

Arbitration Clauses in Trusts

The U.S. developments and a Comparative Perspective

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*Abstract**

This paper aims to present a comparative law study about the enforceability of arbitration clauses in a trust, with particular emphasis on the U.S. and Latin American developments and a notion of the issue in the international context. Part 1 is an introduction of the topic. Part 2 will discuss arbitration in estate planning by providing a brief description of its advantages in comparison to litigation, by commenting on different ways to implement enforceable arbitration in estate planning devices and then by suggesting mediation as a way to commence the forthcoming process prior to binding arbitration. Part 3 will discuss the developments in the United States with binding arbitration clauses in trusts and wills, looking at case law, states' projects and institutional initiatives. Part 4 will address the international experience, reviewing international movements toward the recognition of mandatory arbitration clauses in estate planning devices and some legislation that officially recognizes the clauses in wills and trusts. Finally, Part 5 will present a conclusion and my recommendation, regarding the need of legislation.

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Palabras clave: Cláusula de arbitraje; fideicomisos

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1. Introduction

The devastating effects that litigation causes to parties in almost any type of controversy are well known. Those effects could range from emotional distress, economic losses or deterioration of future family relations. In probate litigation all those controversies are always present and we frequently see them in the news, in our communities and even in our families. Estate planning is defined as the preparation for the distribution and management of a person's estate at death through the use of wills, trusts, insurance policies, and other arrangements so that he and his beneficiaries will derive the maximum benefit during his lifetime and after his death.¹ During this process it is common and logical for a testator or settlor to include an arbitration clause in his will or trust or even for a lawyer to suggest its use. It is a method to avoid litigation, and it could be considered a legacy to the heirs.

That is precisely the purpose of the Alternative Dispute Resolution (ADR) devices: they are means to avoid trials and everything that trials involve and represent. Unfortunately, as we will discuss later in this paper, the enforcement by the United States courts of an arbitration clause provided in a trust or a will is not clear. But, besides the national response to this premise, it is important to take into careful consideration the international developments not only as a possible model for progressive legislation, but also as a possible eventual conflict with an international trust or an international succession. In the era of globalization and with the mobility of these days, it is quite common to see multijurisdictional estate planning.² This takes me to the main point of this paper: the enforceability of an arbitration clause in a foreign trust or in a will executed perhaps in a civil law country with property, movable or immovable, situated in the United States. This paper will not address difficulties related to trust instrument clauses conferring jurisdiction to decide disputes arising out of the trusts upon the courts of a particular territory. The question is: On account of the experiences in the United States and in the international arena, can a trust instrument contain an effective arbitration clause in relation to future disputes? Moreover, in such case, would it be recommended or necessary to adopt legislation governing this particular subject?

¹ Black's Law Dictionary (8th ed. 2004), estate planning.

² Jeffrey A. SCHOENBLUM (2006), *Multistate and Multinational Estate Planning*, 3^a Ed., Wolters Kluwer Business; See also Jeffrey A. SCHOENBLUM (1992), "Multijurisdictional Estates and Article II of the Uniform Probate Code", 55 *Alb. L. Rev.* 1291.

2. Arbitration in Estate Planning

2.1. Arbitration Clauses

The use of arbitration clauses in estate planning devices is not an innovation. In the United States, George Washington's will had an arbitration clause.³ He is frequently cited as the father of will arbitration clauses.⁴ Even Supreme Court Chief Justice Marshall, back in 1828, upheld a clause that empowered a majority of the executors to decide all disputes arising under a will, later called "Quasi-Arbitration Provisions."⁵ In other jurisdictions these provisions are also known. Just to mention one of them, the Spanish Arbitration Act of 2003, based in the Act of 1988, which includes an interesting disposition about Testamentary Arbitration.⁶ Talking about its origins VALLET DE GOYTISOLO, quoting DE LA PLAZA, pointed out as the precedent of Spain's testamentary arbitration that the German Civil Procedure Law, Z.P.D., in §1.048, required the application of arbitration rules when the arbitration was ordered in a disposition of last will.⁷ Big steps have been taken favoring arbitration as a public policy, but besides its long history, the use of arbitration clauses have not yet been ultimately transformed into a preferred method to avoid courts. As Arnold M. ZACK pointed out in 1956 "the historical hostility of the judiciary toward the concept of arbitration has been mirrored in the field of decedents' estates with like results as were found in the early cases on commercial arbitration."⁸ On the other hand, there are examples of arbitration clauses for trusts or wills available, and settlors and testators are using them.⁹ Therefore, we can anticipate that controversies are going to arise especially in the international arena.

³ The Arbitration Clause in George Washington will, established "... that all disputes (if unhappily they should arise) shall be decided by three impartial and intelligent men, known for their probity and good understanding; two to be chosen by the disputants each having the choice of one, and the third by those two--which three men thus chose shall, unfettered by law or legal constructions, declare their sense of the Testator's intention; and such decision is, to all intents and purposes, to be as binding on the parties as if it had been given in the Supreme Court of the United States." Will of George Washington, Transcription, (<http://gwpapers.virginia.edu>) (last visited Oct. 6, 2007).

⁴ John R. PHILLIPS, *et al.* (2006), "Analyzing the potencial for ADR in estate Planning instrument", 24 *Alternatives to High Cost Litig.* 1, 10 [hereinafter PHILLIPS (2006), Analyzing the potencial for ADR].

⁵ *Pray v. Belt*, 26 U.S. 670, 679-80 (1828).

⁶ Ley 60/2003 de 23 de diciembre, de Arbitraje (BOE nº 309, de 26.12.2003).

⁷ VALLET DE GOYTISOLO (1989), "Comentarios al art. 1059 CC" en ALBALADEJO (Director), *Comentarios al Código Civil y Compilaciones Forales*, Tomo XIV Vol. 2, Edersa, Madrid, 2nd ed., p. 366; See also COGLIOLO (1940), "La clausula arbitrale nei testamenti, en scritti varii di privato", 7th ed 1940, p. 483 quoted by ALBALADEJO (1990), "Comentarios al art. 907 CC" en ALBALADEJO (Director), *Comentarios al Código Civil y Compilaciones Forales*, Tomo XII, Vol. 2, 2nd ed., p. 227.

⁸ Arnold ZACK (1956), "Arbitration: Step-Child of the Wills and Estates", 11 *Arb. J.* 179 [hereinafter ZACK (1956), Arbitration: Step-Child].

⁹ See AAA Standard Arbitration Clause; See also Bruce M. STONE & Robert W. GOLDMAN (2005), "Resolving Disputes with Ease and Grace", 31 *ACTE J.* 235 (Providing four sample arbitration clauses).

2.2. Advantages

In comparison to litigation, arbitration in estate planning devices presents a variety of advantages. First, most of the people consider the ordinary judicial system to be extremely formal. Arbitration provides the parties a less formal atmosphere than the traditional adversarial processes. It allows the testator or the settlor to select the arbitrator and the rules that will control the forthcoming process or to adopt by reference of the rules provided by the American Bar Association.¹⁰ Second, court systems usually are overburdened and understaffed. Arbitration doesn't depend on the courts calendar or personnel. An arbitration meeting will be easily coordinated, and thus it could resolve disputes in less time than litigation.¹¹ Third, in complete concordance with arbitration as a faster more efficient method, it provides a cheaper option to litigation.¹² One of the main goals of an effective estate planning is avoiding the high costs that litigation represents.¹³ It will be enough to say that "as the litigation rages on, the pie that everyone is fighting over shrinks rapidly."¹⁴ Fourth, court hearings are usually open to the public and their content becomes part of the public record. The probate process frequently involves the discussion of private issues that could be embarrassing to the parties.¹⁵ As an author eloquently said, parties "...value 'not airing the family's dirty laundry' in public."¹⁶ The arbitration process is not public; therefore, it maintains privacy and confidentiality of the process.¹⁷ Generally speaking, as CAMPISI said, "[a]lternative dispute resolution may be ideally suited for real property and probate disputes" and its advantage "warrants increased use of ADR in such matters."¹⁸

¹⁰ Bridget A. LOGSTROM (2005), "Arbitration in Estate and Trust Disputes: Friend or Foe?", 30 ACTEC J. 267 [hereinafter LOGSTROM (2005), Arbitration in Estate and Trust].

¹¹ *Id.* at 268. See also Brian C. HEWITT (1996), "Probate Mediation: a means to an end", 40-AUG *Res Gestae* 41 (Arguing that "historically, probate practitioners have viewed litigation as a roadblock to accomplishing the ultimate goal, which is the efficient and timely administration of a probate or guardianship estate").

¹² *Id.* at 267.

¹³ See Robert WHITEMAN (2005), "Resolution Procedures to Resolve Trust Beneficiary Complaints", 39 *Real. Prop. Prob. & Tr. J.* 829, 853 (Arguing that lawyers had to work "...hard to achieve a balanced trust administration system that will avoid the costs of formal litigation whenever possible by informally solving problems and creating workable solutions.")

¹⁴ Kevin J. PARKER (1998), "Why mediating probate disputes is attractive Alternative", 16 *Alternatives to High Cost Litig.* 82.

¹⁵ Mary F. RADFORD (2001), "Advantages and disadvantages of mediation in probate, trust, and guardianship matters", 1 *Pepp. Disp. Resol. L.J.* 241, 241-42 (making these arguments as an advantage of mediation).

¹⁶ *Id.* at 242.

¹⁷ LOGSTROM (2005), Arbitration in Estate and Trust, *supra* note 10, at 268.

¹⁸ Dominic J. CAMPISI (1995), "Using ADR in property and probate disputes", 9 *Prob. & Prop.* 48, 53.

2.3. How to Use Them

Parties do not need an arbitration clause in a testament or in a trust to formally refer a dispute to impartial arbitration. They could do it voluntarily. As a matter of fact, a majority of the states authorize the trustee to use binding arbitration or mediation in probate controversies.¹⁹ Under this idea, if the testator or the settlor includes an arbitration clause in his estate planning device, the parties could consent to submit to binding arbitration. It would represent fewer problems.²⁰ The problem arises when some parties don't agree to willingly refer their controversies to arbitration. Some authors have suggested that a different road to make the mandatory arbitration binding is to include all possible parties (e.g. the beneficiaries, trustee, etc.) in the instrument and have them sign it, promising to submit to arbitration any controversy.²¹ In the United States, the arbitration agreement could be made when the controversy arises or in prevention of a future controversy. This agreement could also be made in a separate instrument, perhaps a contract, where the parties agree to formally submit any controversy to arbitration as a condition of accepting the benefit.²² These mechanisms raise other questions, which will be analyzed later in this paper. But for now it is important to point out that there is a difference when the parties consent voluntarily to binding arbitration and when one or more of the parties do not accept compulsory arbitration.

