Yearbook on International Arbitration

Volume II

edited by

Marianne Roth
Michael Geistlinger

with the assistance of

Marianne Stegner

Antwerp · Copenhagen · Zurich · Vienna · Graz 2012
Christopher P. KOCH

A tale of two cities! – arbitrating trust disputes and the ICC’s arbitration clause for trust disputes

Abstract
This article examines whether arbitration clauses in trust deeds can be effective, in view of the fact that a trust is not a contractual undertaking but a unilateral act of a person disposing of some or all of his or her assets. Can the beneficiaries of a trust be compelled to arbitrate disputes which might arise under the deed of
trust even though they are not parties to the arbitration clause? After exploring
the general principals involved and some relevant case law as well as certain
legislative developments concerning the arbitration of trust disputes, the article
will examine the ICC arbitration clause trust for trust disputes suggested by the
ICC in the light of the foregoing discussion and also with a view to the new join-
der provisions in the new ICC arbitration rules.

Keywords
Arbitration, arbitration clause, agreement to arbitrate, trust deeds, nature of trust,
trust dispute and arbitration, ICC arbitration clause for trust disputes, joinder of
parties under new 2012 ICC Rules of arbitration

I Introduction

OH, East is East, and West is West, and never the twain shall meet.¹

The often quoted first line of Kipling’s Ballad of East and West tells of an un-
bridgeable gap between East and West. There may be a similar dichotomy be-
tween the world of contract law and that of trusts. While the former implies the
pursuit of competing goals through a common effort regulated by contract, the
latter evokes a world of solitary contemplation of a life beyond death or, in some
cases, beyond the grasp of the national revenue service, as the settlor seeks to
dispose of his/her assets in such a manner as he feels is best, ensuring that the
affairs of the progeny are sometimes regulated well beyond the grave, for years
if not generations to come.

However different these two worlds are, they share the impact of globalization
and, with it, the ever increasing complexity of problems arising between the par-
ties involved. Trusts developed as estate planning tools when assets were held
locally and a trust would be set up under the same law that governed the will and
probate procedures. Settlers, trustees and beneficiaries were likely to be domi-
ciled in the same jurisdiction as the courts that had jurisdiction over the estate.
Today, fortunes tend to be international, with real and movable assets located in
many jurisdictions. Trusts are increasingly used to achieve other than testament-
ary objectives and are set up in offshore trust jurisdictions such as the Baha-
mas, the Cayman Islands, the British Virgin Islands, or, closer to home, the
Channel Islands, while the trust assets may be held in a third country. Upon the
death of a settlor in the U.S., his/her will may be probated there, while the trust
might be subject to the supervision of the Bahamas courts and a trust company,
say in Lichtenstein, will be administering the trust assets held in various coun-
tries. The estate might end up before the courts of three or four jurisdictions. If
one adds the public nature of these proceedings and the threat that internal
family disputes might thus be exposed to the unkind eye of the international

¹ Rudyard Kipling, The Ballad of East and West, A Victorian Anthology, 1837-1895, at
press, it is not difficult to imagine a specter of international judicial entanglements and public exposure that is considerably more horrific than even *Jarndyce v. Jarndyce*.2

To deal with the complexities of resolving disputes in an era of increasingly globalized transactions, international commerce has privatized the adjudication of commercial disputes through arbitration. Arbitration provides a neutral private and confidential forum, where arbitral tribunals chosen by the parties apply tailor-made procedures to arrive at a final and internationally enforceable decision. The huge success of international commercial arbitration is largely due to the success of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards3 as well as to the fact that states throughout the world have enacted arbitration-friendly laws.

It would therefore seem that arbitration might be the ideal means to resolve trust disputes. All disputes arising out of a deed of trust would be heard in the venue as foreseen by the deed. Proceedings would be confidential and hearings held behind the closed doors of conference rooms in first-class hotels, rather than the publicly accessible courtroom of the local court. The dispute would be decided by a panel of arbitrators, chosen by the parties for their experience and skill and any decision rendered by the tribunal at the end of the process would be enforceable throughout the world.

Will an arbitration clause in the deed of trust live up to these promises? Arbitral institutions seem to think so. The American Arbitration Association promulgated Wills and Trusts Arbitration Rules, the latest revision of which is dated June 1, 20094 and, in 2008, the ICC’s Commission on Arbitration published the ICC Arbitration Clause for Trust Disputes along with an Explanatory note.5

The purpose of this study is to examine to what extent an arbitration clause in a trust instrument can fulfill its promise as an efficient and discrete method for dealing with trust disputes. Having examined the challenges that arbitration faces in the world of trusts, we will take a closer look at the ICC’s suggested Arbitration Clause for Trust Disputes and see how it deals with those challenges. We will not concern ourselves with business trusts or trusts set up for a specific purpose (i.e. charitable trusts), but only trusts which are set up to manage all or a part of a settlor’s assets during his/her lifetime and/or after his/her death.

2 Charles Dickens’ account in “Bleak House” of a fictitious trial about a large estate that, after lasting for generations, ended up eating up the entire estate. Two examples of such publicized family litigation that readily come to mind are the Thyssen and Weissfisch cases. While the former pitted father against son in trust litigation in Bermuda concerning control over the Thyssen industrial group generating legal fees in excess of 100 million pounds, the former concerned a dispute between two brothers about the control over the trust holding the assets of their metals trading company.

3 The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards has been ratified or acceded to by 145 states. The full text of the Convention can be found at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html (16 September 2011).


5 Taskforce on Trusts and Arbitration, ICC Arbitration Clause for Trust Disputes, ICC International Court of Arbitration Bulletin, 19 (2008), 9; The Taskforce also published an Explanatory Note, which is reproduced in Annex 1 of this article.
II What is a trust – who is involved?

There is no clear-cut legal definition of the concept of trust. Given the incredible variety of types of trusts one might be tempted to say, like Supreme Court Justice Stevens did in 1964, defining pornography: “I know it when I see it.”

*Black’s Dictionary contains inter alia the following definition of a trust: “Any arrangement whereby property is transferred with the intention that it be administered by a trustee for another’s benefit.”*

Article 2 of the Hague Convention on the Law Applicable to Trusts and on their Recognition (Trust Convention), ratified by Switzerland in 2007, defines the trust as follows:

“Article 2

For the purposes of this Convention, the term “trust” refers to the legal relationships created – inter vivos or on death – by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose. A trust has the following characteristics:

a) the assets constitute a separate fund and are not a part of the trustee’s own estate;

b) title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee;

c) the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law.

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

Finally, the classic definition of a trust is that of Sir Arthur Underhill.

“A trust is an equitable obligation, binding a person (called the trustee) to deal with property owned by him (called the trust property, being distinguished from his private property) for the benefit of persons (called the beneficiaries) of whom he may himself be one, and any of them may enforce the obligation.”

A The actors

From the three definitions above, it becomes apparent that we are dealing with at least three actors, namely the settlor, the trustee and the beneficiary/ies.

---

6 “I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [of hard core pornography]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.” USSC, *Jacobellis v. Ohio*, judgment of 22 June 1964, 378 U.S. 184.


1 The settlor

The settlor is the person who creates the trust by transferring title to his/her property to the trustee and declaring a trust over that property. In the case of a testamentary trust, the settlor will also be the testator. In a living (inter vivos) trust, the Trust Convention expressly foresees that the settlor may also be a beneficiary and/or a trustee.9

2 The trustee

The trustee is the person who receives the property in trust and becomes its legal but not its beneficial owner. Trust property is separate property. According to the Trust Convention, the recognition of a trust in a non-trust jurisdiction “shall imply as a minimum that the trust property constitutes a separate fund ….”10 The trustee has the fiduciary duty and the power to manage or dispose of the assets in his name but in accordance with the deed of trust and the law. Trustees may be physical persons; however, nowadays, more often than not, trusts are administered by professional trust companies acting as trustees.

