RACHAL V. REITZ AND THE EFFICACY AND IMPLEMENTATION OF MANDATORY ARBITRATION PROVISIONS IN TRUSTS

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BACKGROUND

With the recent decision in *Rachal v. Reitz*, the Supreme Court of Texas enforced a trust provision requiring binding arbitration of disputes between a trustee and a beneficiary, joining Florida and Arizona in explicitly recognizing the validity of such clauses.[1] Settlors and testators who seek to minimize the delays and costs of potential conflict between beneficiaries will enjoy the favorable decision.[2] But while the *Rachal* court answered, at least in part, the question of whether the settlor of a Texas trust can impose arbitration on the trustee and beneficiaries, the conscientious estate planning practitioner must also consider whether a client *should* do so in its will and trust instruments.[3]

Accordingly, the first part of this article discusses the advantages and disadvantages of arbitration—a vehicle for avoiding litigation developed for the commercial world—in the realm of settling trust controversies.[4] The second part of this article considers the impact of the *Rachal* opinion, as well as statutes in other jurisdictions that have recognized the use of such provisions.[5] The third part addresses the particular limitations of mandatory

1. *See* Rachal v. Reitz, 403 S.W.3d 840 (Tex. 2013).
2. *See infra* Part I.
3. *See infra* Part I; *see* TEX. PROP. CODE ANN. §§ 113.019, 117.011(c)(2)(A) (West 2016).
4. *See infra* Part I.
5. *See infra* Part II.

arbitration in the context of resolving trust disputes.[6] And the last part discusses the implementation of trust arbitration, both in terms of the summarizing the procedures set forth in the Texas Arbitration Act (TAA) and the drafting of the clause itself.[7]

I. THE ADVANTAGES AND DISADVANTAGES OF BINDING ARBITRATION IN TRUST DISPUTES

Before choosing to incorporate a mandatory arbitration clause into the terms of a trust and drafting such a clause, one must first consider the purposes for doing so.[8]

> Our collective gut tells us that the administration of a will or trust would run more efficiently and at less cost if we could resolve disputes arising in those proceedings through the use of an arbitral, rather than judicial, forum. Justice is mired often in procedure, hyper technical evidentiary rules, ignorant finders of fact and law, and unmanageable judicial calendars. If we could only bring common sense and legal expertise to our specialized disputes, we might get to justice more efficiently. Further, we might be able to keep these proceedings private.[9]

A clause mandating that arbitration resolve all disputes regarding the administration of the trust may now be enforceable under Texas law, but with the reek of ambiguity, it could also prove to be counterproductive.[10] If the arbitration procedures themselves may become time-consuming and costly, then the inclusion of mandatory provisions may merely substitute one burden for another.[11] If privacy is of primary importance to the settlor or testator, then avoiding disclosures that become a matter of public record (i.e., in a probate court) suggests a broader scope to the arbitrable matters and more procedures to deal with a range of potential issues.[12]

In addition to offering a potentially cost-effective means of settling disputes privately, an arbitration clause also offers the settlor or testator the power to select or qualify the arbitrator of such disputes.[13] Specifically, the arbitration process potentially removes the decision-making authority regarding the distribution and administration of the settlor or testator's property from the bias or inexperience of triers of fact in the applicable

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6. *See infra* Part III.
7. *See infra* Part IV.
8. *See infra* Part I.
9. Bridget A. Logstrom, Bruce M. Stone & Robert W. Goldman, *Resolving Disputes with Ease and Grace*, 31 ACTEC J. 235 (2005) [hereinafter *Resolving Disputes*].
10. *See id.*
11. *See id.*
12. *See id.*
13. *See id.*

judicial system.[14] As Professor E. Gary Spitko has argued, this aspect is especially important where an "abhorrent" settlor or testator seeks to dispose of the property in a manner that "offends the trier of fact's sense of equity or propriety."[15] That is, as much as the courts purport to value testamentary freedom, the results of actual cases involving claims of incapacity and undue influence suggest that this lip service may largely be a myth when it comes to dispositions that favor non-relatives over family members.[16] As a further example, consider how the incorporation of Islamic values would be viewed in a community where a majority of the electorate—and thus, potential jurors—are imbued with so much fear of Islam—and so little faith in the First Amendment to the U.S. Constitution—that the community finds it necessary to adopt a statute affirmatively banning judges from considering foreign or international law.[17]

II. RECOGNITION OF MANDATORY ARBITRATION PROVISIONS IN TRUST INSTRUMENTS

A. Rachal v. Reitz *and the Application of the Texas Arbitration Act (TAA)*

In *Rachal*, the Supreme Court of Texas held that an arbitration provision contained in a trust was enforceable against the beneficiary for two reasons.[18] "First, the settlor determines the conditions attached to her gifts, and we enforce trust restrictions on the basis of settlor's intent," which in this case, "was to arbitrate any disputes over the trust."[19] Second, the mutual assent necessary to meet the requisites of an arbitration agreement under the Texas Arbitration Act (TAA) may be manifested through the doctrine of direct

14. *See* E. Gary Spitko, *Gone But Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES. L. REV. 275, 281 (1999) [hereinafter *Gone But Not Conforming*].

15. *See id.* at 281.

16. *See id.* at 283–86 (citing Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 243–46 (1996)).

17. *See, e.g.*, *Handbook of Last Will & Testament*, LAW & SHARIA CONSULTANTS 1, 4 http://www.muslimpersonallaw.co.za/inheritancedocs/Last%20Will%20&%20Testament.pdf [https://perma.cc/SC6D-SWYQ] (last visited Dec. 20, 2016); *see* H.R.J. Res. 1056, 52d Leg., 2d Sess. (Okla. 2010) (proposed amendment to Oklahoma constitution that "[t]he courts shall not consider international law or Sharia law."), https://www.sos.ok.gov/documents/legislation/52nd/2010/2R/HJ/1056.pdf [https://perma.cc/KB7G-U25K] (last visited Dec. 20, 2016); *see Summary Results General Election*, OK. STATE ELECTION BD., http://www.ok.gov/elections/support/10gen. html [https://perma.cc/P973-GKWP] (last visited Dec. 20, 2016) (approving the amendment by the Oklahoma voters); *see also* Awad v. Ziriax, 754 F. Supp. 2d 1298, 1304 (W.D. Okla. 2010), *aff'd*, 670 F.3d 111 (10th Cir. 2012) (granting an injunction preventing certification of election results).

18. Rachal v. Reitz, 403 S.W.3d 840, 842 (Tex. 2013).

19. *Id.*

benefits estoppel, which applies to any beneficiary who accepts the benefits of the trust and sues to enforce its terms.[20]

In *Rachal*, the settlor established a trust for the sole benefit of his two children; and after the settlor's death, the terms of the trust became irrevocable, and the settlor's attorney became the sole successor trustee.[21] Nine years after the settlor established the trust, a beneficiary sued the successor trustee, alleging that the trustee "had misappropriated assets and failed to provide an accounting and [sought] a temporary injunction, removal of the trustee, and damages."[22] The successor trustee "denied the allegations and later moved to compel arbitration of the dispute under the TAA," relying upon the following arbitration provision in the trust:

> Despite anything herein to the contrary, I intend that as to any dispute of any kind involving this Trust or any of the parties or persons concerned herewith (e.g., beneficiaries, Trustees), arbitration as provided herein shall be the sole and exclusive remedy, and no legal proceedings shall be allowed or given effect except as they may relate to enforcing or implementing such arbitration in accordance herewith. Judgment on any arbitration award pursuant hereto shall be binding and enforceable on all said parties.[23]

The trial court denied the trustee's motion to compel arbitration, and the appellate court affirmed.[24] On appeal, the supreme court began its analysis by noting that because the language of the trust was unambiguous, the court must enforce the settlor's intent and compel arbitration if the trust contains a valid arbitration agreement *and* the dispute is within the scope of the agreement.[25]

With respect to the existence of a valid arbitration agreement, the TAA requires "[a] written agreement to arbitrate is valid and enforceable if the agreement is to arbitrate a controversy that: (1) exists at the time of the agreement; or (2) arises between the parties after the date of the agreement."[26] The *Rachal* court distinguished between the use of the term "agreement" in this statutory definition of covered arbitration provisions and other provisions of the TAA that referred to a "contract" and concluded that "[i]f the [l]egislature intended to only enforce arbitration provisions within a contract, it could have said so."[27] Because the TAA did not specifically define an

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20. *See id.* (whether *both* or *either* of these two circumstantial bases are sufficient to enforce such a clause is unclear from the *Rachal* opinion).

21. *See id.*

22. *Id.*

23. *Id.*

24. *Id.* at 843.

25. *Id.* at 844.

26. TEX. CIV. PRAC. & REM. CODE ANN. § 171.001(a) (West 2011).

27. Rachal v. Reitz, 403 S.W.3d 840, 848 (Tex. 2013) (indeed, the reference to an arbitration *agreement*—as opposed to a *contract*—distinguished the TAA from the parallel statute at issue in an

"agreement," the court looked to the "generally accepted definition" of the term, which only requires the mutual assent of the parties.[28] The court also noted that although a party typically signs an agreement to manifest its assent, the courts have also found the requisite assent of a non-signatory party under the doctrine of direct benefits estoppel, the application of which does not depend upon the existence of a valid contract.[29] In this instance, the court reasoned, the beneficiary had already accepted the benefits of the trust and sued to enforce its terms against the trustee, and as such, was estopped from claiming that the arbitration provision was invalid.[30]

With respect to the determination of whether the dispute was within the scope of the arbitration agreement, the court noted that after establishing a valid arbitration agreement, a strong presumption favoring arbitration arises; the court must then look to the factual allegations and not the legal claims.[31] In this case, the arbitration provision was very broad, applying to any dispute of any kind, and thus certainly covered the controversy before the court.[32]

The basic sticking point with the use of mandatory arbitration provisions in this context has been that, unlike the parties to a contract, beneficiaries of a trust have not expressly agreed to arbitration.[33] In this regard, the *Rachal* court recognized several different ways in which case law could bind a non-signatory party to an arbitration agreement.[34] The court ultimately found that the doctrine of direct benefits estoppel applied explained its reasoning as follows:

> A beneficiary may disclaim an interest in a trust. And a beneficiary is also free to challenge the validity of a trust: conduct that is incompatible with the idea that she has consented to the instrument. Thus, beneficiaries have the opportunity to opt out of the arrangement proposed by the settlor. On the other hand, a beneficiary who attempts to enforce rights that would not exist without the trust manifests her assent to the trust's arbitration clause.

Arizona case cited by the beneficiary); *see* Schoneberger v. Oelze, 96 P.3d 1078, 1079 (Ariz. Ct. App. 2004).

28. *Rachal*, 403 S.W.3d at 845.

