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# Arbitration of Mexican Trust Disputes: A Couple Made for Each Other?

Edgardo Muñoz

Sofía Llamas

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ARBITRATION OF MEXICAN TRUST DISPUTES: A  
COUPLE MADE FOR EACH OTHER?

*Edgardo Muñoz<sup>1</sup> & Sofía Llamas<sup>2</sup>*

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<sup>1</sup> Dr. iur. (Basel), LL.M. (UC Berkeley), LL.M. (Liverpool), Professor of Law, Panamericana University at Guadalajara, Mexico.

<sup>2</sup> Graduate in Law, Panamericana University at Guadalajara, Mexico.

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I.	INTRODUCTION	

In their respective paramount articles, Strong and Koch describe the apparent tension between the law of arbitration and the law of trusts in common law jurisdictions with expressions such as “Two Bodies of Law Collide” or “A

Tale of Two Cities.”<sup>3</sup> On one hand, much of this current tension is reportedly caused by the equity nature of the trust institution in Anglo-American law. On the other hand, the tension also arises from arbitration laws that require arbitration agreements to be contained in contracts or for such agreements to be related to contracts. We embarked on the interesting task of determining whether the same tension exists between the law of trusts in civil law jurisdictions and arbitration laws modeled by the UNCITRAL Law on International Commercial Arbitration (UNCITRAL Model Law). In particular, we chose to focus on the Mexican trust, arguably the first and most influential trust instrument in the civil law world, and on Mexico’s commercial arbitration law (which is based on the UNCITRAL Model Law of 1985). As our comparative law analysis progressed, we found out that some of the points that differentiate the Mexican trust from its Anglo-American trust ancestor, coupled with the flexibility that characterizes the UNCITRAL Model Law, eliminate most of the legal incompatibility reported in some common law jurisdictions. Profiting from the descriptive expressions used by our common law colleagues, Strong and Koch, this work gathers legal evidence and provides a thorough analysis to answer the question of whether arbitration and Mexican trusts are “A Couple Made for Each Other” . . . affirmatively.

Section II of this paper furnishes some important information about the Mexican trust to set the basis for our proposition. Section III forecasts the benefits that arbitration

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<sup>3</sup> S.I. Strong, *Arbitration of Trust Disputes: Two Bodies of Law Collide*, 45 VAND. J. OF TRANSNAT’L L. 1157 (2012); Christopher P. Koch, *A Tale of Two Cities! - Arbitrating Trust Disputes and the ICC's Arbitration Clause for Trust Disputes*, 2 Y.B. ON INT’L ARB. 180 (2012).

will ultimately bring to the Mexican trust industry and to the parties of Mexican trusts. Section IV introduces the main legal issues that must be carefully considered to achieve the enforcement of an arbitration agreement in trusts disputes, from a global perspective. Section V addresses, in minute detail, the requirements and theories of intent that make an arbitration agreement enforceable against all trust parties. Section VI discusses what type of trusts claims are arbitrable from a Mexican law standpoint. Section VII highlights some legal capacity rules that may affect the enforcement of arbitration agreements over parties to a Mexican trust. Section VIII identifies some procedural and representation measures to be taken in order to ensure compliance with due process and the right to be heard principles in the context of Mexican trust disputes. Section XI analyzes two examples of mandatory norms of law that could give rise to the public policy exception for enforcement of arbitral awards in the context of arbitration of Mexican trusts disputes. Section X concludes with some reflections on the current perception of arbitration as a means to resolve Mexican trust disputes and its future.

## II. THE MEXICAN TRUST

The first Mexican Trust provisions were enacted in 1924.<sup>4</sup> This set of provisions closely followed the Uniform Fiduciaries Act enacted in the United States in 1922.<sup>5</sup> Both

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<sup>4</sup> See Ley General de Instituciones de Crédito y Establecimientos Bancarios [LGICEB] [General Law of Credit Institutions and Banking Establishments], (Dec. 24, 1924) (Mex.), available at <http://biblio.juridicas.unam.mx/libros/6/2791/16.pdf>.

<sup>5</sup> LUIS CARLOS FELIPE DÁVALOS MEJÍA, TÍTULOS Y OPERACIONES DE CRÉDITO: ANÁLISIS TEÓRICO PRÁCTICO DE LA LEY GENERAL DE TÍTULOS Y

the American Act and the Mexican Trust rules regulated the power and obligations of trustees only.<sup>6</sup> None of them dealt with the trust institution itself. Most of the law of trusts in the United States was still in the form of judicial precedent, largely from England.<sup>7</sup> Ten years later, in 1932, Mexico became the first country to codify its trust law in a comprehensive manner in its *Ley General de Titulos y Operaciones de Crédito* (“LGTOC”).<sup>8</sup> This was achieved after two prior significant legislative attempts.<sup>9</sup> The U.S. equivalent, the Uniform Trusts Act of 1937, followed only five years later.<sup>10</sup> The drafts and prior statutes that led to the trust provisions in Mexico’s LGTOC were clearly based on the U.S. trust law at the time.<sup>11</sup> However, the Mexican trust<sup>12</sup>

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OPERACIONES DE CRÉDITO Y TEMAS AFINES 541 (Oxford Univ. Press, 4th ed. 2012).

<sup>6</sup> *The Uniform Fiduciaries Act*, 24 COLUM. L. REV. 661, 661 (1924) (“An Act concerning liability for participation in breaches of fiduciary obligations and to make uniform the law with reference thereto.”).

<sup>7</sup> John H. Langbein, *Why Did Trust Law Become Statute Law in the United States?*, 58 ALABAMA L. REV. 1069, 1069-71, 1081 (2007). In 1935, the Restatement of Trust gathered the trust law principles developed by Equity and Common Law Courts. *Id.* at 1069 n.5.

<sup>8</sup> *Ley General de Titulos y Operaciones de Credito* [LGTOC] [General Law of Securities and Credit Operations], ch. V, sec. I-II, art. 381-407, Diario Oficial de la Federacion [DOF] (Aug. 27, 1932), ultima reforma June 13, 2014 (Mex.).

<sup>9</sup> This was achieved after two prior non-negligible legislative attempts: the *Ley de Bancos de Fideicomisos* of 1926 and the *Ley General de Instituciones de Crédito y Establecimientos Bancarios* of 1926.

<sup>10</sup> MEJÍA, *supra* note 5, at 541.

<sup>11</sup> MARIA EUGENIA RETTEG, UNIVERSITÉ DE GENÈVE FACULTÉ DE DROIT, THE MEXICAN FIDEICOMISO: THEORETICAL AND PRACTICAL APPROACH 15 (2009), available at [http://www.unige.ch/droit/mbl/upload/pdf/M\\_moire\\_RETTEG.pdf](http://www.unige.ch/droit/mbl/upload/pdf/M_moire_RETTEG.pdf) (Mexican “legislators decided to try and adapt the Anglo - Saxon Trust

was born with a distinctive twist. The LGTOC gave the Mexican trust an evident contractual character, which scholars attribute to the influence that the Mexico Federal Civil Code of 1928 (Mexico FCC) had over the LGTOC.<sup>13</sup> Since then, the Mexican trust has become a reference for many civil law jurisdictions, particularly in Latin American countries. As a result, today Mexico is one of the major trust jurisdictions in the civil law world.

#### A. LEGAL NATURE

Pursuant to Article 381 LGTOC, “[b]y virtue of the trust, the settlor conveys to a fiduciary institution [trustee] the property of certain assets or rights, for those to be destined to lawful and determined goals, entrusting the fulfillment of such purposes to the fiduciary institution [trustee].” Because neither the LGTOC nor the Mexico Code of Commerce (“CCo.”) expressly characterizes the institution of trust within any of the so-called “sources” of legal obligations in Mexican law,<sup>14</sup> the legal community has

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to the Mexican Law. As a result, there were many projects of acts that tried to establish the *fideicomiso* in the legislation. The first of these attempts took place in 1905 with the Limantour Project, which was the first to adapt the Trust to a Roman law system. The second attempt was in 1924 with the Creel Project, which was based on the functioning of the ‘American Trusts and Saving Banks’. In 1924 the LGICEB was created and this second project had an effective influence on the first official regulation of the Mexican *fideicomiso*.” (footnote omitted)).

<sup>12</sup> Mexican trust means one created and governed under Mexican law.

<sup>13</sup> MEJÍA, *supra* note 5, at 542.

<sup>14</sup> Pursuant to Mexican law, obligations may arise out of the following sources: contracts, unilateral declarations of intent, unjust enrichment, and torts (*responsabilidad extra-contractual* due to risk created or strict liability).

frequently debated its legal nature. Some scholars argue that Mexican courts, including the Supreme Court of Justice, have repeatedly maintained that the Mexican trust is contractual in nature.<sup>15</sup> Other legal scholars maintain that a trust is a fiduciary transaction that ultimately has the legal nature of a contract under Mexican law.<sup>16</sup>

## B. PARTIES

Like the Anglo-American trust, there are three main parties to a Mexican trust: the settlor (*fideicomitente*), the trustee (*institución fiduciaria*), and the beneficiaries (*fideicomisarios*). Occasionally a fourth party, a technical committee, also acts as party to a Mexican trust. A settlor is required for a Mexican trust to exist. Through the settlor's declaration of intent, the first element to create a trust is accomplished. Both individuals and entities may be settlors as long as they have the capacity to transfer legal ownership of the subject matter of the trust, whether assets or rights, and the legal capacity to enter into commercial agreements.<sup>17</sup> In addition, government or administrative bodies may act as settlors where authorized by their statute and charter.<sup>18</sup> This

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<sup>15</sup> MEJÍA, *supra* note 5, at 554-557 (reporting a series of Mexican Supreme Court decisions upholding the contractual nature of trusts under Mexican law); see e.g., *Fideicomiso, Naturaleza del., Pleno de la Suprema Corte de Justicia [SCJN]*, Informe de la Suprema Corte de Justicia, Séptima Época, Primera Parte, 1986, Tesis 32, Amparo en revision 769/84, 675 (Mex.) (holding that the trust is a legal business through which the settlor creates a set of independent assets, which is autonomous from the parties to the contract, which title is granted to the trustee for the achievement of its determined goal.).

<sup>16</sup> MEJÍA, *supra* note 5, at 560.

<sup>17</sup> LGTOC, ch. V, sec. I, art. 384 (Mex.).

<sup>18</sup> *Id.*

work does not address Mexican public trusts, which are created by the government.<sup>19</sup>

According to Article 381 of the LGTOC, the trustee is also a (*sine qua non*) party to the Mexican trust.<sup>20</sup> Only legal entities (never a natural person) may serve as trustees. Moreover, only legal entities authorized by law,<sup>21</sup> generally

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<sup>19</sup> Despite the fact that most of what is submitted in this article will hold true where a state entity is involved, issues of arbitrability and capacity would require a more detailed analysis due to the current treatment of arbitration by Mexican public procurement and administrative rules.

<sup>20</sup> Trustee involvement is vital to create a Mexican trust. This conclusion can be drawn from LGTOC Article 385, which reads as follows: "when as a result of resignation or removal the trustee concludes its services as such, a replacement trustee shall be designated. Where this replacement is not possible, the trust will extinguish." LGTOC, ch. V, sec. I, art. 385 (Mex.) (author's translation).

<sup>21</sup> *Id.* The following entities are allowed to act as trustees: credit institutions, insurance companies, guarantee institutions, brokerage firms, financial corporations with limited capacity to act only in financial matters, general storage warehouses, the Mexican National Bank, and National Savings and Financial Services Banks. For general storage warehouses, *see id.* at ch.V, sec. II, art. 395; for insurance companies, *see* Ley General de Instituciones y Sociedades Mutualistas de Seguros [LGISMS] [General Law for Insurance Institutions and Companies], ch. II, art. 34, frac. IV, as amended, Diario Oficial de la Federación [DO], (Aug. 31, 1935) (Mex.); for insurance companies, *see also* Ley de Instituciones de Seguros y de Fianzas [LISF] [Law for Insurance and Bond Institutions], ch. I, sec. I, art. 118, Pfo. XXIII, as amended, Diario Oficial de la Federación [DO], (Apr. 14, 2013) (Mex.); for guarantee institutions, *see* Ley Federal de Instituciones de Fianzas [LFIF] [Federal Law for Bond Institutions], ch. II, art. 16, Pfo. XV, Diario Oficial de la Federación [DO], (Dec. 29, 1950) (Mex.); for brokerage firms, *see* Ley del Mercado de Valores [LMV] [Law for Stock Market], ch. II, sec. II, art. 183, Diario Oficial de la Federación [DO], (Dec. 30, 2005) (Mex.); for financial corporations with limited object, *see* Ley General de Organizaciones y Actividades Auxiliares de Crédito [LGOC] [General Law of Auxiliary Credit Organizations and Activities], title V, ch. 1, art. 87-Ñ, Diario

banks and financial corporations, may request an authorization from the National Bank and Stock Commission (“CNBV”)<sup>22</sup> to operate as trustee.<sup>23</sup> This authorization covers the trustee’s capacity to act as such.

Pursuant to Article 382 of the LGTOC, any person with legal capacity to receive the benefits of the trust may be a beneficiary.<sup>24</sup> Furthermore, the beneficiary has to be born, or at least be conceived, at the time of the settlor’s death in order to be entitled to receive the benefits of the trust. Also, unless it is a guarantee trust, the trustee shall not be a beneficiary of the trust.<sup>25</sup>

If the settlor so wishes, he may set up a “technical committee,” either at the trust’s creation or in a subsequent modification of the trust deed. The settlor determines the functioning, purpose, rights, members, etc., of the technical committee.<sup>26</sup> The technical committee usually serves as a supervisory board that ensures the achievement of the trust’s rules and objectives. For example, the settlor may stipulate the type of decisions or tasks that shall be

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Oficial de la Federación [DO], (Jan. 14, 1985) (Mex.); for the Mexican National Bank, *see* Ley Del Banco de México [LBM] [Law for the Bank of Mexico], art. 7, Pfo. XI, Diario Oficial de la Federación [DOF], (Dec. 23, 1993) (Mex.); for national savings and financial services bank, *see* Ley Orgánica del Banco del Ahorro Nacional y Servicios Financieros [LOBANSF] [Organic Law for the National Savings and Financial Services Bank], ch. II, art. 7, Pfo. VII & VIII, Diario Oficial de la Federación [DO], (June 1, 2001) (Mex.).

<sup>22</sup> *Comisión Nacional Bancaria y de Valores*.

<sup>23</sup> Ley de Instituciones de Crédito [LIC] [Law for Credit Institutions], ch. IV, art. 80, Diario Oficial de la Federación [DO] (July 19, 1990) (Mex.).

<sup>24</sup> LGTOC, ch. V, sec. I, art. 382, Pfo. 1 (Mex.).

<sup>25</sup> *Id.* at Pfo. 4.

<sup>26</sup> LIC, ch. IV, art. 80 (Mex.).

performed by the trustee in accordance with the technical committee's instructions.<sup>27</sup>

### C. TYPES

Although the law provides no catalogue of the different types of trusts under Mexican law, scholarship has provided one using different criteria, such as: personal elements, goals, and structure. Types include the irrevocable trust,<sup>28</sup> the investment trust,<sup>29</sup> the management trust,<sup>30</sup> the guarantee trust,<sup>31</sup> the public trust,<sup>32</sup> the testamentary trust,<sup>33</sup>

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<sup>27</sup> *Id.* Article 80 of the LIC provides that when the trustee is acting upon the technical committee's request, as long as these instructions are lawful and in accordance with the trust's purpose, the trustee will not be held liable for damages. *Id.*

<sup>28</sup> Where the assets are definitively transferred to the trustee with no possibility for the settlor to revoke such transfer.

<sup>29</sup> The life insurance trust and retirement plan (for employees) trust, among others, are generally structured as an investment trust.

<sup>30</sup> The ultimate purpose of this trust is to transfer all the managerial work related to the assets and have the settlor benefit from them (by designating himself as beneficiary).

<sup>31</sup> This type of trust is expressly regulated by the LGTOC in Articles 395-406. LGTOC, ch. V, sec. II, arts. 395-406 (Mex.) (listing the institutions and corporations that are allowed to act as trustees in these trusts in art. 395). In these types of trusts, trustees are allowed to act as beneficiaries when the trust is created to provide a guarantee in benefit of the trustee. *Id.* at art. 396.

<sup>32</sup> This type of trust is created for the purpose of assisting the executive branch of the government in the promotion and support of certain activities for the social and economic development of the country; its purpose is of public interest always.

<sup>33</sup> This type of trust is settled by a unilateral declaration of intent made by the settlor, and takes effect after his death. The trustee is given the task to manage the assets. The persons designated as beneficiaries must be alive or at least conceived at the time of the settlor's death LGTOC. It

and those trusts that are unlawful, such as the secret trust and the successive trust.<sup>34</sup>

#### D. THE MAIN DIFFERENCES WITH ANGLO-AMERICAN TRUSTS

The Anglo-American trust and the Mexican trust are very similar since the former is modeled after the latter (see Section II above). Notwithstanding this fact, the Mexican trust differs from the Anglo-American trust in some important ways. Unlike the Anglo-American trust, which is considered to create a legal relationship that arises out of an equitable obligation (see Section V below),<sup>35</sup> the Mexican trust is considered a contract (see Section II.A. above). In addition, pursuant to Mexican law, only institutions expressly authorized by law may serve as trustees (see Section II.B. above); under the Anglo-American trusts law, any capable person, either an individual or a legal entity, may serve as trustee.<sup>36</sup> Likewise, Mexican law of trusts establishes a clear restriction to the designation of beneficiaries who shall exist or at least be conceived at the

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is revocable and becomes irrevocable after the death of the settlor. LGTOC, ch. V, art. 394, frac. II (Mex.).

