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Mandatory Arbitration of Internal Trust Disputes:
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S.I. Strong*

I. INTRODUCTION

Contemporary commercial practice often views trusts and their civil law equivalents, typically referred to as foundations or associations,¹ as the functional equivalents of corporations and other business associations, at least in a number of important regards.² As a result, many lawyers

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¹ Although trusts developed historically as a common law device, civil law jurisdictions are becoming increasingly involved in this field, either because they are developing their own domestic forms of trusts or because they are being asked to recognize trusts formed in common law countries. See Henry Christensen III, *Foreign Trusts and Alternative Vehicles*, 1902 PLI/CORP. 323, §4 (Aug. 18-19, 2011); Adair Dyer, *International Recognition and Adoption of Trusts: The Influence of the Hague Convention*, 32 VAND. J. TRANSNAT'L L. 989 (1999); Dante Figueroa, *Civil Law Trusts in Latin America: Is the Lack of Trusts an Impediment for Expanding Business Opportunities in Latin America?* 24 ARIZ. J. INT'L & COMP. L. 701, 703-07, 721-51 (2007); Frances H. Foster, *American Trust Law in a Chinese Mirror*, 94 MINN. L. REV. 602, 637-50 (2010); Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. REV. 434, 437-45 (1998); John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 YALE L.J. 165, 186 (1997) [hereinafter Langbein, *Commercial Trusts*]; John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 629, 632-43, 669-71 (1995) [hereinafter Langbein, *Contractarian*]; Maurizio Luponi, *The Civil Law Trust*, 32 VAND. J. TRANSNAT'L L. 967, 970-73 (1999); Julien Perrin, *The Recognition of Trusts and Their Use in Estate Planning Under Continental Laws*, 10 Y.B. PRIV. INT'L L. 629, 630 (2008); Steven L. Schwarcz, *Commercial Trusts as Business Organizations: An Invitation to Comparativists*, 13 DUKE J. COMP. & INT'L L. 321, 322 (2003). For ease of discussion, the term "trust" will be used to refer to all of these devices, unless otherwise indicated.

² See Hansmann & Mattei, *supra* note 1, at 434; Langbein, *Contractarian*, *supra* note 1, at 631; Paul B. Miller, *The Future for Business Trusts: A Comparative Analysis of Canadian and American Uniform Legislation*, 36 QUEEN'S L.J. 443, 452-55, 474-78, 482, 499 (2011); A. Joseph Warburton, *Trusts Versus Corporations: An Empirical Analysis of Competing Organizational Forms*, 36 J. CORP. L. 183, 188 (2010).

consider trust arbitration to be just another variant of commercial arbitration, a belief that is strengthened by the number of trusts that regularly appear as parties in arbitrations all over the world.³ Indeed, some of the most highly publicized cases to arise in international commercial arbitration in recent years have involved trusts.⁴

Although these matters gained a great deal of notoriety, none of the issues turned on the fact that one of the parties was a trust. Indeed, the irrelevance of the trust form to the arbitral proceedings would seem to reinforce the notion that trust-related arbitration is not in any way special.

Such a conclusion would be deeply misguided. In fact, the reason that these proceedings did not appear to be significantly different than standard commercial arbitrations is that they did not really constitute “trust disputes” *per se*, arising, as they did, out of contractual relationships between trusts and unrelated third parties, and thus involving matters entirely external to the trusts themselves. However, external third party disputes are not the only kind of trust-related controversy to arise, nor indeed are they the most common. Instead, “[m]ost trust disputes are internal disputes”⁵ that address matters relating to the inner workings of the trust and involve conflicts between some or all of the various parties to the trust, including trustees, protectors

³ See *The Trustees of the Edmond Stern Settlement v. Levy*, [2009] EWHC 14 (TCC), ¶¶1-2; *Laughton v. CGI Tech. & Sol’ns, Inc.*, 602 F. Supp. 2d 262, 263-64 (D. Mass. 2009); *Delaney Elec. Co., Inc. v. Schiessle*, 601 N.E. 2d 978, 980 (Ill. App. Ct. 1992); *United States Trust Co., N.A. v. Cavalieri*, No. HHDCV070513653S, 2008 WL 1822721, at *1 (Conn. Super. Apr. 1, 2008).

⁴ See *Dallah Real Estate & Tourism Holding Co. v. Pakistan*, [2010] UKSC 46, ¶¶1-2, 7 (Lord Mance); *Fili Shipping Co. Ltd. Premium Nafta Products Ltd.*, [2007] UKHL 40 ¶¶3-5 (Lord Hoffman), on appeal from *Fiona Trust & Holding Corp. v. Privalov* [2007] 1 All E.R. (Comm.) 891.

⁵ Michael Hwang, *Arbitration of Trust Disputes*, in *GUIDE TO THE WORLD’S LEADING EXPERTS IN COMMERCIAL ARBITRATION* 83, 83 (2009). Different commentators define internal and external trust disputes differently. See Paul Buckle & Carey Olsen, *Trust Disputes and ADR*, 14 *TR. & TRUSTEES* 649, 651 (2008); Tina Wüstemann, *Arbitration of Trust Disputes*, in *NEW DEVELOPMENTS IN INTERNATIONAL COMMERCIAL ARBITRATION 2007*, 33, 38 (Christoph Müller ed., 2007).

and/or beneficiaries.⁶ These types of proceedings are much more problematic as a matter of arbitration law and procedure, and it is these types of disputes that are the subject of this Article.

One of the major difficulties associated with arbitration of internal trust disputes involves the mechanism by which such matters can be made subject to a pre-dispute arbitration agreement.⁷ Thus far, the only plausible means of doing so has been to place an arbitration provision in the trust itself.⁸ However, a number of objections have been raised in response to this practice.⁹ While matters relating to the jurisprudential propriety of mandatory trust arbitration have been discussed at length in the legal literature,¹⁰ one issue that has been largely

⁶ See DAVID HAYTON ET AL., UNDERHILL AND HAYTON LAW RELATING TO TRUSTS AND TRUSTEES ¶¶8.157-8.167 (18th ed. 2010); Langbein, *Contractarian*, *supra* note 1, at 664; Wüstemann, *supra* note 5, at 36.

⁷ Pre-dispute agreements in the trust context are preferable to post-dispute agreements for the same reasons that apply outside the trust realm. However, post-dispute agreements regarding internal trust concerns are largely uncontroversial in a number of jurisdictions because those statutes have enacted statutes giving trustees the power to enter into nonjudicial means of dispute resolution. See Trustee Act 1925, §15(f), *as amended by* Trustee Act 2000, *available at* <http://www.legislation.gov.uk/ukpga/Geo5/15-16/19>; Idaho Code Ann. §§15-8-101, 15-8-103 (2011); Wash. Rev. Code §§11.96A.010, 11.96A.030 (2012); National Conference of Commissioners on Uniform State Laws (NCCUSL), Uniform Trust Code (2000), §§111, 816(23), last revised or amended in 2005, *available at* <http://www.law.upenn.edu/bll/archives/ulc/uta/2005final.htm> [hereinafter UTC].

⁸ Interestingly, efforts to include arbitration provisions in trusts are somewhat analogous to efforts to include arbitration provisions in the charter or by-laws of corporations as a means of requiring the arbitration of internal shareholder disputes. See Christian Borris, *Arbitrability of Corporate Law Disputes in Germany*, in ONDERNEMING EN ADR 55 (C.J.M. Klaassen et al., eds., 2011); Olivier Caprasse, *Objective Arbitrability of Corporate Disputes – Belgium and France*, in ONDERNEMING EN ADR, *supra*, at 79; Gerard Meijer & Josefina Guzman, *The International Recognition of an Arbitration Clause in the Articles of Association of a Company*, in ONDERNEMING EN ADR, *supra*, at 117; S.I. Strong, *Arbitration of Trust Law Disputes: Two Bodies of Law Collide*, 45 VAND. TRANSNAT'L L. REV. __ (forthcoming 2012) [hereinafter Strong, *Two Bodies Collide*].

⁹ For example, some states require an arbitration provision to either be or be contained within a contract, and a trust may not be considered a contract *per se*. See *Rachal v. Reitz*, 347 S.W.3d 305, 309 (Tex. Ct. App. 2011), *petition for review filed* Sept. 8, 2011; *Diaz v. Bukey*, 125 Cal. Rptr. 3d 610, 612-13 (Cal. Ct. App. 2011), *petition for review granted*, 257 P.3d 1129 (2011). *But see* *New South Federal Savings 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 Strong, *Two Bodies Collide*, *supra* note 8.

¹⁰ See American College of Trust and Estate Counsel (ACTEC), Arbitration Task Force Report 34-42 (Sept. 2006), *available at* <http://www.mnbar.org/sections/probate-trust/ACTEC%20Arbitration%20Task%20Force%20Report-2006.pdf>; Buckle & Olsen, *supra* note 5, at

ignored involves the question of whether arbitration can provide the kind of procedures that are necessary to the proper resolution of internal trust disputes.

This lack of attention is problematic given that internal trust controversies give rise to a multitude of procedural challenges that are seldom, if ever, seen in other contexts. For example, trust disputes not only proceed *in rem*, such that an award will be binding on “all persons having adequate notice, whether or not they actually participate in the proceeding,”¹¹ but can also involve parties who are unascertained, unborn or legally incompetent at the time the dispute arises.¹² Parties to trusts may also require assistance with certain trust-related procedures known as judicial instruction and accounting that bear little resemblance to “normal” types of arbitration.¹³

It is unclear why the arbitral community has not yet considered these issues in any detail.¹⁴ To some extent, it may be that the traditional isolation of trust law has meant that few

655; Lawrence Cohen & Joanna Poole, *Trust Arbitration – Is It Desirable and Does it Work?* 18 TR. & TRUSTEES __ (2012); Lawrence Cohen & Marcus Staff, *The Arbitration of Trust Disputes*, 7 J. INT’L TR. & CORP. PLAN. 203, 210 (1999); David Fox, *Non-excludable Trustee Duties*, 17 TR. & TRUSTEES 17, 25 (2011); David Horton, *The Federal Arbitration Act and Testamentary Instruments*, 90 N.C. L. REV. __, *54 (forthcoming 2012); Charles Lloyd & Jonathan Pratt, *Trust in Arbitration*, 12 TR. & TRUSTEES 18, 18 (2006); Bridget A. Logstrom, *Arbitration in Estate and Trust Disputes: Friend or Foe?* 30 AM. COLL. TR. & ESTATES COUNS. J. 266, 266-68 (2005); 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 (2009); Stephen Wills Murphy, *Enforceable Arbitration Clauses in Wills and Trusts: A Critique*, 26 OHIO ST. J. DISP. RES. 627, 630 (2011); E. Gary Spitko, *Gone But Not Conforming: Protecting the Abhorrent Testator Form Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES. L. REV. 275, 277 (1999); Strong, *Two Bodies Collide*, *supra* note 8; Tina Wüstemann, *Anglo-Saxon Trusts and (Swiss) Arbitration: Alternative to Trust Litigation?* TR. & TRUSTEES __ (2012); Wüstemann, *supra* note 5, at 55-56.

¹¹ Blaine Covington Janin, Comment, *The Validity of Arbitration Provisions in Trust Instruments*, 55 CAL. L. REV. 521, 529 (1967); *see also* Horton, *supra* note 10, at *9; Anna di Robilant, *The Virtues of Common Ownership*, 91 B.U. L. REV. 1359, 1360, 1368 (2011).

¹² For examples of how these issues might arise in practice, see *infra* notes 206-08, 211 and accompanying text.

¹³ *See* Langbein, *Contractarian*, *supra* note 1, at 662.

¹⁴ Virtually all analysis of trust arbitration has been conducted by experts in trust law and published in specialty journals for the trust industry.

specialists in arbitration were experienced enough in trust law to undertake this kind of analysis.¹⁵ Alternatively, it may be because the arbitral community does not believe that existing arbitral procedures need any amendment. Indeed, that was the conclusion reached several years ago by a working group formed by the International Chamber of Commerce (ICC) to consider whether the ICC should adopt any new procedures for use in trust disputes.¹⁶ However, the American Arbitration Association (AAA) has arrived at precisely the opposite conclusion, creating a dedicated set of rules – the AAA Wills and Trusts Arbitration Rules (AAA Trust Arbitration Rules) – especially for use in trust disputes.¹⁷

This lack of consensus regarding the possible need for special procedures for trust disputes suggests that an in-depth analysis of trust arbitration is long overdue.¹⁸ This Article therefore aims to fill this gap in the legal literature by identifying the unique attributes of trust disputes that create difficulties in arbitration; considering whether those difficulties require the

¹⁵ See WILLIAM M. MCGOVERN ET AL., *WILLS, TRUSTS AND ESTATES: INCLUDING TAXATION AND FUTURE INTERESTS* 626 (2010).

¹⁶ See ICC Arbitration Clause for Trust Disputes, 19 ICC BULL. 9, Explanatory Notes 4-6 (2008) [hereinafter ICC Model Trust Clause], available on http://www.iccdri.com/CODE/LevelThree.asp?page=Commission%20Reports&tocxml=ltoc_CommReptsAll.xml&tocxsl=DoubleToc.xsl&contentxml=CR_0035.xml&contentxsl=arbSingle.xsl&L1=Commission%20Reports&L2=&Locator=9&AUTH=&nb=10. The working group decided that it was sufficient to draft a new model clause. See *id.*; see also Christopher P. Koch, *A Tale of Two Cities! – Arbitrating Trust Disputes and the ICC’s Arbitration Clause for Trust Disputes*, 2 Y.B. INT’L ARB. __ (2012); S.I. Strong, *Empowering Settlers: How Proper Language Can Increase the Enforceability of a Mandatory Arbitration Provision in a Trust*, 47 REAL PROP., TR. & EST. L.J. __ (forthcoming 2012) [hereinafter Strong, Language].

¹⁷ See AAA Wills and Trusts Arbitration Rules, effective 1 June 2009 [hereinafter AAA Trust Arbitration Rules], available at http://www.adr.org/aaa/faces/rules/searchrules/rulesdetail?doc=ADRSTG_004135&_afLoop=61313946326739&_afWindowMode=0&_afWindowId=11ysgf10nw_108#%40%3F_afWindowId%3D11ysgf10nw_108%26_afLoop%3D61313946326739%26doc%3DADRSTG_004135%26_afWindowMode%3D0%26_adf.ctrl-state%3D11ysgf10nw_160.

¹⁸ Interestingly, although the AAA Trust Arbitration Rules have been in existence since 2003 and are the only set of procedures targeted specifically toward trust disputes, they are not very well known in either the trust industry or the arbitral community. Indeed, only a few references have ever been made to the AAA Trust Arbitration Rules in the legal literature, and then only in passing. See Horton, *supra* note 10, at *7; Erin Katzen, *Arbitration Clauses in Wills and Trusts: Defining the Parameters for Mandatory Arbitration of Wills and Trusts*, 24 QUINNIPIAC PROB. L. J. 118, 130-32 (2011).

adoption of any special procedural mechanisms; describing what those procedures might entail; and evaluating the extent to which the AAA Trust Arbitration Rules incorporate any of the procedural innovations suggested in the course of the discussion.

The discussion proceeds as follows. First, Section II provides a basic introduction to trusts and outlines the importance of this area of law to commercial lawyers and arbitral specialists. This discussion is necessary to set later analyses in context.

Next, Section III describes some of the more unique types of disputes arising out of the inner workings of trusts. While this discussion has the benefit of familiarizing non-specialists with some of the unique challenges associated with trust law, this section also begins to grapple with a number of the more salient legal issues by considering the extent to which these various types of internal trust disputes are arbitrable. This section also introduces the various ways that states deal with trust arbitration, ranging from explicit and precisely drawn legislation to statutory silence.

Section IV considers various procedural problems associated with mandatory trust arbitration and the extent to which those issues can be resolved through adoption of specific arbitral procedures. The discussion here focuses on three basic concerns – arbitrability, impermissible ouster of the courts and proper representation of the parties – that seem particularly sensitive to changes in arbitral procedure.

Next, Section V introduces the AAA Trust Arbitration Rules and analyzes their effectiveness in light of the procedural issues raised in Section IV. This section also considers a second set of specialized arbitral rules – the German Institution of Arbitration (Deutsche Institution für Schiedsgerichtsbarkeit or DIS) Supplementary Rules for Corporate Law Disputes (DIS Supplementary Rules) – to see whether any of those procedures would be applicable to

trust arbitration.¹⁹ Although the DIS Supplementary Rules do not apply to trusts, there are a number of similarities between arbitration of internal trust disputes and arbitration of internal shareholder disputes that make the DIS Supplementary Rules relevant to this discussion. Furthermore, the approach used by the DIS varies significantly from that adopted by the AAA, which allows for productive comparative analysis.

Finally, Section VI pulls the various strands of discussion together and concludes the Article with some closing observations. In so doing, the text offers some practical advice to those involved in drafting procedures in this area of practice.

Before beginning, it is important to describe the parameters of the current analysis. First, this discussion will not, for the most part, attempt to differentiate between commercial and other types of trusts. This is not because these distinctions are not important, for they very well may be.²⁰ Indeed, some jurisdictions treat business trusts as more akin to corporations than to trusts, at least in certain contexts,²¹ and it may be that commercial trusts could or should be considered more amenable to mandatory trust arbitration than other kinds of trusts.²² However, scholarly and judicial analysis has not yet begun to distinguish between the two devices, and proper consideration of this matter would be beyond the scope of the current Article. Therefore, these distinctions are for the most part excluded, although some relevant observations are made from time to time.

¹⁹ See DIS Supplementary Rules for Corporate Law Disputes, effective 15 September 2009, available at http://www.dis-arb.de/download/DIS_SRCoLD_%202009_Download.pdf [hereinafter DIS Supplementary Rules].

²⁰ See Fox, *supra* note 10, at 26; Steven L. Schwarcz, *Fiduciaries With Conflicting Obligations*, 94 MINN. L. REV. 1867, 1870, 1877-78 (2010). But see Robert Flannigan, *Business Applications of the Express Trust*, 36 ALBERTA L. REV. 630, 630-31 (1998).

²¹ See Christensen, *supra* note 1, §2 (noting that in the U.S., “[b]usiness trusts, although trusts for property law purposes, are taxed as corporations because they conduct a business”); see also HAYTON ET AL., *supra* note 6, ¶1.133 (noting that beneficiaries of commercial trusts in England may be treated differently than beneficiaries of private family trusts).

²² See Strong, *Two Bodies Collide*, *supra* note 8.

Second, trusts operate in an increasingly globalized context, requiring this Article to adopt a similarly international and comparative approach to the issues presented herein. Particular emphasis is placed on English and U.S. law as they relate to both trusts and arbitration. However, this Article is not intended to present a comprehensive comparative analysis of the two jurisdictions. Instead, the aim is simply to use the two legal systems as exemplars of the various issues that can arise in this area of law.²³ Thus, legal developments from several other countries will also be discussed as appropriate.

Having laid the foundation for further discussion, the analysis begins with an introduction to the various types of trusts used today.

II. WHAT IS A TRUST?

Trusts play a large and growing role in the international economy, making trust arbitration a matter of increasing relevance to commercial practitioners. Not only do trust vehicles hold trillions of dollars worth of assets and generate billions of dollars worth of annual income, but administrators and trustees earn similarly massive amounts in fees each year.²⁴ Indeed, the vast majority of trusts operating today are commercial rather than personal in nature, putting to rest the notion that trusts are primarily used as “mere” estate planning devices.²⁵ Furthermore, trusts

²³ These two countries have been chosen for several reasons. First, England and the United States are leaders in both trust and arbitration law. As such, the principles developed in these two nations have persuasive effect elsewhere in the world. Second, much of the most probing scholarly analysis of mandatory trust arbitration comes from England, although some of the best judicial discussions of mandatory trust arbitration come from the United States. Since lessons can be learned from both sources, both are included. Finally, the author is qualified as a solicitor in England as well as an attorney in the United States and has first-hand practical experience in both jurisdictions.

²⁴ See Horton, *supra* note 10, at *22 (noting irrevocable trusts in the United States “generated \$188 billion in income and \$4.7 billion in trustees’ fees” in 2008 alone); Langbein, *Commercial Trusts*, *supra* note 1, at 177-78 (estimating in 1997 that commercial trusts held assets in the range of \$11.6 trillion, with non-commercial trusts holding an additional \$672 billion in assets, conservatively estimated).

²⁵ See Langbein, *Commercial Trusts*, *supra* note 1, at 166.

can no longer be considered purely domestic mechanisms, since favorable tax laws in various off-shore jurisdictions are making international trusts increasingly attractive and popular.²⁶

As the use of trusts has grown, so, too, has the amount of hostile trust litigation proceeding around the world, so much so that such suits are said to be reaching “near epidemic” levels.²⁷ Unsurprisingly, this level of litigation has led many settlors and trustees²⁸ to express an interest in arbitration as a means of limiting extensive litigation costs.²⁹

However, arbitration of internal trust disputes is not as simple as arbitration of other sorts of commercial matters, since trust law retains a variety of substantive and procedural characteristics not seen in other areas of law.³⁰ Notably, many arbitration or commercial practitioners may not even be aware of these special attributes, since most lawyers’ only exposure to trusts was in law school (and then solely in the context of testamentary or estate planning),³¹ if they even studied it at all.³² Given this likely lack of familiarity with trusts, it is

²⁶ See Wüstemann, *supra* note 5, at 33-34.

²⁷ Cohen & Staff, *supra* note 10, at 203; see also 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); Wüstemann, *supra* note 5, at 33-34.

²⁸ Many settlors and trustees are often sophisticated commercial actors in their own right, since numerous trusts rely on professional trustees drawn from the ranks of national and international financial institutions. See Wüstemann, *supra* note 5, at 41.

²⁹ See *id.*; see also 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 10, at *3; Katzen, *supra* note 18, at 118-19; Janin, *supra* note 11, at 521.

³⁰ This is due in part to the historic allocation of trust-related matters to special probate or chancery courts, a distinction which continues in some jurisdictions to this day. See MCGOVERN ET AL., *supra* note 15, at 626.

³¹ See Langbein, *Commercial Trusts*, *supra* note 1, at 165.

³² Most civil law lawyers never had the opportunity to study trusts, since trusts developed as creatures of the common law and are still primarily associated with that legal tradition. See *supra* note 1.

useful to provide a very brief introduction to the device so as to lay a foundation for discussions regarding arbitration of these unique legal mechanisms.³³

(a) *What is a Trust*

The device now known as a trust originally developed in medieval England as a means of safeguarding and transferring wealth.³⁴ Although trusts have changed greatly over the years in both their uses and forms, some factors have remained constant, including the elements necessary to establish a trust.³⁵

Precise requirements associated with establishing a trust vary according to national law. However, one internationally recognized set of criteria can be found in the Hague Convention on the Law Applicable to Trusts and on Their Recognition (Hague Convention on Trusts), which states that:

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

A trust has the following characteristics –

- a) the assets constitute a separate fund and are not a part of the trustee’s own estate;
- b) title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee;
- c) the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance

³³ More detailed reading on trusts and their civil law equivalents exists elsewhere. See HAYTON ET AL., *supra* note 6 (discussing English trusts); MCGOVERN ET AL., *supra* note 15 (discussing U.S. trusts); Christensen et al., *supra* note 1 (discussing civil law equivalents of trusts).