29. *Id.* at 845–46.

30. *Id.* at 847.

31. *Id.* at 850.

32. *Id.* at 850. The court also rejected the beneficiary's argument that a subsequent trust provision exonerating the trustee for unintentional conduct indicated an intent by the settlor to allow for litigation of disputes with the trustee because: (1) by its own terms, the arbitration provision in question superseded "anything herein to the contrary"; and (2) the exoneration provision would still have meaning even in conjunction with the arbitration provision (e.g., when a claim filed in court is then sent to arbitration). *Id.*

33. *See* Michael P. Buyere & Meghan D. Marion, *Making Arbitration Truly Mandatory STET*, TR. & EST. (July 2008), http://www.flprobatelitigation.com/wp-content/uploads/sites/206/2007/09/Making ArbitrationTrulyMandatory.pdf [https://perma.cc/2L2B-XX55].

34. In a footnote to the *Rachal* opinion, the Texas supreme court also listed six other doctrines that potentially bind non-signatories to arbitration agreements, including incorporation by reference, assumption, agency, alter ego, equitable estoppel, and that of the third-party beneficiary. *Rachal*, 403 S.W.3d at 846 (citing *In re* Kellogg Brown & Root, Inc., 166 S.W.3d 732, 739 (Tex. 2005)).

> For 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.[35]

Notably, the beneficiary in this instance had already been receiving distributions from the trust.[36]

In the recent California appellate court case, *McArthur v. McArthur*, the court posed an important question in the context of this doctrine: What if a beneficiary has not accepted the benefits of the trust?[37] In that case, several months before the settlor of an irrevocable trust died, the settlor amended the terms to provide for a number of specific distributions to be made upon her death, designate her daughter Kristi as the remainder beneficiary, and require mediation and, if necessary, arbitration of "any claim or dispute arising from or related to the Trust as amended."[38] Upon the settlor's death, another daughter of the settlor, Pamela, filed a petition contesting the validity of the amendment to the trust on the grounds of undue influence and lack of testamentary capacity, sought to remove Kristi as trustee, and sued Kristi for damages based on financial elder abuse.[39] Kristi filed a motion to compel arbitration of Pamela's claims according to the trust amendment.[40]

In denying the motion to compel arbitration on several grounds, the court distinguished the facts in *Rachal* and noted that Pamela had never sought any benefits under the amended trust, whether expressly or

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35. *Rachal*, 403 S.W.3d at 847.

36. *See id*. at 847–48.

37. *See* McArthur v. McArthur, 168 Cal. Rptr. 3d 785, 788 (Cal. Ct. App. 2014). The California court considered this question as one of first impression among the reported appellate opinions. *Id*. Previously, the California supreme court had vacated and remanded the decision of another appellate court, disregarding an arbitration clause in a trust, for reconsideration in light of the opinion in *Pinnacle Museum Tower Ass'n v. Pinnacle Market Dev. (US), LLC*, 282 P.3d 1217 (Cal. 2012). *See also* Diaz v. Bukey, 287 P.3d 67 (Cal. 2012) (instructing the Second District Court of Appeals to vacate and to consider the *Pinnacle* case), *vacating and rem'g*, 125 Cal. Rptr. 3d 610 (Cal. Ct. App. 2011). However in the *McArthur* case, the lower court eventually dismissed the appeal without opinion pursuant to the parties' stipulation. *See McArthur*, 168 Cal. Rptr. 3d at 788, n.5. As such, the *McArthur* court endeavored to "complete the assignment originally given by the Supreme Court" and "consider the application of *Pinnacle* to these circumstances." *Id.* at 791. While the *Pinnacle* opinion and related authority was cited for the proposition that a mandatory arbitration clause could bind a non-signatory under the doctrine of delegated authority, the *McArthur* court concluded that the facts and circumstances in *Pinnacle*, which involved a condominium matter and a statutory scheme with consumer protection elements, were materially distinguishable from, and inapplicable to, the context of a trust. *See id*. at 791–93 ("Here, there is no similar statutory scheme that would require that a trust beneficiary be bound by an arbitration clause in a trust instrument."). *Id.* at 793.

38. *See McArthur*, 168 Cal Rptr. 3d at 793.

39. *Id.* at 787.

40. *Id.*

implicitly.[41] To the contrary, Pamela *was* contesting the validity of the most recent amendment.[42] Furthermore, the court rejected Kristi's additional argument as illogical: that Pamela's failure to contest the *original* trust instrument—under which Pamela *was* a beneficiary—somehow represented an implied acceptance of benefits under the amended trust.[43] As such, among other things, "Kristi fail[ed] to demonstrate that any other jurisdiction would compel arbitration under the facts of this case . . .".[44]

However, outside the context of a challenge to the validity of the trust itself, the question of whether a beneficiary seeking to avoid a mandatory arbitration provision is estopped from doing so becomes largely academic.[45] That is, pursuing the only other option to arbitration (i.e., going to court to enforce one's rights as a beneficiary) in and of itself could constitute an acceptance of the benefits of the trust, and thus, subject the litigant to the arbitration clause.[46]

B. Statutory Enforceability in Other Jurisdictions

While the Supreme Court of Texas applied the TAA generally to a trust administration matter, other jurisdictions have enacted statutes dealing with mandatory arbitration clauses in trust disputes.[47] The author submits that some of these statutes could serve as a guide addressing the questions that the *Rachal* opinion, and similar judicial pronouncements, left unanswered.[48]

1. Florida

In 2006, the American College of Trust and Estate Counsel Foundation (ACTEC) Arbitration Task Force issued a report that discussed the legal underpinnings, constitutionality, and tax aspects of arbitrating will and trust disputes and proposed two model statutes for recognizing arbitration

41. *See id.* at 790 (i.e., by failing to disclaim a beneficial interest or failing to contest the validity of the trust, as the *Rachal* opinion suggested).

42. *See id.*

43. *See id.* at 791.

44. *Id.* at 795.

45. *See id.* (implications of holding on question of avoidance of mandatory arbitration).

46. *See id*.

47. WASH. REV. CODE ANN. §§ 11.96A.280–.320 (West 2016); *see also* Archer v. Archer, 2014 WL 2802735 (Tex. App.—Dallas June 17, 2014, no pet.) (interpreting an arbitration clause in a trust to be permissive and not mandatory). In contrast to the statutes discussed herein, certain jurisdictions have enacted statutes that recognize *permissive* alternative dispute resolution measures. *Id.* For example, Washington has adopted a procedure that allows an interested party to an estate or trust matter to resolve an issue first by mediation, and then by arbitration, regardless of whether there is a provision in a will or trust instrument, although any other party may object to such proceedings upon receipt of notice. WASH. §§ 11.96A.280–.320.

48. *See* WASH. §§ 11.96A.280–.320; *see also Rachal*, 403 S.W.3d at 840.

clauses.[49] The first and shortest statute, the Model Enforceability Act, provides simply that a clause in a will or trust requiring arbitration of disputes is enforceable and that such a clause is presumed to require binding arbitration; but it also leaves to the courts the determination of whether the will, trust, or any part thereof—including the arbitration clause itself—is valid.[50] Effective in 2007, Florida enacted a statute that mirrors the first two parts of ACTEC's Model Enforceability Act.[51]

2. Arizona

In 2009, the Arizona legislature enacted the Arizona Trust Code, which included a statute stating: "[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."[52] The statute effectively superseded case law.[53]

In *Jones v. Fink*, an appellate court decided the first case under the new statute.[54] Two beneficiaries of an irrevocable life insurance trust (ILIT1) petitioned the court to contest the trustee's transfer of a $6 million life insurance policy to another irrevocable life insurance trust established six years later (ILIT2) of which they were also beneficiaries, alleging, among other things, the existence of a fraudulent transfer.[55] The trustee and two other beneficiaries of ILIT2 countered that in bringing the action, the petitioners violated a provision in ILIT2 that requires all beneficiaries to agree to submit disputes regarding the administration or distribution of ILIT2 to binding arbitration or forfeit the beneficiary's rights.[56] The appellate court upheld the arbitration provision with respect to ILIT2 under the new statute and rejected the petitioners' argument that posting the necessary $14,500 to participate in the arbitration was unreasonable, but the court remanded the

49. *Arbitration Task Force Report*, AM. COLL. OF TR. & EST. COUNSEL FOUND., (Sept. 18, 2006), https://www.mnbar.org/docs/default-source/sections/actec-arbitration-task-force-report.pdf?sfvrsn=2 [https://perma.cc/3VUJ-WOKL].

50. *Id.* at 27–28. The second Model Simplified Trial Resolution Act is more detailed, requiring (among other things) the service of notice that lists the issues in dispute, the filing of proof of notice with the clerk of the court, and the entry of simplified trial resolution judge determination as a final judgment of the court. *See id.* at 28–33.

51. *See* FLA. STAT. ANN. § 731.401 (West Supp. 2016) (effective 2016 regular session). In 2013, the statute was amended to clarify that an enforceable trust arbitration provision would be treated as an "agreement" for purposes of its arbitration statute. *Id.*

52. ARIZ. REV. STAT. ANN. § 14-10205 (2016) (effective January 1, 2009).

53. *See* Jones v. Fink, No. 1 CA-SA 10-0262, 2011 WL 601598, at *2 (Ariz. Ct. App. Feb. 22, 2011).

54. *See id.*

55. *Id.* at *1.

56. *Id.*

case for a judicial determination of the issues related to ILIT1 for which the arbitrator had no authority to address.[57]

3. Malta

In 2004, the Republic of Malta added section 15A to its Arbitration Act, recognizing: (1) an arbitration clause in a will as binding all persons claiming under the will in relation to all disputes relating to the interpretation and validity of the will; and (2) an arbitration clause in a deed of trust as binding all trustees, protectors, and any beneficiaries with respect to matters arising under or in relation to the trust.[58] That said, the statute also provides that any court exercising jurisdiction over a trust is not required to stay any proceedings and refer the parties to arbitration "until such time as it determines that the matter is of a contentious nature."[59]

4. Guernsey

In 2008, the Bailiwick of Guernsey (a possession of the British Crown) adopted an enabling statute that is both broader—referring to any ADR directed by the terms of the trust—and more limited—applying only to breach of trust claims against a trustee—than the other statutes discussed in this article.[60] Under this statute, any resulting settlement of the claim is binding upon *all* beneficiaries of the trust if they were represented, afforded reasonable notice, or had the opportunity to be heard.[61] That said, the person conducting the ADR proceedings must certify that a person appointed by a court of law independently represents any minor, legally disabled, or unascertained beneficiary.[62]

5. The Bahamas

In 2011, the Parliament of the Commonwealth of The Bahamas enacted what may be the most robust trust arbitration statute, going beyond mere recognition of mandatory trust arbitration clauses with the following specific

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57. *Id.* at *3.

