EMPOWERING SETTLORS: HOW PROPER LANGUAGE CAN INCREASE THE ENFORCEABILITY OF A MANDATORY ARBITRATION PROVISION IN A TRUST

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Editors' Synopsis: As the trust becomes an increasingly popular method of disposing of wealth, disputes arising from trusts increasingly congest the court systems. This Article addresses mandatory arbitration as an alternative to litigation for resolving internal trust disputes. Although the convention of including a mandatory arbitration clause in a trust is in its infancy, the American Arbitration Association and the International Chamber of Commerce have developed model trust clauses that suggest possible methods of drafting arbitration clauses within trusts. Between the two model trust clauses, drafters can find language that addresses issues such as the operability and effectiveness of the arbitration provision, the ability to bind particular parties, proper representation of interested parties, and arbitrability of the disputes raised. Courts are still wary of allowing mandatory arbitration to take a greater role in trust dispute resolution because this subject matter has traditionally fallen within the purview of the courts, and very little authority is available on the construction of various arbitral provisions. While each of the model clauses has its strengths and weaknesses, this Article suggests that drafters analyze both clauses and use the best of each when drafting a trust arbitration clause.

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I. INTRODUCTION

Trusts have become an increasingly popular means of structuring wealth in the United States, both in the testamentary and commercial contexts.[1] However, as the use of the trust has grown, so too has the number of

[1] *See* David Horton, *The Federal Arbitration Act and Testamentary Instruments*, 90 N.C. L. REV. 1027, 1029–30 (2012); John H. Langbein, *The Secret Life of the Trust: The*

trust-related lawsuits, with some commentators claiming that hostile trust litigation has reached "near epidemic" levels.[2]

Excessive litigation is problematic in any context, given the time and cost associated with defending and pursuing a lawsuit, and the attendant disruption in the parties' lives and businesses. However, litigation may be particularly unwelcome in the context of trusts. Not only do attorneys' fees and other litigation costs reduce the amount of money that is available to beneficiaries, thus thwarting one of the primary goals of the settlor, but the public airing of trust-related concerns also violates the expectation of privacy that drives many settlors to create trusts in the first place.[3]

However, litigation is not the only way to resolve legal disputes. Arbitration has long been used in a wide variety of contexts, including consumer, employment, labor, securities, antitrust, commercial, maritime, and international law,[4] pursuant to strong state and federal policies in favor of alternative means of dispute resolution.[5] Arbitration has even been used to resolve trust-related disputes.[6]

However, certain distinctions exist among the various types of trust controversies. For example, most contemporary arbitration relating to trusts involves disputes between the trust and external third party agents or advi-

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Trust as an Instrument of Commerce, 107 YALE L.J. 165, 177–78 (1997) [hereinafter Langbein, *Commercial Trusts*].

[2] Lawrence Cohen & Marcus Staff, *The Arbitration of Trust Disputes*, 7 J. INT'L TR. & CORP. PLAN. 203, 203 (1999); *see also* Horton, *supra* note 1, at 1029 ("[w]ills generate more lawsuits 'than any other legal instrument'") (quoting Leon Jaworski, *The Will Contest*, 10 BAYLOR L. REV. 87, 88 (1958)); AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL (ACTEC), ARBITRATION TASK FORCE REPORT 22 (2006), *available at* http://www.mnbar.org/sections/probate-trust/ACTEC%20Arbitration%20Task%20Force%20Report-2006.pdf.

[3] *See* Georg von Segesser, *Arbitrability in Estate and Trust Litigation*, *in* PAPERS OF THE INTERNATIONAL ACADEMY OF ESTATE AND TRUST LAW – 2000 21, 21 (Rosalind F. Atherton ed., 2001); Tina Wüstemann, *Arbitration of Trust Disputes*, *in* NEW DEVELOPMENTS IN INTERNATIONAL COMMERCIAL ARBITRATION 2007 33, 33–34, 40 (Christoph Müller ed., 2007); Robert Flannigan, *Business Applications of the Express Trust*, 36 ALBERTA L. REV. 630, 631 (1998); Frances H. Foster, *Trust Privacy*, 93 CORNELL L. REV. 555, 563, 610–11 (2008).

[4] *See* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 839 (2009) [hereinafter BORN, ICA].

[5] *See* Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 57–58 (1995). Many trusts reflect an international or interstate component that brings them within the ambit of the Federal Arbitration Act (FAA). *See generally* 9 U.S.C.A. §§ 1-307 (West 2011); Horton, *supra* note 1, at 1072–73.

[6] *See* Horton, *supra* note 1, at 1029–31; ACTEC, *supra* note 2, at 13. *See generally* Blaine Covington Janin, Comment, *The Validity of Arbitration Provisions in Trust Instruments*, 55 CAL. L. REV. 521, 524–28 (1967); Arnold M. Zack, *Arbitration: Step-child of Wills and Estates*, 11 ARB. J. 179 (1956).

sors.[7] The relationships and issues considered in these types of proceedings strongly resemble standard commercial disputes, making this type of arbitration largely unremarkable. Arbitration of internal trust disputes involving matters relating to the inner workings of the trust, on the other hand, is much rarer. These types of proceedings not only raise issues not usually seen in other areas of commercial practice, they also address conflicts between all or some of the various parties to a trust, including trustees, protectors, or beneficiaries, and thus involve relationships that are somewhat distinct from those seen in the standard business context.[8]

Despite these distinctive characteristics, there is no per se bar to arbitration of internal trust disputes. Indeed, the Uniform Trust Code (UTC) explicitly describes a number of these types of concerns as being amenable to arbitration.[9] Instead, the difference in treatment appears to arise as a result of the manner in which each type of arbitration is invoked. External trust disputes are generally made subject to arbitration through an arbitration agreement contained within a contract that exists apart from the trust it-

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[7] *See* Laughton v. CGI Tech. & Solutions, Inc., 602 F. Supp. 2d 262, 263–64 (D. Mass. 2009); Delaney Elec. Co. v. Schiessle, 601 N.E.2d 978, 979–80 (Ill. App. Ct. 1992); United States Trust Co., N.A. v. Cavalieri, No. HHDCV075013653S, 2008 WL 1822721, at *1 (Conn. Super. Ct. Apr. 1, 2008). This type of arbitration is often promoted through pro-arbitration provisions based on the Uniform Trust Code (UTC), which has been adopted by twenty-four U.S. states in whole or in part. *See* UNIF. TR. CODE §§ 111, 816(23), 7C U.L.A. 450–51, 630 (2006) (amended 2005), *available at* http://www.law.upenn.edu/library/archives/ulc/uta/2005final.htm. Some states have enacted even more favorable provisions regarding the arbitration of trust disputes. *See* IDAHO CODE ANN. §§ 15-8-101, 15-8-103 (2011); WASH. REV. CODE §§ 11.96A.010, 11.96A.030 (2006 & Supp. 2012). Though most of this legislation simply describes which types of matters are amenable to arbitration without indicating how such procedures are to arise, two states—Arizona and Florida—have enacted statutes explicitly indicating that settlors may require arbitration of future disputes through use of a mandatory arbitration provision in a trust. *See* ARIZ. REV. STAT. ANN. § 14-10205 (2012); FLA. STAT. ANN. § 731.401 (West 2010 & Supp. 2012).

[8] *See* Michael Hwang, *Arbitration for Trust Disputes*, *in* GUIDE TO THE WORLD'S LEADING EXPERTS IN COMMERCIAL ARBITRATION 83, 83 (Legal Media Group ed., 2009). Different commentators define internal and external trust disputes differently. *See* Wüstemann, *supra* note 3, at 38; Paul Buckle & Carey Olsen, *Trust Disputes and ADR*, 14 TR. & TRUSTEES 649, 651 (2008).

[9] *See* IDAHO CODE ANN. §§ 15-8-101, 15-8-103 (2011); WASH. REV. CODE §§ 11.96A.010, 11.96A.030 (2006 & Supp. 2012); UNIF. TR. CODE §§ 111, 816(23), 7C U.L.A. 450–51, 630 (2006) (amended 2005), *available at* http://www.law.upenn.edu/library/archives/ulc/uta/2005final.htm.

self.[10] Internal trust disputes, on the other hand, predominantly arise as a result of a mandatory arbitration provision located in the trust itself.[11]

This is a somewhat problematic state of affairs, since external disputes with third party agents or advisors are not the most common type of controversy to arise in this area of law.[12] Instead, "[m]ost trust disputes are internal disputes."[13] Furthermore, settlors and trustees have expressed a significant and increasing amount of interest in this latter type of arbitration, even though the procedure is somewhat controversial.[14]

As interesting as questions about the jurisprudential propriety of mandatory arbitration of internal trust disputes may be, this Article does not propose to address such matters because that topic is discussed in detail

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[10] *See* S.I. Strong, *Arbitration of Trust Disputes: Two Bodies of Law Collide*, 45 VAND. J. TRANSNAT'L L. (forthcoming 2012) [hereinafter Strong, *Two Bodies Collide*].

[11] *See* Horton, *supra* note 1, at 1029–31. Internal trust disputes could be made subject to post-dispute arbitration agreements among all the parties, but submission agreements (also known as *compromis*) are notoriously difficult to object due to litigation strategies that arise once a conflict has begun. *See* GARY B. BORN, INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: DRAFTING AND ENFORCING 37 (3d ed. 2010) [hereinafter BORN, DRAFTING]. Internal trust disputes are occasionally arbitrated as the result of an arbitration agreement with external third party agents, but that happens only rarely. For example, arbitration of internal trust matters may 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); New S. Fed. Sav. Bank v. Anding, 414 F. Supp. 2d 636, 639 (S.D. Miss. 2005).

[12] *See* Hwang, *supra* note 8, at 83.

[13] *Id.*

[14] *See* Wüstemann, *supra* note 3, at 41; 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); Horton, *supra* note 1, at 1030; Erin Katzen, *Arbitration Clauses in Wills and Trusts: Defining the Parameters for Mandatory Arbitration of Wills and Trusts*, 24 QUINNIPIAC PROB. L. J. 118, 118–19 (2011). Some of the objections are based on a misunderstanding of the nature of arbitration. *See* Bridget A. Logstrom, *Arbitration in Estate and Trust Disputes: Friend or Foe?*, 30 AM. C. TR. & EST. COUNS. J. 266, 266 (2005) (claiming arbitrators can ignore legal precedent and decide issues as a matter of equity). Other objections focus more on questions of enforceability of mandatory arbitration provisions in trusts. *See generally* Horton, *supra* note 1, at 1031–33.

elsewhere. Indeed, most commentators[15] and a growing number of courts[16] and legislatures[17] appear to adopt the view that mandatory arbitration clauses located in trusts are enforceable, despite a few well-publicized judicial decisions to the contrary.[18] Instead, this Article considers the claim made by numerous experts that the enforceability of arbitral provisions in trusts can be improved through the use of appropriate language in the clause itself.[19]

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[15] *See* Wüstemann, *supra* note 3, at 55–56; Buckle & Olsen, *supra* note 8, at 655–56; Cohen & Staff, *supra* note 2, at 210; David Fox, *Non-excludable Trustee Duties*, 17 TR. & TRUSTEES 17, 25 (2011); Horton, *supra* note 1, at 1073–90; Charles Lloyd & Jonathan Pratt, *Trust in Arbitration*, 12 TR. & TRUSTEES 18, 18 (2006); Logstrom, *supra* note 14, at 266–68; 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, 181–82 (2009); Stephen Wills Murphy, *Enforceable Arbitration Clauses in Wills and Trusts: A Critique*, 26 OHIO ST. J. ON DISP. RESOL. 627, 630 (2011); Strong, *Two Bodies Collide*, *supra* note 10; ACTEC, *supra* note 2, at 34–42. *But see* Timothy P. O'Sullivan, *Family Harmony: An All Too Frequent Casualty of the Estate Planning Process*, 8 MARQ. ELDER'S ADVISOR 253, 315 (2007).

[16] *See infra* notes 45–52 and accompanying text.

[17] *See* ARIZ. REV. STAT. ANN. § 14-10205 (2012); FLA. STAT. ANN. § 731.401 (West 2005 & Supp. 2012); *see also* THE TRUSTS (GUERNSEY) LAW § 63 (2007), *available at* http://www.guernseylegalresources.gg/chttpHandler.ashx?id=712788&p=O; TRUSTEE (AMENDMENT) BILL § 18 (2011), *available at* http://www.bacobahamas.com/PDF/Trustee%20(Amendment)%20Bill%202011%20-%2015%20April%202011.pdf. One could possibly construe the UTC and similar state statutes to permit mandatory trust arbitration, although the relevant provisions are somewhat ambiguous as to how arbitration may arise. *See* IDAHO CODE ANN. §§ 15-8-101, 15-8-103 (2011); WASH. REV. CODE §§ 11.96A.010, 11.96A.030 (2006 & Supp. 2012); UNIF. TR. CODE §§ 111, 816(23), 7C U.L.A. 450–51, 632 (2006) (amended 2005), *available at* http://www.law.upenn.edu/library/archives/ulc/uta/2005final.htm.

[18] *See* Rachal v. Reitz, 347 S.W.3d 305, 311 (Tex. App.—Dallas 2011, pet. granted); *see also* Diaz v. Bukey, 125 Cal. Rptr. 3d 610, 612–13 (Cal. Ct. App. 2011), *review granted*, 257 P.3d 1129 (Cal. 2011). Notably, both of these decisions are currently on appeal to higher courts.

[19] *See* ACTEC, *supra* note 2, at 34–42. *See generally* David J. Hayton, *Problems in Attaining Binding Determination of Trust Issues by Alternative Dispute Resolution*, *in* PAPERS OF THE INTERNATIONAL ACADEMY OF ESTATE AND TRUST LAW – 2000, 11, 17 (Rosalind F. Atherton ed. 2000) [hereinafter Hayton, *Problems*]; Hwang, *supra* note 8, at 84; Wüstemann, *supra* note 3, at 45; Gerardo J. Bosques-Hernández, *Arbitration Clauses in Trusts: The U.S. Developments and a Comparative Perspective*, REVISTA PARA EL ANALISIS DEL DERECHO (INDRET) 1, 12 (2008), *available at* http://www.indret.com/pdf/559_en.pdf; Cohen & Staff, *supra* note 2, at 221–23; David Hayton, *Future Trends in International Trust Planning*, 13 J. INT'L TR. & CORP. PLAN. 55, 72 (2006) [hereinafter Hayton, *Future Trends*]; John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 662 (1995) [hereinafter Langbein, *Contractarian*]; Bridget A. Logstrom et al., *Resolving*

This is an intriguing issue. Although conventional wisdom supports the idea that settlors can provide for mandatory trust arbitration by using particular terms and phrases, that advice is often presented in a cursory and somewhat conclusory manner. Indeed, no one has yet undertaken a detailed, in-depth analysis of whether and to what extent settlors can avoid or mitigate any of the major jurisprudential problems traditionally associated with mandatory trust arbitration through proper drafting.[20] This Article aims to fill that gap by considering the various challenges facing mandatory trust arbitration and determining the extent to which language used by the settlor in the trust can positively affect these issues.