3 The beneficiary(ies)

The beneficiaries are all those who have equitable property rights in the trust property as defined in the trust deed and to whom the trustee owes a fiduciary duty. They may include the settlor and any person designated by the deed of trust as a recipient of any right to or benefit from the trust. Beneficiaries can be designated by class (“my children”) and may not exist yet when the trust is settled (grandchildren) which makes them unascertained beneficiaries.

4 The protector

Protectors are a relatively recent phenomenon in the world of trusts. Their use is linked with the increasing tendency to establish trusts in offshore jurisdictions such as Bermuda, the BVI, the Bahamas etc. While settlors want to transfer legal title over their assets to an offshore trust they may be apprehensive about turning over unfettered control over sizeable portions of their wealth to distant trustees operating in those offshore jurisdictions. The protector was thus created as a mechanism to assert various degrees of control over the trustee. Protectors’ powers were initially set out in the trust deed but most offshore trust jurisdictions, perceiving a regulatory need, have adopted legislation to regulate protectors to a greater or lesser extent.11 Apart from extensive supervisory powers, protectors may also have the power to appoint or dismiss trustees or to approve or disapprove beneficiaries or distributions to beneficiaries.

9 Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition which was enacted in Switzerland on June 1, 2007.
10 Ibid. at Art. 11.
5 The courts of the trust jurisdiction

Finally, we must not forget the important role that the courts play in connection with trusts. Underhill describes a trust as an “equitable” obligation, thereby indicating that the law of trusts was developed by the English chancery courts (equity courts) rather than by the common law courts. Traditionally, the courts have retained considerable supervisory powers over trust matters. Thus, courts may not only decide internal and external trust disputes but also intervene in the administration of a trust or replace a trustee who is unfit for her office, or appoint one, when necessary.

The courts’ supervisory power also includes the power to issue directions and/or instructions upon the trustee’s request. The possibility of petitioning the court for directions or instructions is a particularly useful way for trustees to protect themselves from liability. Faced with an unclear or unworkable provision in the trust deed or with several alternative courses of action, the trustee may apply to the court for an interpretation of the unclear provision (constructive summons) or for directions on how to exercise her powers (directive summons). The procedures for a trustee to obtain directions or instructions are usually simple, non-contentious ex parte proceedings, which do not involve the beneficiaries.

However, with impending globalization, it appears to be more and more common, particularly in the case of offshore trusts, that trust companies are located where the trust assets are and not where the court having jurisdiction over the trust is situated. Thus, the trustee of a trust subject to Bahamas law may be a Swiss trust company with its seat in Geneva, administering trust assets located in Switzerland and/or various other jurisdictions. Here, the supervisory role of the Bahamas trust court will be less immediate than if the trustee is located in Nassau.

III Nature and typology of trust disputes: Differences between contract and trust disputes

To appreciate whether arbitration can be an effective tool for resolving trust disputes, it may be useful to take a look at some of the qualitative differences between disputes arising in these different worlds.

Looking at what kind of litigants are most likely to be involved in a dispute, we find that in international commercial disputes that are submitted to arbitration, the overwhelming majority of the parties are incorporated legal entities. While trust disputes may involve a corporation as trustee or protector, the settlor and the beneficiaries will always be physical persons. This has an impact on the tone and conduct of proceedings, which in a trust dispute is likely to become much more personal and emotional than one would find in a contract dispute. One observer remarked that the personal dynamics seen in trust litigation are often comparable to what one sees in divorce proceedings. Trust disputes among
members of a family may have their psychological origins in the family history of each of the members, rather than in the actual wording of a trust deed. Thus, personal emotions may drive the process as much as the rational pursuit of a perceived economic right.

Contractual disputes are limited to the persons who are parties to the contract. Privity of contract closely circumscribes the circle of potential parties to any arbitral proceedings arising out of a contractual dispute. The great majority of international commercial disputes involve two parties. Trust disputes, on the other hand, will usually involve more than two parties, without it being possible to determine in advance exactly who those parties will be. If the dispute is internal between the beneficiaries and the trustee, it may also involve a protector, if there is one, as well as rights of unascertained beneficiaries. If the dispute is between beneficiaries, it may involve the trustee because the dispute concerns the construction of the deed of trust. There is thus a much greater uncertainty about who is bound by the arbitration clause and who would be a party in arbitral proceedings than would be the case with a commercial arbitration agreement.

Contractual relationships are ephemeral. They are based on an understanding which is usually entered into by the parties to achieve a specific commercial result. Once this has been done, the relationship ends and the parties can walk away and no longer have any obligations towards each other. While some long-term contracts may foresee a longer lasting cooperation between parties, the relationship will still come to an end when the purpose has been achieved or the parties give up trying to achieve it.

Trusts, on the other hand, are usually set up in a family setting. The bonds between the members of the family are not ephemeral but permanent fixtures in the life of each member. When disputes arise, their resolution needs to take account of the fact that the parties might want to maintain their family ties. Trust instruments reflect the perennial nature of the family of which they seek to regulate the devolution of assets from one generation to the next and sometimes even one or more generation after that. It may thus be possible that the trust assets do not revert to legal ownership of the settlor’s descendants for over a hundred years after the creation of the trust. This temporal element is reflected in the dispute resolution mechanisms preferred by each of these legal worlds. Arbitral tribunals are as ephemeral as the disputes they decide. They are set up when a party decides to bring its claim to

---

14 According to the ICC’s statistics, slightly more than two thirds of the cases filed every year involve only two parties. ICC Court of Arbitration, 2009 Statistical Report, ICC International Court of Arbitration Bulletin, 21 (2010), 5.
16 The common law rule against perpetuities requires that the remainder interest in trust property revert to the legal ownership of beneficiaries within a determined period of time. According to the “Uniform Statutory Rule against Perpetuities” suggested by the U.S. Uniform Law Commission, an interest in trust property must vest within 90 years of the creation of the interest or else it lapses. Thus, if in a generation skipping trust the remainder interest reverts to the grandchildren when they are 40 years of age, the first grandchild must be born within 90 years of the settlor creating the trust. NCCUSL, Uniform Statutory Rule Against Perpetuities (National Conference of Commissioners on Uniform State Laws 1990).
arbitration and end their existence, becoming *functus officio*, once the dispute has been resolved, either by an award or following a settlement. Trust law has been created by the courts and it is the courts that have traditionally dealt with resolving trust disputes. As permanent institutions, the courts will outlast any trust. They can provide a sense of continuity and stability regarding the judicial oversight of the trust, which an arbitral tribunal cannot.

This brings us to the types of disputes that one may find in a trust setting. The court in the English case of *Alsop Wilkinson v Neary* ([1995] 1 All ER 431, Ch D), gave a description of the typology of trust disputes in which trustees might be involved. It distinguished:

A **Trust disputes**

These are “disputes as to the trusts on which [the trustees] hold the subject matter”, and include all disputes which directly affect the trust or its existence. They do not necessarily have to be adversarial, since they also include a trustee’s petition for the Court to interpret the deed of trust or to guide him/her in the execution of his/her duties. This category also includes external disputes in which non-beneficiaries attack the validity of the trust. For example, a creditor’s action to set aside a trust, allegedly set up by a settlor to hide his/her assets from the creditors, would fall under this category, although, in that particular case, the court did not deal with them.

B **Beneficiary or internal disputes**

The second category defined by the Alsop court concerns “... a dispute with one or more of the beneficiaries as to the propriety of any action which the trustees have taken or omitted to take”, a dispute which can be between beneficiaries among each other or with the trustee. A typical example of an internal trust dispute may be a disagreement between trustees and beneficiaries on how the trust is to be administered or demands for an accounting by a beneficiary etc. What is at stake is not the existence of the trust but the individual beneficiaries’ rights to profit from the trust.

C **Third party disputes**

The last category identified in Alsop is the “third party dispute” which is “... a dispute with persons, otherwise than in the capacity of beneficiaries”. This includes all disputes arising out of contracts which the trustee has entered into with third parties, to provide goods and services to the trust, i.e. bankers or investment advisors. We will not be concerned with this type of dispute.