58. *See* Chapter 387, ARBITRATION ACT, *available at* http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8854&l=1 [https://perma.cc/RYWN-4Art] (last visited Dec. 20, 2016) ((Malta), § 15A(1), (2) (added by Acts XIII.2004.109)).

59. *Id.*

60. *See Trust (Guernsey) Law*, PROJET DE LOI § 63(1), (5) (2007), http://www.guernseylegalresources.gg/article/97619/Trusts-Guernsey-Law-2007 [https://perma.cc/N68-YT8S] (eff. Mar. 17, 2008)).

61. *Id.* § 63(1), (2).

62. *Id.* § 63(2).

provisions to address a number of the unique issues that may arise in trust matters:[63]

- The doctrine of separability of an arbitration agreement from its underlying instrument (e.g., for the purpose of determining the validity of the instrument) does *not* apply to trust arbitration.[64] Thus, the arbitral tribunal cannot make the threshold determination of the validity of a trust instrument.[65]
- One or more persons may be appointed to represent the interests of any person or class of persons—including the unborn or otherwise unascertained—in the trust arbitration according to the terms of the trust, or in the absence of such provisions, by the arbitral tribunal.[66]
- A person under a disability may participate in a trust arbitration through a next friend or guardian *ad litem*, although only a guardian *ad litem* may formally defend, make a counterclaim, or intervene in a trust arbitration.[67] The next friend or guardian *ad litem* may be appointed, serve, and cease to serve according to the terms of the trust, or in the absence of such provisions, by the arbitral tribunal.[68]
- If any party is appointed to represent the interests of an unborn, unascertained, or disabled person in the trust arbitration, the arbitral tribunal must approve of any settlement affecting such represented persons.[69]

III. THE EFFICACY OF MANDATORY ARBITRATION PROVISIONS IN TRUSTS

Aside from considerations of arbitrability (i.e., whether parties or a matter may legally be subjected to arbitration) is the equally important question of whether a matter *should* be subject to arbitration.[70] As certain commentators have correctly observed, arbitration resolves some matters —namely, those that require minimal input and no third party involvement in discovery (such as the amount of fiduciary fees, the exercise of discretion to make investment or distributions, and the interpretation of a provision according to its four corners)—better than other matters (such as the validity of the instrument itself, issues of interpretation that will involve parole

63. *See* Trustee Amendment Act, 2011 (Bah.), §§ 1, 18, http://www.bfsb-ahamas.com/legislation /TrusteeAmend_2011.pdf [https://perma.cc/C5DN-7C6P]. Effective December 30, 2011, the Trustee (Amendment) Act, 2011, added sections 91A, 91B, and 91C to the principal Trustee Act, 1998 (Ch. 176) and effectively amended certain provisions of the Arbitration Act, 2009 (No. 42). *Id.*

64. *See* Trustee Act, 1998 (Bah.), Ch. 176, "Second Schedule (section 91A) to Application of the Arbitration Act," § 5 (as added by Trustee (Amendment) Act, 2011, § 18).

65. *See id*.

66. Trustee Act, 1998 (Bah.), Ch. 176, § 91B(3), (4) (as added by Trustee (Amendment) Act, 2011, § 18).

67. *Id.* § 91B(6).

68. *Id.* § 91B(7), (8).

69. *Id.* § 91B(5), (9), (10).

70. *See Resolving Disputes*, *supra* note 9, at 241–42.

evidence, and breaches of fiduciary duty involving non-beneficiary third parties).[71]

A. Disputes Involving the Validity of the Trust Instrument

If the dispute involving a trust goes to the validity of the instrument that contains the mandatory arbitration clause, a threshold chicken-and-egg issue will arise.[72] In the context of a will, Professor Spitko has argued that courts should stay any judicial challenge pending mandatory arbitration because "[t]he testator's right to dispose of her property as she sees fit is indisputably superior to the right of an intestate heir or beneficiary under a prior will to receive the testator's property at her death," and as such, "the testator ought to be able to condition any distribution of her property on compliance with her reasonable directions respecting resolution of disputes over her estate."[73] He compares the rights of an heir or putative legatee, which are wholly derivative of the testator's right to transfer the property to persons of the testator's choosing, to that of a party who claims rights under an implied contract containing an arbitration clause.[74]

Professor Spitko's argument ultimately relies upon the doctrine of separability—i.e., the enforceability of the arbitration provision is separate from the validity of the rest of its container instrument.[75] In the context of contractual disputes, the Texas courts appear to make a distinction between: (1) a claim that goes to the very existence of a legally binding agreement, which renders the entire agreement, including the arbitration clause, subject to a court's threshold determination; and (2) a claim that pertains to its continued validity or enforcement of the agreement as a whole (and not the arbitration clause in particular), which may be determined in arbitration.[76] That said, the Supreme Court of Texas has also indicated that the determination of whether an arbitration agreement binds a non-signatory party is a threshold issue for a court unless the parties clearly and unmistakably provide otherwise in the agreement itself.[77]

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71. *See id*.

72. *See infra* Section III.A.

73. *Gone But Not Conforming*, *supra* note 14, at 299.

74. *Id.* at 300.

75. *Id.* at 303.

76. *See In re* Morgan Stanley & Co., Inc. 293 S.W.3d 182, 188–89 (Tex. 2009). For example, whether a part to a contract had sufficient mental capacity goes to the issue of mutual assent, and thus, cannot be determined by the arbitrator. *Id.* In contrast, the issue of whether the contract as a whole was fraudulently induced could be decided in arbitration. *See id.*; Holk v. Biard, 920 S.W.2d 803 (Tex. App.—Texarkana 1996, no pet.).

77. *See In re* Weekley Homes, L.P., 180 S.W.3d 127, 130 (Tex. 2005); *In re* Labbatt Food Services, L.P., 279 S.W.3d 640, 643 (Tex. 2009).

B. The Existence of Minor, Incapacitated, Unborn, or Unascertained Beneficiaries

Consider a trust instrument that provides for mandatory distributions of income to the settlor's surviving spouse and discretionary distributions of principal for the health, education, maintenance, and support of the spouse and the settlor's children for the life of the spouse; and upon the surviving spouse's death, the remaining assets pass to separate trusts for the surviving descendants of the settlor for their health, education, maintenance, and support for life; and upon a descendant's death, the remaining assets pass on and on in further trusts until the perpetuities period expires or the trust is exhausted.[78] Now consider a dispute in which a child of the settlor is alleging that the trustee has abused its discretion by: (1) allocating the trust's significant oil and gas royalties to "income" for distribution to the spouse; and (2) denying distributions of principal to the child to acquire a $1 million home.[79] As the ACTEC Task Force observed, disputes like these may be particularly suitable for arbitration.[80] That said, would the trustee in this instance *really* be inclined to reach an arbitrated settlement knowing that all the affected parties are not at the table?[81] Certainly, the participating child's interest in ensuring an impartial allocation of income aligns with the interests of *all* of the beneficiaries other than the surviving spouse.[82] But would an arbitration award of the $1 million for the benefit of the child bind the minor or unascertainable grandchildren or more remote descendants?[83] The remainder interests in the trust are yet to be determined, but they could certainly be affected adversely.[84]

To be sure, a judicial resolution of the matters could result in similar gaps.[85] Contingent beneficiaries are not necessary parties to a proceeding by or against a trustee or otherwise concerning a trust under the Texas Trust Code.[86] Nonetheless, the statute *also* provides for: (1) the virtual representation of beneficiaries whose interests are subject to a power of revocation or general power of appointment and certain minors and unborn or unascertained beneficiaries;[87] and (2) the appointment of a guardian *ad litem* to represent the interests of a minor, an incapacitated, unborn, or

78. *See Arbitration Task Force Report*, *supra* note 49, at 35–36.
79. *See id*.
80. *See id*.
81. *See id*.
82. *See id*.
83. *See* TEX. PROP. CODE ANN. § 115.013(c)(3) (West 2014). Even in a judicial proceeding involving the same hypothetical facts, it is unlikely that the child seeking the $1 million distribution would be able to represent her own children as a guardian ad litem or next friend due to the potential conflict of interest.
84. *See id*.
85. *See* TEX. PROP. CODE ANN. § 115.013(c)(3) (West 2014).
86. *See* § 115.011(b).
87. *See* § 115.013(c).

unascertained person, or person whose identity is unknown, if the court determines that representation of the interest would otherwise be inadequate or an attorney *ad litem* to represent any interest the court considers necessary.[88] Nonetheless, the trustee has some degree of certainty in terms of obtaining instructions that bind *all* of the necessary parties.[89] In Texas, the same is not true in the context of arbitration.[90]

The potential issues with minor, incapacitated, unborn, or otherwise unascertained beneficiaries are generally two-fold.[91] In relying solely upon the interpretation of the TAA under the *Rachal* opinion, as a threshold matter, a party's mutual assent to an arbitration agreement may be necessary for the arbitration clause to be enforceable, and such beneficiaries may be incapable of providing such assent—even implied assent under the doctrines the court discussed.[92] In other words, can the trustee or other parties, virtually or indirectly, bring such beneficiaries to the arbitration proceeding?[93] And if so, how does a model for settling disputes developed in the commercial world provide sufficient notice and opportunity for such beneficiaries to be heard, and thus, be bound by an arbitration award?[94] Without specific statutory guidance, the arbitrability of issues that touch and concern unrepresented parties could conceivably result in litigation long after the arbitration award is granted, which would, in turn, undermine two of the primary purposes for arbitrating trust disputes in the first place—namely, saving time and costs and maintaining privacy over matters involving the trust. Although some commentators have suggested dealing with the issue by allowing courts to appoint representative parties for such purposes, in the interests of maximizing the intended benefits of trust arbitration, a legislative measure

88. *See* § 115.014.

89. *See id.*

90. *See supra* Section II.A.

91. *See* Mickey R. Davis, *Estate Planning in Changing (and Challenging) Financial Times*, SAN ANTONIO EST. PLANNERS COUNCIL 1, 32–33 (Dec. 15, 2009), http://www.sanantonioepc.org/assets/Councils/SanAntonio-TX/library/Estate%20Planning%20in%20Changing%20and%20Challenging%20Financial%20Times.pdf [https://perma.cc/QVJ5-H4UT].