Besides the separate contract method, the testator or the settlor could use a clause analogous to the *in terrorem* or "no-contest" clause. An *in terrorem* clause is one in a contract or will that is designed to frighten someone into compliance with the wishes of another, such as when a will provides that if anyone brings a will contest, they will receive only a nominal bequest, even if the

¹⁹ See Ala. Code § 19-3-322 (1997); Alaska Stat. § 13.36.109 (2006); Ariz. Rev. Stat. Ann. § 14-7233 (2005); Ark. Code Ann. § 28-73-816 (Supp. 2005); Cal. Prob. Code § 16242 (West 2006); Colo. Rev. Stat. § 15-1-804 (2006); Conn. Gen. Stat. Ann. § 45a-153 (West 2004); D.C. Code Ann. § 19-1308.16 (LexisNexis 2005); Fla. Stat. Ann. § 737.402 (West Supp. 2007); Ga. Code Ann. § 53-12-232 (1997); Haw. Rev. Stat. Ann. § 554A-3 (LexisNexis 2006); Idaho Code Ann. § 68-106 (2006); Ind. Code Ann. § 30-4-3-3 (LexisNexis Supp. 2006); Iowa Code Ann. § 633A.4402 (West Supp. 2006); Kan. Stat. Ann. § 58a-816 (2005); Ky. Rev. Stat. Ann. § 386.810 (LexisNexis 1999); La. Rev. Stat. Ann. § 9:2121 (2006); Me. Rev. Stat. Ann. tit. 18-B, § 816 (Supp. 2006); Md. Code Ann., Est. & Trusts § 15-102 (LexisNexis Supp. 2006); Mich. Comp. Laws Ann. § 700.7401 (West Supp. 2006); Minn. Stat. Ann. § 501B.81 (West 2002); Miss. Code Ann. § 91-9-107 (Supp. 2006); Mo. Ann. Stat. § 456.8-816 (West Supp. 2007); Mont. Code Ann. § 72-34-336 (2006); Nev. Rev. Stat. Ann. 163.375 (LexisNexis 2003); N.H. Rev. Stat. Ann. § 564-B:8-816 (LexisNexis 2006); N.M. Stat. Ann. § 46A-8-816 (LexisNexis 2004); N.C. Gen. Stat. § 36C-8-816 (2005); Okla. Stat. Ann. tit. 60, § 175.24 (West Supp. 2005); Or. Rev. Stat. § 130.725 (2005); R.I. Gen. Laws § 18-4-3 (2003); S.C. Code Ann. § 62-7-816 (Supp. 2006); S.D. Codified Laws § 55-1A-25 (2001); Tenn. Code Ann. § 35-15-816 (Supp. 2006); Tex. Prop. Code Ann. § 113.019 (Vernon 2007); Utah Code Ann. § 75-7-814 (Supp. 2006); Va. Code Ann. § 55-548.16 (Supp. 2006); Wash. Rev. Code Ann. § 11.98A.070 (West Supp. 2007); W. Va. Code § 44-5A-3 (LexisNexis 2004); Wyo. Stat. Ann. § 4-10-816 (2005).

²⁰ ZACK (1956), Arbitration: Step-Child, *supra* note 8, at 182.

²¹ Timothy P. O'SULLIVAN (2007), "Family Harmony: An All Too Frequent Casualty of the Estate Planning Process", 8 *Marq. Elder's Advisor* 253, 314 [hereinafter O'SULLIVAN (2007), Family Harmony].

²² *Id.* at 316. (That "stick" could be a requirement that beneficiaries execute a written consent to the mediation and arbitration provisions of the testamentary instrument as a condition precedent to receiving any benefits under the testamentary instrument or serving as financial fiduciary).

challenge is successful.²³ In most of the courts the enforcement of those clauses is limited to cases where there is no probable cause for the contest. Actually, that is the particular test provided by the Restatement (Third) of Property: Wills and other Donatives Transfers.²⁴ The standard of proof will vary from state to state, and there are arguments to support both positions.²⁵ On the one hand it can discourage unmeritorious litigation, but on the other it could inhibit a lawsuit proving fraud or undue influence, thus nullifying the safeguards built around the testamentary disposition of property.”²⁶ In the case of an arbitration clause, that I denominate a “no court contest clause” and it is different from the traditional clause, because the settlor or the testator is giving a viable option: binding arbitration. However, it is unclear if a court will enforce the arbitration clause, using the probable cause standard.

2.4. The Theories

Cohen & Staff suggests that in order to enforce an arbitration clause in a trust deed the court would have to be satisfied: (1) that its jurisdiction is not being ousted (in an unacceptable fashion); (2) that the clause purporting to be an arbitration clause is an agreement which is not inoperable, ineffective or incapable of being performed and that there is actually a dispute within the scope of the clause; (3) that the clause is binding on the party bringing the action which is sought to be stayed; (4) that all interested parties are properly represented (including unascertained and unborn beneficiaries); (5) that the *subject matter* of the dispute is arbitrable.²⁷

With the emergence of those five elements and its analysis, the doctrine has pointed out three theories to support the enforcement of a mandatory arbitration clause in a trust; they are (1) the contractual approach; (2) the intention of the settlor as the law of the trust; and (3) the benefit approach, which means that the beneficiaries of a trust had to take the whole disposition including conditions and restrictions imposed by the settlor.

The Contract Theory. This theory characterizes the trust deed as a contract. One of the major obstacles of the enforcement of trust arbitration clauses is that the general and accepted notion of

²³ Black’s Law Dictionary (8th ed. 2004).

²⁴ DUKEMINIER (2005), *Will, Trust and Estate*, 7 Ed., Aspen, p. 167 [hereinafter DUKEMINIER (2005), *Will, Trust and Estate*] (pointing out that the probable cause rule is adopted by UPC §§2-517 and 3-905 (1990) and by Restatement (Third) of Property: Will and Other Donative Transfers § 8.5 (2003).

²⁵ Donna R. BASHAW (2006), “Are in terrorem clauses no longer terrifying? If so, can you avoid post-death litigation with pre-death procedures?” 2 *NAELA J.* 349; Gerry BEYER *et al.* (1998), “The Fine Art of Intimidating Disgruntled Beneficiaries with in terrorem clauses”, 51 *SMU L. Rev.* 225; But see Martin D. BEGLEITER (1994), “Anti-Contest Clause: When You Care Enough to Send the Final Threat”, 26 *Ariz. St. L. J.* 629 (arguing in favor of the minority rule).

²⁶ DUKEMINIER (2005), *Will, Trust and Estate*, *supra* note 24, at 167; See also Ronald J. SCALISE, Jr. (2006), “New developments in United States succession law”, 54 *Am. J. Comp. L.* 103, 114-115; Jo Ann ENGLEHARDT (1991), “In Terrorem Inter Vivos: Terra Incognita”, 26 *Real Prop. Prob. & Tr. J.* 535.

²⁷ Lawrence COHEN & Marcus STAFF (1999), “The Arbitration of Trust Disputes”, 74 *J. Int’l Trust and Corp. Pl.* 203 [hereinafter COHEN & STAFF (1999), *The Arbitration of Trust Disputes*].

arbitration is limited to a contractual view, where the parties willingly agree to submit to the pertinent process.²⁸ In his renowned article of 1917, Austin W. SCOTT explains that a trust is not a contract.²⁹ In 1986 the United States Supreme Court held in *AT & T Technologies, Inc. v. Communications Workers of America*, that “Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit” and concluded that Arbitration is a creature of contract law.³⁰ More recently, in 1995, John Langbein proposed his theory of *The Contractarian Basis of the Law of Trusts*, explaining that the conventional three-party trust is a prevalingly contractarian institution.³¹

This paper’s intention is not to go further in this debate, but at this point it is important to make three remarks. First, as BOGERT said “there is occasional confusion concerning the legal incidents of contracts and trusts.”³² Courts have characterized trusts as contracts under the theory that contracts embrace a trust relationship or even saying that the trustee’s obligation was of a “contractual nature.”³³ Second, in some civil law jurisdictions one of the possible solutions for the development of trust legislation, as John MINOR WISDOM said, “is the adoption of the Anglo-American trust in terms of concepts of the civil law.”³⁴ With this approach, one of the civil law institutions that best resembles the trust is the contract for the benefit of third parties.³⁵ Some of the legislation tends to see the trust as an agreement or a contract. Moreover, when there is no trust legislation it is also common to see this same characterization.³⁶

²⁸ See David HAYTON (2006), “Future trends in international trust planning”, 13 *J. Int’l Trust and Corp. Pl.* 55 [hereinafter HAYTON (2006), Future trends] (“The problem with arbitration is the need for an arbitration agreement defined in the English Arbitration Act 1996, s 6(1)”; Contrast Jonathan R. MACEY (1999), “Fiduciary Duties as Residual Claims: Obligations to Nonshareholder Constituencies from a Theory of the Firm Perspective”, 84 *Cornell L. Rev.* 1266 (Concluding that fiduciary duties are essentially contractual in nature) with Fitz GIBBON (1999), “Fiduciary Relationships Are Not Contracts”, 82 *Marquette L. Rev.* 303.

²⁹ Austin W. SCOTT (1917), “The Nature of the Rights of the Cestui Que Trust”, 17 *Colum. L. Rev.* 269, 289.

³⁰ 475 U.S. 643, 648 (1986).

³¹ John LANGBEIN (1995), “The Contractarian Basis of the Law of Trusts”, 105 *Yale L.J.* 625, 643; See also Frederic W. MAITLAND (1936), *Equity: A Course of Lectures* (John Brunyate rev. ed., 2d ed.) (A.H. Chaytor & W.J. Whittaker eds., 1st ed. 1909) (“[T]he trust was originally regarded as an obligation, in point of fact a contract though not usually so called.”).

³² BOGERT (2007), *Trusts And Trustees, The Law Of Trusts And Trustees* § 17.

