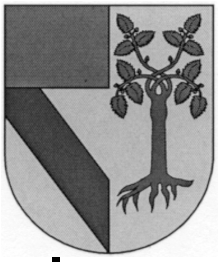

UNIVERSIDAD PANAMERICANA

CAMPUS GUADALAJARA

KARLA SOFÍA LLAMAS BELTRAN

ARBITRATION OF MEXICAN TRUST DISPUTES

Tesis presentada para optar por el título de Licenciado en Derecho con Reconocimiento de Validez Oficial de Estudios de la SECRETARÍA DE EDUCACIÓN PÚBLICA, según acuerdo número 86809 con fecha 13-VIII-86

Zapopan, Jalisco, Noviembre de 2015.

UNIVERSIDAD PANAMERICANA

CAMPUS GUADALAJARA

DICTAMEN DEL TRABAJO DE TITULACIÓN

C. KARLA SOFÍA LLAMAS BELTRÁN

P r e s e n t e.

En mi calidad de Presidente del Comité de Titulación y después de haber analizado el trabajo de TESIS titulado: **"ARBITRATION OF MEXICAN TRUST DISPUTES",** presentado por usted, le manifiesto que reúne los requisitos a que obligan los reglamentos para ser presentado ante el H. Jurado de Exámenes Profesionales.

Atentamente

EL PRESIDENTE DEL COMITÉ

DR. EDUARDO ISAÍAS RIVERA RODRÍGUEZ

Guadalajara, Jalisco, a 11 de diciembre de 2015

Mtra. Yurixhi Gallardo Martínez
Secretaria Académica de la Licenciatura en Derecho
Universidad Panamericana
Campus Guadalajara
Presente,

Estimada Mtra. Gallardo,

Por medio del presente hago de su conocimiento que **KARLA SOFÍA LLAMAS BELTRÁN**, quien cursó la Licenciatura en Derecho, ha concluido satisfactoriamente su trabajo de tesis titulado: **"ARBITRATION OF MEXICAN TRUST DISPUTES"**.

Le comunico que después de haber sido revisada por el suscrito, reúne todos los requisitos técnicos y académicos para solicitar fecha de Examen Profesional.

Agradezco de antemano la atención que puedan brindar al presente, reiterándome a sus órdenes.

Atentamente,

Dr. Edgardo Muñoz López
Director de Tesis

A mis papás, Carlos y Carmen, por su apoyo y cariño incondicional.

ABBREVIATIONS

CCom	Código de Comercio de México
FCC	Código Civil Federal
LBM	Ley del Banco de México
LFIF	Ley Federal de Instituciones de Fianzas
LGISMS	Ley General de Instituciones y Sociedades Mutualistas de Seguros
LGOAAC	Ley General de Organizaciones y Actividades Auxiliares del Crédito
LGTOC	Ley General de Títulos y Operaciones de Crédito
LISF	Ley de Instituciones de Seguros y Fianzas
LMV	Ley del Mercado de Valores
LOBANSF	Ley Orgánica del Banco del Ahorro Nacional y Servicios Financieros

INTRODUCTION

In their respective paramount articles, Strong and Koch describe the apparent tension between the law of arbitration and the law of trusts in common law jurisdictions with expressions such as “Two Bodies of Law Collide” or “A Tale of Two Cities.”[1] Much of this current tension is reported to be caused, on the one hand, by the equity nature of the trust institution in Anglo-American law and, on the other hand, by some arbitration laws that require arbitration agreements to be contained in or be related to contracts. We embarked on the interesting task of determining whether the same tension exists between the law of trusts in civil law jurisdictions and arbitration laws modeled by the UNCITRAL Law on International Commercial Arbitration (UNCITRAL Model Law). In particular, we chose to focus on the Mexican trust, arguably the first and most influential trust figure in the civil law modern world, and on Mexico’s commercial arbitration law (which is based on the UNCITRAL Model Law of 1985). As our comparative law analysis progressed, we were able to find out that some of the points that differentiate the Mexican trust from its Anglo-American trust ancestor, coupled with the flexibility that characterizes the UNCITRAL Model Law, eliminating most of the legal incompatibility reported in some common law jurisdictions. Profiting out of the descriptive expressions used by our common law colleagues Strong and Koch,

[1]S.I. Strong, 'Arbitration of Trust Disputes: Two Bodies of Law Collide', *Vanderbilt Journal of Transnational Law,* 15 (2012); Christopher P. Koch, 'A Tale of Two Cities! - Arbitrating Trust Disputes and the Icc's Arbitration Clause for Trust Disputes', *Yearbook on International Arbitration,* II (2012).

this work gathers legal evidence and thorough analysis to affirm the enforceability of arbitral awards in Mexican trust disputes.

This worked was constructed under the use of mainly comparative, analytical, structural, deductive and descriptive research methods.

Sections II and III furnish some important information about the Mexican trust that sets the basis from which we build up our proposition. Section IV forecasts the benefits that arbitration will ultimately bring to the Mexican trust industry and to the parties to a Mexican trust. Section V introduces what globally are the main legal issues that must be carefully considered to achieve the enforcement of an arbitration agreement in trusts disputes. Section V addresses in minute detail the requirements and theories of intent that make an arbitration agreement enforceable against all trust parties. Section VI discusses what type of trusts claims are arbitrable from a Mexican law's standpoint. Section VIII highlights some legal capacity rules that may affect the enforcement of arbitration agreements over parties to a Mexican trust. Section VIII identifies some procedural and representation measures to be taken in order to ensure compliance with due process and the right to be heard principles in the context of Mexican trust disputes. Section X analyzes two examples of mandatory norms of law that could give raise to the public policy exception for enforcement of arbitral awards in the context of arbitration of Mexican trusts disputes. Section XI concludes with some reflections about the current perception of arbitration as a means to resolve Mexican trusts related disputes and its future.

I. THE MEXICAN TRUST

1. Historical Background

The Anglo-Saxon trust

The modern trust as we conceive it today was developed from the British concept of *use*. Some historians affirm that trusts derive from the roman *fideicommissum*[2] and some others sustain that it has its origins in the Germanic *Treuhand* or *Salman.*[3] Although both precedents could have had a considerable influence in the foundation of trusts, none was fundamental in underlining their origin, unlike *uses*.[4]

The word *use* derives from the Vulgar Latin expression *ad opus* (*al oes*, *ues* in its ancient French translation and confused in the British pronunciation by *use*), which stands for "in representation of". First appearing in the eight century, *uses* consisted in the transfer *in rem* by means of a will or an act *inter vivos* to a

[2] *Fideicommissum* (*fidei*, trust and *committere*, commend). In order to evade legal restrictions on the capacity of certain people to inherit (foreigners, emancipated slaves, etc.) a person conveyed an heir the task of holding certain assets in benefit of a third person. See Rodolfo Batiza, 'El Fideicomiso: Teoría y Práctica', (7th ed.: Mexico: Jus, 1995) at 34.

[3] An early executor to whom assets were transferred to *inter vivos,* with a resolutory condition that eventually reestablished its ownership,in order for the latter to fulfill certain purposes upon the transferor's death. See Silvio V. Lisoprawski& Claudio Marcelo Kiper, 'Fideicomiso. Dominio Fiduciario. Securitización', (2nd ed.: Argentina: Depalma, 1996) at 97.

[4] Pierre Lepaulle, 'Tratadoteórico y práctico de los trusts', (Mexico: Porrúa, 1975), at 11.

person (*feofee to use*) who would hold them *in use* in favor of the beneficiary or *cestui que use*.[5]

Uses were first employed in order to elude legal restrictions on the transfer of property either to religious congregations[6] or to feudal landlords.[7]

The development of the *use* in the fifteenth and sixteenth centuries was such that, by 1500, it was said that the greater part of England was held in *use*.[8]

Considering that *uses* developed as a way to circumvent dispositions of common law, it seamed unfeasible to sort to common law courts to enforce obligations that arose from them.

As a response to this state of helplessness, pleas were made before the King and in delegation of its powers he conferred his Lord Chancellor the faculty to decide upon these matters. Afterwards, the Lord Chancellor appointed several counselors and a number of verdicts were issued. This eventually resulted in the creation of rules of law that were based upon imperative determinations of equity, different from costumes and the written law. These counselors ultimately conformed courts that were to enforce these equitable obligations, *i.e.* equity courts.[9]

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[5]Frederic William Maitland, 'Equity A Course of Lectures', (Cambridge University Press, 1949) at 23.
[6] Restrictions imposed by virtue of the Statute of Mortmain.
[7] Lepaulle, 'Tratado teórico y práctico de los trusts', at 11-14.
[8] Philip H. Pettit, 'Equity and the Law of Trusts', (11th ed.: United States: Oxford University Press, 2009), at 13.
[9] Alastair Hudson, 'Equity and Trusts', (3rd ed.: United Kingdom: Cavendish Publishing, 2003) at 10-11.

In 1536, in an attempt to withhold the newly gained impulse in the spread of *uses*, Henry VIII enacted the Statute of Uses, which imposed numerous restrictions on this now very frequent practice.[10] Nevertheless, aware of the convenience of the attributes of *uses*, equity courts made the Statute subject to vast interpretation. This interpretation led to the subsequent recognition of the lawfulness of most kinds of *uses*, and the replacement of the word "*use*" for the word "trust", "*feofee to uses*" for "trustee" and "*cestui que* trust" instead of "*cestui que uses*". Trusts began to acquire considerable impulse not only in fact but now progressively in law.[11]

Later on, the equity system in general seemed to be widely accepted by most of the inhabitants of British colonies in America. Nevertheless, this happened not without some difficulties: for some people equity institutions represented the king's prerogatives and thus, they were perceived with mistrust. Notwithstanding, the equity system was eventually acknowledged, especially in the first part of the XIX century. As this acceptance occurred, the trust practice began to gain force in the United States of America.[12]

The United States contributed to the British trust with the use of corporative trustees. In England, still in 1743, corporations were barred from acting as trustees.

[10] Carlos Felipe Dávalos Mejía, 'Títulos y Operaciones de Crédito. Análisis teórico práctico de la Ley General de Títulos y Operaciones de Crédito y temas afines', (4th ed.: Oxford University Press, 2012) at 535.
[11] Lepaulle, 'Tratado teórico y práctico de los trusts', at 16-17.
[12] Jesús Roalandini, 'El Fideicomiso Mexicano', (Mexico: Instituto Fiduciario Bancomer A. C., 1998) at 37-38.

The first trace of a trust in which authorization was given to a corporation to act as trustee is the one granted to *The Farmers fiere Insurance & Loan Company* in 1822. From that year on, corporations were created in order to administer trusts. This practice eventually became very frequent. As a result, in the United States to this day the trustee is usually a professional.[13]

Trusts in Mexico: first traces

A variation of the trust was first used in Mexico almost twenty-five years before its first legislative recognition. At that time, trusts were used as guarantee in bond issuances destined to finance the construction of railways. In this context, the 1889 *Ley de Ferrocarriles* (Railways Law) and the 1884 Mexican Civil Code provided for the recognition of a Trust Deed even when concluded in a different country.[14]

Later on, a couple of legislative initiatives were presented before the Federal Congress. First, in 1905 José Y. Limantour, the Ministry of Treasury and Public Credit at the time, presented an initiative drafted by José Vera Estañol that provided for the possibility to create commercial institutions that were to operate as trustees.[15] As was expressly stated throughout the project, the idea was naturally a consequence of the influence of North American Trust Companies. However, the Congress did not grant approval.[16]

[13] *Idem*.
[14] Batiza, 'El Fideicomiso: Teoría y Práctica', at 102.
[15] These institutions were referred to in the project as *agents* *beneficiarys* (beneficiaries). Nevertheless, this was a clear mistake since they were to operate as trustees.
[16] Roalandini, 'El Fideicomiso Mexicano', at 47-48.

After that came the Creel project. In 1924, arising from the First Banking Convention, Enrique C. Creel presented a project named "*Compañías Bancarias de Trust y Ahorro".*[17] The Congress once again refused to approve.[18]

Nevertheless, by January of 1925 the *Ley General de Instituciones de Crédito y Establecimientos Bancarios* was published. This was the first body of law to regulate the Mexican trust. This law provided for Trust Banks to operate under State concession agreements in order to establish and exploit credit institutions for a maximum duration of 30 years.[19] These Banks were to function to serve the interests of the public mostly by administering capitals entrusted to them and to act in representation of subscribers or bondholders of mortgage bonds. The law stated that Trust Banks were to be governed by a special lawthat was going to be subsequently issued.[20]

Furthermore, worth mentioning as legislative background, in 1926 a project called "*Proyecto de Ley de Compañías Fideicomisarias y de Ahorro*" was drafted by Jorge Vera Estañol and presented before the Ministry of Finance and Public Credit. The Vera Estañol project contained a very detailed description of the purposes and practical implications of transactions regarding Mexican trusts referred to as "fiduciary transactions". This project served as model to several legislations of different countries such as Chile, Bolivia and Peru.[21]

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[17] Trust and saving banks. Creel attempted to follow the practice of these North American entities.
[18] Pablo Macedo, 'El Fideicomiso Mexicano' in Lepaulle, 'Tratado teórico y práctico de los trusts', at XIII-XIV.
[19] Sergio Monserrit Ortiz Soltero, 'El Fideicomiso Mexicano', (Mexico: Porrúa, 1998) at 3.
[20] *Idem.*
[21] Roalandini, 'El Fideicomiso Mexicano', at 49-51.

After that, in 1926, came the special law to which the 1924 *Ley General de Instituciones de Crédito y Establecimientos Bancarios* made reference to: the *Ley de Bancos de Trust.* Structure was given to the *trust* for the first time. Nonetheless, its period of validity was rather short. This new law was abrogated 4 months later with the issuance that same year of the *Ley General de Instituciones de Crédito y Establecimientos Bancarios* which incorporated the provisions regarding *trusts* of the *Ley de Bancos de Trust*.[22] The very first trusts ever concluded in Mexico[23] were entered into under this law.[24]

Afterwards, legislation that addressed the substantive particularities of the Mexican trust more specifically was enacted: the *Ley General de Instituciones de Crédito* in June 29th1932 and two months after that same year the *Ley General de Títulos y Operaciones de Crédito*.[25] These two bodies of law were drafted to complement each other and thus, they presented no contradictions.

In 1941 the *Ley General de Instituciones de Crédito y Organizaciones Auxiliares* which abrogated the 1932 *Ley General de Instituciones de Crédito* was issued. Certain modifications were made to the provisions regarding trusts.[26]

Later on came the nationalization of the banking sector. Under the *Ley Reglamentaria del Servicio Público de Banca y Crédito* that was published by decree in 1982, private banking institutions were expropriated in benefit of the nation. The Federal Executive power by conduct of the Ministry of Finance and

[22] Ortiz Soltero, 'El Fideicomiso Mexicano', at 4.
[23] Guarantee trusts, dated 1931.
[24] *Ibidem,* at 51.
[25] Macedo, 'El Fideicomiso Mexicano', at XX-XXVIII.
[26] Jose Manuel Villagordoa Lozano, 'Doctrina General del Fideicomiso', (Mexico: Asociación de Banqueros de México, 1976) at 56-57.

Public Credit was to give proper compensation within no longer than 10 years.However, trustsor funds administered by the banks were not subject to expropriation.[27]

This new law published by decree coexisted harmoniously with the *Ley General de Instituciones de Crédito y Organizaciones Auxiliares* of 1941, considering that the latter was drafted as a legal instrument of transition. Nevertheless, such coexistence prevailed only until the new *Ley Reglamentaria del Servicio Público de Banca y Crédito*, published in 1985, derogated the 1941 *Ley de Instituciones de Crédito* and the *1982 Ley Reglamentaria del Servicio Público de la Banca y Crédito*. This new legal instrument provided rules under which fiduciary transactions were to operate in particular, but also general provisions that were applicable to every banking transaction.[28]

After almost 8 years, banks were reprivatized in 1990. A draft decree that provided for the reestablishment of the former combined system of banking services was presented by the Federal Executive power and subsequently approved by the Federal Congress. Yet, legislation regarding economic and legalstrategies in order to materialize this transition was still needed. In this regard, *trusts* proved to be an extremely useful alternative. Investment and management *trusts* were created in order to carry out the subscription of capital for the acquisition of shares of the newly converted *sociedades anónimas*.[29]

[27] Roalandini, 'El Fideicomiso Mexicano', at 58-59.
[28] *Idem.*
[29] From national credit corporations to limited liability corporations. See Batiza, at 136-139.

Lastly, on June 28 1990, the Federal Executive submitted for consideration before the Congress an initiative for a new *Ley de Instituciones de Crédito*. This initiative provided for regulation in terms ofthe institutional organization of banks and the way in which they were to operate. Said project was approved in its full terms. The *Ley de Instituciones de Crédito* was enacted and published on July 1990.[30]

It has been sustained that the *Ley de Instituciones de Crédito* and the 1932 *Ley General de Títulos y Operaciones de Crédito*[31] were meant to complement each other, with substantive legislation being provided by the latter and dispositions regarding structure in general by the first.[32]

2. Definition

The Mexican trust is governed by Mexico's *Ley General de Títulos y Operaciones de Crédito* (here in after LGTOC), in chapter V, articles 381 to 407.

Article 381 of the LGTOC states the following:

"*By virtue of the* trust*, the settlor conveys to a fiduciary institution the property of certain assets or rights, for those to be destined to lawful and determined purposes, entrusting the fulfillment of such purposes to the fiduciary institution*".

As it can be drawn from the above and as was mentioned before, the LGTOC does not provide a verdict on the legal nature of the trust, rather, it only

[30] *Ibidem*, at 141-142.
[31] Up to this day, the Mexican trust is regulated under this law.
[32] Roalandini, 'El Fideicomiso Mexicano', at 63.

states its technical implications *in causam*: certain assets are being destined to a specific purpose.[33]

According to Sergio Rodríguez Azuero the trust is a legal transaction by virtue of which one or more assets are being transferred to a person, along with a task to manage and sell them and, to use the product of its activity to fulfill the purpose established by the settlor, in his benefit or in benefit of a third party.[34]

This abovementioned person to whom the assets are being conveyed, in the Mexican trust, can only be a fiduciary institution.[35]

3. Legal Nature

Neither the LGTOC nor the Mexican Code of Commerce provide a definition of the Mexican trust. Is for this reason that scholars have extensively discussed its legal nature, either affirming that it is a legal transaction[36] or a fiduciary transaction.[37] It has also been discussed whether the Mexican trust is a unilateral declaration of intent[38], an agreement or a combination of both.

A very technical and certainly doctrinal approach to the legal nature of the Mexican trust is that of the fiduciary transaction.

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[33]Dávalos Mejía, 'Títulos y Operaciones de Crédito. Análisis teórico práctico de la Ley General de Títulos y Operaciones de Crédito y temas afines',at 543.
[34]Sergio Rodríguez Azuero, 'Negocios fiduciarios', (Colombia: Legis, 2005) at 182.
[35] Art. 385 LGTOC.
[36] Jorge Alfredo Domínguez Martínez, 'El Fideicomiso', (6th ed.: Mexico, Porrúa, 1996) at 35.
[37]Lisoprawski and Kiper, 'Fideicomiso. Dominio Fiduciario. Securitización', at 109- 111.
[38] The will of the *settlor* certainly constitutes a unilateral declaration of intent, however, this declaration alone does not give rise to the trust. Consent of the fiduciary is thus, a *condition sine qua non* in the creation of the trust.

