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You Can't Have Your Trust and Defeat It Too: Why Mandatory Arbitration Provisions in Trusts Are Enforceable, and Why State Courts Are Getting It Wrong

Rachel M. Hirshberg

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Rachal v. Reitz[1]

I. INTRODUCTION

This note addresses a recent decision by the Texas State Court of Appeals concerning the enforceability of mandatory arbitration provisions found in testamentary instruments, and specifically, inter vivos trusts.[2] After analyzing the legal background of arbitration, the use of contract principles to analyze both arbitration and trust agreements, and statutory enactments making trust arbitration provisions enforceable, this note will discuss the nuanced relationship between contract principles of construction, arbitration agreements, and trust instruments, and specifically the relationship between trust agreements and contracts. In analyzing these relationships, this note will also address the differences between the statute at issue in *Rachal v. Reitz* and the Arizona arbitration statute at issue in *Schoneberger v. Oelze*,[3] the landmark case addressing the enforceability of trust arbitration provisions. Additionally, the relationship between contract law, trust instruments, and the role of settlors' intent will be briefly discussed. Finally, this note will argue that mandatory arbitration provisions found in valid trust instruments should be enforced when they would effectuate the settlor's unambiguous intent.

II. FACTS AND HOLDING

John W. Reitz was the beneficiary of the A.F. Reitz Trust, an inter vivos trust established by his father, A.F. Reitz.[4] At the time that A.F. Reitz established the trust, he made himself the sole initial trustee and appointed his attorney, Hal Rachal, as the successor trustee.[5] After A.F. Reitz's death, Hal Rachal became the trustee, pursuant to the terms of the Trust.[6] John Reitz brought an action against Mr. Rachal, both individually and as successor trustee, in Texas Probate Court.[7] In

1. Rachal v. Reitz, 347 S.W.3d 305 (Tex. App. 2011).
2. *Id.* at 307.
3. Schoneberger v. Oelze, 96 P.3d 1078, 1082 (2004), *superseded by statute,* 2008 Ariz. Sess. Laws, ch. 247, § 16 (2d Reg. Sess.) (current version at ARIZ. REV. STAT. ANN. § 14–10205 (West, Westlaw through 2d Reg. Sess. 2012).
4. *Rachal*, 347 S.W.3d at 307.
5. *Id.*
6. *Id.*
7. *Id.*; *In re* the A.F. Reitz Trust, Cause No. PR09–03183–P2 (Tex. Prob. Ct. No. 2 2009).

his complaint, Reitz alleged that Rachal had failed to satisfy Texas statutory accounting requirements, constituting a breach of Mr. Rachal's fiduciary duty.[8] Additionally, the fiduciary duty claim accused Rachal of concealing his routine use of trust funds for his personal gain and requested that Rachal be removed as trustee.[9]

Rachal filed a motion to compel arbitration and to stay litigation of the matter in Texas District Court,[10] pursuant to the Texas General Arbitration Act (TAA).[11] Rachal's motion to compel arbitration cited a provision in the Trust evidencing the settlor's intent that disputes involving the trust be resolved by arbitration.[12] The trial court summarily denied Rachal's motions.[13] Rachal filed an interlocutory appeal with the Court of Appeals of Texas seeking a reversal of the trial court's order.[14] On appeal to the court of appeals, Rachal argued that he had successfully established the existence of a valid arbitration agreement, that Mr. Reitz's claims fell within the purview of this agreement, and therefore, that the trial court denied his motion in error.[15] The court of appeals heard Rachal's interlocutory appeal, and finding the arbitration provision of the trust was not a binding arbitration agreement, the court affirmed the trial court's denial of Rachal's motions.[16]

Holding that a mandatory arbitration provision in a trust instrument[17] is not enforceable, the court emphasized the "foundational principle" that parties may not be compelled to arbitrate a dispute without having expressly agreed to do so.[18] The court explained that under the TAA, parties must enter into a "specific, mutual agreement to arbitrate before a court will force a party to relinquish its judicial rights and remedies."[19] The court cited arbitration's foundation in contract law,[20] explaining that the validity of an arbitration agreement is therefore measured by its validity under traditional contract law.[21] Validity under contract law, the court explained, requires than an arbitration agreement itself satisfy the requirements of a contract, or exist in a valid contract.[22]

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8. *Rachal*, 347 S.W.3d at 307.
9. *Id.*
10. *Id.*
11. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 171.001, 171.098 (West 2005).
12. *Rachal*, 347 S.W.3d at 307. The trust document contained the following provision:
Arbitration. Despite anything herein to the contrary, I indent that as to any dispute of any kind involving this Trust or any of the parties or persons concerned herewith (e.g. beneficiaries, Trustees), arbitration as provided herein shall be the sole and exclusive remedy . . .
Id. at 308.
13. *Id.* at 307.
14. *Id.*
15. *Id.*
16. *Id.* at 311–12.
17. Hereinafter referred to as a "trust arbitration provisions," unless otherwise noted.
18. *Rachal*, 347 S.W.3d at 308 (citing Roe v. Ladymon, 318 S.W.3d 502, 510 (Tex. App. 2010)).
19. *Id.* at 310 (citing Phillips v. ACS Mun. Brokers, Inc., 888 S.W.2d 872, 875 (Tex. App. 1994)).
20. *Id.* (citing Schoneberger v. Oelze, 96 P.3d 1078, 1082 (2004)).
21. *Id.* at 309 (citing J.M. Davidson, Inc. v. Webster, 128 S.W.3d 223, 227 (Tex. 2003)).
22. *Id.* "[W]e determine the existence of an arbitration agreement based on Texas contract law (citation omitted). The elements required for the formation of a valid contract are (1) an offer, (2) acceptance in strict compliance with the terms of the offer, (3) a meeting of the minds, (4) each party's consent to the terms, and (5) execution and delivery of the contract with the intent that it be mutual and binding on the parties to the agreement. (citation omitted). Consideration is a fundamental element of every valid contract." *Id.* (citing *J.M. Davidson,* 128 S.W.3d at 227; Gables Cent. Constr., Inc. v. Atrium Cos., Inc., No. 05–07–00438–CV, 2009 WL 824732, at *2 (Tex. App. 2009) (mem. op.)).

As evidence that the arbitration provision did not satisfy contract requirements, the court outlined the lack of assent between the parties allegedly bound by the arbitration provision.[23] The court explained that because beneficiaries are not signatories to the trusts from which they benefit,[24] and because they are often not involved in the creation of a trust,[25] they cannot be said to have assented to the terms of a trust.[26] According to the court, the relationship between a trust beneficiary and trustee does not satisfy the contractual requirement of mutual assent necessary to establish a valid arbitration agreement.[27] As such, the court reasoned that the relationships created by a trust "are not contractual"[28] and concluded that a "trust is not a contract."[29] Thus, according to the court, arbitration provisions in trust documents are unenforceable.[30] Following the Court of Appeals' disposition of his appeal, Mr. Rachal filed a petition for review with the Supreme Court of Texas.[31] On June 8, 2012 the Texas Supreme Court granted review of the case, which is still pending.[32] In *Rachal v. Reitz*, the Texas Court of Appeals held that because arbitration agreements are inherently contractual in nature, and because trust documents do not create contractual relationships, mandatory arbitration provisions found in trust documents are not enforceable against trustees or beneficiaries.[33]