³⁴ See Langbein, Contractarian, *supra* note 1, at 632-43, 669-71.

³⁵ See *id.*; see also HAYTON ET AL., *supra* note 6, ¶1.95; MCGOVERN ET AL., *supra* note 15, at 369 (noting that “[t]he word ‘trust’ is used for many property arrangements which have little in common with each other apart from the fact that they were historically enforced in . . . the court of Equity”).

with the terms of the trust and the special duties imposed upon him by law.

The reservation by the settlor of certain rights and powers, and the fact that the trustee may himself have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust.³⁶

Thus, the three most important persons in a trust relationship are the settlor (also called the donor), who creates and funds the trust; the trustee, who holds legal title to the property, though only for the benefit of the beneficiary; and the beneficiary, who holds equitable title to the property and receive the benefits of the trust.³⁷ There may be more than one person in each role (for example, there may be multiple settlors, multiple trustees and/or multiple beneficiaries), and in some cases, the same person may act in multiple roles (for example, a settlor may also be a trustee, and a trustee may also be a beneficiary). The variety of potential parties means that most internal trust disputes can or will involve more than two participants, which has led some trust law practitioners to question whether arbitration is capable of handling the special procedural challenges that are sure to arise in this area of law.³⁸

Historically, trusts were typically established to protect property from creditors, a use which continues to this day.³⁹ Trusts were also created as a means of ensuring competent administration of funds in cases where the beneficiary might be incapable of acting on his or her

³⁶ See Convention on the Law Applicable to Trusts and on Their Recognition, art. 2, 1 July 1985, 23 I.L.M. 1389 (1984) [hereinafter Hague Convention on Trusts]; see also HAYTON ET AL., *supra* note 6, ¶8.1; MCGOVERN ET AL., *supra* note 15, at 374-81; Perrin, *supra* note 1, at 634-36.

³⁷ See MCGOVERN ET AL., *supra* note 15, at 370; Langbein, Contractarian, *supra* note 1, at 632. Some trusts also provide for “protectors” (also known as “enforcers”), though typically only in situations where the settlor wishes to establish an extra layer of protection regarding the administration of the trust. See HAYTON ET AL., *supra* note 6, ¶¶8.157-8.167; Langbein, Contractarian, *supra* note 1, at 664; Wüstemann, *supra* note 5, at 36.

³⁸ See Horton, *supra* note 10, at *9; Janin, *supra* note 11, at 529; Wüstemann, *supra* note 5, at 53-54.

³⁹ See Langbein, Contractarian, *supra* note 1, at 640-43. However, creditors of the settlor may be able to reach trust funds if the settlor has attempted to use the trust form to defraud creditors or cheat a spouse or child of a statutory share at death. See HAYTON ET AL., *supra* note 6, ¶¶7.1(2), 8.252-8.53; MCGOVERN ET AL., *supra* note 15, at 413-14, 656. Creditors of beneficiaries stand in a slightly different position, with many trusts being drafted in such a way that the trust assets cannot be reached. See *id.* at 417-20.

own behalf (as in cases involving a legal impediment, such as minority) or might lack the necessary qualities to act prudently (as in cases involving persons who were financially unsophisticated or had a tendency toward profligacy).⁴⁰

(b) *Types of Trusts*

Trusts exist in a wide variety of forms. All express trusts can be categorized as (1) either a living trust (also known as an *inter vivos* trust) or a testamentary trust, and (2) either a revocable trust or an irrevocable trust.⁴¹ Beyond that, trusts are typically defined by their purpose. Many trusts (such as dynasty trusts, marital trusts or family trusts) are meant to pass on wealth within a family, with the quintessential example being a trust created by a parent to benefit a child either before or after the parent's death.⁴² However, trusts serve other purposes as well. For example, some trusts are created entirely for charitable purposes⁴³ while others, such as asset protection trusts or credit shelter trusts, appear to focus primarily on deterring potential creditors from reaching trust assets or garnering various tax savings.⁴⁴ Although most trusts are created intentionally ("express trusts"), trusts may also be created by statute or by operation of law.⁴⁵

Although family planning trusts are perhaps the most well-known type of trust in existence today, they are not the most common. Instead, "well over 90% of the money held in

⁴⁰ See HAYTON ET AL., *supra* note 6, ¶¶11.1, 11.77-11.78; MCGOVERN ET AL., *supra* note 15, at 389, 417-20.

⁴¹ A living or *inter vivos* trust comes into effect during the lifetime of the settlor, whereas a testamentary trust comes into effect only after the death of the settlor. Revocable trusts may be changed or terminated by the settlor, whereas irrevocable trusts may not. Thus, only living trusts may be revocable.

⁴² See MCGOVERN ET AL., *supra* note 15, at 369-70; Langbein, *Commercial Trusts*, *supra* note 1, at 165.

⁴³ Charitable trusts are often subject to slightly different rules than private trusts. See MCGOVERN ET AL., *supra* note 15, at 436-50.

⁴⁴ See *id.* at 369-70.

⁴⁵ Trusts created as a matter of law include resulting trusts, constructive trusts and trusts created through bankruptcy. See HAYTON ET AL., *supra* note 6, ¶¶3.1-3.11; MCGOVERN ET AL., *supra* note 15, at 369-70. These trusts are not amenable to arbitration for various reasons and therefore are not discussed in the current Article.

trust in the United States” in recent years has been held “in commercial trusts as opposed to personal trusts.”⁴⁶ Commercial trusts are not limited to the United States, but have become increasingly popular in other jurisdictions as well.⁴⁷ Indeed, numerous commentators have noted that “the role of trusts in intrafamily wealth transfers is today ‘relatively trivial,’” particularly when compared to the “enormously important” role of trusts in the business context.⁴⁸

A commercial trust (also known as a business trust) can be defined as “a trust that implements bargained-for exchange, in contrast to a donative transfer,”⁴⁹ which would be the primary motivation for a trust created to pass on family wealth. Some, but not all, commercial or business trusts are created by statute.⁵⁰

Commercial trusts are created for a variety of reasons. Some of these rationales are largely similar to those involving trusts in other contexts and thus suggest that commercial and non-commercial trusts should be treated similarly in most, if not all, regards. For example, both business and non-business trusts provide protection from insolvency and some forms of taxation while also creating a fiduciary regime that requires the application of fiduciary duties such as loyalty and prudence.⁵¹

⁴⁶ Langbein, Commercial Trusts, *supra* note 1, at 166-67, 178 (citing figures from mid- to late-1990s).

⁴⁷ *See id.* at 166; *see also* HAYTON ET AL., *supra* note 6, ¶¶1.97-1.138; Figueroa, *supra* note 1, at 740-51; Flannigan, *supra* note 20, at 630-31; Hansmann & Mattei, *supra* note 1, at 434; Langbein, Contractarian, *supra* note 1, at 630-31.

⁴⁸ Christensen, *supra* note 1, §1 (quoting Hansmann and Mattei).

⁴⁹ Langbein, Commercial Trusts, *supra* note 1, at 166-67; *see* HAYTON ET AL., *supra* note 6, ¶¶1.100-1.138.

⁵⁰ *See* NCCUSL, Uniform Statutory Trust Entity Act, Prefatory Note, approved July 9-16, 2009 [hereinafter Uniform Statutory Trust Entity Act], *available at* <http://www.law.upenn.edu/blj/archives/ulc/ubta/2009final.htm>; *see also* Robert J. D’Agostino, *The Business Trust and Bankruptcy Remoteness*, 2011 ANN. SURVEY OF BANKR. L. 4 (2011).

⁵¹ *See* Langbein, Commercial Trusts, *supra* note 1, at 179-83, 189.

However, business trusts also have purposes that are entirely unique to the commercial realm.⁵² For example, parties to commercial trusts often take advantage of the structural flexibility inherent in trusts and create relationships or procedures that might be difficult or impossible to achieve as a matter of corporate law, particularly with respect to “matters of internal governance and . . . the creation of beneficial interests.”⁵³ “Transaction planners designing asset securitization trusts especially welcome the freedom to carve beneficial interests without regard to traditional classes of corporate shares,” creating a wide range of “so-called tranches, each embodied in its own class of trust security.”⁵⁴

Interest in commercial trusts has grown exponentially in recent years due to the increased liberalization of laws regarding the use and creation of such devices as a matter of national and international law.⁵⁵ However, commercial trusts “are a woefully under-analyzed and underappreciated form of business organization,” despite their being “critically important” to

⁵² For this reason, some authorities exclude commercial trusts from standard trust law analyses. For example, the U.S. *Restatement of Trusts* excludes business trusts from consideration and focuses solely on trusts as donative devices. See *Restatement (Second) of Trusts*, §1 cmt. B (stating that “[a]lthough many of the rules applicable to trusts are applied to business trusts, yet many of the rules are not applied . . . The business trust is a special kind of business association and can best be dealt with in connection with other business associations”); see also David M. English, *Representing Trust and Estate Beneficiaries and Fiduciaries: The Uniform Trust Code*, SK089 ALI-ABA 191 IV (Feb. 10-11, 2005) (noting the Uniform Trust Code is not directed at commercial trusts but does not exclude them from consideration, either). However, “[n]either the text of the Restatement’s official comment, nor the reporter’s note, supplies any authority for [the Restatement’s] claim that ‘many of the rules’ of trust law do not apply to business uses of the trust.” Langbein, *Commercial Trusts*, *supra* note 1, at 166 n.6. Furthermore, courts often do not distinguish between the two. Indeed, no known judicial opinions or statutes dealing with mandatory trust arbitration differentiate between personal and commercial trusts. Therefore, this Article will not attempt to distinguish between the two types of trusts.

⁵³ Langbein, *Commercial Trusts*, *supra* note 1, at 183; see also HAYTON ET AL., *supra* note 6, ¶1.99; Langbein, *Contractarian*, *supra* note 1, at 659-63.

⁵⁴ Langbein, *Commercial Trusts*, *supra* note 1, at 183 (citation omitted). “A tranche is simply a slice of a deal, a payment stream whose expected return increases with its riskiness.” *Id.* at 183 n.109.

⁵⁵ See Uniform Statutory Trust Entity Act, *supra* note 50; Gerardo J. Bosques-Hernández, *Arbitration Clauses in Trusts: The U.S. Developments and a Comparative Perspective*, 3 REVISTA PARA EL ANALISIS DEL DERECHO (INDRET) 1, 20 (2008), available at http://www.indret.com/pdf/559_en.pdf; David M. English, *The Uniform Trust Code (2000)*, SL003 ALI-ABA 1 (July 21-22, 2005); Figueroa, *supra* note 1, at 721-39; Langbein, *Commercial Trusts*, *supra* note 1, at 187-88; Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 359-64 (2005).

various capital markets.⁵⁶ Indeed, many lawyers may be unaware of what constitutes a commercial trust *per se*. As such, it is useful to summarize some of the more common types of business trusts so as to be better able to consider the types of procedures that might be appropriate in arbitrations involving such devices. Notably, a number of commercial trusts have already resolved certain internal disputes pursuant to an arbitration provision found in the trust itself.⁵⁷

Several basic types of trusts are routinely used in commercial practice, although the precise shape of these devices varies according to national law.⁵⁸ Indeed, new forms of trusts are being developed for use in business settings all the time.⁵⁹ The following discussion does not attempt to identify all of these types of trusts, but simply provides an introduction to some of the various forms currently used in commercial practice.

The first and perhaps most important is the pension trust, which is a major commercial device in the United States and elsewhere.⁶⁰ These plans hold trillions of dollars worth of assets in the United States,⁶¹ with similarly significant amounts held in trust in other nations. Pension

⁵⁶ Miller, *supra* note 2, at 444.

⁵⁷ See *Municipality of San Juan v. Corporacion Para El Fomento Economico de la Ciudad Capital*, 597 F. Supp. 2d 247, 248-49 (D. Puerto Rico 2008) (enforcing a mandatory arbitration provision involving the rules of the International Centre for Dispute Resolution (ICDR)); *Robin v. Doran*, No. 392456, 2010 WL 728558, at *1 (Mass. Land Ct. Mar. 3, 2010) (involving mandatory arbitration provision in by-laws of a condominium trust).

⁵⁸ See HAYTON ET AL., *supra* note 6, ¶¶1.135, 1.138; Miller, *supra* note 2, at 447. For list of the various types of trusts recognized by the U.S. Internal Revenue Code, see Christensen, *supra* note 1, §2 (listing nineteen separate categories of trust).

⁵⁹ For example, New Zealand has recently developed the “trading trust,” which is distinguishable from unit or investment trusts. See Law Commission (New Zealand), *Court Jurisdiction, Trading Trusts and Other Issues: Review of the Law of Trusts: Fifth Issues Paper*, ¶¶6.1 to 6.5 (2011), available at http://www.lawcom.govt.nz/project/review-law-trusts?quicktabs_23=issues_paper.

⁶⁰ See HAYTON ET AL., *supra* note 6, ¶1.127; Bosques-Hernández, *supra* note 55, at 20; Langbein, *Commercial Trusts*, *supra* note 1, at 168-69.

⁶¹ See Langbein, *Commercial Trusts*, *supra* note 1, at 168-69 (noting in 1997 that private pension plans held assets in the realm of \$3 trillion, with state and federal plans for governmental employees holding an addition \$1.6 trillion in assets, primarily in trust form). While recent market vicissitudes have changed the amount held in private and public pension plans since the late 1990s, the amount in question is

trusts arise out of contracts of employment and provide employees with the ability to defer some of their compensation until retirement.⁶² Although such trusts include a private contribution element, the trusts themselves often reflect a statutory element. For example, in the United States, the Employee Retirement Income Security Act (ERISA) indicates that “all assets of an employee benefit plan shall be held in trust.”⁶³ The United Kingdom recognizes a related type of statutory trust known as the employee trust, which is not tied to retirement but which instead provides certain tax-related and other benefits to current employees.⁶⁴ Notably, there is evidence that internal disputes arising out of statutorily-created trusts in ERISA and related contexts have been made subject to arbitration, at least to a limited degree.⁶⁵

Another kind of commercial trust is the investment or unit trust.⁶⁶ These types of devices, which are often international in nature,⁶⁷ also hold a staggering amount of assets.⁶⁸

nevertheless vast. *See* Employee Benefit Research Institute, 30 Notes 1, 2 (April 2009), *available at* http://www.ebri.org/pdf/notespdf/EBRI_Notes_04-Apr09.PblcPnsPlns1.pdf.

⁶² *See* Langbein, Commercial Trusts, *supra* note 1, at 169. Although life insurance company separate accounts do not constitute pension trusts *per se*, they reflect certain similarities in form. *See id.* at 168 (noting a further \$900 billion held in these accounts in 1997).

⁶³ 29 U.S.C. §§1103 (2010).

⁶⁴ *See* Pensions Act 1995, §124, *available at* <http://www.legislation.gov.uk/ukpga/1995/26/contents/enacted>; HAYTON ET AL., *supra* note 6, ¶¶1.134, 43.1(1).

⁶⁵ *See* Hastings v. Wilson, 516 F.3d 1055, 1059 (8th Cir. 2008); Bortrager v. Central States, Southeast and Southwest 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. Tarvzian, 351 F.2d 889, 890-92 (1st Cir. 1965). Arbitration of disputes in this context are subject to special rules published by the AAA and the International Foundation of Employee Benefit Plans (IFEBC). *See* AAA/IFEBC Multiemployer Pension Plan Arbitration Rules for Withdrawal Liability, effective 1 Sept. 1986, *available at* <http://www.foreclosuremediationfl.adr.org/sp.asp?id=22108>; AAA/IFEBC Impartial Umpire Rules for Arbitration of Impasses Between Trustees of Joint Employee Benefit Trust Funds, effective 1 Jan. 1988, *available at* <http://www.foreclosuremediationfl.adr.org/sp.asp?id=22111>; Teamsters-Employers Local 945 Pension Fund v. Waste Management of New Jersey, Inc., No. 11-902 (FSH), 2011 WL 2173854, at *2 (D.N.J. 2 June 2011); I.L.G.W.U. Nat’l Retirement Fund v. Meredith Gray, Inc., 94 Fed. Appx. 850, 852 (2d Cir. 2003). The AAA/IFEBC rules do not appear to address the types of internal disputes under discussion in this Article and therefore will not be discussed herein.

⁶⁶ The term “investment trust” is more common in the United States, with the term “unit trust” being used in England. *See* HAYTON ET AL., *supra* note 6, ¶1.122; Bosques-Hernández, *supra* note 55, at 20; Langbein, Commercial Trusts, *supra* note 1, at 170.

⁶⁷ *See* Bosques-Hernández, *supra* note 5, at 20.

Investment or unit trusts fall into several subcategories: mutual funds (known as collective investment schemes in England),⁶⁹ real estate investment trusts (REITs),⁷⁰ oil and gas royalty trusts⁷¹ and asset securitization trusts.⁷² Interestingly, at least one U.S. court has considered mandatory arbitration in the context of an internal trust dispute involving an investment trust.⁷³ Another U.S. court has discussed an important related issue, namely whether certain internal disputes arising out of an investment or unit trust can be arbitrated pursuant to a mandatory arbitration provision found in an insurance policy covering the trust, and has held that arbitration in such circumstances is permissible.⁷⁴

⁶⁸ While comprehensive worldwide figures are impossible to compile, it is perhaps sufficient to note that in 1997, U.S.-based REITs held over \$98 billion in assets. See Langbein, *Commercial Trusts*, *supra* note 1, at 171.

⁶⁹ See HAYTON ET AL., *supra* note 6, ¶1.122. Mutual funds can take the form of an investment company or a trust, with slightly more than half of contemporary mutual funds taking the form of a trust. See Langbein, *Commercial Trusts*, *supra* note 1, at 170-71.

⁷⁰ REITs are mutual funds that invest in real property and/or in mortgages on real property. See Langbein, *Commercial Trusts*, *supra* note 1, at 171. Interestingly, calls have been made to reduce, rather than increase, the regulation of REITs in the wake of the recent financial crisis, thus showing the level of legislative support for these types of investment vehicles. See Bruce Arthur, *Housing and Economic Recovery Act of 2008*, 46 HARV. J. LEGIS. 585, 589 (2009).

⁷¹ These types of trusts are often created by oil corporations that want a vehicle to hold legal title to certain oil-producing properties while dispensing beneficial assets to corporate shareholders. See Langbein, *Commercial Trusts*, *supra* note 1, at 171. The trust interests can be sold, and several of the larger oil-royalty trusts are publicly traded. See *id.* at 171-72. Trusts relating to royalties from intellectual property are also possible. See HAYTON ET AL., *supra* note 6, ¶1.135.

⁷² In this form of trust, banks or other financial entities, often called originators or packagers, buy a type of debt (such as credit card receivables), “but then transfer[] [the debt] in trust to a separate trustee. Shares in that trust are sold to various participating investors, who, under the new scheme, are not lenders to the bank but share owners in the trust.” Langbein, *Commercial Trusts*, *supra* note 1, at 172. Changes have been made to the specific rules regarding these types of investment vehicles in the wake of the recent financial crisis, but the concept remains viable. See Giacomo Rojas Elgueta, *Divergences and Convergences of Common Law and Civil Law Traditions on Asset Partitioning: A Functional Analysis*, 12 U. PA. J. BUS. L. 517, 527-54 (2010); Peter A. Furci, *U.S. Trade or Business Implications of Distressed-Debt Investing*, 63 TAX LAW. 527, 537 (2010) (discussing U.S. regulations under the now-repealed Financial Asset Securitization Investment Trust (FASIT)); Grace Soyon Lee, *What’s in a Name? The Role of Danielson in the Taxation of Credit Card Securitization*, 62 BAYLOR L. REV. 110, 126 n.82 (2010) (noting FASITs were repealed in 2004 but recognizing the continued use of similar devices).

⁷³ See *Stender v. Cardwell*, Civ. No. 07-cv-02503-REB-MJW, 2009 WL 3416904, at *2 (D. Colo. Oct. 20, 2009) (involving breach of contract of an UPREIT, which is a type of REIT).

⁷⁴ See *Radian Ins., Inc. v. Deutsche Bank National Trust Co.*, 638 F. Supp. 2d 443, 446-47 (E.D. Pa. 2009) (involving mortgage trusts in the asset securitization context).

A third kind of commercial trust involves trusts relating to the issuance of bonds. In the United States, such trusts arise under the Trust Indenture Act,⁷⁵ which requires “most debt securities issued in the United States . . . to provide for the services of a corporate fiduciary to act as trustee for the bondholders or other obligees.”⁷⁶ Trusts created under the Trust Indenture Act reflect certain unusual qualities. For example, trustees under bond indentures have fewer responsibilities for the trust property and typically do not enjoy possession or the right to possession until a default occurs.⁷⁷ Instead:

[t]he trustee under a bond indenture acts primarily under the terms of the contract creating the relationship, and acquires actual possession of the particular assets only in the event that the issuer breaches the covenants of the loan agreement. The indenture regime imposes, therefore, a species of contingent or standby trusteeship.

What commends the trust form for these corporate and municipal bond transactions is the ability to have a sophisticated financial intermediary – that is, a trust company – act on behalf of numerous and dispersed bondholders in the event that a loan transaction does not work out routinely. The indenture trustee overcomes the coordination problem that inheres in widespread public ownership of debt securities.⁷⁸

Other countries also recognize the concept of a bond-related trusts, whereby a trust deed gives a trustee both the responsibility and the authority to enforce the terms of the bonds held in the

⁷⁵ See 15 U.S.C. §77aaa (2011).

⁷⁶ Langbein, *Commercial Trusts*, *supra* note 1, at 173 (estimating that as of 1997, the amount held exceeded \$3 trillion).

⁷⁷ See *id.* at 173-74.