---


A tale of two cities! – arbitrating trust disputes and the ICC’s arbitration clause for trust disputes

IV Questions of arbitrability

Arbitrability concerns the question whether a given type of dispute may legally be referred to arbitration or whether it must remain in the exclusive purview of the state courts or other institutions of the state. Generally, the law of the seat of the arbitration determines what type of dispute is arbitrable. However, the issue can also come up at the enforcement stage, since one of the grounds under the New York Convention permitting a court to refuse enforcement of a foreign arbitral award under Article V.2 (a) is that: “The subject matter of the difference is not capable of settlement by arbitration under the law of that country”. Questions of personal status, such as whether a person is married, competent, or a legal heir are usually not arbitrable.

On the other hand, in commercial arbitration, there is very little that is not arbitrable these days. Arbitration-friendly statutes have defined what is arbitrable in the broadest way. Thus, Switzerland, Germany and Austria consider that any dispute involving a financial or economic interest is arbitrable. 20 Other jurisdictions have defined arbitrability in terms of the rights which the parties can freely dispose of. 21 However, in the more personal world of trust disputes, issues of personal status i.e. marital status, filiation or mental capacity as well as the protection of minors, incapacitated or unascertained beneficiaries are likely to come up, which are not monetary or economic in nature and may raise questions about whether such issues may be decided by private adjudication. In re Trust of Fellman, a Pennsylvania court found that the question whether the settlor was competent to revoke the trust was not arbitrable. 22 The Court’s rationale was that, since interdiction was so invasive of an individual’s human rights, it could only be pronounced after a full hearing guaranteeing all constitutional safeguards, which were not present in arbitration. 23 While the court’s reasoning may not be utterly convincing, it does reflect that the bench looks at probate disputes differently than at contract disputes. As a consequence, the AAA’s model arbitration clause for Wills and Trusts expressly removes questions of competency from the scope of the clause. 24

20 Art. 177 Swiss PILA; para. 1030 German ZPO; para. 582 Austrian ZPO.
21 This is the case in France: Art. 2059 CC; Italy: Art. 806 CPC and Art. 1966 CC; in the Netherlands: Art. 1020 para. 3 CPC; Sweden: Art. 1 Arbitration Act; Spain: Art. 2 Arbitration Act.
23 Ibid. at p. 583.
24 AAA, Standard Arbitration Clause

In 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 sub-
There are, however, more issues arising in the context of probate proceedings which might impinge on the resolution of a trust dispute, with regard to which most countries would consider that only state courts are competent to act. These would be, among others:

– measures protecting the estate or its creditors
– probation of the will
– issuing certificates of heirship
– receipt of heirs’ declarations of acceptance or rejection of the estate. 25

Article 15 of the Trust Convention contains a catalogue of legal areas where a signatory state may disregard the provisions of a trust because they are contrary to mandatory rules of law, relating in particular to:

– the protection of the rights of minor and incapacitated parties;
– the personal and proprietary effects of marriage;
– succession rights, testate and intestate, especially the indefeasible shares (forced heirship) of spouses and relatives;
– the transfer of title on property and security interests in such property;
– the protection of creditors in insolvency matters;
– the protection, in other respects, of third parties acting in good faith.

V Is an arbitration clause in a trust deed enforceable?

The bedrock and foundation of arbitration as an alternative method of resolving disputes is the agreement to arbitrate. That agreement has the effect of removing any dispute arising out of the act it is contained in from the purview of the courts which would normally have jurisdiction over the parties. Without being able to establish that there was an agreement to arbitrate it is not possible to compel a reluctant party to settle its disputes in the alternative venue of arbitral jurisdiction.

For there to be an agreement there must be offer and acceptance, which implies that at least two parties were involved in making the deal. If we look at the essential elements in Underhill/Haytons’ definition of trust, cited above and reproduced here for ease of reference:

“A trust is an equitable obligation, binding a person (called the trustee) to deal with property owned by him (called the trust property, […] The settlor

of property is the person who creates a trust of that particular property, whether, as normal, by transferring [...] title to that property to the trustee and declaring trusts thereof or, exceptionally, by retaining certain property over which he declares trusts of which he is to be trustee" 

or the relevant part of the Trust Convention’s definition of a Trust, according to which "[...] the term ‘trust’ refers to the legal relationships created [...] by a person, the settlor [...]", we find that the trust is not created by offer and acceptance but by a unilateral transfer of property by the settlor. Underhill/Hayton require also that there be a declaration of trust by the settlor. Both transfer and declaration are unilateral acts and once they have been made the trust exists. The trust is, therefore, not a contract and not even the trustee’s legal relationship with the settlor is considered contractual, even though the trustee will be paid for his/her services and will sign the trust deed as it is stated by the Restatement (second) of Trusts of 1959.

"A trustee who fails to perform his duties … is not liable to the beneficiary for breach of contract … The creation of a trust is conceived as a conveyance of the beneficial interest in the trust property rather than as a contract. … Further, the trustee by accepting the trust and agreeing to perform his duties … does not make a contract to perform the trust enforceable in an action at law."26

If the deed of trust is not a contract then neither the trustee nor the beneficiary are parties to a contract, which means that the arbitration provision contained in a trust deed is not an agreement to arbitrate as required by the New York Convention or by national arbitration laws.

Given the urgent need to find a contractual basis for the undertaking to arbitrate, proponents of trust arbitration have advanced several theories to allow a court to conclude that there was indeed an enforceable “agreement to arbitrate” and not merely an obligation to arbitrate imposed by a third party.

In a dispute between settlor and trustee, a contractual approach is feasible. Before taking on the duties of trustee, the latter will have negotiated his/her fees and the parties may have discussed the extent to which the trustee could exclude liability as well as other conditions under which he/she would perform his/her services. There is thus ample evidence of offer and acceptance and there is the trustee’s signature on the deed of trust by which he/she agrees to his/her fiduciary obligations and to the undertaking to arbitrate any disputes arising under the deed of trust.27 This analysis supposes that it would be possible to separate the individual relationships created by a deed of trust and deal with the settler-trustee relationship differently than with the trustee-beneficiary or the legal relationship between beneficiaries.

However, most testamentary trust disputes will not involve the settlor but rather the trustee and the beneficiaries or concern disagreements among beneficiaries. Here it is harder to find a contractual basis for arbitration as the beneficiaries will not have been parties to the creation of the trust or have agreed to the

---

dispute resolution clause in any shape or form; in particular, they will not have
signed the deed and thus be considered to have “agreed to arbitration.” 28
This, however, has not deterred the proponents of arbitrating trust disputes.
They argue that the difficulty can be overcome by drafting the arbitration clause
of the deed of trust in such a way as to make it into a contractual undertaking.
Accepting to receive rights and benefits from the trust also means accepting any
terms and conditions set out by the trust so as to be able to enjoy those rights
and benefits.

“A beneficiary takes what he takes under the trust purely by the bounty of
the settlor; he is not entitled to anything as of right apart from the provi-
sions of the trust; he must take the benefits subject to the conditions which
are in the trust and abide by them.” 29
Thus, according to the theory of “deemed acquiescence”, by accepting the
settlor’s bounty the beneficiary is deemed to have also accepted the conditions
under which the settlor is willing to have the beneficiaries profit from his/her
bounty, which includes the agreement to arbitrate.

Cohen and Staff as well as David Hayton find additional support for this ap-
proach in section 82.2 of the 1996 English Arbitration Act, which includes as
party to an arbitration agreement “any person claiming under or through a party
to the agreement.” 30 Since any rights that beneficiaries could claim derive from
the settlor’s trust they would be claiming under or through the settlor, and would
thus be bound by the settlor’s agreement to arbitrate. The theory is elegant but
suffers, in my view, from circularity. Section 82.2 requires that the person under
or through whom a claim is made (the settlor) “be a party to the [arbitration]
agreement”. However, if the arbitration provision in the trust is not considered an
agreement because there is no counterparty, the settlor is not a party to an
agreement to arbitrate.