<sup>34</sup> The purpose of every trust must be made perfectly clear; failing to do so will have the consequence of presuming that its purpose is secret and this would cause it to be null and void under Mexican law. In addition, Mexican law prohibits trusts in which the benefit is given to several persons that should substitute each other successively upon the death of the previous beneficiary. The only exception to this principle is when beneficiaries are alive or conceived at the moment of death of the settlor.

<sup>35</sup> JESSE DUKEMINIER & ROBERT H. SITKOFF, *WILLS, TRUSTS, AND ESTATES* 386, 387 (9th ed. 2013); ALASTAIR HUDSON, *UNDESTANDING EQUITY & TRUSTS* 12 (2d ed. 2004).

<sup>36</sup> ALASTAIR HUDSON, *EQUITY & TRUSTS* 237-38 (3d ed. 2003).

time of the settlor's death (see Section II.B. above). This is not so with the Anglo-American trust.<sup>37</sup> Moreover, under the Anglo-American law of trusts it is possible for the same person or entity to be the trustee and beneficiary or the settlor and trustee at the same time, so long as the same person does not assume all three capacities (settlor, trustee and beneficiary).<sup>38</sup> Under Mexican law, the trustee may never be a beneficiary because this makes the trust null and void (unless the settlor creates a guarantee trust).<sup>39</sup> Anglo-American trusts may be settled in an implied or oral fashion,<sup>40</sup> unlike the Mexican trusts, which are only valid in writing.<sup>41</sup>

#### E. THE APPLICATION OF MEXICO'S COMMERCIAL ARBITRATION LAW TO MEXICAN TRUST DISPUTES

Pursuant to Article 1 of the LGTOC, all acts and credit operations falling under its scope of application are deemed "acts of commerce."<sup>42</sup> Accordingly, the Mexican trust is an act of commerce. As such, the Mexican trust is also governed by the provisions of Mexico's CCo. and the relevant banking

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<sup>37</sup> DUKEMINIER & SITKOFF, *supra* note 35, at 417.

<sup>38</sup> *Id.* at 402.

<sup>39</sup> LGTOC, ch. V, sec. II, art. 396 (Mex.).

<sup>40</sup> "The United States' law of trusts does not require a writing to create a valid trust. However, in the United States a testamentary trust must be in writing to satisfy the Wills Act, and an inter-vivos trust of land to satisfy the Statute of Frauds." See DUKEMINIER & SITKOFF, *supra* note 35, at 427.

<sup>41</sup> LGTOC, ch. V, sec. I, art. 387 (Mex.).

<sup>42</sup> Mexican law still follows the old dichotomy that distinguishes between civil acts primarily governed by the civil code provisions and the so-called acts of commerce primarily governed by the Mexico Code of Commerce and mercantile laws.

and trade usages.<sup>43</sup> However, a Mexican trust may involve parties (i.e. settlors or beneficiaries) that are non-traders or that do not pursue any business objective in the trust.<sup>44</sup> In this scenario, scholars would find that such a Mexican trust might be considered a “mixed act,” where those non-trader parties to the Mexican trust will enjoy the special treatment granted by the civil code provisions.<sup>45</sup> We agree that some mandatory rules of law contained in the civil code and other non-commercial law statutes shall apply to non-trader parties (see e.g. Sections VII.B., VIII, and IX below). However, we submit that the provisions on commercial arbitration in Articles 1415-1480 of the CCo. shall govern arbitration disputes arising out of Mexican trusts (particularly where the seat of arbitration is in Mexico), irrespective of whether one or more non-trader parties are involved in the trust relationship. We find support in Article 1050 of the CCo., which provides that whenever an act has a business nature for one of the parties and a civil nature for

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<sup>43</sup> LGTOC, art. 2o (Mex.). Acts of commerce are those falling within the definition established by the same Code of Commerce, irrespective of the persons who perform those acts (*see* Código de Comercio [CCo.] [Commercial Code], art. 1, Diario Oficial de la Federación [DO], (Dec. 13, 1889) (Mex.)). Generally, an act of commerce pursues a goal of economic speculation or a profit purpose, which does not need to be expressed in the contract, but is rather assessed on a case-by-case basis. (*see id.* at art. 75, fracs. XIV & XXIV (Mex.)).

<sup>44</sup> So-called civil transactions are executed by parties who do not ordinarily enter into the transaction with a profit purpose and cannot be considered as traders under the Mexico Code of Commerce or as suppliers under Mexico consumer protection law. *See generally* Código de Comercio [CCo.] [Commercial Code], Diario Oficial de la Federación [DO], (Dec. 13, 1889) (Mex.).

<sup>45</sup> SOYLA H. LEÓN & HUGO GONZALEZ GARCÍA, DERECHO MERCANTIL 155 (2007).

the other party, any dispute that arises out of the transaction at stake will be governed by the business law (i.e. the CCo.).<sup>46</sup> Against this background, a Mexican trust will always have a business nature for at least one of the (*sine qua non*) parties: the trustee. Therefore, the arbitration provisions in any of the civil codes of the thirty-one Mexican states shall not apply to the resolution of trust disputes.

### III. BENEFITS OF ARBITRATION FOR THE TRUST INDUSTRY AND THE PARTIES INVOLVED

#### A. ECONOMIC BENEFITS: A FAST AND FLEXIBLE PROCEDURE

Litigation is not always as fast and effective as it should be. This ultimately results in increased costs for the parties. Various elements affect the resolution of disputes in state courts. For instance, state courts are frequently overloaded with cases and understaffed.<sup>47</sup> The issuance of court decisions takes quite some time, and after a decision is delivered to the parties, the decision is inevitably subject to a number of expensive and time-consuming appeals.<sup>48</sup>

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<sup>46</sup> Código de Comercio [CCo.] [hereinafter “Commercial Code”], art. 1050, Diario Oficial de la Federación [DO], (Dec. 13, 1889) (Mex.) (“Cuando conforme a las disposiciones mercantiles, para una de las partes que intervienen en un acto, éste tenga naturaleza comercial y para la otra tenga naturaleza civil la controversia que del mismo se derive se regirá conforme a las leyes mercantiles.”).

<sup>47</sup> This is at least the case in Mexico. *OECD Economic Surveys Mexico*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT 22, ¶ 31 (Jan. 2015), <http://www.oecd.org/eco/surveys/Mexico-Overview-2015.pdf>.

<sup>48</sup> In the OECD area, the average length of civil proceedings is around 240 days in the first instance, but in some countries a trial may require almost twice as many days to be resolved (in Mexico: 342 days). Final

Arbitration provides a cost-effective option for dispute resolution of trust disputes.<sup>49</sup> One of the main advantages of arbitration is that proceedings take substantially less time than litigation.<sup>50</sup> This benefit is especially appealing to parties involved in trust disputes. The trust's goal could be completely lost if a dispute were to last for years in litigation.<sup>51</sup> Arbitral proceedings are put to an end by the issuance of an arbitral award, which is final and binding for the parties. This feature of the award has a direct impact on the time that is invested in the resolution of a dispute simply because it is not subject to any appeal mechanisms.<sup>52</sup> Furthermore, arbitral tribunals do not depend on the courts'

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disposition of cases may involve a long process of appeal before the higher courts, which in some cases can average more than seven years. Guiliana Palumbo et al., *Judicial performance and its determinants: a cross-country perspective* 38 (OECD Economic Policy Paper No. 5, 2013), available at <http://www.oecd.org/eco/growth/FINAL%20Civil%20Justice%20Policy%20Paper.pdf>.

<sup>49</sup> Gerardo J. Bosques-Hernández, *Arbitration Clauses in Trusts: The U.S. Developments and a Comparative Perspective*, REVISTA PARA EL ANÁLISIS DEL DERECHO (INDRET) 6 (2008); Strong, *supra* note 3, at 1182.

<sup>50</sup> It has been reported that arbitration proceedings in Mexico normally last a year, plus the enforcement stage. Claus von Wobeser, *Arbitration Guide: MEXICO*, INTERNATIONAL BAR ASSOCIATION 2 (May 2013), available at

<http://www.ibanet.org/Document/Default.aspx?DocumentUid=8A7876EB-EBB9-4D5F-B073-24618471E911>.

<sup>51</sup> Stephen Wills Murphy, *Enforceable Arbitration Clauses in Wills and Trusts: A Critique*, 26 OHIO ST. J. DISP. RESOL. 627, 635-36 (2011).

<sup>52</sup> ALAN REDFERN ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 34 (5th ed. 2009) ("Although the initial cost is not likely to be less than that of proceedings in court, the award of the arbitrators is unlikely to be followed by a series of costly appeals to superior local courts.").

calendar. Arbitration meetings are easily coordinated, and the disputes are resolved considerably faster.<sup>53</sup>

Moreover, most litigation in state court follows a very formalistic approach in the conduct of the proceedings. This results in formalities that are often prioritized over the substance of the dispute. Arbitration proceedings are tailored to meet the specific requirements of the parties. This benefit can be particularly valuable for parties to trust disputes. One of the reasons why settlors usually choose a trust institution is because of its structural flexibility.<sup>54</sup> In this regard, parties to trust disputes should in principle prefer flexibility in their dispute resolution mechanism as well.<sup>55</sup>

#### B. INTERPERSONAL BENEFITS: A PERSONALIZED AND PRIVATE PROCEDURE

Disputes arising out of trusts can be complex. State judges may lack the expertise needed for a dispute of this particular kind. Thus, an arbitration panel versed in the specificities of modern trust law and practice is advisable. Parties can appoint arbitrators that are qualified for the dispute at stake, select the rules under which the proceedings shall be carried out and determine which law will be applicable to the substantive issues of the dispute, among other things. If an arbitral tribunal is experienced enough, it should be able to grasp the decisive issues of fact

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<sup>53</sup> Bosques-Hernández, *supra* note 49, at 6.

<sup>54</sup> Strong, *supra* note 3, at 1183.

<sup>55</sup> *Id.* at 1173, 1183.

and law in the dispute and adapt the procedure in order to ensure that such issues are properly dealt with.<sup>56</sup>

Parties to trust disputes will also value the personalized and high-end service performed by most arbitral tribunals. As opposed to state court judges, arbitrators are appointed to handle one specific case from the beginning to the end. Accordingly, arbitrators get to know the parties and their counsel better than state judges do. Most importantly, as the case develops through the documents filed by the parties, the pleadings, and the gathering of evidence, arbitral tribunals perform a thorough analysis of the case and get a proper understanding of it. As a result, arbitral tribunals are fully qualified to issue sensible awards that will be suitable for the dispute at hand.<sup>57</sup>

In addition, arbitration offers a private means of resolving legal controversies. This, in principle, makes arbitration confidential to the outside world.<sup>58</sup> While parties to all kinds of contracts appreciate the privacy and confidentiality that surrounds arbitral proceedings, parties to trusts could particularly value this feature. This holds true because, on the one hand, “public forms of dispute resolution can damage not only the trustee’s own business reputation but also the reputation of the trust industry as a whole.”<sup>59</sup> On the other hand, settlors and beneficiaries will probably appreciate that the dispute is kept private. Settlers of both testamentary and commercial trusts often make use of trusts precisely because they provide more privacy,

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<sup>56</sup> REDFERN, *supra* note 52, at 32.

<sup>57</sup> *Id.* at 33.

<sup>58</sup> JULIAN D. M. LEW ET AL., *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* 8 (2003).

<sup>59</sup> Strong, *supra* note 3, at 1183.

discretion, or tax and wealth management optimization than other contractual alternatives.<sup>60</sup>

Furthermore, privacy will attract parties to testamentary trusts because in state courts, issues that may be embarrassing to the parties are publically discussed during the probate process.<sup>61</sup> Likewise, parties to business trusts may have an interest in protecting valuable information such as trade secrets, ownership of assets, credit-lines, competitive practices, or any delicate detail that could be subject to adverse publicity.<sup>62</sup>

#### IV. ENFORCEMENT OF ARBITRATION AGREEMENTS IN MEXICAN TRUSTS

Arbitration agreements contained in Mexican trusts are presumed enforceable in accordance with the New York Convention and modern arbitration laws. One of the main objectives of the New York Convention and modern arbitration laws, including Mexican arbitration law,<sup>63</sup> is to make arbitration agreements readily enforceable.<sup>64</sup> Article II(1) of the New York Convention provides that Contracting States shall recognize an arbitration agreement made

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<sup>60</sup> *Id.* at 1172-73.

<sup>61</sup> Bosques-Hernández, *supra* note 49, at 6.

<sup>62</sup> REDFERN, *supra* note 52, at 32.

<sup>63</sup> Mexican arbitration law is found in Articles 1415-1480 of the Commercial Code. Its provisions are largely, if not completely, based on the original UNCITRAL Model Law on International Commercial Arbitration of 1985. Commercial Code, art. 1415-80 (Mex.).

<sup>64</sup> GARY B. BORN, INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: DRAFTING AND ENFORCING 145, 147 (4th ed. 2013).

between parties.<sup>65</sup> Article 8 of the UNCITRAL Model Law also provides for the enforcement of arbitration agreements, regardless of the arbitral seat.<sup>66</sup> The same principle is embodied in Article 1424 of the CCo.<sup>67</sup>

The presumption of enforceability of an arbitration agreement in a Mexican trust deed is the rule and the New York Convention and modern arbitration laws limit exceptions to this rule. Possible exceptions relate only to issues of form validity (e.g. the in-writing requirement), substantive validity (the lack of intent or impaired intent), non-arbitrability of the subject matter, and lack of legal capacity by one of the parties.<sup>68</sup> All of these exceptions require strong evidence in order to make an arbitration agreement unenforceable.<sup>69</sup> Accordingly, state courts and arbitral tribunals will always enforce an arbitration agreement in a Mexican trust by referring the parties to arbitration unless one party furnishes evidence that the arbitration agreement relied upon is null and void, inoperative, or incapable of being performed.<sup>70</sup> The above

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<sup>65</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. II(1), June 10, 1958, 21 U.S.T. 2517 [hereinafter "N.Y. Convention"].

<sup>66</sup> U.N. Comm'n on Int'l Trade Law, UNCITRAL Model Law on Commercial Arbitration, art. 8, U.N. Doc. A/40/17, U.N. Sales No. E.08.V.4 (2008) [hereinafter "UNCITRAL Model Law"].

<sup>67</sup> Commercial Code, art. 1424 (Mex.).

<sup>68</sup> Commercial Code, arts. 1415, 1423, 1424, 1457, 1462 (Mex.).

<sup>69</sup> INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION, ICCA'S GUIDE TO THE INTERPRETATION OF THE 1958 NEW YORK CONVENTION: A HANDBOOK FOR JUDGES 45 (2011).

<sup>70</sup> N.Y. Convention, *supra* note 65, at art. II(3); UNCITRAL Model Law, *supra* note 66, at art. 8(1); Commercial Code, art. 1424; INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION, *supra* note 69, at 38.

may include legal evidence that the subject matter of the dispute is not capable of settlement by arbitration.<sup>71</sup>

The exception of lack of form validity may scarcely arise in the context of Mexican trust disputes. Under Mexican law, a trust deed shall be made in writing.<sup>72</sup> An arbitration clause contained therein will therefore also fulfill the writing requirement established in Article I(1) of the New York Convention and Article 1423 CCo.

With regard to issues of substantive validity, i.e. whether a party's intent to arbitrate exists and is free of mistake, fraud, unconscionability, and duress, etc., these will be treated by state courts and arbitral tribunals under the applicable general contract provisions.<sup>73</sup> The severability principle of the arbitration agreement in modern arbitration laws<sup>74</sup> (Art. 1432 CCo.) will possibly trigger the application of a law to the arbitration agreement other than the law governing the underlying Mexican trust between the parties. Depending on the approach taken at the seat of arbitration, i.e. the *lex arbitri*, the question of which law applies to the substantive validity of the arbitration agreement could be easy or complex to answer. In arbitrations seated in France, case law provides that the existence and effectiveness of an arbitration agreement is to be assessed on the basis of the

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<sup>71</sup> N.Y. Convention, *supra* note 65, at art. V(2)(a); Commercial Code, arts. 1415, 1457 (I)(a) & (II), 1462 (I)(a) & (II).

<sup>72</sup> LGTOC, ch. V, sec. I, art. 387 (Mex.).

<sup>73</sup> BORN, *supra* note 64, at 148.

<sup>74</sup> *Id.* at 146 ("In many nations, including all major trading states, an arbitration agreement is presumptively 'separable' from the underlying contract in which it appears. National arbitration legislation often expressly so provides (See UNCITRAL Model Law Article 16; Swiss Law on Private International Law Article 178(3); U.S. Federal Arbitration Act §2; German Civil Procedure Act Article 1040(1)).").

parties' common intention alone, with no need to refer to any national law.<sup>75</sup> Under other arbitration laws, which do not contain a conflict of law rule on the applicable law to the arbitration agreement *per se* (i.e. Mexico arbitration law), the severability principle can give rise to more complex decisions on the law relevant to determining the substantive validity of an arbitration agreement contained in a Mexican trust deed. A uniform solution to this issue is nevertheless found in the New York Convention and in other pro-enforcement arbitration laws. Article V(1)(a) of the New York Convention<sup>76</sup> and Article 1462(I)(a) of the CCo.<sup>77</sup> both

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<sup>75</sup> A determination of the law applicable to the arbitration agreements is not required under the French law on arbitration, in the absence of an express choice of law to govern the arbitration agreements. *Municipalité de Khoms El Mergeb v. Soc. Dalico*, Dec. 20, 1993, *Revue de l'Arbitrage*, KLUWER ARBITRATION (1994), at 117. "By virtue of a substantive rule of international arbitration, the arbitration agreement is legally independent of the main contract containing or referring to it, and the existence and effectiveness of the arbitration agreement are to be assessed, subject to mandatory rules of French law and international public policy, on the basis of the parties' common intention, there being no need to refer to any national law." Identifying the governing law of the arbitration agreement thus becomes unnecessary. All that matters is that the parties consent to refer disputes to arbitration.