92. *See generally* Rachal v. Reitz, 403 S.W.3d 840, 847 (Tex. 2013) (proposing that a beneficiary may implicitly assent to the arbitration clause of a trust by failing to disclaim his or her interest). Setting aside the nonexistence of unborn or otherwise unascertained beneficiaries, the author strains to imagine a scenario where a minor or incapacitated beneficiary, or a court-appointed representative for such a beneficiary, could make such a disclaimer before the beneficiary reaches adulthood or is no longer incapacitated. Notably, however, the Texas Uniform Disclaimer of Property Interests Act (effective September 1, 2015) no longer imposes a time limit for making an effective disclaimer, and does provide certain circumstances in which a fiduciary (including a "natural guardian" for a minor child) may make an effective disclaimer on behalf of another person. TEX. PROP. CODE ANN. § 240.008 (West 2016); *see also* TEX. EST. CODE ANN. § 1104.051 (Thomson Reuters 2014); Fleetwood Enter., Inc. v. Gaskamp, 280 F.3d 1069, 1074–76 (5th Cir. 2002) (holding that parents may not bind their minor children in an arbitration under a third-party beneficiary theory).

93. *See Rachal*, 403 S.W.3d at 847; PROP. § 240.008; EST. § 1104.051; *Fleetwood Enter., Inc.*, 280 F.3d 1074–76.

94. *See Rachal*, 403 S.W.3d at 847; PROP. § 240.008; EST. § 1104.051; *Fleetwood Enter., Inc.*, 280 F.3d 1074–76.

along the lines of the Bahamian statute, allowing the arbitrator to appoint representative parties, would be the most efficient solution.[95]

In the meantime, a settlor or testator relying upon the *Rachal* opinion could take the position that the enforceability of a mandatory arbitration clause in that case was premised solely upon the right to impose conditions on a gift and that the existence of implied assent by the beneficiary in that case was merely an alternative basis for enforceability.[96] That is, settlors or testators are free to write their own rules for trust administration as conditions upon a gift, and in doing so, could expressly bind all beneficiaries' interests to mandatory arbitration under the terms of the trust.[97]

C. The Primacy of Probate and Estate Administration

In the context of arbitration provisions, many commentators refer to wills and trusts in the same breath.[98] However, the inclusion of such provisions in a will may present special problems.[99] That is, the probate of a will is inextricably connected to the administration of a decedent's estate, which necessarily invokes statutory procedures imposing varying degrees of judicial oversight over requirements intended to ensure that certain parties receive sufficient notice and opportunity to be heard—not just beneficiaries, but also creditors and other third parties.[100]

In *In re Jacobovitz*, a New York Surrogate Court considered the effect of an agreement that four of the sixteen potential distributees of an estate executed whereby a Rabbinical Court would determine "all controversies between them with respect to the estate . . . including but not limited to the validity of any and all wills . . . and the disposition of this Estate under any such wills made by this [sic] or irrespective of any such will."[101] The Rabbinical Court eventually decided that the estate should be distributed amongst the petitioner and another distributee, even though the petitioner was

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95. IDAHO CODE ANN. § 15.8-305 (2009) (upon petition by the personal representative or trustee); WASH. REV. CODE ANN. § 11.96A.250 (2016) (upon petition by any party or the parent of a minor or unborn party). Cf. UNIF. TR. CODE § 305 (2010); OR. REV. STAT. § 130.120 (2015). Both Idaho and Washington provide an *ex parte* procedure and forms for the judicial appointment of a "special representative," who is either a licensed attorney or an individual with special skill or training in the administration of estates or trusts and who is neither interested or related to a person interested in the matter, in order to reach binding nonjudicial settlements of a broad range of estate and trust matters. IDAHO § 15.8-305; WASH. § 11.96A.250.

96. *See Rachal*, 403 S.W.3d at 847.

97. *Id.*

98. *See, e.g.*, *Arbitration Task Force Report*, *supra* note 49, at 22. The Florida statute includes both wills and trusts in its statute providing for enforceability of a mandatory arbitration clause, although it also excludes "disputes of the validity of all or a part of a will or trust." FLA. STAT. ANN. § 731.401(a) (West 2016). On the other hand, the enabling statute in the Arizona Trust Code refers only to a "trust instrument." ARIZ. REV. STAT. ANN. § 14-10205 (2012).

99. *See, e.g.*, *Arbitration Task Force Report*, *supra* note 49, at 22.

100. *Id.*

101. *In re* Jacobovitz, 295 N.Y.S.2d 527, 529 (Sur. Ct. Nassau Cnty. 1968).

the only beneficiary under the decedent's will.[102] Suffice to say, the petitioner sought to probate the will against the arbitration decision.[103] The court ultimately agreed with the petitioner's argument that upholding the arbitration decision would deny the due process rights of the other distributees and creditors who were unrepresented.[104] After citing the jurisdictional provisions of the applicable probate statutes, the court explained its rationale as follows:

> It can thus be seen that even where all of the proper parties are before the court, the legislature has imposed such requirements as to who may made a will and its proper execution that, even without objections to probate, the court has the duty to exercise its judicial conscience before admitting the instrument to probate. . . .The probate of an instrument purporting to be the last will and testament of a deceased and the distribution of an estate can not be the subject of arbitration under the Constitution and the law as set forth by the legislature of the State of New York and any attempt to arbitrate such issue is against public policy.[105]

The New York Appellate Court subsequently cited this portion of the *Jacobovitz* opinion in vacating a Rabbinical Tribunal's Clarification Document that both the petitioners and respondents sought regarding the interpretation of a decedent's will in *In re Berger*.[106]

These cases highlight the difficulties of shoehorning arbitration into the probate process, even if and when administration of the estate might otherwise be unnecessary.[107] Estate administration provides a set of statutory procedures for the payment of claims against the estate and the allocation and distribution of the remaining property of the decedent's estate among the devisees—and to the extent the will fails to dispose of all of the property, the heirs—whereby *all* interested persons have the opportunity to be heard.[108] Within this statutory scheme, even if all of the interested persons participated in an arbitration to determine the validity of a will and the arbitrator could order parties to pay any outstanding claims against the estate without the service of a personal representative, the beneficiaries would *still* have to probate the will to establish title to the property of the estate vis-à-vis third

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102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 530–31. With that said, Texas courts have demonstrated a general reluctance to set aside arbitration awards on the grounds of "public policy." *See* CVN Grp., Inc. v. Delgado, 95 S.W. 234, 239 (Tex. 2002) ("an arbitration award cannot be set aside on public policy grounds except in an extraordinary case in which the award clearly violates carefully articulated, fundamental policy").

106. *In re* Berger 437 N.Y.S.2d 690, 691 (N.Y. App. Div. 1981). *See also* Milnes v. Salomon, Smith Barney, Inc., 2002 WL 31940718 (N.Y. Sur. Ct. Broome Cnty. 2002).

107. *See In re* Jacobovitz, 295 N.Y.S.2d at 529.

108. *See id.*

parties.[109] Notwithstanding a judicial policy favoring settlements of disputes without depriving the court of its jurisdiction, the Texas Estates Code does not allow for probate by consent per se—the court must make affirmative determinations of its own based on the evidentiary requirements set forth in the statute.[110] And in setting forth the requirements to admit a will to probate, the statute repeatedly uses terms such as "to the court's satisfaction" and "if the court is satisfied."[111] That is, nothing in the statute could bind the court to the arbitrator's determinations and awards, and nothing in the statute expressly permits the court to defer to an arbitrator even if it was inclined to do so.[112] As such, without significant changes to the probate statute, any attempt to arbitrate the validity of a will would prove fruitless.[113] The same would appear to hold true with respect to the construction of a will and any other matters involving a court-supervised administration of the estate.[114]

The issue is less clear with respect to matters involving a testamentary trust, at least while a probate administration is pending.[115] On the one hand, a will construction suit is considered a probate proceeding that falls within the category of original—and in the case of a statutory probate court, exclusive—probate jurisdiction and generally requires a declaratory judgment by a court with such jurisdiction to establish title to the decedent's assets.[116] But even so, without infringing on the necessity of a judicial procedure for the disposition of the decedent's estate, a declaratory judgment that construes the will to determine whether, and to what extent, the trustee is entitled to the decedent's property is usually distinguishable from a determination of the terms of the testamentary trust itself.[117] As such, with specific respect to the interpretation and administration of a testamentary trust, a court with probate jurisdiction should have no problem deferring to

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109. *See* TEX. EST. CODE ANN. § 256.001 (West 2014) ("a will is not effective to prove title to, or the right to possession of, any property disposed of by the will until the will is admitted to probate").

110. *See* Carter *ex rel.* Estate of Haley v. Campbell, 427 S.W.3d 503, 570 (Tex. App.—Austin 2014, *no pet.*).

111. *See* EST. §§ 256.151, 256.152, 256.153(c)(3), 256.153(d)(2), 256.201, 257.001, 257.054.

112. *See* EST. §§ 256.151, 256.152, 256.153(c)(3), 256.153(d)(2), 256.201, 257.001, 257.054.

113. *See* EST. §§ 256.151, 256.152, 256.153(c)(3), 256.153(d)(2), 256.201, 257.001, 257.054.

114. *See* EST. §§ 31.001(7), 32.001(a), 32.002, 32.005(a).

115. EST. §§ 31.002(b)(2-3), (c)(1), 32.001(a), 32.006(2), 32.007(3); TEX. PROP. CODE ANN. § 115.001(a), (a-1), (d)(1), (d)(6) (West 2014). Once an issue involving a testamentary trust is no long "a matter related to a probate proceeding" because the proceeding has terminated, the district court would have exclusive jurisdiction or if applicable, concurrent jurisdiction, with a statutory probate court to construe the trust instrument; determine the applicable law; appoint or remove a trustee; determine the powers, responsibilities, duties, and liabilities of a trustee; ascertain beneficiaries; make determinations of fact affecting the administration, distribution, or duration of the trust; determine a question arising in the administration or distribution of the trust; relieve a trustee from any or all of the duties, limitations, and restrictions otherwise existing; require an accounting, review trustee fees, and settle interim and final accounts; and surcharge a trustee. *See* EST. §§ 31.002.

116. *See* EST. §§ 351.351, 352.352, 351.353, 351.354.