However, this Article also makes a second contribution to the development of this area of law. At this point, most of the analysis concerning mandatory trust arbitration has come from the trust law community, with relatively little input from experts in arbitration.[21] The lack of interaction between experts in trust and arbitration law means that the trust industry overlooked a number of important developments in arbitration law.[22] The lack of integration between trust and arbitration law also means that a number of proposals generated by the trust law community with respect to man-

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Disputes With Ease and Grace, 31 AM. C. TR. & EST. COUNS. J. 235, 241–44 (2005); O'Sullivan, *supra* note 15, at 315–16; Strong, *Two Bodies Collide*, *supra* note 10.

[20] Passing references and offhand suggestions are, however, routinely made on this subject. *See* UNIF. TR. CODE § 816(23), cmt., 7C U.L.A. 632 (2006) (amended 2005), *available at* http://www.law.upenn.edu/library/archives/ulc/uta/2005final.htm; *see also* Hayton, *Problems*, *supra* note 19; Hwang, *supra* note 8, at 84; Wüstemann, *supra* note 3, at 45–47; Jonathan G. Blattmachr, *Reducing Estate and Trust Litigation Through Disclosure, In Terrorem Clauses, Mediation and Arbitration*, 9 CARDOZO J. CONFLICT RESOL. 237, 247–48, 260–61 (2008); Bosques-Hernández, *supra* note 19, at 7–8, 12; Hayton, *Future Trends*, *supra* note 19; Katzen, *supra* note 14, at 125–27; Logstrom et al., *supra* note 19, at 241–44; O'Sullivan, *supra* note 15, at 315–16; E. Gary Spitko, *Gone But Not Conforming: Protecting the Abhorrent Testator From Majoritanian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES. L. REV. 275, 277 (1999); ACTEC, *supra* note 2, at 34–42.

[21] The only nationally or internationally recognized specialist in arbitration law to have written on mandatory trust arbitration is Michael Hwang, and his analysis is quite brief. *See* Hwang, *supra* note 8, at 83–84.

[22] *See generally* Strong, *Two Bodies Collide*, *supra* note 10. This is not to say that the arbitral community has been actively excluded from the discussion in any way. Instead, the problem is that arbitration and trust law appear to operate in isolation from each other. This separatism is due partially to the specialized nature of trust law and procedure and the way in which trust matters are often heard in special probate divisions or chancery courts. *See also* WILLIAM M. MCGOVERN ET AL., WILLS, TRUSTS AND ESTATES: INCLUDING TAXATION AND FUTURE INTERESTS 626 (4th ed. 2010); John T. Rogers Jr., *Avoiding and Managing Litigation (For Planners and Fiduciaries)* (ALI-ABA Course of Study, June 12–17, 2011), WL SS043 A.L.I.-A.B.A. 791, 809 (2011).

datory trust arbitration may meet requirements imposed by trust law but fail to comply with "best practices" in arbitration law.

One example of the kind of problem that can arise as a result of this sort of analytical isolationism involves suggestions that settlors adopt certain language drafted entirely by the author of whatever scholarly article is at issue.[23] While these proposals may address certain issues that arise as a matter of trust law and may constitute an important contribution to the literature in this area of practice,[24] they often do not comply with advice given by arbitration specialists. For example, experts in arbitration strongly recommend that parties begin with well-known, well-tested language before tailoring it to their own particular needs.[25] The best place for a drafting party to begin is with a model clause propounded by a reputable arbitral institution, since those clauses tend to provide comprehensive and well-tested language.[26]

This could appear to create several problems for proponents of mandatory trust arbitration. For example, many of the most successful and popular institutional clauses are targeted to controversies in other subject matter are-

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[23] Some commentators propose entire arbitral clauses while others simply suggest one or two phrases. *See* ACTEC, *supra* note 2, at 34–42; *see also* Hayton, *Problems*, *supra* note 19; Blattmachr, *supra* note 20; Hayton, *Future Trends*, *supra* note 19; Logstrom et al., *supra* note 19.

[24] Often these articles only address certain narrow concerns rather than considering the entire range of issues facing mandatory trust arbitration. *See, e.g.*, Blattmachr, *supra* note 20 (regarding *in terrorem* provisions).

[25] *See* BORN, DRAFTING, *supra* note 11. By avoiding nonstandard terms and phrases, parties can limit interpretive difficulties and litigation over the content and scope of the agreement. *See id.*

[26] *See id.* Arbitral institutions typically undertake two tasks: (1) the promulgation of one or more sets of arbitral procedures that are akin to the rules of civil procedure, but which are much more flexible and tailored to the special issues that arise in arbitration, and (2) the administration of arbitrations that proceed under the institution's published rules. Notably, parties do not have to have their arbitrations administered and can instead choose to proceed ad hoc. Ad hoc arbitrations typically allow parties and arbitrators to adopt any procedures that appear necessary, subject to certain due process concerns. Although inexperienced parties often prefer ad hoc arbitration because such procedures appear less expensive, most experts recommend administered arbitration, since the use of well-recognized rules and the availability of an administering institution makes the process smoother and more predictable, thus offsetting any money the parties might spend on fees paid to the institution. For more on ad hoc and administered arbitration, see BORN, ICA, *supra* note 4, at 147–51; JULIAN D. M. LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION ¶¶ 3-4 to 3-23 (2003).

as, such as labor, employment, consumer, or commercial law.[27] Furthermore, the unique challenges associated with mandatory trust arbitration suggest that a non-specific arbitral clause may not be the most appropriate starting point for someone intent on creating an enforceable arbitration provision in a trust, even though standard commercial clauses have been successfully used in trust arbitrations in the past.[28] Indeed, it is the very inapplicability of these standard clauses that has presumably led trust law commentators to suggest their own language.[29]

While these observations may seem to explain how the current state of affairs has come to be, the truth is that those interested in drafting an enforceable arbitration provision in a trust do not need to use general commercial clauses as their starting point, nor do they need to draft new provisions

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[27] *See, e.g.*, Am. Arbitration Ass'n, Arbitration, http://www.adr.org/arb_med (last visited July 27, 2012) [hereinafter AAA, Arbitration] (listing range of rules addressing different areas of law).

[28] While the principles of arbitral confidentiality mean that it is impossible to discover precise details or statistics about trust arbitration, it is possible to glean some information from judicial opinions addressing arbitration-related disputes. Thus, for example, it is apparent that a number of disputes involving trusts have used both the American Arbitration Association (AAA) Commercial Arbitration Rules and the rules of the International Centre for Dispute Resolution (ICDR), which is the AAA's international arm. *See* Am. Arbitration Ass'n, Commercial Arbitration Rules and Mediation Procedures (June 1, 2009), http://www.adr.org/; *see also* Life Receivables Trust v. Syndicate 102 at Lloyd's of London, 549 F.3d 210, 218 (2d Cir. 2008) (involving AAA rules in an external trust dispute); Municipality of San Juan v. Corporación Para El Fomento Económico de la Ciudad Capital, 597 F. Supp. 2d 247, 248–49 (D. P.R. 2008) (upholding terms of a predispute, mandatory arbitration provision in a trust deed calling for arbitration under the rules of the ICDR); New S. Fed. Savings Bank v. Anding, 414 F. Supp. 2d 636, 646–47 (S.D. Miss. 2005) (upholding mandatory arbitration agreement in trust deed rider requiring AAA arbitration); Burlington Resources Oil & Gas Co. LP v. San Juan Basin Royalty Trust, 249 S.W.3d 34, 36, 38 (Tex. App.—Houston 2007) (involving a post-dispute arbitration agreement concerning accountings and audits of the trust); Wilcox & Fetzer, Ltd. v. Corbett & Wilcox, No. Civ. A.2037-N, 2006 WL 2473665, at *1 (Del. Ch. Aug. 22, 2006) (involving a pre-dispute arbitration agreement with a party external to a revocable trust); Int'l Ctr. for Dispute Resolution, Int'l Dispute Resolution Procedures (June 1, 2009), http://www.adr.org/. Arbitrations involving trusts have also taken place under the Arbitration Rules of the International Chamber of Commerce (ICC), one of the world's leading arbitral institutions. *See* Newbridge Acquisition I, L.L.C. v. Grupo Corvi, S.A. de D.V., No. 02 Civ. 9839(JSR), 2003 WL 42007, at *1 (S.D.N.Y. Jan. 6, 2003); *see also* Int'l Chamber of Commerce, ICC Rules of Arbitration (Jan. 1, 2012), http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration [hereinafter ICC Arbitration Rules].

[29] Anecdotal evidence indicates that relatively few trusts currently contain arbitration provisions, which suggests that there is no standard ad hoc language that settlors can use as an exemplar. *See* Wüstemann, *supra* note 3, at 41; *see also* Horton, *supra* note 1, at 1029–30; Katzen, *supra* note 14, at 119.

entirely from scratch, since two of the world's leading arbitral institutions—the American Arbitration Association (AAA) and the International Chamber of Commerce (ICC)—both offer specially drafted model arbitration provisions for use in trusts. These provisions have been available for years, starting in 2003, when the AAA published model language (AAA Model Trust Clause)[30] to be used in tandem with a dedicated set of arbitral procedures known as the AAA Wills and Trusts Arbitration Rules.[31] A second model arbitration clause became available in 2008, when the ICC published its own model language (ICC Model Trust Clause) following an extensive consultation process involving experts from around the world.[32]

Shockingly, no practitioner or scholar has yet discussed either of these model arbitration provisions, nor has anyone used these clauses as a starting point for further drafting proposals.[33] This is deeply troubling, given that these provisions are perhaps the best models currently available for how to invoke mandatory trust arbitration.

Therefore, this Article will be the first to analyze the AAA and ICC Model Trust Clauses in detail, considering both the differences between the two provisions as well as the extent to which each of the clauses addresses the various jurisprudential challenges facing mandatory trust arbitration. In so doing, this Article considers the AAA and ICC Model Trust Clauses as the starting point for future drafting efforts, just as practitioners would do if

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[30] *See* Am. Arbitration Ass'n, Wills and Trusts Arbitration Rules, Model Clause (June 1, 2009), http://www.adr.org/ [hereinafter AAA Model Trust Clause]. The AAA is currently in the process of revising the AAA Wills and Trusts Arbitration Rules, which could affect the AAA Model Trust Clause. However, the extent of any proposed change is unknown.

[31] *See* Am. Arbitration Ass'n, Wills and Trusts Arbitration Rules (June 1, 2009), http://www.adr.org/ [hereinafter AAA Trust Arbitration Rules]. The author analyzes the AAA Wills and Trusts Arbitration Rules, which are currently in the process of revision, in detail in a companion article. *See* 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*].

[32] *See* Int'l Chamber of Commerce (ICC), Arbitration Clause for Trust Disputes, 19 ICC BULL. 9 (2008), http://www.iccdrl.com/CODE/LevelThree.asp?page=Commission%20Reports&tocxml=ltoc_CommReportsAll.xml&tocxsl=DoubleToc.xsl&contentxml=CR_0035.xml&contentxsl=arbSingle.xsl&L1=Commission%20Reports&L2=&Locator=9&AUTH=&nb=10 [hereinafter ICC Model Trust Clause].

[33] The few references to these model clauses that exist only mention the two institutional initiatives in passing. *See* Horton, *supra* note 1, at 1031; *see also* Hwang, *supra* note 8, at 83–84; Katzen, *supra* note 14, at 130–32.

they were faced with a request to include a mandatory arbitration provision in a trust.[34]

The structure of the discussion is as follows. First, Section II discusses potential problems that arise with respect to mandatory arbitration of trust disputes. Although a comprehensive evaluation of these issues is beyond the scope of this Article, it is nevertheless necessary to consider each issue briefly so as to identify the extent to which each of these elements can be positively affected by good drafting practices and to set the stage for later discussions about the effectiveness of the model arbitration clauses suggested by the AAA and the ICC. Next, Section III considers how well the model clauses suggested by the AAA and the ICC address each of the various problems identified in Section II and outlines some of the additional measures introduced by each of the arbitral institutions. Section IV concludes the Article with some final observations.

Before beginning, it is important to mention several background concerns. First, parties need to understand at the outset that wholesale adoption of either the AAA or ICC Model Trust Clause will lead to an administered arbitration with that organization.[35] However, parties who wish to proceed on an ad hoc basis or under the administration of a different institution may nevertheless look to these clauses for inspiration, since the proposed language can be modified for other uses.[36]

Second, when looking at the names of the two institutions, it might seem reasonable to conclude that the ICC Model Trust Clause is only suitable for use in international trusts, while the AAA Model Trust Clause is only appropriate for matters involving domestic trusts.[37] In fact, neither the ICC nor the AAA limit themselves geographically, which means that those who are looking for useful drafting tips should consider language contained in both the AAA and ICC Model Trust Clauses, regardless of whether the trust in question is domestic or international.[38]

Third, the AAA and the ICC have decided to handle mandatory trust arbitration in slightly different manners. Whereas the AAA has embraced a more holistic approach to the issue, not only adopting a model arbitration

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[34] *See* BORN, DRAFTING, *supra* note 11; *see also* AAA Model Trust Clause, *supra* note 30; ICC Model Trust Clause, *supra* note 32.

[35] *See* AAA Model Trust Clause, *supra* note 30; ICC Model Trust Clause, *supra* note 32.

[36] *See* BORN, DRAFTING, *supra* note 11, at 37–38; AAA Model Trust Clause, *supra* note 30; ICC Model Trust Clause, *supra* note 32.

[37] *See* AAA Model Trust Clause, *supra* note 30; ICC Model Trust Clause, *supra* note 32.

[38] *See* AAA Model Trust Clause, *supra* note 30; ICC Model Trust Clause, *supra* note 32. *See generally* BORN, DRAFTING, *supra* note 11.

clause but also creating a new set of dedicated trust arbitration rules, the ICC has taken the view that it does not need to create a new set of arbitral procedures, since the standard ICC Arbitration Rules are considered flexible enough to address any trust-related disputes that might arise.[39] Interestingly, the disparity in the way the AAA and the ICC address trust arbitration reflects a larger philosophical difference between the two institutions, in that the ICC currently has only one set of rules for all types of disputes while the AAA offers a wide variety of subject-specific rules.[40] However, neither approach is better or worse as a matter of principle. Instead, parties simply choose the option that is most attractive to them. Indeed, the arbitral community welcomes this kind of variation because it provides parties with a wide range of alternatives to consider.[41]

II. TRUST IN ARBITRATION? OVERCOMING DOUBTS REGARDING THE ENFORCEABILITY OF AN ARBITRATION PROVISION

A. Provision Found in a Trust

If Confucius were alive today, he might say trust lawyers are currently living through "interesting times," at least with respect to mandatory trust arbitration.[42] On the one hand, two recent and well-publicized state court cases—*Diaz v. Bukey*[43] and *Rachal v. Reitz*[44]—have both held that arbitration provisions located in a trust are unenforceable, although both decisions are currently under appeal. While this would seem to bode ill for the future of mandatory trust arbitration, other developments suggest that the procedure is becoming increasingly accepted in the United States and elsewhere. For example, a growing number of jurisdictions have demonstrated increased support for trust arbitration by enacting statutory provisions that either explicitly permit the use of mandatory arbitration provisions in

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[39] *See* AAA Model Trust Clause, *supra* note 30; AAA Trust Arbitration Rules, *supra* note 31; ICC Model Trust Clause, *supra* note 32, explanatory notes 4-6; *see also* ICC Arbitration Rules, *supra* note 28.