<sup>76</sup> N.Y. Convention, *supra* note 65, at art. V(1)(a) ("Recognition and enforcement of the award may be refused . . . [where] 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.").

<sup>77</sup> Commercial Code, art. 1462(I)(a), which is modeled after Article 36(1)(a) of the UNCITRAL Model Law. UNCITRAL Model Law, *supra* note 66, at art. 36(1)(a) (stating that "(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only: . . . [where] 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.").

provide that absent any specific choice of law by the parties to that effect, the substantive validity of an arbitration agreement is determined by the law of the country where the award is made. In other words, by the contract law at the place of arbitration.<sup>78</sup> In Section V below, we address some questions regarding proper formal and substantive intent to arbitrate disputes arising out of Mexican trusts.

The non-arbitrability exception refers to the parties' restriction to submit a dispute to arbitration.<sup>79</sup> Virtually all countries' laws exclude certain categories of matters from resolution by arbitration.<sup>80</sup> Each country has specific policy reasons and criteria to remove a class of claims from the realm of arbitration.<sup>81</sup> A matter that is arbitrable under the law of one country may not be capable of resolution by arbitration under another country's law. For example, some arbitration laws deem arbitrable only disputes over rights the parties are free to dispose of.<sup>82</sup> Other more liberal laws deem arbitrable all disputes involving claims of a financial

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<sup>78</sup> INTERNATIONAL CHAMBER OF COMMERCE, ARBITRATION RULES, art. 31(3) (2006) [hereinafter "ICC ARBITRATION RULES"].

<sup>79</sup> Also called "objective arbitrability," as opposed to "subjective arbitrability," which concerns whether a party by its own nature is restricted to enter into arbitration agreements because of a policy consideration to protect that party before State courts. LOUKAS A. MISTELIS & STAVROS L. BREKOULAKIS, ARBITRABILITY: INTERNATIONAL & COMPARATIVE PERSPECTIVES 6 (2009).

<sup>80</sup> BORN, *supra* note 64, at 148.

<sup>81</sup> MISTELIS & BREKOULAKIS, *supra* note 79, at 4 ("Certain disputes may involve such sensitive public policy issues that it is felt that they should only be dealt with by the judicial authority of state courts. An obvious example is criminal law which is generally the domain of the national courts: it is undisputed that the sanctioning of criminal activity is in the power of the judiciary.").

<sup>82</sup> CODE JUDICIAIRE [C.JUD.] art. 1676(1) (Belg.).

nature.<sup>83</sup> The arbitration laws based on the UNCITRAL Model Law do not usually set forth which disputes are arbitrable.<sup>84</sup> Instead, UNCITRAL-based laws, like the Mexican arbitration law, take the approach of defining the scope of arbitrability through the exclusion of certain matters via statutory provisions that expressly give exclusive jurisdiction to specific State courts.<sup>85</sup> The determination of the law governing the arbitrability of disputes can thus be an important strategic question and not an easy one. In practice, State courts have relied on the conflict of laws rule in Article V(2)(a) of the New York Convention, or its equivalent domestic arbitration law,<sup>86</sup> in order to apply their own national law to determine the arbitrability of the dispute at a pre-award (jurisdictional) stage or a post-award stage (in a setting aside claim or enforcement claim).<sup>87</sup> Arbitral tribunals similarly tend to apply the law at the place of arbitration in order to determine the arbitrability of the subject matter (*lex loci arbitri* and mandatory rules of law).<sup>88</sup> This trend may be influenced not only by the fact that the applicable norms and standards of the seat of arbitration are easy to identify, but also by the arbitrators' natural wish to shield their awards against setting aside claims at the place of arbitration. In Section VI, we will address the arbitrability of disputes arising out of Mexican trusts.

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<sup>83</sup> LDIP, art. 177(1) (Switz.); ZPO, § 1030, para. 1 (Ger.).

<sup>84</sup> UNCITRAL MODEL LAW, *supra* note 66, at art. 1(5) (providing that it does not intend to affect other laws of the adopting State that preclude certain disputes being submitted to arbitration).

<sup>85</sup> Commercial Code, art. 1415 (Mex.).

<sup>86</sup> UNCITRAL MODEL LAW, *supra* note 66, at arts. 34(2)(b)(i), 36(1)(b)(i); Commercial Code, arts. 1457(II), 1462(II) (Mex.).

<sup>87</sup> MISTELIS & BREKOULAKIS, *supra* note 79, at 12, 13.

<sup>88</sup> *Id.* at 13.

The exception for lack of legal capacity of one of the parties to the arbitration agreement is equally relevant in the context of trust disputes. Article V(1)(a) of the New York Convention provides that the recognition and enforcement of an award may be denied where the parties to the arbitration agreement were, under the law applicable to them, under some incapacity.<sup>89</sup> However, the New York Convention does not define the law governing the issue of capacity<sup>90</sup> or power<sup>91</sup> to enter into an arbitration agreement. Under the traditional conflict of laws method, the law governing legal capacity is determined differently depending on whether it relates to natural persons or legal entities. With regard to natural persons, traditional choice of law rules of France or Germany would deem applicable the law of their nationality.<sup>92</sup> On the contrary, some countries' conflict of laws rules, particularly in common law jurisdictions, but also in Mexico,<sup>93</sup> favor the application of the law of the country where the natural person concerned has his or her domicile as the connecting factor.<sup>94</sup>

With respect to capacity of legal entities, the approach is not uniform in domestic laws either. The conflict of laws

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<sup>89</sup> N.Y. Convention, *supra* note 65, at art. V(1)(a).

<sup>90</sup> PHILIPPE FOUCHARD ET AL., FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 242 (1999).

<sup>91</sup> Fouchard et al., correctly point out the confusion regarding capacity and power. Capacity relates to the natural or legal person's legal possibility under the law to act on its own name and on its own account. Power relates to the legal possibility to act on behalf of and for the interest of a legal or natural person. *Id.*

<sup>92</sup> *Id.* at 244.

<sup>93</sup> Código Civil Federal [CC] [Federal Civil Code], art. 13(II), Diario Oficial de la Federación [DOF] (May 14, 1928), últimas reformas DOF Dec. 24, 2013 (Mex.).

<sup>94</sup> FOUCHARD ET AL., *supra* note 90, at 244.

rules of some jurisdictions, like France, would designate the application of the law of the country where the legal entity has its headquarters (*siege social*). Conversely, under other legal systems, including Mexico's,<sup>95</sup> the capacity of legal entities is assessed in accordance with the law of incorporation or registry.<sup>96</sup>

The validity and scope of powers of representation are governed by different laws. Absent an express choice of law by the principal and agent, an agency relationship shall be governed by either the law where the authorization was granted,<sup>97</sup> the law where the principal has its headquarters,<sup>98</sup> or the law where the authorization ought to be performed,<sup>99</sup> depending on the relevant conflict of laws rule applied.

In both, issues of capacity and power of representation, arbitrators face the challenge of deciding which conflict of laws rule they will apply. As arbitrators have no forum, and thus are not bound by the conflict of laws rules of State courts at the seat or any possible place of enforcement, arbitrators enjoy flexibility to select the conflict of laws rules they deem appropriate. Some scholars see risks

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<sup>95</sup> Federal Civil Code, art. 2736 (Mex.) (designating the law of incorporation to determine the existence, legal capacity, object, and functioning of legal entities).

<sup>96</sup> FOUCHARD ET AL., *supra* note 90, at 245.

<sup>97</sup> Inter-American Convention on the Legal Regime of Powers of Attorney, (Jan. 16, 1975), 1438 U.N.T.S. 267.

<sup>98</sup> Convention on the Law Applicable to Agency, art. 6, (Mar. 14, 1978), 16 I.L.M. 775; Code Civil [C. Civ.] [Civil Code] art. 1837(1) (Fr.).

<sup>99</sup> Federal Civil Code, art. 13(V) (Mex.) (however, pursuant to Federal Civil Code, art. 13(IV), issues of form validity of a power of representation may be determined by the law of the place where the power was granted); Código Civil [C.C.] art. 39 (Port.); Código Civil [C.C.] art. 21 (Spain); Suprema Corte, [Paraguay Supreme Court] 18/5/2001, *Diego Pizziolo v. Nereo Tiso y Otros*, 224.

in resorting to the conflict of laws method since, in view of the different approaches above described, it is impossible to ensure a uniform approach.<sup>100</sup> In practice, arbitrators will apply either the conflict of laws rule which they are most familiar with or the forum judge conflict of laws rules of the place of arbitration or enforcement because of the natural tendency to render a valid and enforceable award. However, as none of these approaches may lead to a uniform and satisfactory solution, some scholars, particularly from France, have argued for the application of substantive law concepts considered essential in an international context instead of performing a complicated conflict of laws exercise.<sup>101</sup> For example, the rule that “any natural person carrying on an economic activity on a professional basis is at least presumed to have capacity to enter into arbitration agreements relating to that activity.”<sup>102</sup> In section VII below, we will address issues of capacity and representation of natural and legal persons usually involved in a Mexican trust disputes.

#### V. CONSENT TO ARBITRATE

As stated above, most countries' arbitration laws will give effect to arbitration proceedings provided there is an agreement by the parties to that effect (see Section IV above). Therefore, the enforcement of an arbitration agreement over one party depends first and foremost, upon the existence of that party's intent, otherwise called 'consent,' to arbitrate. In most legal systems, agreements or contracts are the product

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<sup>100</sup> FOUCHARD ET AL., *supra* note 90, at 244, 246.

<sup>101</sup> *Id.* at 248.

<sup>102</sup> *Id.*

of a process of offers and acceptances.<sup>103</sup> For instance, a buyer makes an offer to enter into a sales contract whereby it undertakes to buy a number of goods for a given price and to settle any dispute arising thereof in arbitration. A seller accepts the terms of such an offer, creating a contract with the buyer. The parties may have achieved a profitable bargain out of it. In addition, their arbitration agreement has the effect of removing their sales contract from the purview of state courts. A state court seized to decide a dispute over that sale contract should, in principle, refer the parties to arbitration because an arbitration agreement “operates” over those parties.<sup>104</sup>

In the context of Anglo-American trust law, the issue arises as to whether the act of creating a trust, which may contain an arbitration provision in the trust deed, is an agreement to arbitrate as required by the New York Convention and by national arbitration laws.<sup>105</sup> The issue is of significance because under Anglo-American law, trusts are not contracts.<sup>106</sup> Indeed, the unilateral transfer of property and declaration of trust by the settlor alone creates a trust.<sup>107</sup> There is no need for an offer and an acceptance for a trust to exist.<sup>108</sup> Accordingly, the legal relationship

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<sup>103</sup> INGBORG SCHWENZER et al., *GLOBAL SALES AND CONTRACT LAW* 130 (Oxford Univ. Press 2011).

<sup>104</sup> N.Y. Convention, *supra* note 65, at art. II(3).

<sup>105</sup> Koch, *supra* note 3, at 189.

<sup>106</sup> Michael P. Bruyere & Meghan D. Marino, *Mandatory Arbitration Provisions: A Powerful Tool to Prevent Contentious And Costly Trust Litigation, But Are They Enforceable?*, 42 A.B.A. REAL PROP., PROB. & TR. J. 351, 357 (2007); S.I. Strong, *Empowering Settlers: How Proper Language Can Increase the Enforceability of a Mandatory Arbitration Provision in a Trust*, 47 REAL PROP., TR. AND EST. L. J. 275, 291 (2012).

<sup>107</sup> Koch, *supra* note 3, at 101.

<sup>108</sup> Strong, *supra* note 3, at 1174.

between the settlor, the trustee, and the beneficiaries is not strictly contractual in nature.<sup>109</sup> In spite of the fact that the trustee may be paid for its services or even sign the trust deed, the trustee's fee will arise out of a collateral contract that does not form part of the trust.<sup>110</sup>

It follows from the above that arbitration provisions contained in a trust deed may not constitute an agreement between the parties covered by the trust relationship either. Indeed, state courts in the United States have considered that the unilateral declaration by the settlor *per se* could hardly be construed as an expression of intent by the trustees or beneficiaries to arbitrate any disputes arising thereof.<sup>111</sup> In *Schoneberger v. Oelze*,<sup>112</sup> decided by the Arizona Court of Appeals in 2004, the trust contained a provision stating that "any dispute arising in connection with this Trust, including disputes between Trustee and any beneficiary or among the Co-trustees, shall be settled by . . . negotiation, mediation and arbitration."<sup>113</sup> When the beneficiaries brought claims against the trustees of two related family trusts, the latter moved for arbitration on the

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<sup>109</sup> Koch, *supra* note 3, at 189.

<sup>110</sup> HUDSON, *supra* note 36, at 42.

<sup>111</sup> See e.g., Diaz v. Bukey, 125 Cal. Rptr. 3d 610, 612-13 (Cal. Ct. App. 2011) (discussing the statutory and case law restrictions to arbitration clauses in trusts. "[Appellant] contends the trial court erred by denying her motion to compel arbitration under the California Arbitration Act, Code of Civil Procedure section 1280 et seq., because the Trust contains an arbitration provision and the Trust is a contract. We disagree. The applicability of the California Arbitration Act requires the existence of a contract."), as modified on denial of reh'g (June 8, 2011), review granted and opinion superseded by Diaz v. Bukey, 257 P.3d 1129 (Cal. 2011) and cause transferred by 287 P.3d 67 (Cal. 2012); Murphy, *supra* note 51, at 639-42.

<sup>112</sup> 96 P.3d 1078 (Ariz. Ct. App. 2004).

<sup>113</sup> *Id.* at 1080.

basis of the above-mentioned arbitration agreement.<sup>114</sup> In response, the beneficiaries contended that the arbitration provisions were unenforceable because trusts are not contractual agreements and, as non-signatories of the trust deeds, they had never agreed to arbitrate their claims against the trustees.<sup>115</sup> In deciding in favor of the beneficiaries, the court explained the nature of Anglo-American trusts in the following terms:

The legal distinctions between a trust and a contract are at the heart of why [the beneficiaries] cannot be required to arbitrate their claims against the defendants. Arbitration rests on an exchange of promises . . . . In contrast, a trust does not rest on 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 and common law, holds that interest for the beneficiary. The “undertaking” between trustor and trustee “does not stem from the premise of mutual assent to an exchange of promises” and “is not properly characterized as contractual.”<sup>116</sup>

In spite of the above, common law scholars and courts have recently advanced different theories in order to conclude that arbitration provisions in trust deeds are

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<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 1081.

<sup>116</sup> *Id.* at 1083 (quoting *In re Naarden Trust*, 990 P.2d 1085, 1089 (Ariz. App. 1999)); see also Bruyere & Marino, *supra* note 106, at 358-60; Bosques-Hernández, *supra* note 49, at 16-17.

binding agreements between the parties covered by the trust relationship.<sup>117</sup> In *Rachal v. Reitz*,<sup>118</sup> the Supreme Court of Texas reversed an early decision by its court of appeals<sup>119</sup> concluding that an arbitration provision in a trust deed could not be enforced under the Texas Arbitration Act (TAA) because a binding arbitration provision must be the product of an enforceable contract,<sup>120</sup> and a contract does not exist in the trust context. This is in part because there is no consideration and in part because the trust beneficiaries have not consented to such a provision.<sup>121</sup> The Supreme

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<sup>117</sup> See e.g., Bruyere & Marino, *supra* note 106, at 361-62 (submitting that the distinction between contracts and trusts no longer makes sense in U.S. law. The distinction was due in large part to the works of Austin W. Scott, who published an article in the *Columbia Law Review* in 1917 on the inability of contract law to enforce the trust terms because English contract law “did not recognize a third-party beneficiary contract, a recognition essential to enforcing trust agreements.”). However, this has changed in modern U.S. contract law where agreements for the benefit of a third party are now enforceable. See Murphy, *supra* note 51, at 645-61 (addressing the theoretical shortcoming of the current characterization of a trust as something other than a contract; anticipating the “benefit theory” that would later on be applied in *Rachal v. Reitz* by the Supreme Court of Texas, which gave effect to an arbitration agreement in a trust deed; and addressing the donor’s “Intent Theory” as one of the means to enforce arbitration agreements, though admitting that only few jurisdictions give unlimited effect to a donor’s intent). See also Bosques-Hernández, *supra* note 49, at 8-12.

<sup>118</sup> 403 S.W.3d 840 (Tex. 2013), *reh'g denied* (Aug. 23, 2013).

<sup>119</sup> *Rachal v. Reitz*, 347 S.W.3d 305, 311 (Tex. App. 2011) *rev'd*, 403 S.W.3d 840 (Tex. 2013).

<sup>120</sup> *Id.*

<sup>121</sup> See *id.*; see also Nancy E. Delaney et al., *Rachal v. Reitz and the Evolution of the Enforceability of Arbitration Clauses in Estate Planning Documents*, 27 PROB. & PROP. 12, 12 (2013) (commenting on the background and Texas Supreme Court decision); see also Steven K. Mignogna, *Increasing Enforceability of Mandatory Arbitration Clauses in Wills and Trust*, N.J. L. J.