A fiduciary transaction entails a complex arrangement that arises out of the combination of two different transactions in nature and effect: a) a contract over real rights (a positive kind): the transfer of property and b) a negative legal relationship whereby the fiduciary is bound to use the acquired right in a certain way.[39]

The concept of fiduciary transaction arises from a classification within the doctrinal classification of legal act. A legal act is an act that comprises the involvement of human intent in itself and its consequences.

Likewise, legal acts are subdivided into three: legal acts *lato sensu*, legal acts in strict sense (or legal transactions) and fiduciary legal acts and transactions. This third subdivision entails the transfer of certain rights and assets from one party to another for the latter to fulfill certain purposes established by the first.

The main difference between a fiduciary legal act and a fiduciary transaction is that the consequences of the latter are fully controlled and designed by the author of such transaction, unlike in the fiduciary legal act in which, although its consequences are in fact sought by the author, these cannot be subject to any modification on his behalf.[40]

The Mexican trust is created out of the settlor's declaration of intent and a subsequent acceptance from the fiduciary institution. In addition, the fiduciary

[39] Amparo directo 1627/60. Hermenegildo Moreno González. 24th August 1960. Mayoría de tres votos. Ponente: Gabriel García Rojas.
[40]Dávalos Mejía, 'Títulos y Operaciones de Crédito. Análisis teórico práctico de la Ley General de Títulos y Operaciones de Crédito y temas afines' at 549-550.

institution has a duty to act in accordance with the intent of the settlor as well as to manage the assets and rights entrusted in accordance with the specific purpose of the trust. Hence, the Mexican trust is a fiduciary transaction.

Furthermore, on a more practical approach, the Mexican trust is within the legal classification, a contract. The Mexican Federal Civil Code (hereinafter FCC) states that "a legal agreement is an agreement between two or more parties to create, transfer, modify or extinguish obligations"[41] and that "legal agreements that produce or transfer those rights and obligations, take the name of contracts".[42] Moreover, in order for a contract to be existent and valid in Mexican law, it must conform to the following requirements: acquiescence, object, capacity, absence of defects in the expression of consent, lawfulness and proper form.[43] All of the abovementioned characteristics and requirements hold true for the Mexican trust, *ergo*, under Mexican law the trust is a contract.

It must be noted also that the Mexican trust, unlike most contracts, does not have a purpose in itself, but instead, it serves as a means to fulfill a purpose; its creation and technical structure is justified by the existence of a different transaction, qualified by the LGTOC as a lawful and determined purpose. Potentially, there can be as many trusts as special or tailored means are

[41] Article 1792 FCC.
[42] Idem.
[43] Diego Robles Farías, 'Teoría General de las Obligaciones', (Mexico: Oxford University Press, 2011) at 142.

necessary to fulfill different purposes, only as long as two legal requirements are met: lawfulness and determination.[44]

4. Elements

The following essential elements of the Mexican trust can be drawn from its concept:

a. The assets subject matter of the trust are purportedly affected in order to accomplish a determined purpose.
b. This detachment entails an *in rem* transfer of the assets.
c. The purpose for which the trust is created has to be lawful and determined.
d. The fulfillment of such purpose is entrusted to a fiduciary institution.

Likewise, the fiduciary ownership is a complex and very important element of the Mexican trust. Once the trust is settled, the assets and the rights that the settlor transferred, the subject matter of the trust, are turned *ipso iure* into a estate with a special regulation and their destination cannot be other than that determined by the purpose of the trust.

In regard to the subject matter of the trust, only activities that lead to the fulfillment of its purpose can be carried out.

[44]Dávalos Mejía, 'Títulos y Operaciones de Crédito. Análisis teórico práctico de la Ley General de Títulos y Operaciones de Crédito y temas afines', at 533.

Is for this reason that a differentiation between the conventional civil ownership and the fiduciary ownership is fundamental.

When the settlor voluntarily detaches himself from the assets and or rights there is without a doubt a transfer of ownership, but not in the purely civil sense that supposes the recognition and acknowledgement of the old and the new owner in terms of the *ius utendi*, *fruendi* and *abutendi* enjoyable correspondingly before and after the transfer.

After the transfer takes place, the settlor no longer has the assets *ipso iure*, nevertheless, neither does the fiduciary; and the latter will not enjoy real rights in civil terms, but in fiduciary terms, which follows from the understanding that the transfer did not take place for the purpose of obtaining title itself, since the settlor did not receive any consideration in return, rather, the transfer was made to constitute a legal structure in order to attain a subsequent purpose.[45]

It was considered by the Mexican legislator that it was essential to, first, disengage the assets from civil property. Secondly, to have the settlor relinquish the ownership of the assets[46] without allocating them to a different person. And lastly, to transfer those assets to a fiduciary institution along with the ownership that from that moment on is inherent to said assets, only in order for the latter to

[45] *Ibidem*, at 561-562.
[46] Jorge Alfredo Domínguez Martínez, 'Dos aspectos de la esencia del fideicomiso mexicano (acto constitutivo unilateral y propiedad conservada por el fideicomitente con la titularidad del fiduciario)', (3rd ed.: Mexico: Porrúa, 2000) at 104.

maintain and keep custody of both –assets and their ownership- by law, and only pursuant to the terms and conditions established by the settlor.[47]

Is for the aforesaid reasons that the estate of a Mexican trust is autonomous, *i.e.* legally independent from the estate of the settlor, the fiduciary institution, and any other person. No person performs *fruendi*, *utendi* or *abutendi* over the assets. Nonetheless, the fiduciary remains the titleholder, and the ownership is only transferred with the sole interest to fulfill the established purpose. The transfer of the ownership is a means to reach the purpose.[48]

The subject matter of the trust is a universal patrimony; an independent estate[49] that, on the one hand, is managed by an entity or person entrusted with such power, and on the other, is intended to accomplish a specific purpose. Thus, the trust's estate must be registered at Mexico's commerce registry separately from the fiduciary's assets (art. 386 LGTOC).

Furthermore, even though the rights and assets transferred to the fiduciary do not form part of the latter's capital, "the net assets of the trust are not assets without titleholder. The ownership title corresponds to the fiduciary, according to the terms and conditions established at the moment in which the trust was settled". In some cases however, the fiduciary will not be considered the owner of

[47] Dávalos Mejía, 'Títulos y Operaciones de Crédito. Análisis teórico práctico de la Ley General de Títulos y Operaciones de Crédito y temas afines', at 561-562.
[48] *Idem.*
[49] For example, in case of bankruptcy of the fiduciary institution, the assets and/or rights will not be part of the bankruptcy estate since these are not part of the patrimony of the fiduciary.

those assets or rights, such is the case when the fiduciary only has management rights over certain assets.[50]

5. Parties

Three are the main parties to a Mexican trust: the settlor, the fiduciary institution, the beneficiary or beneficiaries and sometimes, a technical committee.

a) The settlor

The settlor is the main party of a trust; his presence is necessary in order for the trust to exist. By his declaration of intent, the first element to settle a trust is provided.

Both, individuals and entities may be settlors as long as they have the capacity to transfer the property or the legal ownership of the assets or rights subject matter of the trust and the legal capacity to enter into an agreement.[51]

In addition, according to the circumstances, judicial or administrative authorities may act as settlors when competent.[52] These authorities are understood to be competent when dealing with the guardship, conservation, administration, liquidation or distribution or sale that corresponds in a specific case.[53]

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[50] María Eugenia Retteg, 'The Mexican Fideicomiso: Theoretical and Practical Approach', (Geneva, 2009) at 26.
[51] Article 384 LGTOC.
[52] *Idem.*
[53] Dávalos Mejía, 'Títulos y Operaciones de Crédito. Análisis teórico práctico de la Ley General de Títulos y Operaciones de Crédito y temas afines', at 599.

Under Mexican law, the settlor can designate himself as beneficiary, *i.e.* he can be settlor and beneficiary simultaneously. When the settlor fails to designate a beneficiary, he should be considered as such.[54]

Also worth noting, a Mexican trust may have more than one settlor. For instance, when real estate held in co-ownership is being affected to a trust, there will be as many settlors as co-owners exist.[55]

b) The fiduciary institution

According to article 381 LGTOC the fiduciary is an essential party to the trust. Only fiduciary institutions expressly authorized by law can act as such, generally, banks.[56]

The Mexican trust is a regulated contract; in this sense, only state regulated institutions can act as fiduciaries, individuals are strictly prevented from doing so.[57] By state regulated the following is understood: entities that are subject to specific rules to which compliance is supervised by the federal government through a statutory system.[58]

[54] Ortiz Soltero, 'El Fideicomiso Mexicano', at 47.
[55] *Ibidem,*at 29.
[56] Article 385 LGTOC. See list below.
[57] Art. 385 LGTOC.
[58] The National Banking and Stock Commission (*Comisión Nacional Bancaria y de Valores*), except for insurance and guarantee institutions, which are subject to their own specific supervision body: the National Insurances and Guarantees Commission (*Comisión Nacional de Seguros y Fianzas*).

Only credit institutions *i.e.* banks that provide full banking and credit services and development banks, are allowed to act as fiduciaries.[59] Specific authorization from the CNBV[60] is required in order for a credit institution to operate as such[61] and this authorization covers the capacity to act as fiduciary to a Mexican trust.[62]

Entities allowed to act as fiduciaries and their restrictions are the following:

- Credit Institutions.
- Insurance Companies (article 34 IV LGISMS, article 118 f. XXIII LISF).
- Guarantee Institutions (article 16, XV, LFIF).
- Brokerage Firms (article 183, LMV).
- Financial corporations with limited object (SOFOLES) (article 87-Ñ, LGOAAC).
- General storage warehouses (article 395, LGTOC).
- Mexican National Bank (*Banco de México,* article7 f. XI LBM)
- National Savings and Financial Services Bank (*Banco de Ahorro Nacional y Servicios Financieros* article 7 f. VII and VIII LOBANSF)

Therefore, with the exception of guarantee trusts[63] (article 395 LGTOC) and specific transactions proper of each of the last five cited above entities (insurances, guarantees, stock market, general storage warehouses and SOFOLES), which are ultimately subject to the rules of article 85 bis LIC, entities

[59] Art. 46 f. XV LIC.
[60] *Comisión Nacional Bancaria y de Valores*.
[61] Art. 8 LIC.
[62] Retteg, 'The Mexican Fideicomiso: Theoretical and Practical Approach', at 31.
[63] Trusts created to be used as a payment instrument of non performed obligations of the credits granted by the fiduciary (acting as a credit institution) to the settlor (articles 382 paragraph 4 and 396 LTOC).

allowed to act as fiduciaries in any sort of transaction are banks, in the understanding that the LIC only identifies two types of banks (credit institutions): 1) development banks and 2) multipurpose banks. Thus, only the following are allowed to act as fiduciaries in any transaction (article 46, XV, LIC):

- Development banks that operate commercially as national credit entities (article 30, LIC).
- Multipurpose banks that operate commercially as *sociedades anónimas* (limited liability companies) (article 9, LIC).

Moreover, the fiduciary institution will be held liable for damages caused by its noncompliance with the terms and conditions of the trust or the law.[64]

Lastly, it is worth mentioning that the fiduciary's involvement is vital to enter into a trust; this conclusion can be drawn from article 385 LGTOC that reads as follows: "when as a result of resignation or removal the fiduciary institution concludes its services as such, a replacement fiduciary shall be designated. Where this replacement is not possible, the trust will be considered extinguished".

c) The beneficiary

As previously stated, the Mexican trust is created in order to fulfill a purpose in favor of a third person; this third person is the beneficiary.

[64] Art. 80 para 2 LIC.

What is truly relevant in regard to the beneficiary is ultimately whether he is enabled to enjoy the benefits of the trust. Pursuant to article 382 of the LGTOC any person with legal capacity to receive the benefits of the trust may be a beneficiary. This legal capacity is not just the one needed for the conclusion of contracts in general, but also, the one demanded by the trust's particular purpose.[65] This means that if a person with full legal capacity to enter into contracts is legally precluded from exercising the rights and benefits inherent to the trust, that person may not become a beneficiary.[66] For example, article 12 of the Code of Commerce provides that commercial brokers (*corredores públicos*), persons declared bankrupt and not recovered, and individuals convicted for financial crimes are barred from acting as beneficiaries in business trusts, since these persons are not allowed to get involved in any commercial activity.

Furthermore, the beneficiary has to exist, or at least be conceived, at the time of decease of the settlor in order for him to be able to receive the benefits of the trust.[67]

Also, unless it is a guarantee trust, the trust will be null and void if the fiduciary is designated as beneficiary (382, paragraph 5, LGTOC).

[65] Art. 382, first paragraph, LGTOC
[66] Dávalos Mejía, 'Títulos y Operaciones de Crédito. Análisis teórico práctico de la Ley General de Títulos y Operaciones de Crédito y temas afines', at 609.
[67] In Anglo-American trusts, this is not necessary, neither when the trust is created nor when the settlor dies. See Hudson, 'Equity and Trusts', at 109.

d) The Technical Committee

If the settlor so desires, he may establish a Technical Committee, whether when settling the trust or in a subsequent modification of it. The way in which this committee shall operate, its rights, the nomination of its members etc., have to be set out in the trust deed.[68]

Additionally, the settlor has to determine which decisions or actions are to be done by the fiduciary in accordance with the committee's instructions. When the fiduciary institution is acting as requested by the committee, as long as these instructions are lawful and in accordance with the trust's purpose, it will not be held liable for damages.[69]

6. Types

Although the law provides no classification of the different types of Mexican trusts, doctrine has provided some using different criteria such as personal elements, purposes, and structure, among others.[70] We will briefly address a classification that considers the purpose that the trust seeks to achieve.

a) Revocable trusts

[68] Art. 80 *in fine* LIC
[69] *Idem*.
[70] Rodolfo Batiza, 'Principios básicos del fideicomiso y la administración fiduciaria', (2nd ed.: Mexico: Porrúa, 1985) at 83.

When the settlor reserves the right to revoke or modify the agreement, the trust is considered to be revocable. This revocability is generally inherent when the act is gratuitous.[71] As a consequence, the settlor maintains the right to reacquire the assets given in trust to the fiduciary.[72]

b) Irrevocable trusts

In this type of trusts, the settlor cannot revoke or modify the trust since he did not reserve for himself the right to do so.

c) Investment trusts

The settlor transfers assets or rights to the fiduciary for it to invest them and then, along with the profit resulting from the investment, return them to the settlor or the beneficiary. Generally, in this type of trust, the settlor is also the beneficiary.

The life insurance trust and retirement plan (for employees) trust, among others, are generally structured as investment trusts.[73]

d) Management trusts

The fiduciary has the task to manage the assets given in trust in the terms and conditions established in the agreement. The ultimate purpose of this trust is to transfer all the administrative work related to the assets and have the settlor benefitting from them (by designating himself as beneficiary).

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[71] Villagordoa Lozano, 'Doctrina General del Fideicomiso', at 197.
[72] Retteg, 'The Mexican Fideicomiso: Theoretical and Practical Approach', at 41.
[73] Raúl Rodríguez Ruiz, 'El Fideicomiso. Elementos de Administración Fiduciaria', (Mexico: Ediciones Contables y Administrativas S.A., 1990) at 87.

e) Guarantee trusts

This trusts are settled for the specific purpose of creating a guarantee of payment for the fulfillment of an obligation in favor of the creditor (which is designated as beneficiary). This trust is ancillary to the main contract, subordinated to it, and is created to ensure the performance of the obligations acquired by the settlor under the underlying agreement.

"*These type of trusts do not grant a right* in rem*in favor of the beneficiary (creditor) but only the right to demand to the fiduciary to proceed with the sale or execution of the assets or rights transferred to a trust (execute the guarantee) in order to receive the payment of the loan in case the settlorfails to execute his obligation (art. 402 LTOC)."*[74]

This trust is expressly regulated by the LGTOC in articles 395 to 406; the law lists the institutions and corporations that are allowed to act as fiduciaries in these trusts. In this kind of trusts, fiduciaries are allowed to act as beneficiaries when the trust is created to provide a guarantee in benefit of the fiduciary (article 396 LGTOC).[75]

This trust is irrevocable until the beneficiary notifies the fiduciary that the settlor complied with the obligations provided by the main contract (art. 397

[74] Retteg, 'The Mexican Fideicomiso: Theoretical and Practical Approach', at 40.
[75] *Idem.*

LGTOC)[76]. Once this notification occurs, the beneficiary no longer has rights under the trust.

f) Trusts created by disposition of law

Referred to as Public trusts also, these trusts are created for the purpose of assisting the Executive branch of the government in the promotion and support of certain activities for the social and economic development of the country; its purpose is of public interest always.

The federal, local or municipal government or a semi-public entity (*paraestatal*) may be settlors to these trusts.[77]

g) Property transfer trusts

Settled for the purpose of transferring the ownership of the assets and or rights given in trust to the beneficiary once the prerequisites established by the settlor are met.[78]

h) Testamentary trusts

This type of trust is settled by a unilateral declaration of intent made by the settlor, and takes effect after his death. The fiduciary is given the task to manage the assets until the beneficiary or beneficiaries fulfill certain conditions, *e.g.* attaining a certain age.

[76] Ortiz Soltero, 'El Fideicomiso Mexicano', at 210.

[77] Article 47 *Ley de la Administración Pública Federal*.
[78] Villagordoa Lozano, 'Doctrina General del Fideicomiso' at 226.

The nature of this trust entails the obligation of stating it in the settlor's will.[79]

In order for this trusts to be legally constituted, the persons designated as beneficiaries must be alive or at least conceived at the time of the settlor's death (article 394 f. II LGTOC).

Also, this trust is revocable and becomes irrevocable after the death of the settlor.[80]

i) Prohibited trusts

Article 394 of the LGTOC sets forth the type of trusts that are prohibited as follows:

- Secret trusts

The purpose of the trust must be made perfectly clear; failing to do so will have the consequence of presuming that its purpose is secret and this would cause its nullity and voidability under the law.

- Successive trusts

The beneficiary has to be alive or at least conceived upon the death of the settlor in order for him to be able to receive the benefits of the trust. "*The law expressly prescribes that* trusts *where the benefit is given to several persons that should substitute each other successively upon the death of the previous*

[79] *Ibidem,* p. 241.

[80] Retteg, 'The Mexican Fideicomiso: Theoretical and Practical Approach', at 43.

beneficiary will be prohibited. The only exception to this principle is when the beneficiaries are alive or conceived at the moment of death of the settler."[81]

- Extended legal duration

A trust that is structured to benefit individuals or entities that are neither public nor charitable cannot have a period of duration longer than 50 years. An exception applies where the trust is settled to maintain scientific projects or artistic museums without a profitable purpose. In spite of the above, it is possible for the parties to provide for the renewal of all types trusts.[82]

[81] *Idem*.
[82] Article 394 II LGTOC.