⁷⁸ *Id.* at 174 (citations omitted). A related type of device involves a trust created to establish a contingent value right (CVR) which requires an acquiring party “to pay additional consideration to a Target company’s stockholders following the close of the acquisition contingent on the occurrence of specified payment triggers.” Barbara L. Borden & Henry Gosebruch, *Contingent Value Rights Outline*, 1902 PLI/CORP. 323, 325 (Sept. 22-23, 2011); see also *id.* at 340 (noting CVRs can be “issued pursuant to a trust agreement”).

trust.⁷⁹ Notably, at least one English court has held that claims relating to certain bonds may be subject to arbitration under an arbitration provision contained in the trust deed.⁸⁰

A fourth type of commercial trust involves what could be called “the ‘regulatory compliance trust,’ [which is] a trust created primarily for the purpose of discharging responsibilities imposed by law.”⁸¹ These trusts reflect a variety of forms, including nuclear decommissioning trusts, environmental remediation trusts, liquidating trusts, prepaid funeral trusts, foreign insurers trusts and law office trust accounts.⁸² While no cases have been discovered that specifically discuss mandatory arbitration in any of these contexts, it is easy to see how arbitration could be used to resolve issues relating to regulatory compliance trusts.

While there are numerous other types of business trusts in existence, it is unnecessary outline them all, since the question for this Article is whether existing arbitral procedures adequately protect the rights of parties involved in arbitration of internal disputes arising under these and other types of trusts. To answer that question, it is necessary to consider what constitutes an internal trust dispute and whether such controversies are even arbitrable.⁸³ These matters are considered in the next section.

III. TYPES OF TRUST DISPUTES AND ARBITRABILITY OF THOSE DISPUTES

⁷⁹ See *The Law Debenture Trust Corp. v. Elektrim S.A.* [2009] EWHC 1801 ¶¶1, 11, 16, 18, 37 (Ch).

⁸⁰ See *The Law Debenture Trust Corp. plc v. Elektrim Fin. B.V.* [2005] EWHC 1412, ¶¶38-47 (Ch) (concluding that the language in the arbitration clause in question provided one party with a unilateral right to choose to litigate instead of arbitrate, but upholding the provision as binding between the parties).

⁸¹ See Langbein, *Commercial Trusts*, *supra* note 1, at 174.

⁸² See *id.* at 175-76.

⁸³ This Article uses the terms “arbitrable” and “arbitrability” in their international sense to describe which disputes can be heard in arbitration and which are reserved to the exclusive purview of the courts. 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).

Because trust law and commercial law operate largely in isolation from one another,⁸⁴ specialists in arbitration may be unaware of some of the more unique types of controversies that can develop under a trust as well as the various jurisprudential problems that can arise when settlors attempt to mandate arbitration of those disputes through an arbitration provision in a trust. While a comprehensive analysis of these issues is beyond the scope of this Article,⁸⁵ it is nevertheless necessary to introduce briefly certain fundamental principles.

When considering arbitration of internal trust disputes, it is useful to distinguish between: (1) states with legislation explicitly permitting arbitration of trust disputes through inclusion of a provision in the trust itself; (2) states with legislation explicitly permitting arbitration of trust disputes but without reference to provisions found in the trust itself; and (3) states without legislation concerning trust arbitration. Each is discussed separately below.

(a) *States With Legislation Explicitly Permitting Arbitration Through Inclusion of a Provision in the Trust Itself*

Analysis regarding the arbitrability of internal trust disputes is easiest in jurisdictions that statutorily recognize the validity of an arbitration provision found in a trust, since the legislation specifically states which types of issues may be made subject to mandatory arbitration. Thus, for example, the U.S. state of Arizona passed a law in 2008 indicating that “[a] trust instrument may provide mandatory, exclusive and reasonable procedures to resolve issues between the trustee and interested persons or among interested persons with regard to the administration or distribution of the trust.”⁸⁶ This provision is to be construed broadly to include “any matter

⁸⁴ See MCGOVERN ET AL., *supra* note 15, at 626.

⁸⁵ These issues are considered at length elsewhere. See *supra* note 10.

⁸⁶ Ariz. Rev. Stat. Ann. §14-10205 (2011).

involving the trust's administration, including a request for instructions and an action to declare rights."⁸⁷

The U.S. state of Florida has also made statutory provision for mandatory trust arbitration, albeit in a smaller range of disputes. That enactment, passed in 2007, indicates that:

(1) A provision in a will or trust requiring the arbitration of disputes, other than disputes of the validity of all or a part of a will or trust, between or among the beneficiaries and a fiduciary under the will or trust, or any combination of such persons or entities, is enforceable.

(2) Unless otherwise specified in the will or trust, a will or trust provision requiring arbitration shall be presumed to require binding arbitration under s. 44.104.⁸⁸

While the Florida statute includes a carve-out for challenges to the trust itself,⁸⁹ the range of arbitrable matters nevertheless appears relatively broad. However, the precise scope of this legislation is somewhat unclear, since no cases have yet been decided under this provision.

Legislation concerning mandatory arbitration of internal trust disputes also exists outside the United States. For example, Guernsey, one of the leading jurisdictions for offshore trusts, enacted a statute in 2007 discussing the availability of various alternative dispute resolution mechanisms, including arbitration.⁹⁰ That law states that:

(1) Where -

⁸⁷ See *Jones v. Fink*, No. 1 CA-SA 10-0262, 2011 WL 601598, at *3 (Ariz. Ct. App. Feb. 22, 2011) (emphasis omitted).

⁸⁸ Fla. Stat. Ann. §731.401 (2011); see also Fla. Stat. Ann. §44.104.

⁸⁹ Challenges to the trust often involve claims based on undue influence, lack of capacity, fraud, duress, forgery or mistake. Some states bar such disputes from arbitration altogether while other jurisdictions analyze the issue under standard principles of separability. See *Spahr v. Secco*, 330 F.3d 1266, 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); *Weizmann Institute of Science v. Neschis*, 421 F. Supp. 2d 654, 680 n.28 (S.D.N.Y. 2005); Strong, *Two Bodies Collide*, *supra* note 8.

⁹⁰ The Trusts (Guernsey) Law 2007, §63, available at <http://www.guernseylegalresources.gg/ccm/legal-resources/laws/trusts/the-trusts-guernsey-law-2007.en>; see also *Bosques-Hernández*, *supra* note 55, at 25; *Buckle & Olsen*, *supra* note 5, at 652-55; Andrew Vergunst & Lawrence Grabau, *Arbitrating Trust Disputes*, STEP J. (Jan. 2011), available at http://www.stepjournal.org/journal_archive/2011/step_journal_jan_2011/arbitrating_trust_disputes.aspx.

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

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

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

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

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

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

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

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

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

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

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

(5) In this section -

“ADR” includes conciliation, mediation, early neutral evaluation, adjudication, expert determination and arbitration, and

“proceedings” includes oral and written proceedings.⁹¹

⁹¹ The Trusts (Guernsey) Law 2007, *supra* note 90, §63.

Although the statute relates only to a limited range of claims (i.e., claims brought against a trustee for breach of trust), it specifically contemplates the possibility that arbitration can be mandated through a provision included in the trust instrument itself. The statute also expressly indicates that beneficiaries of the trust may be bound by the outcome of the arbitration.

Most recent developments concerning mandatory trust arbitration involve common law jurisdictions, since those states are home to the classic form of the trust. Indeed, a number of common law countries other than the U.S. and Guernsey are currently contemplating legislation in this area of law.⁹² However, civil law jurisdictions also appear to permit arbitration of trusts or trust-like devices pursuant to legislation. Thus, for example:

Austrian arbitration law recognizes . . . ways of granting arbitrators the authority to decide a dispute by arbitration. Section 581(2) ZPO [Zivilprozeßordnung or Code of Civil Procedure] grants such an authority to arbitral tribunals that are set up in a manner permitted by law, either by testamentary disposition or by other legal transactions that are not based on the agreement of the parties. Authority is also granted to tribunals provided for by articles of incorporation.⁹³

The concept of arbitration based on “testamentary disposition or by other legal transactions that are not based on the agreement of the parties” would appear to permit arbitration arising out of a trust.⁹⁴ German law appears to take a similar approach, in that:

[Section] 1066 ZPO [Zivilprozeßordnung or Code of Civil Procedure] requires arbitral tribunals to be legitimized by a testamentary disposition or other non-contractual dispositions. Thus, [Section] 1066 ZPO encompasses situations in

⁹² For example, both the Bahamas and New Zealand have undertaken efforts in this area of law. *See* Trustee (Amendment) Bill 2011, §18, *available at* [http://www.bacobahamas.com/PDF/Trustee%20\(Amendment\)%20Bill%202011%20-%2015%20April%202011.pdf](http://www.bacobahamas.com/PDF/Trustee%20(Amendment)%20Bill%202011%20-%2015%20April%202011.pdf); Law Commission (New Zealand), *supra* note 59, ¶¶5.16 to 5.20; Neil Hartnell, *Trustee Act's Reform "Bold, Innovative,"* TRIB. (Oct. 25, 2011), *available at* http://www.tribune242.com/business/10252011_Trusts_business_Page1-2.

⁹³ Franz T. Schwartz & Christian W. Konrad, *Austria*, in THE VIENNA RULES: A COMMENTARY ON INTERNATIONAL ARBITRATION IN AUSTRIA 1, 19-20 (Franz T. Schwartz & Christian W. Konrad eds., 2009) (citations omitted).

⁹⁴ *See* Strong, *Two Bodies Collide*, *supra* note 8. The reference to arbitration arising out of articles of incorporation also supports the notion of mandatory trust arbitration, since the two procedures arise in similar manners.

which an arbitration clause has a binding effect on an individual who is not a signatory of an arbitration agreement and did not agree to a contractual arbitration agreement.⁹⁵

Furthermore, it has been said that “arbitration clauses in the statute of a foundation [“stiftung”] in Liechtenstein are . . . binding for persons or entities claiming to be beneficiaries of the foundation on the basis of its by-laws, although they have not signed the Charter of the foundation or the arbitration clause contained therein.”⁹⁶

Although these authorities focus more on the enforceability of an arbitration provision found in a trust than the arbitrability of certain trust-related claims *per se*, the implicit sense is that at least some internal trust concerns will be arbitrable under these provisions.

(b) *States With Legislation Explicitly Permitting Arbitration of Trust Disputes But Without Reference to Provisions Found in the Trust Itself*

Legislation specifically contemplating an arbitration provision in a trust is relatively rare, particularly in the common law countries where trusts are used most often. However, a number of jurisdictions provide for trust arbitration without making reference to arbitral provisions found in the trust itself. This second type of legislation has been in existence in some states for decades.⁹⁷

The precise language used varies somewhat from jurisdiction to jurisdiction, although one of the more widely adopted approaches is found in the Uniform Trust Code (UTC), a model

⁹⁵ Christian Duve, *Part IV: Selected Areas and Issues of Arbitration in Germany, Arbitration of Corporate Law Disputes in Germany*, in *ARBITRATION IN GERMANY: THE MODEL LAW IN PRACTICE* 957, 1002 (Karl Heinz Böckstiegel et al. eds., 2007); *see also* Strong, *Two Bodies Collide*, *supra* note 8.

⁹⁶ *Weizmann Institute of Science v. Neschis*, 421 F. Supp. 2d 654, 668, 679 (S.D.N.Y. 2005) (citation omitted).

⁹⁷ *See* Bruyere & Marino, *supra* note 29, at 355-56, 362; David J. Hayton, *Problems in Attaining Binding Determinations of Trust Issues by Alternative Dispute Resolution*, in *PAPERS OF THE INTERNATIONAL ACADEMY OF ESTATE AND TRUST LAW – 2000*, *supra* note 27, at 11; Horton, *supra* note 10, at *7-10; Hwang, *supra* note 5, at 83; Janin, *supra* note 11, at 524-28; Mautner & Orr, *supra* note 10, at 159.

enactment that has been adopted in whole or in part by twenty-four individual U.S. states.⁹⁸

Section 111 of the UTC indicates that “interested persons may enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust,”⁹⁹ so long as they do “not violate a material purpose of the trust and include[] terms and conditions that could be properly approved by the court under this [Code] or other applicable law.”¹⁰⁰ The scope of arbitrable matters is quite broad, including, among other things:

- (1) the interpretation or construction of the terms of the trust;
- (2) the approval of a trustee’s report or accounting;
- (3) direction to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary or desirable power;
- (4) the resignation or appointment of a trustee and the determination of a trustee’s compensation;
- (5) transfer of a trust’s principal place of administration; and
- (6) liability of a trustee for an action relating to the trust.¹⁰¹

A number of these items relate to internal matters of trust construction and administration and thus expand the concept of arbitrability beyond mere contract concerns to key issues of substantive trust law. This is very helpful, since it removes some of the stigma of arbitration by recognizing that arbitrators are capable of resolving complex trust-related controversies.¹⁰²

As useful as this provision is, it nevertheless fails in one important regard, namely in describing the manner in which trust arbitration can be invoked. Indeed, the drafters of the UTC were purposefully vague when it came to identifying who could enter into these sort of

⁹⁸ See UTC, *supra* note 7; NCCUSL, UTC Status, *available at* www.nccusl.org.

⁹⁹ UTC, *supra* note 7, §111(c).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*, §111(d); *see also id.*, cmt.; Mautner & Orr, *supra* note 10, at 161. Interestingly, the UTC may make some issues subject to the exclusive jurisdiction of the court. See UTC, *supra* note 7, §111(e) (stating “[a]ny interested person may request the court to approve a nonjudicial settlement agreement, to determine whether the representation as provided in [Article] 3 was adequate, and to determine whether the agreement contains terms and conditions the court could have properly approved”). This reservation of judicial jurisdiction could give rise to questions about limited non-arbitrability. See *infra* notes 133-65 and accompanying text.

¹⁰² See ACTEC, *supra* note 10, at 5 (discussing the “blinding prejudice” to arbitration in contemporary trust law).

nonjudicial agreements.¹⁰³ As a result, the UTC provides no guidance as to whether the settlor can require nonjudicial resolution of disputes arising under the trust through inclusion of an arbitration provision in the trust or whether it is only the trustee who has the power to enter into arbitration agreements at some point after the trust has been created.¹⁰⁴ To some extent, the latter approach would seem to be somewhat in tension with the UTC's broad approach to arbitrability, since internal trust concerns are most effectively addressed through an arbitration provision in the trust itself rather than a post-dispute agreement concluded by the trustee.¹⁰⁵

Although the UTC constitutes a significant step forward with regard to the arbitrability of internal trust disputes, some individual U.S. state statutes go even further.¹⁰⁶ For example, the states of Washington and Idaho have both enacted provisions indicating that:

[t]he “matters” that may be addressed and resolved through a nonjudicial procedure are broadly defined and include any issue, question, or dispute involving: (i) the determination of any class of creditors, devisees, legatees, heirs, next of kin, or other persons interested in an estate, trust, nonprobate asset, or with respect to any other asset or property interest passing at death; (ii) the direction of a personal representative or trustee to do or to abstain from doing any act in a fiduciary capacity; (iii) the determination of any question arising in the administration of an estate or trust or with respect to any nonprobate assets or any

¹⁰³ See UTC, *supra* note 7, §111, cmt. The term “interested persons” is defined as meaning “persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court.” *Id.*, §111(a).

¹⁰⁴ The trustee's specific power to enter into an arbitration agreement is also mentioned in Section 816(23) of the UTC, which states that a trustee may “resolve a dispute concerning the interpretation of the trust or its administration by mediation, arbitration, or other procedure for alternative dispute resolution.” *Id.*, §816(23). However, this language does not clear up any of the confusion regarding mandatory trust arbitration, since the provision can be read as suggesting either that only a trustee has the ability to enter into arbitration under Section 111 (since the powers listed in Section 816 are a compilation of specific powers listed elsewhere) or that persons other than the trustee may have the ability to enter into arbitration under Section 111 (since the powers listed in Section 816 are not said to be exclusive to the trustee). See *id.*, §§111, 816(23); see also *id.* §816, cmt. One element in favor of the settlor's ability to mandate arbitration of internal trust disputes is found in the commentary to Section 816, which states that “[s]ettlors wishing to encourage use of alternate dispute resolution may draft to provide it.” *Id.*, §816(23), cmt. (referring parties to the AAA Trust Arbitration Rules for sample language).

¹⁰⁵ Trustees could attempt to enter into individual arbitration agreements with potential parties to an internal dispute after the creation of the trust but before a dispute arises, but that approach is logistically and jurisprudentially difficult. See Strong, *Two Bodies Collide*, *supra* note 8.

¹⁰⁶ See UTC, *supra* note 7, §111.

other asset or property interest passing at death, including, without limitation, questions relating to the construction of wills, trusts, community property agreements, or other writings, a change of personal representative or trustee, a change of the situs of a trust, an accounting from a personal representative or trustee, or the determination of fees for a personal representative or trustee; (iv) the grant to a personal representative or trustee of any necessary or desirable power not otherwise granted in the governing instrument or given by law; and (v) the amendment, reformation, or conformation of a will or trust instrument to comply with statutes and regulations of the Internal Revenue Code in order to achieve qualification for deductions, elections, and other tax requirements.¹⁰⁷

These statutes obviously go beyond what the UTC contemplates in terms of arbitrable concerns. However, the Washington and Idaho statutes suffer from the same problem that the UTC did, namely ambiguity with respect to who may invoke arbitration and how.¹⁰⁸ Although it would again seem incongruous to permit arbitration of such a wide range of internal matters without providing an appropriate mechanism by which to invoke such proceedings, no court has yet considered whether these statutes permit arbitration based on a clause found in the trust itself.

English law takes a somewhat different approach. While U.S. statutes focus on the types of claims that may be settled by arbitration – thus leaving open the question of whether arbitration may be sought only by the trustee after the creation of the trust or can be mandated in the trust itself by the settlor – English law explicitly states that powers relating to nonjudicial dispute resolution are limited to the trustee. Thus, the Trustee Act 1925 states that:

[a] personal representative, or two or more trustees acting together, or, subject to the restrictions imposed in regard to receipts by a sole trustee not being a trust corporation, a sole acting trustee where by the instrument, if any, creating the trust, or by statute, a sole trustee is authorised to execute the trusts and powers reposed in him, may, if and as he or they think fit—

...

¹⁰⁷ Mautner & Orr, *supra* note 10, at 163; *see also* Idaho Code Ann. §§15-8-101, 15-8-103 (2011); Wash. Rev. Code §§11.96A.010, 11.96A.030 (2012).

¹⁰⁸ *See* Idaho Code Ann. §§15-8-101 (2011); Wash. Rev. Code §§11.96A.010 (2011).

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

and for any of those purposes may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things as to him or them seem expedient, without being responsible for any loss occasioned by any act or thing so done by him or them if he has or they have discharged the duty of care set out in section 1(1) of the Trustee Act 2000.¹⁰⁹

Interestingly, although the English statute is limited as to who may authorize the arbitration, the language is quite broad with respect to the types of claims that can be asserted in arbitration (“any debt, account, claim, or thing whatever relating to . . . the trust”).¹¹⁰ This allows parties to claim that most, if not all, trust-related issues are inherently arbitrable, a position that may be very useful if English courts come to recognize that settlors have the power to require arbitration of disputes arising out of or in connection to the trusts that they create.¹¹¹

(c) *States Without Legislation Concerning Trust Arbitration*

While some states have addressed trust arbitration by statute, the vast majority of jurisdictions have not. To make matters worse, there is no clear judicial consensus regarding which types of internal trust disputes are arbitrable, primarily because most courts considering trust-related arbitration focus their discussions almost entirely on the enforceability of an arbitration provision found in a trust rather than on the arbitrability of particular issues.¹¹² Therefore, while several recent U.S. state court decisions clearly indicate that arbitration clauses in trusts are

¹⁰⁹ Trustee Act 1925, *supra* note 7, §15.

¹¹⁰ *Id.*

¹¹¹ Although this issue is beyond the scope of this Article, it is addressed elsewhere. See Cohen & Staff, *supra* note 10, at 221-23; Fox, *supra* note 10, at 25; Lloyd & Pratt, *supra* note 10, at 19-20; David Hayton, *Future Trends in International Trust Planning*, 13 JORDANS J. INT'L TR. & CORP. PLAN. 55, 72 (2006); Hayton, *supra* note 97, at 17; Strong, *Two Bodies Collide*, *supra* note 8.

¹¹² See Strong, *Two Bodies Collide*, *supra* note 8.

unenforceable, they do so on grounds other than arbitrability.¹¹³ On the other hand, a number of older decisions that once acted as significant stumbling blocks in the United States to both the arbitrability of internal trust disputes and the enforceability of arbitration provisions in trusts have recently been abrogated either judicially or legislatively, thus allowing arbitration of internal trust disputes in those states.¹¹⁴

Parties find themselves in a difficult position if they are considering either of these two questions – arbitrability or enforceability – in a jurisdiction without relevant legislation, since there is a widespread perception that precedent in this area of law is “thin and underdeveloped”¹¹⁵ despite the recent introduction of a number of relevant decisions into the legal literature.¹¹⁶ This shortage – real or perceived – of controlling case law has led many members of the trust bench and bar to adopt views that are “more conservative towards ADR than the law actually is today,” even though the lack of subject-specific precedent would normally suggest “that the general principles of arbitration law . . . should apply equally to trust cases.”¹¹⁷

¹¹³ See *Diaz v. Bukey*, 125 Cal. Rptr. 3d 610, 614-15 (Cal. Ct. App. 2011), *petition for review granted*, 257 P. 3d 1129 (2011); *Rachal v. Reitz*, 347 S.W.3d 305, 310 (Tex. Ct. App. 2011), *petition for review filed* Sept. 8, 2011. Notably, both these cases are currently on appeal.

¹¹⁴ See *Schoneberger v. Oelze*, 96 P.3d 1078, 1082-83 (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); *In re Jacobovitz’ Will*, 295 N.Y.S.2d 527, 529 (Sur. Ct. Nassau Co. 1968), *superseded by implication by* *In re Blumenkrantz*, 824 N.Y.S.2d 884, 887 (Sur. Ct. Nassau Co. 2006); *Meredith’s Estate*, 266 N.W. 351 (Mich. 1936), *superseded by implication by* *In re Nestorovski Estate*, 769 N.W. 2d 720, 732 (Mich. Ct. App. 2009).

¹¹⁵ Katzen, *supra* note 18, at 118-19.

¹¹⁶ Although the universe of relevant judicial opinions is not vast, commentators have often overlooked a number of pertinent authorities. See *Zisman v. Lesner*, No. 6:08-cv-1448-Orl-31DAB, 2008 WL 4459029, *3-4 (M.D. Fla. Sept. 29, 2008); *Flores v. Transamerica Homefirst, Inc.*, 113 Cal. Rptr. 2d 376, 385 (Cal. Ct. App. 2001); *Masonry and Tile Contractors Assoc. of So. Nevada v. Jolley, Urga & Wirth, Ltd.*, 941 P.2d 486 (Nev. 1997). These decisions are discussed by the author in more detail in *Strong, Two Bodies Collide*, *supra* note 8. Other relevant but previously undiscussed cases are cited throughout this Article.

¹¹⁷ Cohen & Staff, *supra* note 10, at 211.