Court of Texas held that the intent of the legislature in the Texas Arbitration Act was to enforce arbitration provisions in agreements “to arbitrate future disputes” as well as formal contracts.<sup>122</sup> In *Diaz v. Bukey*,<sup>123</sup> the Supreme Court of California instructed the court of appeal to vacate its decision to refuse the enforcement of an arbitration provision in a trust deed on grounds of lack of a written contract and to reconsider the cause in light of *Pinnacle Museum Tower Ass’n. v. Pinnacle Market Development (US), LLC*.<sup>124</sup> In addition, new legislation in some states within the United States has been recently enacted addressing this issue.<sup>125</sup> In fact, the decision of the Arizona Court of Appeals in *Schoneberger v. Oelze*<sup>126</sup> was superseded by state legislation providing that “[a] trust instrument may provide mandatory, exclusive and reasonable procedures to resolve issues between the trustee and interested persons or among interested persons with regard to the administration or distribution of the trust.”<sup>127</sup> Florida and Hawaii have also adopted specific legislation expressly recognizing the enforceability of arbitration clauses in trusts.<sup>128</sup>

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(2013), available at <http://law-articles.vlex.com/vid/enforceability-clauses-wills-trusts-458312134>; Christopher S. Moore, *Texas Enforces Arbitration Clause in Trust Agreement*, 17 ALT. DISP. RESOL. 21, 22 (2013).

<sup>122</sup> *Rachal*, 403 S.W.3d at 844; Mignogna, *supra* note 121; Delaney et al., *supra* note 121, at 13-14; Moore, *supra* note 121, at 23 (commenting on the *Rachal* court’s reasoning).

<sup>123</sup> 287 P.3d 67, 67 (Cal. 2012).

<sup>124</sup> See generally *id.*

<sup>125</sup> See e.g., Ariz. Rev. Stat. Ann. § 14-10205 (2012).

<sup>126</sup> *Schoneberger*, 96 P.3d at 1078.

<sup>127</sup> Ariz. Rev. Stat. Ann. § 14-10205.

<sup>128</sup> *Bosques-Hernández*, *supra* note 49, at 18; *Murphy*, *supra* note 51, at 665-69.

Despite the above doctrines and recent legislation of some states endorsing the enforcement of arbitration provisions in trust deeds, there is still some jurisprudential uncertainty on the issue in many common law jurisdictions.<sup>129</sup> Proponents of arbitration advise that theoretical difficulties can be overcome through careful drafting of provisions that create contractual obligations in a trust.<sup>130</sup> Appropriate wording may read,

[A] settlor on behalf of himself and the beneficiaries deriving their interests through him, expressly contracts in the trust instrument with the trustee . . . that in consideration of undertaking the office of trustee . . . any breach of trust claim against the trustees shall be referred to arbitration.<sup>131</sup>

Aware of this issue and the potential of the trusts market for arbitration, two important arbitration institutions, the ICC Court of Arbitration and the American Arbitration Association, propose model arbitration clauses tailor-made for trust disputes. The extended text of these clauses evidences the fragility of arbitration agreements in trust deeds and the need to shield the arbitration proceedings

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<sup>129</sup> See Murphy, *supra* note 51, at 639; Delaney et al., *supra* note 121, at 14-16.

<sup>130</sup> Koch, *supra* note 3, at 190; Strong, *supra* note 106, at 307-09; Tina Wüstemann, *Arbitration of Trust Disputes*, in NEW DEVELOPMENTS IN INTERNATIONAL COMMERCIAL ARBITRATION 33, 44-45 (Christoph Müller ed., 2007); Delaney, et al., *supra* note 121, at 16.

<sup>131</sup> Strong, *supra* note 3, at 1179-80 (quoting UNDERHILL & HAYTON: LAW RELATING TO TRUSTS & TRUSTEES ¶ 11.84 (David Hayton et al., eds., 18th ed. 2010)).

against lack-of-intent challenges and other due process issues involving the parties to a trust relationship.<sup>132</sup>

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<sup>132</sup> The ICC Clause alone reads:

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.

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

However, not every jurisdiction experiences this type of “collision of bodies of law” or “tale of two cities” experience, as described by Strong<sup>133</sup> or Koch,<sup>134</sup> respectively, to describe the apparent tension between the law of arbitration and the law of trusts in common law jurisdictions. Indeed, many jurisdictions, particularly civil law countries that have their own domestic version of trusts, view this legal institution as contractual in nature.<sup>135</sup> As mentioned in Section II, the Mexican trust is a contract. In this regard, the enforcement of arbitration provisions in Mexican trusts shall not encounter the same type of

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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.

ICC ARBITRATION CLAUSE FOR TRUST DISPUTES, 19 ICC INT'L CT. OF ARB. BULL. 9 (2008), *available at* <http://www.iccdri.com> (search “ICC Arbitration Clause for Trust Disputes” and follow “Commission Report” hyperlink).

<sup>133</sup> Strong, *supra* note 3.

<sup>134</sup> Koch, *supra* note 3.

<sup>135</sup> Strong, *supra* note 3, at 1180.

challenge. As further addressed below, mutual intent to arbitrate will generally exist between the settlor of a Mexican trust and the designated trustees pursuant to Mexican arbitration law and most other arbitration laws.<sup>136</sup> In addition, intent to arbitrate will also exist between the trustee and non-signatory beneficiaries of a Mexican trust.<sup>137</sup>

A. INTENT TO ARBITRATE BY SETTLOR AND THE TRUSTEE(S)  
IN A MEXICAN TRUST

Typically, the settlor of a Mexican trust will express his intent to transfer specific assets in trust to be held or managed by a designated trustee (an authorized financial institution in Mexico)<sup>138</sup> for clearly identifiable beneficiaries pursuant to the terms established by the settlor. These trust terms will generally include dispute resolution and applicable law provisions. Arbitration may be chosen by the settlor as the means to resolve any dispute that may arise out of the formation, interpretation, performance, and termination of the trust created. In practice, the designated trustee will participate in the negotiation and entering into of the trust. The trustee's intent to be bound by the terms of the trust will usually be recorded in the trust deed. The first question that arises is whether the arbitration provision therein could be enforced against the trustee and the settlor pursuant to Mexican law.<sup>139</sup> The second question is whether the same arbitration provision in the same Mexican trust

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<sup>136</sup> See discussion *infra* § A.

<sup>137</sup> See discussion *id.* § B.

<sup>138</sup> See discussion *infra* § II. B.

<sup>139</sup> See discussion *infra* § II. A. 1.

could (more easily) be enforced against the trustee or the settlor in common law systems, (e.g., U.S. or English law).<sup>140</sup>

1. ENFORCEMENT OF AN ARBITRATION AGREEMENT IN A MEXICAN TRUST PURSUANT TO MEXICAN LAW

Pursuant to Article 1415 of the CCo., the arbitration law of Mexico will apply to national and international arbitrations when the place of the arbitration is in Mexico.<sup>141</sup> Accordingly, an arbitration clause in a Mexican trust deed that selects Mexico as the place of arbitration, or absent such selection when the arbitral tribunal so determines (pursuant to Article 1436), will be governed by the provisions in Articles 1415 *et seq.* (i.e. by Mexico's arbitration law).

With regard to form validity, Article 1423 provides that an arbitration agreement shall be "in writing."<sup>142</sup> This requirement is met if the arbitration agreement is recorded in a document signed by the parties or in an exchange of letters, telex, telegrams, faxes, or other means of communication, which provide a record of the arbitration agreement.<sup>143</sup> In addition, the reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement, provided that the contract is in writing and the reference is such as to make that clause part of the contract.<sup>144</sup> Going back to the typical means to express intent by a settlor and a trustee of a Mexican trust, the form validity requirement in Article 1423 would be satisfied with

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<sup>140</sup> See discussion *infra* § II. A. 2.

<sup>141</sup> Commercial Code, art. 1415 (Mex.).

<sup>142</sup> Commercial Code, art. 1423 (Mex.).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

the settlor's and trustee's signing of a trust deed containing an arbitration clause. Moreover, the same requirement would also be met if—notwithstanding the lack of the trustee's signature on the deed—the trustee's services agreement with the settlor makes reference to the trust deed which contains the arbitration clause. Although less typical in practice, an arbitration agreement recorded in writing will also satisfy the form requirement in Article 1423 if the settlor's or the trustee's agreement to be bound by the trust terms is implied by conduct. An example would be where the settlor transfers the assets that are the subject matter of the trust to the trustee, pursuant to the terms of an unsigned trust deed, or where the trustee begins managing the assets transferred by the settlor under the trust terms before a deed is signed. As has been held by courts and arbitration tribunals applying Article 7 of the UNICTRAL Model Law of 1985—upon which Article 1423 of the CCo. was modeled—the intent shall not necessarily be articulated in writing by all parties: only a record of the agreement upon which a party relies need exist.<sup>145</sup> This also means that implied intent to be bound by an arbitration agreement will satisfy the in-writing requirement, irrespective of who may have drafted the arbitration agreement at stake. As explained by the Swiss Supreme Court in its decision of October 16, 2003, the form requirement only applies to the agreement itself, but not to the intent by any of the parties. The question of the

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<sup>145</sup> *Schiff Food Products Inc. v. Naber Seed & Grain Co. Ltd.* (1996), 149 Sask. R. 54 Can. Sask. Q.B.; *Achilles (USA) v. Plastics Dura Plastics* (1977) ltée/Ltd. (2006) QCCA 1523 (Can.).

subjective scope of an arbitration agreement is determined by means of the classic theory of acceptance of contracts.<sup>146</sup>

Following this line of thought, the next step in establishing the existence of an agreement between the settlor and the trustee in a Mexican trust dispute regards issues of substantive validity, i.e. whether the settlor's or trustee's intention to arbitrate was lawfully exercised and given free of abuse or misconceptions, etc. Because Mexico's arbitration law does not cover these matters, the latter shall be determined by a different set of law provisions. As discussed above, Article V(1)(a) of the New York Convention and Article 1462(I)(a) of the CCo.<sup>147</sup> uniformly

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<sup>146</sup> Tribunal fédérale [TF] [Federal Supreme Court] Oct. 16, 2003, 4P.115/2003, 129 Arrêts Du Tribunal Fédéral Suisse (Recueil Officiel) [ATF] III 727 (Switz.). "However, this formal requirement only applies to the arbitration agreement itself, that is to say the agreement (arbitration clause) by which the original parties have mutually expressed their joint intention to arbitrate. As to the question of the subjective scope of a valid arbitration agreement under Art . 178 al. 1 Swiss PILA - this is about determining which parties are bound by the agreement or if a third party that is not designated nevertheless falls within its scope *ratione personae* - this regards the substance and should therefore be resolved in the light of art. 178 al. 2 Swiss PILA." In the original decision in French, "[t]outefois, cette exigence de forme ne s'applique qu'à la convention d'arbitrage elle-même, c'est-à-dire à l'accord (clause compromissoire ou compromis) par lequel les parties initiales ont manifesté réciproquement leur volonté concordante de compromettre. Quant à la question de la portée subjective d'une convention d'arbitrage formellement valable au regard de l'art. 178 al. 1 LDIP - il s'agit de déterminer quelles sont les parties liées par la convention et de rechercher, le cas échéant, si un ou des tiers qui n'y sont pas désignés entrent néanmoins dans son champ d'application *ratione personae* -, elle relève du fond et doit, en conséquence, être résolue à la lumière de l'art. 178 al. 2 LDIP."

<sup>147</sup> Commercial Code, art. 1423 (Mex.) (modeled after Art. 36(1)(a) of the UNCITRAL Model Law, which states, "(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made,

answer this question designating the law of the country where the award is made to be the contract law at the place of arbitration (see Section IV above).<sup>148</sup> Accordingly, in arbitration proceedings in Mexico, either by parties' choice or by the tribunal's decision (CCo., art. 1436), the provisions on obligations and contracts in Mexico's CCo. and the Federal Civil Code ("CC") will determine the existence of the arbitration agreement from a substantive point of view. As under most, if not all, laws in the world, Mexico's contract law endorses the principle of freedom of contract, whereby agreements may be reached through the parties' express or implied consent (by conduct) to be bound by their terms.<sup>149</sup> Limits on freedom of contract are nevertheless established by provisions on validity where at the conclusion of the contract, primary principles protected by the law are considered to be at risk. Examples of such principles are: (i) the lawfulness of the transaction (illegality, immorality, and impossibility which could hardly arise in the context of an arbitration agreement); (ii) the free and informed will to contract (mistake, unfair terms in adhesion contracts, fraud, and duress); and (iii) the bargaining balance

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may be refused only: (a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that: (i) a party to the arbitration agreement referred to in article 7 was 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").

<sup>148</sup> Pursuant to Article 31(3) of the 2012 ICC Rules, "the award shall be deemed to be made at the place of the arbitration." ICC ARBITRATION RULES, art. 31(3).

<sup>149</sup> See generally EDGARDO MUÑOZ, MODERN LAW OF CONTRACTS AND SALES IN LATIN-AMERICA, SPAIN AND PORTUGAL 94, 103 (Ingeborg Schwenzer 6th ed., 2011).

of the deal (gross disparity (*lesión*) situations which rules do not apply to business deals in Mexico).<sup>150</sup>

It is worth mentioning that under the severability principle of arbitration agreements in Article 1432 of the CCo., an arbitral tribunal's decision to void a Mexican trust does not entail in itself the annulment of the arbitration agreement therein. A party seeking the annulment of an arbitration agreement must specifically prove the substantive validity grounds in relation to the arbitration agreement itself.

## 2. ENFORCEMENT OF AN ARBITRATION AGREEMENT IN A MEXICAN TRUST PURSUANT TO U.S. OR ENGLISH ARBITRATION LAWS

Increasingly, foreign entities and foreign persons are parties to a Mexican trust as either settlors or beneficiaries. Therefore, it is possible that a settlor and a trustee (or in lieu of them, the arbitral tribunal) designate a seat of arbitration outside Mexico to resolve any dispute arising out of a Mexican trust. The reasons for choosing a place of arbitration outside Mexico are many: neutrality, confidentiality, high bargaining power of the settlor, origin or place of deposit of the assets to be transferred in trust, etc.

Because the place of arbitration would determine both the *lex arbitri* as well as the law applicable to the substantive existence of an arbitration agreement,<sup>151</sup> the question is

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<sup>150</sup> *Id.* at 169, 209.

<sup>151</sup> That would be the uniform conflict of laws rule to be taken—absent an agreement by the parties on the law applicable to the arbitration clause—pursuant to Article V(1)(a) of the New York Convention as well as under the English Arbitration Act 1996, sec. 2(1).

whether an arbitration provision in a Mexican trust could be enforced against the trustee or the settlor in common law systems. Issues of form validity impairing the effect of an arbitration agreement in a Mexican trust are unlikely to arise in these jurisdictions. Both the English Arbitration Act<sup>152</sup> and the United States Federal Arbitration Act<sup>153</sup> will give effect to any arbitration agreement “in writing.” The requirement of “in writing” also limits itself to the arbitration provision. It does not require consent to be necessarily given by all parties in such a manner.<sup>154</sup> As mentioned above, the typical conclusion of a Mexican trust involves preparing a written document outlining the terms pursuant to which the settlor conveys the assets to the trustee.<sup>155</sup> The settlor and the trustee will most likely sign the written deed before the trustee becomes the legal depository or manager of the assets on trust. Lack of signature would not empty the arbitration agreement of its binding effect over the settlor or trustee if their implied acceptance of the trust terms can be inferred by conduct. Yet, the question whether the settlor or trustee subjectively agreed on the arbitration agreement will have to be answered by the contract law provisions at the

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<sup>152</sup> English Arbitration Act 1996, ch. 23, § 5.

<sup>153</sup> Federal Arbitration Act, 9 U.S.C. 2 §§ 1-14 (2012).

<sup>154</sup> English Arbitration Act 1996, § 5 provides that “. . . (2) there is an agreement in writing— (c) if the agreement is evidenced in writing or (3) Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing. (4) An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement.”

<sup>155</sup> LGTOC, ch. V, sec. I, art. 387 (Mex.) (“[T]he creation of a trust shall always be made in writing.”).

place of arbitration, and not by the *lex arbitri* (since the latter does not contain that sort of provisions).<sup>156</sup>

In this regard, the issue of characterization of the arbitration claims will be key. As previously addressed, trusts in Anglo-American jurisdictions derive from the law developed by equity courts.<sup>157</sup> Accordingly, “with limited exceptions, the remedies of trust beneficiaries are equitable in character and enforceable against trustees in a court exercising equity powers.”<sup>158</sup> The remedies or claims within a trust are thus not contractual in nature. As the comment to § 197 of the Restatement (Second) of Trusts (1959) explains:

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

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<sup>156</sup> *Clausen v. Watlow Electric Mfg. Co.*, 242 F.Supp. 2d 877, 882 (D.Or.2002); “The [Federal Arbitration Act] ‘creates a body of federal substantive law of arbitrability, enforceable in both state and federal courts and pre-empting any state laws or policies to the contrary’ . . . . The FAA, however, does not preempt state law regarding the “‘validity, revocability and enforceability of contracts generally.’” . . . Thus, to resolve the issue whether the parties entered into a valid and enforceable written agreement to arbitrate, the court must apply general, state-law principles of contract interpretation.” *Id.* at 1049 (citations omitted).

<sup>157</sup> ALASTAIR HUDSON, *EQUITY AND TRUSTS* 45-47 (Routledge, 8th ed. 2014).

<sup>158</sup> *RESTATEMENT (THIRD) OF TRUSTS* § 95 (AM. LAW INST. 2012).

make a contract to perform the trust enforceable in an action at law.<sup>159</sup>

However, the trust created pursuant to Mexican law differs from the Anglo-American trust. The Mexican trust is a contract (see Section II.B. above). Parties and arbitrators should bear in mind that the claims in a Mexican trust are contractual ones. More importantly, because a Mexican trust is contractual in nature, the traditional process of offer and acceptance (or the more modern process of step-by-step negotiations) of the trust terms will in principle also lead to reaching an agreement on the arbitration clause therein. Accordingly, the inclusion of an arbitration agreement in a Mexican trust should not give rise to the type of discussions currently affecting the enforceability of arbitration provisions in Anglo-American trusts (see Section V above). Arbitrators in the United States or England apply the contract law rules of those jurisdictions to determine the substantive existence of the arbitration agreement. Arbitrators should not apply the Anglo-American trust rules at all in order to establish the nature of a Mexican trust. Any issue regarding the Mexican trust (separate from the arbitration agreement) including its nature, scope, interpretation, and effect should be decided by the law pursuant to which such trust was settled, i.e. Mexican law.