³³ *Id.*

³⁴ John MINOR WISDOM (1938), “A Trust Code in the Civil Law Based on the Restatement and Uniform Acts: The Louisiana Trust Estates Act”, 13 *Tul. L. Rev.* 70, 76; See also John MINOR WISDOM (1940), “Progress in the Codification of Trusts”, 14 *Tul. L. Rev.* 165.

³⁵ Pierre LAPAULLE (1927), “Civil Law Substitutes for Trusts”, 36 *Yale L.J.* 1126, 1137; See also SÁNCHEZ VILELLA (1944), “The Problem of Trust Legislation in Civil Law Jurisdictions: The law of Trusts in Puerto Rico”, 19 *Tul. L. Rev.* 374; Ruford G. PATTON (1945), “Trusts Systems in the Western Hemisphere”, 19 *Tul. L. Rev.* 398 [hereinafter PATTON (1945), *Trusts Systems*].

³⁶ Note (1954), “Common Law Trusts in Civil Law Courts”, 67 *Harv. L. Rev.* 1030, 1032 (“Indeed, continental writers often speak of “le contrat du trust,” although at common law a trust need not be founded upon a contract.”)

The third remark is related to the contractual nature of arbitration. As we will examine, there is a tendency in some jurisdictions, e.g. Spain, to abandon the traditional strictly contractual or bilateral approach of the arbitration.³⁷ An arbitration procedure could be unilaterally enforced. In the United States, this extended discussion has focused on labor law issues, and the doctrine has severely censured the practice, as an abuse of power from the employer.³⁸ Nevertheless, the unilateral arbitration provision in estate planning should be considered an expression of the settlor or the trustee intention, focused in its particular purpose of getting the better method of resolving disagreements.

The distinctions are clear: a trust is not a contract.³⁹ In trust, in contrast with a civil law contract in favor of a third party, the third party has a real right to the assets in the trust, not merely a contract claim against the trustee.⁴⁰ Unfortunately, the contract approach revives the trust as a contract debate, which “seems to lack viability with respect to wills and most trusts”⁴¹ even accepting the Langbein theory of the contractual nature of the three-party trusts.

The Intention Theory. The second theory is based on the recognition of the intention of the settlor is the law of the trust.⁴² The Restatement (Third) of Property: Wills and Other Donative Transfers establish that “[t]he controlling consideration in determining the meaning of a donatives document is the donor’s intention.”⁴³ Moreover, the Uniform Trust Code defines ‘Terms of a Trust’ as the manifestation of the settlor’s intent regarding a trust’s provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding.⁴⁴ The settlor creates the trust and the created relationship will

³⁷ See Carmen GARCÍA PÉREZ (1999), *El Arbitraje Testamentario*, Tirant, p. 455 [hereinafter GARCÍA PÉREZ (1999), *El Arbitraje Testamentario*].

³⁸ See generally Anthony N. DILEO (2003), “The Enforceability of Arbitration Agreements by and Against Nonsignatories”, 2 *J. Am. Arb.* 31.

³⁹ A.N. YIANNOPOULOS (1999), “Trust and the Civil Law: The Louisiana Experience”, in Vernon VALENTINE PALMER (EDITOR), *Louisiana: Microcosm of a Mixed Jurisdiction*, Carolina Academic Press, 1999, p. 221 (Holding that “[t]he trust is created through a unilateral declaration of will made by the settlor. The trust is not a contract; there is neither offer nor acceptance.”).

⁴⁰ James GORDLEY (2000), “The Common Law in the Twentieth Century: Some Unfinished Business”, 88 *Cal. L. Rev.* 1815, 1868-69 [hereinafter GORDLEY (2000), *The Common Law in the Twentieth Century*].

⁴¹ Robert W. GOLDMAN (2007), “Simplified Trial Resolution: High Quality Justice in a Kinder, Faster Environment”, 41st *Annual Heckerling Institute on Estate Planning*, Chapter 16, p. 16-5, June 2007, University of Miami School of Law, Lexisnexis [hereinafter GOLDMAN (2007), *Simplified Trial Resolution*].

⁴² E. Gary SPITKO (1999), “Gone But Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration”, 49 *Case W. Res. L. Rev.* 275, 294-97 (proposing testator-compelled arbitration of will challenges to protect a nonconforming testator’s testamentary freedom).

⁴³ The Restatement (Third) of Property: Wills and Other Donative Transfers § 10.1 (2001); accord Restatement (Third) of Trusts § 4 (2003).

⁴⁴ Uniform Trust Code § 103; See Alan NEWMAN (2005), “The Intention of the Settlor under the Uniform Trust Code: Whose Property is it, Anyway?”, 38 *Akron L. Rev.* 649, 705.

implement the settlor's intention. That is the purpose of the deed of trust, to implement the "settlor's donative intent."⁴⁵ Trust legislation is normally subsidiary, and most of the rules primarily apply only in the obvious absence of a clear intention. "Trust law consists almost entirely of default rules."⁴⁶ Therefore, the intention theory proposes that an express condition requiring the subsequent implementation of mandatory arbitration to resolve any controversy should be valid and enforceable. Of course, imposed conditions have to be lawful and not contrary to public policy, but an arbitration clause, generally speaking, is not against public policy.⁴⁷ On settlor's autonomy, mandatory rules have to be considered. LANGBEIN divided the mandatory rules into two groups: "intent-defeating rules that restrict the settlor's autonomy, and intent-serving rules whose purpose is to discern and implement the settlor's true intent."⁴⁸ The intent-defeating rules serve an anti-dead-hand policy, and as variations of this rule, LANGBEIN states "the benefit-the-beneficiaries requirement and the rules allowing courts to modify trusts in response to changed circumstances."⁴⁹ Applying the regulatory limitation, mentioned by LANGBEIN, to the binding arbitration trust clause discussion, it could be argued that the arbitration approach is clearly in favor of the beneficiaries, as demonstrated by its advantages. In reference to changes in circumstances the court will always, upon petition, have the power to examine the arbitrability of the particular issue as part of its power to revise when there are changes in circumstances.

Another limitation, imperative in a comparative approach, is the forced heirship rules as restrictions of the disposition.⁵⁰ Where such restrictions exist, "the possibilities for having a dispute resolved before an arbitration tribunal are limited."⁵¹ In the United States only Louisiana retains some type of forced heirship, limited to children under the age of twenty-three or those

⁴⁵ John H. LANGBEIN (2007), "Trust Law as Regulatory Law: The UNUM/Provident Scandal and Judicial Review of Benefi Denials under ERISA", 101 *Nw. U. L. Rev.* 1315, 1336.

⁴⁶ John H. LANGBEIN (2004), "Mandatory rules in the Law of Trusts", 98 *Nw. U. L. Rev.* 1105, 1126 [hereinafter LANGBEIN (2004), Mandatory rules].

⁴⁷ Uniform Trust Code § 105; *Circuit City Stores v. Adams*, 532 U.S. 105 (2001); But see the New York approach in *In re Will of Jacobovitz*, *supra*. See also Georg VON SEGESSER (2001), "Arbitrability in Estate and Trust Litigation", in Rosalind F. ATHERTON (Editor), *Papers of The International Academy of Estate and Trust Law - 2000*, Kluwer Law International, p. 30 [hereinafter SEGESSER, Arbitrability in Estate and Trust Litigation] (In Switzerland "A unilateral arbitration clause in a last will or trust instrument will... not be considered as being contrary to Swiss public policy").

⁴⁸ LANGBEIN (2004), Mandatory rules, *supra* note 46, at 1106-07.

⁴⁹ *Id.* at 1126. For LANGBEIN "the anti-dead-hand principle is fundamentally a change-of-circumstances doctrine." *Id.* at 1110 -11.

⁵⁰ Anthony DUCKWORTH (2006), "Forced Heirship and the Trust", in John GLASSON and Geraint THOMAS (Editors), *The International Trust*, 2nd ed., Jordans, Chapter 14, p. 711.

⁵¹ VON SEGESSER (2001), Arbitrability in Estate and Trust Litigation, *supra* note 47 at 25.

who are interdicted or subject to interdiction.⁵² The reason for Louisiana's approach resides in the reality that this state is a mixed jurisdiction, where civil and common law coexist, but in civil law jurisdictions the forced heirship, also known as legitime, is quite common. Since arbitration restricts the ordinary remedies of states courts, an arbitration clause in a trust deed has the impact "...of restricting the heir's rights, and is thus not binding [on] the heirs with respect to their forced heirship portions."⁵³

An argument that can be made in favor of the intention approach is the importance of the settlor's intention in conflicts of law. For example, Article 6 of the Hague Convention on Trusts recognizes that the trust shall be governed by the law chosen by the settlor.⁵⁴ By analogy, if the settlor can choose the governing law he ought to be able to choose arbitration as the governing method.

The Benefit Theory. This is the third and final approach to the enforcement of mandatory arbitration clauses in a trust. It could be characterized as a complement of the intention theory. It states that parties who accept property under a will or a trust impliedly agree to be bound by all of its terms, including an arbitration clause. Beneficiaries "must take what the settlor has directed and are bound to the form of dispute resolution selected by the settlor."⁵⁵ The benefit of a trust could not be subjected to a partial acceptance, only taking the advantages.⁵⁶ A beneficiary takes only by benevolence of the testator, who may attach lawful conditions to the receipt of the gift.⁵⁷ Therefore, this approach means that the beneficiaries are bound by the fact that the only title which they have comes through or under the settlor of the trust.⁵⁸

⁵² Katherine SPAHT, et al. (1990), "The New Forced Heirship Legislation: A Regrettable "Revolution,"" 50 *La. L. Rev.* 409; See also Kathryn V. LORIO (1982), "Louisiana Trusts: The Experience of a Civil Law Jurisdiction with the Trust", 42 *La. L. Rev.* 1721.

⁵³ SEGESSER (2001), Arbitrability in Estate and Trust Litigation, *supra* note 47 at 25.

⁵⁴ Hague Conference on Private International Law: Convention on the Law Applicable to Trusts and on Their Recognition, and Final Act of the Fifteenth Session, Oct. 20, 1984, 23 *I.L.M.* 1388 (1984); Donald T. TRAUTMAN (1987), "Party Autonomy in the Proposed Hague Conference Convention for Trusts", 21 *Rev. Jur. U.I.P.R.* 547.