[40] *See* AAA, Arbitration, *supra* note 27 (listing a range of rules addressing different areas of law); ICC Arbitration Rules, *supra* note 28.

[41] *See* BORN, DRAFTING, *supra* note 11, at 58; LEW ET AL., *supra* note 26, ¶¶ 8-21 to 8-23.

[42] *See* David Louie, *The State of Our Bar*, 5 HAW. B. J. 4, 4 (Dec. 2001) (noting an ancient Chinese curse, often attributed to Confucius, is for a person to live through "interesting times").

[43] 125 Cal. Rptr. 3d 610 (Cal. Ct. App. 2011), *review granted*, 257 P.3d 1129 (Cal. 2011).

[44] 347 S.W.3d 305 (Tex. App.—Dallas 2011, pet. granted).

trusts[45] or implicitly authorize such measures.[46] Furthermore, the legislature or judiciary has abrogated several older opinions that were once frequently cited for the proposition that arbitration of trust disputes is impermissible. These cases include well-known decisions such as *In re Jacobovitz' Will*,[47] *Meredith's Estate*,[48] and *Schoneberger v. Oelze*.[49] Finally, a surprisingly large number of judicial decisions appear to take a positive view of mandatory trust arbitration, although these opinions have been largely overlooked in the legal literature.[50]

While this diversity of opinion regarding the enforceability of mandatory trust arbitration would be enough to constitute "interesting times" on its own, trust lawyers must also contend with the fact that many U.S. states have not yet addressed issues in this area of law. While some members of the trust bench and bar appear to take the view that the lack of subject-specific precedent should lead to a conservative approach toward arbitra-

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[45] *See* ARIZ. REV. STAT. ANN. § 14-10205 (2012); FLA. STAT. ANN. § 731.401 (West 2010); *see also* Murphy, *supra* note 15, at 662; THE TRUSTS (GUERNSEY) LAW, *supra* note 17, §63; TRUSTEE (AMENDMENT) BILL, *supra* note 17, §18; Murphy, *supra* note 15, at 662–64.

[46] *See* IDAHO CODE ANN. §§ 15-8-101, 15-8-103 (2009); WASH. REV. CODE ANN. §§ 11.96A.010, 11.96A.030 (2006 & Supp. 2012); UNIF. TR. CODE §§ 111, 816(23), 7C U.L.A. 450–51, 630 (2006) (amended 2005), *available at* http://www.law.upenn.edu/library/archives/ulc/uta/2005final.htm; Strong, *Two Bodies Collide*, *supra* note 10.

[47] *Compare In re* Jacobovitz' Will, 295 N.Y.S.2d 527, 531 (Sur. Ct. Nassau Co. 1968), *with In re* Blumenkrantz, 824 N.Y.S.2d 884, 887 (Sur. Ct. Nassau Co. 2006).

[48] *Compare* Meredith's Estate, 266 N.W. 351, 355 (Mich. 1936), *with In re* Nestorovski Estate, 769 N.W. 2d 720, 734–35 (Mich. Ct. App. 2009).

[49] *See* Schoneberger v. Oelze, 96 P.3d 1078, 1082–83 (Ariz. Ct. App. 2004), *superseded by statute*, ARIZ. REV. STAT. ANN. § 14-10205 (2012), *as recognized in* Jones v. Fink, No. CA-SA 10-0262, 2011 WL 601598 (Ariz. Ct. App. Feb. 22, 2011).

[50] *See* Radian Ins., Inc. v. Deutsche Bank Nat'l Trust Co., 638 F. Supp. 2d 443, 458 (E.D. Pa. 2009); New S. Fed. Sav. Bank v. Anding, 414 F. Supp. 2d 636, 643 (S.D. Miss. 2005); Roehl v. Ritchie, 54 Cal. Rptr. 3d 185 (Ct. App. 2007), *declined to extend by* Diaz v. Bukey, 125 Cal. Rptr. 3d 610 (Ct. App. 2011), *review granted*, 257 P.3d 1129 (Cal. 2011); *see also* Hastings v. Wilson, 516 F.3d 1055, 1059 (8th Cir. 2008); Bortrager v. Cent. States, Se. and Sw. Areas Pension Fund, 425 F.3d 1087, 1092 n.1 (8th Cir. 2005); Contract Serv. Emp'ee Trust v. Davis, 55 F.3d 533, 535 (10th Cir. 1995); Reeves v. Tarvizian, 351 F.2d 889, 890–92 (1st Cir. 1965); Stender v. Cardwell, Civ. No. 07-cv-02503-REB-MJW, 2009 WL 3416904, at *2 (D. Colo. Oct. 20, 2009); Doctor's Assoc., Inc. v. Hollingsworth, 949 F. Supp. 77, 79 (D. Conn. 1996); Masonry and Tile Contractors Assoc. of So. Nevada v. Jolley, Urga & Wirth, Ltd., 941 P.2d 486 (Nev. 1997); Robin v. Doran, No. 392456, 2010 WL 728558, at *1 (Mass. Land Ct. Mar. 3, 2010). *But see* Flores v. Transamerica Homefirst, Inc., 113 Cal. Rptr. 2d 376, 385 (Ct. App. 2001). These decisions are discussed in more detail in Strong, *Two Bodies Collide*, *supra* note 10. Other relevant but often overlooked cases are cited throughout this Article.

tion, it is at least equally appropriate to conclude that general principles of arbitration law, including strong state and federal policies in favor of arbitration, will or should apply to trust disputes to the same extent that they do in other types of controversies.[51] Indeed, numerous commentators have concluded not only that arbitration of internal trust disputes is well suited to the needs of the parties,[52] but that the use of a mandatory arbitration provision in a trust is an entirely legitimate means of invoking arbitration.

Admittedly, some members of the trust community take a different view.[53] However, this is neither the time nor the place to enter into a detailed debate about the propriety of mandatory trust arbitration. Instead, this Article considers whether and to what extent a settlor can positively affect the enforceability of a mandatory arbitration provision in a trust through an appropriate choice of language. However, before entering into this discussion, it is necessary to outline the types of challenges facing contemporary settlors with respect to mandatory arbitration.

Commentators considering the enforceability of arbitration provisions found in trusts have concluded that courts will uphold such provisions if: (1) the court's jurisdiction is not ousted in an unacceptable fashion; (2) the clause purporting to be an arbitration clause is an agreement that is not inoperable, ineffective or incapable of being performed and 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.[54]

Although there is insufficient space in this Article to discuss each of these five factors in detail,[55] it is nevertheless useful to consider each issue briefly so as to demonstrate the extent to which each of these elements can be positively affected by good drafting practices, and to set the stage for later discussions about the effectiveness of the model arbitration clauses suggested by the AAA and the ICC.

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[51] *See* Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 57–58 (1995); Cohen & Staff, *supra* note 2, at 211; Horton, *supra* note 1, at 1073.

[52] *See* Bosques-Hernández, *supra* note 19, at 6; Buckle & Olsen, *supra* note 8, at 649; ACTEC, *supra* note 2, at 5.

[53] *See* ACTEC, *supra* note 2, at 5 (discussing the "blinding prejudice" to arbitration in contemporary trust and estates practice).

[54] *See* Cohen & Staff, *supra* note 2, at 209.

[55] The author has conducted a more comprehensive study of these issues elsewhere. *See* Strong, *Two Bodies Collide*, *supra* note 10.

B. No Impermissible Ouster of the Court's Jurisdiction

Courts have traditionally exercised uniquely broad powers over the administration of trusts,[56] making concerns about the possible ouster of judicial jurisdiction particularly pressing. Several possible rationales can be used to justify these broad jurisdictional powers. One is a concern that allowing a trust dispute to be resolved through any means other than litigation could disadvantage one or more of the parties, typically through the non-application of a mandatory provision of law.[57] However, closer analysis suggests that arbitration does not violate any of the principles underlying these mandatory rules of law. This is because:

> [a]part from the anti-dead-hand rules, the mandatory rules of trust law have a prevailingly 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, 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.[58]

Anti-dead-hand rules can be set aside as having little, if anything, to do with arbitration because 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

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[56] *See* MCGOVERN ET AL., *supra* note 22, at 552–55; Langbein, *Contractarian*, *supra* note 19, at 662.

[57] *See* Cohen & Staff, *supra* note 2, at 215–17; Strong, *Two Bodies Collide*, *supra* note 10.

[58] John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105, 1126–27 (2004) [hereinafter Langbein, *Mandatory Rules*].

principle that the trust must benefit the beneficiaries.[59] 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 but also because arbitration clauses already need to be clear to be enforceable as a matter of arbitration law. Indeed, the requirement for clarity is often higher with respect to arbitration agreements than with respect to other types of agreements.[60] 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.

Another rationale relating to the broad jurisdictional powers of the courts focuses on the idea that access to the courts is necessary as a means of helping protect beneficiaries from overreaching by the trustee.[61] Thus, for example, it is usually "a non-excludable feature of a trust that the trustee's administration of the fund must be, directly or indirectly, subject to the supervision of the court."[62]

The key principle here "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."[63] However, "effective accountability does not mean that the trustees can be accountable only to a 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."[64] Instead, there may be other equally effective means of curbing any abuse by the trustee, of which arbitration may be one. Objections from the beneficiaries regarding the procedure used "would only have weight if the beneficiaries were denied any effective means of enforcing their interests against the

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[59] *See id.* at 1110 n.33; *see also* Adam J. Hirsch, *Freedom of Testation/Freedom of Contract*, 95 MINN. L. REV. 2180, 2244 (2011); John H. Langbein, *Burn the Rembrandt? Trust Law's Limits on the Settlor's Power to Direct Investments*, 90 B.U. L. REV. 375, 396 (2010); Langbein, *Contractarian*, *supra* note 19, at 650–51.

[60] *See* BORN, ICA, *supra* note 4, at 585.

[61] Concerns about overreaching by the settlor are addressed through principles of arbitrability. *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 (2011), *as recognized in* Jones v. Fink, No. CA-SA 10-0262, 2011 WL 601598 (Ariz. Ct. App. Feb. 22, 2011).

[62] Fox, *supra* note 15, at 22.

[63] *Id.* at 24.

[64] *Id.*

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."[65]

Experts have also concluded that arbitration does not impermissibly oust the jurisdiction of the court because judges retain the final word about the propriety of an arbitration as a result of their ability to undertake judicial review of the award at the end of the arbitral process.[66] While this procedure is not the same as an appeal, since judicial review does not allow the court to reconsider the merits of the award, the process still provides the parties with significant procedural protections.[67] Since the primary concern regarding the ouster of the courts appears to be procedural in nature,[68] commentators have therefore concluded that mandatory arbitration does not impermissibly oust the jurisdiction of the court but "merely postpone[s] the involvement of the court until after an arbitration has been carried out."[69]

C. 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 provision 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."[70]

The issue here involves the expectation held in many jurisdictions that an arbitration agreement should reflect certain contractual qualities.[71] While

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[65] *Id.* at 25; *see also* ACTEC, *supra* note 2, at 13–14.

[66] *See* Olivier Caprasse, *Objective Arbitrability of Corporate Disputes – Belgium and France, in* ONDERNEMING EN ADR 79, 86 (C.J.M. Klaassen et al., eds., 2011); Cohen & Staff, *supra* note 2, at 210.

[67] *See* 9 U.S.C. § 10 (2011); Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter New York Convention]; *see also* BORN, ICA, *supra* note 4, at 2649–55, 2865–70.

[68] *See* Fox, *supra* note 15, at 24; Langbein, *Mandatory Rules*, *supra* note 58, at 1110 n.33, 1126–27; Strong, *Two Bodies Collide*, *supra* note 10.

[69] Lloyd & Pratt, *supra* note 15, at 18; *see also* Strong, *Two Bodies Collide*, *supra* note 10; ACTEC, *supra* note 2, at 15 (noting "the argument that arbitration denies access to court died with *Circuit City Stores v. Adams*, 532 U.S. 105 (2001)").

[70] Cohen & Staff, *supra* note 2, at 209. The dispute in question must also fall within the scope of the arbitration provision, but that issue is commonly given to the arbitrators. *See also* BORN, ICA, *supra* note 4, at 852–83.

[71] *See* BORN, ICA, *supra* note 4, at 640–42.

this requirement is not universal,[72] it is still often the case that an arbitration provision located within a larger document such as a trust is only considered enforceable if the larger document is contractual in nature.[73]

This can create several problems. First, trusts are typically only signed by the settlor, not by other parties.[74] 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."[75] Although the signature and consideration requirements have proven fatal to mandatory arbitration of trusts on occasion,[76] 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.

The situation is easiest with respect to trustees, since settlors can create explicit contractual relationships with such parties, either through language in the trust itself or in a side agreement, and can require the trustee to sign the document in question.[77] Problems regarding consideration are typically

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[72] *See* New S. Fed. Sav. Bank v. Anding, 414 F. Supp. 2d 636, 643 (S.D. Miss. 2006) (noting "[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"); *see also* FRANZ T. SCHWARZ & CHRISTIAN W. KONRAD, THE VIENNA RULES: A COMMENTARY ON INTERNATIONAL ARBITRATION IN AUSTRIA 19–20 (2009); Christian Duve, *Arbitration of Corporate Law Disputes in Germany, in* ARBITRATION IN GERMANY: THE MODEL LAW IN PRACTICE 975, 1002 (Karl Heinz Böckstiegel et al. eds., 2007).

[73] *See* BORN, ICA, *supra* note 4, at 661–64. Trusts are typically considered to be donative in nature, although the contractual theory of trusts is gaining traction in the United States. *See also* Bruyere & Marino, *supra* note 14, at 362; Langbein, *Commercial Trusts*, *supra* note 1, at 185; Langbein, *Contractarian*, *supra* note 19, at 627; Strong, *Two Bodies Collide*, *supra* note 10. Interestingly, authorities emphasizing the donative nature of trusts commonly exclude commercial trusts from their consideration, suggesting that commercial trusts may be treated as being primarily contractual, an approach that would be beneficial to the arbitration analysis. *See id.* While it is beyond the scope of this Article to differentiate between commercial and other kinds of trusts, such an analysis would be useful. *See id.*

[74] Oral trusts are permitted in some cases, but are increasingly rare. *See* DAVID HAYTON ET AL., UNDERHILL AND HAYTON LAW RELATING TO TRUSTS AND TRUSTEES ¶ 12.1 (18th ed. 2010).

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

[76] *See* Diaz v. Bukey, 125 Cal. Rptr. 3d 610, 612–13 (Cal. Ct. App. 2011), *review granted*, 257 P.3d 1129 (Cal. 2011); Rachal v. Reitz, 347 S.W.3d 305, 309 (Tex. App.—Dallas 2011, pet. granted).

