based on lack of mental capacity “naturally go[] to *both* the entire contract and the specific agreement to arbitrate in the contract,” the court decided that disputes based on mental incapacity should be heard in court, not in arbitration.<sup>352</sup>

While the court’s analysis was clear, the decision in *Spahr* was handed down prior to the Supreme Court’s decision in *Buckeye Check Cashing* and may therefore no longer be good law.<sup>353</sup> However, if allowed to stand, this approach would negate the concept of separability in trust disputes.<sup>354</sup> Courts adopting this view would likely not only refuse to enforce an arbitration provision found in a

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347. See *id.* at 374, 379–80 (considering pros and cons of having a court decide the issue, as opposed to the arbitral tribunal).

348. See *id.* at 378–80 (discussing problems associated with the lack of a predictable approach).

349. See Horton, *supra* note 2, at 1082–86 (considering separability issues in the context of trust arbitration).

350. The arbitration provision in question was in an external agreement rather than the trust itself, but the decision is instructive as to how capacity issues may be addressed in internal disputes. See *Spahr v. Secco*, 330 F.3d 1266, 1268–69 (10th Cir. 2003).

351. *Id.* at 1273 (citations omitted).

352. *Id.*

353. See *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 n.1 (2006) (considering the parameters of the separability analysis); *Spahr*, 330 F.3d at 1273.

354. See *Spahr*, 330 F.3d at 1273 (holding that the court, not the arbitrator, has the authority to determine the capacity of the settlor).

trust whenever a challenge was made to the mental capacity of the settlor, but would also refuse to order arbitration of trust disputes in cases involving duress and forgery.<sup>355</sup>

However, this is not the only possible approach to separability. Other courts appear inclined to adopt the standard separability analysis. For example, in *Regions Bank v. Britt*, the court was asked to decide whether and to what extent an arbitral tribunal could consider trust-related claims that purportedly affected a party's statutory succession rights.<sup>356</sup> Although this challenge was not based on the alleged incapacity of the settlor, it did attack the underlying validity or existence of the trust in which the arbitration provision was found.<sup>357</sup> Ultimately, the court found that the issue could be, and more properly should be, heard in arbitration, based on the rule in *Prima Paint*.<sup>358</sup> Interestingly, the court here explicitly distinguished between issues involving substantive validity and jurisdictional competence, and gave the question of substantive validity to the arbitrator.<sup>359</sup>

A third approach to the issue of separability is exemplified by *Weizmann Institute of Science v. Neschis*, which considered whether and to what extent an arbitral award rendered in Liechtenstein should be given preclusive effect in a U.S. court proceeding involving claims that were very similar to those determined in the

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355. Challenges to the validity of the arbitration agreement based on mistake and fraud would appear to fall into the category of challenges that could be heard by the arbitrator in the first instance. See BORN, *supra* note 5, at 365–69 (noting a large body of U.S. decisions requiring arbitration of challenges involving “fraudulent inducement, fraud, lack of consideration, illegality, adhesion or unconscionability, the failure of a condition precedent, mistake and expiration or termination” (footnotes omitted)).

356. See *Regions Bank v. Britt*, No. 4:09CV61TSL–LRA, 2009 WL 3766490, at \*2 & n.2 (S.D. Miss. Nov. 10, 2009). In this case, a husband argued that an arbitration agreement found in a deed of trust signed by his wife was invalid because it encumbered marital property without his consent. *Id.* While some distinctions could be drawn on the grounds that the dispute involved a deed of trust on real property, an arrangement which some jurisdictions consider to be akin to mortgages, commentators have indicated that “[m]ost of the rules that apply to ordinary trusts also apply to deeds of trust.” HESS ET AL., *supra* note 328, § 29.

357. *Regions Bank*, 2009 WL 3766490, at \*2 & n.2.

358. See *id.* at \*2 n.2 (discussing *Prima Paint*). A Michigan state court also recently concluded in the context of a will dispute that parties may “conduct[] binding common-law arbitration of probate disputes, including the question of testamentary capacity.” *In re Nestorovski Estate*, 769 N.W.2d 720, 732 (Mich. Ct. App. 2009). While this Article focuses on arbitration of trust disputes rather than arbitration of wills, some courts may approach the two types of disputes in a similar manner. See *id.* at 723–32 (considering precedents involving both trusts and wills); see also *In re Calomiris*, 894 A.2d 408, 409–10 (D.C. 2006) (considering authority discussing both trusts and wills).

359. See *Regions Bank*, 2009 WL 3766490, at \*2 n. 2 (discussing arbitrability issues).

arbitration.<sup>360</sup> One of the issues raised in the arbitration involved the mental capacity of the settlor, who was alleged to have been suffering from Alzheimer's disease at the time she established several foundations (*stiftung*), which are Liechtenstein's version of a trust.<sup>361</sup> The arbitration provision in question was located in the charter establishing the foundation.<sup>362</sup>

At no point did the court in *Weizmann Institute* take the position that issues of settlor capacity could not be heard in arbitration. Instead, the judge refused to hear argument on matters relating to the mental capacity of the settlor, based on principles of collateral estoppel.<sup>363</sup> This suggests that a per se rule barring arbitration of trust disputes involving the mental capacity of the settlor would not necessarily be appropriate, despite the analysis in *Spahr v. Secco*.<sup>364</sup>

Other nations have separability analyses that are considerably less complicated than that used in the United States. For example, the English approach to separability is embodied in the Arbitration Act 1996, which states that:

Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement.<sup>365</sup>

This provision could very well be interpreted as covering an arbitral clause found in a trust, since there is no requirement that the underlying agreement be valid or effective as a contract or even be in writing.<sup>366</sup> Recent judicial statements also suggest that questions regarding settlor capacity can and should be heard in arbitration, particularly in the context of commercial trusts. For example, Lord Hoffman of the House of Lords (the highest court in England prior to

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360. See 421 F. Supp. 2d 654, 674–83 (S.D.N.Y. 2005) (examining preclusive effect of Liechtenstein arbitral judgment). At the time of the decision, Liechtenstein was not a state party to the New York Convention, although that has since changed. See *id.* at 674–75; *New York Convention Status*, *supra* note 143.

361. See *Weizmann*, 421 F. Supp. 2d at 665 (discussing circumstances underlying arbitration).

362. See *id.* at 664, 667–68 (discussing charter).

363. See *id.* at 676–83 (holding that the issue of the settlor's mental capacity was barred from relitigation because it was already decided by the arbitral tribunal).

364. See *id.* (holding parties were collaterally estopped from relitigating arbitrators' decision regarding the settlor's mental capacity); see also *Spahr v. Secco*, 330 F.3d 1266, 1273 (10th Cir. 2003) (holding that the court, not the arbitrator, had authority to determine mental capacity of the settlor).

365. Arbitration Act 1996, c. 23, § 7 (Eng.), available at <http://www.legislation.gov.uk/ukpga/1996/23/contents> (outlining English approach to separability); see also *id.* § 5.

366. See HARRIS ET AL., *supra* note 211, at 56–58 (discussing contractual elements of arbitration under the Arbitration Act 1996).

the formation of the Supreme Court of the United Kingdom in October 2009)<sup>367</sup> recently opined that:

[T]he construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction.<sup>368</sup>

Lord Hope of Craighead took a similar view, noting that no international transaction, particularly of the type at issue in the case at bar, "is complete without a clause which identifies the law to be applied and the methods to be used for the determination of disputes."<sup>369</sup> While these statements were made regarding claims of bribery in the context of an external trust dispute involving a commercial trust, and thus may be limited in terms of their applicability to internal trust disputes, the decision nevertheless provides a useful enunciation of the English view of separability, particularly in the context of commercial relationships.<sup>370</sup> The decision is also consistent with a similarly commercial interpretation that was applied several years earlier in a dispute involving the construction of an arbitration provision found in the trust deed of a business trust.<sup>371</sup>

Other states appear to view separability in much the same light. For example, the German approach to separability has been said to be analogous to that of England.<sup>372</sup> Liechtenstein also appears to have adopted a pro-arbitration approach to matters of separability, even in cases involving the mental capacity of the settlor of a trust.<sup>373</sup>

When contemplating issues of separability going forward, courts should consider whether it is appropriate to adopt a different approach for challenges to trusts, or whether consistency should be

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367. See *History—The Supreme Court*, THE SUPREME COURT, <http://www.supremecourt.gov.uk/about/history.html> (last visited Sept. 30, 2012) (explaining that the Supreme Court replaced the House of Lords as the highest court in the United Kingdom on Oct. 1, 2009).

368. *Premium Nafta Prods. Ltd. v. Fili Shipping Co.*, [2007] UKHL 40, [13] (Lord Hoffman), *on appeal from* *Fiona Trust & Holding Corp. v. Privalov*, [2007] EWCA Civ 20, [2007] 1 All E.R. (Comm.) 891.

369. *Id.* at [26] (Lord Hope of Craighead).