⁵⁵ SEGESSER (2001), Arbitrability in Estate and Trust Litigation, *supra* note 47 at 27.

⁵⁶ See *Tennant v. Satterfield*, 216 S.E.2d 229, 232 (W. Va. 1975) ("The general rule with regard to acceptance of benefits under a will is that a beneficiary who accepts such benefits is bound to adopt the whole contents of that will and is estopped to challenge its validity").

⁵⁷ *American Cancer Soc., St. Louis Division v. Hammerstein*, 631 S.W.2d 858, 864 (Mo. App. 1981).

⁵⁸ COHEN & STAFF (1999), The Arbitration of Trust Disputes, *supra* note 27, at 207; See also Charles LLOYD & Jonathan PRATT (2006), "Trust in Arbitration", 12 *Trusts & Trustees* 18 [hereinafter LLOYD & PRATT (2006), Trust in Arbitration] quoting a judgment of DANKWERTS J, *Re Wynn's Will Trust* ([1952] Ch 271) that said: "Beneficiaries under a will take what they take purely by bound of the testator, and it might be said that, as they are not entitled to anything of right apart from provisions of the will, they must take their benefits subject to the conditions which are contained in the will." LLOYD & PRATT argue that "[t]here is no reason why the same rationale would not be apply equally to a trust." *Id.*

2.5. Mediation as an Alternative

Mediation is a process in which the parties resolve their differences with the additional support of qualified professional called mediator.⁵⁹ This process is not adjudicative nor adversarial. Instead it is conceived as a cooperative or collaborative one. It depends exclusively in the voluntary agreement of the parties, so they can resolve their controversies. In their effort to promote mediation, states have tended to enforce it. But the enforceability can only be directed to promote participation not to reach an outcome, because there is no way of forcing the parties to cooperate or negotiate in good faith.⁶⁰ If the parties in a mediation do not consent to the forthcoming process, they will probably be predisposed not to agree and this predisposition will affect the outcome of the mediation. Thus, mediation should not be enforced by a clause in will or a trust, but it is recommended, if the parties agree, to incorporate a mediation-arbitration clause where the parties will mediate the dispute and then, if the mediation fails, proceed to binding arbitration.⁶¹ A mediation clause should not be legally imposed, but the settlor or the testator could refer to a moral obligation to mediate.

Mediation highlights the significant importance of reliable communication. In addition, it offers people new ways to deal with potential future conflicts.⁶² In probate disputes, mediation has been described as a face-to-face, non-confrontational setting where "...the parties put into their own words their perspectives and problems and not rely on attorneys or piecemeal methods to communicate."⁶³ In the words of MONROE WISNOM:

In the interest of maintaining positive family relationships, strong consideration should be given to incorporating a mediation step into the dispute resolution clause. Thus, any disputes arising under the trusts will go to mediation and, if the mediation is unsuccessful, only then will they proceed to binding arbitration. The goal of requiring pre-arbitration mediation is to engage in a full, dispassionate discussion about the dispute in a less adversarial setting, and prevent a minor dispute from erupting into a full-blown legal battle.⁶⁴

⁵⁹ O'SULLIVAN (2007), *Family Harmony*, *supra* note 21, at 315 (Describing testamentary provisions requiring mediation and/or arbitration as "...a family-harmony-enhancing strategy").

⁶⁰ LLOYD & PRATT (2006), *Trust in Arbitration*, *supra* note 58, at 19.

⁶¹ Susan N. GARY (1997), "Mediation and the elderly Using mediation to resolve probate disputes over guardianship and inheritance", 32 *Wake Forest L. Rev.* 397, 422.

⁶² Ronald CHESTER (1999), "Less law, but more justice?: Jury trials and mediation as means of resolving will contests", 37 *Duq. L. Rev.* 173, 198.

⁶³ PHILLIPS (2006), *Analyzing the potencial for ADR*, *supra* note 4, at 9.

⁶⁴ Patricia MONROE WISNOM (1995), "Probate law and mediation: a therapeutic perspective", 37 *Ariz. L. Rev.* 1345, 1360; See also Melissa STREET (2007), "A Holistic Approach to Estate Planning: Paramount in Protecting Your Family, Your Wealth, and Your Legacy", 7 *Pepp. Disp. Resol. L.J.* 141, 163 (Arguing that "Holistic estate planning employs the techniques of mediation to ensure that testators are successful in passing on a positive legacy that will last for generations").

The benefit of mediation has been recognized by some states with the enactment of legislation providing for probate mediation court sponsored programs.⁶⁵ Excellent outcomes have been reported.⁶⁶ Even so, most of those states only allowed the court to refer probate matters to mediation or some other alternative dispute resolution method. Actually, a few years ago someone presented “a proposal to add a discretionary mediation clause to the Uniform Probate Code.”⁶⁷ Maybe, that is the road to follow in order to promote the use of ADR methods in probate disputes. However, according to the mediation theory, its nature requires the formal agreement of the parties, because they are the ones that will reach the final agreement. In this respect, the American Bar Association has advised that “...attorneys in the estate and trust area must be prepared to advise their clients concerning this method of alternative dispute resolution.”⁶⁸ Similar developments have taken place in the United Kingdom, where the Association of Contentious Trust and Probate Specialists (ACTAPS) has developed a protocol that includes mediation as a litigation “pre-action” because “...trust and probate disputes involve a potentially explosive mixture of personal feelings and money or property claims.”⁶⁹ Moreover, as Behrens said, in the United Kingdom “[m]any trust and probate disputes can and should be resolved by mediation.”⁷⁰

3. The Enforcement of the Clause in the U.S.A.

3.1. The Federal and State Governments Move Toward Arbitration

During the last two or three decades, the enforcement of arbitration clauses in general was a great concern. Those concerns were dissipated, in part, in *Circuit City Stores v. Adams*, where the United States Supreme Court rejected the stereotypical idea that a litigant would lose substantive rights

⁶⁵ States that had those programs are Texas; Florida; Fulton County, Georgia; Los Angeles County, California; San Francisco County, California;) See Alaska Ct. R. 4.5 (2006); Haw. Prob. R. 2.1 (2007); Mass. Prob. & Fam. Ct., Standing Order 1-04 (2006); Mich. Ct. R. 5.143 (2006); N.J. Ct. R. 1:40-6 (2007); Recently Washington and Idaho have enacted Trust and Estate Dispute Resolution Acts. These statutes provide for nonjudicial dispute resolution for matters relating to trusts and estates. See Idaho Code §§ 15-8-101 et seq.; Wash. Rev. Code Ann. §§ 11.96A.010 et seq.

⁶⁶ See in general Ray D. MADOFF (2004), “Mediating probate disputes: a study of court sponsored programs”, 38 *Real Prop. Prob. & Tr. J.* 697.

⁶⁷ Andrew STIMMEL (2002), “Mediating will disputes: a proposal to add a discretionary mediation clause to the Uniform Probate Code”, 18 *Ohio St. J. on Disp. Resol.* 197.

⁶⁸ Robert N. SACKS, Resolution of Estate and Trust Disputes Involving Family Business, RPPT (ABA) 15th Annual Symposia May 12 to 14, 2004 Seattle, Available at <http://www.abanet.org> (Last visited Oct. 15, 2007).

⁶⁹ Draft of Pre-Action Protocol for the Resolution of Probate and Trust Disputes, presented by the Association of Contentious Trust and Probate Specialists (ACTAPS) available at www.ACTAPS.com (Last visited Oct. 15, 2007); See also Henry FRYDENSON (2002), “Resolving probate and trust disputes”, Vol. 152 No. 7037 *New Law Journal* 955 (Describing the protocol).

⁷⁰ James BEHRENS (2001), “The mediation of trust disputes”, Vol. 151 No. 6995 *New Law Journal* 1183.

because an arbitrator, rather than a judge, hears his plea.⁷¹ There have been different initiatives with the optimistic intent of aggressively promoting arbitration. The federal legislature approach was to approve, in 1925, the Federal Arbitration Act (FAA). Its goal was to change the unlikely view, especially courts views, of the judicial system as the only possible dispute resolution system. As Justice Stevens said “Judges in the 19th century disfavored private arbitration.”⁷² The FAA was intended to overcome the negative attitude toward private arbitration. But several cases decided by this Court pushed the pendulum far beyond a neutral attitude and endorsed a policy that strongly favors private arbitration.⁷³ The Second Section of the Federal act requires the existence of a contract or an agreement to arbitrate as a *sine qua non* condition for its enforceability. The Act states that any “written arbitration agreement shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”⁷⁴

In the same way, the states approach was manifested by the adoption of the Uniform Arbitration Act (U.A.A.), originally published in 1956 and adopted in 49 jurisdictions, now in its 2000 version under the name of Revised Uniform Arbitration Act (R.U.A.A.).⁷⁵ The primary purpose of the U.A.A. is to promote arbitration as a desirable alternative to litigation and to provide uniformity in law. There is no doubt about the influence of the U.A.A. in states legislatures. But as with the F.A.A., the base adopted for a binding arbitration is a contractual one.⁷⁶

⁷¹ *Circuit City Stores v. Adams*, 532 U.S. 105, 121 S. Ct. 1302 (2001).

⁷² *Id.*

⁷³ *Id.* at 131-32 (dissenting opinion Justice Stevens – joined by Ginsburg, Breyer, Souter).

⁷⁴ 9 U.S.C. § 2 (2003).

⁷⁵ Available at <http://www.law.upenn.edu> (Last visited Oct. 15, 2007).

