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Empowering Settlers: How Proper Language Can Increase the Enforceability of a Mandatory Arbitration Provision in a Trust

S.I. Strong

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Empowering Settlers: How Proper Language Can Increase
the Enforceability of a Mandatory Arbitration Provision in a Trust

S.I. Strong*

ABSTRACT

With hostile trust litigation reaching epidemic proportions, many people within the trust industry are interested in identifying new and less expensive ways to resolve trust-related disputes. Arbitration is often proposed as a possible alternative, although questions exist about whether and to what extent a mandatory arbitration provision found in a trust will be considered enforceable by a court.

Up until now, most commentary in this area of law has focused on purely jurisprudential issues, with little attention being paid to the practical efforts that settlers can make to increase the enforceability of arbitration provisions found in trusts. This Article takes a slightly different approach to the question of trust arbitration in that it analyzes the extent to which a settlor can overcome the various legal challenges facing mandatory trust arbitration through appropriate use of language in the trust.

In so doing, this Article not only discusses the opinions of both courts and commentators, it also analyzes the effectiveness of various model arbitration clauses specially drafted by two of the world's leading arbitral institutions, the American Arbitration Association (AAA) and the International Chamber of Commerce (ICC), for use in trusts. Although these provisions have been in existence since 2003 and 2008 respectively, no commentator has yet discussed them in any depth. This Article fills that gap, providing settlers and trustees with practical, yet theoretically sound, advice on how to draft an enforceable arbitration provision in a trust. In so doing, the Article also introduces a number of relevant judicial opinions that have not yet entered the legal literature.

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I. Introduction

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

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¹ See David Horton, *The Federal Arbitration Act and Testamentary Instruments*, 90 N.C. L. REV. __, *22 (forthcoming 2012); John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 YALE L.J. 165, 177-78 (1997) [hereinafter Langbein, Commercial Trusts].

so, too, has the number of trust-related lawsuits, with some commentators claiming that hostile trust litigation has reached “near epidemic” levels.²

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

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

However, certain distinctions exist among the various types of trust controversies. For example, most contemporary arbitration relating to trusts involves disputes between the trust and

² Lawrence Cohen & Marcus Staff, *The Arbitration of Trust Disputes*, 7 J. INT’L TR. & CORP. PLAN. 203, 203 (1999); see also American College of Trust and Estate Counsel (ACTEC), Arbitration Task Force Report 22 (Sept. 2006), available at <http://www.mnbar.org/sections/probate-trust/ACTEC%20Arbitration%20Task%20Force%20Report-2006.pdf>; Horton, *supra* note 1, at *3 (suggesting “estate plans generate more lawsuits ‘than any other legal instrument’”).

³ See Robert Flannigan, *Business Applications of the Express Trust*, 36 ALBERTA L. REV. 630, 631 (1998); Frances S. Foster, *Trust Privacy*, 93 CORNELL L. REV. 555, 563, 610-11, 615 (2008); Georg von Segesser, *Arbitrability in Estate and Trust Litigation*, in PAPERS OF THE INTERNATIONAL ACADEMY OF ESTATE AND TRUST LAW – 2000 21, 21 (Rosalind F. Atherton ed. 2001); Tina Wüstemann, *Arbitration of Trust Disputes*, in NEW DEVELOPMENTS IN INTERNATIONAL COMMERCIAL ARBITRATION 2007, 33, 33-34, 40 (Christoph Müller ed., 2007).

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

⁵ See *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57-58 (1995). Many trusts reflect an international or interstate component that brings them within the ambit of the Federal Arbitration Act (FAA). See 9 U.S.C. §§1-307 (2011); Horton, *supra* note 1, at *20.

⁶ See ACTEC, *supra* note 2, at 13; Horton, *supra* note 1, at *7-10; Arnold M. Zack, *Arbitration: Step-child of Wills and Estates*, 11 ARB. J. 179 (1956); Blaine Covington Janin, Comment, *The Validity of Arbitration Provisions in Trust Instruments*, 55 CAL. L. REV. 521, 524-28 (1967).

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

Despite these distinctive characteristics, there is no *per se* bar to arbitration of internal trust disputes. Indeed, a number of these types of concerns are explicitly described as being amenable to arbitration under the Uniform Trust Code (UTC).⁹ Instead, the difference in treatment appears to arise as a result of the manner in which each type of arbitration is invoked. External trust disputes are generally made subject to arbitration through an arbitration agreement contained within a contract that exists apart from the trust itself.¹⁰ Internal trust disputes, on the

⁷ See *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). This type of arbitration is often promoted through pro-arbitration provisions based on the Uniform Trust Code (UTC), which has been adopted by 24 U.S. states in whole or in part. See National Conference of Commissioners on Uniform State Laws (NCCUSL), Uniform Trust Code §§111, 816(23) (2000), last revised or amended in 2005, available at <http://www.law.upenn.edu/bll/archives/ulc/uta/2005final.htm> [hereinafter UTC]; see also NCCUSL, UTC Status, available at www.nccusl.org. Some states have enacted even more favorable provisions regarding the arbitration of trust disputes. See Idaho Code Ann. §§15-8-101, 15-8-103 (2011); Wash. Rev. Code §§11.96A.010, 11.96A.030 (2012). Though most of this legislation simply describes which types of matters are amenable to arbitration without indicating how such procedures are to arise, two states – Arizona and Florida – have enacted statutes explicitly indicating that settlors may require arbitration of future disputes through use of a mandatory arbitration provision in a trust. See Ariz. Rev. Stat. Ann. §14-10205 (2011); Fla. St. Ann. §731.401 (2011).

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

⁹ See UTC, *supra* note 7, §§111, 816(23) (2000); Idaho Code Ann. §§15-8-101, 15-8-103 (2011); Wash. Rev. Code §§11.96A.010, 11.96A.030 (2012).

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

other hand, predominantly arise as a result of a mandatory arbitration provision located in the trust itself.¹¹

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

As interesting as questions about the jurisprudential propriety of mandatory arbitration of internal trust disputes may be, this Article does not propose to address such matters, since that topic is discussed in detail elsewhere. Indeed, most commentators¹⁵ and a growing number of

¹¹ See Horton, *supra* note 1, at *3-4. Internal trust disputes could be made subject to post-dispute arbitration agreements among all the parties, but submission agreements (also known as *compromis*) are notoriously difficult to object due to litigation strategies that arise once a conflict has begun. See GARY B. BORN, INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: DRAFTING AND ENFORCING 37 (2010) [hereinafter BORN, DRAFTING]. Internal trust disputes are occasionally arbitrated as the result of an arbitration agreement with external third party agents, but that happens only rarely. For example, arbitration of internal trust matters may result in cases where (1) a side agreement that includes an arbitration provision has been explicitly incorporated by reference into a trust or (2) a side agreement that includes an arbitration provision explicitly refers to disputes arising out of an associated trust. See *Decker v. Bookstaver*, No. 4:09-CV-1361, 2010 WL 2132284, at *1-2 (E.D. Mo. May 26, 2010); *New South Federal Savings Bank v. Anding*, 414 F. Supp. 2d 636, 639 (S.D. Miss. 2005).

¹² See Hwang, *supra* note 8, at 83.

¹³ *Id.*

¹⁴ See Michael P. Bruyere & Meghan D. Marino, *Mandatory Arbitration Provisions: A Powerful Tool to Prevent Contentious and Costly Trust Litigation, But Are They Enforceable?* 42 REAL PROP. PROB. & TR. J. 351, 352-53 (2007); Horton, *supra* note 1, at *3; Erin Katzen, *Arbitration Clauses in Wills and Trusts: Defining the Parameters for Mandatory Arbitration of Wills and Trusts*, 24 QUINNIPIAC PROB. L. J. 118, 118-19 (2011); Wüstemann, *supra* note 3, at 41. Some of the objections are based on a misunderstanding of the nature of arbitration, see Bridget A. Logstrom, *Arbitration in Estate and Trust Disputes: Friend or Foe?* 30 AM. COLL. TR. & ESTATES COUNS. J. 266, 266 (2005) (claiming arbitrators can ignore legal precedent and decide issues as a matter of equity), while others focus more on questions of enforceability of mandatory arbitration provisions in trusts, see Horton *supra* note 1, at *4-5.

¹⁵ See ACTEC, *supra* note 2, at 34-42; Buckle & Olsen, *supra* note 3, at 655; Cohen & Staff, *supra* note 2, at 210; David Fox, *Non-excludable Trustee Duties*, 17 TR. & TRUSTEES 17, 25 (2011); Horton, *supra* note 1, at *54; Charles Lloyd & Jonathan Pratt, *Trust in Arbitration*, 12 TR. & TRUSTEES 18, 18 (2006); Logstrom, *supra* note 14, at 266-68; Gail E. Mautner & Heidi L.G. Orr, *A Brave New World: Nonjudicial Dispute Resolution Procedures Under the Uniform Trust Code and Washington's and Idaho's Trust and Estate Dispute Resolution Acts*, 35 AM. C. TR. & EST. COUNS. J. 159, 181 (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 From Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES. L. REV. 275, 277 (1999); Strong, *Two Bodies Collide*, *supra* note 10; Wüstemann, *supra* note 3, at 55-56. *But see*

courts¹⁶ and legislatures¹⁷ appear to adopt the view that mandatory arbitration clauses located in trusts are enforceable, despite a few well-publicized judicial decisions to the contrary.¹⁸ Instead, this Article considers the claim made by numerous experts that the enforceability of arbitral provisions in trusts can be improved through the use of appropriate language in the clause itself.¹⁹

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

Timothy P. O'Sullivan, *Family Harmony: An All Too Frequent Casualty of the Estate Planning Process*, 8 MARQUETTE ELDER'S ADVISOR 253, 315 (2007).

¹⁶ See *infra* notes 45-52 and accompanying text.

¹⁷ See Ariz. Rev. Stat. Ann. §14-10205 (2011); Fla. St. Ann. §731.401 (2011); see also The Trusts (Guernsey) Law 2007, §63, available at <http://www.guernseylegalresources.gg/ccm/legal-resources/laws/trusts/the-trusts-guernsey-law-2007.en>; Trustee (Amendment) Bill 2011, §18, available at [http://www.bacabahamas.com/PDF/Trustee%20\(Amendment\)%20Bill%202011%20-%2015%20April%202011.pdf](http://www.bacabahamas.com/PDF/Trustee%20(Amendment)%20Bill%202011%20-%2015%20April%202011.pdf). It is possible that the UTC and similar state statutes could be construed to permit mandatory trust arbitration, although the relevant provisions are somewhat ambiguous as to how arbitration may arise. See UTC, *supra* note 7, §§111, 816(23) (2000); Idaho Code Ann. §§15-8-101, 15-8-103 (2011); Wash. Rev. Code §§11.96A.010, 11.96A.030 (2012).

¹⁸ 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). Notably, both these decisions are currently on appeal to higher courts.

¹⁹ See ACTEC, *supra* note 2, at 34-42; 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, 12 (2008), available at http://www.indret.com/pdf/559_en.pdf; Cohen & Staff, *supra* note 2, at 221-23; David Hayton, *Future Trends in International Trust Planning*, 13 JORDANS J. INT'L TR. & CORP. PLAN. 55, 72 (2006); David Hayton, *Problems in Attaining Binding Determination of Trust Issues by Alternative Dispute Resolution*, in PAPERS OF THE INTERNATIONAL ACADEMY OF ESTATE AND TRUST LAW – 2000, *supra* note 3, at 11, 17; Hwang, *supra* note 8, at 84; John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 662 (1995) [hereinafter Langbein, *Contractarian*]; Bridget A. Logstrom et al., *Resolving Disputes With Ease and Grace*, 31 AM. COLL. TR. & ESTATES COUNS. J. 235, 241-44 (2005); O'Sullivan, *supra* note 15, at 315-16; Strong, *Two Bodies Collide*, *supra* note 10; Wüstemann, *supra* note 3, at 45.

²⁰ Passing references and offhand suggestions are, however, routinely made on this subject. See UTC, *supra* note 7, §816(23), cmt.; ACTEC, *supra* note 2, at 34-42; Jonathan G. Blattmachr, *Reducing Estate and Trust Litigation Through Disclosure*, in *Terrorem Clauses, Mediation and Arbitration*, 9 CARDOZO J. CONFL. RESOL. 237, 247-48, 260-61 (2008); Bosques-Hernández, *supra* note 19, at 7-8, 12; Hayton, *supra* note 19, at 72; Hayton, *supra* note 19,

challenges facing mandatory trust arbitration and determining the extent to which each of these issues can be positively affected through language used by the settlor in the trust.

However, this Article also makes a second contribution to the development of this area of law. At this point, most of the analysis concerning mandatory trust arbitration has come from the trust law community, with relatively little input from experts in arbitration.²¹ The lack of interaction between experts in trust and arbitration law means that a number of important developments in arbitration law have been largely overlooked by the trust industry.²² The lack of integration between trust and arbitration law also means that a number of proposals generated by the trust law community with respect to mandatory trust arbitration may meet requirements imposed by trust law but fail to comply with “best practices” in arbitration law.²³

One example of the kind of problems that can arise as a result of this sort of analytical isolationism involves suggestions that settlors adopt certain language drafted entirely by the author of whatever scholarly article is at issue.²⁴ While these proposals may address certain issues that arise as a matter of trust law and may constitute an important contribution to the literature in this area of practice,²⁵ they often do not comply with advice by arbitration

at 17; Hwang, *supra* note 8, at 84; Katzen, *supra* note 14, at 125-27; Logstrom et al., *supra* note 19, at 241-44; O’Sullivan, *supra* note 15, at 315-16; Spitko, *supra* note 15, at 297-99; Wüstemann, *supra* note 3, at 45-47.

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

²² See Strong, Two Bodies Collide, *supra* note 10; see also *infra* notes 31-34. This is not to say that the arbitral community has been actively excluded from the discussion in any way. Instead, the problem seems to be that arbitration and trust law appear to operate somewhat in isolation from each other. This separatism is due to some extent to the specialized nature of trust law and procedure and the way in which trust matters are often heard in special probate divisions or chancery courts. See WILLIAM M. MCGOVERN ET AL., WILLS, TRUSTS AND ESTATES: INCLUDING TAXATION AND FUTURE INTERESTS 626 (2010); James W. Martin, *Ten Tips for Handling Complex Probate*, 84 FLA. B.J. 45-52 (Feb. 2010); John T. Rogers, Jr., *Avoiding and Managing Litigation (For Planners and Fiduciaries)*, SS043 ALI-ABA 791 (June 12-17, 2011) at III.C.1.

²³ See *infra* notes 31-34.

²⁴ Some commentators propose entire arbitral clauses while others simply suggest one or two phrases. See ACTEC, *supra* note 2, at 34-42; Blattmacht, *supra* note 20, at 247-48, 260-61; Hayton, *supra* note 19, at 72; Hayton, *supra* note 19, at 17; Logstrom et al., *supra* note 19, at 241-44.