370. See BORN, *supra* note 5, at 380–84 (discussing evolution of the English view of separability).

371. See *Law Debenture Trust Corp. v. Elektrim Fin. B.V.*, [2005] EWHC 1412, [2]–[3], [39]–[47] (Ch) (analyzing business trust deed in light of commercial principles to hold that trust provided for arbitration of disputes even though one party was allowed to opt for litigation).

372. See *Premium Nafta*, [2007] UKHL [14] (noting similarities between English and German approaches to separability).

373. See *Weizmann Inst. of Sci. v. Neschis*, 421 F. Supp. 2d 654, 678–79 (S.D.N.Y. 2005) (upholding principle of separability).

the goal regardless of the subject matter of the dispute. Certainly if trusts are seen as reflecting contractual qualities, then a unified approach to separability would appear most appropriate, with no distinction as to the subject matter of the dispute.

However, it does not necessarily follow that a nonuniform approach to separability would be acceptable even if trusts were considered to be primarily or even exclusively donative in nature. Separability is based on principles of consent, and it should not matter whether that consent is unilateral in nature (as it would be under a donative theory of trusts, where only one person—the settlor—can be said to have “consented” to the trust arrangement) or multilateral<sup>374</sup> (as would be the case under a more contractual approach, wherein each of the various parties is said to have actually or constructively agreed to the trust scheme).<sup>375</sup> The only relevant question is whether the consent at issue is sufficient to support arbitration or whether there are enough doubts about the nature and quality of consent that the arbitration agreement should be impeached.

Adopting an approach to separability that is consistent across subject matters would appear particularly appropriate given the large and increasing number of commercial trusts that are in use today.<sup>376</sup> It has been suggested that commercial trusts are best analyzed through a contractual lens,<sup>377</sup> and any disparate treatment of commercial trusts based on a donative rationale would not appear in line with contemporary commercial practices. This is especially true in jurisdictions such as England, where separability is considered in light of the reasonable expectations of a rational commercial actor.<sup>378</sup>

Notably, a rule that required consistency in the application of the principle of separability regardless of the subject matter of the dispute would not necessarily lead to the arbitration of all trust disputes. Instead, such a determination would simply defer the question to preexisting principles of national arbitration law. While this could lead to some disputes about the validity of an arbitration provision found in a trust being heard in arbitration and others being heard in court, this would simply reflect what happens elsewhere in that jurisdiction. Furthermore, application of the standard

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374. Although internal trust disputes may be bilateral, they often involve more than two parties. *See supra* notes 17, 127–29, 139 and accompanying text (discussing multiparty issues).

375. *See BORN, supra* note 5, at 351 (discussing separability in bilateral and multilateral contexts).

376. *See supra* notes 69–70 and accompanying text.

377. *See Langbein, Contractarian, supra* note 1, at 630–31 (stating that “[t]he flexibility of the trust . . . has encouraged transaction planners to use the trust in a wide variety of commercial settings” and that “the contractarian character of the trust is transparent” in such situations).

378. *See supra* notes 368–69 and accompanying text.

separability analysis would still support the notion that an arbitral clause found in the trust can be considered binding vis-à-vis the party against whom the arbitration is brought.

ii. Consent of Parties Other Than the Settlor

Consent issues are not limited to concerns relating to the settlor. In fact, the more commonly analyzed question is whether a mandatory arbitration provision can be considered binding on persons other than the settlor (i.e., trustees and beneficiaries).<sup>379</sup>

The analysis here is similar in ways to that regarding the validity, effectiveness, and operability of the arbitration provision itself.<sup>380</sup> An arbitral clause in a trust is considered operable with respect to trustees and protectors to the extent that those persons agree to act under the terms of the trust, whether that agreement is reflected in the trust itself or in an accompanying document.<sup>381</sup> Arbitral provisions are considered operable vis-à-vis beneficiaries through application of the concepts of deemed acquiescence and conditional transfer.<sup>382</sup>

Although these techniques are used to satisfy certain formal requirements regarding the operability and effectiveness of an arbitration provision, that is no bar to their also being used to demonstrate how and why various parties can be said to have consented to the arbitration agreement. Arbitration law adopts a similar methodology with respect to nonsignatories, using the same theories not only to identify which parties can be held to the terms of the arbitration agreement but also to excuse imperfect compliance with form requirements.<sup>383</sup>

Because conditional transfer and deemed acquiescence have not been well-tested in the context of mandatory arbitration,<sup>384</sup> settlors often seek alternative means of binding various parties to the arbitration.<sup>385</sup> One mechanism that has been discussed by a number

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379. See, e.g., Wüstemann, *supra* note 1, at 36 (discussing whether arbitration provisions in trusts can bind beneficiaries without their consent).

380. See Cohen & Staff, *supra* note 13, at 209 (listing factors relevant to whether an arbitration provision in a trust will be considered enforceable).

381. See Wüstemann, *supra* note 1, at 44 (stating that “[t]rustees and protectors assume their responsibilities,” including those relating to arbitration, “under the terms of the trust deed”).

382. See *id.* at 45–46 (stating that invoking rights or receiving benefits of the trust could serve as an agreement to abide by the arbitration agreement).

383. See Strong, *supra* note 128, at 219–20 (discussing means of bringing nonsignatories into an arbitration).

384. See Buckle & Olsen, *supra* note 3, at 655–56.

385. See Strong, *Enforceability*, *supra* note 33 (manuscript at 25–26) (stating how settlors can bolster the effectiveness of conditional transfers).



of commentators involves the use of a forfeiture or *in terrorem* provision.<sup>386</sup>

*In terrorem* provisions typically state that any party who challenges a trust or will forfeits any rights he or she may have under the instrument. In the context of mandatory arbitration, forfeiture is triggered by a challenge to the use of arbitration to resolve a particular dispute.<sup>387</sup> Although such language obviously provides a strong incentive for beneficiaries to agree to arbitration, *in terrorem* clauses are problematic for several reasons.<sup>388</sup>

First, *in terrorem* provisions are by no means universally embraced, even as a general matter. Indeed, courts often refuse to enforce such provisions if a party has probable cause to bring the claim.<sup>389</sup> Second, *in terrorem* clauses are particularly suspect in the context of mandatory arbitration, since threatening to revoke a benefit under the trust through a forfeiture provision could be seen as “vitiat[ing] the freedom of will required to contract, and so render the [arbitration] agreement voidable.”<sup>390</sup> Third, an *in terrorem* provision could be considered an impermissible attempt to oust the jurisdiction of the court and hence be void *ab initio*.<sup>391</sup> Therefore, while some commentators take the view that requiring a legatee or beneficiary to “forfeit her interest should she decline to respect the testator’s wishes with respect to arbitration of will [or trust] contests should not discourage any truly meritorious . . . contest[, since s]uch a contest may still be brought,”<sup>392</sup> the consensus appears to be that settlors

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386. See Jonathan G. Blattmachr, *Reducing Estate and Trust Litigation Through Disclosure, In Terrorem Clauses, Mediation and Arbitration*, 9 CARDOZO J. CONFLICT RESOL. 237, 245–47, 259–61 (2008) (discussing the use of *in terrorem* clauses to prevent disputes among heirs); Katzen, *supra* note 14, at 125–27 (explaining how *in terrorem* or no contest clauses can be used to encourage arbitration of disputes among beneficiaries); Wüstemann, *supra* note 1, at 46–47 (stating that trustees may be given the power through forfeiture or *in terrorem* clauses to exclude beneficiaries who refuse to submit to arbitration).

387. See Blattmachr, *supra* note 386, at 259–61 (explaining that use of a mandatory arbitration clause could result in an interested party forfeiting any benefits under the trust if the party neglected or refused to engage in arbitration).

388. See *id.* at 245–48, 259–61 (identifying various problems with *in terrorem* clauses); Katzen, *supra* note 14, at 125–27 (stating that no contest clauses do not bind parties when consent to arbitration is an issue).

389. See UNIF. PROBATE CODE §§ 2-517, 3-905 (2006), available at <http://www.law.upenn.edu/bll/archives/ulc/upc/final2005.htm> (denying enforceability of no contest clauses if the challenger has probable cause); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.5 (2003) (stating that no contest clauses are enforceable unless the challenger has probable cause).

390. Cohen & Staff, *supra* note 13, at 221.

391. See UNDERHILL AND HAYTON, *supra* note 9, ¶ 11.1 (stating that a trust is void under English law if created for the illegal purpose of “ousting the jurisdiction of the courts or operating in *terrorem* to induce the beneficiary not to apply to the courts” (footnote omitted)).