In fact, arbitration law provides courts considering an internal trust dispute as a matter of first impression with a very simple and straightforward method of analysis. For example, arbitration law indicates that judges should begin by referring to the national statute on arbitration to determine whether internal trust disputes comply with basic principles of arbitrability. Some states take such a broad view of arbitrability that few, if any, problems should arise with respect to arbitration of internal trust disputes.¹¹⁸ Thus, for example:

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

As nearly all types of trust disputes ultimately concern the distribution of private wealth, the majority of such disputes can be arbitrated given the liberal definition of arbitrability under Swiss law.¹¹⁹

Notably, this does not mean that every trust-related dispute is arbitrable under Swiss law. For example, in addition to situations involving statutes conferring courts with exclusive jurisdiction over certain matters (a subject that is discussed further below),¹²⁰ Swiss courts may refuse arbitration of issues relating to the provision of information to a beneficiary pursuant to a judicial accounting process, since such disputes might not involve the kind of financial or economic interests contemplated under Swiss provisions on arbitrability.¹²¹

A number of other jurisdictions also focus on commercial or economic interests when considering arbitrability and thus might come to the same conclusion that Switzerland does

¹¹⁸ See GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 777-79 (2009).

¹¹⁹ Wüstemann, *supra* note 5, at 49 (emphasis omitted); see also von Segesser, *supra* note 27, at 23.

¹²⁰ See *infra* notes 133-65 and accompanying text.

¹²¹ See Wüstemann, *supra* note 5, at 50-51.

regarding arbitration of internal trust disputes.¹²² Some states, such as Liechtenstein, even go so far as to make arbitration compulsory in cases involving foreign trust deeds.¹²³

Although courts considering the arbitrability of internal trust disputes should refer first to the national statute on arbitration, that approach does not work in all cases. Some countries – including two of the key jurisdictions in this area of law, England and the United States – do not discuss arbitrability in their national arbitration statutes.¹²⁴ States whose laws are based on the UNCITRAL Model Law on International Commercial Arbitration (Model Arbitration Law) may find themselves in a similar situation, since the Model Arbitration Law is also silent on arbitrability.¹²⁵ In situation such as these, “questions whether or not a particular dispute is arbitrable . . . turn almost entirely on judicial interpretation of other statutes” or on general case law.¹²⁶

A full discussion regarding the arbitrability of internal trust disputes in the United States, England and other jurisdictions is beyond the scope of this Article. However, commentators have considered that issue at length and have taken the position that internal trust disputes are for the most part arbitrable.¹²⁷

¹²² See Bosques-Hernández, *supra* note 55, at 22 (discussing Scandinavian law); Caprasse, *supra* note 8, at 81-83 (discussing French and Belgian law).

¹²³ See Bosques-Hernández, *supra* note 55, at 23; see also Denis A. Kleinfeld, *Offshore Trusts*, FLA. B. – ADMIN. TR. §15.41 (2009).

¹²⁴ See Federal Arbitration Act, 9 U.S.C. §§1-307; Arbitration Act 1996, §§1-110, available at <http://www.legislation.gov.uk/ukpga/1996/23/contents>.

¹²⁵ See UNCITRAL Model Law on International Commercial Arbitration, UNCITRAL, 18th Sess., Annex 1, U.N. Doc. A/40/17 (June 21, 1985), revised by Revised Articles of the UNCITRAL Model Law on International Commercial Arbitration, UNCITRAL, 39th Sess., Annex, U.N. Doc. A/61/17 (July 7, 2006), available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html; BORN, *supra* note 118, at 776.

¹²⁶ BORN, *supra* note 118, at 781, 786; see also Strong, *Two Bodies Collide*, *supra* note 8.

¹²⁷ See Cohen & Staff, *supra* note 10, at 223-26; Lloyd & Pratt, *supra* note 10, at 18; Strong, *Two Bodies Collide*, *supra* note 8; Wüstemann, *supra* note 5, at 55-56.

IV. INCREASING THE ENFORCEABILITY OF A MANDATORY ARBITRATION PROVISION IN A TRUST THROUGH ADOPTION OF PARTICULAR PROCEDURAL PROCESSES

The preceding section introduced the various types of disputes that can arise with respect to the inner workings of a trust and outlined the extent to which those matters are considered arbitrable. However, that discussion also demonstrated some of the difficulties associated with establishing arbitration through a clause found in the trust itself, primarily because of inadequate statutory provisions on whether a settlor may require arbitration of internal trust disputes by including an arbitration provision in the trust itself. Although an increasing number of courts and legislatures are addressing this issue, most of the relevant analysis is found in scholarly commentary. These authorities have generally concluded that a court may enforce a mandatory arbitration provision in a trust if:

- (1) the court's jurisdiction is not ousted in an unacceptable fashion;
- (2) the provision purporting to require arbitration 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.¹²⁸

The enumeration of these five factors is very helpful, since it allows settlors to identify the possible means of affecting a court's determination about enforceability. Interestingly, settlors appear able to influence judicial determinations regarding two issues – the operability of the arbitral clause purporting to require arbitration and the ability of that clause to bind any party

¹²⁸ See Cohen & Staff, *supra* note 10, at 209; see also ACTEC, *supra* note 10, at 34-42; Buckle & Olsen, *supra* note 5, at 655; Fox, *supra* note 10, at 25; Horton, *supra* note 10, at * 54; Lloyd & Pratt, *supra* note 10, at 18; Logstrom, *supra* note 10, at 266-68; Mautner & Orr, *supra* note 10, at 181; Murphy, *supra* note 10, at 630; Spitko, *supra* note 10, at 277; Strong, Two Bodies Collide, *supra* note 8; Wüstemann, *supra* note 5, at 55-56. *But see* Timothy P. O'Sullivan, *Family Harmony: An All Too Frequent Casualty of the Estate Planning Process*, 8 MARQUETTE ELDER'S ADVISOR 253, 315 (2007).

seeking to avoid arbitration – through language used in the arbitration provision itself.¹²⁹

Furthermore, settlors might be able to influence how a court analyzes the three remaining concerns – arbitrability, potential ouster of the courts and proper representation of the parties – based on procedures chosen by the settlor to be used in the arbitration itself. Each of these three criteria is discussed individually below.

(a) *Arbitrability*

In some ways, it may seem strange to consider the extent to which a party can affect a court's determination regarding questions of arbitrability, given that arbitrability is quintessentially a state concern and thus not usually considered amenable to external influences.¹³⁰ However, judges may be more willing to consider certain matters arbitrable if the parties can demonstrate that the procedures used in the arbitration were or will be fair. This conclusion is based on the observation that the concept of arbitrability in international commercial arbitration has expanded as arbitral procedures have become more demonstrably fair and objective.¹³¹ While there is no way to establish a causal relationship between the two factors – i.e., that courts and legislatures increased the scope of issues that are considered arbitrable because of an increase in the number and quality of procedural protections for parties – there does seem to be a temporal and hence logical connection between the two developments.¹³² Therefore, it can be supposed that internal

¹²⁹ See Strong, Language, *supra* note 16.

¹³⁰ See JULIAN D.M. LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION ¶¶9-1 to 9-4 (2003).

¹³¹ See BORN, *supra* note 118, at 787.

¹³² Certainly much of the movement toward increased arbitrability in the United States can be attributed to the landmark decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, in which the U.S. Supreme Court noted that “there is no reason to assume at the outset of the dispute that international arbitration will not provide an adequate mechanism.” 473 U.S. 614, 636 (1985); see also BORN, *supra* note 118, at 783, 787.

trust disputes are more likely to be considered arbitrable if the parties can show that the procedures to be used are fair and adequate as a matter of trust law.

One of the more distinctive types of issues that could arise in mandatory trust arbitration involves what may be called the principle of “limited non-arbitrability.” While limited non-arbitrability is a somewhat narrow issue, it is nevertheless critical to the development of arbitration of internal trust disputes.

The first thing to do is explain what is meant by the term “limited non-arbitrability.” Traditionally, the core of any arbitrability analysis turns on whether a certain category of claims is or should be reserved to the courts.¹³³ For years, this determined focused on entire subject matter areas, with states concluding that all claims in a certain field, such as intellectual property, securities or consumer law, were non-arbitrable.¹³⁴ However, as the general scope of arbitrability has expanded, the number of suspect subject matters has diminished. Few fields of law are currently considered categorically off-limits. Instead, judges are now being asked to undertake more nuanced analyses to determine the arbitrability of certain limited subsets of claims that fall within a field that is generally considered arbitrable.¹³⁵

One of the best illustrations of the concept of limited non-arbitrability arises in the context of agency, franchise and exclusive distributor disputes. As a general matter, disputes involving these sorts of commercial relationships can be made subject to arbitration.¹³⁶ However, some courts have refused to enforce pre-dispute arbitration agreements in cases involving termination of the rights of agents, franchisees or exclusive distributors.¹³⁷ Notably, this limitation on arbitrability only affects specific types of claims in this particular field,

¹³³ See Kröll, *supra* note 83, ¶16-7.

¹³⁴ See BORN, *supra* note 118, at 767-69; Kröll, *supra* note 83, ¶16-7.

¹³⁵ See Kröll, *supra* note 83, ¶¶16-7 to 16-8.

¹³⁶ See *id.*, ¶¶16-5, 16-8 to 16-9.

¹³⁷ See *id.* ¶¶16-5, 16-12 to 16-65.

creating a sub-class of non-arbitrable issues within a subject matter that is generally considered arbitrable.

This phenomenon is relevant to mandatory trust arbitration for two reasons. First, limited non-arbitrability is applied in the context of agency, franchise and exclusive distribution disputes in order to protect certain vulnerable parties.¹³⁸ Trust disputes can also involve potential power disparities, either in situations where beneficiaries to certain types of commercial trusts are considered akin to consumers¹³⁹ or in cases involving unborn, unascertained or legally incompetent beneficiaries.

Second, limitations on the arbitrability of certain types of agency, franchise or distribution claims are typically based on statutes that either (1) require the application of certain substantive laws that may rise to the level of “conflict mandatory rules or . . . part of the *ordre public*”¹⁴⁰ or (2) grant state courts exclusive jurisdiction over that particular issue.¹⁴¹ Trust law is full of legislation establishing similar types of substantive and procedural rights.¹⁴² Although these types of provisions could on their face seem fatal to the arbitrability of disputes falling within the terms of the statute, there are two different ways of interpreting this type of legislation. A strict reading of these provisions would bar resolution of a particular issue in all other fora, arbitral or judicial.¹⁴³ However, these sorts of statutes can also be read merely as

¹³⁸ See *id.* ¶16-9.

¹³⁹ Some commentators view participants in certain commercial trusts as akin to consumers, although it might be more appropriate to view such persons as analogous to corporate shareholders or investors, since the typical beneficiary is also acting as a settlor by putting money into the trust. See Alan R. Palmiter & Ahmed E. Taha, *Mutual Fund Performance Advertising: Inherently and Materially Misleading?* 46 GA. L. REV. 289, 319-20 (2012) (discussing Dodd-Frank Wall Street Reform and Consumer Protection Act, which was aimed at mutual fund marketing practices aimed at consumers (albeit not distinguishing between mutual funds formed as trusts and mutual funds formed as investment companies)); see also *supra* note 69 (noting more than half of all mutual funds are formed as trusts).

¹⁴⁰ Kröll, *supra* note 83, ¶16-18; see also *id.* ¶¶16-10 to 16-13.

¹⁴¹ See *id.*, ¶16-16.

¹⁴² See Cohen & Staff, *supra* note 10, at 215-17.

¹⁴³ See Kröll, *supra* note 83, ¶¶16-20 to 16-24.

prohibitions on foreign forum selection clauses, meaning that if the claim is heard in court, then it must be heard in that particular court. This latter approach would leave open the possibility of having the claim heard in arbitration.

Courts considering claims involving the termination of agency, franchise and exclusive distribution relationships have not come to a consensus on the proper interpretation of these sorts of laws in that field.¹⁴⁴ Such determinations would in any case not be binding on judges considering mandatory trust arbitration, since the two analyses are likely different enough to allow courts considering trust disputes to distinguish precedent regarding commercial relationships. Nevertheless, it is useful to consider how various courts have considered this issue in the commercial context, in case some analogies to trust arbitration exist.

The first notable issue is that courts faced with a potentially non-arbitrable issue in the context of an agency, franchise or exclusive distributorship relationship often consider whether and to what extent a mandatory provision of the forum state's substantive law will be applied extraterritorially.¹⁴⁵ Because arbitrators are often seen as either more likely or more able to apply the mandatory laws of a state other than that chosen by the parties to govern the dispute, some courts have been willing to allow arbitration of these suspect issues.¹⁴⁶ However, courts have appeared less inclined to enforce foreign forum selection clauses in similar circumstances because foreign courts are often perceived as less able or less likely to apply mandatory principles of foreign substantive law.¹⁴⁷

¹⁴⁴ See *id.*, ¶¶16-24 to 16-74 (discussing three main approaches).

¹⁴⁵ See *id.*, ¶¶16-18 to 16-20, 16-24 to 16-74.

¹⁴⁶ See *id.*, ¶¶16-10 to 16-14, 16-18 to 16-20 (noting that the courts have the ultimate ability to review the application of substantive law under the "second look" doctrine); see also BORN, *supra* note 118, at 796-97.

¹⁴⁷ See Kröll, *supra* note 83, ¶¶16-57 to 16-65.

This analytical approach does appear to have some relevance to multijurisdictional trust disputes, which can involve similar conflict of laws concerns regarding matters of substantive law.¹⁴⁸ Indeed, it already appears as if Swiss courts will adopt a strict interpretation of exclusive jurisdiction statutes rather than the alternate reading.¹⁴⁹

However, trust arbitration adds a second unique quirk to this line of analysis based on the fact that trust law not only involves special substantive laws, but also certain special procedures relating to the resolution of trust disputes.¹⁵⁰ Indeed, it is altogether possible that some judges may take the view that some of these procedures constitute a type of mandatory law analogous to the *ordre public*,¹⁵¹ even though rules of civil procedure – particularly those of a state other than the arbitral seat – are traditionally considered non-applicable in arbitration.¹⁵² While no cases appear to have discussed this issue yet, parties to trust disputes should nevertheless be aware that some courts might undertake a similar conflict of laws analysis regarding questions of procedural law.¹⁵³

¹⁴⁸ These cross-border claims can involve two different countries or two different territories within a federalized state. See Wüstemann, *supra* note 5, at 47; see also *In re Revocation of Revocable Trust of Fellman*, 604 A.2d 263, 269 (Pa. Super. 1992) (Johnson, J., dissenting) (discussing issues involving U.S. interstate analyses); von Segesser, *supra* note 27, at 22-23.

¹⁴⁹ See Wüstemann, *supra* note 5, at 49; see also *supra* note 119 and accompanying text.

¹⁵⁰ See Langbein, *Contractarian*, *supra* note 1, at 662; see also *infra* note 168 and accompanying text.

¹⁵¹ See Kröll, *supra* note 83, ¶¶16-14.

¹⁵² See BORN, *supra* note 118, at 1765 n.122 (noting “[i]t is often difficult to identify what precisely constitutes a mandatory procedural requirement of the arbitral seat (or elsewhere)”); S.I. Strong, *Resolving Mass Legal Disputes Through Class Arbitration: The United States and Canada Compared*, 37 N.C. J. INT’L L. & COMM. REG. __ (forthcoming 2012); S.I. Strong, *From Class to Collective: The De-Americanization of Class Arbitration*, 26 ARB. INT’L 493, 546-47 (2010) [hereinafter Strong, *De-Americanization*]. However, it is also improper for states to impose litigation-like requirements on arbitration, since that infringes on party autonomy. See BORN, *supra* note 118, at 1768.

¹⁵³ Interestingly, a similar approach may be developing in the area of class and collective arbitration, where the traditional divide between substantive and procedural law is becoming blurred as a result of the view that some matters of procedure may be necessary in order to give effect to certain substantive rights. See Strong, *De-Americanization*, *supra* note 152, at 546-47; S.I. Strong, *Mass Torts and Arbitration: Lessons From Abaclat v. Argentine Republic*, in UNCERTAINTY AND MASS TORT: CAUSATION AND PROOF __ (forthcoming 2012) [hereinafter Strong, *Abaclat*].

The conflict of laws approach is only one way to address issues relating to the potentially mandatory nature of certain substantive and procedural laws relating to trusts. A second method of analysis also exists, based on the unique historical factors that drove the development of trust law and procedure.

Traditionally, trust law has operated as a field apart, not only in terms of its procedural and substantive law, but also in terms of the venue in which trust-related matters are heard. Many jurisdictions still require claims regarding the administration and interpretation of trusts to be brought in a special probate or chancery court, a practice that dates back to medieval England, when trust disputes were heard exclusively in the courts of equity, which were then separate from courts of law.¹⁵⁴ Though the Supreme Court of Judicature Act 1893 eliminated the legal distinctions between law and equity, England's Chancery Division still retains exclusive jurisdiction over trust-related concerns,¹⁵⁵ a practice followed by a number of other common-law countries.¹⁵⁶

Rules regarding venue are found in statutes giving probate and chancery courts sole jurisdiction over trust matters.¹⁵⁷ However, these provisions could not have been originally intended to bar arbitration because arbitration was relatively uncommon at the time these courts first developed in medieval England. Instead, this type of legislation was intended to and did act as a type of internal sorting mechanism within the national judicial system, directing trust disputes to one particular venue. Furthermore, many of the historic rationales supporting the use of specialty courts (i.e., the desire to take trust-related disputes away from the jury and give them

¹⁵⁴ See MCGOVERN ET AL., *supra* note 15, at 369.

¹⁵⁵ See KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 189, 198-99 (Tony Weir trans., 1998); HM Courts & Tribunals Service, Chancery Guide 2009, 135-43, *available at* <http://www.justice.gov.uk/courts/rcj-rolls-building/chancery-division>.

¹⁵⁶ See MCGOVERN ET AL., *supra* note 15, at 626.

¹⁵⁷ See *id.*

to decision-makers with specialized substantive and procedural expertise) would be equally well met by arbitration.¹⁵⁸ As such, it seems inappropriate to conclude that exclusive jurisdiction statutes in the trust context were or are meant to exclude either domestic or international arbitration.

Obviously, there is much more that could be said about limited non-arbitrability in the context of mandatory trust arbitration, although such discussions are beyond the scope of this Article.¹⁵⁹ At this point, it is enough to note that there are no clear guidelines to determine how a particular court will decide these sorts of issues. Nevertheless, settlors should keep two points in mind as the law in this area develops.

First, because determinations regarding limited non-arbitrability are often driven by concerns regarding the application of certain principles of mandatory law, settlors should explicitly adopt procedures that give arbitrators the ability to consider and, if necessary, apply mandatory laws of countries other than that whose law the parties are generally seeking to have apply.¹⁶⁰ In so doing, settlors may want to incorporate a conflict of laws approach similar to that reflected in the Hague Convention on Trusts, since that instrument reflects an internationally recognized means of addressing conflict of laws issues relating to trusts.¹⁶¹ While the Hague Convention on Trusts does not provide answers to all possible concerns (such as which rules of

¹⁵⁸ See Langbein, *Contractarian*, *supra* note 1, at 627, 644-50; Strong, *Two Bodies Collide*, *supra* note 8.

¹⁵⁹ For example, one of the issues that requires further consideration involves the rationales behind rules of limited non-arbitrability. This is particularly true with respect to arguments about the purported vulnerability of the parties. This is particularly true with respect to arguments about the purported vulnerability of the parties. For example, in cases involving agents, franchisees and exclusive distributors, the concern is primarily substantive, in that the economic vulnerability of these commercial actors requires the application of certain mandatory laws that are meant to protect the agent, franchisee or exclusive distributor's substantive rights concerning compensation under the contract. See Kröll, *supra* note 83, ¶¶16-5, 16-9. In the case of trust disputes, the alleged vulnerability is primarily procedural, in that certain parties (i.e., those akin to consumers or those who are unascertained, unborn or legally incompetent at the time the dispute arises) may be harmed through unfair arbitral practices. However, it is unclear whether these distinctions will or should affect a court's analysis in any way.

¹⁶⁰ See Strong, *Language*, *supra* note 16 (noting AAA Model Trust Clause may unwisely bind the hands of the arbitrators in this regard).

¹⁶¹ See Hague Convention on Trusts, *supra* note 36, arts. 6-10, 15-18; Dyer, *supra* note 1, at II.D.

law are to be considered non-derogable or are to be given extraterritorial application), it does usefully describe the factors relevant to the determination of the law that is most closely connected with the trust and could be helpful to the extent that it suggests to the court that the settlor did not choose arbitration as a means of escaping mandatory rules of substantive law.¹⁶²

Second, settlors should be aware that judges may consider procedural laws relating to trust disputes to be as important as substantive laws, with both possibly rising to the level of public policy. Since arbitral procedures that closely resemble judicial procedures cannot be said to be unfair in any way,¹⁶³ settlors wishing to minimize potential problems arising out of the principle of limited non-arbitrability may be well-advised to adopt somewhat more formal procedures vis-à-vis trust arbitration, at least until the device is more widely accepted. While it is true that mirroring judicial processes too closely might lead to the charge that settlors are “fail[ing] to engage with the possibilities of . . . arbitration,”¹⁶⁴ this sort of approach has the benefit of addressing any judicial concerns about the fairness of the procedures used to resolve trust disputes.

As this discussion has shown, questions regarding limited non-arbitrability can become quite complicated.¹⁶⁵ Nevertheless, even this brief analysis has suggested ways that a settlor can positively affect the arbitrability analysis through adoption of certain arbitral procedures.

(b) *Impermissible Ouster of the Court’s Jurisdiction*

¹⁶² See Hague Convention on Trusts, *supra* note 36, arts. 7, 15-16.

¹⁶³ See BORN, *supra* note 118, at 1232 n.442 (writing in the context of class arbitration); 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. __ (forthcoming 2012) [hereinafter Strong, First Principles] (same).

¹⁶⁴ W. Mark C. Weidemaier, *Arbitration and the Individuation Critique*, 49 ARIZ. L. REV. 69, 94-95 (2007) (writing in the context of class arbitration); see also Hans Smit, *Class Actions and Their Waiver in Arbitration*, 15 AM. REV. INT’L ARB. 199, 211 (2004) (same).

¹⁶⁵ These matters are considered elsewhere in more detail. See Strong, *Two Bodies Collide*, *supra* note 8.

The next issue to consider involves the question of whether mandatory arbitration of internal trust disputes impermissibly ousts the jurisdiction of the court.¹⁶⁶ At first glance, this also appears to be an issue over which settlors have little control. However, closer consideration suggests several ways in which settlors can influence a court's analysis of this issue.