II. MAIN SIMILARITIES AND DIFFERENCES WITH COMMON LAW TRUSTS

Mexican trusts hold a very similar structure to Anglo-American trusts since they in fact arose from the latter.

Despite the above, the Mexican trust distinguishes from the Anglo-American trust in some crucial points.

The main differences between these legal figures are the following:

- Unlike in Mexican trusts in which the rights of the beneficiaries are considered to be of a contractual nature, the beneficiaries' rights in Anglo-American trusts are deemed to arise from an equitable obligation.[83]
- Only institutions expressly authorized by law[84] to act as fiduciaries can be appointed as such in a Mexican trust. Such is not the case in Anglo-American trusts, in which any person, either an individual or a legal entity, can become trustee as long as it holds the capacity to hold property.[85]

[83] Anglo-American trusts come from a combination of both equity and common law elements. The latter recognizes the rights of property on the legal owner of the property only. Nevertheless, the beneficiaries have rights to or over the property held in trust, *i.e.* equitable ownership. Likewise, the trustee has an equitable duty to comply with his obligations. See James E. Penner, 'The Law of Trusts', (8th ed.: United Kingdom: Oxford University Press, 2012) at 14-15.
Following this idea, the settlor (the 'absolute owner' of the property) initially holds both legal title and an equitable interest over its property. When the settlor settles that property in trust, he transfers his legal title to the trustee (consequently, the trustee acquires all common law rights in the property) and an equitable interest to the beneficiaries (and thus, all equitable rights in the trust fund). See A. Hudson, 'Understanding Equity & Trusts', (4th ed.: United Kingdom: Routledge, 2013) at 17-18.
[84] See p. 9.
[85] Pettit, 'Equity and the Law of Trusts', at 370.

- A very clear restriction is imposed to the designation of beneficiaries in Mexican trusts: the beneficiary has to exist or at least be conceived at the time of decease of the settlor in order for him to be able to receive the benefits inherent to the trust.[86] This is not so in Anglo-American trusts. Beneficiaries are considered to be validly appointed as long as there is certainty in their identity. That is to say, beneficiaries need to be identifiable, and that sole requirement suffices.[87]
- Moreover, in Anglo-American trusts, it is possible for the same person to be trustee and beneficiary[88] or settlor and trustee at the same time.[89] It is even possible to be settlor, trustee and one of the beneficiaries simultaneously (as long as that person is not the sole beneficiary[90]).[91] In Mexican trusts, if the fiduciary is designated as beneficiary also, the trust is considered to be null and void, unless it is a guaranty trust.[92]

[86] In Mexican law, only persons with legal capacity to enjoy the benefits of the trust can be designated as beneficiaries. This capacity is deemed to be held upon conception. This conclusion is reached by means of art. 382 LGTOC in correlation with article 22 FCC.
[87] The decision of whether it is possible to identify the beneficiaries (certainty of objects) of a trust must be reached depending on the form of trust or power at hand. According to the nature of the power to be exercised, a test for certainty will be carried out. See Alastair Hudson, 'Equity and Trusts', (6th ed.: United Kingdom: Routledge-Cavendish, 2010) at 115.
[88] Retteg, 'The Mexican Fideicomiso: Theoretical and Practical Approach', at 19.
[89] Robert Pearce, John Stevens & Warren Barr, 'The Law of Trusts and Equitable Obligations', (5th ed.; United States: Oxford University Press, 2010) at 181-182.
[90] '*No trust can exist where the entire estate, both legal and equitable, invested in one person*.' See Pettit, 'Equity and the Law of Trusts', at 47.
[91] Hudson, 'Equity and Trusts', (6th ed.), at 75.
[92] Art. 396 LGTOC.

- Anglo-American trusts can be created without following a specific form in particular[93] or even without the agreement of the parties,[94] unlike Mexican trusts that are only valid if made deliberately and in writing.[95]

[93] Express trusts can be created in a rather informal manner. All that is needed is that the 'three certainties' are met: first, the intention of the settlor to benefit the beneficiaries by way of trust must be clear (it can be inferred); secondly, the identity of the property to be held in trust must be certain; and lastly, the beneficiaries must be identifiable. See Sarah Worthington, 'Equity', (2nd ed.; United States: Oxford University Press, 2006) at 67-69.
[94] Such is the case of resulting trusts and constructive trusts. See Pettit, 'Equity and the Law of Trusts' at 67.
[95] Art. 387 LGTOC.

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

Litigation, especially in Mexican courts, is not as effective as it should be. This non-effectiveness ultimately results in elevated costs for the parties.

A lot of elements take place in delaying the resolution of disputes in Mexican courts. First, Mexican courts are very frequently if not always overburdened and understaffed; as a consequence, supervision of the judges' performance is regularly done taking into account the number of resolutions issued without revising the substance of such resolutions. This inevitably results in legally poor decisions. Furthermore, as a consequence of the amount of disputes to be settled by the courts, the issuance of these resolutions takes quite some time. And after that resolution is reached, it is later subject to a number of money and time consuming appeals.

Moreover, litigation in Mexican courts follows a very formalistic approach in the conduct of the proceedings. This results in formalities often being given higher importance than the substance of the dispute.

Alongside the abovementioned critiques, another negative aspect of Mexican courts is that they are often perceived as corrupt or at least biased.

Disputes arising from trusts, considering their particularities, are quite complex. Proceedings conducted in a manner tailored to its specific demands are thus required. Litigation procedures in national courts are ill-suited for the

tailoring of procedures to the particular needs of parties and disputes while decision makers regularly lack the expertise needed in a dispute of a particular kind.[96]

In all of these respects, arbitration offers a simpler, more flexible and cost-efficient method for the settlement of disputes arising out of a trust.

1. Cost benefit and speediness

Arbitration provides a cheaper more cost-effective option than litigation.[97]

One of the main advantages of arbitration is that the procedure is held in substantially less time than litigation. This benefit is especially appealing to parties in disputes regarding trusts mainly because these disputes need not linger for years and months in litigation.[98]

The arbitral proceedings are put to an end by the issuance of an arbitral award, which is final and biding among the parties. This feature has a direct impact on the time that is invested in the resolution of a dispute simply because the final decision is not subject to any appeal mechanisms. Even if the award were to be subject to a judicial review, this analysis will be narrowly confined to issues of jurisdiction, fairness in the process and public policy.[99] Hence, although the initial cost is not likely to be less than that of proceedings in national courts,

[96] Gary B. Born, 'International Commercial Arbitration', 3 vols. (1; The Hague: Kluwer Law International, 2014) at 1.
[97] Gerardo J. Bosques-Hernández, 'Arbitration Clauses in Trusts. The U.S. Developments and a Comparative Perspective', (In Dret Revista para el Análisis del Derecho, issue 3, 2008) at 5. See also Strong, 'Arbitration of Trust Disputes: Two Bodies of Law Collide', at 1182.
[98] Stephen Wills Murphy, 'Enforceable Arbitration Clauses in Wills and Trusts: A Critique', (Ohio State Journal on Dispute Resolution, Vol. 26, Issue 4, 2011) at 635-636.
[99] Gary B. Born, 'International Arbitration and Practice',(The Netherlands: Kluwer Law International, 2012) at 13.

the parties save a great amount of time and money by banning themselves from appealing the arbitral award.[100]

Furthermore, as it was previously mentioned, Mexican courts are overburdened and understaffed. Arbitral tribunals do not depend on the courts' calendar or its personnel, thus, arbitration meetings are easily coordinated and the dispute is solved in a considerably faster fashion.[101]

Another feature of arbitration that has an impact on speediness and thus could be valued by parties to trusts is the continuity of role. As opposed to a state court, arbitral tribunals are appointed to handle one specific case from beginning to end. Certain benefits are generated as a consequence: the tribunal gets to know the parties and their advisors. But most importantly, as the case develops through the documents provided by the parties, the pleadings, the taking of evidence, etc., the tribunal is allowed to do a thorough analysis of the case and get a proper understanding of it. As a result, the arbitral tribunal is fully qualified to issue a sensible award that is suitable for the dispute at hand. This should speed the process and the settlement of the dispute.[102]

Parties can appoint arbitrators that are qualified for the dispute at hand, and if an arbitral tribunal is experienced enough, it should be able to grasp the decisive issues of fact and law and adapt the procedure in order to ensure that

[100] Alan Redfern and Martin Hunter, 'Redfern and Hunter on International Arbitration', (5th ed.: United States: Oxford University Press, 2009) at 34.
[101] Bosques-Hernandez, 'Arbitration Clauses in Trusts. The U.S. Developments and a Comparative Perspective', at 5.
[102] Redfern and Hunter, 'Redfern and Hunter on International Arbitration', at 33.

such issues are properly dealt with. This should save the parties both time and money.[103]

2. Confidentiality

Arbitration offers a private and confidential means of resolving legal controversies.[104]

Although parties to all kinds of contracts appreciate the privacy and confidentiality that surrounds the arbitral proceedings, parties to trusts could particularly value this feature.

The above holds true since, on the one hand, public forms of dispute resolution can damage not only the fiduciary's own personal reputation but also the reputation of the trust industry as a whole.[105] On the other hand, settlors and beneficiaries would probably appreciate the dispute being kept private since settlors in both testamentary and commercial trusts often enter into a trust precisely because it provides more privacy than any other contractual alternative.[106]

Furthermore, confidentiality could be a powerful attraction to parties to testamentary trusts since issues that could be embarrassing to the parties are

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[103] *Ibidem*, at 32.
[104] Julian D. Lew, Loukas A. Mistelis & Stephan Michael Kröll, 'Comparative International Arbitration', (The Netherlands: Kluwer Law International, 2003) at 1-15. See also Joseph F. Morrisey and Jack M. Graves, 'International Sales Law and Arbitration', (The Netherlands: Kluwer Law International, 2008) at 314.

[105] Strong, 'Arbitration of Trust Disputes: Two Bodies of Law Collide', at 1183.
[106] *Ibidem*, at 1182-1183.

discussed during the probate process. In public dispute resolution methods, all this information would become part of the public record.[107] Likewise, parties to commercial trusts may want to protect some information that comes up during the proceedings such as trade secrets, competitive practices or any delicate detail that could be subject to adverse publicity.[108]

3. Flexibility

The Mexican ordinary judicial system is considered to be extremely formal. Preconceived rules for conducting proceedings for the settlement of disputes in general are usually inadequate when it comes to meeting the specific demands of a complex dispute, especially if the judicial system allocates as much importance to formal requirements as Mexican procedural law does.

An arbitral procedure can be tailored to meet the specific requirements of a dispute to the extent necessary for the parties.[109] Parties can select the rules under which the procedure will be carried out, determine which law will be applicable to the substantive issues of the dispute, the arbitrators to be appointed, among other things.[110]

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[107] Bosques-Hernandez, 'Arbitration Clauses in Trusts. The U.S. Developments and a Comparative Perspective', at 5.
[108] Redfern and Hunter, 'Redfern and Hunter on International Arbitration', at 32. See also Margaret L. Mosses, 'The Principles and Practice of International Commercial Arbitration', (United States: Cambridge University Press, 2008), at 4.
[109] Nicole Conrad, Peter Münch& Jonathan Black-Branch (eds.), 'International Commercial Arbitration', (Switzerland: Helbing Lichtenhahn, 2013) at 4.
[110] Born, 'International Arbitration: Law and Practice', at 14.

This benefit can be particularly valued by parties to trusts since one of the reasons why parties usually choose trusts as the contractual scheme in their transactions is due to their structural flexibility. Following that line of thought, parties would be expected to prefer flexibility in their dispute settlement mechanism as well.[111]

4. Neutrality and Quality of decisions

In addition, although arbitration rules usually bar the parties from appealing the final award, the decision in an arbitration is generally rendered by experienced and qualified panelists rather than jurors who may even have an anti-business bias.[112]Considering that businessman prefer settling the dispute instead of exposing themselves to the uncertainty that a trial entails, a significant advantage of this alternative dispute resolution method that parties to trusts could appreciate is that arbitrators are presumed to be more predictable and less prone to extremes.[113]

As for neutrality, in arbitration, parties have the freedom to avoid being limited to any conventional proceedings that may favor one side over the other and to select a neutral an unbiased forum with a neutral arbitrator or

[111] Strong, 'Arbitration of Trust Disputes: Two Bodies of Law Collide', at 1183.
[112] Morrisey & Graves, 'International Sales Law and Arbitration', at 315. See also Thomas E. Carbonneau, 'The Law and Practice of Arbitration', (2nd ed.: United States: Juris Publishing, 2007) at 2.
[113]Grant Henessian& Lawrence W. Newman (eds.), 'International Arbitration Checklists', (2nd ed.: United States: Juris Net LLC, 2009) at 210.

arbitrators.[114] This feature has a special added value in the context of disputes against the state in which litigation of claims before a state court is particularly unattractive.[115]

[114] Morrisey & Graves, 'International Sales Law and Arbitration', at 312.
[115] Henessian & Newman (eds.), 'International Arbitration Checklists', at 210.

IV. ENFORCEMENT OF ARBITRATION AGREEMENTS IN A MEXICAN TRUST

Arbitration agreements contained in Mexican trusts are presumed enforceable in accordance with the New York Convention and modern arbitration laws. One of the main objectives of the New York Convention and modern arbitration laws, including Mexico arbitration law,[116] is to make arbitration agreements readily enforceable.[117] Article II(1) New York Convention provides that Contracting States shall recognize an arbitration agreement made between parties. Article 8 of the UNCITRAL Model Law also provides for the enforcement of arbitration agreements, regardless of the arbitral seat. The same principle is embodied in article 1424 of Mexico Code of Commerce ("Mexico CCom").

The presumption of enforceability of an arbitration agreement in a Mexican trust deed shall be the rule. Exceptions to this rule are limited by the New York Convention and modern arbitration laws. Possible exceptions only relate to issues of form validity (*e.g.* in writing requirement), substantive validity (lack of intent or impaired intent), non-arbitrability of the subject matter and lack of legal capacity by one of the parties.[118] All these exceptions require strong evidence in

[116] Mexico arbitration law is found in Arts. 1415-1480 of the Mexico Code of Commerce. Its provisions are largely if not completely based on the UNCITRAL Model Law on International Commercial Arbitration of 1985 ("UNCITRAL Model Law").
[117] Gary B. Born, 'International Arbitration and Forum Selection Agreements: Drafting and Enforcing' (Walter Kluwer Law & Business, 2013) at 145, 47.
[118] Cf. Arts. 1415, 1423, 1424, 1457 (I) (a), (II) and 1462 (I) (a), (II) Mexico CCom.

order to make an arbitration agreement unenforceable.[119] Accordingly, State courts and arbitral tribunals will always enforce an arbitration agreement in a Mexican trust by referring the parties to arbitration unless one party furnishes evidence that the arbitration agreement relied upon is null and void, inoperative or incapable of being performed.[120] The above may include legal evidence that the subject matter of the dispute is not capable of settlement by arbitration.[121]

The exception of lack of form validity may scarcely arise in the context of Mexican trust disputes. Under Mexican law, a trust deed shall be made in writing.[122] An arbitration clause contained therein will therefore also fulfill the in writing requirement established in Article I(1) of the New York Convention and Article 1423 Mexico CCom.

With regard to issues of substantive validity, *i.e.* whether a party's intent to arbitrate exists and is free of mistake, fraud, unconscionability, and duress, etc., these will be treated by State courts and arbitral tribunals under the general contract provisions applicable.[123] The separability principle of the arbitration agreement in modern arbitration laws[124] (Art. 1432 Mexico CCom) will possibly

[119] Icca, 'Icca's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges' (The Hague: International Council for Commercial Arbitration, 2011) at 45.
[120] Art. II(3) of the New York Convention; Art. 8(1) UNCITRAL Model Law; Art.1424 Mexico CCom; Ibidem, at 38 ff.
[121] Art. V(2)(a) New York Convention; Arts. 1415, 1457 (I) (a), (II) and 1462 (I) (a), (II) Mexico CCom.
[122] Art. 387 Mexico LGTOC.
[123] Born, 'International Arbitration and Forum Selection Agreements: Drafting and Enforcing' at 148.
[124] Ibidem, at 146.: "in many nations, including all major trading states, an arbitration agreement is presumptively 'separable' from the underlying contract in which it appears. National arbitration legislation often expressly so provides (cf. UNCITRAL Model Law Art. 16; Swiss Law on Private

trigger the application of a law to the arbitration agreement other than the law governing the underlying Mexican trust between the parties. Depending on the approach taken at the seat of arbitration, *i.e.* the *lex arbitri*, the question of which law applies to the substantive validity of the arbitration agreement could be easy or too complex to answer. In arbitrations with seat in France, case law provides that the existence and effectiveness of an arbitration agreement is to be assessed on the basis of the parties' common intention alone, there being no need to refer to any national law.[125] Under other arbitration laws, which do not contain a conflict of law rule on the applicable law to the arbitration agreement *per se*, for instance Mexico arbitration law, the separability principle can give rise to more complex decisions on the law that is relevant to determine the substantive validity of an arbitration agreement contained in a Mexican trust deed. A uniform solution to this issue shall nevertheless be found in the New York Convention and in other pro-enforcement arbitration laws. Article V(1)(a) New York Convention[126] and Article 1462(I)(a) Mexico CCom,[127] both provide

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International Law Art. 178(3); U.S. Federal Arbitration Act §2; German Civil Procedure Act Art. 1040(1).

[125] A determination of the law applicable to the arbitration agreements is not required under the French law on arbitration, in the absence of an express choice of law to govern the arbitration agreements. Cf. *Municipalité de Khoms El Mergeb v. Soc. Dalico*, 20 December 1993, 1994 *Revue de l'Arbitrage*, at 116: "By virtue of a substantive rule of international arbitration, the arbitration agreement is legally independent of the main contract containing or referring to it, and the existence and effectiveness of the arbitration agreement are to be assessed, subject to mandatory rules of French law and international public policy, on the basis of the parties' common intention, there being no need to refer to any national law". Identifying the governing law of the arbitration agreement thus becomes unnecessary. All that matters is that the parties consent to refer disputes to arbitration.

[126] Art. V(1)(a) New York Convention: "*Recognition and enforcement of the award may be refused […] [where] the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made*".

[127] Art. 1462(I)(a) Mexico CCom which is modeled by Art. 36(1)(a) UNCITRAL Model Law states that :"(1*) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only: […] [where] the said agreement is not valid under the law to*

that, absent any specific choice of law by the parties to that effect, the [substantive] validity of an arbitration agreement is determined by the law of the country where the award is made. In other words, by the contract law at the place of arbitration.[128] In section V below, we address some questions regarding proper formal and substantive intent to arbitrate disputes arising out of Mexican trusts.

The non-arbitrability exception refers to the parties' restriction to submit a dispute to arbitration.[129] Virtually all countries' laws exclude certain categories of matters from resolution by arbitration.[130] Each country has specific policy reasons and criteria to remove a class of claims from the realm of arbitration.[131] A matter that is arbitrable under the law of one country may not be capable of resolution by arbitration under another country's law. For example, some arbitration laws deem arbitrable only disputes over rights the parties are free to dispose of.[132] Other more liberal arbitration laws deem arbitrable all disputes involving claims of a financial nature.[133] The arbitration laws based on the UNCITRAL Model Law do

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which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made".