392. Spitko, *supra* note 17, at 298.

should avoid trying to force beneficiaries into arbitration through use of a forfeiture clause.<sup>393</sup>

An interesting concept that has not been explored is the possible use of an incentive in connection with an arbitration agreement concluded by the trustee after the creation of the trust but before the dispute arises. This sort of arbitration would be mandatory in that the trustee would be required to seek pre-dispute arbitration agreements with other potential parties to an internal trust dispute (i.e., any actual or potential beneficiaries, as well as any current or successor trustees and protectors) by virtue of a direction in the trust. However, the arbitration provision could also authorize the trustee to make an immediate payment to these parties in consideration of the agreement. While this approach is not precisely the same as the type of mandatory trust arbitration that is the topic of the current Article, it does (1) effectuate the intent of the settlor, at least to some degree;<sup>394</sup> (2) create explicit bilateral contracts that would meet any necessary form requirements;<sup>395</sup> and (3) avoid concerns about vitiating the beneficiaries' consent, since it acts as a positive, rather than negative, incentive to arbitrate.<sup>396</sup>

Although this is an interesting proposition, it is somewhat problematic in that it creates an additional, unnecessary, and potentially expensive hurdle for settlors to overcome before their wishes vis-à-vis arbitration can be effectuated. It may very well be that a settlor does not want to make provisions for a beneficiary if that person does not want to resolve any disputes in arbitration, and it seems contrary to established principles of trust law to require the settlor to put that condition in a document other than the trust for that condition to be given effect. This approach would also give the trustee more power to initiate arbitration than the settlor, which is again contrary to basic principles of trust law.<sup>397</sup> Since this option is problematic as both a practical and jurisprudential matter, it is therefore better to rely on deemed acquiescence and conditional transfer as an appropriate means of binding all parties.<sup>398</sup>

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393. See UNDERHILL AND HAYTON, *supra* note 9, ¶ 11.1 (suggesting *in terrorem* provisions should be avoided).

394. Nevertheless, some actual or potential parties could decline to enter into the agreement, even with the incentive payment.

395. See *supra* notes 260–320 and accompanying text.

396. See Cohen & Staff, *supra* note 13, at 221 (noting *in terrorem* clauses could be seen to “vitate the freedom of will required to contract”).

397. See *supra* notes 175–77 and accompanying text.

398. Judicial application of deemed acquiescence and conditional transfer may be strengthened by language in the trust referring to those doctrines. See Strong, *Enforceability*, *supra* note 33 (providing draft language).

#### d. Proper Representation

The fourth concern relating to mandatory arbitration of trust disputes involves the need to ensure that all interested parties are properly represented in the proceedings.<sup>399</sup> Here, the issue is how best to protect the rights of beneficiaries who may be unascertained, unborn, or legally incompetent at the time the dispute arises.<sup>400</sup>

Issues of this nature may appear somewhat unusual to lawyers who do not routinely work with trusts, since very few areas of law require courts or arbitrators to consider the rights of persons who are not actually present in the dispute. One of the few exceptions is the class action and its corollary, the class arbitration, wherein a few named individuals bring a claim on behalf of a large number of unidentified others.<sup>401</sup> While trust disputes are not representative in nature, they do share some attributes with class claims,<sup>402</sup> most prominently their ability to determine the rights of persons not actually present.<sup>403</sup>

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399. See Cohen & Staff, *supra* note 13, at 209 (identifying factors to be considered when determining whether an arbitration provision in a trust is enforceable).

400. See *id.* at 222 (discussing the procedural requirements of representation in an arbitration clause for incapacitated persons, minors, and persons who are unascertained or unborn).

401. See Strong, *supra* note 128, at 213–19 (discussing the nature of representative relief in arbitration). A new large-scale procedure known as mass arbitration has recently developed in the investment realm and uses more of an agency model than a representative model. See S.I. Strong, *Mass Procedures as a Form of “Regulatory Arbitration”*—*Abaclat v. Argentine Republic and the International Investment Regime*, 38 J. CORP. L. (forthcoming 2013) (discussing arbitration involving 60,000 claimants).

402. For example, trust disputes could grow to rival class suits with respect to size, particularly in cases involving commercial trusts. See Strong, *supra* note 128, at 212 (comparing the criteria for numerosity in class arbitration to the rules governing class actions).

403. This is not to say that a trust dispute could not result in a class claim, including possibly a class arbitration. For example, in *Doctor’s Associates, Inc. v. Hollingsworth*, a number of Subway franchisees brought a class action in state court against various Subway franchising entities, including the trustees of the Subway Franchisee Advertising Fund Trust (SFAFT), alleging “various breaches of fiduciary duty and conspiracy claims relating to the alleged mismanagement and misappropriation of contributions to the SFAFT.” *Doctor’s Assocs., Inc. v. Hollingsworth*, 949 F. Supp. 77, 79 (D. Conn. 1996). The various franchise agreements included a provision requiring arbitration of “[a]ny controversy or claim arising out of or relating to this contract or the breach thereof.” *Id.* Although the SFAFT did not have an arbitration provision itself, the court considered the claims against the SFAFT to have arisen out of or be related to the franchise agreement and concluded that the trust claims were arbitrable. See *id.* at 84–85. As a result, the dispute was ordered into arbitration. See *id.* at 86. The claims were most likely heard on a bilateral basis, since the dispute arose in 1996, prior to the expansion of class arbitration in the mid- to late 2000s. See *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 459–60 (2003) (plurality opinion) (remanding a class arbitration action to allow an arbitrator to determine if a contract silent on the issue of class arbitration allowed for such arbitration); Strong,

However, rather than addressing the collective nature of trusts through class relief, courts consider trust proceedings to be in rem, with decisions binding “all persons having adequate notice, whether or not they actually participate in the proceeding.”<sup>404</sup> This process requires a court or arbitral tribunal to give special consideration to a number of related factors, such as who should have notice of a trust proceeding, how notice must be given to those persons, and what sort of procedures must be used to protect the rights of all interested parties, regardless of whether they are present or not.<sup>405</sup>

The first task—identifying who should be given notice of a trust dispute—requires a careful reading of the trust document, as well as a detailed knowledge of the context in which the trust operates. For example, some beneficiaries may not be identified in the trust by name. Although this practice may seem unusual to nonspecialists, it has long been condoned by trust law for several reasons. For example, a trust may endure for a very long period of time, which means that settlors may need to identify beneficiaries by class so as to ensure that all relevant persons are captured within the trust provisions.<sup>406</sup> Alternatively, a settlor may want to give the trustee the discretion to determine who a beneficiary should be or whether a disbursement under the trust is even proper.<sup>407</sup> Requiring all these elements to be outlined in the trust itself would mean that the trust would have to be constantly amended to take changing circumstances into account. In some cases, it would be impossible to provide the requisite amount of detail.<sup>408</sup> Either way, one of the major benefits of the trust—flexibility—would be severely limited or destroyed.

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*supra* note 128, at 205–11 (discussing the expansion of class arbitration as a result of *Bazzele*). Had the dispute arisen today, it might have been heard as a class arbitration. *See id.* at 269–70 (noting class arbitration has survived recent U.S. Supreme Court decisions); S.I. Strong, *The Sounds of Silence: Are U.S. Arbitrators Creating Internationally Enforceable Awards When Ordering Class Arbitration in Cases of Contractual Silence or Ambiguity?*, 30 MICH. J. INT’L L. 1017, 1055–83 (2009) (discussing how class arbitrations can arise even in cases where the contract is silent as to class treatment).

404. Janin, *supra* note 11, at 529.

405. *See* Strong, *Procedures*, *supra* note 33 (manuscript at 48–49) (discussing various means of providing notice in in rem-type arbitrations).

406. An example might be a trust for the benefit of “my grandchildren,” not all of whom may be born at the time the trust is created. *See* Strong, *Procedures*, *supra* note 33 (manuscript at 50 n.208).

407. An example of the first type of provision might be a trust for the benefit of “any student in the town of Littleton who needs financial assistance to attend university.” An example of the second type of provision might be a trust indicating disbursements to “any of my grandchildren, if they need financial assistance.” *See id.* (manuscript at 51 n.211) (providing examples of trust provisions).

408. For example, a trust that requires disbursement “to those of my grandchildren who are alive ten years after my death” could not reliably name all such persons, since beneficiaries could enter the class (through birth) or depart from the class (through death) after the settlor has passed away but before the disbursement

It is also possible that potential parties to a trust dispute are not apparent from the face of the trust instrument. Instead, these persons' interests in the dispute arise as a matter of law, typically either marital or succession law.<sup>409</sup> Although this issue may be considered most often in the context of private family trusts, marital and succession rights can also affect commercial trusts.<sup>410</sup>

In either case, a court may be able to identify these potential parties by relationship but may not be able to bring any actual, living persons into the dispute because these persons are unascertained, unborn, or legally incompetent at the time the trust dispute arises.<sup>411</sup> In litigated disputes, the issue has been resolved by allowing the court "to appoint a person to represent the interests of such beneficiaries," although "even then, any compromise of the litigation has to be approved by the court."<sup>412</sup> In England, the person named to protect the beneficiaries' claims, called a "special representative," cannot have any independent interest in the dispute itself.<sup>413</sup> Other jurisdictions, such as the United States, either appoint an

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was made. There might also be grandchildren who are living at the time the trust is created but who may not be known to the settlor. *See id.* (manuscript at 50 n.208).