#### B. INTENT TO ARBITRATE BY BENEFICIARIES OR CLASS OF BENEFICIARIES IN A MEXICAN TRUST

As mentioned above, the Mexican trust is created upon the agreement by the settlor and trustee of the terms of

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<sup>159</sup> RESTATEMENT (SECOND) OF TRUSTS § 197 cmt. b (AM. LAW INST. 1959).

the trust (see Subsection A above).<sup>160</sup> Participation of the beneficiaries in the execution of the trust agreement is not a requirement for the existence of a Mexican trust. Mexican law gives effect to trusts that do not designate any beneficiary—the latter may be designated subsequent to the creation of the trust.<sup>161</sup> Accordingly, the question arises as to whether an arbitration provision in a Mexican trust binds beneficiaries who did not consent to its terms at the time of creation.

State courts and arbitral tribunals have extended arbitration agreements to non-signatories using rules or theories such as agency, alter ego, implied consent, group of companies, estoppel, third-party beneficiary, guarantor, subrogation, legal succession and ratification, assumption, etc.<sup>162</sup> Two legal theories, however, seem to fit well with the trust institution and appear to be useful in bridging the initial gap between the creation of the trust and the subsequent acceptance of the trust terms by beneficiaries. The first relies on civil law rules on *stipulation pour autrui*<sup>163</sup> or provision in favor of a third party. The second is rooted in

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<sup>160</sup> LGTOC, art. 381 (Mex.).

<sup>161</sup> *Id.*

<sup>162</sup> See generally Bernard Hanotiau, *Consent to Arbitration: Do We Share a Common Vision?*, 27 *ARBITRATION INTERNATIONAL* 539, 551 (2011); Bernard Hanotiau, *Non-signatories in International Arbitration: Lessons from Thirty Years of Case Law*, *INTERNATIONAL ARBITRATION 2006: BACK TO BASICS?* (Albert Jan van den Berg ed., 2006).

<sup>163</sup> *Stipulation pour autrui* is a contract or provision in a contract that confers a benefit on a third-party beneficiary. A stipulation pour autrui gives the third-party beneficiary a cause of action against the promisor for specific performance. See *MERRIAM-WEBSTER'S DICTIONARY OF LAW* (1996).

the common law doctrine of equitable estoppel,<sup>164</sup> where an equal solution can also be reached under the good faith principle in civil law systems.

1. THE SETTLOR'S PROVISION IN FAVOR OF A THIRD PARTY  
(CIVIL LAW SYSTEMS)

The legal purpose of the trust is to obtain some benefit out of the assets transferred to the trustee. In view of this, Mexican law provides that the settlor will designate the beneficiaries to receive the benefits that the trust encompasses.<sup>165</sup> Although beneficiaries are considered parties to Mexican trust agreements by most scholars (see Section II.B. above), technically beneficiaries only become parties to the trust when they decide to exercise the rights assigned to them in accordance with the trust terms. In the meantime, however, beneficiaries (who did not expressly assume the role of parties at the time of the trust's creation) are legally related to the settlor and the trustee as third party beneficiaries.

The contract law doctrine of third party beneficiary has its roots in medieval law.<sup>166</sup> Pursuant to Article 1121 of

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<sup>164</sup> Equitable estoppel prevents one party from taking a different position at trial than she did at an earlier time if the other party would be harmed by the change.

<sup>165</sup> LGTOC, ch. V, sec. I, art. 382 (Mex.).

<sup>166</sup> Jan Hallebeek, *Contracts for a Third-Party Beneficiary: A Brief Sketch from the Corpus Iuris to Present-Day Civil Law*, 13 *FUNDAMINA* 11, 14 (2008) ("By the end of the Middle Ages both the civilians and the canonists, who adopted the Roman *alteri stipulari* rule, considered it possible for contracting parties to stipulate validly that something be given or done to a third-party beneficiary and to bring it about that this third party could enforce what was stipulated in his favour.").

the French Civil Code, “[a] party may stipulate a benefit for a third party as a condition regarding a stipulation that it makes for itself or concerning a gift that it makes to another party.”<sup>167</sup> The rule is an exception to the principle of *privity* of contracts.<sup>168</sup> Article 1165 of the French Civil Code recognizes the exception, stating: “[a]greements produce effects only between the contracting parties; agreements do not affect and benefit third parties except as provided in article 1121 [provision in favor of a third party].”<sup>169</sup> Beneficiaries of a trust deed are potentially affected by and benefit from the terms of the trust as if they were under the doctrine of *stipulation pour autrui*. It is just a matter of time before the beneficiaries’ become fully bound by the trust terms, including any dispute resolution clause.

Mexico’s Federal Civil Code (CC) embodies the same provisions.<sup>170</sup> Article 1870 of the CC provides further that “the rights of the designated third party arise at the time of the contract conclusion, **unless the contracting parties retain the power to impose conditions expressly established in the agreement as they consider appropriate**” (emphasis

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<sup>167</sup> The original reads, “On peut pareillement stipuler au profit d'un tiers lorsque telle est la condition d'une stipulation que l'on fait pour soi-même ou d'une donation que l'on fait à un autre. Celui qui a fait cette stipulation ne peut plus la révoquer si le tiers a déclaré vouloir en profiter.” Code Civil [C. Civ.] [Civil Code] art. 1121 (Fr.).

<sup>168</sup> The doctrine of *privity* in the common law of contract provides that a contract cannot confer rights or impose obligations arising under it on any person or agent except the parties to that contract.

<sup>169</sup> The original reads, “Les conventions n'ont d'effet qu'entre les parties contractantes ; elles ne nuisent point au tiers, et elles ne lui profitent que dans le cas prévu par l'article 1121.” Code Civil [C. Civ.] [Civil Code] art. 1165 (Fr.).

<sup>170</sup> Federal Civil Code, arts. 1869-1872 (Mex.).

added).<sup>171</sup> In this regard, arbitration specialists in Mexico submit that even if this doctrine arguably does not impose obligations but grants benefits to third parties,<sup>172</sup> Article 1870 validates the view that parties are free to attach to the benefits stipulated in favor of a third party collateral clauses which form part of the whole transaction.<sup>173</sup>

Against this background, an arbitration provision in a trust deed will not only cover disputes between the trustee (promisor) and the settlor (promisee), but also those disputes regarding the *stipulation* itself (the benefits). In light of the fact that the benefits of a trust concern the beneficiary, the arbitration clause binds the beneficiary as part of the transaction designed by the original parties.

That being said, beneficiaries must show their intent to be bound by the arbitration provision in the trust deed. As

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<sup>171</sup> The original reads: “El derecho de tercero nace en el momento de perfeccionarse el contrato, salvo la facultad que los contratantes conservan de imponerle las modalidades que juzgue convenientes, siempre que éstas consten expresamente en el referido contrato.” Federal Civil Code, art. 1870 (Mex.).

<sup>172</sup> The discussion arose out of Francisco Gonzalez de Cossio’s first proposal to see an arbitration agreement as an obligation of the type of a condition precedent to be fulfilled by the third party in order to obtain the benefits stipulated in its favor. Francisco Gonzalez-de-Cossio, *El Que Toma el Botín, Toma La Carga: La Solución a Problemas Relacionados con Terceros en Actos Jurídicos que Contiene un Acuerdo Arbitral e Involucra Terceros*, 14-16 (2012) [hereinafter “Gonzalez-de-Cossio - 2012”]. However, in the two further essays referenced below González de Cossio seems to concede that historically, the third parties could not be burdened with obligations but rather only afforded rights, prompting the author to revisit the nature of an arbitration agreement in that case. Francisco Gonzalez-de-Cossio, *El Que Toma el Botín, Toma la Carga: La Idea Gana Adeptos*, 5-8 (2013) [hereinafter “Gonzalez-de-Cossio - 2013”].

<sup>173</sup> Gonzalez-de-Cossio - 2013, *supra* note 172, at 6-8; see also González-de-Cossio - 2012, *supra* note 172, at 1-3.

addressed above (see Section V.A.1. above), the “in writing” requirement in Article 1423 of the Commercial Code shall not be an issue. Mexican trusts must also be created in writing.<sup>174</sup> Therefore, written evidence of the arbitration agreement will be contained in the trust deed. Pursuant to Article 1423, the beneficiaries’ intent need not necessarily be articulated in writing.<sup>175</sup> Beneficiaries’ implied intent to be bound by an arbitration agreement satisfies the in-writing requirement. The question of whether conduct shows intent is determined by means of the classic theory of contract formation and interpretation.<sup>176</sup>

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<sup>174</sup> LGTOC, ch. V, sec. I, art. 387 (Mex.).

<sup>175</sup> *Schiff Food Products Inc. v. Naber Seed & Grain Co. Ltd*, [1996] 149 Sask. R. 54 (Can. Que.); *Achilles (USA) v. Plastics Dura Plastics*, [1977] 2006 CCQA 1523 (Can. Que.).

<sup>176</sup> Tribunal federal [TF] [Federal Supreme Court] Oct. 16, 2003, 129 III 727, ARRÊTS DU TRIBUNAL FÉDÉRAL SUISSE (ATF) (Switz) (“However, this formal requirement only applies to the arbitration agreement itself, that is to say the agreement (arbitration clause) by which the original parties have mutually expressed their joint intention to arbitrate. As to the question of the subjective scope of a valid arbitration agreement under Art . 178 al. 1 Swiss PILA- this is about determining which parties are bound by the agreement or if a third party that is not designated nevertheless falls within its scope *ratione personae* - this regards the substance and should therefore be resolved in the light of art. 178 al. 2 Swiss PILA.”). In the original decision in French, “[t]outefois, cette exigence de forme ne s'applique qu'à la convention d'arbitrage elle-même, c'est-à-dire à l'accord (clause compromissoire ou compromis) par lequel les parties initiales ont manifesté réciproquement leur volonté concordante de compromettre. Quant à la question de la portée subjective d'une convention d'arbitrage formellement valable au regard de l'art. 178 al. 1 LDIP - il s'agit de déterminer quelles sont les parties liées par la convention et de rechercher, le cas échéant, si un ou des tiers qui n'y sont pas désignés entrent néanmoins dans son champ d'application *ratione personae* -, elle relève du fond et doit, en conséquence, être résolue à la lumière de l'art. 178 al. 2 LDIP.”

As an authority on Mexican arbitration submits, there may not be a clear way to show intent to be bound by an arbitration agreement than a beneficiary's will to exercise a right conferred by the contract that comprises an arbitration agreement.<sup>177</sup> Although not originally a party to such contract, accepting to profit out of the rights therein shall amount to that party's acceptance of the whole combo, including the arbitration provision.<sup>178</sup>

The same result has been achieved under similar common law doctrines. Pursuant to the doctrine of "deemed acquiescence," beneficiaries who receive some type of benefit under the trust are deemed bound by the terms of the trust, including any arbitration clause therein.<sup>179</sup> The rule has been drawn in part from the language found in section 82(2) of the English Arbitration Act, reading "a party to an arbitration agreement includes any person claiming under or through a party to the agreement." In that order of ideas, any beneficiary who draws his interest in the trust from the settlor and whose rights and obligations are determined by the trust deed is considered to have consented to the arbitration agreement.<sup>180</sup> As put by some scholars, the doctrine lies on the premise that "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."<sup>181</sup>

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<sup>177</sup> Gonzalez-de-Cossio - 2013, *supra* note 172, at 9.

<sup>178</sup> *Id.* at 9-10.

<sup>179</sup> Strong, *supra* note 3, at 1211.

<sup>180</sup> *Id.*

<sup>181</sup> Koch, *supra* note 3, at 190.

Should a settlor wish to avoid the interpretive task of proving consent by any designated beneficiaries, she may consider drafting a trust deed in a way that deems benefitting from the trust terms as an implied agreement to submit disputes to arbitration.<sup>182</sup> The ICC Court of Arbitration suggests the following wording in its model trusts dispute clause:

As a condition for claiming, being entitled to or receiving any benefit, interest or right under the trust, any person shall be bound by the provisions of this arbitration clause and shall be deemed to have agreed to settle all disputes arising out of or in connection with the trust in accordance with this arbitration clause.<sup>183</sup>

## 2. DOCTRINE OF DIRECT BENEFITS ESTOPPEL (U.S. LAW) OR GOOD FAITH (CIVIL LAW SYSTEMS)

Courts in the U.S. have recently applied a different (though overlapping) theory to attract non-signatory beneficiaries to arbitration proceedings.<sup>184</sup> Pursuant to the doctrine of "direct benefits estoppel" a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's

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<sup>182</sup> Strong, *supra* note 3, at 1210.

<sup>183</sup> See ICC ARBITRATION CLAUSE FOR TRUST DISPUTES, 19 ICC INT'L CT. OF ARB. BULL. 9 (2008), available at <http://www.iccdrl.com> (search "ICC Arbitration Clause for Trust Disputes" and follow link for "ICC Arbitration Clause for Trust Disputes").

<sup>184</sup> *Rachal v. Reitz*, 403 S.W.3d 840, 847 (Tex. 2013); *ENGlobal U.S., Inc. v. Gatlin*, 449 S.W.3d 269, 274 (Tex. App. 2014); *Greenberg Traurig, LLP v. National American Ins. Co.*, 448 S.W.3d 115, 122 (Tex. App. 2014).

arbitration clause where that party has consistently maintained that other provisions of the same contract should be enforced to benefit him.<sup>185</sup> This theory has its roots in the rule that a third party enjoying direct benefits or exercising rights like a party under a contract may not challenge the jurisdiction of an arbitral tribunal.<sup>186</sup> The rule dates back to *Tepper Realty Co. v. Mosaic Tile Co.*, where a District court found that the “(claimant) cannot have it both ways. It cannot rely on the contract when it works to its advantage and ignore it when it works to its disadvantage.”<sup>187</sup>

More recently, in *Rachal v. Reitz* the Supreme Court of Texas considered this rule in the context of a lawsuit in damages for breach of the trust terms and fiduciary duties brought by a beneficiary against the trustee.<sup>188</sup> In this case, the beneficiary claimed that the trustee had inappropriately taken money from the trust estate and thus that the beneficiary was “entitled to any profits that would accrue to the trust estate if there had been no breach of trust.”<sup>189</sup> The beneficiary, however, argued that the arbitration provision contained in the trust deed was invalid as to him for lack of mutual assent. The court disagreed, holding that:

A beneficiary who attempts to enforce rights that would not exist without the trust manifests her assent to the trust's arbitration clause. For

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<sup>185</sup> *Id.*

<sup>186</sup> GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1473 § 1 (KLUWER L. INT'L. 2014); Janin Blaine-Covington, *The Validity of Arbitration Provisions in Trust Instruments*, 55 CALIF. L. REV. 521, 525, 528 (1967).

<sup>187</sup> 259 F.Supp. 688, 692 (S.D.N.Y. 1966).

<sup>188</sup> 403 S.W.3d at 847.

<sup>189</sup> *Id.*

example, a beneficiary who brings a claim for breach of fiduciary duty seeks to hold the trustee to her obligations under the instrument and thus has acquiesced to its other provisions, including its arbitration clause. In such circumstances, it would be incongruent to allow a beneficiary to hold a trustee to the terms of the trust but not hold the beneficiary to those same terms.<sup>190</sup>

The same solution should be achieved under the principle of good faith in many jurisdictions. Article 2.A.1 of the UNCITRAL Model Law provides that “in the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and **the observance of good faith**” (emphasis added). Notwithstanding the fact that the beneficiary’s intent to be bound by the arbitration agreement must be assessed under the contract law provisions at the place of arbitration (and not by the *lex arbitri*, see Section V.A.1. above), article 2.A.1 of the UNCITRAL Model Law 2006 sheds light on the importance of applying the good faith principle in arbitration matters.<sup>191</sup> Relying on the contract principles of reliance and good faith, the Swiss Supreme Court in a decision dated April 7, 2014, found that a non-signatory parent company of the respondent, by virtue of its statements and behavior, had given the appearance that it was a party to the contract. The claimant could therefore believe, in good faith, that the parent

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<sup>190</sup> *Id.*

<sup>191</sup> See generally Bernardo Cremades, *Good Faith in International Arbitration*, 27 AM. U. INT’L L. REV. 761, 779 (2012).

company was bound by the contracts' terms, including the arbitration agreements.<sup>192</sup>

Although we must still wait to see how State courts and arbitral tribunals will apply the good faith principle in the context of trust disputes, there are grounds to conclude that beneficiaries who maintain an undergoing relationship with trustees under the umbrella of a trust deed that includes an arbitration agreement could eventually be covered by the agreement. The good faith principle works as an interpretive tool to evaluate a non-signatory beneficiary's statements or conduct. If the non-signatory beneficiary's conduct or statements are such as to lead the trustees to reasonably believe that the beneficiary agrees to the terms of the trust as a whole, the beneficiary shall be deemed covered by the arbitration agreement.