²⁵ Often these articles only address certain narrow concerns rather than considering the entire range of issues facing mandatory trust arbitration. See, e.g., Blattmacht, *supra* note 20 (only dealing with *in terrorem* provisions).

specialists. For example, experts in arbitration strongly recommend that parties begin with well-known, well-tested language before tailoring it to their own particular needs.²⁶ The best place for a drafting party to begin is with a model clause propounded by a reputable arbitral institution, since those clauses tend to provide comprehensive and well-tested language.²⁷

This could appear to create several problems for proponents of mandatory trust arbitration. For example, many of the most successful and popular institutional clauses are targeted to controversies in other subject matter areas, such as labor, employment, consumer or commercial law.²⁸ Furthermore, the unique challenges associated with mandatory trust arbitration suggest that a non-specific arbitral clause may not be the most appropriate starting point for someone intent on creating an enforceable arbitration provision in a trust, even though standard commercial clauses have been successfully used in trust arbitrations in the past.²⁹

²⁶ See BORN, DRAFTING, *supra* note 11, at 37. By avoiding non-standard terms and phrases, parties can limit interpretive difficulties and litigation over the content and scope of the agreement. *Id.*

²⁷ See *id.* Arbitral institutions typically undertake two tasks: (1) the promulgation of one or more sets of arbitral procedures that are akin to the rules of civil procedure, but which are much more flexible and tailored to the special issues that arise in arbitration, and (2) the administration of arbitrations that proceed under the institution's published rules. Notably, parties do not have to have their arbitrations administered and can instead choose to proceed *ad hoc*. *Ad hoc* arbitrations typically allow parties and arbitrators to adopt any procedures that appear necessary, subject to certain due process concerns. Although inexperienced parties often prefer *ad hoc* arbitration because such procedures appear less expensive, most experts recommend administered arbitration, since the use of well recognized rules and the availability of an administering institution make the process smoother and more predictable, thus offsetting any money the parties might spend on fees paid to the institution. For more on *ad hoc* and administered arbitration, see BORN, ICA, *supra* note 4, at 147-51; JULIAN D.M. LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION ¶¶3-4 to 3-23 (2003).

²⁸ See, e.g., AAA, Arbitration, available at http://www.adr.org/arb_med (listing range of rules addressing different areas of law).

²⁹ While the principles of arbitral confidentiality mean that it is impossible to discover precise details or statistics about trust arbitration, it is possible to glean some information from judicial opinions addressing arbitration-related disputes. Thus, for example, it is apparent that a number of disputes involving trusts have used both the AAA Commercial Arbitration Rules and the rules of the International Centre for Dispute Resolution (ICDR), which is the AAA's international arm. See AAA Commercial Arbitration Rules, effective June 1, 2009, available at <http://www.adr.org/sp.asp?id=22440>; ICDR International Dispute Resolution Procedures, effective June 1, 2009, available at <http://www.adr.org/sp.asp?id=33994>; Life Receivables Trust v. Syndicate 102 at Lloyd's of London, 549 F.3d 210, 218 (2d Cir. 2008) (involving AAA rules in an external trust dispute); Municipality of San Juan v. 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 a trust deed calling for arbitration under the rules of the International Centre for Dispute Resolution (ICDR)); 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 requiring AAA arbitration); Burlington Resources Oil & Gas Co. LP v. San Juan Basin Royalty Trust, 249 S.W.3d 34, 36, 38

Indeed, it is the very inapplicability of these standard clauses that has presumably led trust law commentators to suggest their own language.³⁰

While these observations may seem to explain how the current state of affairs has come to be, the truth is that those interested in drafting an enforceable arbitration provision in a trust do not need to use general commercial clauses as their starting point, nor do they need to draft new provisions entirely from scratch, since two of the world's leading arbitral institutions – the American Arbitration Association (AAA) and the International Chamber of Commerce (ICC) – both offer specially drafted model arbitration provisions for use in trusts. These provisions have been available for years, starting in 2003, when the AAA published model language (AAA Model Trust Clause)³¹ to be used in tandem with a dedicated set of arbitral procedures known as the AAA Wills and Trusts Arbitration Rules.³² A second model arbitration clause became available in 2008, when the ICC published its own model language (ICC Model Trust Clause) following an extensive consultation process involving experts from around the world.³³

(Tex. App. 2007) (involving a post-dispute arbitration agreement concerning accountings and audits of the trust); *Wilcox & Fetzer, Ltd. v. Corbett & Wilcox*, No. Civ. A.2037-N, 2006 WL 2473665, at *1 (Del. Ch. 22 Aug. 2006) (involving a pre-dispute arbitration agreement with a party external to a revocable trust). Arbitrations involving trusts have also taken place under the Arbitration Rules of the International Chamber of Commerce (ICC), one of the world's leading arbitral institutions. *See Newbridge Acquisition I, L.L.C. v. Grupo Corvi, S.A. de D.V.*, No. 02 Civ. 9839(JSR), 2003 WL 42007, at *1 (S.D.N.Y. Jan. 6, 2003); Rules of Arbitration of the International Chamber of Commerce, effective Jan. 1 2012, *available at* http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/2012_Arbitration%20and%20ADR%20Rules%20ENGLISH.pdf [hereinafter ICC Arbitration Rules].

³⁰ Anecdotal evidence indicates that relatively few trusts currently contain arbitration provisions, which suggests that there is no standard *ad hoc* language that settlors can use as an exemplar. *See Wüstemann, supra* note 3, at 41; *see also Horton, supra* note 1, at *4; *Katzen, supra* note 14, at 119.

³¹ *See* AAA Wills and Trusts Arbitration Rules, Model Clause, effective 1 June 2009 [hereinafter AAA Model Trust Clause], *available at* <http://www.adr.org/sp.asp?id=22005>.

³² *See* AAA Wills and Trusts Arbitration Rules, effective 1 June 2009 [hereinafter AAA Trust Arbitration Rules], *available at* <http://www.adr.org/sp.asp?id=22005>; *see also* AAA, Archived Rules, <http://www.adr.org/sp.asp?id=29487> (containing various revisions). The author analyzes the AAA Wills and Trusts Arbitration Rules in detail in a companion article. *See* AAA Wills and Trusts Arbitration Rules, *supra*; S.I. Strong, *Mandatory Arbitration of Internal Trust Disputes: Are Special Procedures Necessary?*, under consideration by ARB. INT'L (forthcoming 2012) [hereinafter Strong, Procedures].

³³ *See* ICC Arbitration Clause for Trust Disputes, 19 ICC BULL. 9 (2008) [hereinafter ICC Model Trust Clause], *available on* http://www.iccdri.com/CODE/LevelThree.asp?page=Commission%20Reports&tocxml=ltoc_CommReportsAll.xml

Shockingly, no practitioner or scholar has yet discussed either of these model arbitration provisions, nor has anyone used these clauses as a starting point for further drafting proposals.³⁴ This is deeply troubling, given that these provisions are perhaps the best models currently available for how to invoke mandatory trust arbitration.

Therefore, this Article will be the first analyze the AAA and ICC Model Trust Clauses in detail, considering both the differences between the two provisions as well as the extent to which each of the clauses addresses the various jurisprudential challenges facing mandatory trust arbitration.³⁵ In so doing, this Article considers the AAA and ICC Model Trust Clauses as the starting point for future drafting efforts, just as practitioners would do if they were faced with a request to include a mandatory arbitration provision in a trust.³⁶

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

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³⁴ The few references to these model clauses that exist only mention the two institutional initiatives in passing. See Horton, *supra* note 1, at *7; Hwang, *supra* note 8, at 83-84; Katzen, *supra* note 14, at 130-32.

³⁵ See AAA Model Trust Clause, *supra* note 31; ICC Model Trust Clause, *supra* note 33.

³⁶ See BORN, DRAFTING, *supra* note 11, at 37; AAA Model Trust Clause, *supra* note 31; ICC Model Trust Clause, *supra* note 33.

Before beginning, it is important to mention several background concerns. First, parties need to understand at the outset that wholesale adoption of either the AAA or ICC Model Trust Clause will lead to an administered arbitration with that organization.³⁷ However, parties who wish to proceed on an *ad hoc* basis or under the administration of a different institution may nevertheless look to these clauses for inspiration, since the proposed language can be modified for other uses.³⁸

Second, looking at the names of the two institutions, it might seem reasonable to conclude that the ICC Model Trust Clause is only suitable for use in international trusts while the AAA Model Trust Clause is only appropriate for matters involving domestic trusts.³⁹ In fact, neither the ICC nor the AAA limit themselves geographically, which means that those who are looking for useful drafting tips should consider language contained in both the AAA and ICC Model Trust Clauses, regardless of whether the trust in question is domestic or international.⁴⁰

Third, the AAA and the ICC have decided to handle mandatory trust arbitration in slightly different manners. Whereas the AAA has embraced a more holistic approach to the issue, not only adopting a model arbitration clause but also creating a new set of dedicated trust arbitration rules, the ICC has taken the view that it does not need to create a new set of arbitral procedures, since the standard ICC Arbitration Rules are considered flexible enough to address any trust-related disputes that might arise.⁴¹ Interestingly, the disparity in the way the AAA and the ICC address trust arbitration reflects a larger philosophical difference between the two institutions, in that the ICC currently has only one set of rules for all types of disputes while the

³⁷ See AAA Model Trust Clause, *supra* note 31; ICC Model Trust Clause, *supra* note 33.

³⁸ See BORN, DRAFTING, *supra* note 11, at 37-38; AAA Model Trust Clause, *supra* note 31; ICC Model Trust Clause, *supra* note 33.

³⁹ See AAA Model Trust Clause, *supra* note 31; ICC Model Trust Clause, *supra* note 33.

⁴⁰ See BORN, DRAFTING, *supra* note 11, at 37; AAA Model Trust Clause, *supra* note 31; ICC Model Trust Clause, *supra* note 33.

⁴¹ See AAA Model Arbitration Clause, *supra* note 31; AAA Wills and Trusts Arbitration Rules, *supra* note 32; ICC Model Trust Clause, *supra* note 33, Explanatory Notes 4-6; *see also* ICC Arbitration Rules, *supra* note 29.

AAA offers a wide variety of subject-specific rules.⁴² However, neither approach is better or worse as a matter of principle. Instead, parties simply choose the option that is most attractive to them. Indeed, this kind of variation is welcomed in the arbitral community because it provides parties with a wide range of alternatives to consider.⁴³

II. Trust in Arbitration? Overcoming Doubts Regarding the Enforceability of an Arbitration Provision Found in a Trust

If Confucius were alive today, he might say trust lawyers are currently living through “interesting times,” at least with respect to mandatory trust arbitration.⁴⁴ On the one hand, two recent and well-publicized state court cases – *Diaz v. Bukey*⁴⁵ and *Rachal v. Reitz*⁴⁶ – have both held that arbitration provisions located in a trust are unenforceable, although both decisions are currently under appeal. While this would seem to bode ill for the future of mandatory trust arbitration, other developments suggest that the procedure is becoming increasingly accepted, both in the United States and elsewhere. For example, a growing number of jurisdictions have demonstrated increased support for trust arbitration by enacting statutory provisions that either explicitly permit the use of mandatory arbitration provisions in trusts⁴⁷ or implicitly authorize such measures.⁴⁸ Furthermore, several older opinions that were once frequently cited for the proposition that arbitration of trust disputes is impermissible have all been abrogated

⁴² See AAA, Arbitration, *supra* note 28 (listing range of rules addressing different areas of law); ICC Arbitration Rules, *supra* note 29.

⁴³ See BORN, DRAFTING, *supra* note 11, at 58; LEW ET AL., *supra* note 27, ¶¶8-21 to 8-23.

⁴⁴ An ancient Chinese curse, often attributed to Confucius, is for a person live through “interesting times.” See David Louie, *The State of Our Bar*, 5 HAW. B.J. 4, 5 (Dec. 2001).

⁴⁵ See *Diaz v. Bukey*, 125 Cal. Rptr. 3d 610, 614-15 (Cal. Ct. App. 2011), *petition for review granted*, 257 P. 3d 1129 (2011).

⁴⁶ See *Rachal v. Reitz*, 347 S.W.3d 305, 310 (Tex. Ct. App. 2011), *petition for review filed* Sept. 8, 2011.

⁴⁷ See Ariz. Rev. Stat. Ann. §14-10205 (2011); Fla. Stat. Ann. §731.401 (2011); *see also* The Trusts (Guernsey) Law 2007, *supra* note 17, §63; Trustee (Amendment) Bill 2011, *supra* note 17, §18; Murphy, *supra* note 15, at 662-64.

⁴⁸ See 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); Strong, Two Bodies Collide, *supra* note 10; *see also supra* note 7.

legislatively or judicially. These cases include well-known decisions such as *In re Jacobovitz' Will*,⁴⁹ *Meredith's Estate*⁵⁰ and *Schoneberger v. Oelze*.⁵¹ Finally, a surprisingly large number of judicial decisions appear to take a positive view of mandatory trust arbitration, although these opinions have been largely overlooked in the legal literature.⁵²

While this diversity of opinion regarding the enforceability of mandatory trust arbitration would be enough to constitute “interesting times” on its own, trust lawyers must also contend with the fact that many U.S. states have not yet addressed issues in this area of law. While some members of the trust bench and bar appear to take the view that the lack of subject-specific precedent should lead to a conservative approach toward arbitration, it is at least equally appropriate to conclude that general principles of arbitration law, including strong state and federal policies in favor of arbitration, will or should apply to trust disputes to the same extent that they do in other types of controversies.⁵³ Indeed, numerous commentators have concluded

⁴⁹ Compare *In re Jacobovitz' Will*, 295 N.Y.S.2d 527, 529 (Sur. Ct. Nassau Co. 1968), with *In re Blumenkrantz*, 824 N.Y.S.2d 884, 887 (Sur. Ct. Nassau Co. 2006).

⁵⁰ Compare *Meredith's Estate*, 266 N.W. 351 (Mich. 1936), with *In re Nestorovski Estate*, 769 N.W. 2d 720, 732 (Mich. Ct. App. 2009).

⁵¹ 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).

⁵² See *Radian Ins., Inc. v. Deutsche Bank National Trust Co.*, 638 F. Supp. 2d 443, 458 (E.D. Pa. 2009); *New South Federal Savings Bank v. Anding*, 414 F. Supp. 2d 636, 643 (S.D. Miss. 2006); *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); *see also 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. Tarvizian*, 351 F.2d 889, 890-92 (1st Cir. 1965); *Stender v. Cardwell*, Civ. No. 07-cv-02503-REB-MJW, 2009 WL 3416904, at *2 (D. Colo. Oct. 20, 2009); *Doctor's Assoc., Inc. v. Hollingsworth*, 949 F. Supp. 77, 79 (D. Conn. 1996); *Masonry and Tile Contractors Assoc. of So. Nevada v. Jolley, Urga & Wirth, Ltd.*, 941 P.2d 486 (Nev. 1997); *Robin v. Doran*, No. 392456, 2010 WL 728558, at *1 (Mass. Land Ct. Mar. 3, 2010). *But see Flores v. Transamerica Homefirst, Inc.*, 113 Cal. Rptr. 2d 376, 385 (Cal. Ct. App. 2001); *Estate of Proceeding for the Appointment of a Guardian for Charlotte Radcliffe*, N.Y. L.J., July 20, 2007, at 36 (Sur. Ct. N.Y. County July 20, 2007). These decisions are discussed in more detail in Strong, *Two Bodies Collide*, *supra* note 10. Other relevant but often overlooked cases are cited throughout this Article.