409. Many legislatures have limited a decedent's ability to pass on his or her estate. In some jurisdictions, these laws involve "forced heirs" and can include children and other relatives. *See* MCGOVERN, *supra* note 20, at 30 (discussing forced heir statutes); Bosques-Hernández, *supra* note 17, at 23 (discussing "forced heirship," which does not allow testators to deviate from statutory schemes regarding succession "as a matter of public policy"); Perrin, *supra* note 1, at 657–59 (discussing the ability of heirs to assert their "forced heirship" rights in *inter vivos* trusts and testamentary trusts); Wüstemann, *supra* note 1, at 45–46 (comparing forced heirship under U.S. and Swiss law). In other countries, the primary concern is for the settlor or decedent's surviving spouse, who is entitled to what is often called an "elective share" of the settlor's estate if the amount passing under a will or broader testamentary scheme is insufficient. *See* MCGOVERN, *supra* note 20, at 160–71 (comparing the policies and procedures for allocating assets of surviving spouses in different countries and states).

410. *See* Regions Bank v. Britt, No. 4:09CV61TSL-LRA, 2009 WL 3766490, at \*2 n.2 (S.D. Miss. Nov. 10, 2009) (involving marital rights allegedly affected by a deed of trust).

411. For example, a trust provision benefitting "those of my grandchildren who are alive ten years after my death" will be known to affect all of the settlor's grandchildren who are alive ten years after the settlor's death. However, if a dispute involving the trust arises three years after the settlor's death, there may be some potential beneficiaries who are yet unborn or who are minors. Strong, *Procedures*, *supra* note 33 (manuscript at 50 n.208). Alternatively, a trust that provides a \$500 cash award to the valedictorian of Littleton High School for the next twenty years will involve identifiable beneficiaries (since there will be one such person a year for the remainder of the term of the trust), even though future beneficiaries cannot be specifically ascertained at the time a particular dispute arises. *See id.* at 51 n.211 (providing examples of instances where unascertained persons were and were not able to benefit from a trust).

412. Buckle & Olsen, *supra* note 8, at 649–50 (quoting David Hayton, *Major Trends in the Trust World: Part 2*, 2 PCB 122, 125 (2007)).

413. *See* Hayton, *supra* note 271, at 71 (discussing how in England, representatives must not have any independent interests in the dispute and must be appointed and approved by the court).

independent representative, similar to a special representative, or allow an existing beneficiary who shares the absent beneficiary's interests to protect the absent beneficiary's claims in a practice known as "virtual representation."<sup>414</sup> Minors and other legally incompetent persons (such as the mentally incapacitated) may have legal representatives, typically referred to as guardians, already in place.<sup>415</sup> The question therefore becomes whether these sorts of representative mechanisms can be used in arbitration.

The answer may depend on whether the trust instrument specifically describes the representative mechanism that is to be used. For example, it has been said that:

There appears to be no reason why the court would not grant a stay [of litigation] to the trustee on the sole ground that the beneficiary is not properly represented in the arbitration. If the arbitration provision is properly drawn to provide for adequate representation, then the child [or other beneficiary] should be bound to take the benefit of it.<sup>416</sup>

In drafting such a provision, the settlor should be sure to "provide how incapacitated, unascertained and unborn beneficiaries can come (or be brought) forward to make their claims . . . . The arbitral tribunal could determine who should be served with notice of the arbitration, in the same way as, in court proceedings, a judge can."<sup>417</sup> Furthermore, "[t]o avoid problems the trust deed should provide for payment of . . . [special or virtual representatives] out of the trust fund."<sup>418</sup>

Trustees who are not given explicit powers to appoint special or virtual representatives could attempt to do so based on their residual discretionary powers to resolve trust disputes. This approach has not been frequently discussed by commentators and may therefore be more open to debate. However, any efforts by trustees to create their own mechanisms for appointing special or virtual representatives would likely be bolstered by any statutory provisions allowing trustees to pursue nonjudicial means of dispute resolution.<sup>419</sup>

Although the use of special or virtual representatives in mandatory arbitration appears relatively straightforward, some problems may nevertheless arise. For example, there are those in the trust community who take the view that self-help on the part of either the settlor or trustee is inappropriate and that "legislation would have to be enacted to enable arbitration to deal with the

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414. See MCGOVERN ET AL., *supra* note 20, at 613–14 (describing the concept of virtual representation).

415. See *id.* at 660–63 (describing the concept of guardianship).

416. Cohen & Staff, *supra* note 13, at 222–23.

417. *Id.* at 223.

418. Hayton, *supra* note 271, at 72.

419. See *supra* notes 154–73 and accompanying text.

problem of incapacitated, unborn and unascertained beneficiaries.”<sup>420</sup> While this view is by no means universally held,<sup>421</sup> it is certainly true that states retain a public policy interest in the protection of certain vulnerable parties in both litigation and arbitration.<sup>422</sup> However, most jurisdictions also retain the ability to vacate an arbitral award or refuse enforcement if the award violates procedural due process or the public policy of the state.<sup>423</sup> The interests of any unascertained, unborn, or legally incompetent parties would therefore likely be sufficiently protected through standard procedures relating to judicial review of arbitral awards.<sup>424</sup>

Concerns also exist with respect to questions as to whether the court—as opposed to the arbitral tribunal—must approve any settlement or compromise of a trust dispute involving an unascertained, unborn, or legally incompetent party.<sup>425</sup> While arbitrators are entirely competent to enter an award on an agreed settlement as a matter of arbitration law,<sup>426</sup> some jurisdictions may oppose similar actions in the trust context because the judicial duty to approve voluntary disposition of a trust dispute is considered nonderogable.<sup>427</sup> Other jurisdictions may see no problems with permitting an arbitral tribunal to step into the shoes of the court in this regard.<sup>428</sup> Notably, if this issue turns on the proper interpretation of a statute providing the court with exclusive jurisdiction over a particular matter, then it might be better analyzed as a type of arbitrability concern.<sup>429</sup>

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420. Cohen & Staff, *supra* note 13, at 223.

421. See ACTEC, *supra* note 13, at 32, 37–38 (proposing legislative reform to address issues relating to incapacitated, unborn, and unascertained beneficiaries in arbitration); Bruyere & Marino, *supra* note 15, at 364–66 (discussing legislation proposed in Hawai‘i concerning trust arbitration).

422. See Kröll, *supra* note 151, ¶ 16-9 (describing statutes enacted to protect parties with unequal bargaining power in the commercial agency context).

423. See New York Convention, *supra* note 143, art. V (discussing grounds upon which a foreign arbitral award may be refused recognition); BORN, *supra* note 5, at 2620–33, 2827–63 (noting grounds for objection to enforcement under the Model Arbitration Law and the New York Convention).

424. See *supra* notes 192–256 and accompanying text.

425. See Hayton, *supra* note 154, at 13–15 (discussing judicial role in protecting particularly vulnerable parties).

426. See BORN, *supra* note 5, at 2437–38 (“[T]he terms of most national laws and institutional rules leave the arbitrators with the choice whether or not to make a consent award.”).

427. See Hayton, *supra* note 154, at 15 (discussing English courts’ oversight capacity regarding voluntary compromises of probate disputes).

428. See *id.* (“In the United States . . . virtual representatives bind the interests of those whom they represent without the need for any court approval.”); Mautner & Orr, *supra* note 154, at 166 (“The extension of the doctrine of virtual representation to nonjudicial dispute resolution procedures has simplified the settlement process and made it possible to finalize nonjudicial dispute resolution agreements without having to seek court approval.”).

429. See *infra* notes 433–70 and accompanying text.

Challenges could also arise as to the competency of a particular representative. However, this appears to be less of a problem, since it has been said that “[o]ne can leave it to the good sense of the arbitrator to provide for due process and a fair hearing by appointing appropriate skilled independent persons to represent minors and unborn and unascertained beneficiaries.”<sup>430</sup>

Finally, questions could also arise as to whether a representative needs to be appointed in any particular set of circumstances. For example, it has been suggested that a representative need not be appointed for a minor beneficiary if the minor is receiving a benefit under the trust, since consent to receiving a benefit is not necessary in some jurisdictions.<sup>431</sup> However, a representative would be necessary in cases where a conflict of interest existed between a minor and his or her natural guardian (i.e., the parent).<sup>432</sup>

e. Subject Matter Arbitrable

Finally, for a mandatory arbitration provision in a trust to be enforceable, “the subject matter of the dispute [must be] arbitrable.”<sup>433</sup> Arbitrability “determines which disputes can be submitted to arbitration” and which are reserved to the exclusive purview of the courts.<sup>434</sup>

Although national and international laws on arbitration contemplate the possibility that certain issues are nonarbitrable, seldom are the parameters of arbitrability firmly and clearly drawn.<sup>435</sup> Cross-border disputes, including those involving several U.S. states, are often particularly difficult as a result of the need for potentially complicated conflict of laws analyses.<sup>436</sup>

It might initially appear as if the various statutes allowing for the arbitration of certain matters relating to trusts would be useful in this analysis. Certainly the provisions are helpful in some regards, most particularly by suggesting that certain rights relating to trusts

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430. Hayton, *supra* note 271, at 72.

431. See Wüstemann, *supra* note 1, at 52 (“The consent of the parents is not needed where the minor child only benefits from a transaction.”).