III. LEGAL BACKGROUND

Trust law and arbitration law developed at different times in the history of American jurisprudence and were developed to achieve different goals. Trust law is centuries old and was established to aid in the transfer of property.[34] Arbitration law is still evolving and changing the mechanics of conflict resolution in America.[35] While these two areas of the law have not frequently intersected, they are not mutually exclusive. This section first provides a brief background on the contractual nature of trust law, and how contract principles are utilized to effectuate settlors' intent. Second, this section outlines arbitration's legal foundation in contract law, and the enforceability of arbitration provisions. Third, the growing popularity of using alternative dispute resolution (ADR) to resolve disputes of all types is discussed. Next, the cases addressing the enforceability of trust arbitration provisions, and relied on by the *Rachal* majority, are surveyed. Finally, this section

23. *Rachal*, 347 S.W.3d at 310 (citing *Schoneberger*, 96 P.3d at 1080 – 81).
24. *Id.* at 311.
25. *Id.*; *see* TEX. PROP. CODE ANN. § 112.001 (West 2007) (describing methods for creating a trust).
26. *Id.*
27. *Rachal*, 347 S.W.3d at 310.
28. *Id.* at 310.
29. *Id.* at 311.
30. *Id.*
31. Petition for Review, *Rachal*, 347 S.W.3d 305 (No. 05–09–01422–CV).
32. *Id.*
33. *Rachal*, 347 S.W.3d at 312 (citing Schoneberger v. Oelze, 96 P.3d 1078 (2004); Diaz v. Buckey, 125 Cal. Rptr. 3d 610, 611-13, 615 (2011) for support).
34. ROGER W. ANDERSEN, UNDERSTANDING TRUSTS & ESTATES 75 (4th ed. 2009).
35. David Horton, *The Federal Arbitration Act and Testamentary Instruments*, 90 N.C. L. REV. 1027, 1028-30 (2012).

reviews several recently enacted state statutes that make trust arbitration provisions enforceable.

A. Contract Principles of Trust Law

The most commonly espoused theory of trusts is the donative theory.[36] The donative theory of trusts became popular largely due to its adoption in the first Restatement of Trusts, in 1935.[37] The Reporter of the Restatement of Trusts, Austin Wakeman Scott, was a proponent of this theory and is largely credited with its prevalence in American jurisprudence.[38] Prior the publication of the Restatement, American courts and commentators often cited trusts' contractual qualities, particularly in relation arbitration.[39] However, while the "contractarian" theory of trusts had significant support, the Restatement's emphasis on the donative theory made it the predominate approach to trust law in the United States.[40]

While the donative theory of trusts is the most prominent, the contractual aspects of trust law have remained. Trust law is founded on the idea that courts should uphold a settlor's unambiguous intent.[41] As such, courts use common law contract principles to ascertain the settlor's intent.[42] Texas courts are no exception, and have traditionally interpreted trusts as they do contracts.[43] Texas courts look at the four corners of the trust instrument,[44] with the primary goal of determining the intent of the trustor.[45]

Texas courts interpret contracts strictly, giving contract terms their literal, ordinary meaning, and enforcing the "clear, unambiguous provisions of a trust agreement as they were written."[46] If the terms of the trust are unambiguous, they dictate the treatment of any matter provided for by the instrument.[47] Under Texas law, courts construe trust instruments "to give effect to all provisions so that no provision is rendered meaningless."[48] Similarly, the Texas Trust Code recognizes the primacy of the settlor's intent in construing the provisions of a trust instrument.[49]

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36. S.I. Strong, *Arbitration of Trust Disputes: Two Bodies of Law Collide*, 45 VAND. J. TRANSNAT'L L. 1157, 1174 (2012).

37. *Id.* at 1175; Barry L. Zins, *Trustee Liability for Breach of the Duty of Loyalty: Good Faith Inquiry and Appreciation Damages*, 49 FORDHAM L. REV. 1012, 1013 n. 4 (1981), *available at* http://ir.lawnet.fordham.edu/flr/vol49/iss6/4.

38. Strong, *supra* note 36, at 1175.

39. *Id.*

40. *Id.*

41. Rachal v. Reitz, 347 S.W.3d 305, 313 (2001); Stephen W. Murphy, *Enforceable Arbitration Clauses in Wills and Trusts: A Critique*, 26 OHIO ST. J. ON DISP. RESOL. 627, 652-57 (2011).

42. *Id.* at 312–13.

43. Lesikar v. Moon, 237 S.W.3d 361, 366 (Tex. App. 2007).

44. *Id.* at 367 (citing Eckels v. Davis, 111 S.W.3d 687, 694 (Tex. App. 2003)).

45. *Id.* at 366–67 (citing Hurley v. Moody Nat'l Bank of Galveston, 98 S.W.3d 307, 310 (Tex. App. 2003); Myrick v. Moody, 802 S.W.2d 735, 738 (Tex. App. 1990)).

46. Askanase v. LivingWell, Inc., 45 F.3d 103, 106 (5th Cir. 1995).

47. AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS § 164.1 at 253 (4th ed. 1987).

48. *Lesikar*, 237 S.W.3d at 366–67 (citing *Hurley*, 90 S.W.3d at 310).

49. TEX. PROP. CODE ANN. § 111.0035 (West) ("The terms of a trust prevail over any provision of [the Texas Trust Code].").

B. Contractual Nature of Arbitration Agreements

Arbitration grew out of contracting parties' desire to negotiate the terms under which they would resolve future disputes.[50] The enactment of the Federal Arbitration Act (FAA) in 1925[51] and the Supreme Court's subsequent expansion of the FAA[52] have created a strong federal policy favoring arbitration.[53] Nine states have enacted arbitration statutes modeled on the FAA.[54] In 1956, the Commissioner on Uniform State Laws established the Uniform Arbitration Act (UAA), which varies only slightly from the FAA, and has been adopted by thirty-eight states and the District of Columbia.[55]

Under the FAA, arbitration agreements must be "written provisions in . . . a contract."[56] Under the more broadly worded UAA, arbitration provisions are only enforceable if found in a "written agreement" or a "provision in a written contract."[57] As such, courts have construed state arbitration statutes that adopted the UAA and FAA as requiring that arbitration provisions be part of a valid contract.[58] Accordingly, American courts utilize state common law contract principles when deciding whether the parties to a written agreement agreed to arbitrate future disputes arising from it.[59]

The Supreme Court affirmed the contractual nature of arbitration in *AT&T Technologies, Inc. v. Communications Workers of America*.[60] The Supreme Court explained that "[a]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."[61] In the 2010 case *Rent-A-Center, West v. Jackson*, the United States Supreme Court reinforced that "[t]he FAA reflects the fundamental principle that arbitration is a matter of contract."[62] However, the Supreme Court has been very liberal in its appli-

50. Murphy, *supra* note 41, at 631–32.

51. Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–14 (2006)).

52. *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983); Southland Corp. v. Keating, 465 U.S. 1, 11 (1984); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 627 (1985).

53. *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24.

54. Murphy, *supra* note 41, at 640.

55. *Id.* Only three states, Alabama, New Hampshire, and West Virginia, have adopted arbitration statutes not based on either the Uniform or Federal Acts. *Id.* at 681 n.55.

56. *Id.* ("[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising . . . or . . . an existing controversy . . . shall be valid, irrevocable, and enforceable. . . ." (citing 9 U.S.C. § 2 (2011))).

57. *Id.* at 640 n. 56 ("[a] written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable . . . ." *Id.* (quoting Unif. Arbitration Act § 1 (1956))). *See also* Rev. Unif. Arbitration Act § 6(a) (2000) ("An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable. . . ."). *Id.*

58. *Id.* at 64-41.