[128] Pursuant to Art. 31(3) of the ICC Rules 2012 the award shall be deemed to be made at the place of the arbitration.

[129] Also called "objective arbitrability" as opposed to "subjective arbitrability" which regards whether a party by its own nature is restricted to enter into arbitration agreements because of a policy consideration to protect that party before State courts. Cf. Loukas A. Mistelis, 'Arbitrability International and Comparative Perspectives', in Loukas A. Mistelis and Stavros L. Brekoulakis (eds.), (The Hague: Kluwer Law International, 2009) at 6.

[130] Born, 'International Arbitration and Forum Selection Agreements: Drafting and Enforcing' at 148.

[131] Mistelis, 'Arbitrability International and Comparative Perspectives', at 4.: "Certain disputes may involve such sensitive public policy issues that it is felt that they should only be dealt with by the judicial authority of state courts. An obvious example is criminal law which is generally the domain of the national courts: it is undisputed that the sanctioning of criminal activity is in the power of the judiciary".

[132] Art. 1676(1) Belgium Judicial Code.

[133] Art. 177 (1) Swiss FPILA; Art 1030(1) German CCP.

not usually set forth which disputes are arbitrable.[134] Instead, UNCITRAL based laws, like Mexico arbitration law, take the approach of defining the scope of arbitrability through exclusion of certain matters by means of statutory provisions that expressly give exclusive jurisdiction to specific State courts.[135] The determination of the law governing the arbitrability of disputes can thus be an important strategic question and not an easy one. In practice, State courts have relied on the conflict of laws rule in Article V(2)(a) New York Convention, or its equivalent domestic arbitration law,[136] in order to apply their own national law to determine the arbitrability of the dispute at a pre-award (jurisdictional) stage or at a post award stage (in a setting aside claim or enforcement claim).[137] Arbitral tribunals similarly tend to apply the law at the place of arbitration in order to determine the arbitrability of the subject matter (*lex loci arbitri* and mandatory rules of law).[138] This trend may be influenced not only by the fact that the applicable norms and standards of the seat of arbitration are easy to identify but also because of the arbitrators' natural wish to shield their awards against setting aside claims at the place of arbitration. In section VI, we will address the arbitrability of disputes arising out of Mexican trusts.

The exception of lack of legal capacity of one of the parties to the arbitration agreement is equally relevant in the context of trust disputes. Article V(1)(a) of

[134] Art. 1(5) UNCITRAL Model Law provides that it does not intent to affect other laws of the adopting State that preclude certain disputes being submitted to arbitration.
[135] Art. 1415 Mexico CCom.

[136] Arts. 34(2)(b)(i) and 36(1)(b)(i) UNCITRAL Model Law; Arts.1457(II) and 1462(II) Mexico CCom.
[137] Mistelis, 'Arbitrability International and Comparative Perspectives', at 12, 13.
[138] Ibid., at 13.

the New York Convention provides that the recognition and enforcement of an award may be denied where the parties to the arbitration agreement were, under the law applicable to them, under some incapacity. However, the New York Convention does not provide what law does govern the question of capacity,[139] or power[140] to enter into an arbitration agreement. Under the traditional conflict of laws method, the law governing the legal capacity is determined differently depending on whether it relates to natural persons or legal entities. With regard to natural persons, traditional choice of law rules of France or Germany would deem applicable the law of their nationality.[141] On the contrary, some countries' conflict of laws rules, in particular in common law jurisdictions but also in Mexico[142], favor the application of the law of the country where the natural person concerned has his/her domicile as the connecting factor.[143]

With respect to capacity of legal entities, the approach is not uniform in domestic laws either. The conflict of laws rules of some jurisdictions, for example France, would designate the application of the law of the country where the legal entity has its headquarters (*siege social*). Conversely, under other legal systems,

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[139] P. Fouchard et al., 'Fouchard, Gaillard, Goldman on International Commercial Arbitration' (Kluwer Law International, 1999) at 242.

[140] Fouchard et al., correctly points out the confusion regarding capacity and power. Capacity relates to the natural or legal person's legal possibility under the law to act on its own name and on its own account. Power relates to the legal possibility to act on behalf of and for the interest of a legal or natural person. Cf. Ibid.

[141] Ibid., at 244.

[142] Art. 13 (II) Mexico Federal Civil Code (FCC).

[143] Fouchard et al., 'Fouchard, Gaillard, Goldman on International Commercial Arbitration' at 244.

including Mexico's,[144] the capacity of legal entities is assessed in accordance with the law of incorporation or registry.[145]

The validity and scope of powers of representation are governed by a different law. Absent an express choice of law by the principal and agent, an agency relationship shall be governed by the law where the authorization was granted, [146] or where the principal has its headquarters [147] or where the authorization ought to be performed,[148] depending on the relevant conflict of laws rule applied.

In both issues, of capacity and power of representation, arbitrators face the challenge of deciding which conflict of laws rule will they apply. As arbitrators have no forum – thus are not bound by the conflict of laws rules of State courts at the seat or any possible place of enforcement – arbitrators enjoy flexibility to select the conflict of laws rules they deem appropriate. Some scholars see risks in resorting to the conflict of laws method since, in view of the different approaches above described, it is impossible to ensure a uniform approach.[149] In practice, arbitrators will apply either the conflict of laws rule that they are most

[144] Art. 2736 Mexico FCC designates the law of incorporation to determine the existence, legal capacity, object and functioning of legal entities.
[145] Fouchard et al., 'Fouchard, Gaillard, Goldman on International Commercial Arbitration', at 245.
[146] 1975 Inter-American Convention on the legal regime of powers of attorney.
[147] Art. 6 1978 Hague Convention; Art.1837 (1) French Civil Code.
[148] Art. 13 (V) Mexico FCC (however, pursuant to Art. 13 (IV) Mexico FCC issues of form validity of a power of representation may be determined by the law of the place where the power was granted); Portugal Art. 39 CC; Spain Art. 21 CC; Paraguay Supreme Court, Judgment 224, 18 May 2001, Diego Pizziolo v. Nereo Tiso Y Otros.
[149] Fouchard et al., 'Fouchard, Gaillard, Goldman on International Commercial Arbitration' at 244, 46.

familiar with or the forum judge conflict of laws rules of the place of arbitration or enforcement because of the natural tendency to render a valid and enforceable award. However, as none of these approaches may lead to a uniform and satisfactory solution, some scholars, in particular from France, have argued for the application of substantive law concepts considered essential in an international context instead of performing a complicated conflict of laws exercise.[150] For example, the rule that "any natural person carrying on an economic activity on a professional basis is at least presumed to have capacity to enter into arbitration agreements relating to that activity".[151] In section VII below, we will address issues of capacity and representation of natural and legal persons usually involved in Mexican trust disputes.

[150] *Ibidem*, at 248.
[151] Idem.

V. CONSENT TO ARBITRATE

As stated above, most countries' arbitration laws will give effect to arbitration proceedings provided there is an agreement by the parties to that effect (section V above). Therefore, the enforcement of an arbitration agreement over one party depends upon, first and foremost, the existence of that party's intent, or otherwise called 'consent', to arbitrate. In most legal systems, agreements or contracts are the product of a process of offers and acceptances.[152] For instance, a buyer makes an offer to enter into a sales contract whereby it undertakes to buy a number of goods for a given price and to settle any dispute arising thereof in arbitration. A seller accepts the terms of such an offer creating a contract with the buyer. The parties may have achieved a profitable bargain out of it. In addition, their arbitration agreement has the effect of removing their sales contract from the purview of State courts. A State court seized to decide a dispute over that sales contract shall, in principle, refer the parties to arbitration because an arbitration agreement "operates" over those parties.[153]

In the context of Anglo-American trust law, the issue arises as to whether the act of creating a trust, which may contain an arbitration provision in the trust deed, is an agreement to arbitrate as required by the New York Convention and

[152] Ingeborg Schwenzer, Pascal Hachem, and Christopher Kee, 'Global Sales and Contract Law' (London: OUP, 2011) at 130.
[153] Art. II(3) New York Convention.

by national arbitration laws.[154] The issue is of significance because under Anglo-American law, trusts are not contracts.[155] Indeed, the unilateral transfer of property and declaration of trust by the settlor alone creates a trust.[156] There is no need of an offer and an acceptance for a trust to exist.[157] Accordingly, the legal relationship between the settlor, the trustee and the beneficiaries is not strictly contractual in nature.[158] In spite of the fact that the trustee may be paid for its services or even sign the trust deed, the trustee's fee will arise out of a collateral contract that does not form part of the trust.[159]

It follows from the above that arbitration provisions contained in a trust deed may not constitute an agreement between the parties covered by the trust relationship either. Indeed, State courts in the United States have considered that the unilateral declaration by the settlor *per se* could hardly be construed as an expression of intent by the trustees or beneficiaries to arbitrate any disputes arising thereof.[160] In Schoneberger v. Oelze decided by Arizona court of appeals

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[154] Koch, 'A Tale of Two Cities! - Arbitrating Trust Disputes and the Icc's Arbitration Clause for Trust Disputes', at 189.

[155]Michael P. Bruyere and Meghan D. Marino, 'Mandatory Arbitration Provisions: A Powerful Tool to Prevent Contentious and Costly Trust Litigation, but Are They Enforceable?', *ABA Real Property, Probate and Trust Journal* 42/2 (2007), 14 at 357.;S.I. Strong, 'Empowering Settlors: How Proper Language Can Increase the Enforceability of a Mandatory Arbitration Provision in a Trust', *Real Property, Trust & Estate Law Journal,* 47/3 (2012a) at 291.

[156] Koch, 'A Tale of Two Cities! - Arbitrating Trust Disputes and the Icc's Arbitration Clause for Trust Disputes', at 189.

[157]Strong, 'Arbitration of Trust Disputes: Two Bodies of Law Collide', at 1174.

[158] Koch, 'A Tale of Two Cities! - Arbitrating Trust Disputes and the Icc's Arbitration Clause for Trust Disputes', at 189.

[159] Hudson, 'Equity & Trusts', (3rd ed.) at 42.

[160] Diaz v. Bukey (2011) 195 Cal.App.4th 315 [125 Cal.Rptr.3d 610, 612], as modified on denial of reh'g (June 8, 2011)review granted and opinion superseded, (Cal. 2011) 129 Cal.Rptr.3d 324 [257 P.3d 1129]: "Applicant contends the trial court erred by denying her motion to compel arbitration under the California Arbitration Act, Code of Civil Procedure section 1280 et seq., because the Trust contains an arbitration provision and the Trust is a contract. We disagree. The applicability of the California Arbitration Act requires the existence of a contract." Discussing the

in 2004, the trust contained a provision stating that “any dispute arising in connection with this Trust, including disputes between Trustee and any beneficiary or among the Co-trustees shall be settled by the negotiation, mediation and arbitration”.[161] When the beneficiaries brought claims against the trustees of two related family trusts the latter moved for arbitration on the basis of the above mentioned arbitration agreement. In response, the beneficiaries contended that the arbitration provisions were unenforceable because trusts are not contractual agreements and that as non signatories of the trust deeds they had never agreed to arbitrate their claims against the trustees. In deciding in favor of the beneficiaries, the Arizona Court of Appeals explained the nature of Anglo-American trusts in the following terms:

> “The legal distinctions between a trust and a contract are at the heart of why [the beneficiaries] cannot be required to arbitrate their claims against the defendants. Arbitration rests on an exchange of promises... In contrast, a trust does not rest on an exchange of promises. A trust merely requires a trust or to transfer a beneficial interest in property to a trustee who, under the trust instrument, relevant statutes and common law, holds that interest for the beneficiary. Id. at 530, 990 P.2d at 1089. The ‘undertaking’ between trust or and trustee ‘does not stem from the premise of mutual assent

statutory and case law restrictions to arbitration clauses in trust, Cf. Murphy, 'Enforceable Arbitration Clauses in Wills and Trusts: A Critique', at 639-42.

[161] Schoneberger v. Oelze (Ariz. Ct. App. 2004) 208 Ariz. 591, 593 [96 P.3d 1078, 1080].

to an exchange of promises' and 'is not properly characterized as contractual.'"[162]

In spite of the above, common law scholars and courts have recently advanced different theories in order to conclude that arbitration provisions in trust deeds are binding agreements between the parties covered by the trust relationship.[163] In *Rachal v. Reitz*[164] the Supreme Court of Texas reversed an early decision by its court of appeals[165] concluding that an arbitration provision in a trust deed could not be enforced under the Texas Arbitration Act (TAA) because a binding arbitration provision must be the product of an enforceable contract and a contract does not exist in the trust context, in part because there is no consideration and in part because the trust beneficiaries have not consented to such a provision.[166] The Supreme Court of Texas held that the

[162] Schoneberger v. Oelze (Ariz. Ct. App. 2004) 208 Ariz. 591, 596 [96 P.3d 1078, 1083]; cf. Commenting this case Bruyere and Marino, 'Mandatory Arbitration Provisions: A Powerful Tool to Prevent Contentious and Costly Trust Litigation, but Are They Enforceable?', at 358-60.;Bosques-Hernández, 'Arbitration Clauses in Trusts: The U.S. Developments and a Comparative Perspective', at 16.

[163] Bruyere and Marino, 'Mandatory Arbitration Provisions: A Powerful Tool to Prevent Contentious and Costly Trust Litigation, but Are They Enforceable?', at 361, 62.: submitting that the distinction between contract and trusts does no longer make sense in U.S. law. The distinction was due in large part to the works of Austin W. Scott who published an Art. in Columbia Law Review in 1917 on the inability of contract law to enforce the trust terms because English contract law did not recognize a third-party beneficiary contract, a recognition essential for enforcing trust agreements. However, this has changed in modern U.S. contract law where agreements for the benefit of a third party are now enforceable. Murphy, 'Enforceable Arbitration Clauses in Wills and Trusts: A Critique', at 645-61.: addressing the theoretical shortcoming of the current characterization of trust as something else than a contract. Anticipating the 'benefit theory' that would later on be applied in Rachal v. Reitz by the Supreme Court of Texas who gave effect to an arbitration agreement in a trust deed. Addressing the Donor's 'Intent Theory' as one of the means to enforce arbitration agreements, though, admitting that only few jurisdictions give unlimited effect to a donor's intent. In the same line Bosques-Hernández, 'Arbitration Clauses in Trusts: The U.S. Developments and a Comparative Perspective', at 8-12.

[164] Rachal v. Reitz (Tex. 2013) 403 S.W.3d 840, reh'g denied (Aug. 23, 2013).

[165] Rachal v. Reitz (Tex. App. 2011) 347 S.W.3d 305 rev'd, (Tex. 2013) 403 S.W.3d 840

[166] See commenting the background and Texas Supreme Court decision in Rachel v. Reitz, Nancy E. Delaney, Jonathan Byer, and Michael S. Schwartz, 'Rachal V. Reitz and the Evolution

intent of the legislature in the Texas Arbitration Act was to enforce arbitration provisions in agreements not only within a contract.[167] In Diaz v. Bukey,[168] the Supreme Court of California instructed the court of appeal to vacate its decision to refuse the enforcement of an arbitration provision in a trust deed on grounds of lack of a written contract and to reconsider the cause in light of Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC.[169] In addition, new legislation in some States of the US has been recently enacted in order to address this issue. In fact, the decision of the Arizona Court of Appeals in Schoneberger v. Oelze[170] was superseded by State legislation providing that "[a] trust instrument may provide mandatory, exclusive and reasonable procedures to resolve issues between the trustee and interested persons or among interested persons with regard to the administration or distribution of the trust."[171] The

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of the Enforceability of Arbitration Clauses in Estate Planning Documents', *Probate & Property,* 27/6 (2013), 6 at 12. Also Christopher S. Moore, 'Texas Enforces Arbitration Clause in Trust Agreement', *Alternative Dispute Resolution (serial online),* 17/3 (2013), 3 at 21, 22.;Steven Mignogna, 'Increasing Enforceability of Mandatory Arbitration Clauses in Wills and Trusts', *New Jersey Law Journal,* (2013).

[167] Rachal v. Reitz (Tex. 2013) 403 S.W.3d 840, reh'g denied (Aug. 23, 2013). Cf. commenting this reasoning Moore, 'Texas Enforces Arbitration Clause in Trust Agreement', at 22, 23.;Mignogna, 'Increasing Enforceability of Mandatory Arbitration Clauses in Wills and Trusts' ; Delaney, Byer, and Schwartz, 'Rachal V. Reitz and the Evolution of the Enforceability of Arbitration Clauses in Estate Planning Documents', at 13, 14.

[168] (Cal. 2012) 148 Cal.Rptr.3d 495 [287 P.3d 67].

[169](2012) 55 Cal.4th 223, 145 Cal.Rptr.3d 514, 282 P.3d 1217. In this case the Supreme Court of California Arbitration provision in condominium's recorded covenants, conditions and restrictions, which required arbitration of construction disputes, was not a surprise, for purposes of unconscionability, where provision appeared in a separate article under a bold, capitalized, and underlined caption, provision referring to Federal Arbitration Act (FAA) applicability and provision describing the waivers of jury trial and right to appeal were set forth in separate subsections, with the latter appearing in bold and capital letters, and recitals stated, in capital letters, that the relevant provision of the declaration "refers to mandatory procedures for the resolution of construction defect disputes, including the waiver of the right to a jury trial for such disputes".

[170] Ariz. Ct. App. 2004. 208 Ariz. 591, 593 [96 P.3d 1078, 1080]

[171] Ariz. Rev. Stat. Ann. § 14-10205.