432. See *id.* (discussing the potential involvement of the Swiss authorities in a situation involving a conflict of interest).

433. Cohen & Staff, *supra* note 13, at 209.

434. Kröll, *supra* note 151, ¶ 16-7.

435. See LEW ET AL., *supra* note 119, ¶¶ 9-19 to -41 (discussing various jurisdictions’ approaches to arbitrability); Kröll, *supra* note 151, ¶¶ 16-7 to -8 (noting that the uncertainty regarding arbitrability stems from the broad, substantive nature of arbitration provisions that are not “explicitly regulated”).

436. See Wüstemann, *supra* note 1, at 47 (noting potential difficulties associated with international trust disputes); *In re Revocation of Revocable Trust of Fellman*, 604 A.2d 263, 268–69 (Pa. Super. Ct. 1992) (Johnson, J., dissenting) (addressing interstate probate dispute).



are freely disposable and thus not inherently nonarbitrable.<sup>437</sup> However, most of the legislation is written in such a way that it is not clear whether the language covers mandatory arbitration provisions found in trusts.<sup>438</sup> Therefore, courts could limit application of the legislation solely to arbitration agreements entered into by the trustee after the creation of the trust. In so doing, courts could frame the trustee's entering into an arbitration agreement as analogous to a post-dispute arbitration agreement and a provision contained in the trust as analogous to a pre-dispute arbitration agreement. While the analogy would not be entirely apt, in that trustees' arbitration agreements would likely also be made pre- rather than post-dispute,<sup>439</sup> courts might nevertheless attempt to make this sort of distinction because it might allow them to rely on practices adopted in other areas of arbitration, wherein states have declared that certain rights may be made subject to a post-dispute arbitration agreement but not a pre-dispute agreement.<sup>440</sup>

However, this sort of broad-brush analysis is somewhat crude, and there are better ways to analyze the issue. For example, at its core, arbitrability focuses on whether the rights in question are freely disposable by the parties.<sup>441</sup> Because "the freedom to dispose of one's rights . . . implies the possibility to renounce such rights,"<sup>442</sup> it is appropriate to ask whether beneficiaries can dispose of all or some of their rights under a trust. As it turns out, beneficiaries can disclaim any benefits they receive, which would suggest that beneficiaries' rights are freely disposable and thus arbitrable.<sup>443</sup> While some difficulties could arise to the extent that trust law limits beneficiaries'

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437. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985) (noting that disputes that are arbitrable in one context cannot be held to be inherently nonarbitrable in others).

438. See *supra* notes 178–88 and accompanying text.

439. This would most likely include agreements made with external third parties but could also include agreements made with beneficiaries regarding internal disputes. See *supra* note 10 and accompanying text; see also *supra* note 174 and accompanying text.

440. See Caprasse, *supra* note 39, at 84 (discussing Belgian *droits impératifs*); see also BORN, *supra* note 5, at 820–21 (discussing European prohibition on pre-dispute arbitration agreements in consumer context).

441. Thus, some jurisdictions define their concept of arbitrability by stating that "[a]nyone can 'compromise' on rights which are free to be disposed of." Caprasse, *supra* note 39, at 83 (quoting CODE CIVIL [C. CIV.] art. 2059 (Fr.)). Other countries indicate that "[a]ny dispute already existing or that may arise from a given legal situation, and which can be the object of a settlement, may by agreement be submitted to arbitration." *Id.* at 83 (quoting Code Judiciaire [Judicial Code] of May 19, 1998, art. 1676 (Belg.), available at [vsites.unb.br/fd/gt/conteudo/Lei\\_arb\\_belgica\\_ing.doc](http://vsites.unb.br/fd/gt/conteudo/Lei_arb_belgica_ing.doc)).

442. *Id.* at 84.

443. See MCGOVERN ET AL., *supra* note 20, at 88–96 (discussing the ability to disclaim benefits in inheritance); UNDERHILL AND HAYTON, *supra* note 9, ¶¶ 65.1–65.5 ("A person to whom a property interest is purportedly transferred is not obliged to accept it.").

ability to terminate a trust created for their benefit or to alter its terms, arbitration of trust disputes would not be challenging the terms of the trust in any way but would instead be upholding them.<sup>444</sup>

As illuminating as these analyses are, they are just a start. More detailed guidance must be sought from general criteria regarding arbitrability.<sup>445</sup>

When considering whether a claim is arbitrable, courts and arbitrators typically look at a number of factors including the extent to which public interests are at stake, whether the dispute involves significant inequalities in bargaining power, the effect of the decision on third-party rights, the ability of arbitrators to grant legislatively required remedies, and whether arbitral procedures (as opposed to judicial procedures) are adequate to resolve the dispute.<sup>446</sup> Notably, “the existence of a possibility for parties to express their will is an important factor” in favor of arbitrability, a point which may be of particular interest in trust disputes, given trust law’s traditional emphasis on settlor intent and the broad recognition of party autonomy in instruments such as the Hague Convention on Trusts.<sup>447</sup>

Legislative intent is also central to the analysis.<sup>448</sup> England and the United States do not include language on arbitrability in their arbitration statutes, meaning that “questions whether or not a particular dispute is arbitrable . . . turn almost entirely on judicial interpretation of other statutes” or on general case law.<sup>449</sup> Other jurisdictions address questions of arbitrability in their arbitration statute, although the language is often quite general.<sup>450</sup> Nevertheless, it is clear that several of these statutes’ definitions of arbitrability are

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444. See MCGOVERN ET AL., *supra* note 20, at 425–36 (explaining limitations on amendments of trusts); UNDERHILL AND HAYTON, *supra* note 9, ¶¶ 66.1–66.26 (discussing limitations on the ability to terminate or modify a trust).

445. See Caprasse, *supra* note 39, at 80 (giving general criteria for objective arbitrability).

446. See BORN, *supra* note 5, at 788–90 (stating the analytical considerations used to identify “implied legislative intent” regarding arbitrability when national legislation is silent on the issue).

447. Caprasse, *supra* note 39, at 88; see also Hague Convention on Trusts, *supra* note 3, arts. 6–10, 15–18 (discussing the priority of settlor intent in procedures governed by the Hague Convention on Trusts).

448. See BORN, *supra* note 5, at 788–89 (noting legislative intent regarding arbitrability may be explicit or implicit).

449. *Id.* at 781, 786. The Model Arbitration Law is also silent regarding arbitrability. See *id.* at 776 (stating the Model Arbitration Law leaves nonarbitrability provisions to individual legislatures and judiciaries).

450. See *id.* at 775–88 (explaining the varying degrees of breadth of both domestic and international arbitration statutes in different jurisdictions); Caprasse, *supra* note 39, at 82–83.

so broad that few, if any, problems will arise regarding the arbitration of most trust disputes.<sup>451</sup> Thus, for example:

Switzerland has adopted an independent substantive rule for the determination of arbitrability, according to which any dispute involving an economic/financial interest may be settled by arbitration, without any need to consider the possible stricter rules of the law applicable to the merits of the dispute or the national law of one of the parties. Apart from purely non-financial matters, arbitrability can only be denied in an international arbitration with its seat in Switzerland for claims which have exclusively been reserved for the state courts pursuant to foreign mandatory provisions which have to be taken into account under public policy considerations.

As nearly all types of trust disputes ultimately concern the distribution of private wealth, the majority of such disputes can be arbitrated given the liberal definition of arbitrability under Swiss law.<sup>452</sup>

Notably, this does not mean that every trust-related dispute is arbitrable under Swiss law. For example, issues regarding the provision of information to a beneficiary might not involve the kind of financial or economic interests necessary for the matter to be considered arbitrable in Switzerland.<sup>453</sup>

A number of other states also focus on commercial or economic interests when considering the arbitrability of a particular issue and might therefore come to similar conclusions as Switzerland regarding the arbitrability of trust disputes.<sup>454</sup> For example, “[i]n the Scandinavian countries, particularly in Denmark, it has been asserted that a specific provision in the will calling for a certain ADR procedure is likely to be recognized.”<sup>455</sup> Arbitration provisions in testamentary and other noncontractual documents will be upheld in Germany and Austria.<sup>456</sup>

However, even those countries that discuss arbitrability in their arbitration statute might need to look to other legislation on occasion. For example, Swiss courts might prohibit the arbitration of trust

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451. See BORN, *supra* note 5, at 777–79 (discussing Swiss and German statutes, which allow arbitration of any claim regarding an economic interest).

452. Wüstemann, *supra* note 1, at 49 (emphasis omitted); see also von Segesser, *supra* note 13, at 23 (discussing the meaning of “economic interest”).

453. See Wüstemann, *supra* note 1, at 50–51 (explaining that except for cases involving a financial interest, a beneficiary’s request for information would not be arbitrable under Swiss law).

454. See Caprasse, *supra* note 39, at 81–82 (summarizing a French statute that prohibited arbitration except in cases involving commercial activities and transactional disputes).