59. Molly Buck Richard, *Alternative Dispute Resolution–Arbitration–Agreements to Arbitrate*, 1 TEX. PRAC. GUIDE BUS. TRANS. § 1:106 (West 2012) (citing *In re* Dillard Dept. Stores, Inc., 186 S.W.3d 514, 515 (Tex. 2006)). State common law contract principles vary by state, but generally focus on the mutual assent of the parties to the terms of a written agreement. *Id.*

60. AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 648-49 (1986).

61. *Id.*

62. Rent-A-Ctr., W., Inc. v. Jackson, 130 S. Ct. 2772, 2776 (2010) (citing Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

cation of this "fundamental principle." The Court has found valid arbitration agreements in "mere written agreements,"[63] and other documents that were not valid contracts. [64] In fact, the Supreme Court has not interpreted "contract" as narrowly as the *Rachal* majority, and, as a result, has not required that an arbitration clause appear in an overarching contract.[65] Similarly, lower federal courts have upheld arbitration agreements found in instruments that were not contracts, allowing the arbitration clause to "stand alone."[66]

Rooted in the language of the UAA and FAA, state arbitration statutes are equally prone to contradictory interpretation. Some state statutes require only a written agreement to arbitrate, while others require an "arbitration contract."[67] While several states do not require that parties to an arbitration agreement sign the agreement,[68] all states require that arbitration provisions be in writing[69] and evidence the parties' mutual assent and intent to be bound.[70]

C. The Preference for ADR

The past several decades have seen an escalation in the use of alternative dispute resolution (ADR), such as arbitration, to resolve legal claims.[71] As litigation becomes increasingly ubiquitous, expensive, and time consuming, [72] parties increasingly prefer to use arbitration to resolve a growing variety of legal disputes.[73] Federal support of arbitration has become pervasive, with both state and federal courts adopting the "liberal federal policy favoring arbitration."[74] As arbitration becomes more popular, courts are asked to enforce arbitration agreements found in a variety of legal instruments, and between parties with complicated legal relationships.[75] In doing so, courts must not only interpret and construe arbitration agreements in conformity with the state law and precedent, but they must also consider which legal disputes are best suited for ADR.[76]

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63. *Id.* at 2781-82. As a result of these holdings, some commentators argue that "the fact that state law insists that an arbitration clause appear in a 'contract' is irrelevant for the purposes of the FAA." Horton, *supra* note 35, at 1028-30.

64. Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 448 (2006).

65. Horton, *supra* note 35, at 1055–56.

66. Patterson v. Tenet Healthcare, Inc., 113 F.3d 832, 835 (8th Cir. 1997).

67. Rev. Unif. Arbitration Act § 1 (2000); 9 U.S.C. § 2 (1947).

68. Bridas S.A.P.I.C. v. Gov't of Turkmenistan, 345 F.3d 347, 356 (5th Cir. 2003) (discussing various theories for binding non-signatories to arbitration agreements under common law contract principles).

69. 9 U.S.C. § 2 (2006).

70. Gables Cent. Constr., Inc. v. Atrium Cos., Inc., No. 050700438 CV, 2009 WL 824732, at *2 (Tex. App. Mar. 31, 2009) (reciting requisite contract elements of arbitration agreements, including offer, acceptance, mutual assent, consent to the terms, and execution and delivery of the arbitration agreement).

71. Michael P. Bruyere & Meghan D. Marino, *Mandatory Arbitration Provisions: A Powerful Tool to Prevent Contentions and Costly Trust Litigation, But Are They Enforceable?*, 42 REAL PROP. PROB. & TR. J. 351, 352 (2007).

72. Horton, *supra* note 35, at 1029-30.

73. *Id.*

74. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1745 (2011) (citing Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

75. Horton, *supra* note 35, at 1028-29.

76. Murphy, *supra* note 41, at 671.

The increasing popularity of arbitration has led it to be used to settle a growing variety of disputes and has led to the inclusion of arbitration agreements in documents other than traditional contracts.[77] The inclusion of arbitration agreements in these documents creates a question of enforceability and is the basis of the dispute in *Rachal v. Reitz*.

With the increase in arbitration across all legal disputes, the use of arbitration provisions is becoming popular among estate planners. Estates and Trusts lawyers realize the benefits that arbitration offers their clients, who frequently want to avoid intra-family conflict.[78] Thus, the inclusion of arbitration provisions in wills and trusts is on the rise. Clients seeking estate planning assistance are often particularly interested in confidentiality, privacy, maintaining family relationships, and avoiding costly, estate-diminishing litigation. Arbitration provisions allow Estates and Trusts lawyers to allay all of these concerns.[79]

D. The Enforceability of Trust Arbitration Provisions: Case Law

While the Supreme Court has enforced extra-contractual arbitration provisions under the FAA, [80] state courts have centered their analysis around state contract law and have largely "insist[ed] that an arbitration clause appear in a 'contract.'"[81] As more states address the enforceability of trust arbitration provisions, this conservative approach has begun to wane,[82] aided by the enactment of a growing number of state trust arbitration statutes, discussed *infra*.[83] However, the holding in *Rachal v. Reitz* is consistent with the traditional tendency of state courts to strike down arbitration provisions found outside of a contract.

In *Rachal v. Reitz*, the Texas court of appeals faced the question of whether a mandatory arbitration provision included in a trust document is enforceable against beneficiaries of the trust.[84] This was an issue of first impression in Texas, and one that had previously been addressed by only two other states and the District of Columbia.[85] Prior to *Rachal*, the Arizona and California Courts of Appeals considered the enforceability of trust arbitration provisions, finding trust arbitration provisions unenforceable.[86] The reasoning in both the Arizona and California opinions focused on the legal distinctions between trusts and contracts, and the contractual nature of arbitration agreements.[87]

77. Horton, *supra* note 35, at 1030.
78. Murphy, *supra* note 41, at 635–36.
79. *Id.*
80. *See supra* notes 64–66.
81. *See supra* notes 57-58, and accompanying text.
82. *See generally*, Bruyere & Marino, *supra* note 71; Murphy, *supra* note 41.
83. *See* discussion, *infra* notes 111-130.
84. Rachal v. Reitz, 347 S.W.3d 305, 310 (Tex. App. 2011).
85. *Id.* "[W]hether a provision stating the settlor's intent that disputes involving the trust be resolved by arbitration is enforceable as in a contract is an issue of first impression in Texas. Indeed, only two jurisdictions in the country have considered a similar issue." *Id.* (referring to Schoneberger v. Oelze, 96 P.3d 1078 (2004) and Diaz v. Bukey, 125 Cal. Rptr. 3d 610, 611–13, 615 (2011)). *See also In re* Mary Calomiris, 894 A.2d 408 (D.C. Cir. 2006).
86. *Rachal*, 347 S.W.3d at 310.
87. *Id.* at 310-11.

In 2004, the Arizona Court of Appeals was the first court to decide the enforceability of trust arbitration provisions, in *Schoneberger v. Oelze*.[88] The facts of *Schoneberger* were similar to those in *Rachal v. Reitz*. In *Schoneberger*, the beneficiaries of a trust brought an action against the trustee for breach of trust and related torts.[89] The trustee moved to compel arbitration pursuant to an arbitration provision contained in the trust.[90] The beneficiaries argued in response that the arbitration provision was unenforceable because it was not contained in a contract, because trusts are not contracts.[91] Additionally, the beneficiaries argued that as non-signatories to the trust documents, they had never agreed to arbitrate their claims under the trust.[92]

The Arizona Court of Appeals found the arbitration provision unenforceable, reasoning that "[a]rbitration is a creature of contract law" and the "relationships that arise out of a trust are 'not contractual.'"[93] Every court to address this issue subsequently has relied on this reasoning, and the *Schoneberger* opinion specifically.[94] Accordingly, every state court to address the enforceability of trust arbitration provisions has found them unenforceable.[95] Responding to the *Schoneberger* holding, the Arizona legislature passed a statute making trust arbitration provisions enforceable in 2008.[96] Thus, the *Schoneberger* opinion was made obsolete three years before the Texas Court of Appeals adopted its reasoning in the 2011 *Rachal v. Reitz* opinion.