[77] *See* Wüstemann, *supra* note 3, at 45; Bosques-Hernández, *supra* note 19; Cohen & Staff, *supra* note 2, at 221–22. Side agreements with trustees have been enforced in some

overcome in one of three ways: either (1) the trustee is paid for his or her efforts (indeed, it is rare for a trustee to act gratuitously these days);[78] (2) the trustee is said to have consented to the terms of the trust, including any rights and responsibilities thereunder, by accepting the trust appointment;[79] or (3) the jurisdiction in question has concluded that there is no need for mutual consideration to establish an agreement to arbitrate in the context of a trust.[80]

Disputes involving beneficiaries are more difficult. While judicial or legislative elimination of any need for mutual consideration would be equally useful in these cases, it is more difficult for a settlor to draft the trust instrument in such a way that it meets the requirements of a traditional contractual relationship, since beneficiaries neither sign the trust instrument nor accept any burdens thereunder. However, commentators have concluded that:

> a trust deed could be drafted 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.[81]

U.S. courts have described this technique as constituting a "conditional transfer."[82] At its core, conditional transfer holds that certain provisions found in the trust may be binding on beneficiaries if the beneficiary's "rights" in the corpus of the trust are seen as "wholly derivative" of the set-

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jurisdictions. *See also* Decker v. Bookstaver, No. 4:09-CV-1361, 2010 WL 2132284, at *1-3 (E.D. Mo. May 26, 2010). Protectors could be bound in the same way as a trustee.

[78] *See* HAYTON ET AL., *supra* note 74, ¶ 54.1.

[79] *See id.*, ¶ 11.83; Wüstemann, *supra* note 3, at 44; Cohen & Staff, *supra* note 2, at 218; ICC Model Trust Clause, *supra* note 32.

[80] *See* New S. Fed. Sav. Bank v. Anding, 414 F. Supp. 2d 636, 643 (S.D. Miss. 2006); Horton, *supra* note 1, at 1050 (suggesting the U.S. Supreme Court has described the Federal Arbitration Act "as facilitating goals that do not require an arbitration clause to be moored within a 'contract' or to be a 'contract' itself").

[81] Wüstemann, *supra* note 3, at 45. This is the approach adopted by the ICC in its model arbitration clause. *See also* ICC Model Trust Clause, *supra* note 32.

[82] *See* Am. Cancer Soc'y, St. Louis Div. v. Hammerstein, 631 S.W.2d 858, 864 (Mo. Ct. App. 1981) (stating "[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, 231–32 (W. Va. 1975); ACTEC, *supra* note 2, at 10–11.

tlor's "right to pass her property to the persons of her choosing."[83] Because the beneficiary has rights in the trust only because the settlor granted those rights, the settlor can condition acceptance of the rights in the trust, that is, the benefit under the trust, on acceptance of the mandatory arbitration provisions in the trust.[84] The settlor does not have to refer explicitly to the concept of conditional transfer in the arbitration provision for the court to find that the doctrine applies, although it may be useful, as a matter of best practices, for the trust to include language invoking the doctrine so as to boost the likelihood that the arbitration provision will be found operable, effective, and capable of performance. Although the concept of conditional transfer may be sufficient to overcome the need for a signature, the lack of a formal signature can also be addressed through various theories regarding the participation of non-signatories in arbitration.[85]

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

The third issue to discuss is whether an arbitration clause found in the trust is binding on the party against whom the provision is to be used.[86] Rather than focusing on requirements regarding the form of the arbitration provision, this analysis considers whether there is adequate consent to support arbitration. Two types of consent must be considered: that of the settlor and that of parties other than the settlor.

1. 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. In those cases, the claim is that neither the underlying document, that is, the

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[83] Spitko, *supra* note 20, at 300.

[84] *See id.* at 299–300.

[85] *See* Thomson-CSF, SA v. Am. Arbitration Ass'n, 64 F.3d 773, 776 (2d Cir. 1995) (allowing courts and arbitrators to extend an arbitration agreement to non-signatories in cases involving "agency (actual and apparent), alter ego, implied consent, 'group of companies,' estoppel, third-party beneficiary, guarantor, subrogation, legal succession and ratification of assumption"); BORN, ICA, *supra* note 4, at 1137–38; Strong, *Two Bodies Collide*, *supra* note 10.

[86] *See* Cohen & Staff, *supra* note 2, at 209.

trust, nor the arbitration agreement found in the trust ever came into effect and that the dispute therefore should be heard in court.[87]

Some specialists in trust law have differentiated between claims arising under a trust and those challenging the existence of the trust itself, with only the former considered appropriate for arbitration.[88] This appears to be based on practices used in other areas of trust law where "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.[89] However, adopting this approach in cases involving arbitration is problematic, given the arbitral principle of separability.[90] The concept of separability states that challenges to the validity or existence of a contract in which an arbitration agreement is found do not affect the validity or existence of the arbitration agreement itself.[91] The doctrine arose because courts and commentators recognized early on that the effectiveness of the arbitral regime would be in jeopardy if parties could avoid arbitration simply by alleging certain types of contract defenses.[92]

The two primary precedents regarding separability are *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*[93] and *Buckeye Check Cashing Inc. v. Cardegna.*[94] 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."[95] *Buckeye Check Cashing* extended this basic principle to cases involving claims that the underlying contract was void or illegal.[96] Thus, "a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator."[97] This holding ap-

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[87] *See* Horton, *supra* note 1, at 1064; Katzen, *supra* note 14, at 123.

[88] *See* Spitko, *supra* note 20, at 303; *see also* Katzen, *supra* note 14, at 123–24.

[89] Katzen, *supra* note 14, at 124.

[90] Notably, the only way for claims such as these to have even a chance of being heard outside of arbitration is for the challenger to deny the existence of the trust in its entirety. *See* Horton, *supra* note 1, at 1085–86. If a party bases its claim on any portion of the trust, the arbitration clause remains in effect. *See id.*

[91] *See* LEW ET AL., *supra* note 26, ¶¶ 6-9 to 6-22.

[92] *See id.*

[93] 388 U.S. 395 (1967).

[94] 546 U.S. 440 (2006).

[95] BORN, ICA, *supra* note 4, at 363.

[96] *See id.*; *see also Buckeye Check Cashing*, 546 U.S. at 440.

[97] *Buckeye Check Cashing*, 546 U.S. at 449.

plies "regardless of whether the challenge is brought in federal or state court."[98]

Although the basic principles of separability are relatively easy to grasp, the nuances can become quite complicated and are beyond the scope of this Article.[99] Instead, the only relevant question for this discussion is whether and to what extent U.S. courts will apply the doctrine of separability to disputes involving mandatory trust arbitration. Interestingly, courts have taken a variety of approaches.

For example, some judges take the view that the principle of separability does not apply to trust disputes. Thus, the court in *Spahr v. Secco*[100] concluded that:

> the 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.[101]

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 held that a dispute based on mental incapacity should be heard in court, not in arbitration.[102] Although this may appear to be a clear and persuasive interpretation of the principle of separability in trust-related disputes, the decision was handed down prior to the U.S. Supreme Court's decision in *Buckeye Cashing*, and therefore, may no longer be good law.[103]

Regions Bank v. Britt[104] exemplified a second approach. Although the alleged incapacity of the settlor was not the basis of the challenge in *Regions Bank*, as was the case in *Spahr*, *Regions Bank* nevertheless involved an attack on the underlying validity or existence of the trust in which the

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[98] *Id.*

[99] *See* BORN, ICA, *supra* note 4, at 359–91; Strong, *Two Bodies Collide*, *supra* note 10.

[100] *See* 330 F.3d 1266 (10th Cir. 2003).

[101] *Id.* at 1273 (citations omitted). The arbitration provision in question was in an external agreement rather than the trust itself, but the decision may be instructive as to how capacity issues will be addressed in internal disputes. *See id.* at 1268–69.

[102] *Id.* (emphasis omitted).

[103] *Compare Buckeye Check Cashing*, 546 U.S. at 440, *with Spahr*, 330 F.3d at 1273.

[104] No. 4:09CV61TSL-LRA, 2009 WL 3766490, at *2 n.2 (S.D. Miss. Nov. 10, 2009).

arbitration provision was found.[105] In this case, which was handed down after *Buckeye Check Cashing*, the court held that questions regarding the substantive validity of the arbitration provision could, and more properly should, be heard in arbitration based on the rule in *Prima Paint*.[106]

Weizmann Institute of Science v. Neschis showed a third approach to separability, considering 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 arbitration.[107] One of the issues raised in the arbitration involved the mental capacity of the settlor, who was allegedly suffering from Alzheimer's disease at the time he established several foundations ("stiftung"), which are Liechtenstein's version of a trust.[108] The arbitration provision in question was located in the charter establishing the foundation.[109]

Interestingly, at no point did the court in *Weizmann Institute* take the position that arbitrators could not hear the issues of settlor capacity.[110] Instead, the court refused to hear arguments on matters relating to the mental capacity of the settlor, based on principles of collateral estoppel.[111] This refusal suggests that a per se rule barring arbitration of trust disputes involving the mental capacity of the settlor would not be appropriate, despite the

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[105] *See Spahr*, 330 F.3d at 1273; *Regions Bank*, 2009 WL 3766490, at *2 n.2. *Regions Bank* involved a husband who 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. *See id.* While some distinctions could be drawn on the grounds that the dispute involved a deed of trust on real property, an arrangement that 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." AMY MORRIS HESS ET AL., BOGERT'S TRUSTS AND TRUSTEES, THE LAW OF TRUSTS AND TRUSTEES § 29 (2011).

[106] *See Regions Bank*, 2009 WL 3766490, at *2 n.2; *see also Buckeye Check Cashing*, 546 U.S. at 449; Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967).

[107] *See* Weizmann Inst. of Sci. v. Neschis, 421 F. Supp. 2d 654, 674–83 (S.D.N.Y. 2005). At the time of the decision, Liechtenstein was not a party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), although that has since changed. *See id.* at 674; *see also* New York Convention, *supra* note 67; United Nations Comm'n on Int'l Trade Law (UNCITRAL), Status: 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Sept. 19, 2012) (listing signatories to the New York Convention).

[108] *See Weizmann Inst.*, 421 F. Supp. 2d at 660, 665.

[109] *See id.* at 664, 667–68.

[110] *See id.*

[111] *See id.* at 680 n.28.

analysis in *Spahr v. Secco*.[112] Instead, the rule in *Regions Bank* appears to conform more closely to the relevant principles of national and international law.[113]

2. 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 (that is, trustees and beneficiaries).[114]

The analysis here is similar to that regarding the operability and effectiveness of the arbitration agreement.[115] An arbitration provision found in a trust is operable with respect to trustees to the extent that those persons agree to act under the terms of the trust.[116] The concept of conditional transfer yields a similar result vis-à-vis beneficiaries.[117] These same techniques can also be used to demonstrate these parties' consent to be bound by the arbitration provision.[118]

However, commentators have raised an interesting issue with regard to the possible means of binding beneficiaries to a mandatory arbitration provision found in a trust. Although conditional transfer is considered an entirely legitimate mechanism sufficient to achieve the necessary ends, some people have attempted to bolster the effectiveness of an arbitral clause through the use of a forfeiture (*in terrorem*) provision.[119]

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

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[112] *See* Spahr v. Secco, 330 F.3d 1266, 1273 (10th Cir. 2003).

[113] *See* Regions Bank v. Britt, No. 4:09CV61TSL-LRA, 2009 WL 3766490, at *2 n.2 (S.D. Miss. Nov. 10, 2009).

[114] *See* Wüstemann, *supra* note 3, at 36.

[115] *See* Cohen & Staff, *supra* note 2, at 209.

[116] *See* Wüstemann, *supra* note 3, at 44–66; Cohen & Staff, *supra* note 2, at 200–02.

[117] *See* Wüstemann, *supra* note 3, at 44–46; Cohen & Staff, *supra* note 2, at 200–02.

[118] This concept is similar to the analytical framework used with respect to non-signatories in arbitration, where the same type of theories can be used to overcome formal requirements regarding the arbitration agreement as well as issues relating to consent. *See* 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, 219-20 (2012).

[119] *See* Wüstemann, *supra* note 3, at 46–47; Blattmachr, *supra* note 20, at 247–48, 260–61; Bosques-Hernández, *supra* note 19, at 7–8; Katzen, *supra* note 14, at 125–27; Spitko, *supra* note 20, at 297–99.

the use of arbitration to resolve a particular dispute.[120] Although such provisions obviously provide a strong incentive for beneficiaries to agree to arbitration, *in terrorem* provisions are problematic for several reasons.[121]

First, *in terrorem* clauses 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.[122] 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[ing] the [arbitration] agreement voidable."[123] Third, an *in terrorem* provision could be considered an impermissible attempt to oust the jurisdiction of the court, and, hence void *ab initio*.[124] Therefore, while some commentators take the view that requiring a legatee 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,"[125] the better view is that settlors should avoid trying to force beneficiaries into arbitration through use of a forfeiture clause.[126]

E. Proper Representation of the Parties

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.[127] 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.[128]

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[120] *See* Blattmachr, *supra* note 20, at 247–48, 260–61.

[121] *See id.*; Katzen, *supra* note 14, at 125-27; *see also* Cohen & Staff, *supra* note 2, at 221.

[122] *See* UNIF. PROBATE CODE § 2-517, 8 pt. 1 U.L.A. 161 (1998 & Supp. 2012) (amended 2008), *available at* http://www.law.upenn.edu/library/archives/ulc/upc/2008final.htm; *id.* § 3-905, 8 pt. 2 U.L.A. 272 (concerning other proceedings); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.5 (2003); HAYTON ET AL., *supra* note 74, ¶ 11.86 (discussing "justifiable" challenges).

[123] Cohen & Staff, *supra* note 2, at 221.

[124] *See* HAYTON ET AL., *supra* note 74, ¶ 11.1.

[125] Spitko, *supra* note 20, at 298; *see also* Bosques-Hernández, *supra* note 19, at 8; Katzen, *supra* note 14, at 126.

[126] *See* HAYTON ET AL., *supra* note 74, ¶ 11.1; Cohen & Staff, *supra* note 2, at 221.

[127] *See* Cohen & Staff, *supra* note 2, at 209.

[128] *See id.* at 222.

In litigated disputes, "the court has to appoint a person to represent the interests of such beneficiaries, and, even then, any compromise of the litigation has to be approved by the court."[129] Appointed representatives either share a common interest with the absent beneficiaries (a practice known as "virtual representation") or have no independent interest in the dispute itself.[130] Minors and other legally incompetent persons (such as the mentally incapacitated) typically have guardians (either a parent or a guardian *ad litem*) already in place.[131]

The question therefore becomes whether and to what extent these representative mechanisms can be used in arbitration. To some extent, the answer may depend on whether the trust instrument specifically describes the representative mechanism that is to be used. Thus, for example:

> [t]here 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.[132]

However, 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."[133] Furthermore, "[t]o avoid problems the trust deed should provide for payment of [representatives] out of the trust fund."[134]

Trustees who are not given explicit powers in the trust to appoint virtual or other representatives could attempt to do so based on their residual dis-

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[129] Buckle & Olsen, *supra* note 8, at 649 (citation omitted).

[130] *See* McGOVERN ET AL., *supra* note 22, at 613–14; Wüstemann, *supra* note 3, at 51; Mautner & Orr, *supra* note 15, at 161, 163–64.

[131] *See* McGOVERN ET AL., *supra* note 22, at 660–63.

[132] Cohen & Staff, *supra* note 2, at 222–23; *see also* Hayton, *Problems*, *supra* note 19, at 15–18.

[133] Cohen & Staff, *supra* note 2, at 223. Typically, "trustees must take all reasonable practiable [sic] steps" to provide notice to actual and potential beneficiaries, even those who only have a possibility of taking under a discretionary trust. HAYTON ET AL., *supra* note 74, ¶ 56.11.

