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**Sports Arbitration:  
A Coach for Other Players?**

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**JURIS**

## Chapter 6

### "Consent" and Trust Arbitration<sup>1</sup>

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#### 1. INTRODUCTION

Most arbitration practitioners have never been involved in a trust arbitration. This is not really surprising: until recently, trust litigation and arbitration pretty much ignored each other. While trust disputes are primarily concerned with family wealth and involve individuals rather than corporations, arbitration had grown out of international commerce. Moreover, trust litigation has long been the exclusive preserve of the English legal profession as most trust jurisdictions are former English territories and as such follow developments in English law.<sup>3</sup>

However, with increasing mobility of individuals in a shrinking world, trusts are today no longer confined to the Anglo-Saxon world, but have gained wider international recognition. Since the ratification of the Hague Trust Convention<sup>4</sup> and the introduction of jurisdictional rules for international trust disputes in 2007,<sup>5</sup> Switzerland fully recognizes foreign trusts and Swiss courts are, if certain requirements are met, competent to adjudicate trust disputes.

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<sup>1</sup> This article is not intended to be a comprehensive analysis of all the complex questions which arise in the context of trust arbitration and many of the issues covered are necessarily summary in nature. The focus will be on (non-commercial) family trusts as opposed to business trusts, which in some jurisdictions are treated more like a corporation than a trust. Cf. also Tina Wüstemann, "Anglo-Saxon trusts and (Swiss) arbitration: alternative to trust litigation?", *Trusts & Trustees*, 2012, No. 4, 341-347; Tina Wüstemann, "Arbitrating Trust Disputes", *Arbitration in Switzerland*, in Manuel Arroyo (ed.), *Arbitration in Switzerland: The Practitioner's Guide* (Kluwer Law International 2013) 1247 - 1263; Special Issue: Trusts and Arbitration, *Trusts & Trustees*, 2012, no. 4, featuring articles from several authors from different jurisdictions on the subject of trust arbitration. Issues No. 1 & 2 of the *Journal Trusts & Trustees* 2014 contain additional papers on trust arbitration from Toby Graham, David Brownbill QC and Dr. Georg von Segesser on trust arbitration, complementing the coverage of trust arbitration in Issue no. 4 of the 2012 *Journal*.

<sup>2</sup> Tina Wüstemann, LL.M., Attorney-at-Law, Partner at Bär & Karrer Ltd., Zurich.

<sup>3</sup> Bruno Boesch, *The ICC Initiative*, *Trusts & Trustees* 2012, no. 4, 316.

<sup>4</sup> The Hague Convention on the Law Applicable to Trusts and on their Recognition of 1985 (SR 0.221.371).

<sup>5</sup> Articles 149a-149e of the Swiss Federal Act on International Private Law (PIL; SR 291).

Trust litigation has substantially increased during the last years; and very often, massive amounts of money are at stake. One explanation for this development is the fact that more and more settlors are leaving substantial fortunes in complex structures in different jurisdictions. Another possible reason is purely generational: many offshore-trusts were set up by the settlors in the 1960s and 1970s and today, the next generation—with its own needs and visions—takes over. Also, trusts have increasingly come under attack by “outsiders” to the trust, such as forced heirship heirs, former spouses or creditors of the settlor.<sup>6</sup>

Courts in offshore jurisdictions such as Cayman, Bermuda, the Channel Islands or BVI, where trust litigation usually takes place, have been criticized for being overburdened and not always fit to handle family trust disputes. One case where the shortcomings of the court became apparent was the *Thyssen* case,<sup>7</sup> in which the judge, a QC from Hong Kong, after a two year battle before the courts of Bermuda, resigned after a dispute with the Bermudian government about his salary. The parties were then forced to settle the dispute.<sup>8</sup>

Already in the 1990s, representatives mainly from the trust industry started discussing the idea of using arbitration to resolve trust disputes but it is only since the last ten years that the appetite for trust arbitration is on the increase. In 2001, the American Arbitration Association (AAA) issued specific Wills and Trust Arbitration Rules and Model Arbitration Clauses, which were up-dated in 2012.<sup>9</sup> The International Chamber of Commerce (ICC) followed in 2008 and introduced a model arbitration clause (and related explanatory notes) for trust disputes.<sup>10</sup> The ICC Commission on Arbitration and ADR (as it is now called) currently proposes to reconvene its Trusts & Arbitration Task Force with a view to draft a revised model arbitration clause (conforming with the new ICC Rules as in force since 1 January 2012) and an updated explanatory note (reflecting the last five year statutory changes and the academic developments). In parallel, a number of trust jurisdictions such as Guernsey,<sup>11</sup> Malta,<sup>12</sup> the

<sup>6</sup> Tina Wüstemann, “Current Trends in International Litigation”, *International Estate and Tax Planning 2014*, Practising Law Institute, New York, 207-220.