#### VI. ARBITRABILITY OF MEXICAN TRUST DISPUTES IN MEXICO

As introduced in Section IV, the enforceability of an arbitration agreement will also depend upon whether the claims in dispute are arbitrable.<sup>193</sup> We share the majority view within arbitration law and practice that this question is to be determined by the *lex arbitri* and mandatory provisions at the place of arbitration, as discussed in Section IV.<sup>194</sup> For the purposes of this article, we will review whether disputes arising out of a Mexican trust are arbitrable pursuant to

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<sup>192</sup> Tribunal federal [TF] [Federal Supreme Court] Apr. 7, 2014, 4A\_450/2013, KLUWER LAW INTERNATIONAL ARBITRATION (Switz).

<sup>193</sup> BORN, *supra* note 64, at 148; *see also* MISTELIS & BREKOULAKIS, *supra* note 79, at 4.

<sup>194</sup> N.Y. Convention, *supra* note 65, at art. V(2)(a); UNCITRAL MODEL LAW, *supra* note 66, at arts. 34(2)(b)(i), 36(1)(b)(i); Commercial Code, arts. 1457(II), 1462(II) (Mex.); MISTELIS & BREKOULAKIS, *supra* note 79, at 12-13.

Mexican law. In practice, this would make sense. On the one hand, settlors and trustees of Mexican trusts will most likely choose Mexico as a place of arbitration. As previously stated in Section II.B., under Mexican trust law, only authorized and registered financial and credit institutions, which are mainly banks in Mexico, may act as trustees. One could predict that financial institutions proposing or accepting an arbitration agreement in a Mexican trust deed will want to keep the arbitration proceedings under the supervision of Mexican courts and Mexican mandatory rules of law.<sup>195</sup> In this case, a determination of the arbitrability of Mexican trusts-related claims would be relevant at the jurisdictional stage<sup>196</sup> or in the case of annulment actions, against the award.<sup>197</sup>

On the other hand, in the event parties select a place of arbitration outside Mexico, or where the arbitral tribunal so determines,<sup>198</sup> the arbitrability rule pursuant to Mexican law will most likely be relevant at the stage of enforcement of the arbitration award.<sup>199</sup> Since only Mexican-authorized financial and credit institutions may act as trustees, any arbitral award that is not voluntarily complied with by the trustees will have to be enforced in Mexico. In this regard, all parties involved in a Mexican trust arbitration have a

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<sup>195</sup> See *infra* Section IX.

<sup>196</sup> This is when a review of the arbitrability concept needs to be made by the arbitral tribunal pursuant to Art. 1434 CCo. Mexico or by Mexican State courts in accordance with Art. 1424 CCo. Mexico. Commercial Code, arts. 1424, 1434 (Mex.).

<sup>197</sup> See *id.* at arts. 1457(II), 1462(II); MISTELIS & BREKOULAKIS, *supra* note 79, at 12-13.

<sup>198</sup> Commercial Code, art. 1436 (Mex.).

<sup>199</sup> Where Art. V(2)(a) of the New York Convention becomes relevant. See N.Y. Convention, *supra* note 65, at art. V(2)(a).

legitimate interest in knowing whether the scope of arbitrability under Mexican law could jeopardize the enforcement of an arbitration award in Mexico.

Lack of arbitrability is a jurisdictional matter. As such, the arbitral tribunal will determine the arbitrability of trust disputes under Mexican law. Pursuant to Article 1424 of the CCo., state courts will only deny effect to an arbitration agreement where the claim at stake is **evidently** non-arbitrable upon a summary examination.<sup>200</sup> That said, State courts will have the final decision regarding the arbitrability of a dispute if asked to intervene in an annulment or enforcement action pursuant to Articles 1457 (II) and 1462 (II) of the CCo.<sup>201</sup>

Mexico has a unitary or “monist” arbitration law. A single set of provisions, Articles 1415-1480 of the CCo., govern both domestic and international arbitration proceedings.<sup>202</sup> In contrast to other jurisdictions,<sup>203</sup> Mexican

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<sup>200</sup> Commercial Code, art. 1424 (Mex.).

<sup>201</sup> Commercial Code, arts. 1457(II), 1462(II) (Mex.).

<sup>202</sup> Compare Commercial Code, art. 1415 (Mex.) with Commercial Code, arts. 1461-63 (The Commercial Code will apply to enforcement of international awards when the seat is outside of Mexico in a country which has not ratified the New York Convention).

<sup>203</sup> See Xavier Favre-Bulle & Edgardo Muñoz, *Monismo y dualismo de las leyes de arbitraje: ¿Son Todas Ellas Dualistas?*, ARBITRAJE INTERNACIONAL, PASADO, PRESENTE Y FUTURO 1449 (Carlos Soto & Delia Marsano ed., 2013) (The French and the Swiss arbitration laws are dual. A different set of provisions governs international and domestic arbitration proceedings. Actually, the notion of arbitrability is defined differently depending on the international or the domestic nature of the proceedings.); compare Loi fédérale sur le droit international privé [LDIP] [Federal Statute on Private International Law] (Dec. 18, 1987), RS 291, art. 177(1) (Switz.) (applicable to international arbitration with a broad notion of arbitrability), with Code de procédure civile [CPC] [Code of Civil Procedure] (Dec. 19, 2008), RS 272, art. 354 (Switz.) (applicable to

law provides a single notion of arbitrability that applies to both domestic and international arbitrations.<sup>204</sup> The notion of arbitrability has its starting point in Article 1415 CCo.<sup>205</sup> Pursuant to this article, all matters are subject to arbitration unless other laws stipulate the contrary (A) or provide for special procedures (B).<sup>206</sup> In addition, it is generally understood that disputes over rights that a person may not freely dispose of are not arbitrable either (C).<sup>207</sup>

A. PROVISIONS STIPULATING THAT CERTAIN DISPUTES ARE NOT SUSCEPTIBLE TO BE SOLVED BY ARBITRATION

CCo. Articles 2946-2951 lists the matters that shall not be resolved by settlement between parties in dispute.<sup>208</sup> Arbitration specialists in Mexico maintain that those same matters are also understood as excluded from the realm of

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domestic arbitrations with a narrow notion of arbitrability); Décret 75-1123 du 5 décembre 1975 Instituant Un Nouveau Code De Procedure Civile [Law 75-1123 of Dec. 5, 2008 Establishing a New Civil Procedure Code], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], (Dec. 9, 1975), 12521 (provisions of the French Code of Civil Procedure applicable to domestic and international arbitrations).

<sup>204</sup> Commercial Code, art. 1416(III) (Mex.) (stating that proceedings are international where (a) parties have their place of businesses in different countries or the main obligation is to be performed abroad or (b) the place of arbitration is outside of Mexico).

<sup>205</sup> Commercial Code, art. 1415 (Mex.).

<sup>206</sup> *Id.* (stating that Mexican arbitration law applies “unless . . . other acts provide for a different procedure or that certain disputes are not arbitrable”).

<sup>207</sup> FRANCISCO GONZALEZ-DE-COSSIO, ARBITRAJE 199 (Porrúa 3rd ed. 2011).

<sup>208</sup> Federal Civil Code, art. 2944 (Mex.) (pursuant to Mexican law, a “settlement” (*transacción*) is defined as “an agreement by which parties put an end to any present or future dispute”).

arbitration.<sup>209</sup> The list includes disputes over incapacitated persons' or minors' rights, except where settlement is in their interest with prior judicial authorization,<sup>210</sup> tort liability arising from crimes,<sup>211</sup> the legal status of people and the validity of marital agreements,<sup>212</sup> future claims based on crime, fraud or intentional harm,<sup>213</sup> the right to alimony,<sup>214</sup> future inheritance rights,<sup>215</sup> and inheritance rights before a last testament or will is disclosed.<sup>216</sup> Article 615 of Mexico City's Civil Code provides that the same matters are non-arbitrable.<sup>217</sup>

In the context of a family trust dispute, the issue may arise as to whether a claim brought by a tutor or parent on behalf of a minor or incapacitated beneficiary against the trustee or settlor may be barred from being decided in arbitration pursuant to Article 2946 of the CC. We submit that the purpose of Article 2946 is to afford state court protection to minors or incapacitated persons in cases where the claim derives out of rights intrinsic to their personal and family status. For example, rights over alimony calculation, inheritance, (but not wills), social benefits, etc. However, rights that beneficiaries are entitled to pursuant to the terms of a trust have a different nature. These rights arise out of

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<sup>209</sup> GONZALEZ-DE-COSSIO, *supra* note 207, at 201.

<sup>210</sup> Federal Civil Code, art. 2946 (Mex.).

<sup>211</sup> *Id.* at art. 2947.

<sup>212</sup> *Id.* at art. 2948.

<sup>213</sup> *Id.* at art. 2950(I), (II).

<sup>214</sup> *Id.* at art. 2950(V); *see id.* at art. 2949 (for a determination of the amount of alimony that may be arbitrable).

<sup>215</sup> *Id.* at art. 2950(III).

<sup>216</sup> *Id.* at art. 2950 (IV).

<sup>217</sup> *See* Código Civil para el Distrito Federal [CCDF] [Mexico City Civil Code], art. 615, Diario Oficial de la Federación [DOF] (Aug. 31, 1928) (Mex.).

the settlor's wish (not from any legal obligation) to distribute gifts and wealth among his/her descendants through the trustees in accordance with the trust terms. The nature of those rights is purely contractual. Accordingly, no court authorization should be necessary to make a minor's or incapacitated person's claim arbitrable in such a case. As an exemption, proper authorization shall be required if the minor's or incapacitated person's claim is based on the settlor's legal obligation to provide legal alimony or allowance to the minor or to the incapacitated concerned. In such a case, the claim would not even be arbitrable pursuant to Article 2950(V).<sup>218</sup> The rest of the matters covered by Articles 2946-2951 do not pertain to trusts.

It is worth noting that Panama and Paraguay trusts laws specifically recognize the arbitrability of trust disputes.<sup>219</sup> Spanish, Bolivian, and Peruvian laws take the same approach regarding testamentary disputes.<sup>220</sup> Historically rooted in the Spanish civil law tradition, these jurisdictions share similar values of morals and justice with Mexico. Notwithstanding the fact that no specific provision in the Mexican trust law (LGTOC) is needed to submit trust disputes to arbitration, providing for this in the statute would certainly clear any doubts and avoid this type of analysis. Arbitration of trust disputes in Panama is

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<sup>218</sup> Federal Civil Code, at art. 2950(V); *see id.* at art. 2949 (addressing the amount of alimony that may be arbitrable).

<sup>219</sup> Bosques-Hernández, *supra* note 49, at 23-24 (discussing Art. 41 Ley 1 de 1984, 5 de enero (Panamá) and Ley 921, Negocios fiduciarios (Paraguay)).

<sup>220</sup> *Id.*

becoming more popular every day, making this jurisdiction even more attractive to international settlers.<sup>221</sup>

#### B. MATTERS OF THE EXCLUSIVE PURVIEW OF MEXICAN COURTS

Pursuant to Article 568 of Mexico's Federal Code of Civil Procedure ("Mexico CFPC"), Mexican courts will have exclusive jurisdiction to decide claims over matters of land and water resources located within national territory, resources of the exclusive economic zone or resources related to any of the sovereign rights regarding such zone, acts of authority or acts related to the internal regime of the State and of the federal entities, the internal regime of Mexican embassies and consulates abroad, and their official proceedings.<sup>222</sup>

Claims arising out of private Mexican trusts<sup>223</sup> are unlikely to fall in any of the above categories. The scope of Article 568(I) Mexico CFPC covers land or water of public ownership only.<sup>224</sup> Therefore, claims arising out of Mexican trusts which assets in trust consist of non-government lands or immovable goods are arbitrable. On the other hand, disputes arising out of so called trusts over immovable

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<sup>221</sup> GRANT JONES & PETER PEXTON, *ADR AND TRUSTS: AN INTERNATIONAL GUIDE TO ARBITRATION AND MEDIATION OF TRUST DISPUTES* 340 (2015).

<sup>222</sup> Código Federal de Procedimientos Civiles [CFPC] [Federal Civil Procedure Code], art. 568, Diario Oficial de la Federación [DO] (Feb. 24, 1928), últimas reformas Jan. 28, 2010 (Mex.).

<sup>223</sup> Public trusts, i.e. those involving the Mexican government as one of the parties and regulated by administrative law are not covered by this work.

<sup>224</sup> Federal Civil Procedure Code, arts. 568(I) (Mex.).

goods located in the Mexican Restricted Zone<sup>225</sup> are not affected either. Arbitrators may not disregard the mandatory provisions in Article 27(I) of the Mexico Constitution and Title II of the Mexico Foreign Investment Law.<sup>226</sup> In this line of thought, arbitrators shall apply the ownership restrictions regarding the real estate transferred in trust. However, this does not mean that the beneficiaries' right of using and developing the land transferred in trust by the settlor are affected by the non-arbitrability exception. Consequently, the rights and obligations arising out of that type of trust agreement are also arbitrable under Mexican law.

Provisions in Mexican law<sup>227</sup> that merely define the territorial jurisdiction among Mexican courts do not constitute a restriction to arbitration. For example, Article 391 of the LGTOC prohibits trustees from renouncing or being exempted from performing the trust terms but for justifiable grounds according to the First Instance Court of the trustee's domicile.<sup>228</sup> Furthermore, Article 393 provides

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<sup>225</sup> In Spanish: "Fideicomisos sobre Inmuebles localizados en la zona restringida."

<sup>226</sup> Constitución Política de los Estados Unidos Mexicanos [CP] [Political Constitution of the United Mexican States], Diario Oficial de la Federación [DO] (Feb. 5, 1917), últimas reformas DOF Feb. 10, 2014 (Mex.) (barring aliens from acquiring direct ownership of lands and waters within a hundred kilometers along the country borders and within fifty kilometers of the seacoast); Ley de Inversión Extranjera [LIE] [Mexican Foreign Investment Law], tit. II, Diario Oficial de la Federación [DO] (Dec. 27, 1993), últimas reformas Apr. 9, 2012 (Mex.) (stating that aliens are only allowed the use and develop real estate located within this restricted zone, through the creation of a trust).

<sup>227</sup> LGTOC, ch. V, sec. I, art. 381 (Mex.).

<sup>228</sup> The authors' translation. The original in Spanish reads: "La institución fiduciaria tendrá todos los derechos y acciones que se requieran para el cumplimiento del fideicomiso, salvo las normas o limitaciones que se

that the First Instance Court of the trustee's domicile will also decide the effects of the termination of a trust agreement, i.e. whether the settlor or the beneficiaries may receive the remaining assets held in trust by the trustee.<sup>229</sup> As stated, these provisions do not give exclusive jurisdiction to Mexican courts in those matters. Similar provisions are often found in other civil and commercial law statutes and have not raised any arbitrability problems in practice.<sup>230</sup> Ultimately, their goal is to predict which of the many courts in Mexico will have jurisdiction, unless otherwise agreed to

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establezcan al efecto, al constituirse el mismo; estará obligada a cumplir dicho fideicomiso conforme al acto constitutivo; no podrá excusarse o renunciar su encargo sino por causas graves a juicio de un Juez de Primera Instancia del lugar de su domicilio, y deberá obrar siempre como buen padre de familia, siendo responsable de las pérdidas o menoscabos que los bienes sufran por su culpa."

<sup>229</sup> The authors' translation. The original in Spanish reads: "Extinguido el fideicomiso, si no se pactó lo contrario, los bienes o derechos en poder de la institución fiduciaria serán transmitidos al fideicomitente o al fideicomisario, según corresponda. En caso de duda u oposición respecto de dicha transmisión, el juez de primera instancia competente en el lugar del domicilio de la institución fiduciaria, oyendo a las partes, resolverá lo conducente."

<sup>230</sup> Ley General de Sociedades Mercantiles [LGSM] [General Law for Commercial Corporations, arts. 185, 202, Diario Oficial de la Federación [DO] (Aug. 4, 1934), últimas reformas June 13, 2014 (Mex.) (providing for the intervention of State judges in disputes arising between shareholders or out of the internal organization of the company. However, these same disputes are, as a matter of law, susceptible to be solved by arbitration); Pilar Perales Viscasillas, *Arbitrability of (Intra-) Corporate Disputes*, ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 288 (Loukas A. Mistelis & Stravos L. Brekoulakis eds., 2009) ("In modern arbitration practice and law, first, it is considered that the fact that the law refers to Court as competent to hear a certain dispute does not necessarily exclude arbitration.").

by the parties in the form of a forum selection clause<sup>231</sup> or arbitration agreement.<sup>232</sup>

C. DISPUTES OVER RIGHTS THAT A PERSON MAY NOT  
DISPOSE OF

Pursuant to Article 60 of the Mexico CC, people may waive their private rights when doing so does not affect directly the public order or third parties' rights.<sup>233</sup> This principle is the basis of other provisions in Mexican law that expressly invalidate settlement agreements with regard to claims on rights that parties may not freely dispose of such

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<sup>231</sup> Federal Civil Procedure Code, arts. 566, 567 (Mex.) (stating that forum selection clauses are enforceable in Mexico, unless the selection amounts to denial of justice or operates only for the benefit of one of the parties and not for all of them).

<sup>232</sup> Cf. Viscasillas, *supra* note 230, at 288, 289 (“[Brussels Regulation] Art. 22(2) provides for exclusive jurisdiction of the Courts of the seat in regards to proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or of the validity of the decisions of their organs. [However], apart from the fact that the Brussels Regulation excludes arbitration from its scope of application, it establishes the exclusive competence of a national Court in relation to other national Courts within EU, but not in relation to arbitration. Arbitral Tribunals are not within the body of national courts and thus it is wrong to equate the former with the latter.”).