Discussion regarding the impermissible ouster of the court's jurisdiction begins with the recognition that courts have traditionally exercised uniquely broad powers over the administration of trusts.¹⁶⁷ Thus, for example:

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

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

Finally, if litigation arises, it is tried to the judge, sitting without a jury.¹⁶⁸

Several possible rationales can be used to justify the court's expansive jurisdiction over trusts. One posits that the court assumes broad jurisdictional powers as a means of protecting beneficiaries from overreaching from the trustee.¹⁶⁹ 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."¹⁷⁰

¹⁶⁶ See Cohen & Staff, *supra* note 10, at 209.

¹⁶⁷ See MCGOVERN ET AL., *supra* note 15, at 552-55; Langbein, Contractarian, *supra* note 1, at 662.

¹⁶⁸ Langbein, Contractarian, *supra* note 1, at 662; see also UTC, *supra* note 7, §813; MCGOVERN ET AL., *supra* note 15, at 552-55.

¹⁶⁹ Concerns about overreaching by the settlor are addressed through principles of arbitrability. See Strong, Two Bodies Collide, *supra* note 8.

¹⁷⁰ Fox, *supra* note 10, at 22.

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.”¹⁷¹ However, “effective accountability does not mean that the trustees can be accountable only to the court rather than to some other body which has power to enquire into the trustees’ administration of the fund and to require them to abide by the terms of the trust instrument.”¹⁷² Arbitration can be an equally effective means of curbing any abuse by the trustee. In fact, objections from the beneficiaries regarding the procedure adopted “would only have weight if the beneficiaries were denied any effective means of enforcing their interests against the trustees. If the ADR procedure had effective machinery for enforcing the outcome of the determination against the trustees, then it seems that this objection would not hold.”¹⁷³

Although a number of commentators consider mandatory trust arbitration as a legitimate means of holding trustees accountable to beneficiaries, of the trust bench and bar often take a more conservative view based on longstanding precedent that is hostile to arbitration.¹⁷⁴ However, closer analysis of these decisions shows that many of these cases involved trustees acting as arbitrators.¹⁷⁵ Naturally courts found this practice problematic, since trustees were acting as judges in their own cause and either limiting or eliminating the court’s ability to review the propriety of the trustee’s decisions and actions.

This is a concern that can easily be addressed by settlors, most notably through the adoption of procedures that underscore the extent to which contemporary forms of arbitration require arbitrators to be both independent and impartial. While most, if not all, arbitral rules

¹⁷¹ *Id.* at 24.

¹⁷² *Id.*

¹⁷³ *Id.* at 24-25; *see also* ACTEC, *supra* note 10, at 13-14.

¹⁷⁴ *See* ACTEC, *supra* note 10, at 5 (discussing the “blinding prejudice” to arbitration in contemporary trust and estates practice).

¹⁷⁵ *See* Cohen & Staff, *supra* note 10, at 211-15; Fox, *supra* note 10, at 24.

currently mention these principles in general terms, settlors might want to include slightly more complete descriptions of the principles of independence and impartiality (for example, inserting a phrase into the arbitral provision noting that independence means that a settlor, trustee, protector or beneficiary cannot serve as an arbitrator) or explicitly referencing more detailed standards such as the International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration so as to demonstrate to the court the neutrality and objectivity of the process.¹⁷⁶

Another possible technique would be to identify why these procedural protections are being imposed (for example, incorporating a statement noting that arbitrators must be impartial and independent so as to ensure a neutral evaluation of the trustee's activities). Furthermore, because "[m]any trust practitioners [and judges] have never encountered arbitration,"¹⁷⁷ settlors might also want to adopt explicit language regarding the means by which the tribunal is selected, again to reinforce notions of independence and eliminate concerns that a trustee would be permitted to act as an arbitrator in a dispute concerning the trust. Finally, settlors might want to describe the extent to which the arbitral tribunal is bound to follow the governing law, since various members of the trust bench and bar have recently raised concerns in this regard.

These types of issues arise with equal vigor in all trust-related disputes. However, two types of trust procedures – judicial accounting and instruction – give rise to additional concerns, since they do not resemble traditional forms of arbitration.¹⁷⁸ While the mere fact that certain

¹⁷⁶ See IBA, Guidelines on Conflicts of Interest in International Arbitration, available at http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

¹⁷⁷ Cohen & Staff, *supra* note 10, at 206.

¹⁷⁸ See Langbein, Contractarian, *supra* note 1, at 662; see also UTC, *supra* note 7, §813; MCGOVERN ET AL., *supra* note 15, at 552-55.

procedures are unusual is not necessarily fatal to their being considered amenable to arbitration,¹⁷⁹ any form of novelty requires special consideration.

The first procedure – judicial accounting – is distinguishable from “normal” arbitration to the extent that judicial accounting procedures can require routine and continuing oversight to trusts.¹⁸⁰ (Notably, some states do not contemplate ongoing jurisdiction, since the duty to provide an accounting is only triggered by a request from a beneficiary.¹⁸¹) Duties of accounting exist with respect to commercial as well as other types of trusts.¹⁸²

Although this type of continuing involvement in a party’s affairs is unusual in arbitration, it is not unprecedented. For example, some fields – most prominently, the construction industry – use dispute review boards (also known as dispute resolution boards) to resolve issues that may arise between parties to a long-term contract.¹⁸³ Dispute review boards allow arbitrators to gain an ongoing familiarity with the parties and the nature of the relationship while also providing a quick and cost-efficient means of resolving small disputes before they escalate into something more serious. Although some dispute review boards only issue non-binding decisions, there is nothing to prohibit the parties from creating a binding mechanism.¹⁸⁴

¹⁷⁹ Indeed, arbitration is capable of adopting more diverse procedures than are available in litigation. See BORN, *supra* note 118, at 1232 n.442.

¹⁸⁰ See UTC, *supra* note 7, §201(b); Estate of Proceeding for the Appointment of a Guardian for Charlotte Radcliffe, N.Y.L.J., at 36 (Sur. Ct. N.Y. County, July 20, 2007) (holding an arbitration provision in an agreement with an external third party advisor unenforceable on the grounds that arbitration would “unacceptably divest the court of continuing jurisdiction in this matter”); see also UTC, *supra* note 7, §201, cmt. (noting the UTC “does not create a system of routine or mandatory court supervision,” unlike the law in some U.S. states); MCGOVERN ET AL., *supra* note 15, at 552-53.

¹⁸¹ See HAYTON ET AL., *supra* note 6, ¶¶56.1, 87.2 to 87.6; see also *id.* ¶56.2.

¹⁸² See *id.*, ¶56.65.

¹⁸³ See Rebecca Golbert, *The Global Dimension of the Current Economic Crisis and the Benefits of Alternative Dispute Resolution*, 11 NEV. L.J. 502, 517-18 (2011).

¹⁸⁴ See ICC, Standard and Suggested Clauses for Dispute Resolution Services, Dispute Boards, available at <http://www.iccwbo.org/court/arbitration/id4114/index.html> (including three model clauses reflecting varying degrees of finality, including some that approaches are binding); BORN, *supra* note 118, at 243-44.

Trusts often reflect the same kind of relational characteristic that is seen in long-term commercial contracts,¹⁸⁵ and a similar type of standing dispute resolution mechanism could be used in the trust context to deal with ongoing issues such as judicial accounting. Because the members of the board would be either appointed by a neutral body (such as an arbitral institution) or by both proponents of the trust or accounting procedure (i.e., the trustee) and those whose interests would be expected to be adverse to the trust or the accounting procedure (i.e., the beneficiaries),¹⁸⁶ such a process would comply with contemporary requirements for procedural fairness regarding the selection of arbitrators and would allow the trustee to be held accountable to the beneficiaries.

The second procedure – judicial instruction – runs into difficulties because arbitration typically does not involve the granting of advisory opinions. However, requests for judicial instruction could be considered akin to requests for declarative or injunctive relief, which are arbitrable in many jurisdictions.¹⁸⁷ This is particularly true to the extent that a request for judicial instruction leads to final resolution of a particular issue, since such a determination would resemble other types of decisions leading to a partial final award.¹⁸⁸

Notably, no conceptual problems arise simply because a party might make more than one request for judicial instruction during the life of an individual trust, since there is no requirement that arbitration be used only once by a particular set of parties. In cases where a series of disputes is possible, the parties can provide for the matters to be heard by different tribunals or

¹⁸⁵ See Langbein, *Contractarian*, *supra* note 1, at 631, 653-54.

¹⁸⁶ See Michael A. Marra, *The Construction Industry Guide to Dispute Avoidance and Resolution*, 567 *PLI/REAL*. 525, 541-42 (May 7, 2009).

¹⁸⁷ See BORN, *supra* note 118, at 2478-79.

¹⁸⁸ Although arbitration is best suited to disputes that address all of the matters outstanding between the parties, arbitral tribunals can render partial final awards that provide binding resolution of some discrete aspect of a larger dispute. See *Arbitration Act 1996*, *supra* note 124, §47; BORN, *supra* note 118, at 2430-33.

by the same tribunal, either under the auspices of a standing dispute review board or through the reappointment of the same arbitrators that heard the first matter. However, because some courts might take the view that a second arbitration involves “strangers” to the first proceeding, even if the parties and the arbitrators are the same,¹⁸⁹ settlors should consider adopting procedural provisions that outline whether and to what extent a later tribunal can consider arguments and evidence presented to an earlier tribunal so as to avoid problems with respect to the confidentiality of previous proceedings and the preclusive value of earlier awards.¹⁹⁰

Another way to analyze judicial instruction in arbitration is to view such procedures as constituting a form of interim provisional relief.¹⁹¹ Interestingly, this approach could lead to even fewer problems as a matter of arbitral jurisprudence, since courts and arbitral tribunals have long been viewed as holding concurrent jurisdiction over requests for these kinds of relief.¹⁹² Therefore, allowing either a tribunal or a court to hear matters involving judicial instruction could be seen as consistent with practices elsewhere in arbitration.

Concerns might be raised with respect to arbitration of matters relating to judicial accounting or instruction to the extent that arbitration law only considers final awards to be immediately enforceable and some awards arising out of a judicial accounting or instruction procedure might not be considered “final.”¹⁹³ However, this does not appear to be unduly problematic, since some of the issues that are at stake in accounting and instruction procedures are obviously not intended to constitute a final determination of the rights and responsibilities

¹⁸⁹ See BERNARD HANOTIAU, COMPLEX ARBITRATIONS: MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS 372, 389-90 (2005); Alan Scott Rau, *Arbitral Jurisdiction and the Dimensions of “Consent,”* 24 ARB. INT’L 199, 226-29 (2008).

¹⁹⁰ See *Roehl v. Ritchie*, 54 Cal. Rptr. 3d 185, 198 (Cal. Ct. App. 2007), *declined to extend by Diaz v. Bukey*, 125 Cal. Rptr. 3d 610 (Cal. Ct. App. 2011), *review granted and opinion superseded by Diaz v. Bukey*, 257 P.3d 1129 (Cal. 2011).

¹⁹¹ See BORN, *supra* note 118, at 1946-61.

¹⁹² See *id.* at 1972-73, 2050.

¹⁹³ See *id.* at 2430-35.

between the parties.¹⁹⁴ Those matters that do involve final determination of a discrete issue would appear to be adequately covered by existing law regarding partial final awards.¹⁹⁵

All of this suggests that arbitration can provide an appropriate mechanism for resolving issues relating to judicial accounting and instruction, a conclusion that is bolstered by a 2007 decision from the California Court of Appeal, *Roehl v. Ritchie*.¹⁹⁶ The dispute there involved a series of awards rendered by a sole arbitrator pursuant to an arbitration provision contained in a family trust. Although the arbitrator was dealing with ongoing accounting issues, the court demonstrated no conceptual difficulty with allowing such matters to be addressed in arbitration, based on precedent that allowed “the utilization of a multiple incremental or successive award process as a means, in an appropriate case, of finally deciding all submitted issues.”¹⁹⁷ In reaching its conclusion, the court also noted that:

“the ongoing and changing nature of trust administration” may require ongoing proceedings “for instructions, to settle accounts, to fix compensation . . . [and] to allow, compromise or settle claims.” The arbitrator did not abuse his discretion in fashioning a remedy to resolve ongoing matters relating to Trust administration costs and fees.¹⁹⁸

This suggests that arbitrators may properly address all types of disputes associated with trusts, including those dealing with accounting or judicial instruction. Such procedures will not impermissibly oust the court’s jurisdiction so long as the procedures allow independent scrutiny of the trustee’s decisions.

¹⁹⁴ For example, some types of accountings are expressly meant to be interim in nature.

¹⁹⁵ Thus, an award arising out of an accounting that cannot be revisited later can and should be immediately enforceable. *See id.*

¹⁹⁶ *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 and opinion superseded by Diaz v. Bukey*, 257 P.3d 1129 (Cal. 2011).

¹⁹⁷ *Roehl*, 54 Cal. Rptr. 3d at 194 (citation omitted); *see also* Arbitration Act 1996, *supra* note 124, §48 (noting tribunal’s power to create remedies).

¹⁹⁸ *Roehl*, 54 Cal. Rptr. 3d at 195.

(c) *Proper Representation of the Parties*

The third issue to consider involves the need to ensure that all interested parties are properly represented in the proceedings.¹⁹⁹ Here, the biggest problem involves actual or potential beneficiaries who may be unascertained, unborn or legally incompetent at the time the dispute arises.²⁰⁰

This is quite likely a novel issue for many commercial lawyers, since very few areas of law require judges or arbitrators to consider the rights of persons who are not actually present in the dispute. Although there are some exceptions, most notably the representative class action and its corollary, the class arbitration, which both involve a few named individuals bringing a claim on behalf of a large number of unnamed others,²⁰¹ trust disputes are not representative in nature.²⁰² Instead, trust disputes proceed *in rem*, with decisions binding “all persons having

¹⁹⁹ See Cohen & Staff, *supra* note 10, at 209.

²⁰⁰ See *id.*

²⁰¹ See Strong, First Principles, *supra* note 163, at __.

²⁰² Nevertheless, trust disputes do share some attributes with class claims. For example, trust disputes could grow to rival class suits with respect to size, particularly in cases involving commercial trusts. See Wüstemann, *supra* note 5, at 35. However, this characteristic does not create any conceptual problems for either class arbitration or trust arbitration, since the arbitral process is entirely capable of handling multiparty matters and has done so with increasing frequency in recent years. See LEW ET AL., *supra* note 130, ¶16-1 (noting the percentage of multiparty arbitrations administered by the ICC rose from 20% to 30% between 1995 and 2001); Martin Platte, *When Should an Arbitrator Join Cases?*, 18 ARB. INT’L 67, 67 (2002) (noting more than 50% of LCIA arbitrations reportedly involve more than two parties). Notably, a trust dispute could result in a class claim, including possibly a class arbitration. For example, in *Doctor’s Associates, Inc. v. Hollingsworth*, a number of Subway franchisees brought a class action in state court against various Subway franchising entities, including the trustees of the Subway Franchisee Advertising Fund Trust (SFAFT), alleging “various breaches of fiduciary duty and conspiracy claims relating to the alleged mismanagement and misappropriation of contributions to the SFAFT.” *Doctor’s Assoc., Inc. v. Hollingsworth*, 949 F. Supp. 77, 79 (D. Conn. 1996). The various franchise agreements included a provision requiring arbitration of “[a]ny controversy or claim arising out of or relating to this contract or the breach thereof.” *Id.* Although the SFAFT did not have an arbitration provision itself, the court found that the claims against the SFAFT arose out of or related to the franchise agreement and concluded that the trust claims were arbitrable. See *id.* at 84-85. As a result, the dispute was ordered into arbitration. See *id.* at 86. The claims were most likely heard on a bilateral basis, since the dispute arose in 1996, prior to the rapid expansion of class arbitration in the mid- to late 2000s. See *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003) (plurality opinion); Strong, First Principles, *supra* note 163, at __. Had the dispute arisen today, it might have been heard as a class arbitration. See *id.* at __ (noting the class arbitration device has survived recent U.S. Supreme Court decisions); S.I. Strong, *The*

adequate notice, whether or not they actually participate in the proceeding.”²⁰³ This obviously puts significant pressure on judges and arbitrators to adopt procedural mechanisms that properly ascertain who should have notice of a trust proceeding, how notice should be provided and how the rights of all interested parties, including those who are not present, are to be protected during the hearing phase.²⁰⁴

The first task – identifying who should be given notice of a trust dispute – requires a careful reading of the trust document as well as a detailed knowledge of the context in which the trust is operating, since some beneficiaries may not be identified in the trust by name. Although this practice may seem unusual, it is quite common in trusts and arises out of the desire to provide settlors with maximum flexibility in setting up their trusts.²⁰⁵ For example, a settlor contemplating a long-term trust may decide to identify beneficiaries by class so as to ensure that all relevant persons are captured within the trust provisions.²⁰⁶ Alternatively, a settlor may want to give the trustee the discretion to determine who a beneficiary is or whether a disbursement under the trust is necessary.²⁰⁷ Requiring all these elements to be spelled out in the trust would

Sounds of Silence: Are U.S. Arbitrators Creating Internationally Enforceable Awards When Ordering Class Arbitration in Cases of Contractual Silence or Ambiguity? 30 MICH. J. INT’L L. 1017, 1055-83 (2009) (discussing how class arbitrations can arise even in cases of contractual silence as to class treatment).

²⁰³ Janin, *supra* note 11, at 529; *see also* Horton, *supra* note 10, at *9; di Robilant, *supra* note 11, at 1360, 1368.

²⁰⁴ *See* Strong, *Two Bodies Collide*, *supra* note 8.

²⁰⁵ *See* HAYTON ET AL., *supra* note 6, ¶1.99; Langbein, *Commercial Trusts*, *supra* note 1, at 183.

²⁰⁶ An example might be a trust for the benefit of “my grandchildren,” not all of whom may be born at the time the trust is created. Notably, the reference to a class of beneficiaries in the context of a trust should not be equated with a class of claimants in a U.S.-style class action or arbitration. In trust law, the term “class” simply refers to a group of individuals identified by certain characteristics (“my grandchildren” or “my employees”) rather than by name, thus allowing membership in the class to expand or contract without requiring an explicit amendment to the trust. Classes in trust law are not therefore associated with representative relief, as is the case with class actions or arbitrations.

²⁰⁷ An example of the first type of provision might be a trust for the benefit of “any student in the town of Littleton who needs financial assistance to attend university.” An example of the second type of provision might be a trust indicating disbursements to “my son, Jack, if he should need financial assistance.”

mean that the document would not only be quite cumbersome but would also have to be constantly amended to take changing circumstances into account. In some cases, it would be impossible to provide the requisite amount of specificity at the time the trust was created.²⁰⁸ In either event, the flexibility of the trust would be severely curtailed.

The trust document is only one source of information about potential parties to a trust dispute. Sometimes people's interest in the trust and in the dispute arise as a matter of law. Usually these claims are based on certain aspects of either marital or succession law that prohibit property from being distributed in certain ways.²⁰⁹ Although these types of issues may be perceived as arising most often in the context of private family trusts, questions regarding marital and succession rights can also arise in the context of commercial trusts.²¹⁰

Some potential claimants will be ascertainable as soon as it is determined that a right may arise under the trust or under a statute. For example, the settlor's spouse can easily be identified by name and can come forward in his or her own capacity once a dispute is filed and notice is given. However, there will be times when a court may be able to identify a potential party by relationship but may not be able to bring any actual, living person into the dispute because the real party in interest is unascertained, unborn or legally incompetent at the time the dispute

²⁰⁸ For example, a trust created for the benefit of "those of my grandchildren who are alive ten years after my death" could not reliably name all such persons in the trust itself, since beneficiaries could enter the class after the settlor's death (through birth) or depart from the class (through death). There might also be grandchildren who were living at the time the trust was created but who were not known to the settlor.

²⁰⁹ States often restrict dispositions of property that would affect the rights of forced heirs or infringe on a surviving spouse's elective share. See MCGOVERN ET AL., *supra* note 15, at 27, 160-71; Bosques-Hernández, *supra* note 55, 23 (discussing Spain, Bolivia, Peru and Honduras); Perrin, *supra* note 1, at 657-59 (discussing clawback possibilities involving *inter vivos* trusts and testamentary trusts); Wüstemann, *supra* note 5, at 45-46.

²¹⁰ See *Regions Bank v. Britt*, No. 4:09CV61TSL-LRA, 2009 WL 3766490, at *2 n. 2 (S.D. Miss. Nov. 10, 2009) (involving a husband who argued that a deed of trust signed by his wife was invalid because it encumbered marital property without his consent).

arises.²¹¹ In litigated disputes, the problem has been resolved by allowing the court “to appoint a person to represent the interests of such beneficiaries,” although “even then, any compromise of the litigation has to be approved by the court.”²¹² In England, the person named to protect the beneficiaries’ claims, called a “special representative,” cannot have any personal interest in the dispute itself.²¹³ Other jurisdictions, such as the United States, either appoint an independent representative similar to a special representative or allow an existing beneficiary who shares the absent beneficiary’s interests to protect the absent beneficiary’s claims in a practice known as “virtual representation.”²¹⁴ Minors and other legally incompetent persons (such as the mentally incapacitated) may have a legal representative, typically referred to as a guardian, appointed if such a person is not already in place.²¹⁵ The question therefore becomes whether these sorts of representative mechanisms can be used in arbitration.

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

²¹¹ For example, a trust provision benefitting “those of my grandchildren who are alive ten years after my death” will be known to affect all of the settlor’s grandchildren who are alive ten years after the settlor’s death. However, if a dispute involving the trust arises three years after the settlor’s death, there may be some potential beneficiaries who are yet unborn (if at least one of the settlor’s children is still alive) or who are minors. Alternatively, a trust that provides a \$500 cash award annually to the top student of Littleton Preparatory School for the next twenty years will involve a group of identifiable beneficiaries (since it is known that there will be one top student each year for the remainder of the term of the trust), even though future beneficiaries cannot be specifically ascertained by name if a dispute arises in year three of the trust.

²¹² Buckle & Olsen, *supra* note 5, at 649-50; *see also* Mautner & Orr, *supra* note 10, at 161, 163-64; Wüstemann, *supra* note 5, at 47.

²¹³ *See* Mautner & Orr, *supra* note 10, at 161, 163-64; Wüstemann, *supra* note 5, at 47.

²¹⁴ *See* MCGOVERN ET AL., *supra* note 15, at 613-14; Mautner & Orr, *supra* note 10, at 161, 163-64; Wüstemann, *supra* note 5, at 47.

²¹⁵ *See* MCGOVERN ET AL., *supra* note 15, at 660-63. Sometimes this person is a natural guardian (i.e., the parent of a child with a legal interest in the dispute) and sometimes this person is specially appointed (i.e., a guardian *ad litem*). Courts typically appoint a guardian *ad litem* if there is a chance that the interests of the natural guardian will conflict with the interests of the represented person.