<sup>7</sup> Robert Ham, “The Thyssen Case: Swiss Law before Bermuda court”, paper handed out at the 1<sup>st</sup> Annual Zurich Conference on International Trust and Inheritance Law Practice, (Zurich, 9 November 2005).

<sup>8</sup> Tony Molloy QC and Toby Graham, *Arbitration of trust and estate disputes*, *Trusts & Trustees*, no. 4, 2012, 279.

<sup>9</sup> AAA Wills and Trusts Arbitration Rules and Mediation Procedures, amended and effective as of 1 June 2012 ([www.adr.org](http://www.adr.org)).

<sup>10</sup> ICC Bulletin vol 19 No 2-2008, 9-11 and Bruno Boesch, FN 3, 322-323.

<sup>11</sup> Pt II s. 63 Trusts (Guernsey) Law 2008.

Bahamas<sup>13</sup> and some US states (Florida and Arizona)<sup>14</sup> have recently implemented legislation for trust arbitration. Also, the UK Trust Law Committee considered in November 2011 an amendment to the UK Arbitration Act 1996<sup>15</sup> to make arbitration clauses in trust deeds enforceable in order not to lose out on this commercially viable business to other jurisdictions.<sup>16</sup> Finally, Jersey is currently considering the introduction of arbitration provisions into its trust law—so far as it concerns Jersey law governed trusts.<sup>17</sup>

Switzerland's importance as a center for trust services and its longstanding tradition in international arbitration makes it, in the author's view, a perfect venue for trust arbitration considering in particular the scarcely developed arbitration law and practice in several offshore trust jurisdictions.

Against this background, the present contribution deals with the specific issues which may arise in trust disputes and addresses the general features of trust arbitration before analyzing the terms and conditions of arbitration clauses in a trust context in comparison with arbitration clauses used in sports arbitration. Finally, the author concludes with an outlook on the prospects of trust arbitration.

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<sup>12</sup> Malta Arbitration Act, CAP 387, Section 15A.

<sup>13</sup> The Trustee (Amendment) Act, 2011, Sections 91A, 91B and 91C. In addition to expressly enabling the arbitration of trust disputes, the new provisions also clearly specify the scope of the Arbitral Tribunal's powers by granting it all powers in relation to trusts that a domestic court enjoys. See also David Brownbill QC, *Arbitration of Trust Disputes, Trusts & Trustees*, No. 1 & 2, 2014, 30-36.

<sup>14</sup> Ariz. Rev. Stat. Ann s. 14-10205 (West); Florida Statutes, Title XLII (Estates and Trusts), Ch731, s 731.401-Arbitration of Disputes. The American College of Trust & Estate Counsels (ACTEC), of which the author is a member, through its Arbitration Task Force, formulated a model statute for US States to allow the enforceability of arbitration clauses in wills and trust deeds, along with sample clauses to be used. The ACTEC Task Force advises to enact statutes in the states to allowing the settlors to incorporate binding arbitration provisions rather than leaving such controversies to the court. It needs to be noted that so far only Florida and Arizona have introduced legislation declaring arbitration clauses in trust deeds enforceable. Other US states have rejected arbitration clauses in trust deeds, declaring them ineffective. However, in November 2012, the Texas Supreme Court ruled in favor of enforcing an arbitration provision in an *inter vivos* trust in *Rachal v. Reitz*. This is a good decision for swinging the momentum in favor of trust arbitration in the US (<http://www.supreme.courts.state.tx.us/historical/2013/may/110708.pdf>).

<sup>15</sup> Arbitration of Trusts Disputes by the UK Trust Law Committee ACTAPS Newsletter no 145, 2011, 13-15.

<sup>16</sup> Unlike in offshore trust jurisdictions like Guernsey, Jersey and the Bahamas, who took the idea of trust arbitration up, there seems according to some trust practitioners to be currently no appetite in England for putting resource and money into this subject.