455. Bosques-Hernández, *supra* note 17, at 22.

456. See SCHWARZ & KONRAD, *supra* note 110 (discussing how Austrian arbitration law permits arbitration set up by “testamentary disposition or by other legal transactions that are not based on the agreement of the parties” (footnotes omitted)); Duve, *supra* note 110, ¶ 88 (discussing German statutory provisions allowing binding arbitration clauses in testamentary and other noncontractual dispositions).

disputes in cases involving forced heirship, based on various statutes giving courts exclusive jurisdiction over matters involving succession law.<sup>457</sup>

Regardless of whether a state defines arbitrability statutorily or through the common law, the central question is whether a certain category of claims should be reserved to the courts.<sup>458</sup> Traditionally, the analysis was conducted on the basis of entire subject matter areas: for example, the court would ask whether all intellectual property claims were considered arbitrable, or all consumer claims, or all securities claims.<sup>459</sup> As the general scope of arbitrability has expanded, the practice has changed somewhat, with courts now making more nuanced distinctions regarding the arbitrability of certain subsets of claims that fall within a field that is generally considered arbitrable.<sup>460</sup>

For example, agency, franchise, and exclusive distributor disputes are typically considered as amenable to arbitration.<sup>461</sup> However, some courts have refused to enforce pre-dispute arbitration agreements in cases involving the termination of the rights of agents, franchisees, or exclusive distributors, based on specific concerns about the economic vulnerability of those parties.<sup>462</sup> Notably, this limitation on arbitrability only affects specific types of claims, creating a subclass of nonarbitrable issues within a subject matter that is generally considered arbitrable.

This type of analysis is relevant to mandatory trust arbitration for two reasons. First, these other inquiries focus on the protection of vulnerable parties, which is also an issue in trust disputes involving unborn, unascertained, or legally incompetent beneficiaries.<sup>463</sup> Interestingly, however, this may be one time when an emphasis on

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457. See Wüstemann, *supra* note 1, at 45–46 (explaining that Swiss law may prohibit arbitration of disputes involving forced heirs). Other jurisdictions that recognize forced heirship appear to adopt a similar approach. See Bosques-Hernández, *supra* note 17, at 23 (discussing Spain, Bolivia, Peru, and Honduras); Perrin, *supra* note 1, at 657–58 (discussing clawback possibilities involving *inter vivos* trusts and testamentary trusts).

458. See Kröll, *supra* note 151, ¶ 16-7 (“[A]rbitrability . . . determines which disputes can be submitted to arbitration.”).

459. See BORN, *supra* note 5, at 767–69 (discussing laws that treat entire classes of disputes as nonarbitrable); Kröll, *supra* note 151, ¶ 16-7 (discussing objective arbitrability).

460. See Kröll, *supra* note 151, ¶ 16-7 (describing narrow restrictions on objective arbitrability in Europe).

461. See *id.* ¶ 16-4 (describing how arbitration is commonly used in cases involving commercial representation).

462. See *id.* ¶¶ 16-5, 16-8 to -23 (describing the substantive and procedural rules preventing some commercial representation cases from proceeding to arbitration).

463. See *id.* ¶ 16-9 (explaining that many jurisdictions enact provisions to protect agents, distributors, and franchisees because they are considered to be weaker than the commercial entities whose interests they represent); *supra* notes 399–432 and accompanying text (discussing the issue of proper representation in trust arbitrations).

the donative nature of trusts may work to the benefit of mandatory arbitration since concerns about the arbitrability of issues involving agents, franchisees, and exclusive distributors typically focus on economic vulnerability arising from an inequality of bargaining power.<sup>464</sup> Since there can be no inequality of bargaining power in a donative relationship, trust arbitration cannot be problematic in this sense.

Second, limitations on the arbitrability of certain types of agency, franchise, or distribution claims are typically based on statutes that appear to grant courts exclusive jurisdiction over a particular type of claim.<sup>465</sup> Trust law is full of similar types of legislation that ostensibly gives exclusive jurisdiction over certain matters to the courts.<sup>466</sup>

This latter issue is extremely important. Essentially, the question is whether exclusive jurisdiction provisions should be interpreted as a prohibition on forum-selection clauses (meaning that if the claim is heard in court, it must be heard in that particular court, which would leave open the possibility of arbitration of that claim) or whether exclusive jurisdiction provisions should be read as barring resolution of the claim in all other fora, arbitral or judicial.<sup>467</sup>

When the matter is discussed in the context of agency, franchise, and distribution claims, the analysis concentrates primarily on international disputes, where the choice-of-court analysis involves judicial venues in two different countries.<sup>468</sup> In this context, the issues primarily revolve around choice of law and whether a mandatory provision of law will be applied extraterritorially.<sup>469</sup> This obviously has relevance to international or interstate trust disputes, which can involve similar choice of law concerns.<sup>470</sup>

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464. See Kröll, *supra* note 151, ¶ 16-9 (linking protection of commercial representatives to the perception of their having less bargaining power); *supra* notes 73-91 and accompanying text.

465. See Kröll, *supra* note 151, ¶ 16-16 (“[S]ome national laws on commercial agency explicitly stipulate that the courts at the agent’s place of business . . . have exclusive jurisdiction.”). *But see id.* ¶ 16-8 (explaining that in general, national statutes do not explicitly address the arbitrability of disputes relating to commercial representation).

466. See Cohen & Staff, *supra* note 13, at 215-17 (discussing exclusive jurisdiction provisions in trust-related concerns).

467. See Kröll, *supra* note 151, ¶¶ 16-20 to -22 (comparing exclusion of jurisdiction in arbitration versus litigation).

468. See *id.* ¶¶ 16-24 to -74 (citing examples).

469. See *id.* ¶¶ 16-18 to -20 (discussing the effect of mandatory laws on arbitrability determinations).

470. See Wüstemann, *supra* note 1, at 47 (discussing choice of law issues in international trust disputes); see also *In re Revocation of Revocable Trust of Fellman*, 604 A.2d 263, 269 (Pa. Super. Ct. 1992) (Johnson, J., dissenting) (discussing choice of law issues in interstate disputes); von Segesser, *supra* note 13, at 22-23 (comparing the Swiss rule for arbitrability to that of other jurisdictions).

However, this issue can also be considered from a purely domestic perspective, at least when trusts are involved. Trust law has historically operated as a field apart, not only in terms of its procedural and substantive law but also in terms of the venue in which these matters are heard.<sup>471</sup> Many states require claims regarding the administration and interpretation of trusts to be heard in probate or chancery courts, a result that is achieved through exclusive jurisdiction clauses.<sup>472</sup> Therefore, it may be that this sort of legislation should be more properly interpreted as a type of internal sorting mechanism within a national judicial system rather than a method of denying the availability of alternative means of dispute resolution. This conclusion is strengthened not only by the fact that arbitration was relatively uncommon at the time that these specialty courts first developed in medieval England but also by the fact that many of the rationales supporting the creation of specialty courts (i.e., taking the dispute away from the jury and giving it to a decision maker with specialized substantive and procedural expertise) would be met equally well by arbitration.<sup>473</sup> As such, it seems inappropriate to conclude that these statutes were meant to exclude arbitration, at least without more in-depth analysis.

In considering this issue, it is also important to be aware of the ramifications of a rule of limited nonarbitrability. First, allowing these sorts of carve-outs diminishes predictability, since parties will often be surprised by claim-specific limitations in an area of law that is known to be generally arbitrable.<sup>474</sup> Second, this sort of protective behavior is typically unnecessary. States enact exclusive jurisdiction statutes because of the desire to protect vulnerable parties through the application of certain substantive or procedural laws.<sup>475</sup> However, arbitration of trust disputes does not infringe on any necessary procedural protections,<sup>476</sup> nor does it allow the erosion of any necessary substantive principles of law.<sup>477</sup> This is particularly true

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471. See *supra* note 20 and accompanying text (discussing the isolation of the trust bar due to the “specialized nature of trust law and procedure”).

472. See MCGOVERN ET AL., *supra* note 20, at 626 (describing the probate process).

473. See *supra* notes 45, 81–83 and accompanying text.

474. See Cohen & Staff, *supra* note 13, at 206 (noting potential pockets of nonarbitrability in trust arbitration); Kröll, *supra* note 151, ¶¶ 16-79 to -80 (discussing the advantages and disadvantages of a case-specific approach to arbitrability).

475. Cf. Kröll, *supra* note 151, ¶ 16-9 (explaining that states enact exclusive jurisdiction provisions in cases involving commercial representation disputes because of concern for the representatives’ weaker bargaining position relative to their principals).