A Judicial recognition of arbitration clauses in trust
instruments
The dearth of cases involving the arbitration of trust disputes is probably a sign
that the world of trusts and estates is not yet ready to embrace the world of con-
tracts. One Swiss and four American cases do not provide a vast body of prece-
dent that would be indicative of how the judiciary sees the issue. However, both
the Swiss judges and their American counterparts considered that an arbitration
clause in a trust was no enforceable agreement to arbitrate.

The Swiss case decided by courts of the Canton of Basel Town involved a
Lichtenstein trust (Treuhandshaft). One of the beneficiaries sued the trustees

and a Comparative Perspective InDret - Revista Para el Análisis del Derecho, p. 10
at http://www.raco.cat/index.php/InDret/article/viewFile/124284/172257 (16 Septem-
ber 2011).
29  Lawrence Cohen/Marcus Staff, The Arbitration of Trust Disputes, Journal of
International Trust and Corporate Planning, 7 (1999), 221.
30  David Hayton, Problems in Attaining Binding Determination of Trust Issues by
Alternative Dispute Resolution, The International Academy of Estate Trust & Law
A tale of two cities! – arbitrating trust disputes and the ICC’s arbitration clause for trust disputes

for restitution of the trust property, consisting of a house in the south of France, after the trust had been dissolved by the trustees. The suit was brought in Basel because the one share representing the trust property was deposited there. The defendant trustees argued that the Basel court had no jurisdiction because the trust deed contained an arbitration clause.31 The Court of first instance accepted jurisdiction on the basis that the arbitration clause in the trust deed was not an agreement to arbitrate as the trust deed was not a contract. The Court of Appeals confirmed the lower court’s ruling on that point stating, *inter alia*:

“The 1st instance correctly found that, as a potential beneficiary of the trust, the appellant is not a party to the trust agreement (Treuhandvertrag). Also, there is no written arbitration agreement as required by the New York Convention, according to which the contract or the arbitration clause must be signed or contained in an exchange of correspondence or telegrams.”32

Turning now to the U.S. cases, in *Schoneberger v. Oelze*, the Arizona Court of Appeals found that mandatory arbitration clauses in two inter vivos trusts were not binding on the beneficiaries “because such a trust is not a ‘written contract’ requiring arbitration.”33 The beneficiaries sued the trustees in court for breach of trust, conversion, fraudulent concealment, mismanagement and dissipation of assets. The trustees moved to dismiss the suit and to compel arbitration on the basis of the arbitration agreements contained in the deeds of trust. In support of their motion the defendants argued:

– the arbitration provisions in the trust deeds constituted “provisions in a written contract”;
– that although the beneficiaries were not signatories of the trusts they were obligated to arbitrate as “third party beneficiaries”, as they could not demand the benefits of the trusts without accepting its terms;
– alternatively, the beneficiaries were equitably estopped from objecting to arbitration because they were seeking benefits under the trusts.
– Since Arizona trust law allowed trustees to enter arbitration agreements, such agreements in trust were valid.
– The settlor was free to impose conditions on the beneficiaries.

The Schoneberger court reviewed the fundamental difference between a contract and a trust. Quoting an earlier case, it stated:

“We explained [in Naarden] that a beneficiary of a trust receives a beneficial interest in trust property while the beneficiary of a contract gains a personal claim against the promissor.”34

31 BJM 2007, 28, (Basel Court of Appeals)
32 Arbitral jurisdiction was also denied on the basis of the 1968 Treaty between Liechtenstein and Switzerland concerning the recognition of civil judgments and arbitral awards. The treaty requires that choice of forum and arbitration clauses involving individual persons be notarized which was not the case here. The decision was affirmed by the Swiss Supreme Court in SCD 4C.94/2005, judgment of 14 September 2005.
33 *Schoneberger v. Oelze*, p. 2
34 Ibid. at p. 10 § 19.
According to the Arizona Court of Appeals, the 3rd party beneficiary and estoppel theory failed because “Under either theory, [...], defendants face a fundamental problem that defeats their demand for arbitration: section 12-1501 required defendant to prove the existence of a provision in a written contract to submit to arbitration.” 35 The arbitration provision in the deeds did not qualify as such. The court then went on to state:

“Arbitration rests on an exchange of promises … In contrast, a trust does not rest in an exchange of promises, a trust merely requires a trustor to transfer a beneficial interest in property to a trustee, who under the trust instrument, relevant statutes, common law, holds the interest for the beneficiary.”

The fact that Arizona law contained a provision that allowed the trustee to consent to arbitration did not support the motion to compel arbitration either. This section of the probate code deals with the trustee’s capacity to enter into arbitration agreements with third parties, it does not address internal disputes between beneficiaries and trustee. Concerning the argument that a settlor was free to impose the conditions upon which a beneficiary could benefit from the trust, the court had this to say:

“A trustor’s right to reserve power over trust administration matters is not, however, absolute and a trustor of an inter vivos trust may not unilaterally strip trust beneficiaries of their right to access the courts absent their agreement. Although it is commonly said that the law favors arbitration, it is more accurate to say that the law favors arbitration of disputes that the parties have agreed to arbitrate.”

The second U.S. case In re Mary Calomiris was decided by the District of Columbia Court of Appeals in 2006. 36 The D.C. Court of Appeals substantially adopted the Arizona court’s analysis. In litigation between trustees, one of the parties requested a summary judgment dismissing the case for lack of jurisdiction because the will setting up the trust contained an arbitration clause. The trial court dismissed the request with an order. The D.C. Court of Appeals had to decide whether the order dismissing the motion was appealable or not. If the request for summary judgment was qualified as a motion to compel arbitration, it was appealable, otherwise it was not.

An application to compel arbitration must, under the Uniform Arbitration Act applicable in the District of Columbia, show “[…] a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties”. In examining whether the arbitration clause before it was contained in a written contract, the D.C. Court of Appeals adopted the Schoneberger court’s reasoning.

“The Arizona court explained that arbitration is a creature of contract law … and an inter vivos trust is not a contract. […] Our case is slightly different because the arbitration provision is contained in a will not the trust instrument. This distinction makes no difference, however, because a will is no contract either. [...]”

35  Ibid. at p. 11 § 20.
36  District of Columbia Court of Appeals, In re Mary Calomiris, judgment of 2 March 2006, 894 A 2d 408.
In a recent California case, *Diaz v. Bukey*, the California Court of Appeals refused the trustee’s motion to compel arbitration. The beneficiary had sued her sister as trustee of the Diaz family trust for an accounting of the trust assets. The trust deed contained an arbitration clause referring *inter alia* to the AAA arbitration rules. Bukey sought to compel arbitration but the probate court refused the motion for want of an arbitration agreement. The California Court of Appeals affirmed the ruling. It noted that, under California law, there had to be a written arbitration agreement for the trustee to be able to compel the beneficiary to arbitration. Extensively quoting the Schoneberger decision, the California Court of Appeals also found that an arbitration provision in a testamentary trust deed does not amount to an agreement to arbitrate.

Interestingly, the reasoning of the Swiss court is not so far removed from that of their American counterparts. Apart from the difference that under Lichtenstein law the deed of trust is qualified as an agreement, it still does not include the beneficiaries as parties. What we find in all of these cases seems a judicial recognition that trusts and arbitration are incompatible. Particularly the Schoneberger and Diaz courts very firmly resisted any attempt to "contractify" the trust deeds and to recognize the arbitration provision in the deed as a contractual undertaking.

In *Lo vs. Aetna International Inc.*, a Federal District Court had to decide whether an arbitration clause in a deed of trust subject to Hong Kong law was an agreement to arbitrate under the New York Convention and whether the plaintiff should be compelled to arbitrate her claim in Hong Kong. Ms. Tien Lo worked for Aetna International in Hong Kong. The company set up a retirement plan for its employees in the form of a trust of which Ms. Lo was one of the original trustees as well as beneficiary. Several years later after her retirement because of illness, she sued Aetna in a federal court for an alleged shortfall of the incapacity benefits that Aetna was proposing to pay her. Aetna sought to compel arbitration in Hong Kong arguing that, since Ms. Lo had signed the deed of trust, she was bound by the arbitration clause in it. The district court found:

"Aetna cites no Hong Kong authority (3) for its assertion that by signing in her capacity as Trustee, she legally bound her[self] and all other benefi-
ciaries to arbitration. In the absence of any legal authority, the Court de-
clines to conclude that Ms. Lo’s signature as Trustee reflected her agree-
ment to arbitrate this dispute."