⁵³ See *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57-58 (1995); *Cohen & Staff*, *supra* note 2, at 211; *Horton*, *supra* note 1, at *20.

not only that arbitration of internal trust disputes is well-suited to the needs of the parties,⁵⁴ but that the use of a mandatory arbitration provision in a trust is an entirely legitimate means of invoking arbitration.⁵⁵

Admittedly, there are some members of the trust community who take a different view.⁵⁶ However, this is neither the time nor the place to enter into a detailed debate about the propriety of mandatory trust arbitration. Instead, this Article considers whether and to what extent a settlor can positively affect the enforceability of a mandatory arbitration provision in a trust through an appropriate choice of language. However, before entering into this discussion, it is necessary to outline the types of challenges facing contemporary settlors with respect to mandatory arbitration.

Commentators considering the enforceability of arbitration provisions found in trusts have concluded that courts will uphold such provisions if:

- (1) the court's jurisdiction is not ousted in an unacceptable fashion;
- (2) the clause purporting to be an arbitration clause is an agreement that is not inoperable, ineffective or incapable of being performed and covers the dispute at issue;
- (3) the clause is binding on the party seeking to avoid arbitration;
- (4) all interested parties, including unascertained, unborn and legally incompetent beneficiaries, are properly represented in the proceeding; and
- (5) the subject matter of the dispute is arbitrable.⁵⁷

Although there is insufficient space in this Article to discuss each of these five factors in detail,⁵⁸ it is nevertheless useful to consider each issue briefly so as to demonstrate the extent to which each of these elements can be positively affected by good drafting practices and to set the stage

⁵⁴ See ACTEC, *supra* note 2, at 5; Bosques-Hernández, *supra* note 19, at 6; Buckle & Olsen, *supra* note 8, at 649.

⁵⁵ See *supra* notes 15-18 and accompanying text.

⁵⁶ See ACTEC, *supra* note 2, at 5 (discussing the “blinding prejudice” to arbitration in contemporary trust and estates practice).

⁵⁷ See Cohen & Staff, *supra* note 2, at 209; see also *supra* note 15 and accompanying text.

⁵⁸ The author has conducted a more comprehensive study of these issues elsewhere. See Strong, Two Bodies Collide, *supra* note 10.

for later discussions about the effectiveness of the model arbitration clauses suggested by the AAA and the ICC.

A. No impermissible ouster of the court's jurisdiction

Courts have traditionally exercised uniquely broad powers over the administration of trusts,⁵⁹ making concerns about the possible ouster of judicial jurisdiction particularly pressing. Several possible rationales can be used to justify these broad jurisdictional powers. One is a concern that allowing a trust dispute to be resolved through any means other than litigation could disadvantage one or more of the parties, typically through the non-application of a mandatory provision of law.⁶⁰ However, closer analysis suggests that arbitration does not violate any of the principles underlying these mandatory rules of law. This is because:

[a]part from the anti-dead-hand rules, the mandatory rules of trust law have a prevalently intent-serving purpose. They facilitate rather than prohibit; their policy is cautionary and protective. These rules force the settlor to be precise about the tradeoffs between benefiting the trustee and benefiting the beneficiary; hence they aim to clarify and channel, rather than to defeat the settlor's intent. Trust terms that would excuse bad faith, or dispense with fiduciary obligation, or conceal the trust from its beneficiaries would make the trust obligation illusory, effectively allowing the trustee to loot the trust. . . . The intent-serving mandatory rules merely require a settlor who has such an improbable intent to articulate it unambiguously, in order to prevent the settlor from stumbling into that result through misunderstanding or imposition. Accordingly, apart from the anti-dead-hand rules, the mandatory rules of trust law have only the modest aspiration of truth in labeling.⁶¹

Anti-dead-hand rules can be set aside as having little, if anything, to do with arbitration, since they typically focus on (1) issues relating to future interests, as reflected in the Rule Against Perpetuities and similar provisions that give effect to the desire to promote the

⁵⁹ See MCGOVERN ET AL., *supra* note 22, at 552-55; Langbein, *Contractarian*, *supra* note 19, at 662.

⁶⁰ See Cohen & Staff, *supra* note 2, at 215-17; Strong, *Two Bodies Collide*, *supra* note 10.

⁶¹ John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105, 1126-27 (2004) [hereinafter Langbein, *Mandatory Rules*].

alienability of land, and (2) the principle that the trust must benefit the beneficiaries.⁶² Rules requiring the settlor to indicate clearly his or her intentions regarding the relationship between the trustee and the beneficiaries are also not hindered by arbitration, not only because arbitration does not affect the balance of power between parties but also because arbitration clauses already need to be clear to be enforceable as a matter of arbitration law. Indeed, the requirement for clarity is often higher with respect to arbitration agreements than with respect to other types of agreements.⁶³ Therefore, an arbitration provision that clearly reflects the settlor's desires would not appear to oust the jurisdiction of the court in any impermissible manner vis-à-vis the various mandatory rules of law.

Another rationale relating to the broad jurisdictional powers of the courts focuses on the idea that access to the courts is necessary as a means of helping protect beneficiaries from overreaching from the trustee.⁶⁴ 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.”⁶⁵

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.”⁶⁶ 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

⁶² See *id.* at 1110 n.33; see also Adam J. Hirsch, *Freedom of Testation/Freedom of Contract*, 95 MINN. L. REV. 2180, 2244 (2011); John H. Langbein, *Burn the Rembrandt? Trust Law's Limits on the Settlor's Power to Direct Investments*, 90 B.U. L. REV. 375, 396 (2010); Langbein, *Contractarian*, *supra* note 19, at 650-51.

⁶³ See BORN, ICA, *supra* note 4, at 585.

⁶⁴ Concerns about overreaching by the settlor are addressed through principles of arbitrability. See *infra* notes 145-65 and accompanying text; see also *Schoneberger v. Oelze*, 96 P.3d 1078, 1083-84 (Ariz. Ct. App. 2004) (noting a settlor “may not unilaterally strip trust beneficiaries of their right to access the courts absent their agreement”), *superseded by statute*, Ariz. Rev. Stat. Ann. §14-10205 (2011), as recognized in *Jones v. Fink*, No. CA-SA 10-0262, 2011 WL 601598 (Ariz. Ct. App. Feb. 22, 2011).

⁶⁵ Fox, *supra* note 15, at 22.

⁶⁶ *Id.* at 24.

the fund and to require them to abide by the terms of the trust instrument.”⁶⁷ Instead, there may be other, equally effective means of curbing any abuse by the trustee, of which arbitration may be one. Objections from the beneficiaries regarding the procedure used “would only have weight if the beneficiaries were denied any effective means of enforcing their interests against the 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.”⁶⁸

Experts have also concluded that arbitration does not impermissibly oust the jurisdiction of the court because judges retain the final word about the propriety of an arbitration as a result of their ability to undertake judicial review of the award at the end of the arbitral process.⁶⁹ While this procedure is not the same as an appeal, since judicial review does not allow the court to reconsider the merits of the award, the process still provides the parties with significant procedural protections.⁷⁰ Since the primary concern regarding the ouster of the courts appears to be procedural in nature,⁷¹ commentators have therefore concluded that mandatory arbitration does not impermissibly oust the jurisdiction of the court but “merely postpone[s] the involvement of the court until after an arbitration has been carried out.”⁷²

⁶⁷ *Id.*

⁶⁸ *Id.* at 24-25; *see also* ACTEC, *supra* note 2, at 13-14.

⁶⁹ *See* Cohen & Staff, *supra* note 2, at 210; Olivier Caprasse, *Objective Arbitrability of Corporate Disputes – Belgium and France*, in ONDERNEMING EN ADR 79, 86 (C.J.M. Klaassen et al., eds., 2011).

⁷⁰ *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V, June 10, 1958, 21 U.S.T. 2518, 330 U.N.T.S. 3 [hereinafter New York Convention]; 9 U.S.C. §10 (2011); *see also* BORN, ICA, *supra* note 4, at 2649-55, 2865-70.

⁷¹ *See* Langbein, *Mandatory Rules*, *supra* note 61, at 1110 n.33, 1126-27; Fox, *supra* note 15, at 24; Strong, *Two Bodies Collide*, *supra* note 10.

⁷² Lloyd & Pratt, *supra* note 15, at 18; *see also* ACTEC, *supra* note 2, at 15 (noting “the argument that arbitration denies access to court died with *Circuit City Stores v. Adams*, 532 U.S. 105 (2001)”); Strong, *Two Bodies Collide*, *supra* note 10.

B. An arbitration clause that is operable, effective and capable of performance

The second issue to consider involves the arbitration provision itself. For a mandatory arbitration provision found in a trust to be enforceable, “the clause purporting to be an arbitration clause . . . [must be] an agreement which is not inoperable, ineffective or incapable of being performed.”⁷³

The issue here involves the expectation held in many jurisdictions that an arbitration agreement should reflect certain contractual qualities.⁷⁴ While this requirement is not universal,⁷⁵ it is still often the case that an arbitration provision located within a larger document such as a trust is only considered enforceable if the larger document is contractual in nature.⁷⁶

This can create several problems. First, trusts are typically only signed by the settlor, not by other parties.⁷⁷ Second, trusts do not involve the exchange of consideration, which is problematic in jurisdictions that hold that “[a]rbitration rests on an exchange of promises.”⁷⁸

Although the signature and consideration requirements have proven fatal to mandatory

⁷³ Cohen & Staff, *supra* note 2, at 209. The dispute in question must also fall within the scope of the arbitration provision, but that issue is commonly given to the arbitrators. See BORN, ICA, *supra* note 4, at 852-83.

⁷⁴ See BORN, ICA, *supra* note 4, at 640-42.

⁷⁵ 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 also 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); 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).

⁷⁶ See BORN, ICA, *supra* note 4, at 661-64. Trusts are typically considered to be donative in nature, although the contractual theory of trusts is gaining traction in the United States. See *Bruyere & Marino*, *supra* note 14, at 362; Langbein, *Commercial Trusts*, *supra* note 1, at 185; Langbein, *Contractarian*, *supra* note 19, at 627; Strong, *Two Bodies Collide*, *supra* note 10. Interestingly, authorities emphasizing the donative nature of trusts commonly exclude commercial trusts from their consideration, suggesting that commercial trusts may be treated as being primarily contractual, an approach that would be beneficial to the arbitration analysis. See *id.* While it is beyond the scope of this Article to differentiate between commercial and other kinds of trusts, such an analysis would be useful. See *id.*

⁷⁷ Oral trusts are permitted in some cases, but are increasingly rare. See DAVID HAYTON ET AL., *UNDERHILL AND HAYTON LAW RELATING TO TRUSTS AND TRUSTEES* ¶12.1 (18th ed. 2010).

⁷⁸ *Schoneberger v. Oelze*, 96 P.3d 1078, 1083 (Ariz. Ct. App. 2004), *superseded by statute*, Ariz. Rev. Stat. Ann. §14-10205 (2011), *as recognized in Jones v. Fink*, No. CA-SA 10-0262, 2011 WL 601598 (Ariz. Ct. App. Feb. 22, 2011).

arbitration of trusts on occasion,⁷⁹ courts and commentators have identified a number of ways to overcome both problems. However, the approach varies according to the party's relationship to the trust.

The situation is easiest with respect to trustees, since settlors can create explicit contractual relationships with such parties, either through language in the trust itself or in a side agreement, and can require the trustee to sign the document in question.⁸⁰ Problems regarding consideration are typically overcome in one of three ways: either (1) the trustee is paid for his or her efforts (indeed, it is rare for a trustee to act gratuitously these days);⁸¹ (2) the trustee is said to have consented to the terms of the trust, including any rights and responsibilities thereunder, by accepting the trust appointment;⁸² or (3) the jurisdiction in question has concluded that there is no need for mutual consideration to establish an agreement to arbitrate in the context of a trust.⁸³

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

a trust deed could be drafted in such a way that benefiting from the trust would be deemed an agreement to submit trust disputes to arbitration. By accepting the gifts or invoking any rights under the trust deed, the beneficiaries would be

⁷⁹ 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).

⁸⁰ See *Bosques-Hernández*, *supra* note 19, at 12; *Cohen & Staff*, *supra* note 2, at 221-22; *Wüstemann*, *supra* note 3, at 45. Side agreements with trustees have been enforced in some jurisdictions. See *Decker v. Bookstaver*, No. 4:09-CV-1361, 2010 WL 2132284, at *1-3 (E.D. Mo. May 26, 2010). Protectors could be bound in the same way as a trustee.

⁸¹ See *HAYTON ET AL.*, *supra* note 77, ¶54.1; *Langbein, Contractarian*, *supra* note 19, at 627-28, 674-75.

⁸² See *ICC Model Trust Clause*, *supra* note 33; *HAYTON ET AL.*, *supra* note 77, ¶11.83; *Cohen & Staff*, *supra* note 2, at 218; *Wüstemann*, *supra* note 3, at 44.

⁸³ See *New South Federal Savings Bank v. Anding*, 414 F. Supp. 2d 636, 643 (S.D. Miss. 2006); *Horton*, *supra* note 1, at *25-38 (suggesting the U.S. Supreme Court has described the FAA “as facilitating goals that do not require an arbitration clause to be moored within a ‘contract’ or to be a ‘contract’ itself”).

deemed to agree to settle any dispute in accordance with the arbitration agreement contained in the trust deed.⁸⁴

U.S. courts have described this technique as constituting a “conditional transfer.”⁸⁵ At its core, conditional transfer holds that certain provisions found in the trust may be binding on beneficiaries if the beneficiary’s “rights” in the corpus of the trust are seen as “wholly derivative” of the settlor’s “right to pass her property to the persons of her choosing.”⁸⁶ Because the beneficiary has rights in the trust only because the settlor granted those rights, the settlor is allowed to condition acceptance of the rights in the trust (i.e., the benefit under the trust) on acceptance of the mandatory arbitration provisions in the trust.⁸⁷ Notably, the settlor does not have to refer explicitly to the concept of conditional transfer in the arbitration provision for the court to find that the doctrine applies, although it may be useful, as a matter of best practices, for the trust to include language invoking the doctrine so as to boost the likelihood that the arbitration provision will be found operable, effective and capable of performance. Although the concept of conditional transfer may be sufficient to overcome the need for a signature, the lack of a formal signature can also be addressed through various theories regarding the participation of non-signatories in arbitration.⁸⁸

⁸⁴ Wüstemann, *supra* note 3, at 45. This is the approach adopted by the ICC in its model arbitration clause. See ICC Model Trust Clause, *supra* note 33; see *infra* notes 247-59 and accompanying text.

⁸⁵ See American Cancer Soc., St. Louis Division v. Hammerstein, 631 S.W. 2d 858, 864 (Mo. App. 1981) (stating “[a] beneficiary takes only by benevolence of the testator, who may attach lawful conditions to the receipt of the gift”); Tennant v. Satterfield, 216 S.E.2d 229, 231-32 (W. Va. 1975); ACTEC, *supra* note 2, at 10-11.