476. See *supra* notes 194–224 and accompanying text.

477. See Kröll, *supra* note 151, ¶¶ 16-21 to -22 (noting that arbitral tribunals can apply principles of mandatory law even in cases where the parties have not necessarily chosen that law); see also *supra* notes 132–36 and accompanying text

given the type of judicial review that is available at the end of an arbitration.<sup>478</sup> Thus, commentators have concluded that:

[T]he fact that a legal provision gives express, or even exclusive, authority to a state court does not prevent arbitration. These rules merely regulate the distribution of disputes among the different courts of the State. They only indicate which court has the authority when parties want to go to state courts. The rules say nothing about the possibility to bring the dispute in a completely different arena.<sup>479</sup>

Although a detailed analysis of the question of limited nonarbitrability is beyond the scope of the current Article, it is an issue that courts and commentators will need to consider in more depth. Several factors may be relevant to that discussion. For example, because many of these exclusive jurisdiction provisions have as their purpose the protection of certain principles of substantive law, analysts may wish to consider the ability of parties to choose the law that applies to trust disputes.<sup>480</sup> The Hague Convention on Trusts may be a useful starting point for this type of inquiry since it reflects international consensus on a variety of relevant issues, including the application of mandatory rules of foreign law.<sup>481</sup> While the Hague Convention on Trusts does not provide answers to all possible concerns (such as which rules of law are to be considered nonderogable or are to be given extraterritorial application), it does usefully describe the factors that are to be used in determining which law is most closely connected with the trust.<sup>482</sup>

Courts and commentators will also need to determine whether judicial review of arbitral awards adequately protects a state's interest in the application of certain substantive laws.<sup>483</sup> This

(responding to the criticism that arbitration's procedural flexibility leads to violations of procedural and substantive rights).

478. Although judicial review of arbitral awards is primarily procedural, commentators have noted that the second look doctrine provides courts with an opportunity to scrutinize an award to see if it has disregarded any important mandatory public policies of the enforcing state. *See* Kröll, *supra* note 151, ¶¶ 16-66 to -67 (describing the second look doctrine); *see also* *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985) (establishing the second look doctrine).

479. *Caprasse, supra* note 39, at 88.

480. *See* Kröll, *supra* note 151, ¶ 16-20 (“The underlying rationale of [exclusive jurisdiction] provisions is to ensure that the mandatory and protective provisions of the national law on commercial agency are applied.”).

481. *See* Hague Convention on Trusts, *supra* note 3, arts. 6–10, 15–18 (establishing choice-of-law rules for trusts).

482. *See id.* arts. 7, 15–16 (describing the factors that are to be used in determining which law is most closely connected with the trust).

483. *See* Kröll, *supra* note 151, ¶¶ 16-80 to -84 (suggesting post-award judicial review protects this interest sufficiently). While this issue was originally raised as a conflict of laws concern in the context of cross-border disputes, *see id.* ¶ 16-69 (discussing *Mitsubishi Motors Corp.*, which involved the enforcement of an international arbitration award), similar questions could arise in domestic trust

analysis may focus on the extent to which an arbitral tribunal may or must apply mandatory provisions of substantive law of a state other than that whose law is said to govern the dispute.<sup>484</sup> Typically, arbitrators are seen as having more freedom (or inclination) in this regard than state courts.<sup>485</sup> It may also be appropriate to consider the propriety of early intervention in a trust dispute (as would occur if the dispute were determined to be nonarbitrable in the context of a motion to compel arbitration) versus late intervention (as would occur if the propriety of the dispute resolution process were only considered in the context of a motion to vacate an arbitral award or oppose enforcement thereof).<sup>486</sup> Commentators appear to conclude that late intervention is the more appropriate approach, for a variety of reasons.<sup>487</sup>

As complicated as the arbitrability analysis may appear to be, most commentators have nevertheless concluded that internal trust disputes are or should be arbitrable, at least as a general proposition,<sup>488</sup> an approach that is consistent with the general trend toward increased arbitrability in other areas of law.<sup>489</sup> Although courts and commentators need to consider whether certain discrete disputes can or should be carved out of the realm of generally arbitrable matters, those discussions are best left until another day.<sup>490</sup>

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arbitration, given that some people in the trust industry have wondered whether arbitrators in such cases actually apply the law to the matter at hand. *See* Spitko, *supra* note 17, at 295–96 (suggesting that informal dispute resolution processes may run the risk of increased bias or prejudice); Wüstemann, *supra* note 1, at 34, 49, 50–51, 52–53 (describing some specific instances in which the potential nonapplication of mandatory national law may be problematic from a Swiss perspective). Notably, contemporary practice is for arbitrators to apply the law chosen by the parties or, in the absence of party choice, the law that the arbitrators determine to be most relevant to the dispute, which answers questions about whether trust arbitration would operate outside the purview of the law. *See* BORN, *supra* note 5, at 2111, 2153 (explaining interaction between party autonomy and arbitrator discretion).

484. *See* Kröll, *supra* note 151, ¶ 16-82 (discussing extent to which arbitrators may choose to apply law that is neither the law of the seat of arbitration nor the substantive law chosen by the parties to govern the merits of a dispute).

485. *See id.* ¶ 16-20 (discussing arbitrator discretion).

486. *See id.* ¶¶ 16-75 to -85 (comparing benefits of judicial review before and after rendering of final award).

487. *See id.* (favoring judicial review post-award rather than pre-award).

488. *See* Cohen & Staff, *supra* note 13, at 203–06, 226 (discussing the advantages of arbitration and generally concluding that arbitration should be used to resolve a wide range of trust disputes); Lloyd & Pratt, *supra* note 113, at 18–20 (arguing in favor of the enforceability of arbitration clauses in trusts); Wüstemann, *supra* note 1, at 55–56 (“Arbitration is an ideal method for resolving trust disputes.”).

489. *See* BORN, *supra* note 5, at 837–41 (commenting favorably upon the retreat from the nonarbitrability doctrine in most jurisdictions).

490. Concerns have already been raised about the arbitrability of claims arising under marital or succession law, as well as challenges based on the alleged incapacity of the settlor. *See supra* notes 322–78, 409 and accompanying text. Interestingly, some



## IV. CONCLUSION

As the preceding analysis suggests, mandatory arbitration of trust disputes gives rise to a number of complicated jurisprudential questions. This Article has focused on the potential for the impermissible ouster of the courts, the operability and effectiveness of the arbitration provision, the extent to which an arbitration provision can be said to be binding on the party against whom the arbitration provision is sought to be enforced, proper representation of parties, and arbitrability.<sup>491</sup> However, this Article has concluded that none of these matters gives rise to any insurmountable obstacles, since viable solutions to potential problems can be identified as a matter of either trust or arbitration law.

This is not to say that every jurisdiction considers mandatory arbitration of trust disputes in the same light. There are some U.S. states, most prominently California and Texas, that have denied the enforceability of mandatory arbitration provisions found in trusts, although the decisions in question have been appealed to higher courts.<sup>492</sup> However, other U.S. states have taken a different approach. For example, Arizona and Florida have both embraced mandatory trust arbitration legislatively, while Michigan and New York have abrogated negative case law through judicial means.<sup>493</sup> Further

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of those issues could be framed in terms other than arbitrability. For example, concerns about forced heirs could be analyzed as a nonsignatory matter rather than a question of arbitrability, since forced heirs would not be taking “under or through” the trust like other beneficiaries. *See supra* notes 271, 409 and accompanying text.

491. Cohen and Staff have outlined these factors as conditions with which the court must be satisfied before arbitration is a viable option. *See* Cohen & Staff, *supra* note 13, at 209.

492. *See* Diaz v. Bukey, 125 Cal. Rptr. 3d 610, 614–15 (Ct. App. 2011) (holding a mandatory arbitration provision in a trust unenforceable), *rev. granted*, 257 P.3d 1129 (Cal. 2011); Rachal v. Reitz, 347 S.W.3d 305, 311 (Tex. App. 2011) (holding a mandatory arbitration clause in a trust unenforceable), *rev. granted*, 2012 Tex. LEXIS 487 (2012).

493. *See* ARIZ. REV. STAT. ANN. § 14-10205 (2012) (“A trust instrument may provide mandatory, exclusive and reasonable procedures to resolve issues between the trustee and interested persons or among interested persons with regard to the administration or distribution of the trust.”); FLA. STAT. ANN. § 731.401 (2010) (“A provision in a will or trust requiring the arbitration of disputes, other than disputes of the validity of all or a 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”). *Compare* *In re* Estate of Jacobovitz, 295 N.Y.S.2d 527, 531 (Sur. Ct. Nassau Cnty. 1968) (holding that the probate of a will cannot be the subject of arbitration), *with* *In re* Blumenkrantz, 824 N.Y.S.2d 884, 887 (Sur. Ct. Nassau Cnty. 2006) (holding a trustee bound by an agreement to arbitrate); *compare also* *In re* Meredith’s Estate, 266 N.W. 351, 356 (Mich. 1936) (“No agreement [to submit trust disputes to arbitration] under any circumstances could bind the estate unless all persons interested therein were parties thereto.”), *with* *In re* Nestorovski Estate, 769 N.W.2d 720, 732 (Mich. Ct. App. 2009) (holding that *In re Meredith’s Estate* “lacks

development of mandatory trust arbitration may occur through pro-arbitration provisions of the UTC and similar state legislation, even though there are some questions about whether and to what extent the relevant language will apply to mandatory arbitration provisions found in trust instruments.<sup>494</sup>

Advances have also been made in other countries. Among the common law jurisdictions, Guernsey is perhaps the most notable, having adopted legislation allowing mandatory arbitration of various kinds of internal trust disputes, although the Bahamas may soon become the most welcoming offshore jurisdiction in this regard.<sup>495</sup> England's stance on this issue is less clear, with most of the recent developments coming as a result of commentary rather than judicial or legislative means. Nevertheless, the stage appears set for potential developments in England in this regard.<sup>496</sup>

Given the trust's origins as a common law device, it is not surprising that the debate about mandatory trust arbitration has been much less pronounced in civil law jurisdictions. Nevertheless, a pro-arbitration approach appears to exist in a number of countries, including Germany, Austria, Switzerland, and Liechtenstein.<sup>497</sup>

Despite these advancements, the law regarding the enforceability of arbitration provisions found in trusts remains

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continued viability because it has been superseded by more recent legislative developments and intervening changes in the court rules").