Unlike all other cases, here the beneficiary had signed the deed and even that was not enough to establish a contractual obligation to arbitrate disputes, because she had not signed as beneficiary but as trustee.
B Problems under the New York Convention

As I have mentioned before, the New York Convention has been one of the factors that have contributed to the success of international commercial arbitration. It has created an international regime for enforcement of awards which makes it easier to enforce an arbitral award internationally than a national court judgment.

Article V of the Convention sets out the reason for which a court may refuse the enforcement of a foreign award. In particular Article V.1 (a) states:

“1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made”

Article V operates under the assumption that there is an arbitration agreement between the parties. An award issued on the basis of an arbitration clause in a deed of trust might, therefore, not be enforced under the New York Convention, because the arbitration clause may not be considered as an agreement under the law of the enforcement court, even though at the place of arbitration the clause was considered a sufficient basis for a tribunal to assume arbitral jurisdiction. In that case a losing party might try to raise the issue of there not being an “agreement” to arbitrate before the enforcement court.

A second hurdle might arise with regard to the arbitrability of the issues decided in the award, as Article V.II (a) provides that recognition and enforcement can be refused if “the subject matter of the difference is not capable of settlement by arbitration under the law of that country [where enforcement is sought]”. Here again, what is arbitrable in the place where the arbitration is conducted and the award is issued might not be at the place where enforcement of that award is sought.

To avoid ‘foreign’ enforcement problems as much as possible, it might be best for settlors to select as place of arbitration the jurisdiction where an award is most likely going to be enforced, which is likely to be the jurisdiction where the trust is administered and which, ideally, would also be the jurisdiction where a sizeable portion if not most of the trust assets are located.

C Legislative support of arbitration in trust disputes

Since the formal and material requirements which an arbitration clause must satisfy to be considered a valid agreement to arbitrate are usually defined in the national arbitration statutes of the place where the arbitration is to take place, it will take legislative action to change those requirements in order to allow unilateral declarations to create a binding obligation to arbitrate on beneficiaries of wills and trusts.40

There is movement in this direction. Increasingly the scope of issues that can be submitted to arbitration is being extended by legislative action. In both civil and common law jurisdictions probate matters are increasingly being considered arbitrable. § 1066 of the German Code of Civil Procedure provides:

“Arbitral tribunals not established by agreement
The provisions of this Book apply mutatis mutandis to arbitral tribunals established lawfully by disposition on death or other dispositions not based on an agreement.”

This rule predates the adoption by Germany of the model arbitration law in 1998. While German arbitration law accepts that a binding obligation to arbitrate may result from a unilateral declaration such as a will or the bylaws of a corporation, the recognition of such arbitral tribunals is subject to the requirement that they be “lawfully” established i.e. that the subject matter be arbitrable.41

The tension between private adjudication and the inherent supervisory powers of the German probate courts is demonstrated in a 2009 case which was decided by the Higher Regional Court in Karlsruhe.42 A testator had stipulated that any disputes arising out of her will, including the revocation of the executor of the estate be decided by an arbitral tribunal. Paragraph 2227 BGB (German Civil Code) allows an heir to petition the probate court to have an executor removed in certain cases. An heir tried to have the testator removed by the probate court of first instance which declined jurisdiction in favor of arbitration. The Karlsruhe Superior Court found that Article 1066 had to be interpreted by weighing the testator’s freedom to dispose of her estate against the protection that probate law afforded heirs. The heirs’ right to petition the probate court for removal was one of the only protections that heirs had against an executor of an estate. The testator could not remove that protection by mandating arbitration. The issue was therefore beyond the testator’s powers and, hence, not arbitrable.43

Therefore, in Germany, an arbitration clause in testamentary trust is enforceable only to the extent that the trust deals with assets that the testator could freely dispose of. If a will were to set up a generation-skipping trust, giving the direct descendants only a life interest in the income of the estate, any of the settlor’s legal heirs could petition the probate court to ensure that full property of his/her forced heirship share be transferred to them regardless of whether there was an arbitration clause governing the trust. Similarly, if the validity of the will establishing the trust was at issue, the beneficiary challenging the will would probably not be bound by an arbitration clause in the deed. An arbitration clause in a deed for a testamentary trust would thus be enforceable in Germany to the extent that the trust deals with issues and assets of the estate of which the testa-

42  OLG Karlsruhe, decision of 28 July 2009, Az. 11 Wx 94/07.
tor could freely dispose i.e. those assets over which no heirs can claim forced or legal heirship rights.

In Spain, Article 10 of the Arbitration Act foresees that a testator may compel those benefitting from the will to arbitrate differences resulting from the distribution or administration of the estate.

“Testamentary Arbitration.

Arbitration may be validly provided for in a testamentary disposition to resolve disputes between beneficiaries or legatees in matters relating to the distribution or administration of the estate.”

Presumably, an arbitration clause in a trust deed would be enforceable as long as the dispute fell within “the distribution or administration of the estate.” Following the Spanish example, Bolivia, Honduras and Peru have adopted legislation which, to varying degrees, allows the arbitration of testamentary disputes. However, these are civil law jurisdictions which have not incorporated trusts into their legal system so that it is difficult to gauge how an arbitration clause in a trust deed would fare.

Malta, however, is a civil law jurisdiction which has incorporated trusts into its legal system and has specifically provided for the arbitration of trust disputes in its arbitration law. Article 15 of the Malta Arbitration Act states:

“[It shall be lawful for a settlor of a trust to insert an arbitration clause in a deed of trust and such clause shall be binding on all trustees, protectors and any beneficiaries under the trust in relation to matters arising under or in relation to the trust.”

In the U.S., only Florida and the State of Washington have adopted legislation explicitly validating arbitration agreements in trusts and wills. The Florida statute is similar to that of Malta, except that issues concerning the validity of the will or trust or a part thereof are deemed inarbitrable.

Washington adopted the Trust and Estate Dispute Resolution Act (TEDRA) in 2000, which contains an interesting but not internationally applicable approach to arbitrating trust disputes. TEDRA does not deal with arbitration clauses contained in the trust deed, but creates an ADR system that applies to all probate


46 Trust and Estate Dispute Resolution Act TEDRA (RCW) amend. 11.96A see also Bridget A. Logstrom, Arbitration in Estate and Trust Disputes: Friend or Foe?, ACTEC Journal, 30 (2005), 266 at http://www.dorsey.com/files/Publication/0b9c1fd8-7f17-4756-9526-77a039618043/Presentation/PublicationAttachment/e0c42625b-184c-4260-a0d1-7278b1ff76f8/ACTECJournalSpring05ArbitrationFriendOrFoe.pdf (16 September 2011).
and trust matters and is designed for getting cases out of the courts and into ADR. Thus, any party to a trust or probate dispute may, by filing a Notice of Mediation, require that the dispute be mediated. If the dispute is not settled, a party may, by a Notice of Arbitration, compel arbitration, even though there is no arbitration agreement. An award can be appealed to the Superior court within 30 days of being issued. In that case the superior court will hear the case de novo.47

The most complete and thorough statutory response to the perceived need to render arbitration agreements enforceable in trust instruments I found in the Guernsey Trust Act which in Section 63 deals not only with the enforceability of the arbitration provision but also with the effect of an award on beneficiaries who were not parties to the arbitration as well as the representation of minor and incapacitated or unascertained beneficiaries.48

“63 Settlement of action against trustee by alternative dispute resolution to be binding on beneficiaries.

(1) Where –
(a) the terms of a trust direct or authorise, or the Court so orders, that any claim against a trustee founded on breach of trust may be referred to alternative dispute resolution (“ADR”),
(b) such a claim arises and, in accordance with the terms of the trust or the Court’s order, is referred to ADR, and
(c) the ADR results in a settlement of the claim which is recorded in a document signed by or on behalf of all parties, the settlement is binding on all beneficiaries of the trust, whether or not yet ascertained or in existence, and whether or not minors or persons under legal disability.