117. EST. §§ 351.351, 352.352, 351.353, 351.354. That said, a construction of a testamentary trust could be necessary to determine the identity or qualifications of the trustee who would receive title to the decedent's property before the estate is distributed. *See* PROP. § 113.002.

an arbitrator; a constitutional county court would not even have the jurisdiction to pass upon such matters.[118]

IV. THE IMPLEMENTATION OF MANDATORY ARBITRATION FOR TRUST DISPUTES

Assuming that a trust provision mandating arbitration would be effective and advisable under the circumstances, the implementation of such a scheme requires both an understanding of the Texas Arbitration Act (TAA), as well as an approach to drafting a provision that is calculated to realize the purposes of arbitration in light of the issues unique to the context of a trust and the circumstances particular to the settlor.[119]

A. Arbitration under the Texas Arbitration Act (TAA)

Before implementing a plan for mandatory arbitration, one must understand the basic features of the TAA, which provide certain mandatory and default rules for arbitration, as well as judicial procedures and remedies that would apply if an arbitration falls apart.[120]

1. Arbitration Agreement

The TAA applies to any arbitration agreement that meets the requirements above made on or after January 1, 1966, except in certain circumstances expressly provided by statute that are likely inapplicable in the private trust context.[121] Thus, "[a] party may revoke the agreement only on a ground that exists at law or in equity for the revocation of a contract".[122]

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118. *See* EST. §§ 31.001, 31.002(a), (b)(2), (b)(3), (c)(1), 32.001(a). Under the Texas Estates Code, a statutory probate court has original and exclusive probate jurisdiction; but if the county has no statutory probate court, the county court at law has original probate jurisdiction; but if the county has no statutory probate court or county court at law, the constitutional county court has original probate jurisdiction. However, the scope of each court's jurisdiction differs. EST. § 31.002. As such, the interpretation and administration of a testamentary trust is not considered a "probate proceeding" under the Texas Estates Code, but a "matter related to a probate proceeding" over which only a statutory probate court or county court at law has jurisdiction. *Id.*

119. *See* PROP. §§ 111.001, 115.012.

120. *See* PROP. §§ 111.001, 115.012. The Texas Rules of Civil Procedure and other statutes and rules generally applicable to civil actions govern all matters instituted under the Texas Trust Code. *See* PROP. §§ 111.001, 115.012.

121. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 171.002(a)(5) (West 2011). Since its enactment, the courts have applied the TAA as a supplement to the existing common law governing arbitration, not a replacement for the common law. Blue Cross Blue Shield of Texas v. Juneau, 114 S.W.3d 126, 136 (Tex. App.—Austin 2003, *no pet.*); *but see* Hoskins v. Hoskins, 497 S.W.3d 490, 493–94 (Tex. 2016) (holding that the TAA grounds for vacating an arbitration award are exclusive).

122. *See* CIV. PRAC. & REM. § 171.001(b).

2. Arbitration Proceedings

a. Appointment of Arbitrators

The agreement may specify the method of appointing arbitrators; but if the agreement does not specify the method of appointment, the agreed method fails or cannot be followed, or an appointed arbitrator fails or is unable to act and a successor has not been appointed, a court may appoint one or more qualified arbitrators on application of a party stating the nature of the issues and the qualifications of the proposed arbitrators.[123] Unless the agreement or the statute provide otherwise, a majority must act to exercise the powers of multiple arbitrators.[124] Unless the agreement provides otherwise, the expenses incurred in conducting the arbitration, including the arbitrators' fees, are to be paid as the award provides.[125]

b. Arbitration Hearing

All of the appointed arbitrators must conduct the arbitration hearing, unless the agreement provides otherwise.[126] The arbitrators must "set a time and place for the hearings" and provide at least five days' notice to each party, by personal service or by registered or certified mail with return receipt requested.[127] Appearance at the hearing constitutes a waiver of notice.[128] The arbitrators may adjourn the hearing as necessary, and on their own motion or on the request of a party with good cause shown, postpone a hearing to a time not later than the date the agreement sets forth for making the award or a later date on which the parties agree.[129] Further, "[t]he arbitrators may hear and determine the controversy on the evidence produced without regard to whether a party who has been duly notified fails to appear".[130] Any party attending the hearing is entitled to be heard, present evidence material to the controversy, and cross-examine any witness, and a party is entitled to legal representation at a proceeding, a right which may not be waived prior to the proceeding.[131]

123. *Id.* § 171.041.
124. *Id.* § 171.042.
125. *Id.* § 171.055.
126. *Id.* § 171.043(a).
127. *Id.* § 171.044(a), (b).
128. *Id.* § 171.044(b).
129. *Id.* § 171.045.
130. *Id.* § 171.046.
131. *Id.* §§ 171.048(a), (b), 171.047.

c. Witnesses and Depositions

As far as witnesses, "[t]he arbitrators, or an individual arbitrator at the direction of the other arbitrators, may administer to each witness testifying before them the oath required of a witness in a civil action pending in a district court."[132] The arbitrators may authorize a deposition, to be taken in the manner the law so provides in a civil action pending in a district court, for use as evidence to be taken of a witness who cannot be required by subpoena to appear before the arbitrators or who is unable to attend the hearing or for discovery or evidentiary purposes to be taken of an adverse witness.[133] The arbitrators, or an individual arbitrator at the direction of the other arbitrators, may issue a subpoena for the attendance of a witness or production of books, records, documents, or other evidence.[134] The fee for a witness attending a hearing or a deposition is the same as the fee for a witness in a civil action in a district court.[135]

d. Arbitration Award

Unless the parties extend the time for making the award in writing or a party fails to notify the arbitrators before the delivery of the award to that party, thereby waiving any objection, the arbitrators must make the award within the time that the agreement established, or if a time is not so established, within the time the court ordered on application of a party.[136] The arbitrators' award must be in writing and signed by each arbitrator, and a copy must be delivered to each party personally, by registered or certified mail, or as otherwise provided in the agreement.[137] In relation to attorney fees, they are paid as "additional sums required to be paid under the award only if the fees are provided for in the agreement to arbitrate or by law for a recovery in a civil action in the district court on a cause of action on which any part of the award is based."[138] Further, "[t]he fact that the relief granted by the arbitrators could not, or would not, be granted by a court of law or equity is not a ground for vacating or refusing to confirm the award."[139]

An arbitrator may change or correct an award to clarify the terms if: (a) there is an evident miscalculation of numbers or an obvious mistake in the description of a people, things, or property referred to in the award; (b) the arbitrators made an award respecting a matter not submitted to them for arbitration and the award may be corrected without upsetting the merits of

132. *Id.* § 171.049.
133. *Id.* § 171.050.
134. *See id.* § 171.051.
135. *Id.* § 171.052.
136. *Id.* § 171.053(c), (d), (e).
137. *Id.* § 171.053(a), (b).
138. *Id.* § 171.048(c).
139. *Id.* § 171.090.

the decision made with respect to the issues that were submitted; or (c) the form of the award is imperfect in a way not affecting the merits of the controversy.[140] Within twenty days after the date the award is delivered to a party, that party may make an application to the arbitrators to modify or correct an award.[141] The applicant must give written notice promptly to the opposing party stating that any objection must be served not later than ten days after the date of notice.[142]

In the alternative, a party may file an application with the court, which may be joined with an application to vacate, modify, or correct an award on the same grounds, within ninety days after the delivery of a copy of the award to the applicant.[143]

3. Judicial Enforcement

a. Jurisdiction of the Court

If the TAA applies to the arbitration agreement, a court will have jurisdiction to enforce the agreement and provide judgment on an arbitration award under the statute.[144]

b. Venue

If an arbitration hearing has already occurred, an enforcing or contesting party must file the initial application with the clerk of the county where the hearing was held.[145] If the arbitration agreement provides that the arbitration hearing shall be held in a Texas county, a party must file the initial application with the clerk of that county.[146] Otherwise, a party must file the application in the county where the adverse party resides or owns a business, or if the adverse party has no residence or place of business in Texas, in any county.[147] If an application is not filed in the appropriate county, a party adverse to an application may request a transfer to a proper venue within twenty days after service of process on the adverse party and before any other appearance except an appearance to challenge the jurisdiction of the court.[148]

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140. *Id.* §§ 171.054(a), 171.091(a).
141. *Id.* § 171.054(b)(1), (c).
142. *Id.* § 171.054(d).
143. *Id.* § 171.091(b), (c), (d).
144. *Id.* § 171.081.
145. *Id.* § 171.096(c).
146. *Id.* § 171.096(b).
147. *Id.* § 171.096(a).
148. *See id.* § 171.097.

c. Enforcing the Agreement to Arbitrate

A court must order the parties to arbitrate if an application of a party shows: (1) the existence of a valid arbitration agreement; and (2) the opposing party refuses to arbitrate.[149] However, the court may not enforce the agreement if it finds it was unconscionable at the time made.[150]

d. Vacating the Arbitration Award

The court must vacate an award on a party's application if the court finds: (1) the award was obtained through fraud, corruption, or other undue means; (2) a neutral arbitrator's corruption, misconduct, or willful misbehavior prejudiced a party's rights; (3) an arbitrator exceeded the extent of the artibrator's powers, refused to postpone the hearing after a showing of sufficient cause for the postponement, refused to hear material evidence, or conducted a hearing contrary to the statutory requirement or in a manner that substantially prejudiced the rights of a party; or (4) no agreement to arbitrate existed, the issue was not adversely determined in a proceeding, and the party did not participate in the arbitration hearing without raising the objection.[151] The party must file the application within ninety days after the date of delivery of a copy of the award to the applicant, or in the case of an application alleging corruption, fraud, or other undue means, within ninety days after the date the grounds are known or should have been known.[152] Unless the ground for vacating was that there was no agreement, the court may order a rehearing with the original or new arbitrators, depending on the circumstances.[153]

e. Other Judicial Remedies

In addition to an order to modify, correct, or vacate an arbitration award, a court may make the following orders *before* the arbitration proceedings begin in support of arbitration:

- Invoke the jurisdiction of the court over the adverse party and to effect that jurisdiction by service of process on the party before arbitration proceedings begin;
- Invoke the jurisdiction of the court over an ancillary proceeding in rem, including by attachment, garnishment, or sequestration, in the manner under which the proceeding may be instituted and conducted in a district court;

149. *Id.* § 171.021(a).
150. *Id.* § 171.022.
151. *Id.* § 171.088(a).
152. *Id.* § 171.088(b).
153. *See id.* § 171.089.