⁷⁶ See Ala. Code § 6-6-3 (2005); Alaska Stat. § 09.43.330 (2006); Ariz. Rev. Stat. Ann. § 12-1501 (2003); Ark. Code Ann. § 16-108-201 (2006); Cal. Civ. Proc. Code § 1281 (1982); Colo. Rev. Stat. Ann. § 13-22-206 (West 2006); Conn. Gen. Stat. Ann. § 52-408 (West 2005); Del. Code Ann. tit. 10, § 5701 (1999); D.C. Code § 16-4301 (2005); Fla. Stat. § 44.104 (2003); Ga. Code Ann. § 9-9-3 (Supp. 2006); Haw. Rev. Stat. § 658A-6 (2002); Idaho Code Ann. § 7-901 (2004); 710 Ill. Comp. Stat. Ann. 5/1 (West 1999); Ind. Code Ann. § 34-57-2-1 (LexisNexis 1998); Iowa Code Ann. § 679A.1 (West 1998); Kan. Stat. Ann. § 5-401 (2001); Ky. Rev. Stat. Ann. § 417.050 (LexisNexis 2005); La. Civ. Code Ann. arts. 3099, 3100 (1994); Me. Rev. Stat. Ann. tit. 14, § 5927 (2003); Md. Code Ann., Cts. & Jud. Proc. § 3-206 (LexisNexis 2006); Mass. Gen. Laws Ann. ch. 251, § 1 (West 2004); Mich. Comp. Laws Ann. § 600.5001 (West 2000); Minn. Stat. Ann. § 572.08 (West 2000); Miss. Code Ann. § 11-15-103 (2004); Mo. Ann. Stat. § 435.350 (West Supp. 2007); Mont. Code Ann. § 27-5-114 (2005); Neb. Rev. Stat. § 25-2602.01 (Supp. 2006); Nev. Rev. Stat. Ann. § 38.219 (LexisNexis 2006); N.H. Rev. Stat. Ann. § 542:1 (LexisNexis 2006); N.J. Stat. Ann. § 2A:23B-6 (West Supp. 2006); N.M. Stat. Ann. § 44-7A-7 (LexisNexis 2004); N.Y. C.P.L.R. 7501 (McKinney 1998); N.C. Gen. Stat. § 1-569.6 (2005); N.D. Cent. Code § 32-29.3-06 (Supp. 2005); Ohio Rev. Code Ann. § 2711.01 (LexisNexis 2000); Okla. Stat. Ann. tit. 12, § 1857 (West Supp. 2007); Or. Rev. Stat. § 36.620 (2005); 42 Pa. Cons. Stat. Ann. § 7303 (West 2007); R.I. Gen. Laws § 10-3-2 (Supp. 2006); S.C. Code Ann. § 15-48-10 (2005); S.D. Codified Laws § 21-25A-1 (1987); Tenn. Code Ann. § 29-5-302 (2000); Tex. Civ. Prac. & Rem. Code Ann. § 171.001 (Vernon 2005); Utah Code Ann. § 78-31a-107 (2002); Vt. Stat. Ann. tit. 12, § 5652 (2002); Va. Code Ann. § 8.01-581.01 (2000); Wash. Rev. Code Ann. § 7.04A.60 (West Supp. 2007); W. Va. Code Ann. § 55-10-1 (LexisNexis 2000); Wis. Stat. Ann. § 788.01 (West Supp. 2006); Wyo. Stat. Ann. § 1-36-103 (2005).

3.2. The Case Law

While there is a strong policy favoring binding arbitration, a court of the state of New York in *In re Will of Jacobovitz*, ruled that arbitration in probate disputes is “against public policy.”⁷⁷ The judgment was not limited to unilateral arbitration clauses; agreements between the parties in these matters are also against public policy.⁷⁸ The New York court based its rationale on an interpretation of New York State’s Constitution, which held that “the surrogate’s court shall have jurisdiction over all actions and proceedings relating to the affairs of decedents, probate of wills, administration of estates and actions and proceedings arising there under or pertaining thereto...”.⁷⁹ As expressed by the Court “virtually all arbitrations would be unconstitutional, as most constitutions empower courts to decide litigation.”⁸⁰ As far as our investigation reveals, no other state in the United States has adopted this rationale. Dealing with other public policy issues, in *In re Trust of Fellman* the Pennsylvania Superior Court held that an arbitration clause in a trust instrument was “...unenforceable as a matter of public policy, to the extent that the clause required arbitration of a person’s capacity to revoke a trust.”⁸¹ In *Fellman* the settlor and co-trustees wanted to revoke a trust that had an arbitration clause. Their nephew, the other co-trustee, argued that they were mentally impaired.⁸² Invoking the safeguards of the court proceedings in incompetency hearings the forum held that “incompetency cannot be submitted to arbitration.”⁸³

In *Schoneberger v. Oelze* the Court of Appeals of Arizona found that a mandatory arbitration clause in a trust was “unenforceable with respect to the trust beneficiaries.”⁸⁴ The court held that this type of clause can not deprive a “trust beneficiary of their right to access the court in the absence of their agreement.”⁸⁵ This means that a settlor may not unilaterally force binding arbitration absent the mutual agreement between the beneficiaries. There are two important rulings in this case. First, the court distinguishes a trust from a contract, relying on the argument that a trust in its nature is not properly characterized as contractual.⁸⁶ The court stated that “a trust does not rest on an exchange of promises and instead merely requires a settlor to transfer a

⁷⁷ *In re Will of Jacobovitz*, 295 N.Y.S.2d 527, 529 (1968).

⁷⁸ *Id.* See also *Swislocki v. Spiewak*, 273 A.D. 768 (N.Y. App. Div. 1947); *Matter of Kabinoff*, 163 N.Y.S. 2d 798, 799 (N.Y. Sup. Ct. 1957).

⁷⁹ New York State Constitution, Article 6, Section 12, Subdivision d.

⁸⁰ GOLDMAN (2007), *Simplified Trial Resolution*, *supra* note 41, at Footnote 9.

⁸¹ *In re Trust of Fellman*, 412 Pa. Super. 577, 604 A.2d 263 (Pa. Super. 1992) Comented in JEFFREY A. HAEBERLIN (1992), “Case Note”, 31 *U. Louisville J. Fam. L.* 753.

⁸² *Id.* at 582.

⁸³ *Id.* at 586. See also Ronald R. VOLKMER (1992), “Construction of Trust Provisions by Courts”, 19 *Est. Plan.* 320.

⁸⁴ *Schoneberger v. Oelze*, 96 P.3d 1078 (Ariz., 2004).

⁸⁵ *Id.*, at 1084.

⁸⁶ *Id.* citing *In Re Naarden Trust*, 195 Ariz. 526, 530, 990 P.2d 1085, 1089 (App.1999).

beneficial interest in property to a trustee who ...holds that interest for the beneficiary.”⁸⁷ Second, the court modified the proposition that the law should favor arbitration, when they said that “it is more accurate to say that the law favors arbitration of disputes that the parties have agreed to arbitrate.”⁸⁸ In its decision the court relied almost completely on the differences “rather than focusing on the underlying similarities between a trust and a contract.”⁸⁹

Scholars believe that “in view of the growing support for arbitration, it seems unlikely that *Schoneberger* will be the last word on the enforcement of a mandatory arbitration clause in a trust.”⁹⁰ I cannot agree more. But unfortunately, in *In re Calomaris* the District of Columbia Court of Appeals was faced with a similar issue. This time the arbitration provision was contained in a will that established a marital trust, not an *inter vivos* trust.⁹¹ Using *Schoneberger* rationale, the court said that the arbitration clause was not enforceable. The District of Columbia’s version of the U.A.A. required “[a] written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties.”⁹² Moreover, since a will is not a written contract, a mandatory arbitration clause in a will is unenforceable.

Both *Schoneberger* and *Calomaris* represent an unfortunate step back in the important public policy to favor the enforcement of arbitration. Their analyses are limited to a narrow view of the contractual theory. Theory that involves more than the simplistic expression that states that neither a trust nor a will is a contract. Furthermore, the contract theory is not the only one. In the words of Bruyere & Marino “[i]f this ill-advised distinction continues to be the majority approach, a substantive change in the law is necessary to ensure judicial enforcement of arbitration clauses in trust agreements.”⁹³

⁸⁷ *Id.* See also Note (2005), “Arbitration clauses in trust agreements”, 32 *Est. Plan.* 55 (2005).

⁸⁸ *Id.*

⁸⁹ Michael P. BRUYERE & Meghan D. MARINO (2007), “Mandatory Arbitration Provisions: A Powerful Tool to Prevent Contentious and Costly Trust Litigation, but are they Enforceable?”, 42 *Real Prop. Prob. & Tr. J.* 351, 360 [hereinafter BRUYERE & MARINO (2007), Mandatory Arbitration Provisions].

⁹⁰ DUKEMINIER (2005), Will, Trust and Estate, *supra* note 24, at 543.

⁹¹ *In re Calomiris*, 894 A.2d 408 (D.C., 2006), discussed in Note (2006), “Validity and scope of arbitration provisions”, 33 *Est. Plan.* 54.

⁹² D.C.Code § 16-4302(a) and D.C.Code § 16-4301.

⁹³ BRUYERE & MARINO (2007), Mandatory Arbitration Provisions, *supra* note 89, at 361.

3.3. State's Initiatives: The Cases of Hawaii and Florida

Clearly, the cases we have just briefly presented do not favour the enforcement of arbitration clauses in trust deeds. That means that such enforcement will depend on each state's policy to validate arbitration clauses.⁹⁴ Therefore, this reality produces uncertainty in this scenario.

In what has been called as "Hawaii's legislature to the rescue",⁹⁵ the Probate Mediation and Arbitration Choice Act of 2005 proposed a mechanism for the enforcement of mediation and arbitration clauses in wills and trust instruments.⁹⁶ This bill provides that "[a]n arbitration clause in a will or a trust instrument shall be given the same force and effect as to interested parties as if the clause was an agreement by the interested parties."⁹⁷ It also provides that the existing arbitration statutes will govern mandatory arbitration clauses in probate instruments as if the beneficiaries, personal representatives, or trustees, as parties to the dispute over the estate, agreed to arbitration under the terms specified by the maker or settlor.⁹⁸ The 2005 effort was a sequel of a project originally presented a year before.⁹⁹ Unfortunately it seems to be that this will not be the last time such initiatives come to the consideration of the Legislature, because as has been reported the Bill "died in the Judiciary Committee during the 2006 Regular Session of the Hawaii State Senate ...without so much as a hearing."¹⁰⁰

In what seems to be a promising scenario, effective on July 1, 2007, the State Florida has adopted legislation expressly recognizing the enforceability of binding arbitration clauses in wills and trusts.¹⁰¹ In its First Section the bill provides that "[a] provision in a will or trust requiring the arbitration of disputes, other than disputes of the validity of all or a part of a will or trust, between or among the beneficiaries and a fiduciary under the will or trust, or any combination of such persons or entities, is enforceable."¹⁰² Moreover, the Second Section establishes that "[u]nless otherwise specified in the will or trust, a will or trust provision requiring arbitration

⁹⁴ Valerie J. VOLLMAR (2006), "The Oregon Uniform Trust Code and Comments", 42 *Willamette L. Rev.* 187, 375 (Asserting that in Oregon "Settlor's wishing to encourage use of alternate dispute resolution may draft to provide it").