<sup>17</sup> Georg von Segesser, A step forward: addressing real and perceived obstacles to the arbitration of trust disputes, *Trusts & Trustees*, No. 1 & 2, 2014, 37-51, who ranges into the laws of trust arbitration-friendly jurisdictions and addresses common reservations that many trust lawyers may have about arbitration.

## 2. TRUST DISPUTES

### 2.1 The Parties

In each trust relationship, there is a *settlor* who wants to protect and preserve his assets for the next generations under the control of a trustee for the benefit of beneficiaries, typically the settlor himself or his relatives. Apart from the trustee, the settlor may appoint a so-called *protector* to monitor the trustee's activities. While the *beneficiaries* have a strong (financial) interest in the trust assets, they play no part in the creation of the trust: they do not negotiate the trust deed nor do they select the trustee. From their point of view, they are "forced" into a relationship with the trustee and each other, rather than having agreed to be involved. Due to the different interests and positions of these key players, various disputes may arise. Trust disputes do, however, not only arise between these "*insiders*" but also with "*outsiders*" to the trust such as (ex-)spouses, forced heirship heirs or creditors of the settlor who try to attack the trust, to claw back trust assets or to question its validity.

In the context of trust *litigation*, it is important to be aware of the *role of the court* of the state whose law governs the trust. Apart from its judicial function, the court has in addition a supervisory function in relation to the administration of the trust, mainly for protecting the beneficiaries but also to provide guidance to the trustee. A trustee may for example ask the court for directions as to the (i) interpretation of an unclear provision in the trust deed (*constructive summonses*) or (ii) in relation to the conduct of his trusteeship (*directive summonses*).

### 2.2 Types of Trust Disputes

Trust<sup>18</sup> disputes are distinctively different from traditional commercial disputes in international arbitration: they concern individuals rather than corporations and often they are multi-party

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<sup>18</sup> Trust is a concept developed by English equity courts during the 12<sup>th</sup> and 13<sup>th</sup> century. The trust is governed by the provisions of the trust deed and absent any specific provisions, general principles of common law apply, supplemented by local statutory trust law. While many (offshore) trust jurisdictions—mainly former territories or colonies of the British Empire—have developed their own trust law, they often follow the developments in English law. As such, they have adopted many British trust statutes or enacted similar legislation and the decisions of the British courts are highly persuasive for them. *But cf.* Jonathan Harris, *Trusts & Trustees*, 2011 No. 4 236, who notes that many offshore jurisdictions, which had previously tended to follow the English common law lines of authority, now find themselves increasingly departing from them in the pursuit of effective-asset protection legislation designed to attract trusts business to the local jurisdiction.

disputes. Trust disputes come in all forms and shapes and can be divided into three broad categories:

- i) **Third Party Disputes** concern the trustee's external relationship with third parties, e.g. contracts with investment advisors.
- ii) **Trust Disputes** concern external claims by creditors, (forced heirship) heirs or (ex-)spouses trying to attack or vary the trust. An example is the *Thyssen case*,<sup>19</sup> mentioned above, in which Baron Heini Thyssen argued before the Bermuda Court that the trust he set up to protect his business violated Swiss inheritance law to regain control of the trust assets. In this category falls also the Werner K. Rey case,<sup>20</sup> in which the district court of Zurich decided in 1999 that the financier Werner K. Rey did not respect the integrity of his Guernsey family trust and that the trust was thus a "sham" with the result that the substantial trust assets became part of Werner K. Rey's personal estate in bankruptcy. Trust assets worth billions are currently the subject matter of Swiss divorce proceedings between a Russian oligarch and his wife, in what could end up being the biggest divorce settlement ever in history. On 19 May 2014 the Geneva family court ordered that Mr. Rybolovlev must pay more than CHF 4 billion to Elena Rybolovleva. The judgment at the time of writing this article is not final yet; there are two levels of appeals possible.<sup>21</sup>
- iii) **Beneficiaries' Disputes** or so-called **Internal Disputes** concern the relationship between the beneficiaries and the trustee. In this kind of disputes, which are basically disputes about the terms of the trust, the validity of the trust is not generally questioned. The ICC Trust Arbitration Clause applies to such Internal Trust Disputes.<sup>22</sup> Such disputes may

<sup>19</sup> Cf. Robert Ham, FN 7.