[134] Hayton, *Future Trends*, *supra* note 19; *see also* Hayton, *Problems*, *supra* note 19.

cretionary powers to resolve trust disputes. This approach has been discussed less by commentators and may, therefore, be more open to debate. However, any efforts by trustees in this regard would likely be bolstered by any statutory provisions allowing nonjudicial means of dispute resolution.[135]

Other potential problems exist with respect to the proper representation of parties to a mandatory arbitration. For example, questions may arise as to whether the arbitral tribunal has the ability to approve the settlement of a trust dispute in cases involving appointed representatives, or whether that power can be exercised only by a court.[136] While arbitrators are entirely competent to enter an award on an agreed settlement as a matter of arbitration law,[137] some courts could oppose similar actions in the trust context on the grounds that the judicial duty to approve voluntary disposition of a trust dispute is non-delegable.[138] However, some commentators take the view that the use of representative devices in "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."[139]

Challenges could also arise as to the competency of a particular representative. However, others have 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."[140]

Finally, questions could arise as to whether a representative needs to be appointed in any particular set of circumstances. For example, a representative might not need to be appointed for a minor if the minor is receiving a benefit under the trust, since consent to receiving a benefit is not necessary in some jurisdictions.[141] However, a representative would be necessary in cases where a conflict of interest existed between a minor beneficiary and his or her natural guardian.[142]

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[135] *See supra* note 7.

[136] *See* Hayton, *Problems*, *supra* note 19, at 13–15.

[137] *See* BORN, ICA, *supra* note 4, at 2437–38.

[138] *See* Hayton, *Problems*, *supra* note 19, at 15 (noting no need for judicial intervention in some U.S. states while acknowledging need for court involvement in England and certain British dependencies).

[139] Mautner & Orr, *supra* note 15, at 166.

[140] Hayton, *Future Trends*, *supra* note 19, at 72.

[141] *See* Wüstemann, *supra* note 3, at 52.

[142] *See id.*

F. A Subject Matter That is Arbitrable

Finally, for a mandatory arbitration provision in a trust to be enforceable, "the subject matter of the dispute [must be] arbitrable."[143] The term "arbitrability" here is being used in its international sense and describes which disputes can be heard in arbitration and which are reserved to the exclusive purview of the courts.[144] Although national and international laws on arbitration clearly contemplate the possibility that certain issues are non-arbitrable, seldom are the parameters of non-arbitrability firmly and clearly drawn.[145] Cross-border disputes, including those involving individual U.S. states, can become particularly complicated as a result of various conflict of laws analyses concerning the question of which state's law controls the issue of arbitrability.[146]

Initially, one might think that statutes allowing nonjudicial resolution of various trust-related disputes would be useful in this analysis. Certainly, these sorts of provisions are helpful in some regards, particularly by suggesting that certain rights relating to trusts are freely disposable, and thus not inherently non-arbitrable.[147] However, most of the relevant legislation is written in such a way that it does not clarify whether the statutes apply to mandatory arbitration provisions found in trusts.[148] Instead, the legislation could be interpreted as applying only to arbitration agreements entered into by a trustee after the creation of the trust.

The absence of clearly controlling legislation in most jurisdictions means that the analysis must focus on more general principles of law.[149] One way of looking at the issue is to consider that, at its core, arbitrability focuses on whether the rights in question are freely disposable by the par-

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[143] Cohen & Staff, *supra* note 2, at 209.

[144] *See* Stefan Michael Kröll, *The "Arbitrability" of Disputes Arising From Commercial Representation*, *in* ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 317, ¶ 16-7 (Loukas A. Mistelis & Stavros L. Brekoulakis eds., 2009). 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 issues relating to the scope of the arbitration agreement as a matter of party intent. *See* BORN, ICA, *supra* note 4, at 767.

[145] *See* Kröll, *supra* note 144, ¶¶ 16-7 to 16-8; LEW ET AL., *supra* note 26, ¶¶ 9-19 to 9-41.

[146] *See* Wüstemann, *supra* note 3, at 47; *see also In re* Fellman, 604 A.2d 263, 269 (Pa. Super. Ct. 1992) (Johnson, J., dissenting); von Segesser, *supra* note 3, at 22–23.

[147] *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 632–33 (1985) (noting that disputes that are arbitrable in one context cannot be held to be inherently non-arbitrable in others); Strong, *Two Bodies Collide*, *supra* note 10.

[148] *See* Strong, *Two Bodies Collide*, *supra* note 10.

[149] *See id.*

ties.[150] Because "the freedom to dispose of one's rights . . . implies the possibility to renounce such rights,"[151] it is appropriate to ask whether beneficiaries can dispose of all or some of their rights. As it turns out, beneficiaries can disclaim any benefits they are entitled to receive under a trust, suggesting that beneficiaries' rights are freely disposable.[152] While some difficulties could arise to the extent that trust law limits beneficiaries' ability to terminate a trust created for their benefit or to alter its terms, this concern appears inapposite because mandatory trust arbitration does not challenge the terms of the trust so much as it upholds them.[153]

There are many other aspects of the arbitrability analysis that could be discussed, but the issue can become quite complicated and will not be addressed here, primarily because questions of arbitrability are ultimately decided by courts rather than by parties.[154] Therefore, there is little that a settlor can do during the drafting stage to affect the outcome of an arbitrability analysis.[155]

However, there is one point regarding arbitrability that should be noted at this point, since it affects the drafting process. Whereas courts at one time considered arbitrability on a broad scale, treating entire subject matters in a similar manner, judges are now adopting an increasingly nuanced approach to the question of arbitrability, sometimes allowing some claims within a certain general subject matter to go forward in arbitration while disallowing others.[156] Because there have been some suggestions already made about the non-arbitrability of certain types of trust-related disputes, it appears likely that trust law will have to address the question of this sort of "limited arbitrability" at some point in the near future.[157]

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[150] *See* Caprasse, *supra* note 66, at 84.

[151] *Id.*

[152] *See* HAYTON ET AL., *supra* note 74, ¶¶ 65.1 to 65.5; MCGOVERN ET AL., *supra* note 22, at 88–96.

[153] *See* HAYTON ET. AL, *supra* note 74, ¶¶ 66.1 to 66.26; MCGOVERN ET AL., *supra* note 22, at 425–36.

[154] *See* Kröll, *supra* note 144, ¶¶ 16-5, 16-8 to 16-23. More extensive discussion of arbitrability in trust disputes can be found elsewhere. *See* Strong, *Two Bodies Collide*, *supra* note 10.

[155] *See* BORN, DRAFTING, *supra* note 11, at 82. However, parties may be able to encourage courts to enforce arbitration provisions by adopting arbitral procedures that adequately address the special needs of parties to a trust dispute. *See* Strong, *Procedures*, *supra* note 31.

[156] *See* Kröll, *supra* note 144, ¶¶ 16-7; Strong, *Two Bodies Collide*, *supra* note 10.

[157] For example, commentators have already questioned the arbitrability of claims challenging the existence of the trust. *See* BORN, ICA, *supra* note 4, at 359–91; HESS ET AL.,

While no settlor wants to have even some part of a trust struck as being unenforceable, it is important to understand that a judicial determination that one type of claim is non-arbitrable does not affect the validity of the arbitration provision as a whole.[158] There is, as it were, no penalty for over-inclusiveness on the part of the drafter. Instead, the arbitration provision as a whole survives a determination of limited non-arbitrability, with courts or arbitrators simply severing the problematic claim or claims and allowing arbitrable issues to be determined in arbitration, and non-arbitrable issues to be determined in litigation.[159]

Although the arbitrability analysis may seem complicated, most commentators have concluded that most, if not all, internal trust disputes are or should be arbitrable.[160] While further research on the question of limited arbitrability is needed,[161] a rule of general arbitrability is not only consistent with principles of trust law but also with the prevailing trend toward increased arbitrability in other areas of law.[162]

III. THE EMPOWERED SETTLOR: HOW ARBITRAL BEST PRACTICES ADDRESS TRUST LAW CONCERNS

A. Regarding Arbitration

Given the number of jurisprudential problems facing mandatory arbitration of internal trust disputes, it is easy to see why some settlors hesitate before placing an arbitration provision in a trust. However, the preceding section suggests a number of ways to mitigate or resolve the issues through proper drafting. Additional techniques are discussed below.

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supra note 105; LEW ET AL., *supra* note 26, ¶¶ 6-9 to 16-22; Horton, *supra* note 1, at 1064; Katzen, *supra* note 14, at 123–24; Spitko, *supra* note 20, at 303; Strong, *Two Bodies Collide*, *supra* note 10. Other areas of concern include claims involving certain statutory rights, such as those based on marital or succession law. *See* Wüstemann, *supra* note 3, at 45–46 (discussing forced heirship); Strong, *Two Bodies Collide*, *supra* note 10 (discussing elective shares).

[158] *See* BORN, DRAFTING, *supra* note 11, at 130.

[159] *See* Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 217, 221 (1985); *see also* BORN, ICA, *supra* note 4, at 767.

[160] *See* Wüstemann, *supra* note 3, at 55–56; Cohen & Staff, *supra* note 2, at 223–26; Lloyd & Pratt, *supra* note 15, at 18; Strong, *Two Bodies Collide*, *supra* note 10.

[161] *See* Strong, *Two Bodies Collide*, *supra* note 10.

[162] *See* BORN, ICA, *supra* note 4, at 837–41.

B. Background Considerations

Drafting an arbitration provision for the first time can be a daunting task.[163] However, newcomers can take heart in the fact that no special terms of art are needed to demonstrate an intent to arbitrate.[164] Indeed, a simple provision stating that "the parties agree to arbitrate any and all disputes arising out of or in connection with this trust" may be sufficient to trigger arbitration of a wide variety of trust-related disputes.[165] Settlors can also create narrower categories of matters that are to be subject to arbitration, although experts caution against overly complicated provisions, since that could lead to litigation or arbitration over the scope of the arbitral clause.[166]

While parties do not need to use any particular language to reflect an intent to arbitrate, some states may require the document in which an arbitral provision exists to reflect certain contractual qualities.[167] Due to the relatively novel nature of mandatory trust arbitration, drafters may not know in advance which jurisdictions will require an arbitration provision to be in a contract-like document. However, there are several ways to anticipate how a judge might rule on this particular issue.

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[163] For general advice on drafting arbitration agreements, see BORN, DRAFTING, *supra* note 11, at 37-116; 1 LARRY E. EDMONSON, DOMKE ON COMMERCIAL ARBITRATION §§ 8:19 to 8:24 (3d ed. 2011); LEW ET AL., *supra* note 26, ¶¶ 8-1 to 8-73. Furthermore, some experts have advised that an arbitration provision in a trust should, as a general matter:

> (1) clearly and properly identif[y] the matter being resolved; and (2) name[ ] all of the parties interested in the matter. The . . . [arbitration] agreement should include a general recitation of facts as well as provisions addressing venue, jurisdiction, governing law, waivers, virtual representation, the discharge of any special representative, and any future dispute resolution mechanism.

Mautner & Orr, *supra* note 15, at 181; *see also* HAYTON ET AL., *supra* note 74, ¶ 11.84; Bruyere & Marino, *supra* note 14, at 357; Lloyd & Pratt, *supra* note 15, at 19.

[164] However, a writing may be necessary in some jurisdictions. *See* 9 U.S.C. § 2 (2006); BORN, DRAFTING, *supra* note 11, at 37. Each U.S. state has its own arbitration statute, and parties should always consult those provisions to ensure compliance with local requirements, although settlors should be aware of federal requirements as well, given that some commentators suggest that most trusts are covered by the Federal Arbitration Act. *See* 9 U.S.C. §§ 1-307; Horton, *supra* note 1, at 1050.

[165] Wüstemann, *supra* note 3, at 43.

[166] *See* BORN, DRAFTING, *supra* note 11, at 37–38. *But see* Radian Ins., Inc. v. Deutsche Bank Nat'l Trust Co., 638 F. Supp. 2d 443, 458 (E.D. Pa. 2009) (upholding a split jurisdiction clause in the context of a trust).

[167] *See* Mautner & Orr, *supra* note 15, at 181 (noting settlors should be careful to "meet the statutory requirements necessary to create a binding agreement"); *see also* Bruyere & Marino, *supra* note 14, at 357.

First, the jurisdiction in question may have already established whether a trust is a contract in contexts other than arbitration.[168] Although these precedents might not apply to mandatory trust arbitration,[169] settlors should determine whether such cases exist, since some courts seeking persuasive authority could find them relevant.[170]

Second, some states may require a claim involving a trust to be framed as a breach of trust or fiduciary duty, while other jurisdictions permit such allegations to be framed as a breach of contract.[171] Parties may find that courts in the latter category are more inclined to uphold an arbitration provision found in a trust.

Third, some state arbitration statutes speak of an "arbitration contract," while others refer to an "arbitration agreement."[172] Courts faced with the second type of statute could rely on the breadth of the language to allow mandatory trust arbitration even if a trust is not a contract per se.[173] Furthermore, commentators have suggested that the Federal Arbitration Act, rather than state arbitration statutes, governs most trusts and that the goals of the Federal Arbitration Act do not require an arbitration provision to be located in a contract-like document.[174] While there is no way to know definitively whether a judge hearing the dispute will consider the difference in statutory language relevant, settlors may nevertheless find it useful to know what the relevant standard is. Notably, when considering this issue, parties to international or interstate trusts must take care to undertake a proper conflict of laws analysis to identify the law that controls this issue, since the

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[168] *See* Rachal v. Reitz, 347 S.W.3d 305, 311 (Tex. App.—Dallas 2011, pet. granted); *see also* Strong, *Two Bodies Collide*, *supra* note 10.

[169] For example, a broadly written arbitration statute could overcome general case law regarding the theoretical nature of trusts. *See* Strong, *Two Bodies Collide*, *supra* note 10 (regarding the Arbitration Act 1996 overcoming general theories on the nature of trusts).

[170] *See id.*; *see also Rachal*, 347 S.W.3d at 311.

[171] *Compare* Stender v. Cardwell, No. 07-cv-02503-REB-MJW, 2009 WL 3416904, at *2 (D. Colo. Oct. 20, 2009) (involving breach of contract of a commercial trust), *with* Schoneberger v. Oelze, 96 P.3d 1078, 1082 (Ariz. Ct. App. 2004) (stating "[a] trustee who fails to perform his duties . . . is not liable to the beneficiary for breach of contract" (citations omitted)), *superseded by statute*, ARIZ. REV. STAT. ANN. § 14-10205 (2012), *as recognized in* Jones v. Fink, No. CA-SA 10-0262, 2011 WL 601598 (Ariz. Ct. App. Feb. 22, 2011); *see also* Strong, *Two Bodies Collide*, *supra* note 10.

[172] *See Rachal*, 347 S.W.3d at 313–14 (Murphy, J., dissenting).

[173] *See id.*; *see also* SCHWARZ & KONRAD, *supra* note 72; Duve, *supra* note 72.