<sup>233</sup> The authors' translation. The original in Spanish reads: “La voluntad de los particulares no puede eximir de la observancia de la ley, ni alterarla o modificarla. Sólo pueden renunciarse los derechos privados que no afecten directamente al interés público, cuando la renuncia no perjudique derechos de tercero.” Federal Civil Code, art. 60 (Mex.).

as divorce,<sup>234</sup> right to alimony, validity of marriage, criminal matters, etc. (see Section A). Accordingly, rights traditionally considered as inalienable by private parties will also be excluded from the realm of arbitration, despite no express lack of arbitrability stipulated as a matter of law. These rights may include matters such as parental custody, adoption, political rights, employment disputes over salaries, leave and pensions, tax disputes against the state, the absolute right to inheritance by minors, widows etc., despite any testament or will stipulation to the contrary, and anti-trust disputes.<sup>235</sup>

Since freedom to dispose of one's rights means the possibility to waive such rights, in the context of trusts, the question is whether beneficiaries can waive the rights granted by the settlor under the trust terms.<sup>236</sup> As it turns out, beneficiaries can reject any benefits they are entitled to receive under a trust. Once again, such rights usually result from settlor's wish (rather than from any legal obligation) to distribute wealth among the beneficiaries. Accordingly, claims arising out of the interpretation and performance of the trust terms, in principle, relate to rights one can freely dispose of and thus are arbitrable. Should a specific claim concern rights one may not freely dispose of, modern arbitration law and practice will require arbitral tribunals and state courts to only disallow the specific claim while allowing the rest of the claims in a trust dispute to continue.<sup>237</sup> In other words, the non-arbitrability of certain

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<sup>234</sup> In particular, the jurisdiction to decide a divorce is not arbitrable. However, the decision as to the amount of alimony due from a former spouse may be arbitrable.

<sup>235</sup> Federal Civil Code, arts. 1368, 1372 (Mex.).

<sup>236</sup> Strong, *supra* note 106, at 302.

<sup>237</sup> *Id.* at 303.

claims in a trust dispute does not result in the non-arbitrability of all trust matters.

## VII. CAPACITY TO SUBMIT TO ARBITRATION

Full capacity of all parties to the arbitration agreement in a Mexican trust is required for its effective enforcement (see Section IV above). Generally, it is settled that the capacity or authorization to contract on behalf of another will suffice to establish the capacity to arbitrate.<sup>238</sup> However, the question regarding which law arbitrators shall apply to determine a party's capacity is not easily answered. As mentioned above, Article V(1)(a) of the New York Convention does not set forth the law governing the capacity or power to enter into an arbitration agreement.<sup>239</sup> With that being said, the delegates at the New York Conference left the question of which law should govern capacity open so that it could be answered by the conflict of laws rules of the state court faced with a motion to deny enforcement of an arbitration agreement under Article II(3) or of an arbitration award under Article V(I)(a) New York Convention.<sup>240</sup>

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<sup>238</sup> JEAN- FRANCOIS POUURET & SEBASTIEN BESSON, *COMPARATIVE LAW OF INTERNATIONAL ARBITRATION* 232-233 (Stephen V. Berti & Annette Ponti eds., 2d ed. 2007); Konstantin Razumov, *The Law Governing the Capacity to Arbitrate*, *PLANNING EFFICIENT ARBITRATION PROCEEDINGS: THE LAW APPLICABLE IN INTERNATIONAL ARBITRATION* 260 (Albert Jan van-den-Berg ed. 1996).

<sup>239</sup> Despite the fact that pursuant to Art. V(1)(a) of the New York Convention, the recognition and enforcement of an award may be denied where the parties to the arbitration agreement were under some incapacity, the New York Convention does not define the law governing capacity or the power to enter into an arbitration agreement. See FOUCHARD ET AL., *supra* note 90, at 244.

<sup>240</sup> POUURET & BESSON, *supra* note 239, at 233-34.

Against this background, arbitrators should also consider applying the conflict of laws provisions of the forum judge at the place of arbitration or of the state court of enforcement (although arbitrators are not bound by the conflict of laws rules of state courts at the place of arbitration or enforcement).<sup>241</sup> This approach helps to shield an arbitral tribunal's award against setting aside claims at the place of arbitration and to enhance enforcement at the relevant jurisdictions.

In this section, we address questions of capacity that may arise in the context of arbitration agreements in a Mexican trust. These questions will be analyzed from the perspective of an arbitral tribunal seated in Mexico, applying the Mexican courts' conflict of laws rules located in the Mexico CC. On the one hand, Article 13(II) of the CC provides that the capacity of a natural person is decided by the law of the country where he/she has his/her domicile.<sup>242</sup> On the other hand, Article 2736 states that the capacity of legal entities is assessed in accordance with the law of their incorporation.<sup>243</sup>

#### A. CAPACITY OF SETTLORS AND TRUSTEES

Pursuant to Article 384 of the General Law of Securities and Credit Operations a settlor shall have capacity to transfer the property or rights in trust to the trustees.<sup>244</sup> In this line of thought, a natural person domiciled in Mexico would have the capacity to act as settlor and to enter into an

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<sup>241</sup> *Id.*

<sup>242</sup> Federal Civil Code, art. 13(II) (Mex.).

<sup>243</sup> *Id.* art. 2736 (Mex.).

<sup>244</sup> LGTOC, ch. V, sec. I, art. 384 (Mex.).

arbitration agreement if he or she has the capacity to contract on real and personal rights. The general principle under Mexican law is that any person who has not been declared incapacitated by law has capacity to contract.<sup>245</sup> Under Mexican law, natural persons lacking capacity to contract will include minors, those lacking sufficient mental maturity, and those suffering from mental illnesses or those affected by circumstances that do not allow them to exercise their rights. For example, bankrupt traders, the demented, and prisoners.<sup>246</sup> The same provisions govern the capacity of settlors in the context of business trusts.<sup>247</sup>

Legal entities have the capacity to transfer and acquire goods and rights through most of the ways established by law, just as natural persons do. However, an entity's capacity may be limited by law and its documents of incorporation. For example, a limitation to an entity's capacity derives from the company's object or purpose. In this sense, a legal entity's representatives can only bind the company to those agreements which are within its purpose of incorporation and according to the scope of authorization given by the documents of incorporation or bylaws. The law also imposes limits to certain types of legal persons. For

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<sup>245</sup> Federal Civil Code, art. 1798 (Mex.).

<sup>246</sup> *Id.* at art. 450(I) and (II); *see also id.* at arts. 1306-1308 (provisions on the capacity to make a will that may apply by analogy to settlors); RICARDO TREVIÑO-GARCÍA, *LOS CONTRATOS CIVILES Y SUS GENERALIDADES* 48, 49 (McGraw Hill 5th ed. 2002).

<sup>247</sup> Federal Civil Code, art. 81 (Mex.) (Natural and legal persons must first have legal capacity under the Civil Codes in order to perform trade activities. Persons who cannot be bound by their own regular conduct equally lack capacity to perform commercial transactions. Consequently, the provisions on legal capacity contained in the Civil Codes are applicable to the commercial contracts subject to modifications and restrictions imposed by the Code of Commerce).

example, foundations (*asociaciones civiles* under Mexican law) are not allowed to have the for-profit trade of merchandise as their purpose.

In the context of Mexican trusts, unless a legal person incorporated under Mexican law acting as settlor or any financial or credit institution authorized to act as trustee,<sup>248</sup> is expressly precluded by its articles of incorporation and internal rules from agreeing to arbitration, nothing in Mexican law would limit their legal capacity to enter into such an arbitration agreement.

#### B. CAPACITY OF MINORS AND INCAPACITATED BENEFICIARIES

Settlors of family and testamentary trusts frequently designate beneficiaries who are minors or incapacitated pursuant to Mexican law, causing two issues to arise. First, whether a minor or incapacitated beneficiary may consent to an arbitration agreement. Second, whether a minor or incapacitated may participate in the arbitration proceedings. As a starting point, minors lack capacity to contract thus, any arbitration provisions agreed to by a minor or incapacitated beneficiary using his or her own name will be invalid (see Section A above). Yet, parents or tutors could consent to arbitration on behalf of children or persons under guardianship.<sup>249</sup> The same is valid with respect to a minor or impaired person's capacity to present their case before an arbitral tribunal. Any due process issue would be resolved if such person is a duly represented by their parents, tutors, or lawyers.

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<sup>248</sup> LGTOC, ch. V, sec. I, art. 385 (Mex.).

<sup>249</sup> GONZALEZ-DE-COSSIO, *supra* note 208, at 149.

With that being said, Mexican law appears to impose some conditions regarding the above circumstances. On one hand, Article 424 of the CC provides that minors may neither appear in trial nor acquire any obligation without the **express** consent of their parents.<sup>250</sup> Though no reference to arbitration is made in this provision, one could conclude that Mexican law requires that a parent manifest consent in an **express** manner for a minor to be able to participate in arbitration proceedings. Pursuant to Mexican contract law, express consent is manifested verbally, in writing, by electronic or optic means or any other technology, or through unequivocal signs.<sup>251</sup> In other words, a parent's tacit intent resulting from acts or conduct will be insufficient to bind a minor child to arbitration.<sup>252</sup>

With regard to persons under guardianship (*tutela*), Mexican law conditions a tutor's freedom to submit the minor or incapacitated beneficiary's matters to arbitration and to nominate arbitrators upon approval by the Mexican courts.<sup>253</sup> It is unclear whether this requirement extends to a parent-child relationship or whether it is limited to the tutors-incapacitated minors relationship. One could argue that it does not extend beyond tutors-incapacitated minors relationships, since parents are not subject to strict supervision rules that tutors or guardians are under Mexican law.<sup>254</sup> Different legal treatment resides on the fact that

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<sup>250</sup> Federal Civil Code, art. 424 (Mex.).

<sup>251</sup> *Id.* at art. 1803(I) (Mex.).

<sup>252</sup> *Id.* at art. 1803(II) (Mex.).

<sup>253</sup> *Id.* at arts. 566, 567 (Mex.).

<sup>254</sup> *See e.g., id.* at art. 418 (specific rules stating that guardians are subject to the same obligations and restrictions established for tutors. However, no similar rules subject parents to the same obligations and restrictions imposed on tutors.).

tutors are designated by law, while parents become responsible for their children by natural circumstances that morally lead them to act on their childrens' best interest with no need for court supervision. Accordingly, only tutors, not parents, need the Mexican courts' authorization to agree upon and represent minors and incapacitated beneficiaries in arbitration proceedings arising out of Mexican trust disputes.

#### VIII. JOINDER OF PARTIES

Despite the fact that globalization has brought with it a growing number of multi-party and long-term relationships, most commercial contracts are short-term and still only involve two parties. Trust agreements, on the other hand, involve long-term relationships, which typically last longer than most commercial contracts. A Mexican trust may have a 50-year (renewable) term.<sup>255</sup> Presumably, more than one dispute could arise during the trust term. Most importantly, trust disputes usually involve more than two parties and occasionally it may not be possible to predict who those parties will be in advance.<sup>256</sup> When a dispute arises between the trustee and the settlor, it may also involve the beneficiaries if the claims address the performance of the trust terms. If the trust indicates a class of persons as beneficiaries, those who are entitled to the benefits will also have an interest in joining the arbitration as parties. Similarly, when a dispute arises between the beneficiaries, it will most likely also involve the trustee and the settlor if the matter concerns interpretation of the trust terms.

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<sup>255</sup> LGTOC, ch. V, sec. I, art. 394(II) (Mex.).

<sup>256</sup> Koch, *supra* note 3, at 185.

Therefore, arbitration must guarantee some procedural efficiency in this regard. We submit that arbitration currently has the tools to meet these particular needs of trust disputes. Most institutional rules empower the institution or the arbitrators to decide on joinder issues. For the purpose of this work, we will address the relevant provisions in the ICC Rules 2012 and the Mexico Arbitration Center Rules 2009. Arbitral institutions are increasingly requested to join parties covered by the same arbitration agreement during the proceedings.<sup>257</sup> Institutions will accept such requests if all parties participate in the composition of the arbitral tribunal on equal terms.<sup>258</sup> This condition results from arbitration laws establishing that an arbitral award may be set aside or refused enforcement if a party was not given proper notice of the appointment of an arbitrator or if the composition of the arbitral tribunal was not in accordance with the agreement of the parties.<sup>259</sup> Article V(1)(b)(d) of the New York Convention sets forth the same

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<sup>257</sup> From 2007 to 2011 the ICC Court of Arbitration handled 55 requests for joinder of additional parties; 70% involved one additional party, 15% two additional parties and 15% three or more additional parties. See JASON FRY ET AL., *THE SECRETARIAT'S GUIDE TO ICC ARBITRATION* 98 (Moss et al., eds. 2012).

<sup>258</sup> State courts do not face much difficulty in joinder issues since state courts can decide to consolidate claims pertaining to the same parties involved in pending proceedings in a different court or to join additional parties to current proceedings if their rules on jurisdiction so provide. A state judge remains neutral before the parties because state judges decide cases based on territorial, subject matter, or venue rules, but not because of the parties' appointment or agreement.

<sup>259</sup> UNCITRAL MODEL LAW, *supra* note 66, at arts. 34(2)(a)(ii), (iv), 36(1)(a)(ii), (iv); Commercial Code, arts. 1457(I)(b), (d), 1462(I)(b), (d) (Mex.).

grounds for denying the enforcement of arbitration awards.<sup>260</sup>

The duty to include all relevant parties to the arbitration should rest upon the parties themselves, not upon the arbitral tribunal.<sup>261</sup> Preferably, this should happen at the outset of the proceedings. A beneficiary who requests arbitration against the trustee shall, in addition, name in his or her request all beneficiaries of the trust who may eventually have an interest either as claimant or as respondent in the proceedings. Similarly, a trustee who submits a request for arbitration against a beneficiary shall also name all other beneficiaries who may have an interest in appearing in the arbitration proceedings as parties.<sup>262</sup> Where the claimant and eventually the respondent properly designate in their first submission (request for arbitration or answer to the request, respectively) all claimants and all respondents concerned by the type of trust claim, the arbitral institution will ensure notification of the claims and counterclaims, if any, to all parties mentioned.

Early designation of all parties concerned by any trust claims will permit a joint nomination of one co-arbitrator by the group of claimants and/or a joint nomination of one co-arbitrator by the group of respondents if a three-member tribunal is to be constituted.<sup>263</sup> Where a sole arbitrator is to

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<sup>260</sup> N.Y. Convention, *supra* note 65, at art. V(1)(b)(d).

<sup>261</sup> Wüstemann, *supra* note 130, at 54.

<sup>262</sup> Blaine Covington Janin, *The Validity of Arbitration Provisions in Trust Instruments*, 55 CALIF. L. REVIEW 521, 533 (1967).

<sup>263</sup> See e.g., ICC ARBITRATION RULES, *supra* note 78, at art. 12(6); RULES OF ARBITRATION CENTER OF MEXICO art. 16(1) (Centro De Arbitraje De Mexico, ed., 2009), available at <http://www.camex.com.mx/images/pdf/reglas%20de%20arbitraje%20>

be appointed, prompt designation of all parties concerned will also permit a joint-nomination by all parties.<sup>264</sup> Failure to agree on a joint-nomination by one group alone will prompt the arbitral institution to step in to appoint all arbitrators for all parties (claimants and respondents) under many arbitration rules.<sup>265</sup> The purpose of this across-the-board measure (Article 12(8) ICC Rules) is to ensure equality between the parties in the composition of an arbitral tribunal.<sup>266</sup> As explained in the ICC Secretariat Commentary on the ICC Rules 2012:

Where all the parties in one side are unable to agree on a choice of a co-arbitrator, the Court can deny all the parties in the arbitration the right to nominate an arbitrator, if appropriate. This prevents one party or one side from having a perceived or actual advantage over the other in respect of the arbitral tribunal's constitution.<sup>267</sup>

Article 12(8) of the ICC Rules addresses the decision by the French *Cour de Cassation* in the *BKMI v. Dutco* case.<sup>268</sup> In that case, any dispute had to be solved by a three-member

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del%20cam%20adoptadas%20por%20arias%20mexico.pdf [hereinafter "CAMEX Rules"].

<sup>264</sup> ICC ARBITRATION RULES, *supra* note 78, at art. 12(3); CAMEX Rules, *supra* note 263, at art. 14(3)(a)

<sup>265</sup> ICC ARBITRATION RULES, *supra* note 78, at art. 12(8); CAMEX Rules, *supra* note 263, art. 16(2).

<sup>266</sup> ICC ARBITRATION RULES, *supra* note 78, at art. 12(8).

<sup>267</sup> FRY, *supra* note 239, at 258.