⁸⁶ Spitko, *supra* note 15, at 300.

⁸⁷ See *id.*

⁸⁸ See Thomson-CSF, SA v. Am. Arbitration Ass’n, 64 F.3d 773, 776 (2d Cir. 1995) (allowing courts and arbitrators to extend an arbitration agreement to non-signatories in cases involving “agency (actual and apparent), alter ego, implied consent, ‘group of companies,’ estoppel, third-party beneficiary, guarantor, subrogation, legal succession and ratification of assumption”); BORN, ICA, *supra* note 4, at 1137-38; Strong, Two Bodies Collide, *supra* note 10.

C. An arbitration clause that is binding on the party seeking to avoid arbitration

The third issue to discuss is whether an arbitration clause found in the trust is binding on the party against whom the provision is to be used.⁸⁹ Rather than focusing on requirements regarding the form of the arbitration provision, this analysis considers whether there is adequate consent to support arbitration. Two types of consent must be considered: that of the settlor and that of parties other than the settlor.

1. Settlor consent

In some ways, it may seem strange to ask whether a settlor has consented to arbitration, since the settlor is the one who created the trust with the mandatory arbitration provision in the first place. However, settlor consent is essentially what is at issue when a party challenges a trust on grounds such as undue influence, lack of capacity, fraud, duress, forgery or mistake. In those cases, the claim is that neither the underlying document (i.e., the trust) nor the arbitration agreement found in the trust ever came into effect and that the dispute therefore should be heard in court.⁹⁰

Some specialists in trust law have differentiated between claims arising under a trust and those challenging the existence of the trust itself, with only the former being considered appropriate for arbitration.⁹¹ This appears to be based on practices used in other areas of trust law, where “courts often void entire testamentary instruments, or, at a minimum, the dispositive sections” when it is too difficult to separate clauses that were created through improper means

⁸⁹ See Cohen & Staff, *supra* note 2, at 209.

⁹⁰ See Horton, *supra* note 1, at *38 n.219; Katzen, *supra* note 14, at 123.

⁹¹ See Spitko, *supra* note 15, at 303; see also Katzen, *supra* note 14, at 123-24.

from those that were not.⁹² However, adopting this approach in cases involving arbitration is problematic, given the arbitral principle of separability.⁹³

The concept of separability states that challenges to the validity or existence of a contract in which an arbitration agreement is found do not affect the validity or existence of the arbitration agreement itself.⁹⁴ The doctrine arose because courts and commentators recognized early on that the effectiveness of the arbitral regime would be in jeopardy if parties could avoid arbitration simply by alleging certain types of contract defenses.⁹⁵

The two primary precedents regarding separability are *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*⁹⁶ and *Buckeye Check Cashing Inc. v. Cardegna*.⁹⁷ The essential holding of *Prima Paint* is that “claims of fraudulent inducement, directed at the underlying contract and capable of rendering it voidable, [do] not impeach the arbitration clause contained in that contract.”⁹⁸ *Buckeye Check Cashing* extended this basic principle to “cases involving claims that the underlying contract was void or illegal.”⁹⁹ Thus, “a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.”¹⁰⁰ This holding applies “regardless of whether the challenge is brought in state or federal court.”¹⁰¹

⁹² Katzen, *supra* note 14, at 123-24.

⁹³ Notably, the only way for claims such as these to have even a chance of being heard outside of arbitration is for the challenger to deny the existence of the trust in its entirety. See Horton, *supra* note 1, at *40. If a party bases its claim on any portion of the trust, the arbitration clause remains in effect. See *id.*

⁹⁴ See LEW ET AL., *supra* note 27, ¶¶6-9 to 6-22.

⁹⁵ See *id.*

⁹⁶ 388 U.S. 395 (1967).

⁹⁷ 546 U.S. 440 (2006).

⁹⁸ BORN, ICA, *supra* note 4, at 363.

⁹⁹ *Id.*; see also *Buckeye Check Cashing*, 546 U.S. at 440.

¹⁰⁰ *Buckeye Check Cashing*, 546 U.S. at 449.

¹⁰¹ *Id.*

Although the basic principles of separability are relatively easy to grasp, the nuances can become quite complicated and are beyond the scope of this Article.¹⁰² Instead, the only relevant question for this discussion is whether and to what extent U.S. courts will apply the doctrine of separability to disputes involving mandatory trust arbitration. Interestingly, a variety of approaches have arisen.

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

the analytical formula developed in *Prima Paint* cannot be applied with precision when a party contends that an entire contract containing an arbitration provision is unenforceable because he or she lacked the mental capacity to enter into the contract. Unlike a claim of fraud in the inducement, which can be directed at individual provisions in a contract, a mental capacity challenge can logically be directed only at the entire contract.¹⁰³

Because challenges based on lack of mental capacity “naturally go[] to both the entire contract and the specific agreement to arbitrate in the contract,” the court decided that a dispute based on mental incapacity should be heard in court, not in arbitration.¹⁰⁴ Although this may appear to be a clear and persuasive interpretation of the principle of separability in trust-related disputes, the decision was handed down prior to the U.S. Supreme Court’s decision in *Buckeye Check Cashing* and therefore may no longer be good law.¹⁰⁵

A second approach was exemplified in *Regions Bank v. Britt*.¹⁰⁶ Although this challenge was not based on the alleged incapacity of the settlor, as was the case in *Spahr*, it did attack the underlying validity or existence of the trust in which the arbitration provision was found on other

¹⁰² For more detailed analysis of this issue, see BORN, ICA, *supra* note 4, at 359-91; Strong, Two Bodies Collide, *supra* note 10.

¹⁰³ 330 F.3d 1266, 1273 (10th Cir. 2003) (citations omitted). The arbitration provision in question was in an external agreement rather than the trust itself, but the decision may be instructive as to how capacity issues will be addressed in internal disputes. *See id.* at 1268-69.

¹⁰⁴ *See id.*

¹⁰⁵ *See Buckeye Check Cashing Inc. v. Cardegna*, 546 U.S. 440 (2006); *Spahr*, 330 F.3d at 1273.

¹⁰⁶ *See Regions Bank v. Britt*, No. 4:09CV61TSL-LRA, 2009 WL 3766490, at *2 n.2 (S.D. Miss. Nov. 10, 2009).

grounds.¹⁰⁷ In this case, which was handed down after *Buckeye Check Cashing*, the court held that questions regarding the substantive validity of the arbitration provision could and more properly should be heard in arbitration, based on the rule in *Prima Paint*.¹⁰⁸

A third approach to separability was seen in *Weizmann Institute of Science v. Neschis*, which considered whether and to what extent an arbitral award rendered in Liechtenstein should be given preclusive effect in a U.S. court proceeding involving claims that were very similar to those determined in the arbitration.¹⁰⁹ One of the issues raised in the arbitration involved the mental capacity of the settlor, who was alleged to have been suffering from Alzheimer's disease at the time he established several foundations ("stiftung"), which are Liechtenstein's version of a trust.¹¹⁰ The arbitration provision in question was located in the charter establishing the foundation.¹¹¹

Interestingly, at no point did the court in *Weizmann Institute* take the position that issues of settlor capacity could not be heard in arbitration.¹¹² Instead, the court refused to hear argument on matters relating to the mental capacity of the settlor, based on principles of collateral estoppel.¹¹³ This suggests that a *per se* rule barring arbitration of trust disputes involving the mental capacity of the settlor would not be appropriate, despite the analysis in

¹⁰⁷ See *Spahr*, 330 F.3d at 1273; *Regions Bank*, 2009 WL 3766490 at *2 n.2. *Regions Bank* involved a husband who argued that an arbitration agreement found in a deed of trust signed by his wife was invalid because it encumbered marital property without his consent. See *id.* While some distinctions could be drawn on the grounds that the dispute involved a deed of trust on real property, an arrangement that some jurisdictions consider to be akin to mortgages, commentators have indicated that "[m]ost of the rules that apply to ordinary trusts also apply to deeds of trust." See AMY MORRIS HESS ET AL., *BOGERT'S TRUSTS AND TRUSTEES, THE LAW OF TRUSTS AND TRUSTEES* §29 (2011).

¹⁰⁸ See *Regions Bank*, 2009 WL 3766490 at 2 n.2; see also *Buckeye Check Cashing*, 546 U.S. at 449; *Prima Paint Corp. v. Flood & Conklin Mfg Co.*, 388 U.S. 395 (1967).

¹⁰⁹ See *Weizmann Institute of Science v. Neschis*, 421 F. Supp. 2d 654, 674-83 (S.D.N.Y. 2005). At the time of the decision, Liechtenstein was not a party to the New York Convention, although that has since changed. See *id.* at 674-75; see also *New York Convention Status*, *supra* note 70.

¹¹⁰ See *Weizmann Institute*, 421 F. Supp. 2d at 660, 665.

¹¹¹ See *id.* at 664, 667-68.

¹¹² See *id.*

¹¹³ See *id.* at 680 n.28.

Spahr v. Secco.¹¹⁴ Instead, the rule in *Regions Bank* appears to conform more closely with the relevant principles of national and international law.¹¹⁵

2. Consent of parties other than the settlor

Consent issues are not limited to concerns relating to the settlor. In fact, the more commonly analyzed question is whether a mandatory arbitration provision can be considered binding on persons other than the settlor (i.e., trustees and beneficiaries).¹¹⁶

The analysis here is similar to that regarding the operability and effectiveness of the arbitration agreement.¹¹⁷ An arbitration provision found in a trust is considered operable with respect to trustees to the extent that those persons agree to act under the terms of the trust.¹¹⁸ The concept of conditional transfer yields a similar result vis-à-vis beneficiaries.¹¹⁹ These same techniques can also be used to demonstrate these parties' consent to be bound by the arbitration provision.¹²⁰

However, commentators have raised an interesting issue with regard to the possible means of binding beneficiaries to a mandatory arbitration provision found in a trust. Although conditional transfer is considered an entirely legitimate mechanism and sufficient to achieve the

¹¹⁴ See *Spahr v. Secco*, 330 F.3d 1266, 1273 (10th Cir. 2003).

¹¹⁵ See *Regions Bank v. Britt*, No. 4:09CV61TSL-LRA, 2009 WL 3766490, at *2 n.2 (S.D. Miss. Nov. 10, 2009).

¹¹⁶ See Wüstemann, *supra* note 3, at 36.

¹¹⁷ See Cohen & Staff, *supra* note 2, at 209.

¹¹⁸ See *id.* at 200-02; Wüstemann, *supra* note 3, at 44-46; see *supra* notes 73-88 and accompanying text.

¹¹⁹ See Cohen & Staff, *supra* note 2, at 200-02; Wüstemann, *supra* note 3, at 44-46; see *supra* notes 73-88 and accompanying text.

¹²⁰ This is similar to the analytical framework used with respect to non-signatories in arbitration, where the same type of theories can be used to overcome formal requirements regarding the arbitration agreement as well as issues relating to consent. See S.I. Strong, *Does Class Arbitration "Change the Nature" of Arbitration?* Stolt-Nielsen, *AT&T and a Return to First Principles*, 17 HARV. NEGOT. L. REV. ___ (forthcoming 2012).

necessary ends, some people have attempted to bolster the effectiveness of an arbitral clause through the use of a forfeiture (*in terrorem*) provision.¹²¹

In terrorem provisions typically state that any party who challenges a trust or will forfeits any rights he or she may have under the instrument. In the context of mandatory arbitration, forfeiture is triggered by a challenge to the use of arbitration to resolve a particular dispute.¹²² Although such provisions obviously provide a strong incentive for beneficiaries to agree to arbitration, *in terrorem* provisions are problematic for several reasons.¹²³

First, *in terrorem* clauses are by no means universally embraced, even as a general matter. Indeed, courts often refuse to enforce such provisions if a party has probable cause to bring the claim.¹²⁴ Second, *in terrorem* clauses are particularly suspect in the context of mandatory arbitration, since threatening to revoke a benefit under the trust through a forfeiture provision could be seen as “vitiat[ing] the freedom of will required to contract, and so render[ing] the [arbitration] agreement voidable.”¹²⁵ Third, an *in terrorem* provision could be considered an impermissible attempt to oust the jurisdiction of the court and hence be void *ab initio*.¹²⁶ Therefore, while some commentators take the view that requiring a legatee to “forfeit her interest should she decline to respect the testator’s wishes with respect to arbitration of will [or trust] contests should not discourage any truly meritorious . . . contest [, since s]uch a contest

¹²¹ See Blattmacht, *supra* note 20, at 247-48, 260-61; Bosques-Hernández, *supra* note 19, at 7-8; Katzen, *supra* note 14, at 125-27; Spitko, *supra* note 15, at 297-99; Wüstemann, *supra* note 3, at 46-47.

¹²² See Blattmacht, *supra* note 20, at 247-48, 260-61.

¹²³ See *id.*; Katzen, *supra* note 14, at 125-27; see also Cohen & Staff, *supra* note 2, at 221.

¹²⁴ See NCCUSL, Uniform Probate Code §2-517 (2006), available at <http://www.law.upenn.edu/bll/archives/ulc/upc/final2005.htm>; see *id.* §3-905 (concerning “any other proceeding”); (1990); Restatement (Third) of Property: Wills and Other Donative Transfers §8.5 (2003); HAYTON ET AL., *supra* note 77, ¶11.86 (discussing “justifiable” challenges).

¹²⁵ Cohen & Staff, *supra* note 2, at 221.

¹²⁶ See HAYTON ET AL., *supra* note 77, ¶11.1.

may still be brought,¹²⁷ the better view appears to be that settlors should avoid trying to force beneficiaries into arbitration through use of a forfeiture clause.¹²⁸

D. Proper representation of the parties

The fourth concern relating to mandatory arbitration of trust disputes involves the need to ensure that all interested parties are properly represented in the proceedings.¹²⁹ Here, the issue is how best to protect the rights of beneficiaries who may be unascertained, unborn or legally incompetent at the time the dispute arises.¹³⁰

In litigated disputes, “the court has to appoint a person to represent the interests of such beneficiaries, and, even then, any compromise of the litigation has to be approved by the court.”¹³¹ Appointed representatives either share a common interest with the absent beneficiaries (a practice known as “virtual representation”) or have no independent interest in the dispute itself.¹³² Minors and other legally incompetent persons (such as the mentally incapacitated) typically have guardians (either a parent or a guardian *ad litem*) already in place.¹³³

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

[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

¹²⁷ Spitzko, *supra* note 15, at 298; *see also* Bosques-Hernández, *supra* note 19, at 8; Katzen, *supra* note 14, at 126.

¹²⁸ *See* HAYTON ET AL., *supra* note 77, ¶11.1; Cohen & Staff, *supra* note 2, at 221.

¹²⁹ *See* Cohen & Staff, *supra* note 2, at 209.

¹³⁰ *See id.*

¹³¹ Buckle & Olsen, *supra* note 8, at 649-50 (citation omitted).

¹³² *See* MCGOVERN ET AL., *supra* note 22, at 613-14; Mautner & Orr, *supra* note 15, at 161, 163-64; Wüstemann, *supra* note 3, at 47.