[174] *See* Horton, *supra* note 1, at 1072–73.

law that governs the merits of a dispute does not always govern the interpretation or validity of the arbitration agreement.[175]

While these suggestions may be helpful, they obviously do not provide settlors with any guarantees. Therefore, absent clear statutory or judicial authority that a mandatory arbitration provision in a trust is enforceable,[176] settlors should err on the side of caution and draft their arbitration provisions to maximize contract-like elements.

Several techniques can be used to help fulfill these sorts of requirements. For example, settlors may "incorporat[e] a mandatory arbitration provision into a separate contract rather than into the actual trust agreement."[177] Such an approach could be effective even in jurisdictions that "dismiss[] the contractual nature of trust agreements," since those regimes nevertheless "allow[] for a separate contract between the grantor and the trustee."[178]

While side agreements may be effective with respect to the trustee, they may not be applicable in situations in which the settlor wishes to bind the beneficiaries. In those cases, the focus needs to be on the language found in the trust itself. Different provisions may be necessary depending on whether the settlor anticipates (1) claims being brought primarily by the beneficiaries against the trustee, (2) claims being asserted among the beneficiaries, or (3) both.[179] A settlor concerned about the first situation may be able to create a binding arbitration provision in the trust itself if he:

> [o]n 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 settlor, the

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[175] *See* Gerard Meijer & Josefina Guzman, *The International Recognition of an Arbitration Clause in the Articles of Association of a Company, in* ONDERNEMING EN ADR 117, 125 (2011); *see also In re* Fellman, 604 A.2d 263, 269 (Pa. Super. Ct. 1992) (Johnson, J., dissenting); von Segesser, *supra* note 3, at 22–23; Wüstemann, *supra* note 3, at 47.

[176] *See* ARIZ. REV. STAT. ANN. § 14-10205 (2012); FLA. STAT. ANN. § 731.401 (West 2010); New S. Fed. Sav. Bank v. Anding, 414 F. Supp. 2d 636, 646–47 (S.D. Miss. 2005).

[177] Bruyere & Marino, *supra* note 14, at 364.

[178] *Id.*; *see also* Bosques-Hernández, *supra* note 19, at 7.

[179] Drafters should always consider in advance what types of disputes are most likely to arise in their particular circumstances so that the dispute resolution clause can be tailored to the particular needs of the parties. *See* BORN, DRAFTING, *supra* note 11, at 13–15. However, drafters should also include language sufficient to address other contingencies because novel claims could always arise.

> beneficiaries and itself) any breach of trust claim against the trustees shall be referred to arbitration.[180]

Drafters may also wish to indicate explicitly that former trustees remain bound by the arbitration provision.[181]

Settlors concerned about claims being asserted among the beneficiaries would need to amend the proposed language to incorporate claims of this nature.[182] In so doing, drafters should consider whether they can establish some form of mutual consideration that would be acceptable under the law governing the interpretation of the arbitration provision or whether the doctrine of conditional transfer will be sufficient to overcome the need for consideration.[183]

One item that people often overlook is the need to include proper contractual language regarding the privacy and confidentiality of the proceedings. Although many people assume that arbitration is a private and confidential process, most national and international laws are silent in this regard.[184] Parties must, therefore, include specific language regarding confidentiality in their arbitration agreement or agree to abide by institutional rules that guarantee similar protections.[185]

It is certainly possible to incorporate all the necessary elements into arbitration clauses drafted on a case-by-case basis. However, experts do not recommend this sort of ad hoc approach because the use of non-standard terms can lead to interpretive difficulties and litigation over the content and scope of the agreement.[186] Instead, specialists in arbitration recommend use of a model arbitration clause tailored to the parties' individual needs.[187]

The best language is often found in the model clauses published by reputable arbitration institutions.[188] However, parties that do not want to have an administered arbitration should take care, since blanket acceptance of those clauses will result in an administered proceeding with that institu-

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[180] HAYTON ET AL., *supra* note 74, ¶ 11.84; *see also* Wüstemann, *supra* note 3, at 44; Logstrom, *supra* note 14, at 289–90.

[181] *See* Strong, *Procedures*, *supra* note 31. Protectors and successor protectors can be addressed in the same manner as trustees and successor trustees.

[182] *See* Logstrom, *supra* note 14, at 289–90.

[183] *See* Strong, *Two Bodies Collide*, *supra* note 10 (regarding incentive payments).

[184] *See* BORN, ICA, *supra* note 4, at 2253.

[185] *See id.* at 2265–69.

[186] *See* BORN, DRAFTING, *supra* note 11, at 37–38.

[187] *See id.*

[188] *See id.* at 37.

tion.[189] This is not to say that institutional clauses cannot be useful, even to parties that wish to proceed ad hoc since those clauses can provide inspiration on how to structure an ad hoc provision as well as precise language that has been well tested in courts.[190] Nevertheless, parties should always confirm that the clause in question really does reflect best practices in drafting before relying on it, since the mere fact that a clause has been published by an arbitral institution is not proof of the efficacy of that provision.[191] To that end, the following subsection considers model arbitration clauses provided by two leading arbitral institutions, the AAA and the ICC, so as to determine the extent to which the language actually addresses the special needs of the trust industry.

C. Model Arbitration Clauses Relating to Trust Disputes

1. The AAA Model Trust Clause

The AAA was the first organization to address the particular challenges associated with trust arbitration, publishing the AAA Wills and Trusts Arbitration Rules in 2003 along with the AAA Model Trust Clause.[192] By 2003, the AAA already had some experience with trust arbitration as a result of its work with the International Foundation of Employee Benefit Plans (IFEBP) in enacting several trust-related rule sets involving pension trusts.[193] However, use of those rules is explicitly permitted by federal regulation and therefore does not involve the same kind of drafting issues that exist in other types of trusts.[194] Therefore, this Article does not discuss the proposed model clauses associated with those rules.

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[189] Notably, "many experienced international arbitration practitioners prefer institutional arbitration to *ad hoc* arbitration, because of the heightened predictability, stability, and institutional expertise provided by the former" as well as other benefits. *Id.* at 45.

[190] *See id.*

[191] *See id.* at 37–38, 57–58.

[192] *See* AAA Model Trust Clause, *supra* note 30; AAA Trust Arbitration Rules, *supra* note 31.

[193] *See* Teamsters-Emp'rs Local 945 Pension Fund v. Waste Mgmt. of N.J., Inc., No. 11-902 (FSH), 2011 WL 2173854, at *2 (D.N.J. June 2, 2011); Am. Arbitration Ass'n, Impartial Umpire Rules for Arbitration of Impasses Between Trustees of Joint Employee Benefit Trust Funds (Jan. 1, 1988), http://www.adr.org/; Am. Arbitration Ass'n, Multiemployer Pension Plan Arbitration Rules for Withdrawal Liability (Sept. 1, 1986), http://www.adr.org/.

[194] *See* I.L.G.W.U. Nat'l Ret. Fund v. Meredith Grey, Inc., 94 Fed. Appx. 850, 852 (2d Cir. 2003) (noting the AAA Multiemployer Pension Plan Arbitration Rules had been approved by the Pension Benefit Guaranty Corporation, a U.S. federal agency); *Teamsters-Employers Local 945*, 2011 WL 2173854, at *2.

Notably, the AAA's efforts with respect to standard trust arbitration have won the approval of the drafters of the UTC and are cited in the UTC as an appropriate means of invoking arbitration.[195] The following discussion introduces the text of the clause itself and considers how well the AAA addresses the various problems associated with mandatory arbitration of trust disputes.

a. Text and Context

The text of the AAA Model Trust Clause states:

> [i]n order to save the cost of court proceedings and promote the prompt and final resolution of any dispute regarding the interpretation of my will (or my trust) or the administration of my estate or any trust under my will (or my trust), I direct that any such dispute shall be settled by arbitration administered by the American Arbitration Association under its Arbitration Rules for Wills and Trusts then in effect. Nevertheless the following matters shall not be arbitrable[:] questions regarding my competency, attempts to remove a fiduciary, or questions concerning the amount of bond of a fiduciary. In addition, arbitration may be waived by all *sui juris* parties in interest.
>
> The arbitrator(s) shall be a practicing lawyer licensed to practice law in the state whose laws govern my will (or my trust) and whose practice has been devoted primarily to wills and trusts for at least ten years. The arbitrator(s) shall apply the substantive law (and the law of remedies, if applicable) of the state whose laws govern my will (or my trust). The arbitrator's decision shall not be appealable to any court, but shall be final and binding on any and all persons who have or may have an interest in my estate or any trust under my will (or my trust), including unborn or incapacitated persons, such as minors or incompetents.

[195] *See* UNIF. TR. CODE § 816(23) cmt., 7C U.L.A. 632 (2006) (amended 2005), *available at* http://www.law.upenn.edu/library/archives/ulc/uta/2005final.htm (noting that "[s]ettlors wishing to encourage use of alternate dispute resolution may draft to provide it" and referring parties to the AAA Wills and Trusts Arbitration Rules).

> Judgment on the arbitrator's award may be entered in any court having jurisdiction thereof.[196]

This provision should be included in the trust itself, rather than in a side agreement, in accordance with suggestions made by various experts in trust arbitration.[197] While the clause contains language that is common to model arbitration clauses used outside the context of trust arbitration and is in that sense unremarkable,[198] the AAA also addresses a number of issues specifically relating to trust disputes. The next subsections discuss these items.

b. Means of Addressing Known Problem Points

Commentators have identified five areas of concern regarding mandatory trust arbitration: (1) the impermissible ouster of the courts, (2) the operability and effectiveness of the arbitration provision, (3) the extent to which the arbitration provision is binding on the party against whom the provision is asserted, (4) the proper representation of parties, and (5) arbitrability.[199] Many of these issues overlap as a matter of theory, and the AAA Model Trust Clause demonstrates how difficult it can be to separate each of the various elements as a matter of practice.[200] The clause also demonstrates how difficult it can be to address these issues adequately, for although the AAA clearly attempts to deal with a number of trust-related matters, significant problems remain.

(1) Operability and Effectiveness of the Arbitration Agreement

One of the key concerns relating to a mandatory arbitration provision in a trust is whether that provision is operable, effective, and capable of being performed under statutory requirements concerning an agreement to arbitrate.[201] Surprisingly, the AAA Model Trust Clause does nothing to address this particular issue, even though this is one area where good drafting is

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[196] AAA Model Trust Clause, *supra* note 30.

[197] *See id.*; *see also* Wüstemann, *supra* note 3, at 44.

[198] For example, language regarding the finality of the arbitral award and entry of judgment is quite typical and may even be necessary as a matter of U.S. law. *See* BORN, DRAFTING, *supra* note 11, at 38; BORN, ICA, *supra* note 4, at 2788–89.

[199] *See* Cohen & Staff, *supra* note 2, at 209.

[200] *See* AAA Model Trust Clause, *supra* note 30; Cohen & Staff, *supra* note 2, at 209.

[201] *See* Cohen & Staff, *supra* note 2, at 209.

likely to make a significant difference in a court's willingness to enforce a mandatory arbitration provision.[202]

The better approach would be to include language that demonstrates the existence of certain contract-related elements. For example, the clause could invoke the concept of conditional transfer by including language indicating 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."[203]

Alternatively, the provision could attempt to create a contractual relationship with the trustee by highlighting the existence of consideration on both sides and by requiring the signature of the trustee as well as the settlor. As it stands, there is no such language in the AAA Model Trust Clause, which leaves the question of the operability of the clause entirely dependent on background principles of law.[204] This omission is not only unnecessary, it is somewhat dangerous given the uncertain nature of that law in many jurisdictions and the possibility of a negative bias towards arbitration.[205]

(2) Binding the Proper Parties and Proper Representation of Those Parties

Difficulties also arise regarding the way in which the AAA Model Trust Clause attempts to bind all potential parties to a trust dispute and ensure proper representation of those parties.[206] Rather than specifically invoking theories of conditional transfer (which would help establish that the arbitration provision was binding on beneficiaries) or virtual representation (which would help remind courts that unborn, unascertained and legally incapacitated persons can have their rights adjudicated by a proper representative), the AAA Model Trust Clause chooses to state, without more, that all interested persons, including those that are unborn or incapacitated, are bound by the clause.[207] Although this type of declarative language may adequately demonstrate the settlor's intent to arbitrate with those parties, it does little to address any underlying concerns a court may have about arbitration involv-

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[202] *See* AAA Model Trust Clause, *supra* note 30.

[203] Wüstemann, *supra* note 3, at 45.

[204] *See* AAA Model Trust Clause, *supra* note 30.

[205] *See* ACTEC, *supra* note 2, at 5 (discussing the "blinding prejudice" to arbitration in contemporary trust and estates practice).

[206] *See* AAA Model Trust Clause, *supra* note 30.

[207] *See id.*

ing those kinds of potentially vulnerable parties.[208] Furthermore, the AAA's failure to include unascertained beneficiaries in the list of potential parties could prove problematic, since a court could interpret that as an intentional omission.

The better approach would be to include specific language regarding how the various parties will be bound, including the manner in which any representatives are to be appointed and paid.[209] While it is good that the AAA has specifically mentioned unborn and legally incapacitated beneficiaries, since that will eliminate questions about whether the arbitration provision was meant to apply to those persons as well as to named beneficiaries, unascertained beneficiaries should also be included on the list of potential parties.

(3) Arbitrability

Although there is no penalty associated with having an inappropriately broad arbitration provision,[210] wise lawyers do not include patently non-arbitrable matters in their arbitration provisions, since that will only lead to litigation, thus wasting both time and money.[211] However, the AAA takes a highly and unnecessarily conservative approach to arbitrability and explicitly excludes a number of matters from the scope of arbitration.[212] The reason for this reticence is unclear, particularly given the broad range of issues that are considered arbitrable under existing legislation. For example, the UTC allows nonjudicial resolution of matters such as:

> (i) the interpretation or construction of trust terms; (ii) the approval of a trustee's report or accounting; (iii) the direction to a trustee to refrain from performing a particular act or the grant to a trustee of a necessary or desirable power; (iv) the resignation or appointment of a trustee; (v) the transfer of the situs of trust administration;

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[208] *See supra* notes 127–42 and accompanying text.

[209] *See supra* notes 132–33 and accompanying text.

[210] *See supra* notes 156–59 and accompanying text.

[211] Litigation regarding arbitrability can arise either at the initiation of the proceedings or at the enforcement stage and could lead to an unenforceable award. *See* LEW ET AL., *supra* note 26, ¶¶ 9-9 to -10.

[212] *See* AAA Model Trust Clause, *supra* note 30. Experts suggest that drafters avoid listing the types of disputes that are considered arbitrable, since the list could be considered exhaustive. *See* Wüstemann, *supra* note 3, at 44. Excluding various types of disputes appears to be somewhat less problematic, since the assumption would be that all items not listed are intended to be heard in arbitration.