<sup>20</sup> Judgment of the Zurich District Court of 14 February 1994, ZR 98, 1999, Nr. 52, 225-259.

<sup>21</sup> Decision of the Swiss Federal Supreme Court 5A\_259/2010 [*Rybolovlev v. Rybolovleva*] of 26 April 2012. Cf. also Tina Wüstemann/Delphine Pannatier, *Trusts in the context of Swiss Divorce Proceedings, Trusts & Trustees*, 2011, No. 9, 883-882; Tina Wüstemann/Debora Gabriel, *International Trust and Divorce Litigation in Switzerland*, (Goodman/Harper/Hamlin/Matthews/Gale/Fudakowska, Burgess eds.), second edition, Jordans, 2013, 266-275. See also <http://www.independent.co.uk/news/world/europe/worlds-most-expensive-divorce-costs-russian-billionaire-dmitry-rybolovlev-27bn-9400148.html>.

<sup>22</sup> See FN 9.



arise e.g. if it is not clear whether someone falls within a class of beneficiaries (e.g. is an illegitimate child of the settlor a beneficiary of the trust?). They may further concern the exercise of discretion by a trustee (e.g. did a beneficiary receive a large enough distribution from the trust?) or breach of trust claims (e.g. alleged mismanagement by the trustee of the trust assets). A famous example of such an Internal Trust Dispute is the Pritzker family feud where the actress Liesel Pritzker of the Chicago Pritzker family, who hold their USD 15 billion empire including the Hyatt hotel chain in trusts, sued her own father Robert Pritzker, who was the trustee of her trust, claiming that he looted her trust funds of USD 1 billion. The dispute was settled in 2005 after a court battle of three years.<sup>23</sup>

Most trust deeds contain a choice of law clause but no jurisdiction clause.<sup>24</sup> In many offshore trust jurisdictions, courts are competent to deal with trust disputes if the trust in question has been established and is governed by the local law of the respective jurisdiction even though the parties and the facts of the case may be unrelated to that jurisdiction. Trust users such as settlors, trust companies and beneficiaries from non-trust countries are today less willing to accept that disputes among themselves have to be litigated in remote jurisdictions in accordance with foreign procedural rules merely because the law of that jurisdiction happens to govern the trust. Accordingly, there appears to be a tendency to include jurisdictional rules in trust deeds in order to determine in advance a convenient forum for trust disputes.<sup>25</sup>

### 3. TRUST ARBITRATION

There is consensus today among trust practitioners that the advantages acknowledged in international arbitration equally apply to the resolution of international trust disputes: First, confidentiality to avoid potential humiliation and reputation risks, but equally the

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<sup>23</sup> [http://articles.chicagotribune.com/2005-06-12/news/0506120282\\_1\\_penny-pritzker-jay-pritzker-family-businesses](http://articles.chicagotribune.com/2005-06-12/news/0506120282_1_penny-pritzker-jay-pritzker-family-businesses).

<sup>24</sup> David Brownbill QC and Edward Cumming of XXIV Old Buildings: International Trust Litigation: Choosing your Battleground?, *Who's Who Legal*100, March 2014, <http://whoswholegal.com/news/ukbar/article/31247/%20franco-vigliano> (last visited 15 May 2014).

<sup>25</sup> Cf. Article 149 b(1) PIL, which foresees the possibility that the settlor prorogates a Swiss court to adjudicate internal trust disputes. Another question, however, is whether the foreign trust court - in particular in its supervisory function - would recognize the jurisdiction of the Swiss courts rather than assert its own jurisdiction in that regard.

selection of the expert adjudicator and the choice of the most appropriate procedural rules seem very compelling.

For an arbitrator to assume jurisdiction over a trust dispute there must be (i) a valid arbitration agreement, (ii) the representation of all interested parties (including unborn, minor and unascertained beneficiaries) and (iii) the subject matter of the dispute must be *arbitrable*.

From the range of problems identified in the context of trust arbitration, the primary hurdle is whether a beneficiary can be compelled to arbitration on the basis of an arbitration clause in a trust deed.

#### 4. THE ARBITRATION CLAUSE IN A TRUST CONTEXT

The establishment of a trust is not considered as a contract nor is a trust akin to a corporation. Rather, the settlor, *by unilateral act*, transfers property into the trust, i.e. to the trustee—be it his stake in a family business, an art collection or valuable real estate portfolio—and confers rights and obligations on the other parties to a trust such as a trustee, a protector or a beneficiary.