States of Florida and Hawaii have also adopted specific legislation expressly recognizing the enforceability of arbitration clauses in trusts.[172]

Despite the above doctrines and recent legislation of few States endorsing the enforcement of arbitration provisions in trust deeds, there is still some jurisprudential uncertainty on the issue in many common law jurisdictions.[173] Proponents of arbitration advise to overcome such theoretical difficulties by carefully drafting provisions that create contractual obligations in a trust.[174] Appropriate wording may read "*a settlor on behalf of himself and the beneficiaries deriving their interests through him, expressly contracts in the trust instrument with the trustee… that in consideration of undertaking the office of trustee… any breach of trust claim against the trustees shall be referred to arbitration*".[175]

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

[172] Bosques-Hernández, 'Arbitration Clauses in Trusts: The U.S. Developments and a Comparative Perspective', at 18, 19; Murphy, 'Enforceable Arbitration Clauses in Wills and Trusts: A Critique', at 665-69.
[173] Delaney, Byer, and Schwartz, 'Rachal V. Reitz and the Evolution of the Enforceability of Arbitration Clauses in Estate Planning Documents', at 14-16; Murphy, 'Enforceable Arbitration Clauses in Wills and Trusts: A Critique', at 639-34.
[174] Strong, 'Empowering Settlors: How Proper Language Can Increase the Enforceability of a Mandatory Arbitration Provision in a Trust', at 276, 304, 11; Koch, 'A Tale of Two Cities! - Arbitrating Trust Disputes and the Icc's Arbitration Clause for Trust Disputes', at 190; Delaney, Byer, and Schwartz, 'Rachal V. Reitz and the Evolution of the Enforceability of Arbitration Clauses in Estate Planning Documents', at 16; Tina Wüstemann, 'Arbitration of Trust Disputes', in Christoph Müller (ed.), *New Developments in International Commercial Arbitration 2007* (Basel: Schulthess, 2007) at 45.
[175] Strong, 'Arbitration of Trust Disputes: Two Bodies of Law Collide', at 1179, 80.

arbitration agreements in trust deeds and the need to shield the arbitration proceedings against lack of intent challenges and other due process issues involving the parties to a trust relationship.[176]

However, not every jurisdiction experiences this type of 'collision of bodies of law' or 'tale of two cities'; to take the expressions used by Strong[177] or Koch[178] respectively to describe the apparent tension between the law of arbitration and the law of trusts in common law jurisdictions. Indeed, many jurisdictions, in particular civil law countries that have their own domestic version of trusts, regard this legal institution as contractual in nature.[179] As mentioned above, the Mexican trust is a contract (see section II subsection 2 above). In this regard, the

[176] The ICC Clause alone reads: "All disputes arising out of or in connection with the trust created hereunder shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed by the ICC International Court of Arbitration (the 'Court'), in accordance with the said Rules. The settlor hereby agrees to the provisions of this arbitration clause and the trustees, any protector and their successors in office, by accepting to act under the trust, also agree or shall be deemed to have agreed to the provisions of this arbitration clause. Accordingly, they all agree to settle all disputes arising out of or in connection with the trust in accordance with this arbitration clause.
As a condition for claiming, being entitled to or receiving any benefit, interest or right under the trust, any person shall be bound by the provisions of this arbitration clause and shall be deemed to have agreed to settle all disputes arising out of or in connection with the trust in accordance with this arbitration clause. If, at any time, any person requests to participate in arbitral proceedings already pending under the present arbitration clause, or if a party to arbitral proceedings pending under this arbitration clause desires to cause any person to participate in the arbitration, the requesting party shall present a request for joinder to the Court setting forth the reasons for the request. It is hereby agreed that, if the Court is prima facie satisfied that a basis for joinder may exist, any decision as to joinder shall be taken by the Arbitral Tribunal itself. When taking a decision on the joinder, the Arbitral Tribunal shall take into account all relevant circumstances, including, but not limited to, the provisions of the trust and the stage of the proceedings. It is further agreed that the Court may reject the request for joinder if it is not so satisfied, in which case there shall be no joinder. In case of a joinder after the signature or approval of the Terms of Reference, an amendment to the same will be made either through signature by the parties and the Arbitral Tribunal or through approval by the Court, pursuant to Article 18 of the ICC Rules of Arbitration. It is agreed that, in such a case, the Court may take whatever measures that it deems appropriate with respect to the advance on costs for arbitration."
[177] Strong, 'Arbitration of Trust Disputes: Two Bodies of Law Collide'.
[178] Koch, 'A Tale of Two Cities! - Arbitrating Trust Disputes and the Icc's Arbitration Clause for Trust Disputes'.
[179] Strong, 'Arbitration of Trust Disputes: Two Bodies of Law Collide', at 1180.

enforcement of arbitration provisions in Mexican trusts shall not encounter the same type of challenge. As further addressed below, mutual intent to arbitrate will generally exist between the settlor of a Mexican trust and the designated trustees pursuant to Mexican arbitration law and most other arbitration laws (see 1 below). In addition, intent to arbitrate will also exist between the trustee and non-signatory beneficiaries of a Mexican trust (see 2 below).

1. Intent to arbitrate by Settlor and the Trustee(s) in a Mexican Trust

Typically, the settlor of a Mexican trust will express his intent to transfer specific assets on trust to be held or managed by a designated trustee (an authorized financial institution in Mexico)[180] for clearly identifiable beneficiaries pursuant to the terms established by the settlor. These trust terms will generally include dispute resolution and applicable law provisions. Arbitration may be chosen by the settlor as the means to resolve any dispute that may arise out of the formation, interpretation, performance and termination of the trust he created. In practice, the designated trustee will participate in the negotiation and entering into of the trust. The trustee's intent to be bound by the terms of the trust will usually be recorded in the trust deed. The first question thus arises as to whether the arbitration provision therein could be enforced against the trustee and the settlor pursuant to Mexican law (see **a** below). The second question is whether

[180] See section I subsection 5 above.

the same arbitration provision in the same Mexican trust could be (more easily) enforced against the trustee or the settlor in common law systems, *e.g.* US or English law (see **b** below).

a) Enforcement of an arbitration agreement in a Mexican trust pursuant to Mexican law

Pursuant to article 1415 Mexico CCom, the arbitration law will apply to national and international arbitrations when the place of the arbitration is Mexico. Accordingly, an arbitration clause in a Mexican trust deed that selects Mexico as the place of arbitration, or absent such selection when the arbitral tribunal so determines pursuant to article 1436 Mexico CCom, will be governed by the provisions in articles 1415 *et seq.* Mexico CCom, *i.e.* by Mexico's arbitration law.

As regards form validity, article 1423 Mexico CCom provides that an arbitration agreement shall be 'in writing'. This requirement is met if the arbitration agreement is recorded in a document signed by the parties or in an exchange of letters, telex, telegrams, faxes u other means of communication which provide a record of the arbitration agreement.[181] In addition, the reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is

[181] Art. 1423 Mexico CCom.

such as to make that clause part of the contract.[182] Going back to the typical means to express intent by a settlor and a trustee of a Mexican trust, the form validity requirement in article 1423 Mexico CCom would be satisfied with the settlor's and trustee's signature of a trust deed containing an arbitration clause. Moreover, the same requirement will also be met if notwithstanding the lack of the trustee's signature in the deed, the trustee's services agreement with the settlor makes reference to the trust deed that contains the arbitration clause. Although less typical in practice, an arbitration agreement recorded in writing will also satisfy the form requirement in article 1423 Mexico CCom if the settlor's or the trustee's agreement to be bound by the trust terms is implied by conduct. For example, where the settlor transfers the assets which are the subject matter of the trust to the trustee pursuant to the terms of an unsigned trust deed or where the trustee begins managing the assets transferred by the settlor under the trust terms before a deed is signed. As it has been upheld by courts and arbitration tribunals applying article 7 of the UNICTRAL Model Law of 1985, upon which article 1423 Mexico CCom was modeled, the intent shall not necessarily be articulated in writing by all parties: only a record of the agreement upon which a party relies shall exist.[183] This also means that implied intent to be bound by an arbitration agreement will satisfy the in writing requirement irrespective of who may have drafted the arbitration agreement at stake. As explained by the Swiss Supreme Court in its decision of 16 October 2003, the form requirement only

[182] *Idem.*
[183]Saskatchewan Court of Queen's Bench (Wedge J.)1996, *Schiff Food Products Inc. v. Naber Seed & Grain Co. Ltd;* Court of Appeal of Quebec, Canada, 2006, *Achilles (USA) v. Plastics Dura Plastics (1977) ltée/Ltd.*

applies to the agreement itself, but not to the intent by any of the parties; the question of the subjective scope of an arbitration agreement is determined by means of the classic theory of acceptance of contracts.[184]

Following this line of thought, the next step in establishing the existence of an agreement between the settlor and the trustee in a Mexican trust dispute regards issues of substantive validity, *i.e.* whether the settlor's or trustee's intention to arbitrate was lawfully exercised and given free of abuse or misconceptions, etc. Because Mexico's arbitration law does not cover these matters, the latter shall be determined by a different set of laws provisions. As submitted above, Article V(1)(a) New York Convention, and Article 1462(I)(a)[185] Mexico CCom, uniformly answer this question designating the law of the country where the award is made, *i.e.* the contract law at the place of arbitration (see section V above).[186] Accordingly, in arbitration proceedings with seat in Mexico, either by parties' choice or by the tribunal's decision (article 1436 Mexico CCom), the provisions on obligations and contracts in Mexico's Code of Commerce and the Federal

[184]Supreme Court of Switzerland (ATF) 16 October 2003, 129 III 727, « Toutefois, cette exigence de forme ne s'applique qu'à la convention d'arbitrage elle-même, c'est-à-dire à l'accord (clause compromissoire ou compromis) par lequel les parties initiales ont manifesté réciproquement leur volonté concordante de compromettre. Quant à la question de la portée subjective d'une convention d'arbitrage formellement valable au regard de l'art. 178 al. 1 LDIP - il s'agit de déterminer quelles sont les parties liées par la convention et de rechercher, le cas échéant, si un ou des tiers qui n'y sont pas désignés entrent néanmoins dans son champ d'application ratione personae -, elle relève du fond et doit, en conséquence, être résolue à la lumière de l'art. 178 al. 2 LDIP (dans ce sens. Cf., parmi d'autres, BLESSING, ibid.). »

[185] Cf. Art. 1462(I)(a) Mexico CCom which is modeled by Art. 36(1)(a) UNCITRAL Model Law states that "(1*) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only: (a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that: (i) a party to the arbitration agreement referred to in Art. 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made"*.

[186] Pursuant to Art. 31(3) of the ICC Rules 2012 the award shall be deemed to be made at the place of the arbitration.

Civil Code will determine the existence of the arbitration agreement from a substantive point of view. As under most, if not all, laws in the world, Mexico contract law endorses the principle of freedom of contract, whereby agreements may be reached through the parties' express or implied consent (by conduct) to be bound by their terms.[187]Limits to the principle of freedom of contract are nevertheless established by the provisions on validity when, at the time of contract conclusion, primary principles protected by the law are considered to be at risk. Examples of such principles are: (i) the lawfulness of the transaction (illegality, immorality and impossibility which could hardly arise in the context of an arbitration agreement); (ii) the free and informed will to contract (mistake, unfair terms in adhesion contracts, fraud and duress) and; (iii) the bargaining balance of the deal (gross disparity (*lesión*) situations which rules do not apply to business deals in Mexico).[188]

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

[187] Cf. generally Edgardo Muñoz, 'Modern Law of Contracts and Sales in Latin-America, Spain and Portugal', ed. Ingeborg Schwenzer (International Commerce and Arbitration, 6; The Hague: Eleven International Publishing, 2011) at 94, 103.
[188]Ibid., at 169, 209.

b) Enforcement of an arbitration agreement in a Mexican trust pursuant to US or English arbitration laws

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

Because the place of arbitration would determine both the *lex arbitri* as well as the law applicable to the substantive existence of an arbitration agreement,[189] the question is whether an arbitration provision in a Mexican trust could be enforced against the trustee or the settlor in common law systems. Issues of form validity impairing the effect of an arbitration agreement in a Mexican trust are unlikely to arise in these jurisdictions. Both the English Arbitration Act[190] and the US Federal Arbitration Act,[191] will give effect to any arbitration agreement "in writing". The requirement of 'in writing' also limits itself to the arbitration provision. It does not require consent to be necessarily given by all parties in such a

[189] That would be the uniform conflict of laws rule to be taken pursuant to Art. V(1)(a) New York Convention, absent an agreement by the parties on the law applicable to the arbitration clause; but also under the English Arbitration Act 1996, Sec. 2(1)
[190] English Arbitration Act 1996, Sec. 5.
[191] The Federal Arbitration Act (Title 9, US Code, Section 1-14) Sec. 2.

manner.[192] As commented above, the typical conclusion of a Mexican trust involves preparing a written document outlining the terms pursuant to which the settlor commends the assets to the trustee.[193] The settlor and the trustee will most likely sign the written deed before the trustee becomes the legal depositary or manager of the assets on trust. Lack of signature would not empty the arbitration agreement of its binding effect over the settlor or trustee if their implied acceptance of the trust terms can be inferred by conduct. Yet, the question of whether the settlor or trustee subjectively agreed on the arbitration agreement will have to be answered by the contract law provisions at the place of arbitration, and not by the *lexarbitri* (since the latter does not contain that sort of provisions).[194]

In this regard, the issue of characterization of the arbitration claims will be key. As previously addressed, trusts in Anglo-American jurisdictions derive from the law developed by equity courts.[195] Accordingly, "*with limited exceptions, the remedies of trust beneficiaries are equitable in character and enforceable against*

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

[193] Art. 387 Mexico LGTOC: the creation of a trust shall always be made in writing.

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

[195] Cf. also Alastair Hudson, 'Equity and Trusts' (New York: Routledge, 2014) at 45-47.

trustees in a court exercising equity powers."[196] The remedies or claims within a trust are thus not contractual in nature. As the comment to section 197 of the Restatement (Second) of Trusts (1959) explains: "*A trustee who fails to perform his duties … is not liable to the beneficiary for breach of contract … The creation of a trust is conceived as a conveyance of the beneficial interest in the trust property rather than as a contract... Further, the trustee by accepting the trust and agreeing to perform his duties … does not make a contract to perform the trust enforceable in an action at law*."

However, the trust created pursuant to Mexican law does not have the same nature of the Anglo-American trust. The Mexican trust is a contract (see section II subsection 3 above). Parties and arbitrators shall bear in mind that the claims in a Mexican trust are contractual ones. Most importantly, because a Mexican trust is a contract in nature, the traditional process of offer and acceptance (or the more modern process of step-by-step negotiations) of the trust terms will in principle also lead to reaching an agreement on the arbitration clause therein. Accordingly, the inclusion of an arbitration agreement in a Mexican trust should not give raise to the type of discussions currently affecting the enforceability of arbitration provisions in Anglo-American trusts. Arbitrators with seat in the US or England will simply apply the contract rules of those jurisdictions to determine the substantive existence of the arbitration agreement. Arbitrators shall not apply the Anglo-American trust rules at all in order to establish the nature of a Mexican trust. Any issue regarding the Mexican trust (separate from the arbitration

[196] Section 95 of the Restatement (Third) of Trusts (2012).

agreement) including its nature, scope, interpretation and effect shall be decided by the law pursuant to which such trust was settled, *i.e.* Mexican law.

2. Intent to arbitrate by beneficiaries or class of beneficiaries in a Mexican trust

As mentioned above, the Mexican trust is created upon the agreement by settlor and trustee of the terms of the trust.[197] Participation of the beneficiaries in the entering into of the trust agreement is not a requirement for the existence of a Mexican trust. Actually, Mexican law gives effect to trusts that do not designate any beneficiary; the latter may be designated after the settlement of the trust.[198] Accordingly, the question arises as to whether an arbitration provision in a Mexican trust binds beneficiaries who did not consent to its terms at the time of creation.

State courts and arbitral tribunals have extended arbitration agreements to non-signatories using rules or theories such as agency, alter ego, implied consent, group of companies, estoppel, third-party beneficiary, guarantor, subrogation, legal succession and ratification, assumption, etc.[199] Two legal theories, however, seem to fit the institution of trust well and appear to be useful

[197] Art. 381 Mexico LGTOC.
[198] *Idem.*
[199] See generally Bernard Hanotiau, 'Consent to Arbitration: Do We Share a Common Vision?', *Arbitration International,* 27/4 (2011) at 551; Bernard Hanotiau, 'Non-Signatories in International Arbitration: Lessons from Thirty Years of Case Law', in Albert Jan Van Den Berg (ed.), *International Arbitration 2006: Back to Basics?* (13; The Hague: ICCA Congress Series, 2006).

to bridge the initial gap between the creation of the trust and the subsequent acceptance of the trust terms by the beneficiaries. The first has as background the civil law system rules on *stipulation pour autrui*[200] or provision in favor of a third party (see **a** below). The second is rooted in the common law doctrine of equitable estoppel[201] which equal solution could also be reached under the good faith principle in civil law systems (see **b** below).

a. The settlor's provision in favor of a third party (civil law systems)

The legal purpose of the trust is to obtain some benefit out of the assets transferred to the trustee. In view of that, Mexican law provides that the settlor will designate the beneficiaries to receive the benefits that the trust encompasses.[202] Although beneficiaries are considered parties to Mexican trust agreements by most scholars (see section II subsection 5 above), technically, beneficiaries only become parties to the trust when they decide to exercise the rights assigned to them in accordance with the trust terms. In the meantime, however, beneficiaries (who did not expressly assume the role of parties at the time of the trust's creation) are legally related to the settlor and the trustee as third party beneficiaries.

[200] *Stipulation pour autri* is a contract or provision in a contract that confers a benefit on a third-party beneficiary. A stipulation pour autrui gives the third-party beneficiary a cause of action against the promisor for specific performance. Cf. Merriam-Webster's Dictionary of Law ©1996.
[201] Equitable estoppel prevents one party from taking a different position at trial than she did at an earlier time if the other party would be harmed by the change.
[202] Art. 382 Mexico LGTOC.

The contract law doctrine of third party beneficiary has its roots in Medieval law.[203] Pursuant to article 1121 of the French Civil Code, "[a] party may stipulate a benefit for a third party as a condition regarding a stipulation that it make for itself or concerning a gift that it makes to another party".[204] The rule is an exception to the principle of *privity* of contracts.[205] Article 1165 of the French Civil Code recognizes the exception stating: "[a]greements produce effects only between the contracting parties; agreements do not affect and benefit third parties except as provided in article 1121 [provision in favor of a third party]".[206] Beneficiaries of a trust deed are potentially affected by and benefited from the terms of the trust as if they were under the doctrine of *stipulation pour autrui*. It is just a matter of time until the beneficiaries' become fully bound by the trust terms, including any dispute resolution clause.

Mexico's Federal Civil Code (Mexico FCC) embodies the same provisions.[207] Article 1870 Mexico FCC provides further that "the rights of the designated third party arise at the time of the contract conclusion, **unless the**

[203] Jan Hallebeek, 'Contracts for a Third-Party Beneficiary: A Brief Sketch from the Corpus Iuris to Present-Day Civil Law', *Fundamina,* 13/2 (2008) at 14 ff.: "By the end of the Middle Ages both the civilians and the canonists, who adopted the Roman *alteristipulari*rule, considered it possible for contracting parties to stipulate validly that something be given or done to a third-party beneficiary and to bring it about that this third party could enforce what was stipulated in his favour".

[204] The authors' translation ; the original reads : « On peut pareillement stipuler au profit d'un tiers lorsque telle est la condition d'une stipulation que l'on fait pour soi-même ou d'une donation que l'on fait à un autre. Celui qui a fait cette stipulation ne peut plus la révoquer si le tiers a déclaré vouloir en profiter ».

[205] The doctrine of privity in the common law of contract provides that a contract cannot confer rights or impose obligations arising under it on any person or agent except the parties to that contract.

[206] The authors' translation. The original reads : « Les conventions n'ont d'effet qu'entre les parties contractantes ; elles ne nuisent point au tiers, et elles ne lui profitent que dans le cas prévu par l'article 1121. »

[207] Arts. 1869-1872 Mexico FCC.

contracting parties retain the power to impose conditions expressly established in the agreement as they consider appropriate [emphasis added]".[208] In this regard, arbitration specialists in Mexico submit that, even if arguably, this doctrine does not impose obligations but grants benefits to third parties,[209] article 1870 Mexico FCC validates the view that parties are free to attach to the benefits stipulated in favor of a third party collateral clauses which form part of the whole transaction.[210]

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

That being said, the beneficiaries will have to show their intent to be bound by the arbitration provision in the trust deed. As addressed above (see section

[208] The authors' translation.The orginal Art. 1870 Mexico FCC reads: "El derecho de tercero nace en el momento de perfeccionarse el contrato, salvo la facultad que los contratantes conservan de imponerle las modalidades que juzgue convenientes, siempre que éstas consten expresamente en el referido contrato."