⁹⁵ Daniel BENT (2004), "My bequest to my heirs: years of contentious, family splitting litigation...", 8 *Haw. B. J.* 28, 30.

⁹⁶ S.B. 1314, 23rd Leg. (Haw. 2005).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Probate Mediation and Arbitration Choice Act, S.B. 2444, 22nd Leg., Reg. Sess. (Haw. 2004) Hawaii 2004 HB NO. 2675.

¹⁰⁰ BRUYERE & MARINO (2007), Mandatory Arbitration Provisions, *supra* note 89, at 365.

¹⁰¹ 2007 Fla. Sess. Law Serv. Ch. 2007-74 (C.S.H.B. 311) (West) FL ST § 731.401; (<http://www.flsenate.gov>) (Last visited Oct. 15, 2007).

¹⁰² *Id.*

shall be presumed to require binding arbitration ...".¹⁰³ The exception "of disputes of the validity of all or a part of a will or trust" resembles the policy issues discussed in *Fellman*. There are public policy issues that should be determined by the courts. The validity of the devise used is one of them.

3.4. An Institutional Approach

One of the reasons the Florida Bill was approved is because it was endorsed by the American College of Trust and Estate Counsel (ACTEC).¹⁰⁴ Through its Arbitration Task Force, ACTEC has also formulated a model statute to allow the enforceability of arbitration clauses in wills and trusts, along with sample clauses to be used.¹⁰⁵ They advise that the lack of certainty in the enforcement of arbitration mandated by the testator or the settlor is unnecessary, and that an alternative to bring certainty to those significant concerns is enacting statutes officially allowing them to incorporate binding arbitration provisions as a method, rather than leaving such controversies to the court.¹⁰⁶ The Report of the Arbitration Task Force includes two different Model Act's, some sample arbitration clauses for trusts and wills and a checklist of significant issues that drafters should have in mind.¹⁰⁷ They hope that the comprehensive report serves as a "launching pad" with the recognition that the Task Force mission is yet to be accomplished. First, legislation should be promulgated and then ACTEC should work on the awareness of this method as a preferred one over litigation.¹⁰⁸

The American Arbitration Association (AAA) has adopted the Arbitration Rules for Wills and Trusts, as revised September 15, 2005.¹⁰⁹ Their first rule says that "[a] testator or settlor shall be deemed to have made these rules a part of the will or trust whenever the will or trust has provided for arbitration by the American Arbitration Association or under its Arbitration Rules for Wills and Trusts."¹¹⁰ The rules included a sample clause, procedures for large complex disputes, dispositions concerning the arbitrators, the hearings, and the evidence, etc.¹¹¹ These

¹⁰³ *Id.*

¹⁰⁴ American College of Trust and Estate Counsel (ACTEC) (<http://www.actec.org>) (Last visited Oct. 15, 2007); See also Juan ANTUNEZ, "New Florida legislation expressly authorizes mandatory arbitration clauses in wills and trusts", posted 09/26/2007, (<http://www.flprobatelitigation.com/>) (Last visited Oct. 15, 2007).

¹⁰⁵ The Report of the ACTEC Arbitration Task Force was published in GOLDMAN (2007), Simplified Trial Resolution, *supra* note 41, at 16-27.

¹⁰⁶ *Id.* at 16-06.

¹⁰⁷ *Id.* at 16-13 to 16-24.

¹⁰⁸ *Id.* at 16-27.

¹⁰⁹ <http://www.adr.org> (Last visited Oct. 15, 2007).

¹¹⁰ *Id.*

¹¹¹ *Id.*

rules have been around for a while and have been proven viable. As a matter of fact in both *Fellman* and *Schoneberger* the arbitration clauses refer to the rules of the AAA.¹¹²

4. The International Experience

4.1. The International Trust

Historically, the trust has been described as a creature of the common law courts of equity. Some scholars believe that it was a creature of the Roman Law developed by the Common Law.¹¹³ This debate have generated an important scholarly discussions, especially when, in a comparative approach, they bring into consideration the Roman Law *fideicommissum*, the German *treuhand*, the Hindu *benimi* or the Islam *waaf*.¹¹⁴ The purpose of this note is not to revive the trust origins debate or its conflict of law difficulties, but it is important to point out that the trust is considered to be so useful that despite of the differences it has spread all over the modern world.¹¹⁵ Furthermore, in relation to conflicts of law, we should say that there is a remarkably strong policy in favor of granting effect to the settlor's intention, a tendency that also extends to non-conflict trust cases.¹¹⁶

The recent developments and use of the trust in the international arena has been called by the Spanish scholar, CÁMARA LAPUENTE the "Gold fever of the Trust."¹¹⁷ Its commercial and economic flexibility in international commerce is one of the main reasons for its international development.¹¹⁸ In this respect, developments in corporate pensions, disability provisions for employees, the offshore market of global investments and in the protection of family wealth management among others have been key elements in its propagation.¹¹⁹ Another key element in the recognition of the international trust, described as "the launch of the international trust", is

¹¹² *Schoneberger*, 96 P.3d at 1080; *In re Fellman*, 412 Pa. Super. at 580.

¹¹³ H. Patrick GLENN (1993), The historical origins of trust, in Alfredo MORDECHAI RABELLO (Editor), *Aequitas and Equity: Equity in Civil Law and Mixed Jurisdictions*, Jerusalem Sacher Institute p. 775.

¹¹⁴ DUKEMINIER (2005), *Will, Trust and Estate*, *supra* note 24, at 488.

¹¹⁵ GORDLEY (2000), *The Common Law in the Twentieth Century*, *supra* note 40, at 1869. See PATTON (1945), *Trusts Systems*, *supra* note 35.

¹¹⁶ SCOLES, HAY, BORCHERS & SYMEONIDES (2000), *Conflict of Law*, Third Ed. West, p. 1027.

¹¹⁷ Sergio CÁMARA LAPUENTE (2006), "Breve Compendio Geo-Conceptual sobre el Trust", in *Los patrimonios fiduciarios y el Trust*, III Congreso de Derecho Civil Catalán, Tarragona, 20 y 21 de octubre de 2005, Monogràfics La Notaria, Marcial Pons, p. 25. See also Sergio CÁMARA LAPUENTE (2005), "Trust a la francesa", *Indret*, 2/2005, (www.indret.com) (Last visited Oct. 15, 2007).

¹¹⁸ See generally Henry HANSMANN & Ugo MATTEI (1998), "The functions of trust law: a comparative legal and economic analysis", 73 *N.Y.U. L. Rev.* 434; David HAYTON (1999), "The Uses of trusts in the Commercial Context", in HAYTON (EDITOR), *Modern International Developments in Trust Law*, Kluwer law, p. 145.

¹¹⁹ HAYTON (1999), *Principles of European Trust Law*, Ed. Hayton, Kluwer Law, Vol. 1, p. 5.

the Hague Convention on the Law relating to Trusts and On Their Recognition.¹²⁰ Several countries from the common law tradition have ratified the Convention, including the United Kingdom (1989), Australia (1991), and Canada (1992). Signing countries with Civil Law system are: Italy (1985), the Netherlands (1985), France (1991), Luxembourg (1985), Cyprus (1998), Malta (1994), Liechtenstein (2004), San Marino (2005) and Switzerland (2007), and the Convention has been ratified by most of them, with the exception of France and Cyprus.¹²¹ Even though there is a great debate about the adaptation or recognition of trust law in civil law jurisdictions, great advances have been made inspired by the Hague Convention of 1984.¹²² The purpose of the convention “is in essence an effort to unify the international rules of conflict of laws for trusts.”¹²³ As GAILLARD & TRAUTMAN explain “[t]he Convention endeavors to solve these growing difficulties by establishing the rule for determining the applicable law for trusts.”¹²⁴ It is not a trust model act, which states could simply adopt. As Maurizio LUPOI has pointed out “the Hague Convention does not require an element of foreignness other than the simple fact that a trust is governed by a foreign law.”¹²⁵

All these developments have brought some uniformity and certainty to the trust industry. Still, some countries such as Germany strongly believe that there is no need for trust legislation in the Civil Law system.¹²⁶ Unfortunately, they had the extraordinary possibility to generate international controversies, especially when properties in different jurisdictions are part of the trust. If domestic trust litigation is expensive and time consuming, in the international arena it would be almost impossible to manage international trust litigation.

¹²⁰ Hague Conference on Private International Law: Convention on the Law Applicable to Trusts and on Their Recognition, and Final Act of the Fifteenth Session, Oct. 20, 1984, 23 I.L.M. 1388 (1984); Adair DYER (1999), *International Recognition and Adaptation of Trusts: The Influence of the Hague Convention*, 32 *Vand. J. Transnat'l L.* 989 [hereinafter DYER (1999), *International Recognition and Adaptation of Trusts*].

¹²¹ <http://www.hcch.net> (Last visited Oct. 15, 2007).

¹²² HAYTON (1987), “Hague Convention on the Law Applicable to Trusts and on their Recognition”, 36 *Int'l & Comp. L.Q.* 260; GUILLEARD & TRAUTMAN (1997), “Trust in Non-Trust Countries: Conflict of Law and the Hague Convention on Trust”, 35 *Am. J. Comp. L.* 357 [hereinafter GUILLEARD & TRAUTMAN (1997), *Trust in Non-Trust Countries*].

¹²³ DYER (1999), *International Recognition and Adaptation of Trusts*, *supra* note 118, at 991.

¹²⁴ GUILLEARD & TRAUTMAN (1997), *Trust in Non-Trust Countries*, *supra* note 120, at 313.

¹²⁵ Maurizio LUPOI (1999), “The Civil law Trust”, 32 *Vand. J. Transnat'l L.* 1, 2 (Asserting that trusts are not incompatible with the basic assumptions of civil law systems). See also Gerwyn GRIFFITHS (2006), “The Common Law Trust and its Utility for Civil Law Systems”, in *Los patrimonios fiduciarios y el Trust*, III Congreso de Derecho Civil Catalán, Tarragona, 20 y 21 de octubre de 2005, Monogràfics La Notaria, Marcial Pons, p. 53.