[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.²¹⁶

However, a trust that specifically describes notice and representation procedures in the document itself could become quite lengthy, something that is often not advisable as a matter of arbitration law and procedure.²¹⁷ Instead, it may be better to devise special arbitral rules outside of the trust itself describing how unascertained, unborn and legally incompetent beneficiaries can come (or be brought) forward to make their claims.²¹⁸ Either way, the arbitral clause or procedural rules should also provide for the payment of special or virtual representatives out of the trust fund.²¹⁹

Trustees who are not given explicit powers to appoint special or virtual representatives in the trust or governing arbitral rules could attempt to do so based on their residual discretionary powers under the trust. Although this approach has not been frequently discussed by commentators and may therefore be somewhat open to debate, trustees wishing to take on this task could seek to rely on statutory provisions allowing trustees to pursue nonjudicial means of dispute resolution.²²⁰

Even if representatives can be used in arbitration, some potential problems still remain. For example, questions exist as to whether the arbitral tribunal would have the ability to approve

²¹⁶ Cohen & Staff, *supra* note 10, at 222-23 (suggesting “[t]he arbitral tribunal could determine who should be served with notice of the arbitration, in the same way as, in court proceedings, a judge can”); *see also* Hayton, *supra* note 97, at 15-18 (suggesting possible mechanisms for appointing virtual representatives).

²¹⁷ *See* GARY B. BORN, INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: DRAFTING AND ENFORCING 37-38 (2010) [hereinafter BORN, DRAFTING]; Borris, *supra* note 8, at 65.

²¹⁸ *See* HAYTON ET AL., *supra* note 6, ¶56.11.

²¹⁹ *See* Hayton, *supra* note 111, at 72; *see also* Hayton, *supra* note 97, at 17.

²²⁰ *See* Trustee Act 1925, *supra* note 7, §15(f); Idaho Code Ann. §§15-8-101, 15-8-103 (2011); Wash. Rev. Code §§11.96A.010, 11.96A.030 (2012); UTC, *supra* note 7, §§111, 816(23).

the settlement of a trust dispute in cases involving appointed representatives or whether that power could be exercised only by a court.²²¹ While arbitrators are entirely competent to enter an award on an agreed settlement as a matter of arbitration law,²²² some courts could oppose similar actions in the trust context on the grounds that the judicial duty to approve the voluntary disposition of a trust dispute is non-derogable.²²³ 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.”²²⁴

Challenges could also arise as to the competency of a particular representative. However, it has been said that “[o]ne can leave it to the good sense of the arbitrator to provide for due process and a fair hearing by appointing appropriate skilled independent persons to represent minors and unborn and unascertained beneficiaries.”²²⁵

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

²²¹ See Hayton, *supra* note 97, at 13-15.

²²² See BORN, *supra* note 118, at 2437-38.

²²³ See Hayton, *supra* note 97, at 15 (indicating no need for judicial intervention in litigated cases in some U.S. states while acknowledging the need for court involvement in England and certain U.K. dependences). Interestingly, arbitrators appear to have the right to enter a consent award in the context of class arbitration, even though courts typically have to confirm a settlement in a judicial class action. See Federal Rules of Civil Procedure, Rule 23(e) (U.S.); American Arbitration Association, Supplementary Rules for Class Arbitrations, rule 8, effective 8 October 2003 [hereinafter AAA Supplementary Rules], available at www.adr.org/sp.asp?id=21936 JAMS Class Action Procedures, rule 6, effective 1 May 2009, available at www.jamsadr.com/rules/class_action.asp. This provides some support for the notion that arbitrators in trust disputes should be able to enter consent awards involving represented parties without the need for judicial intervention. The important point is that a neutral entity – either the court or the arbitral tribunal – has independently reviewed the settlement to ensure that it is fair to all concerned.

²²⁴ Mautner & Orr, *supra* note 10, at 166.

²²⁵ Hayton, *supra* note 111, at 72.

not necessary in some jurisdictions.²²⁶ However, a representative would be necessary in cases where a conflict of interest existed between a minor beneficiary and his or her natural guardian (i.e., the parent).²²⁷

It is notable that although numerous questions exist with respect to the procedures that can or should be used to address the special needs of unborn, unascertained and legally incompetent beneficiaries, none of the issues is conceptually problematic. Instead, adequate solutions appear possible with sufficient forethought and care. Therefore it appears as if settlors can positively influence determinations about the enforceability of an arbitration provision in a trust by adopting procedures that take the special needs of particularly vulnerable beneficiaries into account.

V. ADOPTING VIABLE PROCEDURES FOR MANDATORY TRUST ARBITRATION

As the preceding discussion suggests, mandatory trust arbitration gives rise to a number of issues that would benefit from special arbitral procedures. These procedures could be adopted in one of several ways. First, settlors could attempt to address each of these items in an arbitration provision located in the trust itself. However, experts in arbitration do not encourage drafters to adopt these sorts of lengthy, *ad hoc* provisions, since the use of non-standard language can lead to disputes over the scope and interpretation of the operative terms.²²⁸ This sort of approach would also not permit easy and inexpensive amendment of the procedures to take new legal developments into account, as would be the case if the detailed provisions were found in a separate set of arbitral rules.²²⁹ Furthermore, this type of clause might be difficult to draft at the

²²⁶ See Wüstemann, *supra* note 6, at 52.

²²⁷ See *id.*

²²⁸ See BORN, DRAFTING, *supra* note 217, at 37-38.

²²⁹ See Borris, *supra* note 8, at 65.

time of trust creation, since the settlor may not want to pay for a lawyer to draw up an individualized dispute resolution mechanism that the settlor may not believe is necessary.

Second, settlors could leave the nuances of arbitral procedure to the discretion of the arbitral tribunal, although this sort of approach suffers somewhat from a lack of transparency and predictability. Because courts may be more inclined to enforce an arbitration provision in a trust if the judge can be assured of the fairness of the process in advance of any actual proceedings, settlors may be better served by having key procedures set in place before the arbitration begins.²³⁰ A similar sort of benefit can arise retroactively, in that courts considering the enforcement of an arbitral award might look favorably on the fact that certain procedures were known in advance of the arbitration, since parties can thus be said to have been on notice of the procedures to be used to resolve the dispute.

This strongly suggests that the best approach would be to adopt some sort of pre-established rule set in the arbitration provision located in the trust. Of course, in so doing, the settlor is not required to have arbitral procedures that have been drafted especially for use in trust disputes. Indeed, a number of internal trust disputes arising out of mandatory arbitration provisions in a trust instrument have utilized the general rules of the AAA, the ICC and the ICDR.²³¹ However, none of these standard rule sets specifically addresses any of the various

²³⁰ This is one of the reasons why parties adopt institutional arbitration. *See* LEW ET AL., *supra* note 130, ¶3-20.

²³¹ *See* Municipality of San Juan v. Corporacion Para El Fomento Economico de la Ciudad Capital, 597 F. Supp. 2d 247, 248-49 (D. Puerto Rico 2008) (upholding terms of a pre-dispute, mandatory arbitration provision in the trust deed calling for arbitration under the ICDR Arbitration Rules); Burlington Resources Oil & Gas Co. LP v. San Juan Basin Royalty Trust, 249 S.W.3d 34, 36, 38 (Tex. App. 2007) (involving a post-dispute arbitration agreement concerning accountings and audits of the trust and invoking the AAA Commercial Arbitration Rules); New South Federal Savings Bank v. Anding, 414 F. Supp. 2d 636, 646-47 (S.D. Miss. 2005) (upholding mandatory arbitration agreement in trust deed rider invoking the AAA Commercial Arbitration Rules); 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) (involving an arbitration provision in a trust agreement invoking the ICC Arbitration Rules).

trust-related concerns outlined in this Article. While this is not fatal to the use of these rules, since the tribunal can always tailor the procedures pursuant to the general grant of discretion contained in each of the rule sets,²³² this kind of broad reliance on arbitral discretion again robs the court of the opportunity to appreciate independently the extent to which the procedures used in the arbitration safeguard important principles of procedural fairness.

However, settlors do not have to rely on general institutions rules, since the AAA has specifically designed a dedicated set of arbitral procedures – the AAA Trust Arbitration Rules – to address the unique challenges associated with the arbitration of trust disputes.²³³ These rules are analyzed in detail below. However, a second set of specialized procedures – the DIS Supplementary Rules – might also provide useful ideas for proponents of trust arbitration, since the DIS rules address a type of collective arbitration that is in many ways similar to mandatory trust arbitration.²³⁴ Therefore, the DIS Supplementary Rules are discussed below as well.

(a) *The AAA Trust Arbitration Rules*

²³² See AAA, Commercial Arbitration Rules, effective 1 June 2009, R20-21, R-30, available at http://www.adr.org/aaa/faces/rules/searchrules/rulesdetail?doc=ADRSTG_004130&_afLoop=60971558760000&_afWindowMode=0&_afWindowId=11ysgf10nw_1#%40%3F_afWindowId%3D11ysgf10nw_1%26_afLoop%3D60971558760000%26doc%3DADRSTG_004130%26_afWindowMode%3D0%26_adf.ctrl-state%3D11ysgf10nw_53; AAA, International Dispute Resolution Procedures, effective 1 June 2009, art. 16, available at http://www.adr.org/aaa/faces/rules/searchrules/rulesdetail?doc=ADRSTG_002008&_afLoop=61171829589355&_afWindowMode=0&_afWindowId=11ysgf10nw_1#%40%3F_afWindowId%3D11ysgf10nw_1%26_afLoop%3D61171829589355%26doc%3DADRSTG_002008%26_afWindowMode%3D0%26_adf.ctrl-state%3D11ysgf10nw_75; ICC, Rules of Arbitration, effective 1 January 2012, art. 22, available at <http://www.iccwbo.org/ICCDRSRules/> [hereinafter ICC Arbitration Rules].

²³³ See AAA Trust Arbitration Rules, *supra* note 17. In 2005, the American College of Trust and Estate Counsel (ACTEC) was said to be working on a set of Model Rules for Trust and Estate Arbitration, but those rules do not appear to have been published as such. See Bridget A. Logstrom et al., *Resolving Disputes With Ease and Grace*, 31 AM. COLL. TR. & ESTATES COUNS. J. 235, 243 (2005).

²³⁴ See DIS Supplementary Rules, *supra* note 19. While class arbitration also constitutes a collective arbitral proceeding, class arbitration is not really analogous to trust arbitration given class arbitration's focus on representative relief. Therefore, the various rules on class arbitration will not be discussed herein.

The AAA Trust Arbitration Rules were first published in 2003, with various revisions having been made in the intervening years.²³⁵ Although the title of the rules clearly demonstrates that the AAA meant to address the special challenges associated with trust arbitration, no one has ever analyzed the extent to which the AAA Trust Arbitration Rules achieve that objective. The following discussion aims to fill that analytical gap.²³⁶

(i) *Applicability*

The first thing to consider is how the AAA Trust Arbitration Rules may be invoked. According to Rule 1, the settlor of a trust can adopt the AAA Trust Arbitration Rules either by mentioning the rules by name in the trust or by invoking institutional arbitration with the AAA without reference to any particular AAA rule set.²³⁷ Reference to the AAA Trust Arbitration Rules may be made in the trust itself, thus triggering the obligation to resolve future disputes involving matters internal to the trust through arbitration, although the rules can also be adopted in existing disputes.²³⁸ The AAA provides a model arbitration clause for inclusion in the trust, although that clause appears to restrict unnecessarily the scope of issues that are considered amenable to arbitration.²³⁹

Although Rule 1 appears straightforward on its face, implicitly or even explicitly invoking the AAA Trust Arbitration Rules does not necessarily mean that any ensuing arbitration will be governed by those procedures. Instead, the AAA will override the settlor's choice of

²³⁵ See AAA Trust Arbitration Rules, *supra* note 17; see also AAA, Archived Rules, <http://www.adr.org/sp.asp?id=29487>.

²³⁶ The AAA Trust Arbitration Rules contain a number of standard provisions which are necessary for any arbitration but which do not bear on any trust-related issues. These provisions will not be addressed herein.

²³⁷ See AAA Trust Arbitration Rules, *supra* note 17, rule 1.

²³⁸ See *id.*, Introduction, rule 4.

²³⁹ See *id.*, Model Clause; Strong, Language, *supra* note 16.

procedures if the relationship between the parties appears to be consumer in nature. In those cases, the dispute will proceed under the AAA Supplementary Rules on Consumer-Related Disputes (AAA Consumer Rules).²⁴⁰ While parties are permitted to bring any concerns about the application of the AAA Consumer Rules to the arbitrator, there is no guarantee that their objections will prevail, since the decision to use the AAA Consumer Rules resides solely with the AAA.²⁴¹ Although the intent is obviously to protect small, individual parties from what might be seen as unnecessarily complex procedures, this approach is troubling because it eliminates the application of any special trust-related procedures that are presumably contained in the AAA Trust Arbitration Rules. The provision is also problematic as a matter of trust law, since one of the primary rules of trust construction is to give effect to the intent of the settlor unless to do so would contravene positive law or public policy.²⁴²

Of course, the immediate response is that the settlor can be said to have agreed to the use of the AAA Consumer Rules in appropriate cases, since the AAA Trust Arbitration Rules explicitly contemplate such a possibility. Use of the AAA Consumer Rules may also be seen as necessary in light of the special public policy concerns relating to consumer arbitration. Indeed, some trust commentators approve of the AAA's approach to consumer-oriented arbitration, based on worries about overreaching on the part of professional trustees involved in overseeing certain commercial trusts, since those trusts are sometimes seen as operating largely at the discretion of the professional trustee rather than at the direction of the settlors.²⁴³

²⁴⁰ See AAA Trust Arbitration Rules, *supra* note 17, rule 1; see also AAA Consumer-Related Disputes Supplementary Procedures [hereinafter AAA Consumer Arbitration Rules], available at <http://www.adr.org/sp.asp?id=22014>.

²⁴¹ See AAA Trust Arbitration Rules, *supra* note 17, rule 1. Because settlors have no legal interest in any disputes involving the trusts that they have created, settlors have no standing to enforce an arbitration provision in a trust and thus cannot lodge an objection themselves.

²⁴² See HAYTON ET AL., *supra* note 6, ¶43.1.(1); Janin, *supra* note 11, at 528.

²⁴³ The author is grateful to David Horton for this point.

However, it is not yet clear whether this default rule is necessary, given that there has been no suggestion that the AAA Trust Arbitration Rules are in any way unfair to small users. Furthermore, there has been no evidence that any purported overreaching on the part of a trustee of a commercial trust is any different than overreaching by any other trustee. Indeed, although some people may view settlor-beneficiaries to commercial trusts as consumers, it may be more apt to view these persons as analogous to corporate shareholders, since they are “buying into” the trust in much the same way that corporate shareholders purchase corporate shares. As such, settlor-beneficiaries of these types of trusts might be seen as more sophisticated than other types of consumers and therefore might be subject to somewhat different rules and presumptions.²⁴⁴ Given these and other questions, it seems inappropriate to assume automatically that the AAA Consumer Rules would be the best means of resolving an internal trust dispute.

The AAA also alters certain aspects of the standard AAA Trust Arbitration Rules in cases involving particularly large disputes, with Rule 8 indicating that the arbitration will proceed under the AAA Supplementary Procedures for Large, Complex Disputes (AAA Complex Dispute Procedures) whenever the claim or counterclaim exceeds \$1 million and at least one party has requested use of those procedures.²⁴⁵ Parties may also jointly agree to the application of the AAA Complex Dispute Procedures, regardless of the amount at issue.²⁴⁶ In both

²⁴⁴ See *Abaclat (formerly Beccara) v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility dated August 4, 2011, ¶461, available at <http://italaw.com/documents/AbaclatDecisiononJurisdiction.pdf> [hereinafter *Abaclat Award*]; Strong, *Abaclat*, *supra* note 153 (discussing ICSID mass arbitration wherein the arbitrators distinguished between the relative level of sophistication of investors in sovereign bonds and consumers).

²⁴⁵ See AAA Trust Arbitration Rules, *supra* note 17, rule 8; see also *id.*, rules 46-51. This triggering amount will likely be reached quite often, particularly in cases involving commercial trusts.

²⁴⁶ See *id.*, rule 8.

instances, application of the AAA's Complex Dispute Procedures is subject also to the AAA's discretion.²⁴⁷

The AAA Complex Dispute Procedures are not lengthy and primarily involve slightly different procedures regarding certain administrative concerns, such as those involving the number of arbitrators and the form of the award.²⁴⁸ However, there are some important differences between the standard AAA Trust Arbitration Rules and the AAA Complex Dispute Procedures.²⁴⁹ As such, the AAA's approach to the application of these alternative procedures is problematic because it puts procedural decisions in the hands of the AAA and, to a lesser extent, the parties, even though trust law has traditionally given precedence to the intent of the settlor in all matters concerning the trust.

(ii) *Multiparty procedures*

One of the primary challenges of trust arbitration involves the possibility of multiparty disputes.²⁵⁰ Thus, it is not surprising that the AAA Trust Arbitration Rules appear to take this issue into account, most visibly in language stating that “[t]he initiating party shall give written notice to all other parties (hereinafter respondent).”²⁵¹

While this language properly recognizes that trust disputes can involve more than two parties, the AAA creates various problems by characterizing anyone who is not initiating the arbitration as a respondent. Certainly there are benefits to the AAA's approach, including the clear delineation of who should work together for purposes of appointing arbitrators and

²⁴⁷ *See id.*

²⁴⁸ *See id.* rules 48, 50. The AAA Complex Dispute Procedures appear at the end of the AAA Trust Arbitration Rules. *See id.* rules 46-51.

²⁴⁹ *See infra* notes 261-70 and accompanying text.

²⁵⁰ *See Horton, supra* note 10, at *9; *Janin, supra* note 11, at 529; *Wüstemann, supra* note 5, at 53-54.

²⁵¹ *See AAA Trust Arbitration Rules, supra* note 17, rule 5.

submitting any responsive documents. However, this particular technique fails to take into account the possibility that not all members of the so-called respondent group may be similarly situated.

This potential for misalignment arises out of the diverse nature of the parties to a trust dispute. For example, trust-related controversies can involve the original or successor trustee(s), the original or successor protector(s), some or all of the beneficiaries (including perhaps some persons who are unborn, unascertained or legally incompetent) and possibly even parties external to the trust, such as advisors, agents or persons with statutory claims hostile to the existence of the trust.²⁵² Requiring all of these individuals to act together to choose an arbitrator or file a single response would be inappropriate in some cases, since some of these late-joined parties could have interests that align more naturally with those of the claimant.

The AAA Trust Arbitration Rules also run into difficulties to the extent that they fail to mention whether and to what extent claimants must provide statutory notice based on provisions found in any relevant probate or family law statute. The rules are also silent with respect to the appointment of representatives for parties who are unascertained, unborn or legally incompetent at the time the dispute arises.²⁵³ While these issues could be addressed by the arbitral tribunal on an *ad hoc*, discretionary basis,²⁵⁴ such omissions are striking in a rule set that purports to take the special needs of trust disputes into account.

The AAA Trust Arbitration Rules struggle with multiparty issues in other ways as well. For example, the rules indicate that “[a]ny person having a direct interest in the arbitration is

²⁵² Although external parties are not usually implicated in internal disputes, exceptions to the general rule do exist. *See supra* note 202; *see also infra* note 293.

²⁵³ The introduction to the rules advises parties to consult local law with respect to the need to name a guardian *ad litem* for unborn or legally incompetent parties, but does not mention the issue of unascertained parties. *See* AAA Trust Arbitration Rules, *supra* note 17, Introduction.

²⁵⁴ *See id.*, rules 16, 25.

entitled to attend hearings.”²⁵⁵ While this phrase may refer only to persons who have been formally joined in the proceedings, the language could be interpreted to include potential parties who have not yet officially joined the arbitration even though they have an interest in the outcome of the dispute.²⁵⁶ However, because the AAA Trust Arbitration Rules do not discuss how notice would be given to these sorts of potentially interested but currently non-participating parties, any right to attend a hearing would likely be in name only.²⁵⁷

This raises a related problem, namely that some parties to a trust dispute may only wish to join or need to be joined at some point late in the proceedings. However, the AAA does not address the issue of late joinder.

The AAA Trust Arbitration Rules have difficulty dealing not only with late-arriving parties but also with late-arising claims. For example, the AAA states that no new or different claim can be submitted by a party without the consent of the arbitrator.²⁵⁸ While this may be a standard provision in other types of arbitral rules, the special nature of trust disputes makes such restrictions potentially problematic, since not all parties may be similarly situated toward the dispute. This is particularly true given the mechanical classification of all parties who did not initiate the claim as respondents.

There is opportunity for improvement in individual cases, since AAA Trust Arbitration Rules allow both the parties and the arbitral tribunal to craft suitable procedures that are more narrowly tailored to the dispute at hand.²⁵⁹ Other savings mechanisms also exist, such as the rule

²⁵⁵ *Id.*, rule 21.

²⁵⁶ For example, one of several beneficiaries might decide against active participation in a trust dispute, even though that person’s rights will be determined by the outcome of the dispute. *See Horton, supra* note 10, at *9; Janin, *supra* note 11, at 529.

²⁵⁷ *See Horton, supra* note 10, at *45.

²⁵⁸ *See AAA Trust Arbitration Rules, supra* note 17, rule 7.

²⁵⁹ *See id.*, rules 1, 25. However, the parties may only vary the AAA Trust Arbitration Rules by written agreement. *See id.*, rule 1.

indicating that if parties joined together in a claimant or respondent group fail to agree on the selection of an arbitrator, the AAA will appoint such a person.²⁶⁰ However, the overall impression is that the AAA Trust Arbitration Rules do not make adequate provision for the unique, multiparty nature of trust disputes.

(iii) *Awards*

Another area of concern involves awards. In general, the AAA Trust Arbitration Rules appear to consider awards arising out of trust arbitration to be similar to awards in any other context. However, in so doing, the AAA overlooks some significant issues. For example, for an arbitral award to be enforceable under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), that award must be binding on the parties (i.e., final).²⁶¹ However, some awards arising out of mandatory trust arbitration, particularly those involving judicial instruction and accounting, could have problems meeting the New York Convention's test of finality.²⁶² While parties can take steps to increase the enforceability of individual awards by only submitting suitable issues to the arbitrators, it would have been helpful if the AAA had addressed this issue in some way.²⁶³

The AAA Trust Arbitration Rules also do not seem to recognize any potential problems with respect to consent awards, instead simply stating that an arbitrator may make such an

²⁶⁰ See *id.* rule 11.

²⁶¹ See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V(1)(e), June 10, 1958, 21 U.S.T. 2518, 330 U.N.T.S. 3 [hereinafter New York Convention]. There are some questions as to whether the New York Convention would even apply to trust arbitration, but those issues are beyond the scope of this Article. See Strong, *Two Bodies Collide*, *supra* note 8.