[209] The discussion arose out of Francisco Gonzalez de Cossio's first proposal to see an arbitration agreement as an obligation of the type of a condition precedent to be fulfilled by the third party in order to obtain the benefits stipulated in its favor. Cf. Francisco Gonzalez-De-Cossio, 'El Que Toma El Botín, Toma La Carga: La Solución a Problemas Relacionados Con Terceros En Actos Jurídicos Que Contiene Un Acuerdo Arbitral E Involucra Terceros', (2012) at 14-16.However, in the two further essays below referred González de Cossio seems to concede that historically the third party may not be imposed obligations but only rights, which make the author to revisit the nature of an arbitration agreement in that case. Cf. Francisco Gonzalez-De-Cossio, 'El Que Toma El Botín, Toma La Carga: La Idea Gana Adeptos', (2013) at 5-8.

[210] Gonzalez-De-Cossio, 'El Que Toma El Botín, Toma La Carga: La Idea Gana Adeptos', (at 6-8. Cf. also Francisco González-De-Cossio, 'Estipulación a Favor De Tercero Y Arbitraje: El Debate Continua', (2014) at 1-3.

V.1.a) above), the in writing requirement in article 1423 Mexico CCom shall not be an issue. Mexican trusts are also required to be established in writing.[211] Therefore, in writing evidence of the arbitration agreement will be contained in the trust deed. Pursuant to article 1423 Mexico CCom, the beneficiaries' intent shall not necessarily be articulated in writing.[212] The beneficiaries' implied intent to be bound by an arbitration agreement will satisfy the in writing requirement. The question of whether a conduct shows intent is determined by means of the classic theory of contract formation and interpretation.[213]

As a Mexican arbitration authority submits, there may not be a clearest way to show intent to be bound by an arbitration agreement than a beneficiary's will to exercise a right conferred by the contract that comprises an arbitration agreement.[214] Although not originally a party to such contract, accepting to profit

[211] Art. 387 Mexico LGTOC.

[212]Saskatchewan Court of Queen's Bench (Wedge J.)1996, *Schiff Food Products Inc. v. Naber Seed & Grain Co. Ltd;* Court of Appeal of Quebec, Canada, 2006, *Achilles (USA) v. Plastics Dura Plastics (1977) ltée/Ltd.*

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

[214] Gonzalez-De-Cossio, 'El Que Toma El Botín, Toma La Carga: La Idea Gana Adeptos', (at 9.

out of the rights therein shall amount to that party's acceptance of the whole combo, including the arbitration provision.[215]

The same result has been achieved under similar common law doctrines. Pursuant to the doctrine of "deemed acquiescence", beneficiaries who receive some type of benefit under the trust are deemed bound by the terms of the trust, including any arbitration clause therein.[216] The rule has been drawn in part from the language found in section 82(2) of the English Arbitration Act which reads: "a party to an arbitration agreement includes any person claiming under or through a party to the agreement". In that order of ideas, any beneficiary who draws his interest in the trust from the settlor and whose rights and obligations are determined by the trust deed is considered to have consented to the arbitration agreement.[217] As put by some scholars, the doctrine lies on the premise that "*by accepting the settlor's bounty the beneficiary is deemed to have also accepted the conditions under which the settlor is willing to have the beneficiaries profit from his/her bounty, which includes the agreement to arbitrate*."[218]

Should a settlor wish to avoid the interpretation task to prove consent of any designated beneficiaries, he may consider drafting a trust deed in a way in which profiting from the trust terms would be deemed an agreement to submit

[215] *Ibidem*, at 9-10.

[216] Strong, 'Arbitration of Trust Disputes: Two Bodies of Law Collide', at 1211.
[217] Idem.
[218] Koch, 'A Tale of Two Cities! - Arbitrating Trust Disputes and the Icc's Arbitration Clause for Trust Disputes', at 190.

disputes to arbitration.[219] The ICC Court of Arbitration suggests the following wording in its model trusts dispute clause:

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

b. Doctrine of direct benefits estoppel (US law) or good faith (civil law systems)

Courts in the US have recently applied a different (though overlapping) theory to attract non-signatory beneficiaries to arbitration proceedings.[220] Pursuant to the doctrine of 'direct benefits estoppel' a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause where that party has consistently maintained that other provisions of the same contract should be enforced to benefit him.[221] This theory has its roots in the rule that a third party enjoying direct benefits or exercising rights like a party under a contract shall be prevented

[219] Strong, 'Arbitration of Trust Disputes: Two Bodies of Law Collide', at 1210.
[220] Cf. Rachal v. Reitz (Tex. 2013) 403 S.W.3d 840, reh'g denied (Aug. 23, 2013); ENGlobal U.S., Inc. v. Gatlin (Tex. App. 2014) 449 S.W.3d 269, 274; Greenberg Traurig, LLP v. National American Ins. Co. (Tex. App. 2014) 448 S.W.3d 115, 122, reh'g overruled (Oct. 7, 2014).
[221] Ibid.

from contesting the jurisdiction of an arbitral tribunal.[222] The rule dates back to Tepper Realty v. Mosaic Tile, where a District court found that the "(claimant) cannot have it both ways. It cannot rely on the contract when it works to its advantage and ignore it when it works to its disadvantage".[223]

More recently, in Rachal v. Reitz the Supreme Court of Texas considered this rule in the context of a lawsuit in damages for breach of the trust terms and fiduciary duties brought by a beneficiary against the trustee. In this case, the beneficiary claimed that the trustee had inappropriately taken money from the trust estate and thus that the beneficiary was "entitled to any profits that would accrue to the trust estate if there had been no breach of trust."[224] The beneficiary, however, argued that the arbitration provision contained in the trust deed was invalid as to him for lack of mutual assent. The court disagreed, holding that:

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

[222] Gary B. Born, 'International Commercial Arbitration', at 1473; Janin Blaine-Covington, 'The Validity of Arbitration Provisions in Trust Instruments', *California Law Review,* 55/2 (1967), 14 at 525, 28.
[223] Tepper Realty Co. v. Mosaic Tile Co. (S.D.N.Y. 1966) 259 F.Supp. 688, 692.
[224] Rachal v. Reitz (Tex. 2013) 403 S.W.3d 840, 847, reh'g denied (Aug. 23, 2013).

incongruent to allow a beneficiary to hold a trustee to the terms of the trust but not hold the beneficiary to those same terms".[225]

The same solution should be achieved under the principle of good faith in many jurisdictions. Article 2.A.1 of the UNCITRAL Model Law provides that "in the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and **the observance of good faith** [emphasis added]." Notwithstanding, the beneficiary's intent to be bound by the arbitration agreement will have to be assessed under the contract law provisions at the place of arbitration (and not by the *lexarbitri*), article 2.A.1 of the UNCITRAL Model Law 2006 sheds light on the importance to consider the application of the good faith principle in arbitration matters.[226] Relying on the contractual principles of reliance and good faith, the Swiss Supreme Court in a decision dated 7 April 2014, found that a non-signatory parent company of respondent, by virtue of its statements and behavior, had given the appearance that it was a party to the contract. The claimant could therefore believe, in good faith, that the parent company was bound by the contracts' terms, including the arbitration agreements.[227]

Although we still await to see how State courts and arbitral tribunals will apply the good faith principle in the context of trust disputes, there are grounds to

[225] *Idem.*
[226] See also generally Bernardo Cremades, 'Good Faith in International Arbitration', *American University International Law Review,* 27/4 (2012) at 779 et seq.
[227] Swiss Supreme Court Decision 4A_450/2013 of 7 April 2014.

submit that beneficiaries who maintain an undergoing relationship with trustees under the umbrella of a trust deed which includes an arbitration agreement could eventually be covered by the said agreement. The good faith principle shall work as an interpretation tool of a non-signatory beneficiary's statements or conduct. If the non-signatory beneficiary's conduct or statements are such as to lead the trustees to reasonably believe that the said beneficiary agrees to the terms of the trust as a whole, the beneficiary shall be covered by the arbitration agreement.

VI. ARBITRABILITY OF MEXICAN TRUST DISPUTES IN MEXICO

As introduced above (see section V above), the enforceability of an arbitration agreement will also depend upon whether the claims in dispute are arbitrable.[228] We share the majority view in arbitration law and practice that this question is to be determined by the *lex arbitri* and mandatory provisions at the place of arbitration (section V above).[229] For the purposes of this work, we will consider whether disputes arising out of a Mexican trust are arbitrable pursuant to Mexican law. In practice, this would make sense. On the one hand, settlors and trustees of Mexican trusts will most likely choose Mexico as a place of arbitration. As previously stated, under Mexican trusts law only authorized and registered financial and credit institutions (mainly banks) in Mexico may act as trustees (see section II subsection 5 above). One could forecast that financial institutions proposing or accepting an arbitration agreement in a Mexican trust deed will want to keep the arbitration proceedings under the supervision of Mexican courts and Mexican mandatory rules of law.[230] In this case, a determination of the arbitrability of Mexican trusts related claims would be relevant at the jurisdictional stage[231] or in case of annulment actions against the award.[232]

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[228] Born, 'International Arbitration and Forum Selection Agreements: Drafting and Enforcing' at 148.Mistelis, 'Arbitrability International and Comparative Perspectives', at 4.

[229] Art. V(2)(a) of the New York Convention; Arts. 34(2)(b)(i) and 36(1)(b)(i) UNCITRAL Model Law; Arts. 1457(II) and 1462(II) Mexico CCom.Mistelis, 'Arbitrability International and Comparative Perspectives', at 12, 13.

[230] In this regard, see section IX below.

[231] This is when a review of the arbitrability concept needs to be made by the arbitral tribunal pursuant to Art. 1434 Mexico CCom or by Mexican State courts in accordance with Art.1424 Mexico CCom.

[232] See Arts. 1457(II) and 1462(II) Mexico CCom; Mistelis, 'Arbitrability International and Comparative Perspectives', at 12, 13.

On the other hand, in the event parties select a place of arbitration outside Mexico, or where the arbitral tribunal so determines,[233] the arbitrability rule pursuant to Mexican law will most likely be relevant at the stage of enforcement of the arbitration award.[234] Since only Mexican authorized financial and credit institutions may act as trustees, any arbitration award that may not be voluntarily complied with by the trustees will have to be enforced in Mexico. In this regard, all parties involved in a Mexican trust arbitration have a legitimate interest in knowing whether the scope of arbitrability under Mexican law could jeopardize the enforcement of an arbitration award in Mexico.

Lack of arbitrability is a jurisdiction matter. As such, the arbitral tribunal will determine the arbitrability of trust disputes on the basis of Mexican law. Pursuant to Article 1424 Mexico CCom, State courts will only deny effect to an arbitration agreement where the claim at stake is **evidently** non-arbitrable upon a summary examination. That said, State courts will have the final decision regarding the arbitrability of a dispute if asked to intervene in an annulment or enforcement action pursuant to articles 1457 (II) and 1462 (II) Mexico CCom.

Mexico has a unitary (or 'monist') arbitration law. A single set of provisions, articles 1415-1480 Mexico CCom, govern both domestic and international

[233] Art. 1436 Mexico CCom.

[234] Where Art. V(2)(a) of the New York Convention becomes relevant.

arbitration proceedings.[235] In contrast to other jurisdictions,[236] Mexican law provides a single notion of arbitrability that applies to both domestic and international arbitrations.[237] The notion of arbitrabilibity has its starting point at article 1415 Mexico CCom. Pursuant to this article, all matters are susceptible to be solved by arbitration unless other laws stipulate the contrary (A) or provide for special procedures (B).[238] In addition, it is generally understood that disputes over rights that a person may not freely dispose of are not arbitrable either(C).[239]

A. Provisions stipulating that certain disputes are not susceptible to be solved by arbitration

Articles 2946-2951 Mexico FCC lists the matters that shall not be resolved by settlement[240] between parties in dispute. Arbitration specialists in Mexico maintain that those same matters are also understood to be expressly excluded

[235] Cf. Art. 1415 Mexico CCom; Provisions in Arts. 1462, 1461 y 1463 Mexico CCom will apply to enforcement of international awards when the seat is outside Mexico in a country which has not ratified the New York Convention.
[236] The French and the Swiss arbitration laws are dual. A different set of provisions govern international and domestic arbitration proceedings. Actually, the notion of arbitrability is defined differently depending on the international or the domestic nature of the proceedings. See for example Art. 177(1) of the Swiss PILA applicable to international arbitration with a broad notion of arbitrability compared to Art. 354 of the Swiss Code of Civil Procedure applicable to domestic arbitrations with a narrow notion of arbitrability. Compare also provisions of the French Code of Civil Procedure applicable to domestic and international arbitrations respectively. Cf. Xavier Favre-Bulle and Edgardo Muñoz, 'Monismo Y Dualismo De Las Leyes De Arbitraje: ¿Son Todas Ellas Dualistas?', in Carlos Soto and Delia Marsano (eds.), *Arbitraje Internacional, Pasado, Presente Y Futuro* (Lima: Instituto Peruano de Arbitraje, 2013) at 1449.
[237] Pursuant to Art. 1416(III) Mexico CCom proceedings are international where (a) parties have their place of businesses in different countries or the main obligation is to be performed abroad or (b) the place of arbitration is outside Mexico.
[238] Art. 1415 Mexico CCom reads Mexican arbitration law applies "unless […] other acts provide for a different procedure or that certain disputes are not arbitrable".
[239] Francisco Gonzalez-De-Cossio, 'Arbitraje' (3rd edn.; Mexico: Porrúa, 2011) at 199.
[240] Pursuant to Mexican law a "settlement" (*transacción*) is defined as "an agreement by which parties put an end to any present or future dispute". Cf. Art. 2944 Mexico FCC.

from the realm of arbitration.[241] The list includes disputes over incapacitated persons' or minors' rights, except where settlement is in their interest with prior judicial authorization,[242] tort liability arising from crimes,[243] the legal status of people and the validity of marriage agreements,[244] future claims based on crime, fraud or intentional harm,[245] the right to alimony,[246] future inheritance rights,[247] inheritance rights before a last testament or will is disclosed.[248] Article 615 of Mexico City's Civil Code provides that the same matters are non-arbitrable.

In the context of a family trust disputes, the issue may arise as to whether a claim brought by a tutor or parent on behalf of a minor or incapacitated beneficiary, against the trustee or settlor may be barred from being decided in arbitration pursuant to article 2946 Mexico FCC. We submit that the purpose of article 2946 Mexico FCC is to afford State court protection to minors or incapacitated persons in cases where the claim derives out of rights intrinsic to their personal and family status. For example, rights over alimony calculation, inheritance, (but not wills), social benefits, etc. However, the rights that beneficiaries are entitled to pursuant to the terms of a trust have a different nature. These rights arise out of the settlor's wish (not from any legal obligation) to distribute gifts and wealth among his/her descendants through the trustees in

[241] Gonzalez-De-Cossio, 'Arbitraje', at 201.
[242] Art. 2946 Mexico FCC.
[243] Art. 2947 Mexico FCC.
[244] Art. 2948 Mexico FCC.
[245] Art. 2950 (I) (II) Mexico FCC.
[246] Art. 2950 (V) Mexico FCC. However, the determination of the amount of alimony may be arbitrable according to the Art. 2949 Mexico FCC.
[247] Art. 2950 (III) Mexico FCC.
[248] Art. 2950 (IV) Mexico FCC.

accordance with the trust terms. The nature of those rights is purely contractual. Accordingly, no court authorization should be necessary to make a minor's or incapacitated person's claim arbitrable in such a case. As an exemption, proper authorization shall be required if the minor's or incapacitated person's claim is based on the settlors legal obligation to provide legal alimony or allowance to the minor or to the incapacitated concerned. In such a case, the claim would not be even arbitrable pursuant to 2950(V) Mexico FCC.[249] The rest of the matters covered by Articles 2946-2951 Mexico FCC do not pertain to trusts.

It is worth noting that Panama and Paraguay trust laws specifically recognize the arbitrability of trust disputes[250] (Spain, Bolivia and Peru laws take the same approach regarding testamentary disputes).[251] Historically rooted in the Spanish civil law system, these jurisdictions share similar values of moral and justice with Mexico. Notwithstanding the fact that no specific provision in Mexico trusts law (LGTOC) is needed to submit trust disputes to arbitration, stating so in statute would certainly clear out any doubts and avoid this type of analysis. Everyday, arbitration of trust disputes in Panama is becoming more popular making this jurisdiction even more attractive to international settlors.[252]

[249] Art. 2950 (V) Mexico FCC. However, the determination of the amount of alimony may be arbitrable according to the Art. 2949 Mexico FCC.
[250] Art. 41 Panama Trust Law (Ley 1 de 1984); Art. 44 Paraguay Trust Law (Ley de NegociosFiduciarios); Bosques-Hernández, 'Arbitration Clauses in Trusts: The U.S. Developments and a Comparative Perspective', (at 23, 24.
[251] *Ibidem.*
[252] Grant Jones and Peter Pexton, 'Adr and Trusts: An International Guide to Arbitration and Mediation of Trust Disputes', (London: Spiramus, 2015) at 340.

B. Matters of the exclusive purview of Mexican courts

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

Claims arising out of private Mexican trusts[253] are unlikely to fall in any of the above categories. The scope of article 568(I) Mexico FCCP covers land or water of public ownership only. Therefore, claims arising out of Mexican trusts which assets in trust may consist of privately owned lands or immovable goods are arbitrable. On the other hand, disputes arising out of so called "Trusts over immovable goods located in the Mexican Restricted Zone"[254] are not affected either. Arbitrators may not disregard the mandatory provisions in article 27 (I) Mexico Constitution and Title II Mexico Foreign Investment Law.[255] In this line of thought, arbitrators shall apply the ownership restrictions regarding the real estate transferred in trust. However, this does not mean that the beneficiaries

[253] Public trusts, *i.e.* involving the Mexican government as one of the parties and regulated by administrative law are not covered by this work.
[254] In Spanish: *Fideicomisos sobre Inmuebles localizados en la zona restringida*.
[255]Pursuant to Art. 27 (I) Mexico Constitution, aliens are barred to acquire direct ownership of lands and waters within a hundred kilometers along the country boarders and within fifty kilometers of the seacoast. Aliens are only allowed the use and develop real estate located within this restricted zone, through the creation of a trust, according to Title II of Mexico Law on Foreign Investment.

right of using and developing the land and immovable transferred in trust by the settlor are affected by the non-arbitrability exception. Consequently, the rights and obligations arising out of that type of trust agreement are also arbitrable under Mexican law.