¹³³ *See* MCGOVERN ET AL., *supra* note 22, at 660-63.

adequate representation, then the child [or other beneficiary] should be bound to take the benefit of it.¹³⁴

However, in drafting such a provision, the settlor should be sure to:

provide how incapacitated, unascertained and unborn beneficiaries can come (or be brought) forward to make their claims The arbitral tribunal could determine who should be served with notice of the arbitration, in the same way as, in court proceedings, a judge can.¹³⁵

Furthermore, “[t]o avoid problems the trust deed should provide for payment of [representatives] out of the trust fund.”¹³⁶

Trustees who are not given explicit powers in the trust to appoint virtual or other representatives could attempt to do so based on their residual discretionary powers to resolve trust disputes. This approach has been discussed less by commentators and may therefore be more open to debate. However, any efforts by trustees in this regard would likely be bolstered by any statutory provisions allowing nonjudicial means of dispute resolution.¹³⁷

Other potential problems exist with respect to the proper representation of parties to a mandatory arbitration. For example, questions may arise as to whether the arbitral tribunal has the ability to approve the settlement of a trust dispute in cases involving appointed representatives or whether that power can be exercised only by a court.¹³⁸ While arbitrators are entirely competent to enter an award on an agreed settlement as a matter of arbitration law,¹³⁹ some courts could oppose similar actions in the trust context on the grounds that the judicial duty

¹³⁴ Cohen & Staff, *supra* note 2, at 202-23; *see also* Hayton, *supra* note 19, at 15-18.

¹³⁵ Cohen & Staff, *supra* note 2, at 223. Typically, “trustees must take all reasonable practicable [sic] steps” to provide notice to actual and potential beneficiaries, even those who only have a possibility of taking under a discretionary trusts. HAYTON ET AL., *supra* note 77, ¶56.11.

¹³⁶ Hayton, *supra* note 19, at 72; *see also* Hayton, *supra* note 19, at 17.

¹³⁷ *See supra* note 7.

¹³⁸ *See* Hayton, *supra* note 19, at 13-15.

¹³⁹ *See* BORN, ICA, *supra* note 4, at 2437-38.

to approve voluntary disposition of a trust dispute is non-derogable.¹⁴⁰ 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.”¹⁴¹

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.”¹⁴²

Finally, questions could arise as to whether a representative needs to be appointed in any particular set of circumstances. For example, a representative might not need to be appointed for a minor if the minor is receiving a benefit under the trust, since consent to receiving a benefit is not necessary in some jurisdictions.¹⁴³ However, a representative would be necessary in cases where a conflict of interest existed between a minor beneficiary and his or her natural guardian.¹⁴⁴

E. A subject matter that is arbitrable

Finally, for a mandatory arbitration provision in a trust to be enforceable, “the subject matter of the dispute [must be] arbitrable.”¹⁴⁵ The term “arbitrability” here is being used in its international sense and describes which disputes can be heard in arbitration and which are

¹⁴⁰ See Hayton, *supra* note 19, at 15 (noting no need for judicial intervention in some U.S. states while acknowledging need for court involvement in England and certain British dependences).

¹⁴¹ Mautner & Orr, *supra* note 15, at 166.

¹⁴² Hayton, *supra* note 19, at 72.

¹⁴³ See Wüstemann, *supra* note 3, at 52.

¹⁴⁴ See *id.*

¹⁴⁵ Cohen & Staff, *supra* note 2, at 209.

reserved to the exclusive purview of the courts.¹⁴⁶ Although national and international laws on arbitration clearly contemplate the possibility that certain issues are non-arbitrable, seldom are the parameters of non-arbitrability firmly and clearly drawn.¹⁴⁷ Cross-border disputes, including those involving individual U.S. states, can become particularly complicated as a result of various conflict of laws analyses concerning the question of which state's law controls the issue of arbitrability.¹⁴⁸

Initially one might think that statutes allowing nonjudicial resolution of various trust-related disputes would be useful in this analysis.¹⁴⁹ Certainly these sorts of provisions are helpful in some regards, most particularly by suggesting that certain rights relating to trusts are freely disposable and thus not inherently non-arbitrable.¹⁵⁰ However, most of the relevant legislation is written in such a way that it is not clear whether the statutes apply to mandatory arbitration provisions found in trusts.¹⁵¹ Instead, the legislation could be interpreted as applying only to arbitration agreements entered into by a trustee after the creation of the trust.

The absence of clearly controlling legislation in most jurisdictions means that the analysis must focus on other, more general principles of law.¹⁵² One way of looking at the issue is to consider that, at its core, arbitrability focuses on whether the rights in question are freely

¹⁴⁶ See Stefan Michael Kröll, *The "Arbitrability" of Disputes Arising From Commercial Representation*, in *ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES* 317, ¶¶16-7 (Loukas A. Mistelis & Stavros L. Brekoulakis eds., 2009). In the United States, arbitrability refers not only to the question of what issues are reserved to the courts as a matter of law but also to issues relating to the scope of the arbitration agreement as a matter of party intent. See BORN, *ICA*, *supra* note 4, at 767; Kröll, *supra*, ¶¶16-7.

¹⁴⁷ See LEW ET AL., *supra* note 27, ¶¶9-19 to 9-41; Kröll, *supra* note 146, ¶¶16-7 to 16-8.

¹⁴⁸ See Wüstemann, *supra* note 3, at 47; see also *In re Revocation of Revocable Trust of Fellman*, 604 A.2d 263, 269 (Pa. Super. 1992) (Johnson, J., dissenting); von Segesser, *supra* note 15, at 22-23.

¹⁴⁹ See *supra* note 7.

¹⁵⁰ See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985) (noting that disputes that are arbitrable in one context cannot be held to be inherently non-arbitrable in others); Strong, *Two Bodies Collide*, *supra* note 10.

¹⁵¹ See Strong, *Two Bodies Collide*, *supra* note 10; see also *supra* note 7.

¹⁵² See Strong, *Two Bodies Collide*, *supra* note 10.

disposable by the parties.¹⁵³ Because “the freedom to dispose of one’s rights . . . implies the possibility to renounce such rights,”¹⁵⁴ it is appropriate to ask whether beneficiaries can dispose of all or some of their rights. As it turns out, beneficiaries can disclaim any benefits they are entitled receive under a trust, suggesting that beneficiaries’ rights are freely disposable.¹⁵⁵ While some difficulties could arise to the extent that trust law limits beneficiaries’ ability to terminate a trust created for their benefit or to alter its terms, this concern appears inapposite because mandatory trust arbitration does not challenge the terms of the trust so much as it upholds them.¹⁵⁶

There are many other aspects of the arbitrability analysis that could be discussed, but the issue can become quite complicated and will not be addressed here, primarily because questions of arbitrability are ultimately decided by courts rather than by parties.¹⁵⁷ Therefore, there is little that a settlor can do during the drafting stage to affect the outcome of an arbitrability analysis.¹⁵⁸

However, there is one point regarding arbitrability that should be noted at this point, since it affects the drafting process. Whereas courts at one time considered arbitrability on a broad scale, treating entire subject matters in a similar manner, judges are now adopting an increasingly nuanced approach to the question of arbitrability, sometimes allowing some claims within a certain general subject matter to go forward in arbitration while disallowing others.¹⁵⁹ Since there have been some suggestions already made about the non-arbitrability of certain types of

¹⁵³ See Caprasse, *supra* note 69, at 82-83.

¹⁵⁴ *Id.* at 84.

¹⁵⁵ See HAYTON ET AL., *supra* note 77, ¶¶65.1-65.5; MCGOVERN ET AL., *supra* note 22, at 88-96.

¹⁵⁶ See HAYTON ET AL., *supra* note 77, ¶¶66.1-66.26; MCGOVERN ET AL., *supra* note 22, at 425-36.

¹⁵⁷ See Kröll, *supra* note 146, ¶¶16-5, 16-8 to 16-23. More extensive discussion of arbitrability in trust disputes can be found elsewhere. See Strong, Two Bodies Collide, *supra* note 10.

¹⁵⁸ See BORN, DRAFTING, *supra* note 11, at 82. However, parties may be able to encourage courts to enforce arbitration provisions by adopting arbitral procedures that adequately address the special needs of parties to a trust dispute. See Strong, Procedures, *supra* note 32.

¹⁵⁹ See Kröll, *supra* note 146, ¶¶16-7; Strong, Two Bodies Collide, *supra* note 10.

trust-related disputes, it appears likely that trust law will have to address the question of this sort of “limited arbitrability” at some point in the near future.¹⁶⁰

While no settlor wants to have even some part of a trust struck as being unenforceable, it is important to understand that a judicial determination that one type of claim is non-arbitrable does not affect the validity of the arbitration provision as a whole.¹⁶¹ There is, as it were, no “penalty” for over-inclusiveness on the part of the drafter. Instead, the arbitration provision as a whole survives a determination of limited non-arbitrability, with courts or arbitrators simply severing the problematic claim or claims and allowing arbitrable issues to be determined in arbitration and non-arbitrable issues to be determined in litigation.¹⁶²

Although the arbitrability analysis may seem complicated, it should be emphasized that most commentators have concluded that most, if not all, internal trust disputes are or should be arbitrable.¹⁶³ While further research on the question of limited arbitrability is needed,¹⁶⁴ a rule of general arbitrability is not only consistent with principles of trust law but also with the prevailing trend toward increased arbitrability in other areas of law.¹⁶⁵

III. The Empowered Settlor: How Arbitral Best Practices Address Trust Law Concerns Regarding Arbitration

Given the number of jurisprudential problems facing mandatory arbitration of internal trust disputes, it is easy to see why some settlors hesitate before placing an arbitration provision in a

¹⁶⁰ For example, commentators have already questioned the arbitrability of claims challenging the existence of the trust. *See supra* notes 90-115 and accompanying text. Other areas of concern include claims involving certain statutory rights, such as those based on marital or succession law. *See Strong, Two Bodies Collide, supra* note 10 (discussing elective shares); Wüstemann, *supra* note 3, at 45-46 (discussing forced heirship).

¹⁶¹ *See BORN, DRAFTING, supra* note 11, at 130.

¹⁶² *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217, 221 (1985); *see also BORN, ICA, supra* note 4, at 767.

¹⁶³ *See Cohen & Staff, supra* note 2, at 223-26; Lloyd & Pratt, *supra* note 15, at 18; Strong, *Two Bodies Collide, supra* note 10; Wüstemann, *supra* note 3, at 55-56.

¹⁶⁴ *See Strong, Two Bodies Collide, supra* note 10.

¹⁶⁵ *See BORN, ICA, supra* note 4, at 837-41.

trust. However, the preceding section suggests a number of ways that these issues can be mitigated or resolved through proper drafting. Additional techniques are discussed below.

A. Background considerations

Drafting an arbitration provision for the first time can be a daunting task.¹⁶⁶ However, newcomers can take heart in the fact that no special terms of art are needed to demonstrate an intent to arbitrate.¹⁶⁷ Indeed, a simple provision stating that “the parties agree to arbitrate any and all disputes arising out of or in connection with this trust” may be sufficient to trigger arbitration of a wide variety of trust-related disputes.¹⁶⁸ Settlers can also create narrower categories of matters that are to be subject to arbitration, although experts caution against overly complicated provisions, since that could lead to litigation or arbitration over the scope of the arbitral clause.¹⁶⁹

While parties do not need to use any particular language to reflect an intent to arbitrate, some (though not all) states may require the document in which an arbitral provision exists to

¹⁶⁶ For general advice on drafting arbitration agreements, see BORN, DRAFTING, *supra* note 11, at 37-116; LARRY E. EDMONSON, DOMKE ON COMMERCIAL ARBITRATION §§8:19 to 8:24 (2011); LEW ET AL., *supra* note 27, ¶¶8-1 to 8-73. Furthermore, some experts have advised that an arbitration provision in a trust should, as a general matter:

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

Mautner & Orr, *supra* note 15, at 181; *see also* HAYTON ET AL., *supra* note 77, ¶11.84; Bruyere & Marino, *supra* note 15, at 357; Lloyd & Pratt, *supra* note 15, at 19.

¹⁶⁷ However, a writing may be necessary in some jurisdictions. *See* 9 U.S.C. §2 (2011); BORN, DRAFTING, *supra* note 11, at 37. Each U.S. state has its own arbitration statute, and parties should always consult those provisions to ensure compliance with local requirements, although settlers should be aware of federal requirements as well, given that some commentators suggest that most trusts are covered by the FAA. *See* 9 U.S.C. §§1-307; Horton, *supra* note 1, at *20.

¹⁶⁸ Wüstemann, *supra* note 3, at 43.

¹⁶⁹ *See* BORN, DRAFTING, *supra* note 11, at 37-38. *But see* Radian Ins., Inc. v. Deutsche Bank National Trust Co., 638 F. Supp. 2d 443, 458 (E.D. Pa. 2009) (upholding a split jurisdiction clause in the context of a trust).

reflect certain contractual qualities.¹⁷⁰ Due to the relatively novel nature of mandatory trust arbitration, drafters may not know in advance which jurisdictions will require an arbitration provision to be in a contract-like document. However, there are several ways to anticipate how a judge might rule on this particular issue.

First, the jurisdiction in question may have already established whether a trust is a contract in contexts other than arbitration.¹⁷¹ Although these precedents might not apply to mandatory trust arbitration,¹⁷² settlors should determine whether such cases exist, since some courts seeking persuasive authority could find them relevant.¹⁷³

Second, some states may require a claim involving a trust to be framed as a breach of trust or fiduciary duty while other jurisdictions permit such allegations to be framed as a breach of contract.¹⁷⁴ Parties may find that courts in the latter category are more inclined to uphold an arbitration provision found in a trust.

Third, some state arbitration statutes speak of an “arbitration contract” while others refer to an “arbitration agreement.”¹⁷⁵ Courts faced with the second type of statute could rely on the breadth of the language to allow mandatory trust arbitration even if a trust is not considered a

¹⁷⁰ See Mautner & Orr, *supra* note 15, at 181 (noting settlors should be careful to “meet the statutory requirements necessary to create a binding agreement”); see also Bruyere & Marino, *supra* note 14, at 357; *supra* notes 73-83 and accompanying text.

¹⁷¹ See *Rachal v. Reitz*, 347 S.W.3d 305, 311 (Tex. Ct. App. 2011), *petition for review filed* Sept. 8, 2011; see also *Strong, Two Bodies Collide*, *supra* note 10.

¹⁷² For example, a broadly written arbitration statute could overcome general case law regarding the theoretical nature of trusts. See *Strong, Two Bodies Collide*, *supra* note 10 (regarding the Arbitration Act 1996 overcoming general theories on the nature of trusts).

¹⁷³ See *id.*; see also *Rachal*, 347 S.W.3d at 311.

¹⁷⁴ Compare *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 a commercial trust), with *Schoneberger v. Oelze*, 96 P.3d 1078, 1082-83 (Ariz. Ct. App. 2004) (stating “[a] trustee who fails to perform his duties . . . is not liable to the beneficiary for breach of contract” (citations omitted)), *superseded by statute*, Ariz. Rev. Stat. Ann. §14-10205 (2011), as recognized in *Jones v. Fink*, No. CA-SA 10-0262, 2011 WL 601598 (Ariz. Ct. App. Feb. 22, 2011); see also *Strong, Two Bodies Collide*, *supra* note 10.