(2) Subsection (1) applies in respect of a beneficiary only if -
(a) he was represented in the ADR proceedings (whether personally, or by his guardian, or as the member of a class, or otherwise), or
(b) if not so represented, he had notice of the ADR proceedings and a reasonable opportunity of being heard, and only if, in the case of a beneficiary who is not yet ascertained or in existence, or who is a minor or person under legal disability, the person conducting the ADR proceedings certifies that he was independently represented by a person appointed for the purpose by a court of law.

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

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

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

(5) In this section -
“ADR” includes conciliation, mediation, early neutral evaluation, adjudication, expert determination and arbitration, and “proceedings” includes oral and written proceedings.”

47 TEDRA 11.96A.310.
48 Section 63, Projet de Loi, The Trusts (Guernsey) Law 2007.
VI Minor, incapacitated and non-ascertained beneficiaries

Family trusts that regulate the devolution of family assets for one or two generations will invariably, at one point or another, involve the interests of minor and, perhaps, incapacitated beneficiaries and, if the trust creates future interests for beneficiaries who do not exist yet, there will also be the interests of the unascertained beneficiaries to take into consideration.

In England, Part 21 of the Civil Procedure Rules requires that a minor or incapacitated party have a “litigation friend” either appointed by the court or otherwise. No proceedings may continue beyond filing the claim form until this has happened and no settlement may be entered into that has not been approved by the Court. Similarly, Section 305 of the Uniform Trust Code allows the court to appoint a representative for minor or incapacitated beneficiaries if no other form of representation is possible (parental representation, representation by a member of class with substantially similar interests) because of a conflict of interest.

Ensuring that the interests of minor and incapacitated beneficiaries are adequately represented and protected in adversarial proceedings is a major policy concern of all jurisdictions. The jurisdiction most concerned with the protection will usually be the one where the minor or incapacitated person lives and not the one regulating the trust.

How can these policy concerns be addressed in arbitration? Should it be for the arbitral tribunal to take over the rule of the state court and ensure that the rights of minors and incapable persons are adequately protected in proceedings before it? As a private adjudicator, the arbitral tribunal can only decide the disputes which the parties have submitted to it. Thus, it would not have the power, ex officio, to decide that a certain beneficiary needed a “litigation friend” or that a class of beneficiaries needed to be represented or protected.

Even if the trust instrument gave the tribunal powers to protect the interests of minors, incapacitated and unascertained beneficiaries, exercising those powers may be problematic for the arbitrators. If a tribunal came to the conclusion that there was a conflict of interest between parents and children and it ordered that the children be provided with a “litigation friend” or independent representation, the tribunal might be perceived to have prejudged the dispute having lost its impartiality in regard to the parents. Moreover, would the tribunal have the power to appoint such a litigation friend or would it turn to the courts? In the latter case, which ones, those of the seat of the arbitration or those at the domicile of the beneficiary who needs protection?

The 2007 Guernsey Trust Law deals with these concerns as follows:

Section 63(1)(c) sets out the general principle that the results of ADR proceedings, which settle the dispute and are recorded in writing and are either signed by the parties or on behalf of the parties, are binding on all beneficiaries of the trust, whether or not yet ascertained or in existence, and whether or not minors or persons under legal disability. An award is the result of an ADR proceeding which settles the dispute and is reduced to a document signed by the arbitrators on behalf of the parties. According to the general principle, the assumption will be that this award is binding on all beneficiaries present or future, whether they participated in the proceedings or not.
That general principle is qualified in section two. The beneficiary will not be bound if he was not
– present as a party personally or through a guardian
– represented as a member of a class or otherwise
– was not on notice of the proceedings and did not have a reasonable opportunity to be heard.

Unascertained, minor and legally disabled beneficiaries will only be bound by an award if the arbitral tribunal certifies
– that such a beneficiary was independently represented (not as member of a class). This implies that there must be a litigation friend or someone able to ensure the interests of unascertained beneficiaries and that all known minor or legally disabled beneficiaries are independently represented
– that the representative was appointed by a court of law.

It will be for the parties to the arbitration to ensure that the various classes of beneficial interests are adequately represented. The arbitral tribunal’s only duty is to certify that the minor, incapacitated or unascertained beneficiary was a party to the arbitration and represented by someone appointed by a court of law. Apart from verifying this fact, the arbitrators are not responsible for ensuring the adequacy of the representation.

VII The ICC arbitration clause for trust disputes

In 2006, the ICC’s Commission on Arbitration decided to set up a taskforce to examine the issues which arose in trust arbitrations and, if it thought it appropriate, to suggest a standard arbitration clause for trust disputes. The taskforce concluded that the then valid ICC Arbitration Rules (1998 version) were flexible enough to accommodate the particularities of trust arbitration. It suggested the following “ICC Clause for Trust Disputes”, which was approved by the Commission and published in the Bulletin of the Court in 2008.

“All 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.

49 The taskforce was jointly chaired by Alexis Mourre and Bruno Boesch. The author was one of its members.
50 Taskforce on Trusts and Arbitration, ICC Arbitration Clause for Trust Disputes, ICC International Court of Arbitration Bulletin, 19 (2008), 9; The taskforce also published an Explanatory Note, which is reproduced in Annex 1 of this article.
As a condition for claiming, being entitled to or receiving any benefit, interest or right under the trust, any person shall be bound by the provisions of this arbitration clause and shall be deemed to have agreed to settle all disputes arising out of or in connection with the trust in accordance with this arbitration clause.

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

For the ICC, whose standard arbitration clause is 39 words, to propose this 400 word behemoth, is in itself indicative of the problems it perceived when contemplating arbitrating trust disputes under its rules.

Since the ICC is in the process of adopting a whole new set of arbitration rules which should be approved and implemented this year, hereinafter referred to as the “2011 Rules” it will be interesting to examine whether this model arbitration clause is compatible with the new rules.

A The agreement to arbitrate

The taskforce’s approach was to clearly formulate the contractual basis upon which all actors in a trust relationship agree to the arbitration agreement contained in the trust deed.

While the first paragraph contains the standard ICC arbitration clause, the second deals with the relationship between settlor and all those obliged to act under the trust, i.e. trustee and protectors and their successors. As stated above, even though the traditional view does not regard the settlor–trustee relationship as a contract, there are, nevertheless, numerous contractual elements that support a contractual analysis of that relationship. The proposed clause highlights the contractual element by having the settlor expressly agree to the arbitration provision in the trust deed. The trustee and the protectors and their successors agree to the terms of the arbitration clause either expressly, by their agreement to act under the trust, i.e. by signing the deed or are deemed to have agreed to the arbitration provision by acting under the trust as will be the case with successors who may not sign the deed again. Paragraph two thus establishes the “agreement to arbitrate” between settlor and trustee and protectors.
The third paragraph establishes the agreement with the beneficiaries. They, as a rule, will not have been involved in setting up the trust and it is harder to construe a contractual basis for their agreement to arbitrate. The ICC’s suggested clause seeks to contractually bind beneficiaries to the agreement to arbitrate by the theory of deemed acquiescence. As a condition for being able to claim any rights or benefits under the trust, a beneficiary must accept to settle any dispute arising out of the trust by arbitration as stipulated in the clause. By clearly articulating the basis on which a beneficiary is deemed to have agreed to arbitrate under the ICC rules, this clause seeks to leave no doubt as to the contractual nature of the arbitration agreement. The ICC’s use of “deemed acceptance” to establish arbitral jurisdiction in trust disputes is very similar to the statutory method suggested by the Uniform Trust Code for States to establish jurisdiction of their trust courts over trustees and beneficiaries.51

However, is it possible to create a contract (limited to the arbitration clause) within a document which is, by its nature, not a contract? The theory of separability of the arbitration clause may be of some succor here. It is internationally settled practice that the agreement to arbitrate is a legally separate undertaking from the contract it is contained in.52 If the arbitration agreement is legally distinct and separately enforceable from the contract containing it, it should also be possible for the arbitration clause to be formulated as a contractual undertaking even though the trust deed which contains it is not a contract.