In 2011, the same year that *Rachal v. Reitz* was decided in Texas, the California Second Court of Appeal became the first California court to decide the enforceability of trust arbitration provisions.[97] Again, relying on the Arizona court's *Schoneberger* analysis, the California court focused on the distinctions between a contract and a trust.[98] The court held that the trust arbitration provision at issue was unenforceable against a beneficiary who did not agree to arbitrate disputes arising from the trust, and that such a beneficiary could not be compelled to arbitrate because a trust is not a contract.[99]

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88. *Id.* at 310. "The issue was first considered by the Arizona Court of Appeals in *Schoneberger v. Oelze*, 208 Ariz. 591, 96 P.3d 1078 (2004)." *Id.*

89. *Schoneberger*, 96 P.3d at 1080.

90. *Id.*

91. *Id.* at 1080–81.

92. *Id.*

93. *Id.* at 1082 (quoting AT & T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 648 (1986) and *In re* Naarden Trust, 990 P.2d 1085, 1088–89 (1999) (distinguishing a trust from a contract)).

94. *See generally* Rachal v. Reitz, 347 S.W.3d 305, 311 (Tex. App. 2011); Diaz v. Buckey, 125 Cal. Rptr. 3d 610, 611-13, 615 (2011); *In re* Mary Calomiris, 894 A.2d 408, 410 (D.C. 2006). In 2006, the District of Columbia relied on Arizona's *Schoneberger* holding in ruling that arbitration provisions in *wills* are similarly unenforceable.[94] In *In re Mary Calomiris*, the D.C. Court of Appeals found the Arizona court's reasoning "instructive" and concluded that "just as a trust is not a contract, 'a will is not a contract either.'" *In re Mary Calomiris*, 894 A.2d at 409.

95. *Id.*

96. *See* ARIZ. REV. STAT. ANN. § 14-10205 (West, Westlaw through 1st & 2d Spec. Sess. 2011) (stating that a "trust instrument may provide mandatory, exclusive and reasonable procedures to resolve issues between the trustee and interested persons . . . with regard to the administration or distribution of the trust").

97. *Diaz*, 125 Cal. Rptr. 3d at 611–13, 615.

98. *Id.* at 615.

99. *Id.*

E. Statutory Approaches

The sparse case law addressing the enforceability of trust arbitration provisions may be responsible for state courts' tendency to narrowly interpret their arbitration statutes to require that arbitration agreements exist in a valid contract.[100] As such, many states have recognized the need for statutory reform in this area.[101] Several states have revised their arbitration statutes to make arbitration provisions found in legal instruments, other than contracts, enforceable.[102] As arbitration's popularity continues to grow, arbitration provisions will likely be included in more and more trust documents. States with large populations of senior citizens and states hoping to draw trust business will likely begin revising their arbitration statutes in increasing numbers every year.[103]

The legislatures of all fifty states have enacted statutes allowing trustees to use arbitration to resolve trust disputes.[104] However, the language of all but two of these statutes requires that parties to a trust agree to use arbitration to resolve their disputes.[105] While the majority of state arbitration statutes merely grant trustees the power to resolve trust disputes using ADR,[106] a few states have enacted legislation specifically aimed at promoting the use of arbitration in trust and other probate disputes.[107]

In 2005, Hawaii became the first state to propose a trust-specific arbitration statute.[108] Senator Suzanna Chun Oakland co-sponsored a bill that would have made trust arbitration provisions enforceable in Hawaii.[109] Hawaii was motivated by a desire to create a dispute resolution system that would minimize contentious trust litigation for its large, aging senior population.[110] Unfortunately, the bill lacked a champion and died in committee before ever being brought to a vote.[111]

In 2004, the American College of Trusts and Estate Counsel (ACTEC)[112] formed a task force to address the inclusion of arbitration provisions in testamen-

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100. Strong, *supra* note 36, at 1247–48.

101. Murphy, *supra* note 41, at 662–70.

102. *Id.* (reviewing and analyzing such statutory reforms). Missouri is currently finalizing such a statute, which may be enacted in 2013. Interview with Scott Martinsen, author of the proposed Missouri statute (October 25, 2012).

103. Murphy, *supra* note 41, at 669.

104. Bruyere & Marino, *supra* note 71, at 355 n.13 (listing state statutes granting trustees the power to utilize ADR to resolve trust disputes).

105. *Id.*

106. *Id.* at 355.

107. *See* ALASKA CT. R. 4.5 (2006); HAW. PROB. R. 2.1 (2007); MASS. PROB. & FAM. CT., Standing Order 1-04 (2006); MICH. CT. R. 5.143 (2006); N.J. CT. R. 1:40-6 (2007); WASH. REV. CODE ANN. § 11.96A.260 (West 2006).

108. Probate Code Mediation and Arbitration Choice Act, S.B. 1314, 23d. Leg., Reg. Sess. (Haw. 2005).

109. Murphy, *supra* note 41, at 663.

110. *Id.* at 663–64. Hawaii has a large population of senior citizens, which boasts "the highest longevity in the nation and largest growth in our in our elders per capita (growing rate of 300% for 85-year-olds and older)." *Id.* In proposing the statute, the Hawaii legislature was "trying to be proactive in addressing many aging issues," by "looking at mediation and less contentious forms of problem solving in the legal system." *Id.*

111. *Id.* at 664.

112. *Id.* at 665. ACTEC is a nonprofit association of trust and estate lawyers who "have made substantial contributions to the field of trusts and estates law through writing, teaching and bar leadership

tary instruments.[113] The Task Force concluded that the legislative action is the most expeditious and effective way for states to ensure the enforceability of their citizens' trust arbitration provisions.[114] The Task Force proposed a "Model Act," with suggested statutory provisions, for adoption by states. The Model Act included two key elements. First, it made trust and will provisions requiring arbitration of disputes between, or among, trustees and beneficiaries enforceable.[115] Second, and unlike the proposed Hawaii bill, the ACTEC Model Act limited the scope of enforceable trust arbitration provisions. The Model Act only enforced arbitration provisions requiring arbitration of disputes regarding the interpretation of the trust and the fiduciary duty of the trustee.[116] The Model Act would not enforce arbitration provisions that sound to govern disputes regarding the validity of the trust.[117]

Washington was the next state to pass a trust arbitration statute, the Trust and Estate Dispute Resolution Act, in 2006.[118] The statute grants any party the right to use ADR to resolve trust disputes before filing suit in court, and provides directions on utilizing ADR.[119] However, while the Washington statute was the first trust arbitration statute to be successfully enacted, it does not, on its own, make arbitration provisions in trust documents enforceable.[120] Under the Washington statute, the parties to the dispute must still enter a written arbitration agreement before they will be compelled to arbitrate trust disputes. Additionally, Washington courts must make the ultimate decision to order arbitration of a dispute, regardless of the inclusion of an arbitration provision in a trust.[121]

In 2007, Florida became the first state to enact a trust arbitration statute modeled after the ACTEC Model Act.[122] Similar to the Model Act, the Florida statute makes trust and will arbitration provisions requiring arbitration of future trust disputes enforceable against beneficiaries and trustees.[123] The Florida statute ex-

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activities." THE AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL, http://www.actec.org/public/AboutACTEC.asp (last visited on Aug. 22, 2012).