¹²⁶ Hein KÖTZ (1999), “The Modern Development of Trust Law in Germany”, in HAYTON (Editor), *Modern International Developments in Trust Law*, Kluwer Law, p. 49.

4.2. The International Experience with Trust and Arbitration

The use of ADR mechanisms in the context of wills and trusts is well known in many countries. Let's examine a few examples. In the Scandinavian countries, particularly in Denmark it has been asserted that a specific provision in the will calling for a certain ADR procedure is likely to be recognized.¹²⁷ In Switzerland, besides the fact that they don't have trust law, disputes arising out of trusts may be subjected to arbitration.¹²⁸ The Swiss solution would be "to conclude a testamentary pact with all the parties concerned" and if it is "not possible to conclude a testamentary pact with all the heirs, the testator may consider including in the last will a provision which would restrict the non-cooperative heir to the minimum share should he or she not respects the arbitration clause."¹²⁹ In the United Kingdom, some authors have pointed out that it is both desirable and possible to submit a wide range of disputes arising out of or in connection with express trusts to arbitration.¹³⁰ But Professor David HAYTON says that its enforcement is questionable, because of the problems with arbitration clauses in controversies in which the beneficiaries are minors or unborn or unascertained.¹³¹

An essential advantage of the use of arbitration in international trust litigation is the recognition of the awards in the international arena. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the "New York Convention of 1958", establishes that awards are fully enforceable in states that have ratified the Convention.¹³² As of June 2007, 142 countries have ratified the Convention.¹³³ That way, arbitration proceedings may be preferred to court proceedings, especially in international transactions.¹³⁴ The Convention does not have an express recognition of a unilateral arbitration clause.¹³⁵ However, "it can be used as grounds for the enforcement of the award if such a unilateral clause is admissible under the domestic law of the country where the enforcement and recognition of the award is sought."¹³⁶

Some countries considered the possibility of changing their law to require that, in a case where the terms of the trust provide for binding arbitration or other form of A.D.R., the provision

¹²⁷ Randi BACH POULSEN (2001), "The Use of Alternative Dispute Resolution from a Scandinavian Perspective", in Rosalind F. ATHERTON (Editor), *Papers of The International Academy of Estate and Trust Law - 2000*, Kluwer Law International, p. 7 [hereinafter BACH POULSEN (2001), *The Use of Alternative Dispute Resolution*].

¹²⁸ SEGESSER (2001), *Arbitrability in Estate and Trust Litigation*, *supra* note 47, at 27.

¹²⁹ *Id.* at 26.

¹³⁰ COHEN & STAFF (1999), *The Arbitration of Trust Disputes*, *supra* note 27, at 205.

¹³¹ HAYTON (2006), *Future trends*, *supra* note 28, at 71.

¹³² United Nations Convention on the Recognition and enforcement of Foreign Arbitration Awards (New York Convention of 1958, (<http://www.uncitral.org>) (Last visited Oct. 15, 2007).

¹³³ Várady BARCELÓ & Arthur VON MEHREN (2006), *International Commercial Arbitration*, Third Ed, Supplement, p. 6.

¹³⁴ BACH POULSEN (2001), *The Use of Alternative Dispute Resolution*, *supra* note 127, at 9.

¹³⁵ SEGESSER (2001), *Arbitrability in Estate and Trust Litigation*, *supra* note 47, at 28.

¹³⁶ *Id.* at 29.

should be binding even upon the beneficiaries who have not agreed to it, and even though they are under age, or even unborn.¹³⁷ But, as we said before, trust arbitration is not a novel issue. A good example is the case of Liechtenstein where provisions or clauses enforcing mandatory arbitration are law since 1928.¹³⁸ In this jurisdiction “the trust deed may provide for compulsory arbitration and indeed a foreign trust deed must provide for compulsory arbitration in Liechtenstein, for disputes arising between the settlor, the trustee and the beneficiaries.”¹³⁹

There are different models to address the issue of where it is desirable to include the legal norms. Some countries, like Paraguay and Malta, have regulated the validity of a trust arbitration clause in the arbitration law. Others, like Guernsey and Panamá, enforce the clause in their trust legislation. Interesting approaches related to this issue are the cases of Spain, Bolivia, Honduras, and Perú where arbitration clauses in wills are recognized. This approach is important because it can be viewed in two ways: it could handle *mortis causa* trusts, or it can be used by analogy to recognize the enforcement of a unilateral arbitration clause binding on the beneficiaries.

The binding testamentary arbitration approach is recognized with some limitations. All the jurisdictions considered are based on the scenario of forced heirship, where provisions such as these cannot be subjected to any charge or condition, as a matter of public policy. With that in mind, let’s examine some cases. The Spanish Arbitration Law limits the authority of mandatory arbitration clauses in wills “to resolve disputes between beneficiaries or legatees in matters relating to the distribution or administration of the estate.”¹⁴⁰ A more specific case is Bolivia’s Arbitration and Conciliation Law which also limits the testamentary arbitration for resolving differences that arise among heirs and legatees, exclusively regarding: (1) the interpretation of the last will of the testator; (2) their shares in the assets of the estate; (3) heirs institution and conditions; and (4) the distribution and administration of the estate.¹⁴¹ It is important to point out that Article 6 of the Bolivian law establishes, in the general terms applicable to every arbitration process, that matters regarding capacity of the people are not arbitral, so the testator or settlor’s capacity could not be subjected to mandatory arbitration.¹⁴² The laws of Perú and Honduras have similar language permitting testamentary arbitration. But specifically in Article 32 Honduras excludes mandatory arbitration for any controversies in which forced heirs are involved.¹⁴³

¹³⁷ Paul MATTHEWS (2005), “The Characteristics of a Modern Trust and Foundation Law”, Liechtenstein Dialogue, October 5, 2007 Vaduz, Liechtenstein, (<http://www.dialogue.li>) (Last visited Oct. 15, 2007).

¹³⁸ PGR Art. 931 (1)(2) at Maurizio LUPOI (2000), *Trust Laws of the World*, Vol.2 Rome, p. 1169.

¹³⁹ ArComm Trust Company, Liechtenstein The Trust, In Liechtenstein Law August 22, 2002 (<http://www.mondaq.com>) (Last visited Oct. 15, 2007).

¹⁴⁰ Article 10, Ley 60/2003, de 23 de diciembre, Ley de Arbitraje; See ALBALADEJO (1990), *El arbitraje testamentario*, Actualidad Civil, 1990, p. 82; GARCÍA PÉREZ (1999), *El Arbitraje Testamentario*, *supra* note 37.

¹⁴¹ Article 10, Ley de Arbitraje y conciliación N° 1770 de 10 de marzo de 1997 (Bolivia).

¹⁴² *Id.*, at Article 6.

¹⁴³ Article 32, Ley de Conciliación y Arbitraje de Honduras, Decreto N° 161-200, (<http://www.ftaa-alca.org>) (Last visited Oct. 15, 2007); Article 13, Ley General de Arbitraje Ley N° 26572 (Perú).

There are new silhouettes in the horizon: the appearance of two drafts referring to the testamentary arbitration. Those are the cases of Puerto Rico and Argentina. In Puerto Rico, I have proposed to include an article in the Revised Civil Code Draft, as one of the modalities of the heir's institution.¹⁴⁴ This proposal excludes from arbitration any controversies regarding the forced portion or *legítima* as it is called. The Civil Code Commission, which has been working on the Draft for a New Civil Code for Puerto Rico since 1997,¹⁴⁵ has adopted the recommendation and the revised drafts as November 2007 includes this provision.¹⁴⁶ The other project is the Draft of 2007 for the National Law of Arbitration of Argentina.¹⁴⁷ Article 11 of this draft recognizes the validity of a testamentary arbitration clause to resolve only disputes that may arise between heirs or legatees regarding "real estate".

Specific recognition of arbitration clauses in trusts has been adopted in some other legislation. Article 41 of the Panamá Trust Law of 1984 recognizes that it can be stipulated in the trust instrument that any dispute arising from the trust will be determined by binding arbitration.¹⁴⁸ It can also be done by establishing the proper rules for the arbitration, and in case that such procedure has not been set, the parties should apply the rules contained in the Judicial Code.¹⁴⁹ In Paraguay, Article 44 of *Ley de Negocios fiduciarios* recognizes the arbitration agreement.¹⁵⁰ This Article says that the constitutive act may contain an arbitration clause for disputes between the settlor and the trustee or beneficiary, regarding the existence, interpretation, development or termination of the trust business.¹⁵¹ Like the Panamanian Law, it authorizes the express inclusion of the substantive and procedural rules for the arbitration, and in absence of rules, the arbitration law will govern.¹⁵²

¹⁴⁴ Gerardo BOSQUES HERNÁNDEZ (2008), "Del Arbitraje Testamentario en Puerto Rico", 42 *REV. JUR. U.I.P.R.* (forthcoming 2008); Gerardo BOSQUES HERNÁNDEZ (2007), "Una Propuesta de Arbitraje Testamentario para Puerto Rico", 19 N° 3 *Revista Vasca de Derecho Procesal y Arbitraje* 369.

¹⁴⁵ Marta FIGUEROA-TORRES (2001), "Crónica de una Ruta Iniciada: El Proceso de Revisión del Código Civil de Puerto Rico", 35 *Rev. Jur. U.I.P.R.* 491; Marta FIGUEROA-TORRES (2006), "Crónica de una Ruta Adelantada: Los Borradores del Código Civil de Puerto Rico", 40 *Rev. Jur. U.I.P.R.* 419.

¹⁴⁶ www.codigocivilpr.net (Last visited Oct. 15, 2007)

¹⁴⁷ See generally ALTHAUS (2004), *Hacia una ley nacional de arbitraje*, *Jornadas Nacionales de Tribunales Arbitrales*, Rosario, Argentina, June 24 -25, 2004, <https://www.bcr.com.ar> (Last visited Oct. 15, 2007) (commenting on the Argentinian Project).

¹⁴⁸ Article 41 Ley 1 de 1984, 5 de enero (Panamá).

¹⁴⁹ *Id.*

¹⁵⁰ Ley 921, *Negocios fiduciarios* (Paraguay).