²⁶² See New York Convention, *supra* note 261, art. V(1)(e); see also *supra* notes 178-98 and accompanying text.

²⁶³ For example, the rules could distinguish between the types of trust-related issues that might lead to interim (and hence non-enforceable) awards and those that could be considered final, even if the procedure used varied somewhat from what is considered "normal" for arbitration. See *supra* notes 178-98 and accompanying text.

award, using language that is very similar to that found in other AAA rule sets.²⁶⁴ This could create difficulties, since some judges could take the view that approval of any settlement agreement involving a trust dispute lies within the exclusive jurisdiction of the courts, particularly if the award affects the rights of unascertained, unborn or legally incompetent beneficiaries.²⁶⁵ While it is possible to devise procedures that would help assuage any judicial concerns about coercive settlements,²⁶⁶ the AAA provides no proposals in this regard, suggesting that this was not an issue that the drafters of the AAA Trust Arbitration Rules considered independently in light of the applicable principles of trust law.

Other issues also arise. For example, Rule 37 of the AAA Trust Arbitration Rules requires awards to contain, *inter alia*, “a summary of the issues, the damages and/or other relief requested and awarded, a statement of any other issues resolved, [and] a statement regarding the disposition of any statutory claim.”²⁶⁷ Requiring this type of fully reasoned award appears highly appropriate given the *in rem* nature of trust proceedings.²⁶⁸ However, the right to a reasoned award is not guaranteed. Instead, in large cases where the AAA Complex Dispute Procedures apply, a reasoned award is only required if the parties so agree or if one party requests such an award and the arbitrator, in his or her discretion, agrees.²⁶⁹ Parties who are ordered to proceed under the AAA Consumer Rules also lose their opportunity for a reasoned

²⁶⁴ See AAA Trust Arbitration Rules, *supra* note 17, rule 37(d); see also AAA Commercial Rules, *supra* note 232, rule R-44.

²⁶⁵ See *supra* notes 221-24 and accompanying text.

²⁶⁶ For example, the AAA Trust Arbitration Rules could adopt language similar to that regarding consent awards in the class arbitration context, although some amendments would need to be made to take into account the fact that trust arbitration is an *in rem* rather than representative proceeding. See AAA Supplementary Rules, *supra* note 223, rule 8; JAMS Class Action Procedures, *supra* note 223, rule 6.

²⁶⁷ See AAA Trust Arbitration Rules, *supra* note 17, rule 37.

²⁶⁸ See also Horton, *supra* note 10, at *9; Janin, *supra* note 11, at 529.

²⁶⁹ See AAA Trust Arbitration Rules, *supra* note 17, rules 46(a), 50.

award as of right.²⁷⁰ These procedural distinctions are deeply troubling, not only because they are entirely unpredictable when viewed from the time of trust creation, but because they deny parties of the right to a reasoned award even though that kind of such an award is essential in an *in rem* type of proceeding.

(iv) *No waiver*

One aspect of the AAA Trust Arbitration Rules is quite beneficial to parties to trust disputes. According to Rule 40(a), “[n]o judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party’s right to arbitrate.”²⁷¹ Although the same language appears in other AAA rule sets and therefore may be somewhat standard,²⁷² a non-waiver provision is particularly helpful in the trust context because parties in some jurisdictions may need to apply to the court for assistance with certain trust-related matters.²⁷³ While different jurisdictions will take different views regarding the need for judicial intervention on these various issues, the AAA provides useful protection to parties who want to protect their ability to arbitrate their disputes.²⁷⁴

(v) *Fees*

Although issues regarding fees may not seem “procedural” *per se*, the AAA Trust Arbitration Rules contain some useful language that may help protect mandatory arbitration from claims that

²⁷⁰ See AAA Consumer Arbitration Rules, *supra* note 240, C-7.

²⁷¹ AAA Trust Arbitration Rules, *supra* note 17, rule 40(a).

²⁷² See AAA Commercial Rules, *supra* note 232, R-48(a).

²⁷³ For example, a party may need to seek judicial instruction on a particular point of law or need assistance appointing special or virtual representatives. Alternatively, parties may need to seek judicial approval of consent awards.

²⁷⁴ This type of non-waiver provision also protects the settlor’s desire to have all proper disputes heard in arbitration, since it stops parties from intentionally initiating litigation simply to eliminate the obligation to arbitrate.

such procedures impermissibly oust the jurisdiction of the court by making access to justice prohibitively expensive.²⁷⁵ This provision, which is found in Rule 41, states that “[t]he AAA may, in the event of extreme hardship on the part of any party, defer or reduce the administrative fees” otherwise payable to the AAA.²⁷⁶ While similar language is found in other AAA rules, the fact that the provision is somewhat standard does not make it any less useful in the context of trust disputes.²⁷⁷

(vi) *Omissions*

Although the preceding subsections identify a few aspects of the AAA Trust Arbitration Rules that seem specifically tailored to trust arbitration, there are a number of issues that the AAA has not addressed at all. Indeed, the overall impression is that the AAA has largely tracked other AAA rule sets without any regard to the unique nature of trust disputes. This, of course, is highly problematic given the many unique challenges associated with mandatory arbitration of internal trust disputes.

Proponents of the AAA Trust Arbitration Rules might claim that a number of these procedural shortcomings could easily be cured by an arbitrator with adequate knowledge of trust issues. However, there is no guarantee that arbitrators named to a AAA trust dispute will have the kind of specialized skill in trust law that would allow them to exercise their discretion in a particularly fruitful manner. For example, while the model clause proposed by the AAA suggests that arbitrators should have a certain level of expertise in trust disputes, arbitration under the AAA Trust Arbitration Rules may be invoked by means other than the model clause.²⁷⁸

²⁷⁵ See Cohen & Staff, *supra* note 10, at 209.

²⁷⁶ AAA Trust Arbitration Rules, *supra* note 17, rule 41.

²⁷⁷ See AAA Commercial Rules, *supra* note 232, R-49.

²⁷⁸ See AAA Trust Arbitration Rules, *supra* note 17, rules 1, 3; *see also id.*, Model Clause.

The only mention of arbitrator expertise in the AAA Trust Arbitration Rules themselves is a statement indicating that the AAA will rely on its commercial roster for the appointment of arbitrators.²⁷⁹

Parties to commercial trusts may not view the lack of trust-related expertise as problematic, since participants in those kinds of disputes may value general commercial experience more highly than qualifications relating to trusts *per se*. However, the trust form is fundamentally different than other structural devices regardless of whether the trust is commercial or personal, and the failure to require arbitrators to have significant experience in both the procedural and substantive aspects of trust law puts the credibility of the entire process into doubt. Given that concerns have been raised on numerous occasions about whether arbitrators are capable of handling the kind of complex substantive and procedural matters associated with trust disputes,²⁸⁰ the AAA should be trying to minimize worries about the quality of trust arbitration, not exacerbate them.

At this point, settlors have no other dedicated rules of procedure that they can adopt in preference to the AAA Trust Arbitration Rules. However, other arbitration rules may provide some useful insights into how to handle certain relevant issues. First among these other rule sets are the DIS Supplementary Rules.

(b) *The DIS Supplementary Rules*

The DIS Supplementary Rules were developed in 2009 for use in shareholder arbitration following a determination by the German Federal Court of Justice (Bundesgerichtshof or BGH)

²⁷⁹ See *id.*, rule 3.

²⁸⁰ See Bosques-Hernández, *supra* note 55, at 5, 15; Katzen, *supra* note 18, at 127-34; Spitko, *supra* note 10, at 307-14; Wüstemann, *supra* note 5, at 40-41.

stating that shareholder disputes were arbitrable.²⁸¹ The DIS Supplementary Rules, like the AAA Trust Arbitration Rules, may be invoked by inclusion in the parties' founding document (i.e., the corporate charter or by-laws in the case of the DIS Supplementary Rules and the trust in the case of the AAA Trust Arbitration Rules) or by subsequent agreement.²⁸² Because the DIS Supplementary Rules are only applicable to matters involving "limited liability companies (GmbH) under German law" and "partnerships (Personengesellschaften)," they are inapplicable to trust disputes *per se*.²⁸³

However, the fact that the DIS Supplementary Rules were not intended for use in trust disputes does not mean that they cannot provide useful insights to those interested in designing trust arbitration procedures, given that arbitration of internal shareholder disputes faces many of the same practical and procedural challenges as arbitration of internal trust disputes. For example, both kinds of proceedings can involve large numbers of parties.²⁸⁴ Furthermore, both types of controversies reflect an *in rem* quality, in that the resolution of one party's claims will often be binding on both the legal entity (i.e., the trust or corporation) as well as individual parties with notice, regardless of whether those other parties participated in the proceedings.²⁸⁵ These similarities suggest that innovations developed by the DIS for use in shareholder arbitration might have some relevance to mandatory trust arbitration.

²⁸¹ See *S v M*, Case No. II ZR 255/08 (German Federal Court of Justice, 6 April 2009), Kriendler Digest for ITA Board of Reporters, available at www.kluwerarbitration.com; Borris, *supra* note 8, at 56; S.I. Strong, *Collective Arbitration Under the DIS Supplementary Rules for Corporate Law Disputes: A European Form of Class Arbitration?* 29 ASA BULL. 45, 47 (2011) [hereinafter Strong, DIS].

²⁸² See AAA Trust Arbitration Rules, *supra* note 17, rule 1; DIS Supplementary Rules, *supra* note 18, §1.1.

²⁸³ DIS Supplementary Rules, *supra* note 19, cmt.

²⁸⁴ See Strong, DIS, *supra* note 281, at 47; Wüstemann, *supra* note 5, at 53-54.

²⁸⁵ See DIS Supplementary Rules, *supra* note 19, Model Clause, §11; Borris, *supra* note 8, at 55; Horton, *supra* note 10, at *9; Janin, *supra* note 11, at 529; Strong, DIS, *supra* note 281, at 51-54.

The following discussion therefore introduces several novel procedures developed by the DIS and considers them in the context of trust arbitration.²⁸⁶ In particular, the following subsections discuss notice to and joinder of individuals who have an interest in the outcome of the dispute but who do not actively participate in the arbitration; privacy and confidentiality; substantive amendments to the statement of claim; procedures relating to parallel proceedings; appointment of arbitrators; issues as to costs; and possible means of binding parties to the dispute.

(i) *Notice to and joinder of individuals who have an interest in the outcome of the dispute*

DEFINITION OF “CONCERNED OTHERS”

The first issue to consider involves notice to and joinder of individuals who have an interest in the outcome of the dispute. Both matters are central to trust disputes, since “effective trust or estate arbitration must include a mechanism for providing notice and a fair opportunity to be heard,” particularly “to minors and unborn and unascertained persons through their proper representatives.”²⁸⁷ Indeed, “trustees must take all reasonable practicable [sic] steps” to provide notice and accountings to actual and potential beneficiaries, even those who only have a possibility of taking under a discretionary trust.²⁸⁸ Thus it has been said that:

[t]o avoid a challenge to an award and to enhance its enforcement in relation to all parties concerned, it is important that all relevant persons be parties to the arbitral proceedings. In England, the court – usually on the basis of a proposal of the trustee – notifies the interested parties about an ongoing trust litigation and invites

²⁸⁶ Because the DIS Supplementary Rules are meant to be read in tandem with the DIS’s regular rules of arbitration, there are a great many standard provisions that are left out of the DIS Supplementary Rules. See DIS Supplementary Rules, *supra* note 19, rule 1; Arbitration Rules of the German Institution of Arbitration, available at <http://www.dis-arb.de/scho/schiedsordnung98-e.html> [hereinafter DIS Arbitration Rules].

²⁸⁷ ACTEC, *supra* note 10, at 20.

²⁸⁸ HAYTON ET AL., *supra* note 6, ¶56.11.

them to join the proceedings. It is recommended therefore that potential beneficiaries should be notified of an arbitration – preferably prior to the constitution of the arbitral tribunal – and that the parties should agree to the intervention of such interested persons during the arbitral proceedings. It should not be the duty of the arbitrators to include all interested parties but rather such burden should be upon the claimant (possibly with a related duty of respondent to inform claimant of any known potential beneficiaries).²⁸⁹

Collective shareholder disputes involve similar issues regarding the fairness of collective notice and hearing mechanisms, which inspired the DIS to develop the concept of “Concerned Others.”²⁹⁰ Notably, this innovation appears to be largely transferable to the trust context.

According to the DIS Supplementary Rules, a Concerned Other has the right but not the obligation to participate in a particular proceeding. Although a Concerned Other in a collective shareholder dispute will have a somewhat different relationship to the various parties than a Concerned Other in a trust dispute will, in that the parties to a trust dispute could be situated somewhat differently and could hold somewhat more diverse interests than the parties to a shareholder dispute, both types of disputes could involve potential parties who may not be actively involved in the controversy at the time the arbitration is filed but who should nevertheless be given notice of a pending arbitration because they hold a legal interest that may be affected by such proceedings. Furthermore, both types of disputes could involve potential parties who have the right to join the dispute but who do not wish to do so, even after they have received notice, either because they believe their interests are adequately represented by an existing party or because they are indifferent as to the outcome of the dispute.

Concerned Others under the DIS Supplementary Rules are defined by their relationship to the dispute. Thus:

[i]n disputes requiring a single decision binding all shareholders, . . . it is mandatory not only to introduce the corporation as a party but all shareholders as

²⁸⁹ Wüstemann, *supra* note 5, at 53-54.

²⁹⁰ See DIS Supplementary Rules, *supra* note 19, at 3.

Concerned Others to the arbitral proceeding. In case the introduction of any Concerned Other is omitted, current jurisprudence does not recognize the “arbitrability” of such disputes.²⁹¹

Therefore, Concerned Others in the context of shareholder disputes can, in the first instance, be considered to include all shareholders of the corporation as well as the corporation itself. In a trust dispute, a Concerned Other might constitute not only the trust itself but also the original and/or successor trustee(s), the original and/or successor protector(s), and former, current or potential beneficiaries, to the extent that any arbitral award would attempt to affect those persons’ rights in a final and binding manner. External third parties, such as creditors or consultants, would likely not be bound by the arbitration provision in the trust and would therefore not constitute a Concerned Other unless there existed a separate arbitration agreement that contemplated the joinder of the third party dispute with a dispute under the trust.²⁹² Although such overlapping agreements are not common, they can occasionally arise.²⁹³

The DIS recognizes two distinct subgroups within the category of Concerned Others. For example:

[d]isputes requiring a single decision binding all shareholders and the corporation and in which a party intends to extend the effects of an arbitral award to all shareholders and the corporation without having been introduced as a party to the arbitral proceeding (Concerned Others), the Concerned Others shall be granted the opportunity to join the arbitral proceeding pursuant to the [DIS Supplementary Rules] as a party or compulsory intervenor in the sense of section 69 German Code of Civil Procedure (Intervenor). This applies mutatis mutandis to disputes that require a single decision binding specific shareholders or the corporation.²⁹⁴

²⁹¹ *Id.*

²⁹² *See* Hwang, *supra* note 5, at 83.

²⁹³ For example, arbitration of internal trust matters may involve external parties 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 South Federal Savings Bank v. Anding*, 414 F. Supp. 2d 636, 639 (S.D. Miss. 2005); *see also supra* note 202.

²⁹⁴ DIS Supplementary Rules, *supra* note 19, §2.1.

Therefore, a Concerned Other may act as either a party or an intervenor, with different rights and responsibilities being associated with the two different classifications.

Collective shareholder arbitration is a relatively homogenous affair, with most shareholders either sharing identical concerns or being classifiable into easily definable groups.²⁹⁵ Trust disputes can involve a wider variety of parties with more diverse connections to the trust and the issue in contention, although the number of variations is not unlimited. Nevertheless, the distinction between a party and an intervenor may be useful in trust arbitration, to the extent that such a distribution reflects the difference between an active participant and a party who is only passively involved in the proceeding but whose rights will be affected by the outcome. Interestingly, the concept of third party intervenors in trust-related arbitration has been used on at least one occasion involving a Liechtenstein “stiftung” (foundation), which is Liechtenstein’s version of a trust.²⁹⁶

PROCEDURES ASSOCIATED WITH NAMING CONCERNED OTHERS

After defining the term “Concerned Others,” the DIS Supplementary Rules go on to describe the practical procedures to be followed with regard to identifying and providing notice to those persons. This is a several-step process that begins when the claimant files its statement of claim. At that point, the claimant is required to “identify the respondent and any shareholders or the corporation itself to which the effects of the arbitral award shall extend, by providing an address of service and requesting the DIS-Secretariat to deliver the statement of claim also to the

²⁹⁵ For example, all shareholders might stand in the same position with respect to a claim regarding mismanagement of the company. However, shareholders might be split with respect to the propriety of a proposed merger, although the division would be likely be binary (i.e., either in favor of the merger or against it) and thus relatively straightforward.

²⁹⁶ See *Weizmann Institute of Science 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 party status”).

Concerned Others.”²⁹⁷ Respondents are also given the opportunity to identify additional Concerned Others, as are any Concerned Others who subsequently join as parties.²⁹⁸ The procedure for notification is the same in each case, with Concerned Others being given 30 days from the time they receive the copy of the statement of claim to notify the DIS Secretariat in writing whether they choose to join the proceedings “on claimant’s or respondent’s side as party or as intervenor.”²⁹⁹

This type of notice procedure would also appear to work very well in the trust context. In fact, this type of provision appears very similar to the kind of notice requirements described in various probate codes regarding mandatory notice to presumptive heirs.³⁰⁰ It also complies with suggestions made by experts in trust law that “potential beneficiaries should be notified of an arbitration – preferably prior to the constitution of the arbitral tribunal – and that the parties should agree to the intervention of such interested persons during the arbitral proceedings,” with the burden of identifying potentially interested parties falling not upon the arbitrator but “upon the claimant (possibly with a related duty of respondent to inform claimant of any known potential beneficiaries).”³⁰¹

Some difficulties could arise as a result of the need for Concerned Others to affiliate themselves with either the claimant or the respondent, since that assumes that the substantive issues in trust-related disputes can always be characterized as bilateral in nature. Of course, to some extent, a bilateral administrative procedure may be necessary, at least as a presumptive default option, since that is the norm in both litigation and arbitration. However, allowing

²⁹⁷ DIS Supplementary Rules, *supra* note 19, §2.2

²⁹⁸ *See id.*, §§3.2, 4.1.

²⁹⁹ *Id.*, §3.

³⁰⁰ *See* MCGOVERN ET AL., *supra* note 15, at 628-30 (discussing formal and informal probate); *see also* UTC, *supra* note 7, §813 (discussing trustees’ duty to inform and report); *id.* §817 (discussing notice upon termination of trust funds);

³⁰¹ Wüstemann, *supra* note 5, at 53-54.

Concerned Others to choose their affiliation for themselves is much better than mechanically assigning parties to a particular group based solely on the time at which they enter the proceedings, as appears to be the case under the AAA Trust Arbitration Rules.³⁰² Notably, the approach outlined in the DIS Supplementary Rules appears to have been adopted by at least one U.S. court in the context of a trust arbitration.³⁰³

According to the DIS Supplementary Rules, failing to opt into the proceeding within the prescribed time period acts as a waiver of a Concerned Other's right to join the arbitration actively as either a party or an intervenor.³⁰⁴ Nevertheless, Concerned Others can join the proceeding even after the notice period has expired, although consequences do arise as a result of the delay. For example, those who wish to join the proceedings after the expiry of the initial time period may only do so "provided that they refrain from raising objections against the composition of the arbitral tribunal and either accept the arbitral proceeding as it stands at the point in time of their joinder, or the arbitral tribunal approves their joinder at its free discretion."³⁰⁵ Notably, this provision regarding late joinder applies not only to Concerned Others who were named during the initial notification period but also to Concerned Others who were not identified until after that period has ended.³⁰⁶

³⁰² See AAA Trust Arbitration Rules, *supra* note 17, rule 5.

³⁰³ See *In re Ismailoff*, No. 342,207, 2007 N.Y. Slip Op. 50211(U), at 4 (Sur. Ct. Nassau County Feb. 1, 2007) (allowing a late-joining party to a trust arbitration to choose the side with which she would be affiliated).

³⁰⁴ See DIS Supplementary Rules, *supra* note 19, §4.2. However, the Concerned Other's interests will still be affected by the arbitration, so long as notice has been properly given. See *id.* §11.

³⁰⁵ *Id.*, §4.3. This is similar to restrictions on intervention in German courts. See HOWARD D. FISHER, *THE GERMAN LEGAL SYSTEM & LEGAL LANGUAGE* 94-95 (1999).

³⁰⁶ See DIS Supplementary Rules, *supra* note 19, §§2.3, 4.3.

Interestingly, the approach adopted in the DIS Supplementary Rules somewhat resembles certain provisions adopted in a model arbitration clause designed by the ICC for use in trusts.³⁰⁷

The relevant portions of that model clause state that:

[i]f, 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.³⁰⁸

While both the ICC and the DIS attempt to balance issues relating to any possible prejudice to either the joining or existing parties, the DIS approach seems slightly better, in that it gives the parties the absolute right to join the arbitration so long as they do not attempt to attack retroactively any of the procedural decisions already made. Given the importance of having all the parties to a trust dispute present, that appears better than leaving the final decision in the hands of the arbitral tribunal.

The DIS Supplementary Rules also distinguish between the rights and responsibilities of Concerned Others who have joined as parties and the rights and responsibilities of Concerned

³⁰⁷ See *id.*, §§2.3, 4.3; ICC Model Trust Clause, *supra* note 16. The ICC chose to address the unique challenges associated with trust disputes through creation of a new model clause rather than a new set of procedural rules. See *id.* Explanatory Notes 4-6. For a more detailed analysis of the ICC Model Trust Clause, see Strong, Language, *supra* note 16. The AAA Trust Arbitration Rules do not address the late joinder of parties, although the rules do contemplate the possible late submission of claims. See AAA Trust Arbitration Rules, *supra* note 17, rule 7.

³⁰⁸ ICC Model Trust Clause, *supra* note 16; see also Strong, Language, *supra* note 16.

Others who have joined as intervenors. For example, Concerned Others who have joined the proceeding as parties “become a party to the arbitral proceeding with all rights and duties pertaining thereto at the moment their declaration of joinder is received by the DIS-Secretariat.”³⁰⁹ Alternatively, those who join as intervenors “are entitled to the rights of a compulsory intervenor in the sense of section 69 German Code of Civil Procedure.”³¹⁰ One of the ways in which the two groups differ is that only those who join as parties are permitted to name additional Concerned Others.³¹¹ This obviously increases the legitimacy of the joinder process, since those who are official parties to the dispute (as opposed to intervenors) will suffer most if there is any malfeasance in the naming process and thus have a heightened incentive to identify all relevant parties but no others.