113. *Id.* at 664.

114. Bridget A. Logstrom, *Resolving Disputes with Ease and Grace*, 31 ACTEC J. 235, 238 (2005).

115. Murphy, *supra* note 41, at 664 (citing ACTEC Arbitration Task Force Report, at *27 (Sept. 15, 2006), *available at* http://www2.mnbar.org/sections/probate-trust/ACTEC%20Arbitration%20Task%20Force%20Report-2006.pdf.

116. ACTEC Arbitration Task Force Report, at *14.

117. *Id.* at 6 n.2. "If [a will or trust] contest takes the form of an attack on the validity of the whole will or trust, including the arbitration clause (e.g. testamentary capacity), then the matter will be heard by the court, not the arbitrator, whose very power is at issue. *See Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 403-04 (1967). On the other hand, if the arbitration clause is attacked as being the product of fraud or undue influence, then arbitration under an otherwise appropriate clause remains extant." *Id.*

118. Trust and Estates Dispute Resolution Act, WASH. REV. CODE ANN. § 11.96A.260 to 11.96A.320 (2009).

119. *Id.* at § 11.96A.310(3). "Objection to arbitration. A party may object to arbitration by filing a petition with the superior court and serving the petition on all parties or the parties' virtual representatives. . . . . [T]he court shall order that arbitration proceed except for good cause shown. Such order shall not be subject to appeal or revision. If the court determines that the matter should not be subject to arbitration, the court shall dispose of the matter by: (a) Deciding the matter at that hearing, but only if the petition objecting to arbitration contains a request for such relief; or (b) directing other judicial proceedings." *Id.*

120. *See id.* § 11.96A.310(5)(f).

121. *Id.*

122. FLA. STAT. ANN. § 731.401 (2010); Murphy, *supra* note 41, at 665.

123. FLA. STAT. ANN. § 731.401 (2010).

plicitly excludes disputes over the validity of the donative instrument from arbitration.[124] The Florida statute was, therefore, the first state statute to truly make trust arbitration provisions enforceable.

In 2008, Arizona's legislature overturned *Schoneberger* when it enacted a new statute making ADR provisions in trusts enforceable.[125] Like the Florida statute, the Arizona statute does not enforce arbitration provisions that require arbitration of the validity of a trust document.[126] However, the Arizona statute differs from the Florida statute in that it pertains only to trusts, and not wills.[127] Additionally, unlike the Florida statute, which specifically references "arbitration," the Arizona statute is broader. The Arizona statute mandates the enforcement of arbitration provisions, or any other "reasonable procedures" to resolve trust disputes, as indicated in the trust instrument.[128]

Many commentators, state legislatures, and courts believe that statutory reform is necessary to make trust arbitration provisions fully enforceable.[129] Many commentators believe that such legislative action is the most effective and reliable way to guarantee the enforceability of such trust arbitration provisions.[130] *Schoneberger* was the first case to address the enforceability of trust arbitration provisions, and it served as a compass for state courts across the country that have struck down trust arbitration provisions.[131] Despite the fact that the *Schoneberger* opinion was superseded by statute three years before *Rachal v. Reitz* was decided, the Texas court adopted *Schoneberger*'s interpretation of Arizona's since-superseded arbitration statute.[132] As a result, *Rachal v. Reitz* held that because arbitration agreements are inherently contractual in nature, and because a trust does not contractually bind its beneficiaries, mandatory arbitration provisions found in trust documents are not enforceable against trustees or beneficiaries.[133]

IV. INSTANT DECISION

A. Majority Opinion

Rachel v. Reitz presented an issue of first impression in Texas.[134] Presiding en banc, the Texas Court of Appeals held that the mandatory arbitration provision found in the trust at issue was not enforceable against trustees, beneficiaries, or other interested parties.[135] Relying on the reasoning of the Arizona Court of Ap-

124. *Id.*
125. ARIZ. REV. STAT. ANN. § 14-10205 (West, Westlaw through 1st & 2d Spec. Sess. 2011).
126. Murphy, *supra* note 41, at 666.
127. *Id.*
128. *Id.* (citing ARIZ. REV. STAT. ANN. § 14-10205).
129. *See generally* Murphy, *supra* note 41; ACTEC Arbitration Task Force Report, *supra* note 103; Rachal v. Reitz, 347 S.W.3d 305, 312 (Tex. App. 2011).
130. *See, e.g.*, Bruyere & Marino, *supra* note 71, at 364; Murphy, *supra* note 41, at 634.
131. Rachal v. Reitz, 347 S.W.3d 305, 310 (Tex. App. 2011). *See also*, *supra* notes 94-95 and accompanying text.
132. *Id.* at 311.
133. *Id.* at 311–12 (citing Schoneberger v. Oelze, 96 P.3d 1078 (2004) and Diaz v. Buckey, 125 Cal. Rptr. 3d 610, 611-13, 615 (2011) for support).
134. *Id.* at 310.
135. *Rachal*, 247 S.W.3d at 311.

peals' *Schoneberger* opinion, the Texas court reasoned that because arbitration provisions are governed by contract law, parties who do not directly assent to such provisions are not bound by them.[136]

The court first analyzed the TAA,[137] under which Rachal moved to compel arbitration.[138] Under the TAA, an enforceable arbitration agreement must exist before a court will compel arbitration.[139] The court explained that "[i]t is a foundational principle that a party cannot be compelled to arbitrate a dispute when the party has not agreed to do so."[140] When analyzing the validity of arbitration agreements, Texas courts "apply standard contract principles and do not resolve doubts or indulge a presumption in favor of arbitration."[141] These contract principles, required for the formation of a valid contract, include: an offer; acceptance "in strict compliance with the terms of the offer;" a "meeting of the minds;" mutual assent; and execution and delivery of the contract, with the understanding and desire that the contract be binding on both parties to the agreement.[142]

In a single paragraph, the court analyzed the trust according to contract principles and concluded that the trust document did not satisfy Texas common law contract principles.[143] The court reasoned that proof of the settlor's intent that trust disputes be arbitrated is not enough to demonstrate mutual assent to an arbitration agreement.[144] To substantiate its finding that no agreement to arbitrate existed, the court noted that it was "undisputed that neither Rachal nor Reitz signed the trust document as parties to the trust."[145] The court further stated that Rachal's motion to compel arbitration did not explain how the trust settlor's intent that trust disputes be arbitrated transformed into mutual assent to arbitrate between Rachal and Reitz. As such, the court concluded that no agreement to arbitrate existed between Rachal and Reitz, and refused to enforce the trust's arbitration provision.[146]

The bulk of the majority opinion is dedicated to a discussion of the *Schoneberger* and *Diaz* opinions.[147] The Texas Court of Appeals' opinion assumed the Arizona court's distinction between a trust and a contract, tracking the language of the *Schoneberger* opinion closely.[148] Cting Rachal's failure to establish how the arbitration provision satisfied all of the required elements of a contract, or how the settlor's intent "transformed" the arbitration provision into an agreement between

136. *Id.*
137. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 171.001–.098 (West 2005).
138. *Rachal*, 247 S.W.3d at 308.
139. *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 171.021(a)).
140. *Id.* (citing Roe v. Ladymon, 318 S.W.3d 502, 510 (Tex. App. 2010)).
141. *Id.* (citing J.M. Davidson, Inc. v. Webster, 128 S.W.3d 223, 227 (Tex. 2003)).
142. *Id.* at 309 (citing Gables Cent. Constr., Inc. v. Atrium Cos., Inc., No. 050700438 CV, 2009 WL 824732, at *2 (Tex. App. Mar. 31, 2009) (enumerating the required elements of a contract under Texas law)).
143. *Rachal*, 247 S.W.3d at 311–12.
144. *Id.* at 309–10 (explaining that "Rachal did not establish how the settlor's expression of intent satisfied all of the required elements of a contract or how this expression of the settlor's intent transformed the trust provision into an agreement to arbitrate between Rachal and Reitz").
145. *Id.* at 309.
146. *Id.* at 312.
147. *Id.* at 310–11.
148. *Rachal*, 247 S.W.3d at 310–11.