- Restrain or enjoin the destruction of all or an essential part of the subject matter of the controversy or destruction or alteration of books, records, documents, or other evidence needed for the arbitration;
- Obtain an order for a deposition for discovery, perpetuation of testimony, or evidence needed before the arbitration proceedings begin;
- Appoint one or more arbitrators so that an arbitration under the agreement may proceed; or
- Obtain such other relief, which the court may grant in its discretion, needed to permit the arbitration to be conducted in an orderly manner and to prevent improper interference or delay of the arbitration".[154]

During the period that an arbitration is pending before the arbitrators, or at or after the conclusion of the arbitration, a party may file an application for the following:

- An order that was referred to, or that would serve a purpose referred to, in the statute with respect to pre-arbitration orders (see above);
- An order to require compliance by an adverse party or any witness with an order made under the statute by the arbitrators during the arbitration;
- An order to require the issuance and service under court order, rather than under the arbitrators' order, of a subpoena, notice, or other court process in support of the arbitration or in an ancillary proceeding *in rem*;
- An order to require security for the satisfaction of a court judgment that may be later entered under an award;
- An order to support the enforcement of a court order entered under the statute; or
- An order confirming the award, vacating the award and ordering a rehearing, or modifying or correcting the award.[155]

B. Drafting the Mandatory Arbitration Provision for a Trust

The remainder of this article makes suggestions for drafting an arbitration provision for a trust instrument in a manner so as to mitigate the potential issues under Texas law.[156] As discussed above, the TAA provides certain default rules for the conduct of an arbitration in the absence of provisions in the arbitration agreement.[157] As also discussed above, arbitration statutes have been devised and applied outside the unique milieu of trust law, and the uncertainty surrounding the application of the *Rachal*

154. *Id.* § 171.086(a).
155. *Id.* § 171.086(b).
156. *See infra* Section IV.B.
157. *See supra* Section IV.A.3.a.

opinion warrants careful consideration of how the provision should be conceived.[158]

1. Model Clauses

a. The American Arbitration Association (AAA) Model

Considering the relative popularity among practitioners in the United States, the remainder of this article focuses primarily upon the use of the provisions and rules promulgated by the American Arbitration Association® (AAA).[159] Nonetheless, the same issues would be relevant in drafting an ad hoc provision or adapting another model provision, such as the ACTEC provision discussed below.[160]

The AAA is a non-profit organization offering a broad range of dispute resolution services in a variety of contexts with offices located in major cities throughout the United States—although the locations available for hearings are not limited to AAA offices.[161] The AAA charges an administrative fee based on a schedule for providing rules for arbitrations, administering the arbitration and serving as an intermediary for communications between the arbitrator and the parties, and if necessary or appropriate, appointing arbitrators.[162] Currently, there is a standard fee schedule and a flexible filing schedule, payable at various stages, which is generally based on the size of any claim or counterclaim.[163]

The AAA is one of the few organizations that conduct arbitrations in the United States that has promulgated special rules of arbitration devoted to wills and trusts ("AAA Rules").[164] Within those rules, the AAA offers the following "Standard Arbitration Clause for Wills and Non-Commercial Trusts":

> In order to save the cost of court proceedings and promote the prompt and final resolution of any dispute regarding the interpretation of my will (or my trust) or the administration of my estate or any trust under my will (or my trust), I direct that any such dispute shall be settled by arbitration administered by the American Arbitration Association ® under its AAA

158. *See supra* Section II.A.

159. *See infra* Section IV.B.1.

160. *See infra* Section IV.B.1.

161. *About the American Arbitration Ass'n (AAA)*, AM. ARBITRATION ASS'N, https://www.adr.org/aaa/faces/home?_afrLoop=2027956627146916&_afrWindowMode=0&_afrWindowId=null#%40%3F_afrWindowId%3Dnull%26_afrLoop%3D2027956627146916%26_afrWindowMode%3D0%26_adf.ctrl-state%3Db8orv6c6t_176 [http://perma.cc/mT8Q-35TK] (last visited Feb. 28, 2017).

162. *Id.*

163. *Id.*

164. *Wills and Trusts Arbitration Rules & Mediation Procedures*, AM. ARBITRATION ASS'N 1, 1 (June 1, 2012), https://www.adr.org/aaa/faces/aoe/commercial/financialservices/willstrusts [http://perma.cc/474E-4JWB].

> Wills and Trusts Arbitration Rules and Mediation Procedures then in effect. Nevertheless, the following matters shall not be arbitrable: questions regarding my competency, attempts to remove a fiduciary, or questions concerning the amount of bond of a fiduciary. The arbitrator(s) shall be a practicing lawyer licensed to practice law in the state whose law govern my will (or my trust) and whose practice has been devoted primarily to wills and trusts for at least 10 years. The arbitrator(s) shall apply the substantive law (and the law of remedies, if applicable) of the state whose laws govern my will (or my trust). The arbitrator's decision shall not be appealable to any court, but shall be final and binding on any and all persons who have or may have an interest in my estate or any trust under my will (or my trust), including unborn or incapacitated persons, such as minors or incompetents. Judgment on the arbitrator's award may be entered in any court having jurisdiction thereof.[165]

AAA Rule 1(a) provides that "[t]he parties, by written agreement, may vary the procedure set forth in these Rules."[166] As such, the author proposes a revised version of the AAA model provision, attached as "Appendix A," which is referenced in the following discussion.[167]

Before incorporating the rules of the AAA, a practitioner must first ask which rules will apply.[168] The AAA Rules are periodically updated, and AAA Rule 1(a) states that "[t]hese rules and amendment of them shall apply in the form obtaining *when the demand for arbitration or submission agreement is received* by the AAA".[169] That said, Texas law requires that the terms of a valid will exist at the time of execution.[170] Concerning revocable trusts, would a change in the AAA Rules count as a written amendment by the settlor? In this context, it is advisable to refer to the AAA Rules in effect on the date the will or trust instrument is executed.[171]

Moreover, the applicable AAA Rules may shift depending on the number of parties involved, the amounts of the claims and counterclaims, or in some cases, whether the parties agree to change the rules.[172] Namely, under AAA Rules 1(b) and 1(c), the "Expedited Procedures" (Rules E-1 through E-10) may be applied if no disclosed claim or counterclaim exceeds $75,000 and no more than two parties are involved; the "Procedures for Large, Complex Commercial Disputes" (Rules L-1 through L-4) may be

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165. *Id.* at 7.

166. *Id.* at 16.

167. The form language for an arbitration provision set forth in Appendix A represents an attempt by the author to address the issues raised in this article within the terms of the trust itself. However, the author makes no representations as to the efficacy of such a provision in addressing *all* of those issues, and each provision should be tailored to the purposes and circumstances of each settlor or testator.

168. *See infra* Section IV.B.

169. *Wills and Trusts Arbitration Rules & Mediation Procedures*, *supra* note 164, at 16.

170. *See, e.g.*, Allday v. Cage, 148 S.W. 838, 839 (Tex. Civ. App. 1912, *writ ref'd*).

171. *See* Appendix A, *infra*, ¶ B (first sentence).

172. *See Wills and Trusts Arbitration Rules & Mediation Procedures*, *supra* note 164, at 16.

applied if a disclosed claim or counterclaim exceeds $500,000.[173] As a result, these supplemental commercial rules are either *somewhat* more abbreviated or involved than the AAA Rules applicable to wills and trusts, depending on the circumstances.[174] Also, the AAA also provides "Optional Measures for Emergency Relief" (Rules O-1 through O-8), which either the arbitration agreement must expressly adopt or the parties must consent to.[175]

To assist the practitioner, the AAA has also published a booklet entitled "Drafting Dispute Resolution Clauses—A Practical Guide," which includes alternative sample clauses and suggests the extent to which the AAA may be open to modifications to its form language.[176]

b. ACTEC Model Clause

The ACTEC Task Force Report includes three examples of language for will and trust arbitration clauses, two of which are dependent upon the enactment its own Model Simplified Trial Resolution Act.[177] The references to the ACTEC sample arbitration provision in the remainder of this article refer to Sample 1, which is the clause *not* based on a proposed model statute.[178]

2. Special Drafting Considerations

a. Prerequisites for Arbitration

In its sample arbitration clause, the ACTEC Task Force requires that the parties first attempt to agree upon a settlement and then submit the matter to mediation before the binding arbitration provisions take effect.[179] In the experience of the author, if one or more of the parties do not want to engage in mediation, it is unlikely that imposing the costs of compulsory mediation will be worthwhile. Rather than *assuming* that the parties have not made any effort to settle the matter, the sample language in Appendix A simply recognizes the possibility of mediation and settlement.[180]

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173. *Wills and Trusts Arbitration Rules & Mediation Procedures*, *supra* note 164, at 16.

174. *See id*.

175. *Id.* at 37. (As a matter of simplicity, the sample language in Appendix A opts out of these supplemental rules altogether.)

176. *Drafting Dispute Resolution Clauses – A Practical Guide*, AM. ARBITRATION ASS'N 1, 2 (June 1, 2016), *available at* https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_002540 ("[p]arties with questions regarding drafting an AAA clause should contact their local AAA/ICDR® office or visit the AAA's clause drafting tool www.clausbuilder .org") [http://perma.cc/7ZPR-3QLP] (last visited Dec. 20, 2016) .

177. *See Arbitration Task Force Report*, *supra* note 49, at 36–42.

178. *See id.* at 36–42.

179. *See id.*

180. *See* Appendix A, *infra*, ¶ B.

b. Scope and Arbitrability

Considering the purposes of arbitration discussed above, it may be advantageous for the arbitration clause to exclude certain issues out of the scope of arbitrable matters.[181]

i. Validity of Trust Instrument

Assuming that the doctrine of separability applies, and the arbitrator *could* render an enforceable decision upon the validity of the trust instrument that contains the empowering arbitration provisions, the estate planning practitioner must ask whether it would be less time-consuming, more cost-effective, and most adherent to the settlor's concerns for privacy to: (a) adjudicate the validity of instrument itself in court; (b) adjudicate the questions of separability and the validity of the arbitration clause, and then, if the proponents of arbitration are successful, arbitrate the validity of the instrument itself.[182] In the absence of a good reason to have *two* separate proceedings that are likely to involve the same factual determinations, paragraph B of Appendix A provides that the validity of the instrument itself is *always* subject to a judicial determination, a position that the ACTEC model clause also reflects.[183] That said, there is Texas case law to support the proposition that the arbitration agreement itself may expressly provide for arbitration of the issue of whether, and to what extent, a non-signatory may be subject to the arbitration itself.[184]

ii. Interpretation and Construction

Theoretically, questions of interpretation and construction of trust provisions are ideal for a carefully-selected arbitrator to determine, but once again, trusts present uniquely difficult issues.[185] In the interests of realizing the purposes of arbitration, the author suggests that, in the absence of special circumstances, a court should determine the validity of the instrument in all instances.[186] That said, applicable rules of construction may be inextricably linked to the *validity* of the provision being construed, and the validity of a particular trust provision may be inextricably linked to the validity of the instrument *as a whole*.[187]

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181. *See supra* Section III.B.

182. *The Trust (Guernsey) Law 2007*, § 63(i), (5) (Mar. 17, 2008), http://www.guernseylegal resources.gg/article/97619/trusts-guernsey-law-2007 [hereinafter *Guernsey Trust*].

183. *See Arbitration Task Force Report*, *supra* note 49, at 28, n.17.

184. Rachal v. Reitz, 403 S.W.3d 840, 846 (Tex. 2013) (citing *In re* Kellogg Brown & Root, Inc., 166 S.W.3d 732, 739 (Tex. 2005).

185. *Guernsey Trust*, *supra* note 182.