Provisions in Mexican law[256] whose purpose is merely to define the territorial jurisdiction among Mexican courts do not constitute a restriction to arbitration. For example, article 391 Mexico LGTOC sets forth that trustees may not renounce or be exempted from performing the trust terms but for justifiable grounds according to the First Instance Court of the trustee's domicile.[257] Besides, article 393 Mexico LGTOC provides that the First Instance Court of the trustee's domicile will also decide the effects of the termination of a trust agreement, *i.e.* whether the settlor or the beneficiaries may receive the remaining assets held in trust by the trustee.[258] As stated, these provisions do not give exclusive jurisdiction to Mexican courts in those matters. Similar provisions are often found in other civil and commercial law statutes and have not raised any

[256] Arts. 381 *et seq*. LGTOC.
[257] The authors' translation. The original in Spanish reads: "La institución fiduciaria tendrá todos los derechos y acciones que se requieran para el cumplimiento del fideicomiso, salvo las normas o limitaciones que se establezcan al efecto, al constituirse el mismo; estará obligada a cumplir dicho fideicomiso conforme al acto constitutivo; no podrá excusarse o renunciar su encargo sino por causas graves a juicio de un Juez de Primera Instancia del lugar de su domicilio, y deberá obrar siempre como buen padre de familia, siendo responsable de las pérdidas o menoscabos que los bienes sufran por su culpa".
[258] The authors' translation. The original in Spanish reads: "Extinguido el fideicomiso, si no se pactó lo contrario, los bienes o derechos en poder de la institución fiduciaria serán transmitidos al fideicomitente o al fideicomisario, según corresponda. En caso de duda u oposición respecto de dicha transmisión, el juez de primera instancia competente en el lugar del domicilio de la institución fiduciaria, oyendo a las partes, resolverá lo conducente.

arbitrability problems in practice.[259] Ultimately, their goal is simply to predict which of the many courts in Mexico will have jurisdiction, unless otherwise agreed by the parties in the form of a forum selection clause[260] or arbitration agreement.[261]

C. Disputes over rights which a person may not dispose of

Pursuant to article 6 Mexico FCC, people may waive their private rights when such do not affect the public order or third parties' rights directly.[262] This principle is the basis of other provisions in Mexican law that expressly invalidate settlement agreements with regard to claims on rights that parties may not freely

[259] For example, Art. 185 and 202 Mexico Law of Commercial Companies (*Ley General de SociedadesMercantiles*) provides the intervention of State judges in disputes arising between shareholders or out of the internal organization of the company. However, these same disputes are as a matter of law susceptible to be solved by arbitration. As put by one arbitration specialist "In modern arbitration practice and law, first, it is considered that the fact that the law refers to Court as competent to hear a certain dispute does not necessarily exclude arbitration", Pilar Perales Viscasillas, 'Arbitrability of (Intra-) Corporate Disputes', in Loukas A. Mistelis and Stravos L. Brekoulakis (ed.), *Arbitrability: International and Comparative Perspectives.* (International Arbitration Law Library: Kluwer International Law, 2009) at 288.

[260]Pursuant to Mexican law, Arts. 566 and 567 Federal Code of Civil Procedure (FCCP), forum selection clauses are enforceable in Mexico, unless the selection amounts to denial of justice or operates only for the benefit of one of the parties and not for all of them.

[261] For example in the context of Intra-corporate disputes at the European level Perales Viscasillas takes the view that the Brussels Regulation "Art. 22(2) provides for exclusive jurisdiction of the Courts of the seat in regards to proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or of the validity of the decisions of their organs [However], apart from the fact that the Brussels Regulation excludes arbitration from its scope of application, it establishes the exclusive competence of a national Court in relation to other national Courts within EU, but not in relation to arbitration. Arbitral Tribunals are not within the body of national courts and thus it is wrong to equate the former with the latter." Cf. Viscasillas, 'Arbitrability of (Intra-) Corporate Disputes', at 288, 89.

[262]The authors' translation.The original in Spanish reads: "La voluntad de los particulares no puede eximir de la observancia de la ley, ni alterarla o modificarla. Sólo pueden renunciarse los derechos privados que no afecten directamente al interés público, cuando la renuncia no perjudique derechos de tercero".

dispose of such as divorce,[263] right to alimony, validity of marriage, criminal matters, etc. Accordingly, rights that traditionally have been considered as inalienable by private parties will also be excluded from the realm of arbitration, in spite of the fact that no express lack of arbitrability is stipulated as a matter of law. These may include matters such as parental custody, adoption, political rights, employment disputes over salaries, leave and pensions, tax disputes against the State, the absolute right to inheritance by minors, widows etc., despite any testament or will stipulation to the contrary,[264] anti-trust disputes.

Since freedom to dispose of one's rights means the possibility to waive such rights, in the context of trusts, the question is whether beneficiaries can waive the rights granted by the settlor under the trust terms.[265] As it turns out, beneficiaries can reject any benefits they are entitled to receive under a trust. Once more, such rights usually result from the settlor's wish (not from any legal obligation) to distribute wealth among the beneficiaries. Accordingly, claims arising out of the interpretation and performance of the trust terms in principle relate to rights one can freely dispose of and such are arbitrable. Should a specific claim concern rights one may not freely dispose of, modern arbitration law and practice will require arbitral tribunals and State courts to only disallow that specific claim while allowing the rest of the claims in a trust dispute.[266] In other words, the arbitrability

[263] In particular, the jurisdiction to decide a divorce is not arbitrable. However, the decision as to the quantum of alimony due by a former spouse may be arbitrable.
[264] Arts. 1368 and 1372 Mexico FCC.

[265] Strong, 'Empowering Settlors: How Proper Language Can Increase the Enforceability of a Mandatory Arbitration Provision in a Trust', at 302.
[266] *Ibidem*, at 303.

of certain claims in a trust dispute shall not entail the non-arbitrability of all trust matters.

VII. CAPACITY TO SUBMIT TO ARBITRATION

Full capacity of all parties to the arbitration agreement in a Mexican trust is required for its effective enforcement (see section V above). It is generally a settled issue that capacity to contract or authorization to contract on behalf of another will suffice to establish capacity to arbitrate.[267] However, the question of what law shall arbitrators apply to determine a party's capacity is not easily answered. As above mentioned, Article V(1)(a) New York Convention does not set forth the law governing the capacity or power to enter into an arbitration agreement.[268] That said, the delegates at the New York Conference left this question open so that it is answered by the conflict of laws rules of the State court seized with a motion to deny enforcement of an arbitration agreement under Article II(3) or of an arbitration award under article V(I)(a) New York Convention.[269]

Against this background, arbitrators will also consider to apply the conflict of laws provisions of the forum judge at the place of arbitration or of the State court of enforcement (although arbitrators are not bound by the conflict of laws rules of

[267]Jean Francois Poudret and Sebastien Besson, 'Comparative Law of International Arbitration' (2nd edn.: Thomson, 2007) at 232, 33; Konstantin Leonidovich Razumov, 'The Law Governing the Capacity to Arbitrate', in Albert Jan Van-Den-Berg (ed.), *Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration* (The Hague: Kluwer Law International, 1996) at 260.

[268]Despite the fact that pursuant to Art.V(1)(a) of the New York Convention the recognition and enforcement of an award may be denied where the parties to the arbitration agreement were under some incapacity, the New York Convention does not provide which law governs the question of capacity, or power to enter into an arbitration agreement. Cf. Fouchard et al., 'Fouchard, Gaillard, Goldman on International Commercial Arbitration', at 244.

[269] Poudret and Besson, 'Comparative Law of International Arbitration' at 233, 34.

State courts at the place of arbitration or enforcement).[270] This approach helps to shield an arbitral tribunal's award against setting aside claims at the place of arbitration and to enhance enforcement at the relevant jurisdictions.

In this section, we address questions of capacity that may arise in the context of arbitration agreements in a Mexican trust. We analyze these questions from the perspective of an arbitral tribunal with seat in Mexico that has decided to apply the Mexican courts' conflict of laws rules in Mexico Federal Civil Code. On the one hand, article 13 (II) Mexico FCC provides that the capacity of a natural person is decided by the law of the country where she has her domicile. On the other hand, article 2736 Mexico FCC states that the capacity of legal entities is assessed in accordance with the law of their incorporation.

1. Capacity of Settlors and Trustees

Pursuant to article 384 LGTOC a settlor shall have capacity to transfer the property or rights in trust to the trustees. In this line of thought, a natural person domiciled in Mexico will have both capacity to act as settlor and enter into an arbitration agreement if she has capacity to contract on so call real rights and personal rights. The general principle under Mexican law is that any person who has not been declared incapacitated by law has capacity to contract.[271] Under Mexican law, natural persons lacking capacity to contract will include minors,

[270] *Ibidem*.
[271] Mexico Art. 1798 FCC.

those who do not have sufficient mental maturity, suffer from mental illnesses or are affected by circumstances that do not allow them to exercise their rights. For example, the bankrupt trader, the demented, the prisoner.[272] The same provisions will govern the capacity of settlors in the context of business trusts.[273]

With regard to legal entities, they have the capacity to transfer and acquire goods and rights through most of the ways established by law, just as natural persons do. However, a legal entity's capacity may be limited by law and its incorporation documents. For example, a limitation to a legal entity's capacity derives from the company's object or purpose. In this sense, a legal entity's representatives can only bind the company to those agreements which are within its incorporation purpose and according to the scope of authorization given by the documents of incorporation or by-laws. The law also imposes limits to certain types of legal persons. For example, foundations (*asociaciones civiles* under Mexican law) are not allowed to have as their main activity the trade of merchandise for a profit purpose.

In the context of Mexican trusts, unless a legal person incorporated under Mexican law acting as settlor or any financial and credit institution authorized to

[272] Art. 450 (I)(II) Mexico FCC. See also provisions on the capacity to make a will that may apply by analogy to settlors Arts. 1306-1308 FCC; 'Ricardo Treviño-García, Los Contratos Civiles Y Sus Generalidades' (5th edn.; Mexico, D.F.: McGraw Hill, 2002) at 48, 49.

[273] Mexico Art. 81 CCom; natural and legal persons must first have legal capacity under the Civil Codes in order to perform trade activities. Persons who cannot be bound by their own regular conduct equally lack capacity to perform commercial transactions. Consequently, the provisions on legal capacity contained in the Civil Codes are applicable to the commercial contracts subject to modifications and restrictions imposed by the Code of Commerce.

act as trustee,[274] is expressly precluded by its articles of incorporation and internal rules from agreeing to arbitration, nothing in Mexican law would limit their legal capacity to enter into such an arbitration agreement.

2. Capacity of Minors and Incapacitates Beneficiaries

Settlors of family and testamentary trusts frequently designate beneficiaries who are minors or incapacitated pursuant to Mexican law. In this regard, two issues arise. First, whether a minor or incapacitated may consent to an arbitration agreement. Second, whether a minor or incapacitated may participate in the arbitration proceedings. As starting point, minors lack capacity to contract and, thus, any arbitration provisions agreed by a minor or incapacitated beneficiary on her own name will be invalid (see section VII subsection a above). Yet, parents or tutors could consent to arbitration on behalf of their children or persons under their guardianship.[275] The same is valid with respect to a minor's or impaired person's capacity to present their case before an arbitral tribunal; any due process issue would be cleared out if duly represented by their parents or tutors or the latter's lawyers.

However, Mexican law appears to impose some conditions to the above. On the one hand, article 424 Mexico FCC provides that minors may neither appear in trial nor acquire any obligation without the **express** consent of their

[274] Art. 385 Mexico LGTOC.

[275] Gonzalez-De-Cossio, 'Arbitraje', at 149.

parents. Though no reference to arbitration is made in this provision, one could conclude that Mexican law requires that a parent's intent to submit any disputes arising out of a child's right or obligation to (and appear before) an arbitral tribunal shall be given in an **express** manner. Pursuant to Mexican contract law, express intent is manifested verbally, in writing, by electronic or optic means, or any other technology or through unequivocal signs.[276] In other words, a parent's tacit intent resulting from acts or conduct will be insufficient to bind a minor child to arbitration.[277]

With regard to persons under guardianship (*tutela*), Mexican law conditions a tutor's freedom to submit the minor's or incapacitated's businesses to arbitration and to nominate arbitrators upon approval by the Mexican courts.[278] It is unclear whether this requirement extends to a parent-child relationship or whether it is limited to the tutors-minors-incapacitated relationship. One could argue that it does not, since parents are not subject to strict supervision rules as tutors or guardians are in accordance with Mexican law.[279] Different legal treatment resides on the fact that tutors are designated by law while parents become responsible for their children by natural circumstances which morally lead them to act on their children's best interest with no need for court supervision. Accordingly, we submit that only tutors, but not parents, need the

[276] Art. 1803 (I) Mexico FCC.
[277] Art. 1803 (II) Mexico FCC.
[278] Arts. 566 and 567 Mexico FCC.
[279] We find for example in Art. 418 Mexico FCC specific rules stating that guardians are subject to the same obligations and restrictions established for tutors. However, no similar rules subject parents to the same obligations and restrictions imposed to tutors.

Mexican courts' authorization to agree upon and represent minors and incapacitated in arbitration proceedings arising out of Mexican trust disputes.

VIII. JOINDER OF PARTIES

Despite the fact that globalization has brought with it a growing number of multi-party and long-term relationships, most commercial contracts are short-term ones and still involve two parties only. Trust agreements, on the other hand, involve long-term relationships, longer than most commercial contracts. A Mexican trust may have a 50-year (renewable) term.[280] Presumably, more than one dispute could arise during the duration of the trust. Most importantly, trust disputes usually involve more than two parties and occasionally it may not even be possible to forecast who those parties will be in advance.[281] Where a dispute arises between the trustee and settlor, it may also involve the beneficiaries if claims regard the performance of the trust terms. If the trust indicates a class of persons as beneficiaries, those who are entitled to the trust benefits will have also an interest in joining the arbitration as parties. On the other hand, where the dispute arises between the beneficiaries, it will also involve, most likely, the trustee and the settlor if the matter turns around the interpretation of the trust terms.

Therefore, arbitration must guarantee some procedural efficiency in that regard. We submit that arbitration currently has the tools to meet these particular needs of trust disputes. Most institutional rules empower the institution or the

[280] Art. 394 (II) Mexico LGTOC.
[281] Koch, 'A tale of two cities! - arbitrating trust disputes and the ICC's arbitration clause for trust disputes', at 185.

arbitrators to decide on joinder issues. For the purpose of this work, we will address the relevant provisions in the ICC Rules 2012 and the Mexico Arbitration Center Rules 2009.

Everyday arbitral institutions are more often requested to join parties covered by the same arbitration agreement during the proceedings.[282] Institutions will accept these requests if all parties participate in the composition of the arbitral tribunal in equal terms.[283] This condition results from arbitration laws establishing that an arbitral award may be set aside or refused enforcement if a party was not given proper notice of the appointment of an arbitrator or if the composition of the arbitral tribunal was not in accordance with the agreement of the parties.[284] Article V(1)(b)(d) New York Convention sets forth the same grounds for denying the enforcement of arbitration award.

The duty to include all relevant parties to the arbitration should lay upon the parties themselves, not upon the arbitral tribunal.[285] Preferably, this should happen at the outset of the proceedings. A beneficiary who starts an arbitration against the trustee shall in addition name in her request for arbitration all beneficiaries of the trust who may eventually have an interest either as claimant

[282] From 2007 to 2011 the ICC Court of Arbitration handled 55 requests for joinder of additional parties; 70% involved one additional party, 15% two additional parties and 15% three or more additional parties. Cf. Jason Fry, Simon Greenberg, and Francesca Mazza, 'The Secretariat's Guide to Icc Arbitration' (Paris: International Chamber of Commerce, 2012) at 98.

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

[284] Arts. 34(2)(ii)(iv) and 36 (a)(ii)(iv) UNCITRAL Model Law; Arts. 1457 (I)(b)(d) and 1462 (I)(b)(d) Mexico CCom.

[285] Wüstemann, 'Arbitration of Trust Disputes', at 54.

or as respondent in the proceedings. Similarly, a trustee who submits a request for arbitration against a beneficiary shall also name all those other beneficiaries having an interest in appearing in the arbitration proceedings as parties.[286] Where a claimant and eventually the respondent properly designate in their first submission (request for arbitration or answer to the request, respectively) all claimants and all respondents concerned with the type of trust claim, the arbitral institution will ensure notification of the claims and counterclaims, if any, to all parties therein mentioned.

Early designation of all parties concerned by any trust claims will permit a joint-nomination of one co-arbitrator by the group of claimants and/or a joint-nomination of one co-arbitrator by the group of respondents if a three-member tribunal is to be constituted.[287] Where a sole arbitrator is to be appointed, prompt designation of all parties will also permit a joint-nomination by all parties.[288] Failure to agree on a joint-nomination by one group alone will prompt the arbitral institution to step in to appoint all arbitrators for all parties (claimants and respondents) under many arbitration rules.[289] The purpose of this across the board measure (article 12(8) ICC Rules) is to ensure equality between the parties in the composition of an arbitral tribunal. As explained in the ICC Secretariat Commentary on the ICC Rules 2012:

[286] Blaine-Covington, 'The Validity of Arbitration Provisions in Trust Instruments', at 532, 33.
[287] See for example Art. 12(6) ICC Rules 2012; Art.16(1) Mexico Arbitration Center Rules 2009.
[288] Art. 12(3) ICC Rules 2012; Art.14(3)(a) Mexico Arbitration Center Rules 2009.
[289] Art. 12(8) ICC Rules 2012; Art. 16(2) Mexico Arbitration Center Rules 2009.

> "Where all the parties in one side are unable to agree on a choice of a co-arbitrator, the Court can deny all the parties in the arbitration the right to nominate an arbitrator, if appropriate. This prevents one party or one side from having a perceived or actual advantage over the other in respect of the arbitral tribunal's constitution."[290]

Article 12(8) ICC Rules addresses the decision by the French *Cour de Cassation* in the Dutco case.[291] In that case, any dispute had to be solved by a three-member arbitral tribunal nominated in accordance with the ICC Rules. The claimant (Dutco) nominated a co-arbitrator who was confirmed by ICC Court. The ICC Court then requested the two respondents to nominate jointly their co-arbitrator. The respondents protested against the fact that they both had to nominate jointly one co-arbitrator, but eventually did so. When the arbitral tribunal was composed, the respondents again challenged the composition of the tribunal arguing that they should have each been entitled to nominate one arbitrator for them to be in equal terms with the claimant.[292] The arbitral tribunal dismissed this challenge and the respondents moved to set aside the award before French

[290] Fry, Greenberg, and Mazza, 'The Secretariat's Guide to Icc Arbitration', at 148.
[291] BKMI IndustrienlagenGmbH& Siemens AG v. Dutco Construction, Cour de Cassation (1er Chambre Civile), Pourvoi N° 89-18708 89-18726, 7 Janaury 1992, Revue de l'abitrage (1992) 470, Kluwer Arbitration.
[292] Passage from the decision in the original French language : « … il stipulé que tous différends seront tranchés selon le règlement d'arbitrage de la Chambre de commerce internationale, par trois arbitres nommés conformément à ce règlement; que, sur la demande d'arbitrage unique présentée par la société Dutco, séparément, contre ses deux cocontractantes pour des créances distinctes concernant celles-ci, un tribunal arbitral a été constitué de trois arbitres dont un désigné conjointement par les deux défenderesses avec protestations et réserves; que le tribunal a jugé qu'il avait été régulièrement constitué et que la procédure arbitrale devait se poursuivre sous la forme multipartite contre les deux défenderesses;…». Cf. Revue de l'abitrage (1992) 472, Kluwer Arbitration.

courts. The *Cour de Cassation* admitted the challenge holding that all parties are entitled to equality of treatment, including in the process of constituting the arbitral tribunal.