Despite the fact that a trust deed is not a contract nor a corporation, following the principle of severability of the arbitration clause, a trust deed may contain an arbitration clause provided the clause is worded as such in the trust instrument.

##### 4.1 Settlor, Trustees, Protectors

Settlor, trustee(s) and protector(s) execute and sign the trust deed containing the arbitration clause when accepting office and they can see to it that future trustees or protectors do so, too. They have thus explicitly (or in exceptional cases when appointed by the court, impliedly) accepted the arbitration clause when accepting office. This is also the approach followed by the ICC Arbitration Clause for Trust Disputes:<sup>26</sup>

...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... [emphasis added].

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<sup>26</sup> See FN 9.



## 4.2 Third Parties

Third parties such as creditors, (forced heirship) heirs or (ex-)spouses of the settlor can obviously not be compelled to arbitration on the basis of an arbitration clause in a trust deed unless they are at the same time beneficiaries. Instead, they would have to agree to submit an existing dispute to arbitration (*ad hoc* arbitration) like in the *Weissfisch* case,<sup>27</sup> a multi-million pound dispute between two wealthy brothers over the assets of a Bahamas trust, which owned a profitable metal trading business.

## 4.3 Beneficiaries: Non-Signatories to Trust Deed

Unlike the settlor, trustee(s) or protector(s), beneficiaries are normally not signatories to the trust deed, they might not even be born at the time the trust is established. A mechanism is therefore needed to bind them to the arbitration clause in the trust deed.

The approach adopted by the ICC Task Force on Trust Arbitration was to include a trust provision in the trust deed, according to which agreeing to arbitration is a *condition precedent* for the beneficiary to benefit from the trust in the first instance. The clause reads as follows:

**...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... [emphasis added].**

As will be shown below (section 5.2.1 *et seq.*), there is sound legal basis for this mechanism both under English and Swiss law.

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<sup>27</sup> *Weissfisch v. Julius and others* [2006] EWCA Civ 218 (APP.L.R. 03/08). An agreement was signed between the brothers, the protector and trustee of the Bahamas trust providing for ad hoc arbitration with seat in Geneva. The extraordinary aspect of this case was not that the dispute relates to a trust but rather that the arbitrator was both mediator of the dispute and legal adviser of each of the parties prior to the arbitration. Against this background, one of the brothers tried to restrain the arbitrator from continuing to act due to bias by filing injunctions before the English courts which, however, were dismissed. It appears that the arbitration in Switzerland was never really on foot and that the claims were litigated in parallel in the Bahamas, the UK and New York. Cf. Clare Stanley, Traps for the unwary: pitfalls of *ad hoc* arbitration, *Trusts & Trustees*, No 4, 2012, 332-340.

## 5. CONSENT OF BENEFICIARIES IN TRUST ARBITRATION: SAME CONCERNS AS FOR SPORTS ARBITRATION?

### 5.1 Is a Non-Signatory Beneficiary Forced into Arbitration?

The proposed model clause for Trust Disputes developed by the ICC Task Force practically leaves the beneficiary no other choice than to agree to arbitrate future disputes if he or she wants to benefit from the trust. This may thus raise similar concerns as in the *Cañas* case,<sup>28</sup> where the Swiss Federal Tribunal had to examine the validity of a waiver of the jurisdiction of the state courts in favor of the competence of the Court of Arbitration for Sport (TAS) as well as a waiver to set aside the TAS award, both not contained in the agreement with the athlete but in general terms and conditions of the tournament in question. However:

- The particular approach adopted in the ICC Arbitration clause for Trust Disputes is derived from the **unilateral and beneficial nature of the trust**. A beneficiary, whether of a fixed interest or a discretionary family trust, like a donee or an heir, does not incur obligations under the trust deed but rather receives by bounty of the settlor benefits from the trust. Submission to arbitration is considered as a condition for benefitting under the trust. As a consequence, any person claiming to be a beneficiary will be compelled to submit to that condition. This is in the author's view not considered as creating a sort of forced arbitration as trusts are not contracts and no one is obliged to accept to be beneficiary of a trust. Arbitration is, by will of the settlor, one of the conditions set to draw benefits under the trust.
- A beneficiary has often no other choice than to resort to the trust court of the state whose **law governs the trust** in case of a trust dispute, which law and jurisdiction, however, the settlor has *unilaterally chosen*.<sup>29</sup>

<sup>28</sup> Decision of the Swiss Federal Supreme Court 4P.172\_2006 [*Cañas v. ATP Tour*] of 22 March 2007, BGE 133 III 235; translated into English in Swiss Int'l Arb. L. Rep. 2007, 65 et seq.; see also Antonio Rigozzi, "Consent" in sports arbitration: its multiple aspects, *supra* 59 et seq.