186. *Id.*

187. *Id.*

iii. Modification and Termination

In contrast to the Uniform Trust Code, the Texas Trust Code does not allow the settlor and the beneficiaries to *non-judicially* agree to modify or terminate a trust.[188] Furthermore, the provisions of the Uniform Trust Code allow the trustee and beneficiaries to enter into a much broader range of "nonjudicial settlement agreements" than the Texas Trust Code permits.[189] On the other hand, the Texas Trust Code *does* recognize the ability of the settlor to grant a person other than the trustee the power to modify or terminate a trust and direct the actions of the trustee.[190]

c. Selection of Arbitrator

i. Qualifications

As a general rule, an arbitrator should be independent and free from the perception of bias, and at a minimum, an arbitrator should not have a financial interest in the outcome of the arbitration.[191]

That said, in providing for the selection an arbitrator, it is worth emphasizing that arbitration is not mediation.[192] While a mediator in a *nonbinding* mediation draws primarily upon skills of negotiation to reach conciliation among the parties–even if the end result, in the experience of the author, can reflect little regard for the relative strength of each party's legal positions–the arbitrator serving as a *binding* substitute for a judicial determination should ultimately assess the relevant facts and make judgments based on the applicable law.[193] There is certainly a perception, not wholly unfounded, that most professional arbitrators are generalists or practice in the commercial world, and thus, lack the knowledge and experience necessary to deal with the particularities of trust law.[194] To be sure, a seasoned arbitrator may bring a useful level of experience in exercising discretion to fashion procedures appropriate for the venue, but as discussed above, even the

188. *Cf.* UNIF. TRUST CODE § 411(a) (West 2014).

189. *Id.* at § 111(b), (c) (allowing an agreement with respect to "any matter involving a trust" that "does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the court."); TEX. PROP. CODE ANN. §§ 114.032(a) (West 2014) (allowing an agreement "relating to a trustee's duty, power, responsibility, restriction, or liability"). For example, whereas a non-judicial settlement agreement could include a "direction to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary or desirable power" under UNIFORM TRUST CODE § 111(d)(3), TEXAS TRUST CODE § 112.054(a) classifies such actions along with modification and terminations, which are expressly *excluded* from the scope of non-judicial agreements. *See* PROP. § 114.032(d).

190. *See* PROP. §§ 112.033(2), (4); 114.003;114.0031(e).

191. *See Gone But Not Conforming*, *supra* note 14, at 311.

192. *See id.*

193. *Id.*

194. *Id.*

procedural aspects of trust disputes can be significantly distinguishable from other sorts of controversies.[195] As such, if the primary purpose of arbitration is to encourage the effective and efficient disposition of controversies, appointing at least one arbitrator who does not need to be brought up to speed to analyze the claims and issues best serves this purpose.[196]

In the AAA model clause discussed above, the arbitrator must be "a practicing lawyer licensed to practice law in the state whose law governs my will (or my trust) and whose practice has been devoted primarily to wills and trusts for at least 10 years."[197] Presumably, this clause would exclude *retired* lawyers and judges.[198] As an alternative, a practitioner might tailor the provision to utilize a more objective and easily verifiable standard.[199] For example, the language in Appendix A designates a practicing attorney who is Board Certified in Estate Planning and Probate Law by the Texas Board of Legal Specialization (TBLS).[200] In order to be TBLS certified, an attorney must undergo an application process that includes a reference review of the attorney's specialized experience, heightened continuing education requirements, and passing a day-long examination; and a certified attorney is subject to the same heightened continuing education requirements and must be re-certified (sans the examination) every five years.[201] In any event, the AAA and the parties could readily obtain a list of such attorneys, and an adequate number of qualified attorneys is certainly available.[202] Of course, such a standard might not be appropriate if the arbitration was conducted in a geographic area that does not have a certification program for specialists or the number of certified specialists would be unduly limited.[203]

That said, professional qualifications may not be the only concern to consider—it may be more important to the "abhorrent" testator or settlor that the arbitrator be sympathetic to, or even share, personal religious, moral, or cultural values.[204]

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195. *Id.*

196. *See Wills and Trusts: Arbitration Rules and Mediation Procedures*, *supra* note 164, at 16.

197. *See id.*

198. *See id.*

199. *Id.*

200. *Id.*

201. *See Section IV.B.1.a*, TEXAS BOARD OF LEGAL SPECIALIZATION STANDARDS FOR ATTORNEY CERTIFICATION (2013), http://content.tbls.org/pdf/attstdep.pdf (last visited Dec. 20, 2016) [http://perma.cc/BP5N-SVUB]. *Cf. Arbitration Task Force Report*, *supra* note 49, at 37 (requiring that a mediator or arbitrator be a Fellow of the American College of Trust and Estate Counsel).

202. *See generally*, *Find an ACTEC Lawyer*, AM. COLLEGE OF TR. & EST. COUNSEL, www.altec.org/fellows/public-search/ [http://perma.cc/R5R5-HYJG] (last visited Feb. 5, 2017) (giving a list of appropriate attorneys).

203. *See Programs and Assessments*, MEDIATION TRAINING INST. INT'L, http://www.mediationworks.com/medcert3/staterequirements.htm [http://perma.cc/4TUN-84JT] (last visited Feb. 5, 2017).

204. *See* Jessica Stadwick, *Four Factors to Consider When Selecting an Arbitrator*, AL TAMIMI & CO., hhtp://www.tamimi.co/en/magazine/law-updates/section-5/june-issue/four-factors-to-consider-when-selecting-an-arbitrator.html [http://perma.cc/7KZH-AJRT] (last visited Feb. 5, 2017).

In any case, in establishing the qualifications of the arbitrator, the drafting practitioner must consider the provisions in the trust instrument pertaining to the trust situs and governing law.[205] That is, the qualifications of the arbitrator should reflect the likelihood that the situs of the trust could be transferred, resulting in the applicable law governing administration—if not the validity, interpretation, and construction of the trust—moving to another jurisdiction.[206] Depending on the circumstances, jurisdictional or geographic bounds, as well as the inclination to serve as an arbitrator, may also limit the population of professionals with the requisite expertise.[207] Furthermore, an arbitrator who is primarily an estate planning practitioner may tend to make decisions that are more advantageous to clients, settlors, and fellow estate planners than beneficiaries from out of town.[208] There is always a risk of what one commentator describes as "repeat-player syndrome"—that arbitrators may come to favor the same institutional fiduciaries who appear before them on a frequent basis.[209] These concerns may be addressed, at least in part, by expanding the scope of permissible arbitrators to the widest possible jurisdictional bounds.[210]

ii. Number of Arbitrators

In selecting the number of arbitrators, the testator or settlor must balance the enhancement to the quality of an arbitration award offered by having more than one arbitrator against the additional costs, in terms of both time and money, of having three or more cooks in the kitchen.[211] For the sake of simplicity, paragraphs D and E of Appendix A generally require that there be only one arbitrator who is experienced in trust matters.[212] There is a certain set of advantages that a professional arbitrator could bring to the table, and if the settlor believes that situations exist in which more than one arbitrator should serve as do the AAA Rules, then the author would suggest omitting the Number of Arbitrators provision and including the following alternate language for the Qualifications of Arbitrator:

> In all cases where the application of the AAA Rules call for the appointment of a single arbitrator, that arbitrator must be a practicing attorney Board Certified in Estate Planning and Trust Law by the Texas Board of Legal

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205. *See* S.I. Strong, *Empowering Settlors: How Proper Language can Increase the Enforceability of a Mandatory Arbitration Provision in a Trust*, 47 REAL PROP. TR. EST. 275, 321 (2012).

206. *Id.*

207. *See Programs and Assessments*, *supra* note 203.

208. Mary F. Radford, *Using Arbitration and Mediation to Resolve Estate and Trust Disputes*, ALI-CLE227 Westlaw SV024 1, 4 (ALI-ABA CLE, Feb. 20–21, 2014).

209. *Id.*

210. *Id.*

211. *See infra* Appendix A.

212. *See infra* Appendix A.

> Specialization. In all cases where the application of the AAA Rules call for the appointment of multiple arbitrators, at least one arbitrator must be a practicing attorney Board Certified in Estate Planning and Trust Law by the Texas Board of Legal Specialization, and at least one arbitrator must have at least 10 years of experience in serving as an arbitrator.

d. Notice, Parties, and Virtual Representation

In its sample arbitration clause, the ACTEC Task Force deals with the issue of minor, incapacitated, unborn, or unascertained beneficiaries by providing that the arbitrator's decision "shall be final and binding on the Trustee [Executor], all beneficiaries, and their heirs, successors, and assigns," but "a guardian [*ad litem*] shall be appointed by the court having jurisdiction over this Trust [my estate]" if the arbitrator determines it is necessary.[213] In Texas, however, a court will not appoint a guardian *ad litem* or an attorney *ad litem* in the absence of a pending *judicial* proceeding.[214]

Paragraphs C and F of APPENDIX A explicitly provide for notice and the appointment of third parties to represent the interests of minors, incapacitated, unborn, or unascertained beneficiaries whose interests are not otherwise represented in an attempt to address these concerns.[215] The goal is to approximate the procedures that would otherwise in a judicial trust controversy without necessarily imposing undue burdens on the arbitrator, the AAA, or the parties.[216] Under Texas law, the due process sufficiency of such procedures is unclear.[217]

e. Forfeiture and Other Penalties for Failure to Arbitrate

The ACTEC Task Force provides for forfeiture of a beneficiary's interest for failing to participate in arbitration in "good faith."[218] The ACTEC Task Force posits that even if no state statute authorizes the use of a forfeiture clause, such a provision should nonetheless be considered a valid condition imposed upon the underlying gift.[219]

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213. *Arbitration Task Force Report*, *supra* note 49, at 37–38.

214. *See* TEX. EST. CODE ANN. §§ 202.009, 1002.002, 1002.013 (West 2014); TEX. FAM. CODE ANN. §§ 31.004, 33.003(e), 51.11, 107.010, 107.011, 107.012, 107.012(a) (West 2014); TEX. PROP. CODE ANN. § 115.014 (West 2014); TEX. R. CIV. P. ANN. §§ 173.1–.7 (West 2016).

215. *See infra* Appendix A.

216. *See infra* Appendix A.

217. *See* In the Guardianship of Cantu de Villarreal, 330 S.W.3d 11, 23 (Tex. App.—Corpus Christi 2010, *pet. denied*) (recognizing that the terms of the arbitration award may adequately address public policy concerns).

218. *See Arbitration Task Force Report*, *supra* note 49, at 38. The sample arbitration clause also carves out an exception to the forfeiture clause for beneficial interests that might otherwise qualify for the estate or gift tax marital or charitable deduction. *Id.* at ¶ (d). *See also Gone But Not Conforming*, *supra* note 14, at 297–99.

219. *See Arbitration Task Force Report*, *supra* note 49, at 38.