494. See IDAHO CODE ANN. §§ 15-8-101, 15-8-103 (2009) (stating the provisions' pro-arbitration purpose and defining key terms); WASH. REV. CODE ANN. §§ 11.96A.010, 11.96A.030 (West 2006) (stating the provisions' pro-arbitration purpose and defining key terms); UNIF. TRUST CODE §§ 111, 816(23) (amended 2010), available at [http://www.uniformlaws.org/shared/docs/trust\\_code/utc\\_final\\_rev2010.pdf](http://www.uniformlaws.org/shared/docs/trust_code/utc_final_rev2010.pdf) (discussing nonjudicial dispute resolution and empowering a trustee to "resolve a dispute concerning the interpretation of the trust or its administration by mediation, arbitration, or other procedure for alternative dispute resolution").

495. See The Trusts (Guernsey) Law, 2007, c. 2 § 63 (providing permissive rules under which arbitration awards in trust disputes will be binding); Trustee (Amendment) Bill, 2011, § 18 (Bah.) (establishing pro-arbitration rules for the resolution of trust disputes); Hartnell, *supra* note 187 (discussing the Trustee Act amendments).

496. See *Premium Nafta Prods. Ltd. v. Fili Shipping Co. Ltd.*, [2007] UKHL 40 [13] (explaining that the interpretation of an arbitration agreement between two "rational businessmen" should defer to the parties' intentions), *on appeal from* *Fiona Trust & Holding Corp. v. Privalov*, [2007] EWCA Civ 20, [2007] 1 All E.R. (Comm.) 891; *UNDERHILL AND HAYTON*, *supra* note 9, § 11.80 (establishing trustee as the final arbiter on questions of fact).

497. See SCHWARZ & KONRAD, *supra* note 110 (describing ways in which Austrian law grants arbitrators the authority to decide disputes by arbitration); Bosques-Hernández, *supra* note 17, at 23 (describing Liechtenstein's pro-arbitration rules allowing for compulsory arbitration provisions in trust deeds); Duve, *supra* note 110, ¶ 88 (discussing German statutory provisions that allow binding arbitration clauses in testamentary or other noncontractual dispositions); Koch, *supra* note 33, at 187 ("Switzerland, Germany and Austria consider that any dispute involving a financial or economic interest is arbitrable."); Wüstemann, *supra* note 1, at 49 (describing Switzerland's pro-arbitration rule for arbitrability).

somewhat “thin and underdeveloped.”<sup>498</sup> The lack of clear precedent or legislation may slow the further development of trust arbitration in some jurisdictions, at least if lawyers responsible for drafting trust instruments continue to hesitate about recommending arbitration. However, settlors may not be as powerless as some people believe. Indeed, this Article has identified a variety of ways that settlors can improve the enforceability of a mandatory arbitration provision through proper drafting techniques.<sup>499</sup>

Although this Article has attempted to undertake a relatively comprehensive study of the potential problems and solutions in this area of law, using an international and comparative approach so as to assist courts, commentators, and counsel working with both domestic and offshore trusts, more work remains to be done. For example, the trust bench and bar would both benefit from a detailed discussion of the concept of limited nonarbitrability and the way in which exclusive jurisdiction provisions should be interpreted.<sup>500</sup> Additional research into the differences between commercial and other types of trusts would also be useful, particularly if those distinctions were found to affect the arbitration analysis.

Further consideration should also be given to the types of procedures that might be appropriate in a trust arbitration. Courts

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498. Katzen, *supra* note 14, at 19.

499. A growing amount of commentary is available on the subject of “best practices” in drafting. See UNIF. TRUST CODE § 816(23) cmt. (offering practitioners suggestions for best practices); AAA WILLS AND TRUSTS ARBITRATION RULES (2009), available at [http://www.adr.org/cs/idcplg?IdcService=GET\\_FILE&dDocName=ADRSTG\\_004135&RevisionSelectionMethod=LatestReleased](http://www.adr.org/cs/idcplg?IdcService=GET_FILE&dDocName=ADRSTG_004135&RevisionSelectionMethod=LatestReleased) (offering a model arbitration clause); ICC ARBITRATION CLAUSE FOR TRUST DISPUTES, 19 ICC INT’L CT. OF ARB. BULL. 9 (2008), available at <http://www.iccdri.com> (search “ICC Arbitration Clause for Trust Disputes” and follow “Commission Report” hyperlink) (providing a model arbitration clause and accompanying commentary); ACTEC, *supra* note 13, at 34–42 (providing sample arbitration-related clauses for trusts and wills); Bosques-Hernández, *supra* note 17, at 8–12 (discussing the theories under which an arbitration clause in a trust deed can be enforced); Hayton, *supra* note 271, at 71–72 (identifying and attempting to resolve obstacles to the enforceability of arbitration clauses in trust deeds); Hayton, *supra* note 154, at 17 (suggesting tips for drafting effective virtual representation clauses in trust instruments); Hwang, *supra* note 1, at 84 (describing the ICC model arbitration clause for trusts); Bridget A. Logstrom, *Arbitration in Estate and Trust Disputes: Friend or Foe?*, 30 ACTEC J. 266, app. B, 289–90 (2005) (providing sample arbitration clauses); Bridget A. Logstrom et al., *Resolving Disputes with Ease and Grace*, 31 ACTEC J. 235, 241–44 (2005) (providing sample arbitration clauses); Timothy P. O’Sullivan, *Family Harmony: An All Too Frequent Casualty of the Estate Planning Process*, 8 MARQ. ELDER’S ADVISOR 253, 315–16 (2007) (offering suggestions to practitioners on how to ensure the enforceability of arbitration clauses); Wüstemann, *supra* note 1, at 45–47 (describing the English theory of deemed acquiescence, a similar Swiss theory, and forfeiture clauses). See generally Strong, *Enforceability*, *supra* note 33 (advising practitioners on how to ensure enforceability of arbitration clauses in trust deeds through proper drafting).

500. See *supra* notes 433–90 and accompanying text. This issue is taken up in detail in Strong, *Procedures*, *supra* note 33 (discussing the propriety of arbitration procedures in trust disputes).

are often more inclined to enforce arbitration agreements and awards if the proceedings are governed by arbitral rules promulgated by a reputable arbitral institution,<sup>501</sup> so the trust and arbitral communities should work together to ensure that trust-appropriate procedures are in place. Both the AAA and the International Chamber of Commerce (ICC) have begun to address this issue, with the ICC focusing primarily on the creation of a model arbitration clause (although that provision also includes several items affecting arbitral procedure) and the AAA focusing on actual rules of procedure.<sup>502</sup> However, initial inquiries suggest that both the AAA's trust arbitration rules and the ICC's model clause could be improved in a variety of ways, so there is more work to be done in this regard.<sup>503</sup>

While additional research in this field should be encouraged, it appears clear that further development of mandatory trust arbitration is inevitable, given recent events in the United States and elsewhere. Not only are parties in favor of dispute resolution procedures that promote speed, efficiency, confidentiality, personal autonomy, cost-effectiveness, and (in international disputes) an increased likelihood of an internationally enforceable award, but so, too, are many commentators and legislatures. While some courts continue to reflect a more conservative approach to the issue, many of the older, more problematic precedents have been abrogated in recent years,<sup>504</sup> thus opening the door to a more pro-arbitration policy. Trust law will also undoubtedly benefit from the significant advances made in arbitration law and practice over the last two to three decades. Given that "there seem to be no good current policy grounds for permitting the inclusion of arbitration clauses in contracts but not trust deeds,"<sup>505</sup> the trust and arbitral communities should therefore move forward jointly to promote the continued development of this area of law.

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501. See BORN, *supra* note 5, at 150 ("[A]n arbitral institution lends its standing to any award that is rendered, which may enhance the likelihood of voluntary compliance and judicial enforcement.").

502. See generally AAA WILLS AND TRUSTS ARBITRATION RULES (focusing on rules of procedure in trust arbitrations); ICC ARBITRATION CLAUSE FOR TRUST DISPUTES (providing a model trust arbitration clause and commentary thereon).

503. See Strong, *Procedures*, *supra* note 33 (manuscript at 54–85) (analyzing the effectiveness of the AAA Trust Arbitration Rules).

504. See *supra* notes 24–26 and accompanying text.

505. Lloyd & Pratt, *supra* note 113, at 18.