¹⁵¹ *Id.*

¹⁵² *Id.*

In Malta, the Trusts and Trustees Act was approved and came into force on the January 2005. As part of this reform the Maltese Arbitration Act was amended to officially allow the insertion of arbitration agreements in trust deeds and wills.¹⁵³ Article 15 says:

Arbitration clause in wills and trusts.

(1) It shall be lawful for a testator to insert an arbitration clause in a will. In such event such clause shall be binding on all persons claiming under such will in relation to all disputes relating to the interpretation of such will, including any claim that such will is not valid.

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

In 2007 Guernsey's draft *Projet de Loi*, entitled Trusts Law was enacted. In a comprehensive and exhaustive norm, Section 63 introduces mediation and arbitration as a means to resolve trust controversies in this jurisdiction.¹⁵⁴ The Section establishes:

Settlement of action against trustee by mediation or arbitration to be binding on beneficiaries.

(1) Where -

(a) the terms of a trust direct or authorise, or the Court so orders, that any dispute between the trustees and a beneficiary or otherwise relating to the trust or the trust property may be referred to mediation or arbitration,

(b) such a dispute arises and, in accordance with the terms of the trust or the Court's order, is referred to mediation or arbitration, and

(c) the mediation or arbitration results in a settlement of the dispute which is recorded in a document signed by or on behalf of all parties, the settlement is binding on all beneficiaries of the trust, whether or not yet ascertained or in existence, and whether or not minors or persons under legal disability.

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

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

(b) if not so represented, he had notice of the mediation or arbitration and a reasonable opportunity of being heard, and only if, in the case of a beneficiary who is not yet ascertained or in existence, or who is a minor or person under legal disability, the mediator or arbitrator certifies that he was independently represented.

(3) For the avoidance of doubt, the mediation or arbitration need not be conducted in Guernsey or in accordance with the procedural law of Guernsey."

This section not only validates arbitration clauses but also introduces mediation and recognizes that settlements resulting from any of these mechanisms are binding. It is commonly accepted in the doctrine that mediation clauses are not binding. But if an agreement is reached and all the parties sign, it will be enforceable. In terms of the beneficiaries, it addresses Professor HAYTON's points regarding minors or unborn or unascertained children, granting notice and reasonable opportunity of being heard, and requiring that the mediator or arbitrator certifies that such person where independently represented. Last but not least, makes clear that either process could

¹⁵³ Article 15 of the Maltese Arbitration Act, Added by: XIII. 2004.109 (Malta), (<http://docs.justice.gov.mt>) (Last visited Oct. 15, 2007).

¹⁵⁴ See Russell CLARK (2007), "Commentary of the draft *Projet de Loi* entitled Trusts (Guernsey) Law", 6 June 2007 (<http://www.careyolsen.com>) (Last visited Oct. 15, 2007).

be held in Guernsey or outside and, in accordance with its procedure rules or by other rules. This flexibility is in complete concordance with the propensity of the international trust.

4.3. An Institutional Approach

These days international trusts litigation represents serious difficulties. With that in mind, in the year 2000 one of the topics of the International Academy of Estate and Trust Law was “Settlement of disputes in Estate and Trust Matters through Arbitration and Alternative Dispute Resolution.”¹⁵⁵ Distinguished professors from Denmark, the United Kingdom and Switzerland analyzed different approaches regarding these issues. They concluded that in most instances arbitration clauses in trusts will be valid and enforceable, but in order to fully recognize it a legislative reform is necessary.¹⁵⁶ In 2007 the International Chamber of Commerce (ICC) designated a Task Force to work on Trusts and Arbitration.¹⁵⁷ The mission of this group is to “Study and identify specific issues related to Trusts and Arbitration and suggest a draft ICC model arbitration clause to be included in the trust deed.”¹⁵⁸ Later that year, the central theme of the 3rd Zurich Annual Conference on International Trust and Inheritance Law Practice, held on April 2007, was “Trusts and Arbitration” In this Conference, a group of experts from England, the United States and Switzerland discussed the role of arbitration in disputes involving trusts and the benefits and possibilities of resolving trust disputes by means of arbitration.¹⁵⁹ In other developments, the European Convention on the Uniform Law on Arbitration actively encourages states to regulate testamentary arbitration.¹⁶⁰ The Convention, in its explanatory report, comments that “...an arbitration clause in a will may be treated as an arbitration agreement, as the result either of a court decision or of a legal provision.”¹⁶¹ In summary, from a general point of view, as BACH POULSEN said referring to trusts law, “the future of Alternative Dispute Resolution is secure.”¹⁶²

4.4. Some International Concerns

Professor HAYTON pointed out that in the United Kingdom “it is considered that the settlor’s trust instrument cannot normally amount to an ‘arbitration agreement’ capable of leading to an

¹⁵⁵ See in general Rosalind F. ATHERTON (Editor), *Papers of The International Academy of Estate and Trust Law - 2000*, Kluwer Law International.

¹⁵⁶ *Id.*

¹⁵⁷ The Task Force on Trusts and Arbitration is Co-chaired by Bruno W. Boesch (Switzerland) and Alexis Moure (France) (<http://www.iccwbo.org>) (Last visited Oct. 15, 2007).

¹⁵⁸ *Id.*

¹⁵⁹ <http://www.unizh.ch> (Last visited Oct. 15, 2007).

¹⁶⁰ European Convention providing a uniform law on arbitration Commentary on Annex I Article 1, (<http://conventions.coe.int>) (Last visited Oct. 15, 2007).

¹⁶¹ *Id.*

¹⁶² BACH POULSEN (2001), *The Use of Alternative Dispute Resolution*, *supra* note 127, at 10.

'arbitration award' enforceable internationally, while any domestic legislation purporting to treat a relevant provision in a trust instrument as an 'arbitration agreement' leading to an 'award' would not have international effect."¹⁶³ He argues that beneficiaries that are minors or have not yet been born or ascertained, are not bound by the arbitration clause. Moreover, he argues that those problems "cannot be avoided by any provision in the trust instrument purporting to oust the jurisdiction of the court by having some other person or body resolve the matter except under a statutory arbitration procedure."¹⁶⁴ Under the disposition of current laws this is a due process issue, and as HAYTON points out, it "can be regarded as a matter of fundamental public policy, or as being repugnant to the concept of ownership of property to grant a person a property right and then purport to prevent such person enforcing his full proprietary rights by recourse to the courts."¹⁶⁵

For this issue, HAYTON offers two solutions; the first one is "leave it to the good sense of the arbitrator to provide for due process and a fair hearing by appointing appropriate skilled independent persons to represent minors and unborn and unascertained beneficiaries." That is what is going to happen in most jurisdictions. The second one, and his proposal, is the need of legislation on this matter is to create "some procedure for independent non-conflicted representatives to be appointed at an early stage to look after the interests of minor, unborn and unascertained beneficiaries and to have full authority to agree a mediated solution of the dispute."¹⁶⁶

5. Conclusion: The need of legislation

Professor Henry S. ZIEGLER, in his introduction to The International Academy of Estate and Trust Law Conference of 2000 suggested that "[i]f the concept of Alternative Dispute Resolution in the family wealth context is an appealing one, it would seem that some additional legislation is required in order to make it truly effective."¹⁶⁷ I could not agree more. Applying the three theories described (the Contract Theory, the Intention Theory and the Benefit Theory) it is a forced conclusion that the missing part of this structure is progressive legislation. In comparison with litigation, over the last decades Arbitration has evolved and become the preferred method of dispute resolution. At the same time, trusts have been described as an incredible useful and flexible device, but trust litigation has been strongly criticized. Both the arbitration method and

¹⁶³ David J. HAYTON (2001), "Problems in Attaining Binding Determinations of Trust Issues by Alternative Dispute Resolution", in Rosalind F. ATHERTON (Editor), *Papers of The International Academy of Estate and Trust Law - 2000*, Kluwer Law International, p. 12.

¹⁶⁴ HAYTON (2006), Future trends, *supra* note 28, at 71.

¹⁶⁵ *Id.* at 59.

¹⁶⁶ *Id.*

¹⁶⁷ Henry S. ZIEGLER (2001), "Introduction to Part I: Settlement of Disputes in Estate and Trust Matters through Arbitration and Alternative Dispute Resolution", Rosalind F. ATHERTON (Editor), *Papers of The International Academy of Estate and Trust Law - 2000*, Kluwer Law International, p. 4.

the trusts devices represent two of the most important legal features of the twentieth century, in terms of commerce, business and, more importantly for this paper, the private wealth planning and transfer to future generations.

The developments in Hawaii and Florida and the international jurisdictions examined, particularly Malta and Guernsey, reflect a tendency to reconcile trust law and arbitration. Moreover, the institutional approaches in the United States and in the international arena recognize the advantages and the need of a statutory revision, and their effort has started to produce fruits. But there is still much to do. The need of legislation has been discussed in the United States¹⁶⁸ and in international forums.¹⁶⁹ Perhaps one way to promote the use of binding arbitration in trusts and enforcing the clauses in existing trusts is to basically include a norm in model laws. It could be either in the Uniform Probate Code or in the Uniform Trust Code. Another similar approach, from the arbitration point of view, is to amend the contractual notion of the Revised Uniform Arbitration Act (R.U.A.A.).

Austin Wakeman SCOTT once said that “[a]s long as the owner of property can dispose of it in accordance with his legitimate wishes, the great adventure will go on. The law of trusts is living law.”¹⁷⁰ It is time to improve the methods of resolving trusts disputes, with the recognition of the settlor’s authority to enforce arbitration.

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¹⁶⁸ BRUYERE & MARINO (2007), Mandatory Arbitration Provisions, *supra* note 89, at 361 (Pointing out that “further statutory reform will be necessary to move beyond the perceived obstacles some courts have found in the legal distinction between trusts and contracts”).

¹⁶⁹ HAYTON (2006), *Future trends*, *supra* note 28, at 75 (Concluding that “[t]here also have to be some legislative developments to further the use of ADR in internal trust disputes); See also LLOYD & PRATT (2006), *Trust in Arbitration*, *supra* note 58, at 20, arguing that in England “[t]here is no reason why the settlor should not include an arbitration clause in a trust, but it may be safer to wait for legislation so the settlor can be sure that the clause itself does not become the subject of protracted litigation.”

¹⁷⁰ Austin Wakeman SCOTT (1989), Epilogue, *The Law of Trusts*, 4th ed., p. 643-45.

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