One issue that could arise in the context of trust disputes but not shareholder disputes involves the possibility that some Concerned Others may not be inclined to name additional parties if the Concerned Others think that in so doing they will decrease the benefits they will receive under the trust.³¹² However, failure to provide notice to the appropriate parties will open the arbitral award up to challenge, since parties who have not received notice will not be bound by the award. Therefore, it is in the best interest of all parties to ensure that the notification process is full and fair.³¹³

³⁰⁹ DIS Supplementary Rules, *supra* note 19, §4.1.

³¹⁰ *Id.*

³¹¹ *See id.* Other differences are discussed below. *See infra* notes 338-46 and accompanying text (regarding costs).

³¹² For example, a trust benefitting a class identified as “all past and present employees of Acme Manufacturing still living at the time of the distribution of the trust funds” would result in larger per-capita distributions if the size of the class is kept small. Some class members might see this as an incentive not to identify other potential members of the class.

³¹³ Notably, the same incentives for non-disclosure exist in trust disputes being heard in litigation, so trust arbitration is not operating under any sort of special handicap.

Another potential difficulty involves the logistics of notice. The DIS Supplementary Rules make some provision for this, indicating in the introductory notes that:

it is recommended to adopt elsewhere in the articles of incorporation a provision pursuant to which all shareholders are obliged to provide the corporation with a current address of service or a representative for service and that receipt of any written communication at this address will be assumed after the expiry of an adequate time period.³¹⁴

Settlors may not be able to impose a similar obligation on the beneficiaries of a trust, particularly since some beneficiaries may be unborn or unascertained at the time the trust is created. However, trustees and protectors (both past and present) could certainly be required to provide a current address for service of process.

(ii) *Privacy and confidentiality*

Although privacy and confidentiality have long been considered hallmarks of arbitration,³¹⁵ the DIS Supplementary Rules explicitly permit limited derogations from both. Notably, the AAA Trust Arbitration Rules may also allow some deviation from the strict application of privacy, although the relevant language is somewhat ambiguous.³¹⁶

Under the DIS Supplementary Rules, confidentiality is diminished to the extent that the arbitral tribunal is required to inform Concerned Others who have been identified but who have not yet joined the arbitration “on the progress of the arbitral proceeding by delivering copies of written pleadings of the parties or intervenors as well as decisions and procedural orders by the arbitral tribunal to the Concerned Others at their indicated addresses, unless Concerned Others

³¹⁴ DIS Supplementary Rules, *supra* note 19, Introduction.

³¹⁵ However, neither principle is necessary for a procedure to be considered arbitration *per se*. See BORN, *supra* note 118, at 2249-50, 2253; Strong, First Principles, *supra* note 163, at __.

³¹⁶ See AAA Trust Arbitration Rules, *supra* note 17, rule 21; see *supra* notes 255-57 and accompanying text.

have expressly waived in writing to receive this information.”³¹⁷ This approach is necessary because the DIS Supplementary Rules are essentially an opt-in procedure, which results in a heightened need to keep Concerned Others who have not yet joined the arbitration individually apprised of the proceedings so that any non-participants have the opportunity to exercise their right to join the arbitration before the award is finalized.³¹⁸ The DIS Supplementary Rules indicate that the same procedure “applies for other communications of the arbitral tribunal to the parties or intervenors,” though “only in so far as it can be reasonably assumed that these are significant for the decision of a Concerned Other on its later joinder to the arbitral proceeding.”³¹⁹

This procedure would likely be as useful in trust arbitration as it is in shareholder arbitration. Both types of disputes may involve parties who are technically interested in the outcome of the arbitration but who may not wish to participate actively. However, because potentially interested parties in these special types of multiparty arbitration cannot keep themselves apprised of the status of the case in the same way that they do in litigation,³²⁰ it therefore appears appropriate to impose a limited duty of notification on either on the trustee or the arbitral tribunal.³²¹ In many ways, this poses few, if any, problems as a matter of principle, since notifications are only going to those who have been identified as having an actual or potential interest in the outcome of the dispute and no more information is being provided than would be available in a litigation.

³¹⁷ DIS Supplementary Rules, *supra* note 19, §5.1.

³¹⁸ See Strong, DIS, *supra* note 281, at 55-58 (distinguishing the ramifications of an opt-in versus an opt-out regime).

³¹⁹ DIS Supplementary Rules, *supra* note 19, §5.1.

³²⁰ If a trust dispute were litigated, parties could keep abreast of legal proceedings by attending public hearings or viewing any court documents that were made publicly available.

³²¹ Under the DIS Supplementary Rules, the Tribunal appears to be given the task of notification, although commentators in the trust law context have suggested that trustees be given the duty of providing notice. See DIS Supplementary Rules, *supra* note 19, §5.1; Wüstemann, *supra* note 5, at 53-54.

Confidentiality is not the only principle that is affected under the DIS Supplementary Rules. Privacy is also diminished, with the rules stating that “Concerned Others, that have not joined the arbitral proceeding, are not entitled to participate in the oral hearing.”³²² Although the language is formulated in the negative, the result is that any Concerned Others who have joined the arbitral proceeding may participate in the oral hearing, thus expanding the number of persons who may be present at the hearing beyond the individuals who filed the arbitration or were initially named as respondents.

Opening the doors of the hearing to Concerned Others who have joined the proceedings makes good sense in trust arbitration as well, since those persons are bound by the outcome of the arbitration to the same extent as parties who were named initially. The exclusion of Concerned Others who have not yet joined the dispute is not problematic as a matter of principle, since the DIS Supplementary Rules require that notice be given of any matter that might be significant to a Concerned Other’s decision to join the proceedings.³²³ While this may not mirror judicial procedures perfectly, in that non-parties can freely attend any hearings in court while they are only given notice of a particular in-person proceeding in a trust arbitration, the DIS’s approach allows any Concerned Other who is truly interested in the outcome of that oral hearing to join the arbitration and attend the proceeding.

(iii) *Substantive amendments to the statement of claim*

One of the most pressing problems in large-scale dispute resolution involves the question of who has the ability to make decisions for the group regarding litigation strategy. This is a problem

³²² DIS Supplementary Rules, *supra* note 19, §5.2. The AAA Trust Arbitration Rules may also have adopted this approach, although the language is somewhat unclear. *See* AAA Trust Arbitration Rules, *supra* note 17, rule 21; *see supra* notes 255-57 and accompanying text.

³²³ DIS Supplementary Rules, *supra* note 19, §5.1.

not only in shareholder arbitration but also in any type of internal trust dispute that requires a coordinated response from a large group of beneficiaries.³²⁴

The DIS Supplementary Rules address this issue by making “[a]n extension of claim or a change of the subject-matter (including any possible counterclaims) . . . only admissible with consent of all Concerned Others.”³²⁵ However, “[t]he complete or partial withdrawal of claim is admissible without consent of the Concerned Others, unless a Concerned Other objects within 30 days after being informed on [sic] the intended withdrawal of claim and the arbitral tribunal acknowledges his legitimate interest in a final decision of the dispute.”³²⁶

In these provisions, the DIS is attempting to balance the rights and interests of the various parties and appears to be doing so appropriately. However, the DIS’s approach is somewhat different than that reflected in the AAA Trust Arbitration Rules, which state that no new or different claim can be submitted by a party without the consent of the arbitrator.³²⁷ Although the distinction is slight, one worry under the DIS Supplementary Rules might be that the arbitration could be effectively held hostage by one party who refuses to consent to an amendment to an existing claim. This is somewhat problematic given that the failure to provide consent in a large, multiparty procedure may not even be intentional but could instead simply be due to an oversight on the part of a person who did not understand the ramifications of his or her actions.

Nevertheless, the DIS obviously took the view that party autonomy should prevail over procedural efficiency, at least in matters as important as the formulation of claims and

³²⁴ Depending on the number of Concerned Others, it may be necessary or useful to appoint an agent who can make tactical decisions on behalf of a group of claimants or respondents. *See* Strong, Abaclat, *supra* note 153. This need for a coordinating mechanism may be particularly necessary in the context of commercial trusts, given the potential number of affected persons in those cases. Interestingly, some types of trusts related to the issuance of bonds appear to have this type of mechanism in place already. *See supra* notes 75-80 and accompanying text.

³²⁵ DIS Supplementary Rules, *supra* note 19, §6.

³²⁶ *Id.*

³²⁷ *See* AAA Trust Arbitration Rules, *supra* note 17, rule 7.

counterclaims. Whether and to what extent the DIS approach should be adopted in trust arbitration is open to debate, since there are good arguments to be made either way.

(iv) *Procedures relating to parallel proceedings*

Issues relating to the substantive amendment of claims demonstrate some of the difficulties associated with strategic decision-making in the multiparty context. Another area of concern involves the coordination of related claims brought by different individuals and the possibility of parallel proceedings. Again, this is an issue that can easily arise in trust disputes, given the number of parties and the potential disparity of their relationships to each other and the trust itself.

The DIS Supplementary Rules take a uniquely forward-looking view of this particular issue by specifically addressing the possibility that “multiple arbitral proceedings with a subject-matter have been initiated, requiring a single decision binding the parties and the Concerned Others.”³²⁸ In such cases, “[t]he arbitral proceeding that has been initiated first (leading arbitral proceeding) precludes the conduct of an arbitral proceeding initiated at a later point in time (subsequent arbitral proceeding). A subsequent arbitral proceeding is inadmissible.”³²⁹

Given the ease with which a Concerned Other can join an existing arbitration under the DIS Supplementary Rules, this appears to be a reasonable solution and would work equally well in trust disputes.³³⁰ While some difficulties might arise with respect to the ability of late-joined Concerned Others to affect the litigation strategy and bring claims or counterclaims, the DIS Supplementary Rules notably limit the first-to-file rule to actions that involves a single subject-

³²⁸ DIS Supplementary Rules, *supra* note 19, §9.1.

³²⁹ *Id.*, §9.2. The priority among the various procedures is described in Section 9.3, whereas the timing and circumstances of the joinder of Concerned Others is discussed in Section 9.4.

³³⁰ *See id.*, §§2.3, 4.3.

matter and require a single decision to bind all parties.³³¹ This suggests that actions involving significantly different claims would not be subject to this rule.

Furthermore, by restricting the application of this provision to subsequent arbitral proceedings, the DIS Supplementary Rules leave open the possibility of an appropriate parallel proceeding in court. This is particularly important in trust disputes, which might involve concurrent jurisdictional competency either as a result of a statute giving the courts exclusive jurisdiction over certain matters³³² or a split jurisdiction provision found in the trust itself.³³³

(v) *Appointment of arbitrators*

Another potential pitfall for any kind of multiparty arbitration involves the appointment of arbitrators. Many of the traditional difficulties in this regard³³⁴ have been avoided in the DIS Supplementary Rules through provisions allowing the DIS Appointing Committee to nominate a sole arbitrator if the parties cannot agree on a neutral within the requisite time.³³⁵ In cases involving three arbitrators, the DIS Supplementary Rules allow the claimant group and the respondent group to select their own party-appointed arbitrators.³³⁶ If one side cannot agree on

³³¹ See *id.*, §9.1.

³³² See Strong, *Two Bodies Collide*, *supra* note 8; see also *supra* notes 133-65 and accompanying text. The AAA Trust Arbitration Rules handle the issue of parallel litigation slightly differently, indicating that “[n]o judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party’s right to arbitrate.” AAA Trust Arbitration Rules, *supra* note 17, rule 40(a).

³³³ See *Radian Ins., Inc. v. Deutsche Bank National Trust Co.*, 638 F. Supp. 2d 443,458-59 (E.D. Pa. 2009) (involving mortgage trusts in the asset securitization context).

³³⁴ See *BKMI Industrieanlagen GmbH v. Dutco Construction Co. Ltd* (1990) XV *YB Com. Arb.* 124; EMMANUEL GAILLARD & JOHN SAVAGE, *FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION* ¶¶792-93, 986-89 (1999) (discussing solutions in the wake of *Dutco*).

³³⁵ See DIS Supplementary Rules, *supra* note 19, §7.

³³⁶ See *id.*, §8(2).

an arbitrator within the requisite time, the DIS Appointing Committee appoints two arbitrators, an approach that is also used in the general DIS Arbitration Rules.³³⁷

(vi) *Issues as to costs*

Another area of concern in multiparty disputes involves the allocation of costs and fees, particularly when loser-pays rules apply.³³⁸ This can become particularly problematic when some members of the presumed collective have decided not to join a legal action while another subgroup of the collective has.

Cost-sharing issues are taken into account in the DIS Supplementary Rules through an explicit reference to Section 35 of the general DIS Arbitration Rules, which states that:

[i]n principle, the unsuccessful party shall bear the costs of the arbitral proceedings. The arbitral tribunal may, taking into consideration the circumstances of the case, and in particular where each party is partly successful and partly unsuccessful, order each party to bear his own costs or apportion the costs between the parties.³³⁹

While no guidance exists as to how costs will be split, the DIS Supplementary Rules do indicate that “Concerned Others that have not joined the arbitral proceeding as a party or intervenor are not entitled to reimbursement of costs.”³⁴⁰ Furthermore, the DIS Supplementary Rules indicate that the costs amount is to be calculated pursuant to point number 11 of the

³³⁷ See *id.*, §8(3). The dual appointment reflects the recalcitrant team’s appointment and the chair, who otherwise would have been named by the two party-appointed neutrals. See *id.*, §13. These procedures are similar to those adopted by the AAA Trust Arbitration Rules, in that the AAA will also appoint the arbitrator(s) if parties cannot come to an agreement. See AAA Trust Arbitration Rules, *supra* note 17, rule 11.

³³⁸ See Deborah R. Hensler, *The Globalization of Class Actions: An Overview*, in 622 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 7, 22-25 (Deborah Hensler et al. eds., 2009) [hereinafter *The Annals*]; Christopher Hodges, *What Are People Trying to Do in Resolving Mass Issues, How Is It Going, and Where Are We Headed?* in *The Annals*, *supra*, at 330, 343.

³³⁹ DIS Arbitration Rules, *supra* note 286, §35.2; see also *id.* §12.1.

³⁴⁰ DIS Supplementary Rules, *supra* note 19, §12.1; see also DIS Arbitration Rules, *supra* note 286, §35.

Appendix to Section 40.5 of the DIS Arbitration Rules, with any identified Concerned Others being treated as a party.³⁴¹

The DIS's approach is not the only possible means of allocating costs among parties to a collective dispute. For example, some commentators have suggested that it might be appropriate to provide a smaller costs award in collective disputes that involve some sort of public interest.³⁴² Application of this principle might be appropriate in trust arbitration, not only with respect to charitable trusts (which by definition involve some sort of public benefit),³⁴³ but also perhaps with respect to some types of commercial trusts (such as pension or investment trusts) that arguably involve a public benefit or service.³⁴⁴

While arbitral tribunals may always make appropriate orders as to costs, having the standards or procedures set forth in the governing rule set improves the process by making it more transparent and less discretionary. Currently, the AAA Trust Arbitration Rules permit some reduction in fees in cases of hardship, which provides a useful means of avoiding inequitable treatment of the parties but which does not increase predictability.³⁴⁵ This is particularly problematic given the amount of money that it takes to pursue some types of collective disputes³⁴⁶ and the need for parties to know in advance

³⁴¹ See DIS Supplementary Rules, *supra* note 19, §12.2; see also DIS Arbitration Rules, *supra* note 286, §40.5, Appendix to 40.5, point number 11 (indicating that “[i]f more than two parties are involved in the arbitral proceedings [counting any identified Concerned Others as parties], the amounts of the arbitrators’ fees pursuant to this schedule are increased by 20% for each additional party,” but also noting that the arbitrators’ fees are to be increased by “no more than 50% in total”).

³⁴² See Thomas D. Rowe, Jr., *Shift Happens: Pressure on Foreign-Attorney Fee Paradigms from Class Actions*, 13 DUKE J. COMP. & INT’L L. 124, 147 (2003) (limiting the applicability of loser-pay rules in “public interest” type cases, which might include cases involving collective redress); Strong, *De-Americanization*, *supra* note 152, at 519.

³⁴³ See MCGOVERN ET AL., *supra* note 15, at 436-39.

³⁴⁴ See *supra* notes 58-82 and accompanying text.

³⁴⁵ AAA Trust Arbitration Rules, *supra* note 17, rule 41.

³⁴⁶ See *In re American Express Merchants’ Litigation*, 634 F.3d 187, 197-98 (2d Cir. 2011).

whether and to what extent they will be responsible for their opponents' fees and costs in case of an adverse judgment or award.

(vii) *Binding parties to the dispute*

The final issue to consider involves potential problems associated with binding certain parties to an arbitration. For example, one issue that can arise in the context of shareholder disputes is the possibility that former shareholders might raise objections to the continuing applicability of any arbitration agreement. This issue has been resolved by the DIS through language in its model arbitration clause explicitly stating that former shareholders remain bound by the agreement.³⁴⁷ A similar type of issue might arise in trust disputes regarding former beneficiaries, trustees or protectors, suggesting that trust arbitration would benefit from the adoption of an approach similar to that used by the DIS.

Second, the DIS recognized that disputes can arise as to whether an award resulting from an arbitration should be given *res judicata* effect with respect to persons who do not actively participate in the arbitration.³⁴⁸ This concern is handled in the DIS Supplementary Rules through language in both the model clause and the Rules themselves stating that:

[t]he effects of an arbitral award extend also to those shareholders, that have been identified as Concerned Others within the time limits provided, irrespective whether they have made use of their opportunity to join the arbitral proceedings as a party or as an intervenor. . . . The shareholders named as Concerned Others within the time limits provided, commit to recognize the effects of an arbitral award rendered in accordance with the [DIS Supplementary Rules].³⁴⁹

³⁴⁷ See DIS Supplementary Rules, *supra* note 19, Model Clause (stating “[f]ormer shareholders remain bound by this arbitration agreement”).

³⁴⁸ This issue can be particularly problematic in states where the right to assert a legal claim is considered to be individual in nature. See Strong, De-Americanization, *supra* note 163, at 507, 536.

³⁴⁹ DIS Supplementary Rules, *supra* note 19, Model Clause. The language in Section 11 varies slightly. See *id.*, §11. In some ways, this provision negates the claim that the DIS Supplementary Rules constitute an opt-in procedure, since Concerned Others have no way to avoid being bound by the outcome of the

This language is useful in that it helps provide finality by eliminating any possible objections based on the non-participation of a particular party. While it may be more difficult to bind all actual and potential parties to a trust dispute through language of this nature, particularly given issues relating to the representation of unborn, unascertained and legally incompetent beneficiaries, those involved in drafting arbitral procedures may wish to consider whether similar language regarding the *res judicata* effect of an award arising out of a trust arbitration would be at all useful.

VI. CONCLUSION

Interest in mandatory arbitration of internal trust disputes is on the rise, with settlors and trustees in a variety of jurisdictions eager to find a way to minimize spiraling litigation costs and avoid some of the procedural concerns associated with cross-border judicial procedures.³⁵⁰ While arbitration seems in many ways to be the natural solution, mandatory arbitration of internal trust disputes faces a number of unique challenges not found in other areas of law.

One of the most pressing questions relates to the actual procedure to be used in the arbitration. Interestingly, it appears that settlors can increase – or, possibly, decrease – the enforceability of a mandatory arbitration provision found in a trust by adopting particular procedures. This puts significant pressure on settlors to choose appropriate procedures so as to ensure a favorable determination on the enforceability of an arbitration provision.

Although there are a number of ways for settlors to dictate arbitral procedures to be used in future trust disputes, the easiest and best way is to adopt an arbitral rule set specifically

award, even if they do not actively participate in the proceedings. However, the nature of these sorts of shareholder disputes requires an *in rem* approach, just as trust disputes do.

³⁵⁰ Arbitration of internal trust disputes carries a number of benefits beyond cost savings. See Strong, *Two Bodies Collide*, *supra* note 9.

designed for use in trust disputes. However, the only set of institutional rules that even purports to address the special needs of trust arbitration – the AAA Trust Arbitration Rules – appears to be entirely inadequate to the task. Rather than offering a highly specialized set of rules tailored specifically to the unique demands of trust arbitration, the AAA appears to be operating largely under the belief that trusts are just another type of business association³⁵¹ and that standard arbitral procedures are sufficient to address any disputes arising under a trust. Therefore, settlors must look elsewhere for assistance.

Happily, the DIS has provided a number of extremely innovative ideas in the DIS Supplementary Rules. While the DIS has restricted use of these rules to certain types of shareholder disputes, settlors can nevertheless use the rules as inspiration when setting up individual, *ad hoc* arbitrations.

Of course, widespread reliance on *ad hoc* procedures is not the best way for the trust industry to proceed on a long term basis. Instead, the trust bar and the arbitral community need to come together to develop a new set of arbitral rules that truly takes the unique challenges of trust arbitration into account. While the drafters of those rules can and indeed should look to the DIS Supplementary Rules for inspiration, particularly with respect to the identification of and notice to actual and potential parties, there are a number of other issues that need to be addressed. These include (1) matters regarding late-joining and non-participating parties, (2) special or virtual representation, including appointment and payment of the representative, (3) arbitral (as opposed to judicial) approval of consent awards and (4) the possibility of multiple

³⁵¹ There is little evidence that the AAA considered concerns relating to commercial trusts separately from those arising under non-commercial trusts. While very little attention has been paid to this issue generally, one would expect an arbitral institution that was drafting a specialized rule set to have considered such matters at length.

awards regarding judicial accounting or instruction procedures, including the extent to which an arbitrator could consider facts raised and decisions made in earlier arbitral proceedings.

It is also important that any rules relating to trust arbitration reinforce certain principles of arbitration law that may not be well-known among the trust bench and bar, since that will help eliminate any residual prejudices that may remain in the trust industry regarding arbitration.³⁵²

Therefore, any new arbitral rules targeted toward trust disputes should explicitly demonstrate (1) the fairness of the appointment mechanism, (2) the independence and impartiality of the arbitrators and (3) the extent to which arbitrators must apply the law.

Current trends suggest that an increasing number of jurisdictions are going to rule favorably on mandatory trust arbitration in the coming months and years.³⁵³ As such, the number of trusts with mandatory arbitration provisions is bound to increase. Since many of these trusts will be international in nature, it is incumbent on the international arbitral community to do its part to ensure that the law in this field develops in accordance with established principles of arbitration law and practice. While this Article has only addressed one of a number of concerns, it is hoped that this discussion will act as an inspiration for further developments, initiatives and research involving mandatory arbitration of internal trust disputes.

³⁵² See ACTEC, *supra* note 10, at 5 (discussing the “blinding prejudice” to arbitration in contemporary trust and estates practice).

³⁵³ See Strong, *Two Bodies Collide*, *supra* note 8.