> and (vi) the liability of a trustee for an action relating to a trust.[213]

Interestingly, several of the AAA's excluded items would fall within the UTC's list of arbitrable issues.[214] Other statutes go even further than the UTC regarding the types of matters that are amenable to arbitration.[215]

Of course, parties may choose to modify the AAA's proposed language by removing references to some or all of the excluded matters. However, even if all of the listed items were taken out of the clause, arbitration might nevertheless be limited to matters involving the interpretation and administration of the trust, based on the structure of the sentence discussing the scope of the clause.[216] While the terms "interpretation" and "administration" may be sufficiently broad to include all matters relating to the trust, parties who want to avoid future disputes about the scope of the arbitration provision should consider using more standard language, such as that requiring arbitration of "any and all disputes which may arise out of or in connection with" the trust, since fewer questions will arise regarding the interpretation of that kind of clause.[217] Furthermore, experience suggests that some courts are already willing to uphold those sorts of expansive provisions in the context of trust-related arbitration.[218]

(4) Ouster of the Courts

Although the AAA Model Trust Clause does not appear to address issues relating to the possible ouster of the courts on its face, the clause does include language specifically stating that all interested parties may join to-

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[213] *See* Mautner & Orr, *supra* note 15, at 161; *see also* UNIF. TR. CODE § 111, 7C U.L.A. 450–51 (2006) (amended 2005), *available at* http://www.law.upenn.edu/library/archives/ulc/uta/2005final.htm.

[214] *See* UNIF. TR. CODE § 111, 7C U.L.A. 450–51 (2006) (amended 2005), *available at* http://www.law.upenn.edu/library/archives/ulc/uta/2005final.htm; AAA Model Trust Clause, *supra* note 30.

[215] *See* IDAHO CODE ANN. §§ 15-8-101, 15-8-103 (2011); WASH. REV. CODE §§ 11.96A.010, 11.96A.030 (2006 & Supp. 2012). Commentators have also identified a broad range of trust disputes that are considered "ideal" for arbitration. *See* Logstrom et al., *supra* note 19, at 237.

[216] *See* Logstrom et al., *supra* note 19, at 237. This conclusion is based on the clause preceding the phrase "any such dispute." *See id.*

[217] *See* BORN, DRAFTING, *supra* note 11, at 40; Wüstemann, *supra* note 3, at 43.

[218] *See* Roehl v. Ritchie, 54 Cal. Rptr. 3d 185 (Cal. Ct. App. 2007), *declined to extend by* Diaz v. Bukey, 125 Cal. Rptr. 3d 610 (Cal. Ct. App. 2011), *review granted*, 257 P.3d 1129 (Cal. 2011); *see also* Newbridge Acquisition I, L.L.C. v. Grupo Corvi, S.A. de D.V., No. 02 Civ. 9839(JSR), 2003 WL 42007, at *3 (S.D.N.Y. Jan. 6, 2003).

gether to waive the arbitration provision.[219] As innocuous as this phrase may seem, it could be useful in helping overcome concerns about the impermissible ouster of courts because it indicates that arbitration will not be required if all parties to the actual dispute oppose such procedures.[220] Although the application of the provision is somewhat limited, in that arbitration will be required if even one party to the dispute wants to proceed in arbitration,[221] the AAA's approach is consistent with judicial decisions holding that a mandatory arbitration clause in a trust is enforceable at the election of any one of the parties.[222]

c. AAA Additional Measures

Although the AAA Model Trust Clause demonstrates some shortcomings with respect to issues known to cause concern in trust disputes, the AAA has nevertheless introduced some interesting additional measures in its treatment of trust arbitration. The first of these involves the AAA's description of the qualifications of the arbitrator.[223] The trust community has occasionally expressed some concerns about arbitrators' ability to handle complicated trust disputes,[224] and the AAA has done well to include an explicit description of the amount and type of experience that arbitrators should have. While this sort of language may not be entirely new in the world of arbitration, it may be an effective means of encouraging courts to uphold arbitration provisions in trusts, since the judge and the parties will be assured of a competent decisionmaker.

A second measure is somewhat more troubling. The issue here involves language stating that arbitrators are to "apply the substantive law (and the law of remedies, if applicable) of the state whose laws govern" the trust.[225] On the one hand, the provision appears largely unobjectionable, in that it

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[219] *See* AAA Model Trust Clause, *supra* note 30; Cohen & Staff, *supra* note 2, at 209.

[220] Parties to predispute arbitration agreements in other contexts can also agree to waive arbitration upon the consent of all participants. *See* ISP.com LLC v. Theising, 805 N.E.2d 767, 776 (Ind. 2004); Emmanuel African Methodist Episcopal Church v. Reynolds Constr. Co., 718 S.E.2d 201, 204 (N.C. Ct. App. 2011).

[221] This may include third party beneficiaries of the arbitration provision. *See* Arthur Andersen LLP v. Carlisle, 556 U.S. 624 (2009).

[222] *See In re* Ismailoff, No. 342207, 2007 WL 431024, at *1 (N.Y. Sur. Ct. Nassau County Feb. 1, 2007).

[223] *See* Am. Arbitration Ass'n, Qualifications and Responsibilities of the AAA Commercial Panel of Arbitrators (2012), http://www.adr.org/ (follow "Qualifications and Responsibilities of the AAA Commercial Panel of Arbitrators" hyperlink).

[224] *See* Wüstemann, *supra* note 3, at 40–41.

[225] AAA Model Trust Clause, *supra* note 30.

simply states what would appear to be obvious. However, a court could view the language as tying the hands of the arbitral tribunal and restricting a conflict of laws analysis that might result in the application of the mandatory rules of law of a state other than that chosen by the parties.[226] Since determinations regarding arbitrability and the impermissible ouster of the courts may turn on whether a court believes that its own mandatory rules of law will be considered by the arbitrator,[227] a better solution might be for the AAA to adopt or incorporate by reference the conflict of laws approach set forth in the Hague Convention on the Law Applicable to Trusts and on Their Recognition (Hague Convention on Trusts).[228] The Hague Convention on Trusts constitutes an internationally recognized means of balancing issues relating to conflict of laws, and incorporating the principles of that instrument in the AAA Model Trust Clause could help increase the enforceability of arbitration provisions found in trusts by giving courts an increased degree of confidence that parties will not escape the application of certain mandatory rules of law by using arbitration.[229]

2. The ICC Model Trust Clause

Several years after the AAA published the AAA Wills and Trusts Arbitration Rules, the ICC convened its own expert working group to consider issues relating to the arbitration of trust disputes.[230] After a lengthy consultation process, the ICC produced the ICC Model Trust Clause in 2008.[231]

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[226] *See* Kröll, *supra* note 144, ¶¶ 16-9 to 16-20.

[227] *See id.* ¶ 16-20; *see also* Caprasse, *supra* note 66, at 86; Strong, *Two Bodies Collide*, *supra* note 10.

[228] *See* Convention on the Law Applicable to Trusts and on Their Recognition, arts. 6-10, 15-18, July 1, 1985, 23 I.L.M. 1389, 1389-92 (1984) [hereinafter Hague Convention on Trusts]. The Hague Convention on Trusts has been signed but not ratified by the United States. *See* Hague Convention on Trusts, Status, *available at* http://www.hcch.net/index_en.php?act=conventions.status&cid=59 (last visited July 29, 2012).

[229] *See* Hague Convention on Trusts, *supra* note 228, arts. 6, 10, 15, 18; AAA Model Trust Clause, *supra* note 30; Adair Dyer, *International Recognition and Adaptation of Trusts: The Influence of the Hague Convention*, 32 VAND. J. TRANSNAT'L L. 989, 1006–08 (1999).

[230] *See* AAA Trust Arbitration Rules, *supra* note 31; ICC Model Trust Clause, *supra* note 32, explanatory note 5.

[231] *See* ICC Model Trust Clause, *supra* note 32, explanatory note 6.

a. Text and Context

The text of the ICC Model Trust Clause states that:

> [a]ll disputes arising out of or in connection with the trust created hereunder shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed by the ICC International Court of Arbitration (the "Court") in accordance with the said Rules.
>
> The settlor hereby agrees to the provisions of this arbitration clause and the trustees, any protector and their successors in office, by accepting to act under the trust, also agree or shall be deemed to have agreed to the provisions of this arbitration clause. Accordingly, they all agree to settle all disputes arising out of or in connection with the trust in accordance with this arbitration clause.
>
> As a condition for claiming, being entitled to or receiving any benefit, interest or right under the trust, any person shall be bound by the provisions of this arbitration clause and 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.
>
> If, at any time, any person requests to participate in arbitral proceedings already pending under the present arbitration clause, or if a party to arbitral proceedings pending under this arbitration clause desires to cause any person to participate in the arbitration, the requesting party shall present a request for joinder to the Court setting forth the reasons for the request. It is hereby agreed that if the Court is prima facie satisfied that a basis for joinder may exist, any decision as to joinder shall be taken by the Arbitral Tribunal itself. When taking a decision on the joinder, the Arbitral Tribunal shall take into account all relevant circumstances, including, but not limited to, the provisions of the trust and the stage of the proceedings. It is further agreed that the Court may reject the request for joinder if it is not so satisfied, in which case there shall be no joinder. In case of a joinder after the signature or approval of the Terms of Reference, an amendment to the same will be made either through signature by the parties

> and the Arbitral Tribunal or through approval by the Court, pursuant to Article 18 of the ICC Rules of Arbitration. It is agreed that in such a case, the Court may take whatever measures that it deems appropriate with respect to the advance on costs for arbitration.[232]

The ICC's model clause is very different from that of the AAA.[233] However, the differences extend beyond the language of the model clauses themselves. When publishing the ICC Model Trust Clause, the ICC working group included a detailed commentary discussing various issues relating to the arbitration of trust disputes and the possible interpretation of the model clause.[234] Not only does this commentary help judges and arbitrators interpret and apply the ICC Model Trust Clause, it also provides useful tips to those involved in drafting arbitration provisions for use in trusts, regardless of whether the ICC administers the process.[235]

The ICC commentary contains a number of relatively general suggestions, such as the recommendation that the ICC Model Trust Clause be included in the trust instrument itself rather than in a side agreement, a technique that is advocated by experts in trust arbitration.[236] The commentary also cautions parties about the use and modification of the proposed language, noting that: "[g]iven that the use of arbitration to resolve trust disputes is in its infancy (emerging legislation, limited case law and divergent academic opinions), parties are encouraged to exercise great care when using and possibly adapting the ICC arbitration agreement, so as to ensure the validity of the award."[237]

While parties might prefer to have a higher degree of certainty about the enforceability of the ICC Model Trust Clause, the ICC was wise to highlight the developing nature of this area of law.[238] However, as the following discussion notes, the ICC working group has done an excellent job in addressing many of the major issues in this field, which should increase the

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[232] ICC Model Trust Clause, *supra* note 32.

[233] *Compare* AAA Model Trust Clause, *supra* note 30, *with* ICC Model Trust Clause, *supra* note 32.

[234] *See* ICC Model Trust Clause, *supra* note 32.

[235] *See id.*

[236] *See id.*, explanatory note 7; Wüstemann, *supra* note 3, at 44. The clause should preferably appear after the choice-of-law provision, if such a clause exists. *See* ICC Model Trust Clause, *supra* note 32, explanatory note 7.

[237] ICC Model Trust Clause, *supra* note 32, explanatory note 10.

[238] *See* ICC Model Trust Clause, *supra* note 32.

likelihood that the U.S. and other countries will find the ICC Model Trust Clause enforceable.[239]

b. Means of Addressing Known Problem Points

As noted previously, mandatory trust arbitration gives rise to a number of concerns, including those regarding the impermissible ouster of the courts, the operability and effectiveness of the arbitration provision, the extent to which the arbitration provision is binding on the party against whom the provision is asserted, proper representation of parties and arbitrability.[240] Although the ICC Model Trust Clause does not explicitly address all of these issues, and in some cases combines its treatment of certain items, the associated commentary helps give a more comprehensive picture of how the ICC working group chose to handle the various issues that routinely arise in trust arbitration.[241]

(1) Operability and Effectiveness of An Arbitral Clause That is Also Binding on the Parties

The first way in which the ICC Model Trust Clause differs from the AAA Model Trust Clause involves the ICC's attempt to bolster (1) the operability and effectiveness of the arbitral clause and (2) the ability of that provision to bind the various parties.[242] Whereas the AAA Model Trust Clause is silent with regard to both issues, the ICC Model Trust Clause explicitly incorporates contract oriented language stating that the settlor "agrees" to the arbitration clause along with the trustees, protectors, and any successors who are "deemed to have agreed" to the clause.[243] This is relatively strong language that is likely to be sufficient to bind the various parties to the arbitration and might only be improved by a reference to any remuneration that the trustees, protectors, or successors will receive in connection with the trust.[244] However, that information would likely exist else-

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[239] *See id.*

[240] *See* Cohen & Staff, *supra* note 2, at 209.

[241] *See* ICC Model Trust Clause, *supra* note 32.

[242] *Compare* AAA Model Trust Clause, *supra* note 30, *with* ICC Model Trust Clause, *supra* note 32.

[243] ICC Model Trust Clause, *supra* note 32; *see also* AAA Model Trust Clause, *supra* note 30.

[244] Typically, "trustees must take all reasonable practiable [sic] steps" to provide notice to actual and potential beneficiaries, even those who only have a possibility of taking under a discretionary trust. HAYTON ET AL., *supra* note 74, ¶ 56.11.

where in the trust instrument, so it may not be necessary to refer to it explicitly in the arbitration provision.

The ICC uses similar "deemed to have agreed" language with respect to beneficiaries, which is again likely to have a positive effect on both the operability of the arbitration provision and its ability to bind these particular parties.[245] Although the language here is somewhat British in tone (English trust law uses the term "deemed acquiescence" to describe a practice that is essentially indistinguishable from conditional transfer),[246] that is not likely to cause any problems under U.S. law. Furthermore, it would be relatively easy for a settlor to change the language to incorporate the term "conditional transfer" if it was considered useful to do so.

The ICC also discusses these issues in the commentary, stating that:

> [a]s a general rule, the trustees and any protector will agree to arbitration by accepting their office under the trust. In most cases, it should in addition be possible to have trustees and protectors sign the instrument containing or referring to the ICC arbitration agreement. As for the beneficiaries, the ICC arbitration agreement makes their benefit under the trust conditional upon their agreeing to arbitration. The fact of claiming, being entitled to or receiving any benefit under the trust will be deemed to imply that they have agreed to ICC arbitration. Whether this will be an effective means of extending jurisdiction over non-signatory beneficiaries must be verified under the applicable law.[247]

Although the ICC is wise to highlight the fact that some courts may be hostile to the use of concepts such as conditional transfer, the principle does seem to have sufficient support for settlors to move forward with trust provisions mandating arbitration.[248] Furthermore, some jurisdictions in the U.S.

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[245] *See* ICC Model Trust Clause, *supra* note 32.

[246] *See* Buckle & Olsen, *supra* note 8, at 655–56; Cohen & Staff, *supra* note 2, at 221; Hayton, *Future Trends*, *supra* note 19.

[247] ICC Model Trust Clause, *supra* note 32, explanatory note 7.