Paragraph A of Appendix A includes a forfeiture clause penalizing a party for bringing a judicial action without just cause or good faith, which reflects the standard generally set forth in the Texas Trust Code.[220] The *McArthur* case not only highlights the limitations of an arbitration provision, whether under the judicial direct benefits estoppel doctrine or by statute, but also highlights the importance of giving any such forfeiture clause teeth—something for the beneficiary to lose.[221]

V. CONCLUSION

While the Supreme Court of Texas's 2013 decision in *Rachal v. Reitz* opened the door for the inclusion of mandatory arbitration provisions in trust instrument, not every settlor or testator should walk through that door.[222] In the absence of legislation, a number of ambiguities exist with respect to the effect of the *Rachal* decision and the extent to which such provisions will be enforceable and effective.[223] As such, the practitioner must carefully assess each client's purposes of imposing such a requirement and carefully tailor the provision to account for the particular issues that arise in the context of trust administration.[224]

220. *See* TEX. PROP. CODE ANN. §§ 111.0035(b)(2), 114.007 (West 2014).
221. McArthur v. McArthur, 168 Cal. Rptr. 3d 785, 785 (Cal. Ct. App. 2014).
222. Rachal v. Reitz, 403 S.W.3d 840, 840 (Tex. 2013).
223. *Id.*
224. *See supra* Section IV.B.2.b.ii.

APPENDIX A

Sample Modified AAA Arbitration Provision for a Trust Agreement

*In order to save the costs of judicial proceedings and promote the prompt and final resolution of any dispute regarding the interpretation and construction of the Trust Agreement or the administration and distribution of the Trust Estate, except as specifically provided to the contrary herein, the Settlor directs that any such dispute be settled by arbitration administered by the American Arbitration Association (**AAA**) under the applicable AAA Rules and subject to the following provisions:*

A. Scope of Arbitrability. If any claim or counterclaim is expressly determined not to be arbitrable by statute or by the opinion of an appellate court in the State of Texas, a party shall not be required to submit such claim to arbitration according to these provisions. Furthermore, any claim that the Trust Agreement as a whole, or the arbitration provision in particular, is invalid shall not be arbitrable according to these provisions. Nonetheless, if any party to the arbitration unsuccessfully prosecutes, or affirmatively joins in supporting, any arbitrable claim in a judicial proceeding prior to submitting the claim to arbitration as provided herein, the arbitrator may award any reasonable and necessary attorney's fees and costs incurred by the other parties to the arbitration who did not prosecute or join in support of such claims against the claimant(s) if the arbitrator finds that the claimant(s) brought the judicial action without just cause and good faith, and any such fees and costs so awarded may charged to the claimant(s) or against the beneficial interest of the claimant(s), as determined by the arbitrator; provided, however, that the foregoing provision shall not be construed or applied as to limit the authority of the arbitrator to take into account any other forfeiture provision included in the Trust Agreement in making an arbitration award.

B. AAA Rules. For the purposes of this Trust Agreement, the term AAA Rules shall refer to the AAA Wills and Trusts Arbitration Rules and Mediation Procedures in effect on the date of this Trust Agreement (or the last amendment thereto). Except where the application of such rules would be inconsistent or conflict with the provisions for arbitration set forth herein, the AAA Wills and Trusts Arbitration Rules shall apply in the arbitration proceedings, regardless of whether or not such a party to the arbitration would be considered a "consumer" or otherwise and regardless of the nature or amount the disclosed claim. In other words, the Expedited Procedures, and Procedures for Large, and Complex Commercial Disputes shall not apply unless all of the parties to the arbitration agree in writing to the contrary. It is the intent of the settlor that each of the arbitration provisions of this Trust Agreement be applied, if practicable, as a supplement to, and in a manner consistent with, the AAA Rules; provided, however, that any provision of this Trust Agreement shall supersede any corresponding

inconsistent or conflicting provision in the AAA Rules. If the AAA is unable or unwilling to administer the arbitration, then the Trustee and the parties shall arrange arbitration subject to the arbitration provisions of the Trust Agreement and consistent procedures that are substantially similar to the AAA Rules.

C. Notice Requirements. In addition to the requirements set forth in the AAA Rules, any party other than the Trustee or Co-Trustee who files an initial demand for arbitration and claim for relief must include the name, address, and other available contact information of the Trustee or all of the Co-Trustees. Within five business days after the receipt of any demand or answer other than a demand or answer received by the Trustee or all of the Co-Trustees, the AAA must provide notice of the demand or answer to the Trustee or all of the Co-Trustees. If the Trustee or a Co-Trustee files a demand or answer, or within five business days of receipt of notice of a demand or answer that affects a trust established herein, the Trustee shall provide the AAA with: (1) the names, addresses, and other contact information of all known beneficiaries who have or may have an interest in the trust that may be affected by a claim or counterclaim, and with respect to any known beneficiary who is a minor or incapacitated, the name, relationship to the beneficiary, address, and other contract information of the known custodial parent, legal guardian, or agent of the beneficiary, and (2) a description of all unascertained beneficiaries, whether born or unborn who may have an interest in the trust that may be affected by a claim or counterclaim and any names, addresses, and other contact information of the potential custodial parents of unborn or unascertained beneficiaries known to the Trustee. In reliance upon such information, prior to the process of selecting arbitrators, the AAA shall provide notice to all known beneficiaries, custodial parents, legal guardians, or agents of minor or incapacitated beneficiaries and custodial parents of any unborn or unascertained beneficiaries who have not already submitted a claim or response. Such notice shall be made in writing and include a copy of all claims and responses received by the AAA, an explanation of the capacity in which the person is receiving such notice, and an election to participate in the arbitration with instructions for the return of the election, including any response and counterclaims, within the time period required herein. If the election to participate is received within 15 days of transmission of such notice, the recipient shall be considered a participating party for all purposes; otherwise, the recipient shall not be deemed to be a party except as otherwise provided herein. Notwithstanding the procedures set forth in the AAA Rules, the process of selecting an arbitrator shall not commence until the period for all such elections to participate have expired. In the process of selecting an arbitrator, the AAA shall provide to a potential appointee a list of all known beneficiaries and any of their representatives, including a statement of whether they have elected to participate or not, and the description of all

potential unborn or unascertained beneficiaries and a list of the known potential custodial parents of such beneficiaries.

D. Qualifications of Arbitrator. Any person appointed as arbitrator must be a practicing attorney who is Board Certified in Estate Planning and Probate Law by the Texas Board of Legal Specialization, or if the AAA determines that no such attorney is reasonably available to serve as such in the general location where it is anticipated that the arbitrations hearings will be held, any practicing attorney with substantially similar experience in the practice of the applicable trust law. Notwithstanding the foregoing, no person appointed as arbitrator shall have any prior direct personal, professional, or business relationship with the Settlor, the Trustee, a Co-Trustee, a known beneficiary of the affected trust, any other party to the arbitration, or any known spouse, ancestor, or descendant of such parties.

E. Number of Arbitrators. Only one person shall be appointed to serve as sole arbitrator, regardless of the number of parties or the nature and amount of the claims involved, unless all parties agree in writing in contrary as to both the number and qualifications of such arbitrators.

F. Representation of Minors, Incapacitated, Unborn, or Unascertained Beneficiaries. Within 10 days after the appointment of the arbitrator, or at any time during the proceedings that would not result in prejudice to any of the parties, the arbitrator may find that the representation of one or more minor, incapacitated, unborn, or unascertained beneficiaries is necessary and appropriate under the circumstances, and as such, may direct the AAA to:

> *(a) Obtain the written consent of a custodial parent, legal guardian, or other agent to serve as the representative party for such beneficiary or class of similarly-situated beneficiaries; or*
>
> *(b) Appoint an attorney who meets the qualifications of a guardian ad litem or attorney ad litem to serve as a representative party for such beneficiary, or class of similarly-situated beneficiaries, at the expense of the trust, unless and until the award provides to the contrary).*

Any representative so appointed shall become a party to the arbitration effective on the date of appointment; provided, however, that such representative may not challenge any of the prior procedural decisions made in the arbitration unless the arbitrator determines, based on the written request of the representative, that the interests of the represented beneficiary or beneficiaries would otherwise be substantially prejudiced. In executing the foregoing provisions, the arbitrator and the representative shall take into consideration the general concern that all persons interested in the dispute be adequately represented in the arbitration in a manner consistent with Texas Property Code §§ 115.011, 115.013(c), and 115.014. Any settlement reached by a representative must be approved by the arbitrator. Notwithstanding the foregoing, the arbitrator's decisions and award shall be

final and binding on any and all persons who have or may have an interest in the Trust Estate, including minor, incapacitated, unborn, and unascertained beneficiaries.

G. Arbitration Hearing. Within 30 days after the appointment of the arbitrator, each party shall deliver to the arbitrator and all other parties: (1) a written list of witnesses, a description of the expected testimony, and true and correct copies of any documents to be relied upon as evidence by the party in advancing or opposing any request for relief; and (2) a written request, if desired, for any reasonable and necessary discovery (including, but not limited to, subpoenas). The arbitrator shall make all determinations regarding discovery and evidence as it determines, in its sole and absolute discretion, to be reasonable and necessary to allow each party to be heard, regardless of whether such determinations would be consistent with the rules of procedure and evidence applicable to a judicial proceeding. Based upon these determinations, the arbitrator shall set the time and place for the arbitration hearing, and the procedures (if any) for submission of memoranda by each party, by providing 30 days' written notice to each of the parties unless waived by the parties. For these purposes, the attendance of a party at the arbitration hearing shall constitute a waiver of such notice.

H. Relief Granted. The arbitrator may award damages, including attorney's fees and costs of arbitration against any party who is found to have brought or maintained a claim without just cause or good faith and exemplary damages against any party who is found to have engaged in intentional, knowing, or reckless misconduct; provide instructions to the Trustee or order injunctions, specific performance, or other non-monetary remedies; and grant such other relief as the arbitrator deems necessary and appropriate under the circumstances, regardless of whether or not such relief could or would be granted by a court of law or equity. Notwithstanding the foregoing, any relief awarded against the Trustee shall be granted in a manner and amount consistent with the other provisions of this Trust Agreement.

I. Reasoned Award. In making decisions, the arbitrator shall apply the applicable substantive law. Within 30 days after the date of the last hearing, the arbitrator shall deliver the written arbitration award to all of the parties setting forth the relief granted, and in the discretion of the arbitrator, the factual or legal grounds for granting such relief; provided, however, that the inclusion of any factual or legal grounds for relief shall not be construed to subject the arbitration award to any more judicial scrutiny than is otherwise permitted under the applicable law. Notwithstanding the foregoing, the arbitration award may be modified by the arbitrator in a manner consistent with Texas Civil Practices and Remedies Code §§ 171.054(a) and 171.091(a).