B Joinder provisions

The true innovation and one may even say daring, comes in the hefty last paragraph of the suggested arbitration clause which deals with the joinder of new parties to an on-going arbitration.

The clause sets up a system by which a person may at any time request to become a party to an existing trust arbitration and an existing party may at any

Section 202. Jurisdiction over Trustee and Beneficiary.
(a) By accepting the trusteeship of a trust having its principal place of administration in this State or by moving the principal place of administration to this State, the trustee submits personally to the jurisdiction of the courts of this State regarding any matter involving the trust.
(b) With respect to their interests in the trust, the beneficiaries of a trust having its principal place of administration in this State are subject to the jurisdiction of the courts of this State regarding any matter involving the trust. By accepting a distribution from such a trust, the recipient submits personally to the jurisdiction of the courts of this State regarding any matter involving the trust.
(c) [...]  

52 The principle that the arbitration agreement is a separate agreement from the underlying contract is fundamental to preserving arbitral jurisdiction when the validity of the contract is contested. It is recognized in arbitration rules, cf. Art. 6.4 ICC Rules, as well as in national arbitration laws, cf. Art. 178.3 SPILA; Art. 16.1 UNCITRAL Model Law, which forms the basis of many national arbitration acts, among others, Spain and Germany. In the US, the doctrine was established in the landmark case of the US Supreme Court, Prima Paint Corp. v. Flood & Conklin Mfg. Co., judgment of 12 June 1967, 388 U.S. 395.
time request that another person be joined. The ICC Court will, on a prima facie basis, decide whether there is a basis for joining the new party. If it is satisfied that there is such a basis, any objection to the joinder will be dealt with by the arbitral tribunal.

The taskforce was grappling with the problem of how to ensure that arbitral proceedings involving beneficiaries’ rights were as inclusive as possible. When a probate court hands down a judgment against one beneficiary, that decision may, as a matter of law, be binding and become res judicata for all other beneficiaries of that class or all beneficiaries with substantially identical interests in respect of the decided issue. By contrast, an arbitral award binds only those who were parties in the arbitration. The joinder provisions are thus intended to keep the procedural door open as long as possible so as to allow into the proceedings the greatest number of potentially interested beneficiaries.

The currently operative version of the ICC rules of 1998 (1998 Rules) contains no provision on joining parties to an existing arbitration. While the International Court of Arbitration of the ICC (ICC Court) was traditionally very restrictive on allowing the joinder of parties, it began accepting joinder requests if the following conditions were met:

– the new party is a signatory of the arbitration agreement that is the basis for the existing arbitration;
– the party requesting the joinder has a claim against the new party;
– the joinder is requested before the ICC has started to set up the arbitral tribunal, i.e. has confirmed or appointed any arbitrators.

The 2011 Rules will contain provisions dealing with joining new parties to an existing arbitration. At the time of writing this article, the text of the 2011 Rules is still confidential, so that I can merely summarize the joinder provisions which are likely to govern any ICC trust arbitration filed with the ICC in the foreseeable future:

The new joinder rules will lay down inter alia that any party to a pending arbitration wishing to join a new party to the proceedings will be able to do so by making a request to the Secretariat. However, the request must be made before any action to constitute the arbitral tribunal has been taken, as the rule stipulates that no additional party may be joined after the confirmation or appointment of an arbitrator, unless all parties, including the one to be joined, agree otherwise.

The new joinder provision only contemplates forced joiners, i.e. where someone who is already a party (usually a respondent) wants to involve another person that was not named as a party by the claimant. The rule, however, does not contemplate voluntary participation of a new party in an existing arbitration, which is at odds with the trust arbitration clause which foresees the right of any person who thinks he or she should be included in the proceedings to petition the ICC Court to allow them to become a party to the arbitration. The new joinder provision of the 2011 Rules will not provide a basis for a voluntary accession to

53 For a more thorough discussion of the evolution of the ICC’s policy on joinder, see Christopher Koch, Judicial activism and the limits of institutional arbitration in multiparty disputes, ASA Bulletin, 28 (2010) 2, 380.
an ongoing arbitration. Whether the trust arbitration clause can itself provide a sufficiently solid basis for a non-party to claim a right of participation in an ICC arbitration conducted under the 2011 Rules will remain to be seen.

The rule that no new parties can be joined without the consent of all concerned once the constitution of the tribunal has commenced, is a codification of the ICC Court’s previous practice. Here ICC’s trust arbitration clause is clearly at odds with the joinder provision of the 2011 Rules as it foresees that any person may be joined any time. The taskforce’s attempt to keep the window of opportunity open for as long as possible already ran afoul the ICC’s Court’s published practice under the 1998 Rules, but now is clearly in contradiction with the proposed black letter law of the new 2011 Rules.

Could the settlor vary the ICC rules by inserting this arbitration clause into his/her trust deed? I don’t think that this will be possible. To understand the rule that no new parties can be added once the constitution of the arbitral tribunal has commenced, one needs to go back to the 1992 Dutco case, the landmark decision of the French supreme court which enshrined the principle that, in arbitrations involving more than two parties, the claimants must have the same degree of influence in the constitution of an arbitral tribunal as the respondents.\(^\text{55}\) In that decision, the Cour de Cassation stated: “The principle of the equality of the parties in the designation of the arbitral tribunal is a right enshrined in public policy, which the parties cannot waive before the dispute has arisen.”\(^\text{56}\)

Ever since then the ICC has been concerned to ensure that equality. In the 1998 Rules, it adopted in Article 10 a rule stipulating that, when there are multiple claimants and multiple respondents, each camp must jointly propose an arbitrator and the ICC will appoint the third. If one of the camps cannot agree on a joint nomination, then the ICC will appoint the whole tribunal.\(^\text{57}\) In depriving all parties of a say in constituting the tribunal no camp has a preponderant influence in its composition. That this is not merely a local foible of French arbitration law but has arguably evolved into a substantive rule of international public policy in arbitration can be seen from the fact that arbitral institutions from many countries have adopted a similar rule.\(^\text{58}\)

This was the reason why, under the 1998 Rules, the ICC Court’s practice is to allow forced joinder only before the arbitral tribunal was constituted. Since the practice will soon be enshrined into the new joinder provisions, it is unlikely that the ICC will allow a forced or voluntary joinder against the will of the new party or existing ones after the establishment of the arbitral tribunal has commenced, even though the model trust arbitration clause suggests otherwise.

---

55 Prior to Dutco, the ICC’s practice in multi-party arbitration was that if all respondents did not jointly propose an arbitrator within the time limit provided by the ICC, the Court appointed an arbitrator on their behalf.


57 The problem does not arise with a sole arbitrator appointed by the Court, since none of the parties has had a preponderant influence in the arbitrator’s appointment.

58 See Art. 8.5 Swiss Rules of International Arbitration; Art. 8 LCIA Rules; Sect. 13.2 DIS Rules; Art. 11.4 Stockholm Rules; Art. 15 Milano Cam. Arb. Rules.
In my view, the entire joinder procedure set out in the last paragraph of the model trust arbitration clause is at variance with the joinder provision of the 2011 Rules. The ICC's trust arbitration clause sets up a procedure by which the ICC Court makes a prima facie determination of whether there is a basis for a joinder. The procedure is contrary to the provisions in the 2011 Rules dealing with prima facie jurisdictional questions. Under Article 6.2 of the 1998 Rules, the ICC Court has to make a prima facie jurisdictional determination every time a party contests jurisdiction or fails to respond to the request for arbitration. In the overwhelming number of cases, there is an agreement to arbitrate, at least prima facie, so the joinder issue is then dealt with by the arbitral tribunal.