<sup>268</sup> *BKMI Industrienlagen GmbH & Siemens AG v. Dutco Construction*, Cour de Cassation (1er Chambre Civile), Pourvoi N° 89-18708 89-18726, Jan. 7, 1992, *Revue de l'Arbitrage* (1992), at 472, KLUWER ARBITRATION.

arbitral tribunal nominated in accordance with the ICC Rules.<sup>269</sup> Dutco, the claimant, nominated a co-arbitrator who was confirmed by the ICC Court.<sup>270</sup> The ICC Court then directed the two respondents to nominate their co-arbitrator jointly.<sup>271</sup> The respondents protested against both of them being required to nominate one co-arbitrator jointly, but eventually did so.<sup>272</sup> When the arbitral tribunal was composed, the respondents again challenged the composition of the tribunal arguing that they should have each been entitled to nominate one arbitrator in order to be on equal terms with the claimant.<sup>273</sup> The arbitral tribunal dismissed the challenge and the respondents moved to set aside the award before French court.<sup>274</sup> The *Cour de Cassation* admitted the challenge holding that all parties are entitled to equality of treatment, including in the process of selecting the arbitral tribunal.<sup>275</sup>

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<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> Passage from the decision in the original French language: “qu’il y était stipulé que tous différends seront tranchés selon le règlement d’arbitrage de la Chambre de commerce internationale, par trois arbitres nommés conformément à ce règlement; que, sur la demande d’arbitrage unique présentée par la société Dutco, séparément, contre ses deux cocontractantes pour des créances distinctes concernant celles-ci, un tribunal arbitral a été constitué de trois arbitres dont un désigné conjointement par les deux défenderesses avec protestations et réserves; que le tribunal a jugé qu’il avait été régulièrement constitué et que la procédure arbitrale devait se poursuivre sous la forme multipartite contre les deux défenderesses.” *BKMI Industrienlagen GmbH & Siemens AG v. Dutco Construction*, *Revue de l’Arbitrage* (1992), at 472, KLUWER ARBITRATION.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

The appointment of all arbitrators for both sides by the arbitral institution eliminates any apparent advantage of one side over the other regarding the arbitral tribunal's composition and is not deemed an infringement of Article V(1)(b)(d) New York Convention,<sup>276</sup> or similar provisions.<sup>277</sup>

In case a party is requested to be joined to the proceedings (or a party requests to be joined) after the first exchange of submissions, arbitral institutions take different approaches to comply with the parties' right to participate in the composition of the arbitral tribunal. The ICC Rules require the submission of a request for joinder (which has the same effects as a request for arbitration).<sup>278</sup> The request for joinder shall be made before the confirmation or appointment of any arbitrator, unless all parties agree otherwise.<sup>279</sup> In practice, the ICC Secretariat will advise the parties in advance of this cut-off point<sup>280</sup> and set a time limit for filing any request for joinder before any arbitrator is finally confirmed or appointed. The ICC Court will then make a *prima facie* assessment of the existence of an arbitration agreement covering the additional party.<sup>281</sup> A

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<sup>276</sup> Since the parties are then deemed to have been given the opportunity to appoint their arbitrators and the default appointment by the arbitral institution is made in accordance with the arbitration agreement that incorporates the arbitral institution's rules.

<sup>277</sup> Commercial Code, arts. 1457(I)(b) ,(d), 1462(I)(b), (d) (Mex.).

<sup>278</sup> ICC ARBITRATION RULES, *supra* note 78, at art. 7(1).

<sup>279</sup> *Id.*

<sup>280</sup> FRY, *supra* note 258, at 99.

<sup>281</sup> ICC ARBITRATION RULES, *supra* note 78, at arts. 7(1), 6(3-7) (pursuant to the current rules the Secretariat of the ICC will decide which challenges to the arbitration agreement shall be decided by the arbitral tribunal and which shall be referred to the court for a *prima facie* determination—only those cases where jurisdiction may be at issue will be referred to the court); FRY, *supra* note 258, at 67-68, 95.

timely request for joinder will be subsequently transferred to the parties concerned by the ICC Court's Secretariat. The receiving parties will have thirty days to submit an answer to the request for joinder.<sup>282</sup>

The additional party will thus be permitted to jointly nominate a co-arbitrator with the side it joined pursuant to Article 12(6).<sup>283</sup> Where the additional party is unable to agree with one of the existing parties on a joint-nomination of a co-arbitrator, the institution will appoint all arbitrators for all parties in accordance with Article 12(8).<sup>284</sup>

However, the requirement to ensure equal treatment in the process of composing the arbitral tribunal is not absolute. If all parties agree, a request for joinder may be accepted after the constitution of the arbitral tribunal.<sup>285</sup> In the context of trust disputes, it should not be uncommon that a trustee and a beneficiary agree upon other beneficiaries becoming a party to proceedings after the constitution of the arbitral tribunal. Indeed, this issue may be addressed in advance in the arbitration clause of a trust deed. The following wording may ensure the joinder of additional parties in such circumstances:

All disputes arising out of or in connection with the trust created hereunder shall be finally settled under the Rules of Arbitration of the [institution] (the "Rules") **by one or more arbitrators who shall be exclusively appointed by the [institution]. All parties**

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<sup>282</sup> ICC ARBITRATION RULES, *supra* note 78, at art. 7(3).

<sup>283</sup> ICC ARBITRATION RULES, *supra* note 78, at art. 12(6).

<sup>284</sup> FRY, *supra* note 258, at 150-51.

<sup>285</sup> ICC ARBITRATION RULES, *supra* note 78, at art. 7(1).

**hereby agree that additional parties may be joined to the proceedings before or after the constitution of the arbitral tribunal.** Upon its constitution, the arbitral tribunal shall decide any request for joinder in accordance with the Rules.

The Mexico Arbitration Center Rules do not contain specific provisions on joinder of parties. However, the same solution should ensue from Article 16(2) of the Mexico Arbitration Center Rules.<sup>286</sup> A joinder of additional parties may be possible at any moment before the arbitral tribunal is constituted. The parties' freedom to tailor the proceedings must permit them to agree otherwise in an arbitration clause or during the proceedings.

#### IX. EFFICIENCY OF ARBITRAL AWARDS IN MEXICAN TRUST DISPUTES

The efficiency of an arbitral award is closely dependent upon the enforceable character of the arbitration agreement that gives it origin and the fulfillment of equal treatment and due process principles. The UNCITRAL Model Law sets out the reasons for which a court at the place of arbitration may set aside an arbitral award as well as the reasons for which a court may refuse enforcement of a domestic (or a non-New York Convention) arbitral award.<sup>287</sup> The reasons for setting aside awards actually mirror those

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<sup>286</sup> CAMEX Rules, *supra* note 263, at art. 16(2).

<sup>287</sup> UNCITRAL MODEL LAW, *supra* note 66, at arts. 34, 36.

for refusing enforcement,<sup>288</sup> and are inspired by Article V of the New York Convention.

Most of these reasons, also textually adopted in Mexican arbitration law,<sup>289</sup> have been addressed in the prior sections of this work. They consider the existence of a valid arbitration agreement among the parties (Section V above),<sup>290</sup> the arbitrability of the claims at stake (Section VI above),<sup>291</sup> the capacity of the parties to submit to arbitration (Section VII above),<sup>292</sup> and the proper constitution of the arbitral tribunal (Section VIII above).<sup>293</sup>

In this section, we focus on one major reason that arbitral awards are set aside or that parties are denied enforcement: *public policy*. Like the other grounds analyzed above, we will approach the public policy exception from the Mexican law standpoint.<sup>294</sup> The remaining reasons based

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<sup>288</sup> Except for the fact that the enforcement court may also considered the fact that the award has been set aside at the place of arbitration for denying enforcement. *Id.* at art. 36(2).

<sup>289</sup> Commercial Code, arts. 1457, 1462 (Mex.).

<sup>290</sup> UNCITRAL MODEL LAW, *supra* note 66, at arts. 34(2)(a)(i) and 36(1)(a)(i); N.Y. Convention, *supra* note 65, at art. V(1)(a); Commercial Code, arts. 1457(I)(a), 1462(I)(a) (Mex.).

<sup>291</sup> UNCITRAL MODEL LAW, *supra* note 66, at arts. 34(2)(b)(i), 36(1)(b)(i); N.Y. Convention, *supra* note 65, at art. V(2)(a); Commercial Code, arts. 1457(II), 1462(II) (Mex.).

<sup>292</sup> UNCITRAL MODEL LAW, *supra* note 66, at arts. 34(2)(a)(i), 36(1)(a)(i); N.Y. Convention, *supra* note 65, at art. V(1)(a); Commercial Code, arts. 1457(I)(a), 1462(I)(a) (Mex.).

<sup>293</sup> UNCITRAL MODEL LAW, *supra* note 66, at arts. 34(2)(a)(ii), (iv), 36(1)(a)(ii), (iv); N.Y. Convention, *supra* note 65, at art. V(i)(b), (d); Commercial Code, arts. 1457(I)(b), (d), 1462(I)(b), (d) (Mex.).

<sup>294</sup> This makes sense because settlors and trustees of Mexican trusts will most likely choose Mexico as a place of arbitration. One could easily forecast that financial institutions agreeing upon arbitration will want to keep the arbitration proceedings under the supervision of Mexican

on *ultra petita* decisions<sup>295</sup> or failure to provide proper notice of the proceedings<sup>296</sup> contemplated by the UNCITRAL Model Law or the New York Convention do not seem to raise any particular issue in relation to trust disputes.

Like in other jurisdictions, Mexican courts and scholars have struggled to define what public policy means in the context of arbitration.<sup>297</sup> As a starting point, an arbitral decision will be set aside or refused enforcement only when it infringes on “basic notions of moral and justice” of Mexico’s legal system.<sup>298</sup> Yet, nobody would dare to propose a list of components of Mexican morals and justice. Therefore, scholars have rather taken the approach of explaining what public policy in arbitration is not. We share Gonzalez-de-Cossio’s view that the purpose of this exception is to prevent giving legal effect to institutions that are contrary to the most valuable principles of Mexican

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courts and Mexican mandatory rules of law. In this case, Mexican public policy will be relevant in case of annulment actions against the award. In the event parties select a place of arbitration outside of Mexico, or where the arbitral tribunal so determines, public policy pursuant to Mexican law will then be relevant at the stage of enforcement of the arbitral award. Since only Mexico-based financial and credit institutions may act as trustees, any arbitration award that may not be voluntarily complied with by the trustees will have to be enforced in Mexico. In this regard, all parties involved in a Mexican trust arbitration have a legitimate interest in knowing whether the Mexican notion of public policy could jeopardize the enforcement of an arbitration award in Mexico.

<sup>295</sup> UNCITRAL MODEL LAW, *supra* note 66, at arts. 34(2)(a)(ii)–(iv), 36(1)(a)(ii)–(iv); N.Y. Convention, *supra* note 65, at art. V(1)(b)–(d); Commercial Code, arts. 1457(I)(b)–(d), 1462(I)(b)–(d) (Mex.).

<sup>296</sup> UNCITRAL MODEL LAW, *supra* note 66, at arts. 34(2)(a)(ii), 36(1)(a)(ii); N.Y. Convention, *supra* note 65, at art. V(i)(b); Commercial Code, arts. 1457(I)(b), 1462 (I)(b) (Mex.).

<sup>297</sup> GONZALEZ-DE-COSSIO, *supra* note 208, at 797-800.

<sup>298</sup> *Id.* at 800.

law.<sup>299</sup> In this line of thought, it is improper to consider that an arbitrator's incorrect interpretation or application of what are usually deemed mandatory norms of law under Mexican law constitutes a breach of Mexican public policy. Only arbitral decisions that go against the mandatory norms of law that embody basic notions of morals and justice in Mexico can give rise to the exception of public policy.<sup>300</sup>

Against this background, this work does not intend to define the elusive notion of public policy or verify the accuracy of the contours drawn by Mexican case law or scholars. In lieu of this, we identify two examples of mandatory norms of law that could give rise to the public policy exception in the context of arbitration of Mexican trusts disputes.<sup>301</sup>

The first case involves testamentary trusts.<sup>302</sup> Certain mandatory rules of law may affect the validity of a Mexican revocable trust when the settlor passes away. Pursuant to Article 1374 of the CC, a testament failing to provide allowance for the benefit of legally protected dependents will be invalid.<sup>303</sup> These include the deceased's children, widows, concubines, parents, and siblings who are incapacitated to work or do not possess enough assets to

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<sup>299</sup> *Id.* at 801.

<sup>300</sup> *Id.* at 801-02.

<sup>301</sup> Other situations may also raise the public policy exception in the context of arbitral awards derived from Mexican trust disputes. However, those other situations could also probably arise in the context of a typical commercial arbitration.

<sup>302</sup> In addition to being written, a testamentary trust shall comply with the solemnities and form validity requirements of testaments and wills. See JOSE ARCE-Y-CERVANTES, DE LAS SUCESIONES 148 (Porrúa 10th edición 2011).

<sup>303</sup> The original in Spanish reads: "Es inoficioso el testamento en que no se deje la pensión alimenticia, según lo establecido en este Capítulo."

subsist and were entitled to allowance at the time of death.<sup>304</sup> An arbitral award giving effect to the terms of a revocable testamentary trust that fails to consider as beneficiaries, to the extent required by law,<sup>305</sup> any legally protected-dependent, could be partially or totally set aside or refused enforcement based on Mexican public policy. In principle, the arbitral tribunal should have considered the mandatory nature of Article 1374 and issued an arbitral award in those terms. However, the arbitral tribunal may only consider the application of Article 1374 on two conditions, the first being where one of the parties involved has so requested. If not, the award would be made *ultra petita*.<sup>306</sup> The second is where the party affected by or benefiting from such an award is a party to the arbitration agreement. If the affected or benefitting party is not a party to the agreement, the arbitral tribunal would lack jurisdiction *ratione personae*, thus demanding that the decision concerning the third person be set aside or refused enforcement.<sup>307</sup>

The second case regards disputes arising out of so-called trusts over real estate located in the Mexican

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<sup>304</sup> Federal Civil Code, arts. 1368, 1371 (Mex.).

<sup>305</sup> Pursuant to Mexican law the terms of the *testamento inoficioso* are annulled only to the extent the total of the deceased's estate is not enough to provide alimony and allowance to the deceased's protected dependents.

<sup>306</sup> UNCITRAL MODEL LAW, *supra* note 66, at arts. 34(2)(a)(ii)-(iv), 36(1)(a)(ii)-(iv); N.Y. Convention, *supra* note 65, at art. V(i)(b)-(d); Commercial Code, arts. 1457(I)(b)-(d), 1462(I)(b)-(d) (Mex.).

<sup>307</sup> UNCITRAL MODEL LAW, *supra* note 66, at arts. 34(2)(a)(i), 36(1)(a)(i); N.Y. Convention, *supra* note 65, at art. V(1)(a); Commercial Code, arts. 1457(I)(a), 1462 (I)(a) (Mex.).

Restricted Zone.<sup>308</sup> Pursuant to Article 27(I) of the Mexico Constitution, foreign persons are barred from acquiring direct ownership of lands and waters within a hundred kilometers along the country borders and within fifty kilometers of the seacoast.<sup>309</sup> The usual way to circumvent this constitutional prohibition is to hold the property in a Mexican trust. Since foreigners cannot technically “buy” property in that zone, the seller will act as settlor in order to transfer the real property to the trustee, a bank’s fiduciary department. The trustee then holds ownership title for the benefit of the designated foreign beneficiary pursuant to Articles 10-14 Mexico Foreign Investment Law.<sup>310</sup> Arbitrators may not disregard the mandatory provisions in the Mexican Constitution and Foreign Investment Law. In this order of ideas, arbitrators shall apply the ownership restrictions regarding the real property transferred in trust. Any arbitral decision granting property title to a foreign person in contravention of the above mandatory provisions will be set aside or refused enforcement in Mexico.

#### X. CONCLUSION

As the foregoing analysis suggests, arbitration of Mexican trust disputes raises important issues that must be kept in mind by parties and arbitrators. None of these issues, however, present an insurmountable obstacle to the

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<sup>308</sup> The restricted zone is composed of land located 100 kilometers next to international borders, and 50 kilometers from Mexican costliness. *See* LIEX, art. 2o(VI) (Mex.).

<sup>309</sup> Constitución Política de los Estados Unidos Mexicanos [CP], art. 27(I), Diario Oficial de la Federación [DOF] (Feb. 5, 1917), últimas reformas DOF Feb. 10, 2014 (Mex.).

<sup>310</sup> *See* LIEX, arts. 10-14 (Mex.).

arbitration process. Leaving aside claims pertaining to minors or incapacitated persons that are perhaps specific to family trust disputes, the issues analyzed above are not exclusive to trust relationships. They are common in modern arbitration involving non-signatories and more than two parties.

As shown above, the contractual nature of the Mexican trust (and generally of the trust institution in civil law jurisdictions) relieves any arbitration from jurisdictional challenges frequently faced by arbitral tribunals dealing with Anglo-American trust claims in common law jurisdictions. An arbitration provision contained in a Mexican trust deed undoubtedly covers any disputes arising out of or in connection with the trust agreement between settlors, fiduciaries, and ascertainable beneficiaries.

Moreover, modern arbitration laws and institutional rules are well-equipped with provisions to address non-signatory and multi-party cases efficiently. Additionally, careful design of arbitration clauses and early service of all parties concerned by a trust dispute should enhance the efficiency of the process in these cases.

Arbitration of Mexican trust disputes remains underdeveloped. This may be due to the prevailingly small number of domestic arbitrations taking place in Mexico (compared to the large number of international arbitration cases seated in Mexico or involving Mexican parties). There are various possibilities as to why domestic arbitration matters are much less prevalent than international ones: the high cost of arbitration proceedings (in a country where litigation before state courts is free), the deep-rooted court litigation culture, lawyers' unsound suspicion about the one-instance process offered by arbitration, and insufficient education and training on arbitration.

However, in the case of trust arbitration, these possibilities may not be valid. The trust lawyer community in Mexico is a sophisticated one. Half of its lawyers work as in-house counsel in highly specialized fiduciary departments at banks and credit institutions authorized to act as trustees. The other half of these lawyers are usually members of mid-size or big law firms accustomed to deal with complex contractual, financial, and corporate matters, many involving foreign elements. The price of arbitration is therefore not a concern. In the same vein, the one-time nature of arbitration will always make sense for corporate trustees who allocate more value to financial and legal cost predictability.

The ultimate answer may lie in the fact that little has been discussed about the specific advantages offered by arbitration to trust parties and the issues that could arise in this field. Despite this article's intention to furnish a comprehensive analysis and strong evidence on the benefits of arbitration for trust disputes and the legal compatibility between the Mexican trust and various arbitration laws, additional discussion and promotion are necessary in Mexico and in other civil law jurisdictions.

In addition, empirical research about the perception and use of arbitration among the members of the Mexican trust community is necessary. The results of such empirical research may clear out any invalid assumptions about arbitration and pave the way towards a more significant role for arbitration as a fair and efficient means to settle Mexican trust claims.