[248] *See* Hwang, *supra* note 8, at 84; Wüstemann, *supra* note 3, at 45–46; Buckle & Olsen, *supra* note 8, at 655–56; Cohen & Staff, *supra* note 2, at 221; Hayton, *supra* note 19, at 71–72; Spitko, *supra* note 20, at 300; Strong, *Two Bodies Collide*, *supra* note 10; ACTEC, *supra* note 2, at 10–11; Thomas M. Mayer, *Trust Law in Switzerland*, Step Journal (Jan. 2011), http://www.stepjournal.org/journal_archive/2011/step_journal_jan_2011/trust_law_in_switzerland.aspx.

and elsewhere will not require parties to rely on these sorts of principles at all, since the ability to bind a party to arbitration through a provision in the trust is statutorily or judicially protected.[249] The ICC working group has also done well to note the desirability of having trustees and protectors sign the instrument, since that may help bolster the contract-like qualities of the arbitration provision.[250]

The ICC working group included one other item in its discussion of the operability and effectiveness of the arbitration provision, noting that: "[w]hatever the peculiarities of the trust, the arbitration agreement requires the consent of the parties. Whether this must be in writing will depend on the applicable law."[251]

Because the principle of conditional transfer can establish consent per se, this language may best be interpreted as a reminder that drafting parties need to consider the extent to which an arbitration provision must meet other requirements regarding the form of an arbitration agreement.[252] While many jurisdictions are relaxing their interpretation of what constitutes an "agreement in writing" under national and international arbitration laws,[253] parties should nevertheless err on the side of caution and meet all form requirements currently imposed as a matter of statutory or common law. Again, this may require parties to an international or interstate trust to consider the law of several jurisdictions.[254]

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[249] *See* ARIZ. REV. STAT. ANN. § 14-10205 (2012); FLA. STAT. ANN. § 731.401 (West Supp. 2011); New S. Fed. Sav. Bank v. Anding, 414 F. Supp. 2d 636, 646–47 (S.D. Miss. 2005); *see also* THE TRUSTS (GUERNSEY) LAW 2007, *supra* note 17, § 63; TRUSTEE (AMENDMENT) BILL, *supra* note 17; SCHWARZ & KONRAD, *supra* note 72, at 19-20; Duve, *supra* note 72, at 1002.

[250] *See* ICC Model Trust Clause, *supra* note 32, explanatory note 7.

[251] *Id.*

[252] *See* Mautner & Orr, *supra* note 15, at 181; *see also* Zisman v. Lesner, No. 6:08-cv-1448-Orl-31DAB, 2008 WL 4459029, at *3-4 (M.D. Fla. Sept. 29, 2008) (denying the need for a writing in an arbitration against a trustee); Bruyere & Marino, *supra* note 14, at 357; Strong, *Two Bodies Collide*, *supra* note 10 (regarding the need for a writing).

[253] *See* UNCITRAL, Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, U.N. Doc. A/6/17 (July 7, 2006); UNCITRAL, Revised Articles of the UNCITRAL Model Law on International Commercial Arbitration, 39th Sess., Annex, U.N. Doc. A/6/17 (July 7, 2006); Strong, *Two Bodies Collide*, *supra* note 10; 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, 72–78 (2012).

[254] *See* Hwang, *supra* note 8, at 84 (noting that parties must "ensure that formal and substantial validity requirements for a valid 'arbitration agreement' are met for both the *lex*

(2) Proper Representation

One way that the ICC Model Trust Clause could be improved is with respect to its treatment of unborn, unascertained, and legally incompetent beneficiaries.[255] Like the AAA, the ICC fails to make any special provisions in its model clause for the appointment or payment of virtual representatives.[256]

This is not to say that the ICC ignores the issue completely, since the attendant commentary expressly indicates that all interested parties must be properly represented in any arbitration and cautions drafters that "[t]he representation of beneficiaries, including in particular any minor, unborn or unascertained beneficiaries, . . . needs to be considered in the light of relevant laws."[257] Although this reference acts as a helpful reminder of the unique challenges regarding the representation of beneficiaries in trust arbitration, it would be better if the ICC proposed specific language regarding the appointment and payment of virtual or other representatives, even if such references were qualified as only being potentially relevant in some jurisdictions.[258] Settlors planning to use the ICC Model Trust Clause should therefore approach this issue with caution, and should consider drafting their own language to address the appointment and payment of representatives.[259]

(3) Arbitrability

Unlike the AAA, which takes a very conservative approach to the arbitrability of trust disputes, the ICC envisions few concerns in this regard, giving the tribunal jurisdiction over "all disputes arising out of or in connec-

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arbitri and law governing the arbitration agreement"); Wüstemann, *supra* note 3, at 47; *see also In re* Fellman, 604 A.2d 263, 269 (Pa. Super. Ct. 1992) (Johnson, J., dissenting).

[255] *See* ICC Model Trust Clause, *supra* note 32.

[256] *See* AAA Model Trust Clause, *supra* note 30; ICC Model Trust Clause, *supra* note 32.

[257] ICC Model Trust Clause, *supra* note 32, explanatory note 7; *see also* Cohen & Staff, *supra* note 2, at 209.

[258] Commentators have suggested a variety of options in this regard. *See generally* Hayton, *Problems*, *supra* note 19, at 11, 15–18; Logstrom, *supra* note 14, at 289–90 (citing examples of arbitration clauses); Logstrom et al., *supra* note 19, at 241–44 (describing causes of ambiguous arbitration clauses). English trust law discusses the concept of "special representation," which is similar but not identical to virtual representation. *See* Hayton, *Problems*, *supra* note 19 (describing means of drafting trust provisions to allow special representation).

[259] *See* ICC Model Trust Clause, *supra* note 32.

tion to the trust."[260] This language should be interpreted quite broadly, in that it:

> aims to apply to [a wide variety of] disputes internal to a trust (disputes between parties to a trust: trustees and beneficiaries, trustees *inter se* and beneficiaries *inter se*). [However, i]t does not attempt to apply to disputes external to a trust (disputes between trust parties and outsiders to the trust: for example, attempts by the settlor's creditors to attack the validity of the trust; contractual disputes between trustees and investment advisers engaged for the trust).[261]

The ICC's approach to arbitrability is consistent with U.S. case law allowing the arbitration of "any and all disputes which may arise out of or in connection with" the trust agreement[262] and with statutes that take an expansive view of the arbitrability of trust disputes.[263] However, the ICC working group did include a cautionary note in the commentary, stating that:

> [t]he Task Force appreciates that . . . the issue of arbitrability requires careful and country-specific attention (cf. any statutory jurisdiction provisions). Depending on the relevant rules of the law governing the trust, it may, for example, be appropriate to state that applications to court for directions shall not be deemed a waiver of arbitration.[264]

Furthermore, although the ICC mentions one type of statutory issue (directions from the court),[265]settlors should note that other areas of concern

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[260] ICC Model Trust Clause, *supra* note 32; *see also* AAA Model Trust Clause, *supra* note 30.

[261] Hwang, *supra* note 8, at 83.

[262] Newbridge Acquisition I, L.L.C. v. Grupo Corvi, S.A. de D.V., No. 02 Civ. 9839(JSR), 2003 WL 42007, at *1 (S.D.N.Y. Jan. 6, 2003).

[263] *See* ARIZ. REV. STAT. ANN. § 14-10205 (2012); FLA. STAT. ANN. § 731.401 (West 2010 & Supp. 2012); IDAHO CODE ANN. §§ 15-8-101, 15-8-103 (2011); WASH. REV. CODE §§ 11.96A.010, 11.96A.030 (2006 & Supp. 2012).

[264] ICC Model Trust Clause, *supra* note 32, explanatory note 10.

[265] Notably, there is support in the U.S. for the proposition that disputes regarding judicial instructions and accounting may be subject to arbitration. *See generally* Roehl v. Ritchie, 54 Cal. Rptr. 3d 185, 191–92 (Cal. Ct. App. 2007), *declined to extend by* 125 Cal. Rptr. 3d 610 (Cal. Ct. App. 2011), *review granted*, 257 P.3d 1129 (Cal. 2011) (determining

also exist. For example, settlors may wish to consider the relevance of exclusive jurisdiction clauses concerning other tasks (such as the ability to approve a settlement of a trust dispute)[266] and the interaction between trust law and various statutory rights (such as those involving forced heirs, elective shares, marital rights, and other concerns relating to the law of succession).[267]

c. ICC Additional Measures

The ICC Model Trust Clause and commentary are relatively comprehensive when it comes to addressing the major issues of importance in mandatory trust arbitration.[268] However, the ICC also includes a number of additional measures in its model arbitration provision.[269] The most forward thinking of these measures involve joinder of additional parties.[270]

Because trust disputes proceed in rem,[271] arbitrators may need to devise special procedures to ensure that all actual and potential parties receive adequate notice of and an opportunity to participate in the proceedings.[272] Other measures may also be necessary to allow for the late joinder of interested persons.[273] While courts and arbitrators currently address these matters on an ad hoc basis,[274] a more transparent and predictable procedure would be

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whether the arbitrator exceeded his powers in making an arbitration award); Strong, *Two Bodies Collide*, *supra* note 10 (citing various state statutory provisions for arbitration).

[266] This involves the question of limited arbitrability and is discussed at length by the author elsewhere. *See* Strong, *Two Bodies Collide*, *supra* note 10.

[267] *See* Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 449 (2006); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1976); Spahr v. Secco, 330 F.3d 1266, 1268–69, 1273 (10th Cir. 2003); Regions Bank v. Britt, No. 4:09CV61TSL-LRA, 2009 WL 3766490, at *2 n.2 (S.D. Miss. Nov. 10, 2009); Wetzmann Inst. of Sci. v. Neschis, 421 F. Supp. 2d 654, 660, 665, 667–68, 674–83, 680 n.28 (S.D.N.Y. 2005); BORN, ICA, *supra* note 4, at 359–91, 767; HESS ET AL., *supra* note 105; LEW ET AL., *supra* note 26, ¶¶ 6-9 to 6-22; Wüstemann, *supra* note 3, at 45–46 (discussing forced heirship); Horton, *supra* note 1, at 1064-65; Katzen, *supra* note 14, at 123–24; Spitko, *supra* note 20, at 303; Strong, *Two Bodies Collide*, *supra* note 10 (discussing elective shares).

[268] *See* ICC Model Trust Clause, *supra* note 32.

[269] *See id.*

[270] *See id.*

[271] *See* Horton, *supra* note 1, at 1036; *see also* Janin, *supra* note 6, at 529.

[272] *See* HAYTON ET AL., *supra* note 74, ¶ 56.11; Strong, *Procedures*, *supra* note 31.

[273] Some potential parties may not initially wish to participate in certain proceedings but may later decide to join or be required to join in the arbitration. *See* Life Receivables Trust v. Syndicate 102 at Lloyd's of London, 549 F.3d 210, 218 (2d Cir. 2008).

[274] *See id.*; Weizmann Inst. of Sci. v. Neschis, 421 F. Supp. 2d 654, 668, 678 (S.D.N.Y. 2005) (discussing intervenors in a Liechtenstein arbitration and noting they were given "full

preferable, both for the parties' benefit and as a means of increasing the likely enforceability of the various provisions, since courts may be more inclined to enforce arbitration agreements or awards when the arbitral procedures are identified well in advance of the arbitration.[275]

Unlike the AAA, which does not make any special provision in this regard, the ICC takes the view that a party to a trust dispute may join the arbitration at any time, subject only to a prima facie review of the reasonableness of the request by the ICC Court and, ultimately, the discretion of the arbitral tribunal.[276] The ICC is somewhat vague as to the standard to be used in deciding whether joinder is proper, stating only that "all relevant circumstances, including, but not limited to, the provisions of the trust and the stage of the proceedings," are to be taken into account.[277] Although this language does not provide a great deal of guidance, it is likely that no more definite standard can be established at this point, given the diversity of types of trust disputes that can arise.

IV. CONCLUSION

Hostile trust litigation is becoming increasingly common, leading many settlors and trustees to inquire about the use of arbitration as a means of avoiding lengthy and expensive court battles.[278] Trust law specialists therefore need to be aware not only of the extent to which mandatory arbitration provisions in trusts are enforceable in a particular jurisdiction (a situation that is changing rapidly), but also how best to draft an enforceable arbitration provision, given the unique challenges in this area of law. As it turns out, there are a number of ways that settlors can increase the enforceability of an arbitration provision found in a trust through the use of proper language.

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party status"); *In re* Ismailoff, No. 342207, 2007 WL 431024, at *4 (N.Y. Sur. Ct. Nassau County Feb. 1, 2007) (concerning a late-joining party who was allowed to choose the side with which she intended to align herself).

[275] This is one of the reasons why parties prefer institutional arbitration. *See* LEW ET AL., *supra* note 26, ¶ 3-20.

[276] *See* AAA Model Trust Clause, *supra* note 30; ICC Model Trust Clause, *supra* note 32. The ICC Court is distinct from the arbitral tribunal and primarily exercises a supervisory role over certain administrative issues. *See* W. LAURENCE CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION § 2.03 (2000).

[277] ICC Model Trust Clause, *supra* note 32.

[278] *See* Wüstemann, *supra* note 3, at 40–41; Cohen & Staff, *supra* note 2, at 203.

Experts suggest that drafting parties begin with a well-known model clause provided by a reputable arbitral institution,[279] and the AAA and ICC Model Trust Clauses provide two good starting points in this regard.[280] Although both provisions have their strong points, the ICC Model Trust Clause appears to do a somewhat better job of addressing the unique challenges relating to trust arbitration.[281] While some further improvements could still be made, parties would therefore be advised to look to the ICC Model Trust Clause as a paradigm of best practices in drafting an arbitral provision in a trust.[282] Furthermore, it is entirely possible for settlors to pick the best aspects of the AAA and the ICC model clauses and combine them.[283]

Although there are those who strongly oppose mandatory arbitration of trust disputes, increased use of arbitration provisions in trusts appears inevitable.[284] As a result, settlors should not shy away from adopting arbitration provisions in appropriate cases but should instead focus on identifying and adopting proper language so as to maximize the likelihood of those provisions being upheld by a court. Indeed, as this Article has shown, there are numerous ways that a well-informed drafter can increase the enforceability of an arbitral provision found in a trust, thus satisfying the wishes of both clients and courts.

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[279] *See* BORN, DRAFTING, *supra* note 11.

[280] *See* AAA Model Trust Clause, *supra* note 30; ICC Model Trust Clause, *supra* note 32. Another model clause that might prove useful was drafted by the German Institution of Arbitration (Deutsche Institution für Schiedsgerichtsbarkeit or DIS) for use in certain types of internal shareholder disputes. The clause invokes arbitration under the DIS Supplementary Rules for Corporate Law Disputes (DIS Supplementary Rules) and states that "[t]he corporation shall always raise the existing arbitration agreement as defence against any claim that is filed in the ordinary courts of law and that relates to disputes" within the meaning of the arbitration agreement. DIS Supplementary Rules for Corporate Law Disputes, Deutsche Institution für Schiedsgerichtsbarkeit (September 15, 2009), http://www.dis-arb.de/en/16/rules/dis-supplementary-rules-for-corporate-law-disputes-09-srcold-id15; Strong, *Procedures*, *supra* note 31 (discussing reasons why DIS Supplementary Rules are persuasive in trust arbitration). Settlors to trust disputes might do well to emulate this language so as to require trustees to move to compel arbitration as a defensive mechanism.

[281] *See* ICC Model Trust Clause, *supra* note 32.

[282] *See id.*

[283] *See* AAA Model Trust Clause, *supra* note 30; ICC Model Trust Clause, *supra* note 32. As always, care must be taken whenever a drafting party deviates from established language, since errors can creep into the arbitral provision during the revision process. *See* BORN, DRAFTING, *supra* note 11, at 40–42.

[284] *See* Strong, *Two Bodies Collide*, *supra* note 10.