In order to lighten the administrative burden on the Court, the procedure will be modified in the 2011 Rules. The Secretary General of the Court will now have a gatekeeper function, for it will be he or she who makes a first determination whether a jurisdictional objection should be handled by the ICC Court or by the arbitrators. If the Secretary General believes that there is a doubt as to whether an agreement to arbitrate exists even prima facie, the issue will be referred to the ICC Court, whereas in all other cases the jurisdictional or procedural objections will be referred directly to the arbitral tribunal. The result will be that, in the future, the ICC Court will only deal with those cases where there is a real doubt as to the prima facie existence of an agreement to arbitrate. However, to the extent that the model trust arbitration clause provides that the ICC Court has to determine whether there is prima facie a sufficient basis for a joinder, it would appear that it short-circuits the Secretary General's gate-keeping function.

In light of the changes in the ICC Rules, it would be highly advisable for the ICC Commission to revisit its recommended arbitration clause for trust disputes which, as it presently stands, is in open conflict with the new arbitration rules that the ICC is set to adopt this year. Short of rewriting the clause, I believe that it would be possible to simply eliminate the last paragraph which will result in a recommended arbitration clause which is not in contradiction with the rules which are to apply to the arbitration.

VIII Conclusions

Can the benefits of arbitration, such as the parties' ability to choose their arbitrators, the freedom to design procedures which meet their needs to efficiently and speedily dispose of disputes, its private and confidential nature and the finality of arbitral awards, be fully exploited in the world of trusts?

As we have seen, there are a number of difficulties arising from the differences in the nature of the issues regulated by contracts and trusts that make it difficult to import a mechanism designed to resolve disputes in one system into the other. While arbitration practitioners and arbitral institutions are up-beat about the promises arbitration can hold out for trust disputes, the courts dealing with the question seem to be less enthusiastic about embracing the concept.

In the final analysis, arbitrating trust disputes may eventually become an accepted norm if it is embraced by the various stake holders i.e trustees, settlors, beneficiaries and the legal system. The fact that the geographical and legal link between trust court and trust administration is getting weaker, because trustees are no longer necessarily domiciled in the trust court's jurisdiction, might make trust professionals more amenable to the idea of arbitration. A Swiss trust com-
pany administering trusts under a variety of laws is likely to be less attached to the jurisdiction of the BVI courts than a trustee administering the trust in Road Town, Tortola. While settlors would as a rule certainly prefer disputes arising out of their trust to be dealt with discretely and privately, for beneficiaries, deciding whether to abide by an arbitration provision in a trust deed or to contest it in court will probably depend on various considerations which will certainly include costs and the evaluation of one's chances of success in either forum.

It will be difficult to overcome the fundamental dichotomy between the world of trusts based on unilateral action and that of arbitration which requires a contractual agreement. Given the precedents, I am doubtful whether the legal constructs employed to try to bridge the gap will effectively resist judicial scrutiny.\(^{59}\) For arbitration to become an effective tool in the trust practitioners' dispute resolution toolbox, it will take legislative support admitting arbitration clauses in testamentary dispositions, like the one found in the German and Spanish arbitration acts or those beginning to emerge in common law jurisdictions such as Guernsey.

Then we might see, contrary to all expectations, that East meets West or, as Kipling put it in the first and last stanza of his ballad:

\[
\text{OH, East is East, and West is West, and never the twain shall meet,}
\]
\[
\text{Till Earth and Sky stand presently at God's great Judgment Seat;}
\]
\[
\text{But there is neither East nor West, Border, nor Breed, nor Birth,}
\]
\[
\text{When two strong men stand face to face, tho' they come from the ends of the earth!}
\]

\(^{59}\) Settlors and trustees who nevertheless wish to submit trust disputes to arbitration are well advised to have all known beneficiaries acknowledge in writing their consent to the terms of the trust and the arbitration provision contained in the deed, before any disputes regarding the trust have emerged.
Annex 1

Explanatory note of the ICC accompanying the ICC Arbitration Clause for Trust Disputes

1. Over the years the ICC has been providing the international business community with valuable dispute resolution services and in particular arbitration. The general advantages of arbitration are widely recognized: party autonomy with regard to the choice of arbitrators, flexibility with regard to procedure, confidentiality, efficiency and speed, reduced costs and, finally, enforceability of awards under the 1958 New York Convention.

2. These advantages are equally relevant in trust disputes, particularly at a time when trusts are gaining wider international recognition (see the Hague Convention on the law applicable to trusts and their recognition) and, so to say, have outgrown their traditional territory.

3. Trust disputes are of a great variety. Between trustees and beneficiaries, they concern breach of duties by trustees, the proper exercise of their powers by trustees, the construction of the trust instrument, its possible rectification, the appointment, retirement or removal of trustees. Between beneficiaries, claims are made to have the exercise of a power set aside or beneficial provisions rectified - quite separately, spouses, protected heirs, creditors of the settlor might also have claims relating to the trust. Moreover, trustees sometimes request guidance on the construction of provisions of the trust instrument or on proposed actions in the discharge of their trusteeship. All of these are often complex and sensitive. Settlors rarely relish publicity, legal costs and court process. Trustees and beneficiaries tend to prefer confidentiality and they want a trustworthy system of settlement of disputes.

4. Most such disputes should be capable of settlement in a confidential and expedited manner. ICC Arbitration is an ideal means to that effect. The ICC Rules of Arbitration have the advantage of flexibility, lending themselves to the fine tuning often required for the resolution of trust disputes.

5. The ICC, aware of the desire of many settlors, trustees, protectors and beneficiaries to have their disputes resolved outside of the ordinary courts of the traditional trust countries, mostly offshore (whose law "happens" to govern the trust), constituted in 2006 an international Task Force to study the compatibility of its Arbitration Rules with the peculiarities of trust disputes and the desirability of a specific model arbitration clause.

6. The Task Force concluded that the flexibility of the ICC Rules of Arbitration allowed them to be easily adapted to the particular features of trust disputes. For example, the appointment by the Court of all members of the arbitral tribunal will allow preserving the equality of parties in spite of the frequent multiparty character of trust disputes. However, the Task Force found that the standard ICC Arbitration Clause needed to be amended and a mechanism devised to ensure jurisdiction over non signatory trustees and protectors and especially beneficiaries.
7. The ICC Arbitration agreement for trust disputes should be included in the trust instrument and inserted after the choice of law provision, if any. It may also be included by the settlor in a subsequent variation or in an ad-hoc instrument. No matter the peculiarities of the trust, the arbitration agreement requires the consent of the parties. Whether this need be in writing will depend on the applicable law. As a general rule the trustees and any protector will agree to arbitration by accepting their office under the trust; in addition, in most cases it should 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 it a condition of their benefit under the trust that they agree to arbitration; by claiming, being entitled or receiving any benefit under the trust they shall be deemed to agree to ICC Arbitration. Whether this is an effective means of extending jurisdiction over non-signatory beneficiaries need be verified under the applicable law. The matter of representation of beneficiaries, including in particular of any minor, unborn or unascertained beneficiaries, also requires attention under the relevant laws.

8. The ICC Arbitration agreement does not include a provision regarding the seat of the arbitration. The choice of such seat is of great importance; the parties will have to consider the matter very carefully. Failing an agreement by the parties, the place of the arbitration shall be fixed by the ICC Court of Arbitration as provided for under Article 14(1) of the ICC Rules of Arbitration.

9. The parties can, in addition, refer to the ICC Rules for a Pre-Arbitral Referee Procedure, allowing rapid recourse to a referee empowered to take urgent measures on an interim basis.

10. The Task Force appreciates that the issue of jurisdiction over non-signatories and, to a lesser extent, the issue of arbitrability - see in particular any "statutory jurisdiction" provisions - requires careful country specific attention. Thus, for example, regarding applications to court for directions, depending on the related rules of the law governing the trust, it may be appropriate to state that any possible application for such directions shall not be deemed a waiver of arbitration. Given that the arbitral resolution of trust disputes is in its infancy (emerging statutory law, limited case law and differing academic opinions), the parties are invited to show great care in the use and possible amendment of the ICC Arbitration agreement in order to ensure the validity of the award. The ICC cannot be liable for the consequences of court decisions rendered in any jurisdiction in relation to a trust dispute involving the ICC Arbitration agreement.