Rachal and Reitz,[149] the court refused to enforce the arbitration provision.[150] The court concluded that arbitration is a "creature of contract law," and because a "trust is not a contract," mandatory arbitration provisions found in trust documents are not enforceable.[151]

The majority opinion closed by noting that the issue presented in *Rachal v. Reitz* was better suited for determination by the Texas legislature.[152]

B. Dissenting Opinion

Four judges dissented from the majority opinion in *Rachal v. Reitz*,[153] creating a "badly divided court."[154] The dissent argued that Rachal satisfied the burden of proof when he provided the court with a copy of the trust arbitration provisions, establishing the existence of an enforceable arbitration agreement under the trust.[155] The dissent found the majority's focus on whether the arbitration provision satisfied the require elements of a contract to be misplaced.[156]

The dissent began by arguing that the enforceability of the arbitration provisions was not even at issue in the case.[157] The dissent noted that Reitz had, in fact, claimed to be a party to the trust agreement itself when he asserted his standing as a party and beneficiary to the trust in his initial complaint.[158] Additionally, the dissent emphasized that Reitz never contested the validity of the trust arbitration provision or its enforceability against him.[159] Reitz's initial complaint against Rachal sought to enforce the trust, not to contest its terms.[160] That Reitz sought to enforce the terms of the trust led the dissent to its next argument: one seeking to benefit under a trust cannot simultaneously deny the enforceability of certain trust terms.[161]

The dissent next argued that the language of the TAA does not require an arbitration contract, but simply "a written *agreement* to arbitrate."[162] The dissenting justices distinguished the TAA from the since-revised Arizona arbitration statute

149. *Id.* at 309–10.

150. *Id.* at 311–12.

151. *Id.* (citing Schoneberger v. Oelze, 96 P.3d 1078, 1083 (2004); Diaz v. Buckey, 125 Cal. Rptr. 3d 610, 611-13, 615 (2011)).

152. *Id.*

153. *Rachal v. Reitz* was before the court en banc, with twelve of the Texas Fifth District Court of Appeals' thirteen justices presiding. *Id.* at 307. Three judges joined Justice Murphy's dissenting opinion. *Id.* at 312.

154. Ronald R. Volkmer, *Validity of Trust Arbitration Provision*, 39 EST. PLN. 47, 47 (2012).

155. *Rachal*, 347 S.W.3d at 312 (Murphy, J., dissenting). According to the dissent, Rachal satisfied his burden procedurally, as the party seeking to compel arbitration satisfies his burden if he provides the court with a copy of an agreement to arbitrate. *Id.*

156. *Id.* at 314.

157. *Id.* at 312.

158. *Id.*

159. *Id.*

160. *Rachal*, 347 S.W.3d at 312.

161. *Id.* at 313 (citing Merrill Lynch, Pierce, Fenner & Smith v. Eddings, 838 S.W.2d 874, 880 (Tex. App. 1992) (party opposing arbitration would have no claims but for agreement containing arbitration provision); *see also* Meyer v. WMCO–GP, LLC, 211 S.W.3d 302, 307 (Tex. 2006) ("When a party's right to recover and its damages depend on the agreement containing the arbitration provision, the party is relying on the agreement for its claims.").

162. *Id.* (citing TEX. CIV. PRAC. & REM. CODE § 171.001(a) (emphasis added)).

relied on in *Schoneberger*, which required that arbitration agreements be contained in a contract.[163] Neither the TAA, nor the California arbitration statute cited in *Diaz*, requires the existence of an "arbitration contract." Both statutes require only a "written agreement to arbitrate" any existing or future controversy between the parties to the agreement.[164] Thus, according to the dissent, both the Texas and California courts misappropriated the stricter requirements of the Arizona statute in adopting its reasoning.[165] As such, the dissent agreed that the majority's reliance on the Arizona case was misguided.[166] According to the dissent, the majority's analysis of the TAA misinterpreted the meaning of the statute, and impermissibly narrowed its application.[167]

The *Rachal* dissent also emphasized the importance of enforcing a settlor's intent when construing a trust. While courts interpret trusts as they would contracts,[168] the dissent urged that a court's primary concern in construing a trust is to determine and effectuate the settlor's intent.[169] The dissent emphasized that courts must construe trusts to give effect to each term of the trust, such that no term is rendered meaningless,[170] and that when the settlor's intent is unambiguous, construction of a trust is a question of law for the court.[171] Noting that, in the instant case, the settlor's intent was neither ambiguous nor contested, the dissent disagreed with the majority's refusal to uphold the settlor's intent.[172]

Ultimately, *Rachal v. Reitz* held that because arbitration agreements are inherently contractual in nature, and because trust documents are not trusts and therefore do not create contractual relationships, mandatory arbitration provisions found in trust documents are not enforceable.[173]

V. COMMENT

In *Rachal v. Reitz*, the Texas Court of Appeals addressed the enforceability of trust arbitration provisions for the first time. The majority opinion adopted the reasoning of the Arizona Court of Appeals' *Schoneberger* opinion, ruling trust arbitration provisions unenforceable.[174] In so holding, the Texas Court of Appeals relied on what commentators have referred to as the "thin and underdeveloped"

163. *Id.* at 314.
164. *Id.* at 313-14.
165. *Rachal*, 347 S.W.3d at 313-14.
166. *Id.*
167. *Id.*
168. *Id.* at 312-13 (citing Lesikar v. Moon, 237 S.W.3d 361, 366 (Tex. App. 2007)).
169. *Id.* at 313 (citing Smith v. Moore, 425 S.W.2d 856, 862 (Tex. App. 1969)). "A fundamental principle of trust law requires that we apply contract rules of interpretation and enforce trust agreements based on the settlor's intent." *Id.* at 313 (citing *Lesikar*, 237 S.W.3d at 366; *Smith*, 425 S.W.2d at 862).
170. *Rachal*, 347 S.W.3d at 313.
171. *Id.*
172. *Id.* at 314.
173. *Id.* at 311–12 (citing Schoneberger v. Oelze, 96 P.3d 1078 (Ariz. 2004) and Diaz v. Buckey, 125 Cal. Rptr. 3d 610, 611-13, 615 (2011) for support).
174. *Rachal*, 347 S.W.3d at 310-11.

precedent on this issue.[175] The Texas court did not consider the differences between the arbitration statutes in Arizona and Texas.[176] The majority in *Rachal* failed to address the nuanced relationship between trust and contract law.[177] As a result, the court did not consider alternative interpretations of the TAA and Texas contract law that would have allowed the court to enforce the arbitration provision. Any of these considerations might have enabled the *Rachal* court to effectuate the settlor's intent.