¹⁷⁵ See *Rachal*, 347 S.W.3d at 313-14 (Murphy, J., dissenting).

contract *per se*.¹⁷⁶ Furthermore, commentators have suggested that most trusts are governed by the FAA rather than state arbitration statutes and that the goals of the FAA do not require an arbitration provision to be located in a contract-like document.¹⁷⁷ While there is no way to know definitively whether a judge hearing the dispute will consider the difference in statutory language relevant, settlors may nevertheless find it useful to know what the relevant standard is. Notably, when considering this issue, parties to international or interstate trusts must take care to undertake a proper conflict of laws analysis to identify the law that controls this issue, since the law that governs the merits of a dispute does not always govern the interpretation or validity of the arbitration agreement.¹⁷⁸

While these suggestions may be helpful, they obviously do not provide settlors with any guarantees. Therefore, absent clear statutory or judicial authority that a mandatory arbitration provision in a trust is enforceable,¹⁷⁹ settlors should err on the side of caution and draft their arbitration provisions to maximize contract-like elements.

Several techniques can be used to help fulfill these sorts of requirements. For example, settlors may “incorporat[e] a mandatory arbitration agreement provision into a separate contract rather than into the actual trust agreement.”¹⁸⁰ Such an approach could be effective even in jurisdictions that “dismiss[] the contractual nature of trust agreements,” since those regimes nevertheless “allow[] for a separate contract between the grantor and the trustee.”¹⁸¹

¹⁷⁶ See *id.*; see also Duve, *supra* note 75, at 1002; Schwartz & Konrad, *supra* note 75, at 19-20.

¹⁷⁷ See Horton, *supra* note 1, at *25-38.

¹⁷⁸ See Gerard Meijer & Josefina Guzman, *The International Recognition of an Arbitration Clause in the Articles of Association of a Company*, in ONDERNEMING EN ADR, *supra* note 69, at 117, 125; see also *In re Revocation of Revocable Trust of Fellman*, 604 A.2d 263, 269 (Pa. Super. 1992) (Johnson, J., dissenting); von Segesser, *supra* note 3, at 22-23; Wüstemann, *supra* note 3, at 47.

¹⁷⁹ See Ariz. Rev. Stat. Ann. §14-10205 (2011); Fla. Stat. Ann. §731.401 (2011); *New South Federal Savings Bank v. Anding*, 414 F. Supp. 2d 636, 646-47 (S.D. Miss. 2005).

¹⁸⁰ Bruyere & Marino, *supra* note 14, at 364.

¹⁸¹ *Id.*; see also Bosques-Hernández, *supra* note 19, at 7.

While side agreements may be effective with respect to the trustee, they may not be applicable in situations where the settlor wishes to bind the beneficiaries. In those cases, the focus needs to be on the language found in the trust itself. Different provisions may be necessary, depending on whether the settlor anticipates (1) claims being brought primarily by the beneficiaries against the trustee, (2) claims being asserted among the beneficiaries or (3) both.¹⁸² A settlor concerned about the first situation may be able to create a binding arbitration provision in the trust itself if he:

on behalf of himself and the beneficiaries deriving their interests through him, expressly contracts in the trust instrument with the trustee, on behalf of itself and its successors in title, that in consideration of undertaking the office of trustee (for the benefit of the settlor, the beneficiaries and itself) any breach of trust claim against the trustees shall be referred to arbitration.¹⁸³

Drafters may also wish to indicate explicitly that former trustees remain bound by the arbitration provision.¹⁸⁴

Settlors concerned about claims being asserted among the beneficiaries would need to amend the proposed language to incorporate claims of this nature.¹⁸⁵ In so doing, drafters should consider whether they can establish some form of mutual consideration that would be acceptable under the law governing the interpretation of the arbitration provision or whether the doctrine of conditional transfer will be sufficient to overcome the need for consideration.¹⁸⁶

One item that is often overlooked is the need to include proper contractual language regarding the privacy and confidentiality of the proceedings. Although many people assume that

¹⁸² Drafters should always consider in advance what types of disputes are most likely to arise in their particular circumstances so that the dispute resolution clause can be tailored to the particular needs of the parties. *See* BORN, DRAFTING, *supra* note 11, at 13-15. However, drafters should also include language sufficient to address other contingencies, since novel types of claims could always arise.

¹⁸³ HAYTON ET AL., *supra* note 77, ¶11.84; *see also* Logstrom, *supra* note 14, at 289-90; Wüstemann, *supra* note 3, at 44.

¹⁸⁴ *See* Strong, Procedure, *supra* note 32. Protectors and successor protectors can be addressed in the same manner as trustees and successor trustees.

¹⁸⁵ *See* Logstrom, *supra* note 14, at 289-90.

¹⁸⁶ *See* Strong, Two Bodies Collide, *supra* note 10 (regarding incentive payments).

arbitration is a private and confidential process, most national and international laws are silent in this regard.¹⁸⁷ Parties must therefore include specific language regarding confidentiality in their arbitration agreement or agree to abide by institutional rules that guarantee similar protections.¹⁸⁸

While it is certainly possible to incorporate all the necessary elements into arbitration clauses drafted on a case-by-case basis, experts do not recommend this sort of *ad hoc* approach, since the use of non-standard terms can lead to interpretive difficulties and litigation over the content and scope of the agreement.¹⁸⁹ Instead, specialists in arbitration recommend use of a model arbitration clause, tailored to the parties' individual needs.¹⁹⁰

The best language is often found in the model clauses published by reputable arbitration institutions.¹⁹¹ However, parties that do not want to have an administered arbitration should take care, since blanket acceptance of those clauses will result in an administered proceeding with that institution.¹⁹² This is not to say that institutional clauses cannot be useful even to parties that wish to proceed *ad hoc*, since those clauses can provide inspiration on how to structure an *ad hoc* provision as well as precise language that has been well-tested in courts.¹⁹³ Nevertheless, parties should always confirm that the clause in question really does reflect best practices in drafting before relying on it, since the mere fact that a clause has been published by an arbitral institution is not proof of the efficacy of that provision.¹⁹⁴ To that end, the following subsection considers model arbitration clauses provided by two leading arbitral institutions, the AAA and the ICC, so

¹⁸⁷ See BORN, ICA, *supra* note 4, at 2253.

¹⁸⁸ See *id.* at 2265-69.

¹⁸⁹ See BORN, DRAFTING, *supra* note 11, at 37-38.

¹⁹⁰ See *id.*

¹⁹¹ See *id.* at 37.

¹⁹² Notably, "many experienced international arbitration practitioners prefer institutional arbitration to *ad hoc* arbitration, because of the heightened predictability, stability, and institutional expertise provided by the former" as well as other benefits. See *id.* at 45.

¹⁹³ See *id.*

¹⁹⁴ See *id.* at 37-38, 57-58.

as to determine the extent to which the language actually addresses the special needs of the trust industry.

B. Model Arbitration Clauses Relating to Trust Disputes

1. The AAA Model Trust Clause

The AAA was the first organization to address the particular challenges associated with trust arbitration, publishing the AAA Wills and Trusts Arbitration Rules in 2003 along with the AAA Model Trust Clause.¹⁹⁵ By 2003, the AAA already had some experience with trust arbitration as a result of its work with the International Foundation of Employee Benefit Plans (IFEBP) in enacting several trust-related rule sets involving pension trusts.¹⁹⁶ However, use of those rules is explicitly permitted by federal regulation and therefore does not involve the same kind of drafting issues that exist in other types of trusts.¹⁹⁷ Therefore, the proposed model clauses associated with those rules will not be discussed herein.

Notably, the AAA's efforts with respect to standard trust arbitration have won the approval of the drafters of the UTC and are cited in the UTC as an appropriate means of invoking arbitration.¹⁹⁸ The following discussion introduces the text of the clause itself and considers how well the AAA addresses the various problems associated with mandatory arbitration of trust disputes.

¹⁹⁵ See AAA Trust Arbitration Rules, *supra* note 32; AAA Model Trust Clause, *supra* note 31.

¹⁹⁶ See AAA/IFEBP Multiemployer Pension Plan Arbitration Rules for Withdrawal Liability, effective Sept. 1, 1986, *available at* <http://www.adr.org/sp.asp?id=22108>; AAA/IFEBP Impartial Umpire Rules for Arbitration of Impasses Between Trustees of Joint Employee Benefit Trust Funds, effective Jan. 1, 1988, *available at* <http://www.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).

¹⁹⁷ See 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) (noting the AAA Multiemployer Pension Plan Arbitration Rules had been approved by the Pension Benefit Guaranty Corporation, a U.S. federal agency).

¹⁹⁸ See UTC, *supra* note 7, §816(23), cmt. (noting that “[s]ettlors wishing to encourage use of alternate dispute resolution may draft to provide it” and referring parties to the AAA Wills and Trusts Arbitration Rules).

a. Text and context

The text of the AAA Model Trust Clause states:

[i]n order to save the cost of court proceedings and promote the prompt and final resolution of any dispute regarding the interpretation of my will (or my trust) or the administration of my estate or any trust under my will (or my trust), I direct that any such dispute shall be settled by arbitration administered by the American Arbitration Association under its Arbitration Rules for Wills and Trusts then in effect. Nevertheless the following matters shall not be arbitrable[:] questions regarding my competency, attempts to remove a fiduciary, or questions concerning the amount of bond of a fiduciary. In addition, arbitration may be waived by all *sui juris* parties in interest.

The arbitrator(s) shall be a practicing lawyer licensed to practice law in the state whose laws govern my will (or my trust) and whose practice has been devoted primarily to wills and trusts for at least ten years. The arbitrator(s) shall apply the substantive law (and the law of remedies, if applicable) of the state whose laws govern my will (or my trust). The arbitrator's decision shall not be appealable to any court, but shall be final and binding on any and all persons who have or may have an interest in my estate or any trust under my will (or my trust), including unborn or incapacitated persons, such as minors or incompetents. Judgment on the arbitrator's award may be entered in any court having jurisdiction thereof.¹⁹⁹

This provision is to be included in the trust itself rather than in a side agreement, in accordance with suggestions made by various experts in trust arbitration.²⁰⁰ While the clause contains language that is common to model arbitration clauses used outside the context of trust arbitration and is in that sense unremarkable,²⁰¹ the AAA also addresses a number of issues specifically relating to trust disputes. These items are discussed in the next subsections.

¹⁹⁹ *See id.*

²⁰⁰ *See id.*, Introduction; *see also* Wüstemann, *supra* note 3, at 44.

²⁰¹ For example, language regarding the finality of the arbitral award and entry of judgment is quite typical and may even be necessary as a matter of U.S. law. *See* BORN, DRAFTING, *supra* note 11, at 38; BORN, ICA, *supra* note 4, at 2788-89.

b. Means of addressing known problem points

Commentators have identified five areas of concern regarding mandatory trust arbitration: the impermissible ouster of the courts, the operability and effectiveness of the arbitration provision, the extent to which the arbitration provision is binding on the party against whom the provision is asserted, proper representation of parties and arbitrability.²⁰² Many of these issues overlap as a matter of theory, and the AAA Model Trust Clause demonstrates how difficult it can be to separate each of the various elements as a matter of practice.²⁰³ The clause also demonstrates how difficult it can be to address these issues adequately, for although the AAA clearly attempts to deal with a number of trust-related matters, significant problems remain.

i. Operability and effectiveness of the arbitration agreement

One of the key concerns relating to a mandatory arbitration provision in a trust is whether that provision is operable, effective and capable of being performed under statutory requirements concerning an agreement to arbitrate.²⁰⁴ Surprisingly, the AAA Model Trust Clause does nothing to address this particular issue, even though this is one area where good drafting is likely to make a significant difference in a court's willingness to enforce a mandatory arbitration provision.²⁰⁵

The better approach would be to include language that demonstrates the existence of certain contract-related elements.²⁰⁶ For example, the clause could invoke the concept of conditional transfer by including language indicating that:

²⁰² See Cohen & Staff, *supra* note 2, at 209.

²⁰³ See AAA Model Trust Clause, *supra* note 31; Cohen & Staff, *supra* note 2, at 209.

²⁰⁴ See Cohen & Staff, *supra* note 2, at 209.

²⁰⁵ See AAA Model Trust Clause, *supra* note 31.

²⁰⁶ See *supra* notes 73-88 and accompanying text.

benefiting from the trust would be deemed an agreement to submit trust disputes to arbitration. By accepting the gifts or invoking any rights under the trust deed, the beneficiaries would be deemed to agree to settle any dispute in accordance with the arbitration agreement contained in the trust deed.²⁰⁷

Alternatively, the provision could attempt to create a contractual relationship with the trustee by highlighting the existence of consideration on both sides and by requiring the signature of the trustee as well as the settlor.²⁰⁸ As it stands, there is no such language in the AAA Model Trust Clause, which leaves the question of the operability of the clause entirely dependent on background principles of law.²⁰⁹ This is not only unnecessary, it is somewhat dangerous given the uncertain nature of that law in many jurisdictions and the possibility of a negative bias towards arbitration.²¹⁰

ii. Binding the proper parties and proper representation of those parties

Difficulties also arise with respect to the way in which the AAA Model Trust Clause attempts to bind all potential parties to a trust dispute and ensure proper representation of those parties.²¹¹ Rather than specifically invoking theories of conditional transfer (which would help establish that the arbitration provision was binding on beneficiaries) or virtual representation (which would help remind courts that unborn, unascertained and legally incapacitated persons can have their rights adjudicated by a proper representative), the AAA Model Trust Clause chooses to state, without more, that all interested persons, including those that are unborn or incapacitated,

²⁰⁷ Wüstemann, *supra* note 3, at 45.

²⁰⁸ See *supra* notes 73-88 and accompanying text. Successor trustees could be bound through separate side agreements.

²⁰⁹ See AAA Model Trust Clause, *supra* note 31.

²¹⁰ See ACTEC, *supra* note 2, at 5 (discussing the “blinding prejudice” to arbitration in contemporary trust and estates practice).

²¹¹ See AAA Model Trust Clause, *supra* note 31.

are bound by the clause.²¹² Although this type of declarative language may adequately demonstrate the settlor’s intent to arbitrate with those parties, it does little to address any underlying concerns a court may have about arbitration involving those kinds of potentially vulnerable parties.²¹³ Furthermore, the AAA’s failure to include unascertained beneficiaries in the list of potential parties could prove problematic, since a court could interpret that as an intentional omission.

The better approach would be to include specific language regarding how the various parties will be bound, including the manner in which any representatives are to be appointed and paid.²¹⁴ While it is good that the AAA has specifically mentioned unborn and legally incapacitated beneficiaries, since that will eliminate questions about whether the arbitration provision was meant to apply to those persons as well as to named beneficiaries, unascertained beneficiaries should also be included on the list of potential parties.

iii. Arbitrability

Although there is no “penalty” associated with having an inappropriately broad arbitration provision,²¹⁵ wise lawyers do not include patently non-arbitrable matters in their arbitration provisions, since that will only lead to litigation, thus wasting both time and money.²¹⁶

However, the AAA takes a highly and unnecessarily conservative approach to arbitrability and explicitly excludes a number of matters from the scope of arbitration.²¹⁷ The reason for this

²¹² *See id.*

²¹³ *See supra* notes 129-44 and accompanying text.