The appointment of all arbitrators for both sides by the arbitral institution eliminates any apparent advantage of one side over the other regarding the arbitral tribunal's composition and is not deemed an infringement of Article V(1)(b)(d) New York Convention,[293] or similar provisions.[294]

In case a party is requested to be joined to the proceedings (or a party requests to become a party) after the first exchange of submissions, arbitral institutions take different approaches to comply with the parties' right to participate in the composition of the arbitral tribunal. The ICC Rules require the submission of a request for joinder (which has the same effects as a request for arbitration).[295] The request for joinder shall be made before the confirmation or appointment of any arbitrator, unless all parties agree otherwise.[296] In practice, the ICC Secretariat will advise the parties in advance of this cut-off point[297] and set a time limit for filing any request for joinder before any arbitrator is finally confirmed or appointed. The ICC Court will then make a *prima facie* assessment

[293] Since the parties are then deemed to have been given the opportunity to appoint their arbitrators and the default appointment by the arbitral institution is made in accordance with the arbitration agreement that incorporates the arbitral institution's rules.
[294] Arts. 1457 (I)(b)(d) and 1462 (I)(b)(d) Mexico CCom.
[295] Art. 7(1) ICC Rules.
[296] Art. 7(1) ICC Rules.
[297] Fry, Greenberg, and Mazza, 'The Secretariat's Guide to Icc Arbitration' at 99.

of the existence of an arbitration agreement covering the additional party.[298] A timely request for joinder will be subsequently transferred to the party(ies) concerned by the ICC Court's Secretariat. The receiving party(ies) will have thirty days to submit an answer to the request for joinder.[299]

The additional party will thus be permitted to jointly nominate a co-arbitrator with the side it joined pursuant to article 12(6) ICC Rules. Where the additional party is unable to agree with one of the existing parties on a joint-nomination of a co-arbitrator, the institution will appoint all arbitrators for all parties in accordance with article 12(8) ICC Rules.[300]

However, the requirement to ensure equal treatment in the process of composing the arbitral tribunal is not absolute. If all parties agree, a request for joinder may be accepted after the constitution of the arbitral tribunal.[301] In the context of trust disputes, it should not be uncommon that a trustee and one beneficiary agree upon other beneficiaries becoming a party to proceedings after the constitution of the arbitral tribunal. Indeed, this issue may be addressed in advance in the arbitration clause of a trust deed. The following wording may ensure the joinder of additional parties in such circumstances:

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[298] Arts. 7(1) and 6 (3-7) ICC Rules, Pursuant to the current rules the Secretariat of the ICC Court will decide which pleads against the arbitration agreement (art. 6(4) ICC Rules) shall be decided by the Arbitral Tribunal and which shall be referred to the Court for a prima facie determination, only those cases where jurisdiction may be at issue will be referred to the Court, ibid., at 67, 68, 95.

[299] Art. 7(3) ICC Rules.

[300] Fry, Greenberg, and Mazza, 'The Secretariat's Guide to Icc Arbitration', at 150, 51.

[301] Art. 7(1) ICC Rules.

> All disputes arising out of or in connection with the trust created hereunder shall be finally settled under the Rules of Arbitration of the [institution] (the "Rules") **by one or more arbitrators who shall be exclusively appointed by the** [institution]. **All parties hereby agree that additional parties may be joined to the proceedings before or after the constitution of the arbitral tribunal**. Upon its constitution, the arbitral tribunal shall decide any request for joinder in accordance with the Rules.

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

IX. Efficiency of arbitral awards in Mexican trust disputes

The efficiency of an arbitral award is closely dependent upon the enforceable character of the arbitration agreement that gives it origin and the fulfillment of equal treatment and due process principles. The UNCITRAL Model Law sets out the reasons for which a court at the place of arbitration may set aside an arbitral award as well as the reasons for which a court may refuse

enforcement of a domestic (or a non-New York Convention) arbitral award.[302] The reasons for setting aside awards actually mirror those for refusing enforcement,[303] and all are inspired by article V New York Convention.

Most of these reasons – also textually adopted in Mexican arbitration law[304] – have been addressed in the prior sections of this work. They regard the existence of a valid arbitration agreement among the parties (section V above),[305] the arbitrability of the claims at stake (section VI above),[306] the capacity of the parties to submit toarbitration (section VIII above)[307] and the proper constitution of the arbitral tribunal (section IX above).[308]

In this section, we focus on one major reason for which arbitral awards are set aside or denied enforcement: *public policy.* Such as other grounds analyzed above, we will approach the public policy exception from the Mexican law standpoint.[309] The remaining reasons based on *ultra petita* decisions[310] or failure

[302] Arts. 34 and 36 UNCITRAL Model Law.
[303] Except for the fact that the enforcement court may also considered the fact that the award has been set aside at the place of arbitration for denying enforcement. Cf. Art. 36 (2) UNCITRAL Model Law.
[304] Arts. 1457 and 1462 Mexico CCom.
[305] Arts. 34(2)(a)(i) and 36 (1)(a)(i) UNCITRAL Model Law; Art. V (1)(a) New York Convention; Arts. 1457 (I)(a) and 1462 (I)(a) Mexico CCom.
[306] Arts. 34(2)(b)(i) and 36 (1)(b)(i) UNCITRAL Model Law; Art. V (2)(a) New York Convention; Arts. 1457 (II) and 1462 (II) Mexico CCom.
[307] Arts. 34(2)(a)(i) and 36 (1)(a)(i) UNCITRAL Model Law; Art. V (1)(a) New York Convention; Arts. 1457 (I)(a) and 1462 (I)(a) Mexico CCom.
[308] Arts. 34(2)(a)(ii, iv) and 36 (1)(a)(ii, iv) UNCITRAL Model Law; Art. V (i)(b, d) New York Convention; Arts. 1457 (I)(b, d) and 1462 (I)(b, d) Mexico CCom.
[309] This makes sense since settlors and trustees of Mexican trusts will most likely choose Mexico as a place of arbitration. One could easily forecast that financial institutions agreeing upon arbitration will want to keep the arbitration proceedings under the supervision of Mexican courts and Mexican mandatory rules of law. In this case, Mexican public policy will be relevant in case of annulment actions against the award. In the event parties select a place of arbitration outside Mexico, or where the arbitral tribunal so determines, public policy pursuant to Mexican law will

to provide proper notice of the proceedings[311] contemplated by the UNCITRAL Model Law or the New York Convention do not seem to raise any particular issue in relation to trust disputes.

Like in other jurisdictions, Mexican courts and scholars have struggled to define what public policy means in the context of arbitration.[312] As starting point, an arbitral decision will be set aside or refused enforcement only when it infringes "basic notions of moral and justice" of Mexico's legal system.[313] Yet, nobody would dare to propose a list of components of Mexican moral and justice. Therefore, scholars have rather taken the approach of explaining what public policy in arbitration is not. We share Gonzalez de Cossio's view that the purpose of this exception is to prevent giving legal effect to institutions that are contrary to the most valuable principles of Mexican law.[314] In this line of though, it is improper to consider that an arbitrator's incorrect interpretation or application of what are usually deemed mandatory norms of law under Mexican law constitutes a breach of Mexican public policy. Only arbitral decisions which go against the

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then be relevant at the stage of enforcement of the arbitral award. Since only Mexican based financial and credit institutions may act as trustees, any arbitration award that may not be voluntarily complied with by the trustees will have to be enforced in Mexico. In this regard, all parties involved in a Mexican trust arbitration have a legitimate interest in knowing whether the Mexican notion of public policy could jeopardize the enforcement of an arbitration award in Mexico.

[310] Arts. 34(2)(a)(iii) and 36 (1)(a)(iii) UNCITRAL Model Law; Art. V (i)(c) New York Convention; Arts. 1457 (I)(c) and 1462 (I)(c) Mexico CCom.Arts. 34(2)(a)(ii, iv) and 36 (1)(a)(ii, iv) UNCITRAL Model Law; Art. V (i)(b, d) New York Convention; Arts. 1457 (I)(b, d) and 1462 (I)(b, d) Mexico CCom.

[311] Arts. 34(2)(a)(ii) and 36 (1)(a)(ii) UNCITRAL Model Law; Art. V (i)(b) New York Convention; Arts. 1457 (I)(b) and 1462 (I)(b) Mexico CCom.

[312] Gonzalez-De-Cossio, 'Arbitraje', at 797-800.

[313] *Ibidem*, at 800.

[314] *Ibidem*, at 801.

mandatory norms of law that embody basic notions of moral and justice in Mexico can give raise to the exception of public policy.[315]

Against this background, this work does not intend to define the elusive notion of public policy or verify the accuracy of the contours drew by Mexican case law or scholars. In lieu of, we identify two examples of mandatory norms of law that could give raise to the public policy exception in the context of arbitration of Mexican trusts disputes.[316]

The first case regards testamentary trusts.[317] Certain mandatory rules of law may affect the validity of a Mexican trust when the settlor passes away. Pursuant to article 1374 Mexico FCC, a testament failing to provide allowance for the benefit of so-called law-protected-dependents will be invalid.[318] These include the deceased's children, widow, concubine, parents and siblings who are incapacitated to work or do not possess enough assets to subsist and were entitled to allowance at the time of death.[319] In this context, an arbitral award giving effect to the terms of a testamentary trust that omits to consider as

[315] *Ibidem*, at 801, 02.
[316] Other situations may also give raise to the exception of public policy in the context of arbitral awards derived from Mexican trust disputes. However, those other situations could also probably arise in the context of a typical commercial arbitration.
[317] In addition to be made in writing, a testamentary trust shall comply with the solemnities and form validity requirements of testaments and wills. Cf. José Arce-Y-Cervantes, *De Las Sucesiones* (Mexico, D.F.: Porrúa, 2006) at 148.
[318] The original in Spanish reads:" Es inoficioso el testamento en que no se deje la pensión alimenticia, según lo establecido en este Capítulo."
[319] Art. 1368 and 1371 Mexico FCC.

beneficiaries – to the extent required by law[320] – any law-protected-dependent, could be partially or totally set aside or refused enforcement based on Mexican public policy. In principle, the arbitral tribunal should have considered the mandatory nature of article 1374 and issued an arbitral award in those terms. However, the arbitral tribunal may only consider the application of article 1374 on two conditions. On the one hand, where one of the parties involved have so requested. If not, the award would be made *ultra petita*.[321] On the other hand, where the party affected by or benefiting from such an award is a party to the arbitration agreement. Otherwise, the arbitral tribunal would lack jurisdiction *ratione personae*, and thus the decision concerning the third person would be set aside or refused enforcement.[322]

The second case regards disputes arising out of so called "trusts over real estate located in the Mexican Restricted Zone".[323] Pursuant to Article 27 (I) Mexico Constitution, foreign persons are barred from acquiring direct ownership of lands and waters within a hundred kilometers along the country boarders and within fifty kilometers of the seacoast. The usual way to circumvent this constitutional prohibition is to hold the property in a Mexican trust. Since

[320] Pursuant to Mexican law the terms of the *testamentoinoficioso* are annulled only to the extent the total of the deceased's estate is not enough to provide alimony and allowance to the deceased's protected dependents.
[321] Arts. 34(2)(a)(iii) and 36 (1)(a)(iii) UNCITRAL Model Law; Art. V (i)(c) New York Convention; Arts. 1457 (I)(c) and 1462 (I)(c) Mexico CCom.Arts. 34(2)(a)(ii, iv) and 36 (1)(a)(ii, iv) UNCITRAL Model Law; Art. V (i)(b, d) New York Convention; Arts. 1457 (I)(b, d) and 1462 (I)(b, d) Mexico CCom.
[322] Arts. 34(2)(a)(i) and 36 (1)(a)(i) UNCITRAL Model Law; Art. V (1)(a) New York Convention; Arts. 1457 (I)(a) and 1462 (I)(a) Mexico CCom.
[323] The restricted zone is composed of land located 100 kilometers next to international borders, and 50 kilometers from Mexican costliness. Cf. Art. 2(VI) Mexico Foreign Investment Law.

foreigners cannot technically ‘buy’ property in that zone, the seller will act as settlor in order to transfer the real property to the trustee, a bank fiduciary department. The trustee then holds ownership title for the benefit of the designated foreign beneficiary pursuant to articles 10-14 Mexico Foreign Investment Law. Arbitrators may not disregard the mandatory provisions in the Mexican Constitution and Foreign Investment Law. In this line of though, arbitrators shall apply the ownership restrictions regarding the real property transferred in trust. Any arbitral decision granting property title to a foreign person in contravention of the above mandatory provisions will be set aside or refused enforcement in Mexico.

CONCLUSION

Mexican lawyers envisaged the Anglo-American trust as a legal structure of significant usefulness to the industry. It was not long until a rearranged version of the trust was brought and incorporated into Mexico's legal framework (see section II subsections 1 and 3 above). As it was predicted, the Mexican trust nowadays is one of the most popular means of materializing complex transactions of all kinds. Nevertheless, when a dispute arises from a complex transaction, a considerable degree of complexity tends to exist in the dispute as well. As an alternative to a judicial system that may not be sufficiently adapted or prepared to assess controversies of this kind, arbitration proves to be an efficient dispute resolution mechanism (see section IV above).

However, as it was pointed out throughout this study, concerns as regards whether an arbitration agreement in a Mexican trust is enforceable may arise. Among these concerns, we considered that issues regarding consent, capacity, arbitrability, enforceability and the joinder of third parties are those of greatest importance.

It has been concluded that without further difficulties arbitration agreements in Mexican trusts are enforceable pursuant to the New York Convention and modern arbitration laws. In assessing issues regarding consent in a Mexican trust, consideration must be given to its intrinsically distinct legal nature in contrast with an Anglo-American trust. The latter considered a unilateral declaration of intent and the former a contract (see section III above). Hence, the general contract provisions of the applicable law will determine whether the parties in fact intended to enter into the agreement. As formerly stated, this matter is unlikely to raise any hassles when Mexico is designated as the seat of the arbitration: Mexican contract law will be relevant to assess substantive validity. In

addition, when pursuing enforcement in light of English or US law, the English Arbitration Act and the US Federal Arbitration Act respectively will enable enforcement of an arbitration agreement in a trust deed. However, even when seeking enforcement in these jurisdictions, the contractual nature of the Mexican trust should never be disregarded, as it was settled under Mexican law. Thus, the contract law provisions of the relevant common law jurisdiction will then be applicable to analyze the substantive validity of the arbitral agreement. As for Mexican, US and English laws, intent to arbitrate between settlor and trustee (see section VI subsection 1 above) in a Mexican trust should not be a problem: a Mexican trust is said to come into existence only after the trustee (a fiduciary institution) agrees to undertake such office. If consent is granted as regards the trust deed, the arbitration clause contained therein is being agreed upon also. Notwithstanding, when it comes to the beneficiaries' consent (see section VI subsection 2 above), when not expressly stated in the trust deed, it can be implied by means of different legal doctrines. In civil law systems, under the legal scheme of the provision in favor of a third party. And, in common law systems, pursuant to the direct benefits estoppel doctrine (or its civil law equivalent, good faith).

When it comes to arbitrability, regard is to be had to the *lexarbitri* and the mandatory provisions of the place of the arbitration. If the final award is not voluntarily complied with by the parties, such award will have to, very likely, be enforced in Mexico. Therefore, arbitrability pursuant to Mexican law is of major significance. Matters not susceptible of being solved by arbitration are listed in articles 2946-2951 of the FCC. We concluded that when it comes to a minor's or an incapacitated's rights however, only rights inherent to their personal and family status are non-arbitrable. Following that line of thought, rights of minors or incapacitated arising from a trust deed are arbitrable. This holds true given that such rights result from a deliberated wish of the settlor and not a

legal duty; they are contractual in nature. Thus, they are susceptible of being solved by arbitration. As regards matters of exclusive purview of Mexican courts, matters concerned with a dispute in a Mexican trust will hardly fall within that category, unless it is a trust over immovable goods located in the Mexican Restricted Zone. Nevertheless, even in these circumstances, as long as arbitrators consider the relevant mandatory restrictions of ownership inherent to the estate given in trust conferred by the Mexican Constitution, disputes arising from these trusts are arbitrable. In addition, provisions in Mexican law whose purpose is merely to define territorial jurisdiction among Mexican courts do not constitute a restriction to arbitration. Lastly, since beneficiaries are free to reject any benefits that they are entitled to receive under a trust, these are rights they are free to dispose of and are thus arbitrable.

Likewise, capacity to enter into the agreement was addressed in detail above (see section VIII). In conclusion, under Mexican law the only particular concern that could emerge in the context of Mexican trust disputes is whether minor or incapacitated beneficiaries are capable of consenting to arbitration and of participating in the arbitral proceedings. This concern is superseded by the only requirement of being duly represented by either a parent, a tutor or the latter's lawyer.

Pursuant to the ICC Rules 2012 and the Mexico Arbitration Center Rules 2009, additional parties may join the arbitral proceedings before the constitution of an arbitral tribunal in which all parties participated in the appointment of the arbitrators in equal terms (section IX). If the appointment of arbitrators by the parties fails in light of the above requirement, the institution will intervene and appoint all arbitrators. Nonetheless, parties may forecast this situation and avoid further trouble by using the correct wording in their arbitration clause, as suggested. This would enable the possibility of the joinder

of additional parties even after the constitution of the arbitral tribunal without any concerns regarding infringement of due process.

Finally, we have addressed two examples that could lead to denial of enforcement of arbitration awards in the context of Mexican trust disputes under Mexican law. These regard allowance in testamentary trusts and restrictions of ownership in the Mexican Restricted Zone trust (section X). No issue is likely to be raised as long as the arbitrators take the mandatory provisions regarding testaments and restrictions in the Mexican Restricted Zone to the ownership into consideration. The arbitral tribunal will only be bound to decide in light of these mandatory rules of law when either a party so requests or when a party affected or benefited from the award is a party to the arbitration agreement.

Throughout this study, evidence was solidly furnished on how parties to Mexican trusts are hardly prevented by any legal obstacle from resorting to arbitration to settle their disputes. What is more, a deep compatibility between the legal scheme of a trust and the manner in which arbitral proceedings take place has been demonstrated. The benefits of this alternative dispute resolution mechanism are available for parties to Mexican trusts; all that is left to do is to be bold enough to seize them.

PROPOSALS

1. As it was shown throughout this work, arbitration clauses in Mexican trusts are enforceable under Mexican law. For the abovementioned and constantly repeated reasons, arbitration proves to be a convenient alternative to local courts in the resolution of trusts disputes. The one and only proposal to be drawn from this study is thus, to invite all parties settling Mexican trusts to choose arbitration as their dispute settlement mechanism.

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