A. Arbitration under the TAA

The *Rachal* court adopted the reasoning of the *Schoneberger* opinion, holding that because a trust is not a contract, trust arbitration provisions do not satisfy contract principles and are therefore unenforceable.[178] This analysis misconstrues the TAA.[179] The *Schoneberger* and *Diaz* opinions both turned on the distinction between contracts and trust instruments.[180] The *Schoneberger* opinion cited the specific language of the Arizona arbitration statute then in effect for authority.[181] The Arizona arbitration statute requires proof of an enforceable "arbitration contract," under which parties agree to arbitrate future disputes.[182] In Arizona, an arbitration agreement itself must be a contract, and must therefore independently satisfy the required elements of contract formation to be enforceable.[183] While these requirements may have existed under Arizona's prior arbitration statute, they do not exist under the TAA.

The *Rachal* majority construed the broad language of the TAA as though it were as narrow as the Arizona statute. However, unlike the Arizona arbitration statute, the TAA requires only *agreements to arbitrate*.[184] While the distinction between "agreement" and "contract" may seem purely semantic, statutory language must be interpreted according to its plain meaning.[185] The Texas legisla-

175. S.I. Strong, *Mandatory Arbitration of Internal Trust Disputes: Improving Arbitrability and Enforceability Through Proper Procedural Choices*, 28 ARB. INT'L __, at *29 (forthcoming 2012), *available at* http://ssrn.com/abstract=2046828.

176. It should also be noted that the Arizona decision upon which the *Rachal* court relied had previously been superseded by statute. Schoneberger v. Oelze, 96 P.3d 1078, 1082 (Ariz. 2004), *superseded by statute*, 2008 ARIZ. SESS. LAWS, ch. 247, § 16 (2d Reg. Sess.) (current version at ARIZ. REV. STAT. ANN. § 14–10205 (West, Westlaw through Feb. 2011 Sess.). Additionally, *Diaz v. Bukey*, the California decision cited for support by the *Rachal* court has since been depublished by the Supreme Court of California, and may no longer be cited as precedent by California courts, pending final review by the state's supreme court. Diaz v. Bukey, 195 Cal. App. 4th 315, 125 Cal. Rptr. 3d 610 (2011), as modified on denial of reh'g (June 8, 2011), *review granted and opinion superseded*, 257 P.3d 1129 (Cal. 2011).

177. *Rachal*, 347 S.W.3d at 313 (Murphy, J., dissenting) (citing Lesikar v. Moon, 237 S.W.3d 361, 366 (Tex. App. 2007)).

178. *Id.* at 311–12.

179. *Id.* at 313.

180. *Id.* at 310–11.

181. *Schoneberger*, 96 P.3d at 1083.

182. *Id.* at 1080.

183. *Id.* at 1082.

184. TEX. CIV. PRAC. & REM. CODE § 171.001(a) (emphasis added).

185. Garcia v. State, 172 S.W.3d 270, 272-73 (Tex. App. 2005) (citing Boykin v. State, 818 S.W.2d 782, 785 (Tex. App. 1991) ("In construing a statute, the reviewing court's goal is to effectuate the intent of the Legislature. [*Id.*] The literal text of a statute is generally the only definitive evidence of

ture's decision to use the broader, less restrictive term "agreement" may indicate that the legislature intended to allow arbitration agreements to exist in agreements other than contracts. The broad language of the TAA has enabled Texas courts to find valid arbitration agreements in documents other than contracts.[186] The Texas legislature's decision to use this broader term may indicate that the distinction between trusts and contracts in Texas is not so stark as it was in Arizona, and that the relationship between arbitration agreements and contracts need not be analyzed as narrowly as it was by the *Rachal* court.

B. Approaches to Trust Law

The *Rachal* majority's analysis was based entirely on the donative theory of trusts.[187] Although the donative approach is very common, trusts can also be analyzed as contractual instruments under the contract theory of trusts.[188] While a trust conveys a donative transfer, it is also contract-like.[189] A trust is an agreement between a settlor and a trustee.[190] And trust instruments, often replete with signed written agreements, exchanges of promises, and payment of consideration,[191] can create *binding* agreements between these parties.[192]

The Reporter of the Restatement of Trusts,[193] Austin Scott, has said that he did not distinguish trusts from contracts in the Restatement because they are incompatible or antithetical legal instruments, but rather, out of a desire to keep trust disputes out of the hands of the jury, and protected by the "nurturing hand of the specialist equity bench."[194] Thus, procedural desires, rather than substantive law, may have been responsible for the distinction between trusts and contracts enunciated in the Restatement, and subsequently relied on by courts in holding that "a trust is not a contract."[195] This insight into the distinction made in the Restatement and the Reporter's desire to protect trusts disputes from jury consideration are completely consistent with the use of arbitration to settle trust disputes. Arbitration offers a more "protective," confidential and relationship-focused approach to

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the Legislature's intent. *Id.* Therefore, we must ordinarily apply the 'plain meaning rule,' that is, we must give effect to the statute's plain meaning. *Id.*")).

186. *Rachal*, 347 S.W.3d at 313 (citing Wiley v. Bertelsen, 770 S.W.2d 878, 882 (Tex. App. 1989)).

187. *Id.* at 309–12. The majority opinion in *Rachal* considers only the donative theory of trusts, emphasizing the unilateral transfer of property under trusts, and that, unlike a contract, consideration is not required for the formation of a trust. *Id.* at 311.

188. Strong, *supra* note 36, at 1177.

189. *Id.* (citing Langbein, *supra* note 169, at 185).

190. *Id.* at 1177.

191. *Id.* at 1176–78.

192. *Id.* at 1228 (citing John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 627 (1995)). "An arbitral clause 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, whether that agreement is reflected in the trust itself or in an accompanying document." *Id.* (citing Tina Wüstemann, *Arbitration of Trust Disputes, in* NEW DEVELOPMENTS IN INTERNATIONAL COMMERCIAL ARBITRATION 2007, 33, 40 (Christoph Müller ed., 2007)).

193. The Restatement of Trusts has been cited by many courts for authority that a trust is not a contract. In fact, the *Schoneberger* opinion relied heavily on the Restatement in finding that arbitration agreements cannot exist in trusts because a trust is not a contract. *See* Schoneberger v. Oelze, 96 P.3d 1078, 1082–83 (Ariz. 2004).

194. Strong, *supra* note 36, at 1175.

195. *Schoneberg*, 96 P.3d at 1083; Diaz v. Bukey, 125 Cal. Rptr. 3d 610, 615 (2011).

dispute resolution, making it ideally suited to trust disputes.[196] Thus, it is possible that the laws governing trusts and arbitration are not so diametrically opposed as the *Rachal* majority argues.[197] Trusts' contract-like qualities, and such commentary on the legal basis for distinguishing trusts and contracts have led some commentators to argue that there are "no good current policy grounds for permitting the inclusion of arbitration clauses in contracts but not trust [instruments]."[198]

C. Contract Principles and Trusts in Texas

Courts misconstrue arbitration statutes when they interpret them to require strict compliance with all required contract elements.[199] The *Rachal* majority narrowly construed "written agreement" under the TAA, requiring that arbitration agreements exist in contracts. The court reasoned that because arbitration agreements are analyzed using contract principles, they must satisfy all of the requirements of a contract, or be contained in an overarching contract to be valid.[200] Accordingly, the court argued that because a "trust is not a contract," arbitration agreements in trust documents are unenforceable.[201] The *Rachal* court failed to address the fact that Texas courts use contract principles not only to interpret arbitration agreements, but also in analyzing *trust* documents.[202]

The fact that Texas courts analyze trusts instruments and arbitration agreements using the same contract principles seems to contradict the *Rachal* majority's holding that the contractual nature of arbitration agreements makes them incompatible with trust instruments. Trusts instruments, while contract-like in many ways, need not to satisfy all of the elements of a contract in order to establish a valid trust.[203] The validity of a legal instrument can be analyzed using contract principles without the instrument having to actually *be* a contract. Thus, an arbitration agreement may also be analyzed using contract principles without having to satisfy all of contract requirements, and without having to actually *be* a contract. Accordingly, arbitration agreements do not have to be contained within a "contract," but can exist within a written agreement that does not violate common law contract principles.