²¹⁴ *See supra* notes 134-35 and accompanying text.

²¹⁵ *See supra* notes 159-62 and accompanying text.

²¹⁶ Litigation regarding arbitrability can arise either at the initiation of the proceedings or at the enforcement stage and could lead to an unenforceable award. *See LEW ET AL., supra* note 27, ¶¶9-9 to 9-10.

²¹⁷ AAA Model Trust Clause, *supra* note 31. Experts suggest that drafters avoid listing the types of disputes that are considered arbitrable, since the list could be considered exhaustive. *See Wüstemann, supra* note 3, at 44. Excluding

reticence is unclear, particularly given the broad range of issues that are considered arbitrable under existing legislation. For example, the UTC allows nonjudicial resolution of matters such as:

(i) the interpretation or construction of trust terms; (ii) the approval of a trustee's report or accounting; (iii) the direction to a trustee to refrain from performing a particular act or the grant to a trustee of a necessary or desirable power; (iv) the resignation or appointment of a trustee; (v) the transfer of the situs of trust administration; and (vi) the liability of a trustee for an action relating to a trust.²¹⁸

Interestingly, several of the AAA's excluded items would fall within the UTC's list of arbitrable issues.²¹⁹ Other statutes go even further than the UTC with respect to the types of matters that are amenable to arbitration.²²⁰

Of course, parties may choose to modify the AAA's proposed language by removing references to some or all of the excluded matters. However, even if all of the listed items were taken out of the clause, arbitration might nevertheless be limited to matters involving the interpretation and administration of the trust, based on the structure of the sentence discussing the scope of the clause.²²¹ While the terms "interpretation" and "administration" may be sufficiently broad to include all matters relating to the trust, parties who want to avoid future disputes about the scope of the arbitration provision should consider using more standard language, such as that requiring arbitration of "any and all disputes which may arise out of or in connection with" the trust, since fewer questions will arise with regard to the interpretation of

various types of disputes appears to be somewhat less problematic, since the assumption would be that all items not listed are intended to be heard in arbitration.

²¹⁸ Mautner & Orr, *supra* note 15, at 161; *see also* UTC, *supra* note 7, §111.

²¹⁹ *See* UTC, *supra* note 7, §111; AAA Model Trust Clause, *supra* note 31.

²²⁰ *See* Idaho Code Ann. §§15-8-101, 15-8-103 (2011); Wash. Rev. Code §§11.96A.010, 11.96A.030 (2012).

Commentators have also identified a broad range of trust disputes that are considered "ideal" for arbitration. *See* Logstrom et al., *supra* note 19, at 237.

²²¹ *See id.* This conclusion is based on the clause preceding the phrase "any such dispute." *See id.*

that kind of clause.²²² Furthermore, experience suggests that some courts are already willing to uphold those sorts of expansive provisions in the context of trust-related arbitration.²²³

iv. Ouster of the courts

Although the AAA Model Trust Clause does not appear to address issues relating to the possible ouster of the courts on its face, the clause does include language specifically stating that all interested parties may join together to waive the arbitration provision.²²⁴ As innocuous as this phrase may seem, it could be useful in helping overcome concerns about the impermissible ouster of courts because it indicates that arbitration will not be required if all parties to the actual dispute oppose such procedures.²²⁵ Although the application of the provision is somewhat limited, in that arbitration will be required if even one party to the dispute wants to proceed in arbitration,²²⁶ the AAA's approach is consistent with judicial decisions holding that a mandatory arbitration clause in a trust is enforceable at the election of any one of the parties.²²⁷

c. AAA additional measures

Although the AAA Model Trust Clause demonstrates some shortcomings with respect to issues known to cause concern in trust disputes, the AAA has nevertheless introduced some interesting additional measures in its treatment of trust arbitration. The first of these involves the AAA's

²²² Wüstemann, *supra* note 3, at 43; BORN, DRAFTING, *supra* note 11, at 40.

²²³ 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); see also *Newbridge Acquisition I, L.L.C. v. Grupo Corvi, S.A. de D.V.*, No. 02 Civ. 9839(JSR), 2003 WL 42007, at *1 (S.D.N.Y. Jan. 6, 2003).

²²⁴ See *Cohen & Staff*, *supra* note 2, at 209; AAA Model Trust Clause, *supra* note 31.

²²⁵ Parties to pre-dispute arbitration agreements in other contexts can also agree to waive arbitration upon the consent of all participants. See *ISP.com LLC v. Theising*, 805 N.E.2d 767, 776 (Ind. 2004); *Emmanuel African Methodist Episcopal Church v. Reynolds Constr. Co.*, 718 S.E.2d 201, 204 (N.C. App. 2011).

²²⁶ This may include third party beneficiaries of the arbitration provision. See *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009).

²²⁷ See *In re Ismailoff*, No. 342,207, 2007 N.Y. Slip Op. 50211(U), at 1 (Sur. Ct. Nassau County Feb. 1, 2007).

description of the qualifications of the arbitrator.²²⁸ The trust community has occasionally expressed some concerns about arbitrators' ability to handle complicated trust disputes,²²⁹ and the AAA has done well to include an explicit description of the amount and type of experience that arbitrators should have. While this sort of language may not be entirely new in the world of arbitration, it may be an effective means of encouraging courts to uphold arbitration provisions in trusts, since the judge and the parties will be assured of a competent decision-maker.

A second measure is somewhat more troubling. The issue here involves language stating that arbitrators are to “apply the substantive law (and the law of remedies, if applicable) of the state whose laws govern” the trust.²³⁰ On the one hand, the provision appears largely unobjectionable, in that it simply states what would appear to be obvious. However, it is possible that a court could view the language as tying the hands of the arbitral tribunal and restricting a conflict of laws analysis that might result in the application of the mandatory rules of law of a state other than that chosen by the parties.²³¹ Since determinations regarding arbitrability and the impermissible ouster of the courts may turn on whether a court believes that its own mandatory rules of law will be considered by the arbitrator,²³² a better solution might be for the AAA to adopt or incorporate by reference the conflict of laws approach set forth in the Hague Convention on the Law Applicable to Trusts and on Their Recognition (Hague Convention on Trusts).²³³ The Hague Convention on Trusts constitutes an internationally recognized means of balancing issues relating to conflict of laws, and incorporating the

²²⁸ See AAA Model Trust Clause, *supra* note 31.

²²⁹ See Wüstemann, *supra* note 3, at 40-41.

²³⁰ See AAA Model Trust Clause, *supra* note 31.

²³¹ See Kröll, *supra* note 146, ¶¶16-9 to 16-20.

²³² See *id.*, ¶16-20; see also Caprasse, *supra* note 69, at 86; Strong, Two Bodies Collide, *supra* note 10.

²³³ See Convention on the Law Applicable to Trusts and on Their Recognition, arts. 6-10, 15-18, 1 July 1985, 23 I.L.M. 1389, 1389-92 (1984) [hereinafter Hague Convention on Trusts]. The Hague Convention on Trusts has been signed but not ratified by the United States. See Hague Convention on Trusts, Status, available at http://www.hcch.net/index_en.php?act=conventions.status&cid=59.

principles of that instrument in the AAA Model Trust Clause could help increase the enforceability of arbitration provisions found in trusts by giving courts an increased degree of confidence that parties will not escape the application of certain mandatory rules of law by using arbitration.²³⁴

2. The ICC Model Trust Clause

Several years after the AAA published the AAA Wills and Trusts Arbitration Rules, the ICC convened its own expert working group to consider issues relating to the arbitration of trust disputes.²³⁵ After a lengthy consultation process, the ICC produced the ICC Model Trust Clause in 2008.²³⁶

a. Text and context

The text of the ICC Model Trust Clause states that:

[a]ll disputes arising out of or in connection with the trust created hereunder shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed by the ICC International Court of Arbitration (the “Court”) in accordance with the said Rules.

The settlor hereby agrees to the provisions of this arbitration clause and the trustees, any protector and their successors in office, by accepting to act under the trust, also agree or shall be deemed to have agreed to the provisions of this arbitration clause. Accordingly, they all agree to settle all disputes arising out of or in connection with the trust in accordance with this arbitration clause.

As a condition for claiming, being entitled to or receiving any benefit, interest or right under the trust, any person shall be bound by the provisions of this arbitration clause and shall be deemed to have agreed to settle all disputes arising out of or in connection with the trust in accordance with this arbitration clause.

²³⁴ See Hague Convention on Trusts, *supra* note 233, arts. 6-10, 15-18; AAA Model Trust Clause, *supra* note 31; Adair Dyer, *International Recognition and Adoption of Trusts: The Influence of the Hague Convention*, 32 VAND. J. TRANSNAT'L L. 989, II.D (1999).

²³⁵ See AAA Trust Arbitration Rules, *supra* note 32; ICC Model Trust Clause, *supra* note 33, Explanatory Note 5.

²³⁶ See ICC Model Trust Clause, *supra* note 33, Explanatory Note 6.

If, at any time, any person requests to participate in arbitral proceedings already pending under the present arbitration clause, or if a party to arbitral proceedings pending under this arbitration clause desires to cause any person to participate in the arbitration, the requesting party shall present a request for joinder to the Court setting forth the reasons for the request. It is hereby agreed that if the Court is prima facie satisfied that a basis for joinder may exist, any decision as to joinder shall be taken by the Arbitral Tribunal itself. When taking a decision on the joinder, the Arbitral Tribunal shall take into account all relevant circumstances, including, but not limited to, the provisions of the trust and the stage of the proceedings. It is further agreed that the Court may reject the request for joinder if it is not so satisfied, in which case there shall be no joinder. In case of a joinder after the signature or approval of the Terms of Reference, an amendment to the same will be made either through signature by the parties and the Arbitral Tribunal or through approval by the Court, pursuant to Article 18 of the ICC Rules of Arbitration. It is agreed that in such a case, the Court may take whatever measures that it deems appropriate with respect to the advance on costs for arbitration.²³⁷

As can be seen, the ICC's model clause is very different than that of the AAA.²³⁸

However, the differences extend beyond the language of the model clauses themselves. When publishing the ICC Model Trust Clause, the ICC working group included a detailed commentary discussing various issues relating to the arbitration of trust disputes and the possible interpretation of the model clause.²³⁹ Not only does this commentary help judges and arbitrators interpret and apply the ICC Model Trust Clause, it also provides useful tips to those involved in drafting arbitration provisions for use in trusts, regardless of whether the process will ultimately be administered by the ICC.²⁴⁰

The ICC commentary contains a number of relatively general suggestions such as the recommendation that the ICC Model Trust Clause be included in the trust instrument itself rather

²³⁷ See ICC Model Trust Clause, *supra* note 33.

²³⁸ See AAA Model Trust Clause, *supra* note 31; ICC Model Trust Clause, *supra* note 33.

²³⁹ See ICC Model Trust Clause, *supra* note 33.

²⁴⁰ See *id.*

than in a side agreement, a technique that is advocated by experts in trust arbitration.²⁴¹ The commentary also cautions parties about the use and modification of the proposed language, noting that:

[g]iven that the use of arbitration to resolve trust disputes is in its infancy (emerging legislation, limited case law and divergent academic opinions), parties are encouraged to exercise great care when using and possibly adapting the ICC arbitration agreement, so as to ensure the validity of the award.²⁴²

While parties might prefer to have a higher degree of certainty about the enforceability of the ICC Model Trust Clause, the ICC was wise to highlight the developing nature of this area of law.²⁴³ However, as the following discussion notes, the ICC working group has done an excellent job in addressing many of the major issues in this field, which should increase the likelihood that the ICC Model Trust Clause will be found enforceable in the U.S. and elsewhere.²⁴⁴

b. Means of addressing known problem points

As noted previously, mandatory trust arbitration gives rise to a number of concerns, including those regarding the impermissible ouster of the courts, the operability and effectiveness of the arbitration provision, the extent to which the arbitration provision is binding on the party against whom the provision is asserted, proper representation of parties and arbitrability.²⁴⁵ Although the ICC Model Trust Clause does not explicitly address all of these issues and in some cases combines its treatment of certain items, the associated commentary helps give a more

²⁴¹ See *id.*, Explanatory Note 7; Wüstemann, *supra* note 3, at 44. The clause should preferably appear after the choice-of-law provision, if such a clause exists. See ICC Model Trust Clause, *supra* note 33, Explanatory Note 7.

²⁴² ICC Model Trust Clause, *supra* note 33, Explanatory Note 10.

²⁴³ See ICC Model Trust Clause, *supra* note 33.

²⁴⁴ See *id.*

²⁴⁵ See Cohen & Staff, *supra* note 2, at 209.

comprehensive picture of how the ICC working group chose to handle the various issues that routinely arise in trust arbitration.²⁴⁶

- ii. Operability and effectiveness of an arbitral clause that is also binding on the parties

The first way in which the ICC Model Trust Clause differs from the AAA Model Trust Clause involves the ICC's attempt to bolster (1) the operability and effectiveness of the arbitral clause and (2) the ability of that provision to bind the various parties.²⁴⁷ Whereas the AAA Model Trust Clause was silent with regard to both issues, the ICC Model Trust Clause explicitly incorporates contract-oriented language stating that the settlor "agrees" to the arbitration clause along with the trustees, protectors and any successors who are "deemed to have agreed" to the clause.²⁴⁸ This is relatively strong language that is likely to be sufficient to bind the various parties to the arbitration and might only be improved by a reference to any remuneration that the trustees, protectors or successors will receive in connection with the trust.²⁴⁹ However, that information would likely exist elsewhere in the trust instrument, so it may not be necessary to refer to it explicitly in the arbitration provision.

The ICC uses similar "deemed to have agreed" language with respect to beneficiaries, which is again likely to have a positive effect on both the operability of the arbitration provision and its ability to bind these particular parties.²⁵⁰ Although the language here is somewhat British in tone (English trust law uses the term "deemed acquiescence" to describe a practice that is

²⁴⁶ See ICC Model Trust Clause, *supra* note 33.

²⁴⁷ See AAA Model Trust Clause, *supra* note 31; ICC Model Trust Clause, *supra* note 33.

²⁴⁸ ICC Model Trust Clause, *supra* note 33; see also AAA Model Trust Clause, *supra* note 31.

²⁴⁹ See *supra* note 135 and accompanying text.

²⁵⁰ See ICC Model Trust Clause, *supra* note 33.

essentially indistinguishable from conditional transfer),²⁵¹ that is not likely to cause any problems under U.S. law. Furthermore, it would be relatively easy for a settlor to change the language to incorporate the term “conditional transfer” if it was considered useful to do so.