196. Strong, *supra* note 36, at 1175.

197. *Id.* Several of the reasons given by Austin Scott, the Reporter of the *Restatement of Trusts*, for the *Restatement*'s characterization of trusts as donative, as opposed to contractual, "could be seen as entirely consistent with mandatory arbitration of internal trust disputes." *Id.* "Interestingly, the first *Restatement* is said to have adopted the donative approach to trusts not because that theory prevailed as a matter of jurisprudential discourse (indeed, the contractarian approach had numerous supporters at that time) but simply because that was the model favored by Scott." *Id.* at n.79.

198. *Id.* at 1248 (citing Charles Lloyd & Jonathan Pratt, *Trust in Arbitration,* 12 TR. & TRUSTEES 18, 18 (2006)).

199. Horton, *supra* note 35, at 1057.

200. Rachal v. Reitz, 347 S.W.3d 305, 308 (Tex. App. 2011). "The party attempting to compel arbitration must show that the arbitration agreement meets all requisite contract elements." *Id.*

201. *Id.* at 311.

202. *Id.* at 312 (citing Lesikar v. Moon, 237 S.W.3d 361, 366 (Tex. App. 2007) ("[The] courts interpret trust instruments as they would contracts").

203. Horton, *supra* note 35, at 1049. "As a matter of federal common law, the FAA hinges on whether the parties have agreed to arbitrate, not whether there is a "contract" in which the arbitration clause appears. In turn, wills and trusts are capable of giving rise to agreements to arbitrate; indeed, no one can be bound to the terms of a testamentary instrument against his wishes." *Id.*

This interpretation is consistent with the Texas legislature's decision to require that arbitration agreements be found in a "written agreement," and gives meaning to this decision in a way that the *Rachal* majority's interpretation does not. It follows logically that an arbitration agreement could exist in a valid trust instrument, as long as neither violates contract principles. As such, the *Rachal* court's proclamation that "a trust is not a contract,"[204] is beside the point. A trust need not *be* a contract for an arbitration provision contained in it to be enforceable. Contract principles are a framework for the court's analysis of arbitration agreements, not a test of their enforceability.[205]

That trusts are interpreted using contract principles, just like arbitration agreements and traditional contracts, indicates that the distinction between trusts and contracts, enunciated by the *Schoneberger* and *Rachal* opinions, is not dispositive. As the *Rachal* dissent noted, in Texas, contract principles are used to verify that arbitration agreements do not *violate* traditional contract rules, not to require that they *satisfy* contract rules.[206] This shared relationship to contract law indicates that arbitration's "foundation in contract law" cannot justify finding arbitration agreements and trusts instruments incompatible.

D. Importance of the Settlor's Intent

In focusing on the differences between a trust and a contract, the *Rachal* majority did not consider the foundational principle of trust law that courts should endeavor to uphold a settlor's unambiguous intent.[207].

The *Rachal* court followed Texas precedent by analyzing the arbitration provision using contract principles. However, it failed to interpret the trust instrument according to these same principles. As a result, the court abandoned its primary responsibility when construing both trust instruments and contracts, namely, to enforce the settlor's intent.[208] Had the court analyzed the trust using contract law principles, as Texas case law dictates,[209] the court may have found that the trust was an enforceable, written agreement. In failing to consider the importance of drafter intent in analyzing both contracts and trusts, the court did not properly employ Texas common law contract principles of interpretation. Thus, in choosing not to uphold the settlor's unambiguous intent that any disputes arising out of the trust be arbitrated, the *Rachal* court not only disregarded the primary responsibility of courts when interpreting both trusts and contracts, but also failed to follow Texas common law precedent.

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204. *Rachal*, 347 S.W.3d at 310.

205. Horton, *supra* note 35, at 1049-51.

206. *Rachal*, 347 S.W.3d at 313 (citing *Lesikar*, 237 S.W.3d at 366) (emphasis added).

207. *Id.* at 313; *see also* Murphy, *supra* note 41, at 652–57.

208. Lesikar v. Moon, 237 S.W.3d 361, 366-67 (Tex. App. 2007) ("The court interprets trust instruments as it does contracts. Goldin v. Bartholow, 166 F.3d 710, 715 (5th Cir. 1999). [As such,] the court's primary objective in construing a will or a trust is to determine the intent of the maker. Hurley v. Moody Nat'l Bank of Galveston, 98 S.W.3d 307, 310 (Tex. App. 2003, no pet.). . . . To determine the maker's intent, we are limited to the four corners of the trust instrument. Eckels v. Davis, 111 S.W.3d 687, 694 (Tex. App. 2003).").

209. *Rachal*, 347 S.W.3d at 312–13.

E. Rachal v. Reitz: Looking Ahead

Following the Texas Court of Appeals' decision in *Rachal v. Reitz*, petitioner Hal Rachal filed a petition for review with the Supreme Court of Texas on September 9, 2011. On June 8, 2012 the Supreme Court of Texas granted Rachal's petition for review. Oral arguments will be heard on November 7, 2012. With the *Diaz* and *Rachal* opinions pending review,[210] and the *Schoneberger* opinion superseded by statute, it appears that the sentiment motivating state legislatures may have begun to shift judicial opinion. Thus, it is possible that the *Rachal* court was correct in concluding that this issue is best suited to legislative action.

VI. CONCLUSION

The *Rachal* court should have more closely analyzed the language of the TAA, and the relationship between trusts, arbitration agreements, and contract principles under Texas common law. Had the *Rachal* court done so, the arbitration provision in the Trust could have been enforceable, and A.F. Reitz's intent could have been realized. As the *Rachal* court's analysis, and extensive legal commentary reveals, the enforceability of mandatory arbitration provisions in trust instruments may be best resolved by legislative action.

Trust arbitration provisions are enforceable under many current state arbitration statutes, when read broadly to allow for a variety of written agreements. Because both trusts and arbitration agreements are analyzed using contract principles, arbitration's foundation in contract law does not foreclose trust instruments from including enforceable arbitration agreements. The traditional distinction between trusts and contracts ignores the similarities between these legal instruments, and the relationship between trust law and contract principles. Additionally, trust law's focus on effectuating the settlor's intent is similarly found in contract law's desire to uphold the intent of the parties to a contract. Thus, the relationship between trust law, arbitration agreements, and contract law reveals that arbitration agreements and trust instruments are compatible. As such, courts should endeavor to effectuate trust settlors' intent by enforcing arbitration provisions found in valid trusts.

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210. Rachal v. Reitz, 347 S.W.3d 305 (Tex. App. 2011), *review granted* (June 8, 2012); Diaz v. Bukey, 195 Cal. App. 4th 315, 125 Cal. Rptr. 3d 610 (2011), as modified on denial of reh'g (June 8, 2011), *review granted and opinion superseded*, 257 P.3d 1129 (Cal. 2011).