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

[a]s a general rule, the trustees and any protector will agree to arbitration by accepting their office under the trust. In most cases, it should in addition be possible to have trustees and protectors sign the instrument containing or referring to the ICC arbitration agreement. As for the beneficiaries, the ICC arbitration agreement makes their benefit under the trust conditional upon their agreeing to arbitration. The fact of claiming, being entitled to or receiving any benefit under the trust will be deemed to imply that they have agreed to ICC arbitration. Whether this will be an effective means of extending jurisdiction over non-signatory beneficiaries must be verified under the applicable law.²⁵²

Although the ICC is again wise to highlight the fact that some courts may be hostile to the use of concepts such as conditional transfer, the principle does seem to have sufficient support for settlors to move forward with trust provisions mandating arbitration.²⁵³ Furthermore, some jurisdictions in the U.S. and elsewhere will not require parties to rely on these sort of principles at all, since the ability to bind a party to arbitration through a provision in the trust is statutorily or judicially protected.²⁵⁴ The ICC working group has also done well to note the desirability of having trustees and protectors sign the instrument, since that may help bolster the contract-like qualities of the arbitration provision.²⁵⁵

²⁵¹ See Buckle & Olsen, *supra* note 8, at 655-56; Cohen & Staff, *supra* note 2, at 221; Hayton, *supra* note 19, at 72.

²⁵² ICC Model Trust Clause, *supra* note 3, Explanatory Note 7.

²⁵³ See ACTEC, *supra* note 2, at 10-11; Buckle & Olsen, *supra* note 8, at 655-56; Cohen & Staff, *supra* note 2, at 221; Hayton, *supra* note 19, at 72; Hwang, *supra* note 8, at 84; Thomas M. Mayer, *Trust Law in Switzerland*, STEP J. (Jan. 2011), available at

http://www.stepjournal.org/journal_archive/2011/step_journal_jan_2011/trust_law_in_switzerland.aspx; Spitko, *supra* note 15, at 300; Strong, *Two Bodies Collide*, *supra* note 10; Wüstemann, *supra* note 3, at 45-46.

²⁵⁴ See Ariz. Rev. Stat. Ann. §14-10205 (2011); Fla. Stat. Ann. §731.401 (2011); *New South Federal Savings Bank v. Anding*, 414 F. Supp. 2d 636, 646-47 (S.D. Miss. 2005); see also *The Trusts (Guernsey) Law 2007*, §63, *supra* note 17; *Trustee (Amendment) Bill 2011*; Duve, *supra* note 75, at 1002; Schwartz & Konrad, *supra* note 75, at 19-20.

²⁵⁵ See ICC Model Trust Clause, *supra* note 33, Explanatory Note 7.

The ICC working group included one other item in its discussion of the operability and effectiveness of the arbitration provision, noting that:

[w]hatever the peculiarities of the trust, the arbitration agreement requires the consent of the parties. Whether this must be in writing will depend on the applicable law.²⁵⁶

Since consent *per se* can be established by the principle of conditional transfer, this language may best be interpreted as a reminder that drafting parties need to consider the extent to which an arbitration provision must meet other requirements regarding the form of an arbitration agreement.²⁵⁷ While many jurisdictions are relaxing their interpretation of what constitutes an “agreement in writing” under national and international arbitration laws,²⁵⁸ parties should nevertheless err on the side of caution and meet all form requirements currently imposed as a matter of statutory or common law. Again, this may require parties to an international or interstate trust to consider the law of several jurisdictions.²⁵⁹

ii. Proper representation

One way that the ICC Model Trust Clause could be improved is with respect to its treatment of unborn, unascertained and legally incompetent beneficiaries.²⁶⁰ Like the AAA, the ICC fails to

²⁵⁶ *Id.*

²⁵⁷ See Mautner & Orr, *supra* note 15, at 181; see also Zisman v. Lesner, No. 6:08-cv-1448-Orl-31DAB, 2008 WL 4459029, *3-4 (M.D. Fla. Sept. 29, 2008) (denying the need for a writing in an arbitration against a trustee); Bruyere & Marino, *supra* note 14, at 357; Strong, Two Bodies Collide, *supra* note 10 (regarding the need for a writing).

²⁵⁸ See United Nations Commission on International Trade Law (UNCITRAL), Recommendation Regarding the Interpretation of Article II, Paragraph 2, and Article VII, Paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, U.N. Doc. A/6/17 (July 7, 2006); UNCITRAL, Revised Articles of the UNCITRAL Model Law on International Commercial Arbitration, UNCITRAL, 39th Sess., Annex, art. 7, U.N. Doc. A/61/17 (July 7, 2006); Strong, Two Bodies Collide, *supra* note 10.

²⁵⁹ See Hwang, *supra* note 8, at 84 (noting parties must “ensure that formal and substantial validity requirements for a valid ‘arbitration agreement’ are met for both the *lex arbitri* and law governing the arbitration agreement”); Wüstemann, *supra* note 3, at 47; see also In re Revocation of Revocable Trust of Fellman, 604 A.2d 263, 269 (Pa. Super. 1992) (Johnson, J., dissenting).

²⁶⁰ See ICC Model Trust Clause, *supra* note 33.

make any special provisions in its model clause for the appointment or payment of virtual representatives.²⁶¹

This is not to say that the ICC ignores the issue completely, since the attendant commentary expressly indicates that all interested parties must be properly represented in any arbitration and cautions drafters that “[t]he representation of beneficiaries, including in particular any minor, unborn or unascertained beneficiaries, . . . needs to be considered in the light of relevant laws.”²⁶² Although this reference acts as a helpful reminder of the unique challenges regarding the representation of beneficiaries in trust arbitration, it would be better if the ICC proposed specific language regarding the appointment and payment of virtual or other representatives, even if such references were qualified as only being potentially relevant in some jurisdictions.²⁶³ Settlers planning to use the ICC Model Trust Clause should therefore approach this issue with caution and should consider drafting their own language to address the appointment and payment of representatives.²⁶⁴

iii. Arbitrability

Unlike the AAA, which took a very conservative approach to the arbitrability of trust disputes, the ICC envisions few concerns in this regard, giving the tribunal jurisdiction over “all disputes arising out of or in connection to the trust.”²⁶⁵ This language should be interpreted quite broadly, in that it:

²⁶¹ See *supra* notes 212-14 and accompanying text.

²⁶² ICC Model Trust Clause, *supra* note 33, Explanatory Note 7; see also Cohen & Staff, *supra* note 2, at 209.

²⁶³ Commentators have suggested a variety of options in this regard. See Hayton, *supra* note 19, at 11, 15-18; Logstrom, *supra* note 14, at 289-90; Logstrom et al., *supra* note 19, at 241-44. English trust law discusses the concept of “special representation,” which is similar but not identical to virtual representation. See Hayton, *supra* note 19, at 17 (describing means of drafting trust provisions to allow special representation).

²⁶⁴ See ICC Model Trust Clause, *supra* note 33; *supra* notes 134-35 and accompanying text.

²⁶⁵ ICC Model Trust Clause, *supra* note 33; see also AAA Model Trust Clause, *supra* note 31; *supra* notes 159-60 and accompanying text [re restricted arbitrability].

aims to apply to [a wide variety of] disputes internal to a trust (disputes between parties to a trust: trustees and beneficiaries, trustees *inter se* and beneficiaries *inter se*). [However, i]t does not attempt to apply to disputes external to a trust (disputes between trust parties and outsiders to the trust: for example, attempts by the settlor's creditors to attack the validity of the trust; contractual disputes between trustees and investment advisers engaged for the trust).²⁶⁶

The ICC's approach to arbitrability is consistent with U.S. case law allowing the arbitration of "any and all disputes which may arise out of or in connection with" the trust agreement²⁶⁷ and with statutes that take an expansive view of the arbitrability of trust disputes.²⁶⁸ However, the ICC working group did include a cautionary note in the commentary, stating that:

[t]he Task Force appreciates that . . . the issue of arbitrability requires careful and country-specific attention (cf. any statutory jurisdiction provisions). Depending on the relevant rules of the law governing the trust, it may, for example, be appropriate to state that applications to court for directions shall not be deemed a waiver of arbitration.²⁶⁹

Furthermore, although the ICC mentions one type of statutory issue (directions from the court),²⁷⁰ settlors should note that other areas of concern also exist. For example, settlors may wish to consider the relevance of exclusive jurisdiction clauses concerning other tasks (such as the ability to approve a settlement of a trust dispute)²⁷¹ and the interaction between trust law and various statutory rights (such as those involving forced heirs, elective shares, marital rights and other concerns relating to the law of succession).²⁷²

²⁶⁶ Hwang, *supra* note 8, at 83.

²⁶⁷ 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).

²⁶⁸ See *supra* notes 7, 9 and accompanying text.

²⁶⁹ ICC Model Trust Clause, *supra* note 33, Explanatory Note 10.

²⁷⁰ Notably, there is support in the U.S. for the proposition that disputes regarding judicial instructions and accounting may be subject to arbitration. 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); *Strong, Two Bodies Collide*, *supra* note 10.

²⁷¹ This involves the question of limited arbitrability and is discussed at length by the author elsewhere. See *Strong, Two Bodies Collide*, *supra* note 10.

²⁷² See *supra* note 160 and accompanying text.

c. ICC additional measures

The ICC Model Trust Clause and commentary are relatively comprehensive when it comes to addressing the major issues of importance in mandatory trust arbitration.²⁷³ However, the ICC also includes a number of additional measures in its model arbitration provision.²⁷⁴ The most forward-thinking of these involves joinder of additional parties.²⁷⁵

Because trust disputes proceed *in rem*,²⁷⁶ arbitrators may need to devise special procedures to ensure that all actual and potential parties receive adequate notice of and an opportunity to participate in the proceedings.²⁷⁷ Other measures may also be necessary to allow for the late joinder of interested persons.²⁷⁸ While courts and arbitrators currently address these matters on an *ad hoc* basis,²⁷⁹ a more transparent and predictable procedure would be preferable, both for the parties' benefit and as a means of increasing the likely enforceability of the various provisions, since courts may be more inclined to enforce arbitration agreements or awards when the arbitral procedures are identified well in advance of the arbitration.²⁸⁰

Unlike the AAA, which did not make any special provision in this regard, the ICC takes the view that a party to a trust dispute may join the arbitration at any time, subject only to a *prima facie* review of the reasonableness of the request by the ICC Court and, ultimately, the

²⁷³ See ICC Model Trust Clause, *supra* note 33.

²⁷⁴ See *id.*

²⁷⁵ See *id.*

²⁷⁶ See Horton, *supra* note 1, at *9; Janin, *supra* note 6, at 529.

²⁷⁷ See HAYTON ET AL., *supra* note 77, ¶56.11; Strong, Procedures, *supra* note 32.

²⁷⁸ Some potential parties may not initially wish to participate in certain proceedings but may later decide to join or be required to join in the arbitration. See *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210, 218 (2d Cir. 2008).

²⁷⁹ See *id.*; *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"); *In re Ismailoff*, No. 342,207, 2007 N.Y. Slip Op. 50211(U), at 4 (Sur. Ct. Nassau County Feb. 1, 2007) (concerning a late-joining party who was allowed to choose the side with which she intended to align herself).

²⁸⁰ This is one of the reasons why parties prefer institutional arbitration. See LEW ET AL., *supra* note 27, ¶3-20.

discretion of the arbitral tribunal.²⁸¹ The ICC is somewhat vague as to the standard to be used in deciding whether joinder is proper, stating only that “all relevant circumstances, including, but not limited to, the provisions of the trust and the stage of the proceedings,” are to be taken into account.²⁸² Although this language does not provide a great deal of guidance, it is likely that no more definite standard can be established at this point, given the diversity of types of trust disputes that can arise.

IV. Conclusion

Hostile trust litigation is becoming increasingly common, leading many settlors and trustees to inquire about the use of arbitration as a means of avoiding lengthy and expensive court battles.²⁸³ Trust law specialists therefore need to be aware not only of the extent to which mandatory arbitration provisions in trusts are enforceable in a particular jurisdiction (a situation that is changing rapidly),²⁸⁴ but also how best to draft an enforceable arbitration provision, given the unique challenges in this area of law. As it turns out, there are a number of ways that settlors can increase the enforceability of an arbitration provision found in a trust through the use of proper language.

Experts suggest that drafting parties begin with a well-known model clause provided by a reputable arbitral institution,²⁸⁵ and the AAA and ICC Model Trust Clauses provide two good starting points in this regard.²⁸⁶ Although both provisions have their strong points, the ICC

²⁸¹ See AAA Model Trust Clause, *supra* note 31; ICC Model Trust Clause, *supra* note 33. The ICC Court is distinct from the arbitral tribunal and primarily exercises a supervisory role over certain administrative issues. See W. LAURENCE CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION §2.03 (2000).

²⁸² See ICC Model Trust Clause, *supra* note 33.

²⁸³ See Cohen & Staff, *supra* note 2, at 203; Wüstemann, *supra* note 3, at 41.

²⁸⁴ See *supra* notes 44-58 and accompanying text.

²⁸⁵ See BORN, DRAFTING, *supra* note 11, at 37.

²⁸⁶ See AAA Model Trust Clause, *supra* note 31; ICC Model Trust Clause, *supra* note 33. Another model clause that might prove useful was drafted by the German Institution of Arbitration (Deutsche Institution für

Model Trust Clause appears to do a somewhat better job of addressing the unique challenges relating to trust arbitration.²⁸⁷ While some further improvements can still be made, parties would therefore be advised to look to the ICC Model Trust Clause as a paradigm of best practices in drafting an arbitral provision in a trust.²⁸⁸ Furthermore, it is entirely possible for settlors to pick the best aspects of the AAA and the ICC model clauses and combine them.²⁸⁹

Although there are those who strongly oppose mandatory arbitration of trust disputes, increased use of arbitration provisions in trusts appears inevitable.²⁹⁰ As a result, settlors should not shy away from adopting arbitration provisions in appropriate cases but should instead focus on identifying and adopting proper language so as to maximize the likelihood of that provision's being upheld by a court. Indeed, as this Article has shown, there are numerous ways that a well-informed drafter can increase the enforceability of an arbitral provision found in a trust, thus satisfying the wishes of both clients and courts.

Schiedsgerichtsbarkeit or DIS) for use in certain types of internal shareholder disputes. The clause invokes arbitration under the DIS Supplementary Rules for Corporate Law Disputes (DIS Supplementary Rules) and states that “[t]he corporation shall always raise the existing arbitration agreement as defence against any claim that is filed in the ordinary courts of law and that relates to disputes” within the meaning of the arbitration agreement. 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; Strong, Procedures, *supra* note 32 (discussing reasons why DIS Supplementary Rules are persuasive in trust arbitration). Settlers to trust disputes might do well to emulate this language so as to require trustees to move to compel arbitration as a defensive mechanism.

²⁸⁷ See ICC Model Trust Clause, *supra* note 33.

²⁸⁸ See *id.*

²⁸⁹ See AAA Model Trust Clause, *supra* note 31; ICC Model Trust Clause, *supra* note 33. As always, care must be taken whenever a drafting party deviates from established language, since errors can creep into the arbitral provision during the revision process. See BORN, DRAFTING, *supra* note 11, at 42.

²⁹⁰ See Strong, Two Bodies Collide, *supra* note 10.