<sup>29</sup> See section 2.2 last paragraph above and Art. 6 Hague Trust Convention 1985, Article 149 b(1) PIL.

In light of the above, the concerns expressed by the Swiss Federal Tribunal in the Cañas case can thus in the author's view not be applied by analogy to trust arbitration.

## 5.2 Validity of Arbitration Clauses in Trust Deed

### 5.2.1 Consent

According to the UK deemed acceptance theory under the English Arbitration Act 1996,<sup>30</sup> which is debated by some trust practitioners,<sup>31</sup> a trust deed can be drafted in such a way that benefiting from the trust would be deemed an agreement to submit trust disputes to arbitration. A similar approach has been adopted by Swiss legal commentators as regards arbitration clauses in statutes of foundations<sup>32</sup> and last wills, which should also work in a trust context provided the beneficiary consents to arbitration in the form required under Swiss law. Most Swiss authors agree that bequests or an appointment as heir can be subject to the condition that the legatee or heir consents to arbitration in case of a dispute.<sup>33</sup> Likewise, the majority of Swiss authors<sup>34</sup> acknowledge the binding nature of arbitration clauses in contracts in favor of third parties provided consent to arbitration is a condition precedent for the third party to the contract to benefit. This is also the approach followed by the ICC Arbitration Clause for Trust Disputes.

An additional option for the settlor to back up the arbitration clause is to give the trustee the power to exclude a beneficiary from the

<sup>30</sup> Arbitration of Trusts Disputes by the UK Trust Law Committee ACTAPS Newsletter no. 145, 2011, 13-15.

<sup>31</sup> Tony Molloy and Toby Graham, FN 8, 282-284, analyzing the different academic views in relation to the UK *deemed acceptance theory* under the English Arbitration Act 1996.

<sup>32</sup> Arbitration clauses in statutes of Liechtenstein foundations are considered as binding upon the beneficiaries. Liechtenstein is a member state of the New York Convention since 2011 and introduced new arbitration rules in 2010; cf. Johannes Gasser, Das neue Schiedsverfahren in Liechtenstein und die Auswirkungen in der Stiftungspraxis, PSR [2012] 03, 109-123.

<sup>33</sup> Hans Rainer Kuenzli, Private 2011 no. 3, 6; Werner Wenger/Christoph Müller, Basle Commentary PIL, 2nd edition, no 63 *et seq.* ad Article 178 PIL; Hansjörg Kistler, Schiedsabreden in Testamenten und Erbverträgen, Zurich 1999, 25-30; Marc André Mauerhofer, Schiedsgerichtliche Zuständigkeit in Erbstreitigkeiten aufgrund Parteivereinbarung und erblasserischer Anordnung, ZBJV 2006, 375-401; Bernhard Berger/Franz Kellerhals, International and Domestic Arbitration in Switzerland, para 451-454; Sybille Pestalozzi-Früh, Testamentarische Schiedsklauseln—ein risikoreiches Unterfangen, *successio* 2011 no. 2, 170-173 with a summary of the various positions in Swiss legal doctrine as to unilateral arbitration clauses in last wills.

<sup>34</sup> Werner Wenger/Christoph Müller, Basle Commentary PIL, 2nd edition, no. 66 *et seq.* ad Article 178 PIL; Bernhard Berger/Franz Kellerhals, International and Domestic Arbitration in Switzerland, para 455.

trust if the beneficiary refuses to consent to arbitration or if he brings an action in state court instead of arbitrating (*forfeiture or in terrorem clause*). However, care needs to be taken with such clauses depending on the applicable trust law.

While a trust provision, according to which agreeing to arbitration is a condition precedent to benefiting from the trust, should be effective under Swiss law, the issue is in the author's view actually governed by the applicable trust law (*lex causae*) rather than the Swiss *lex arbitri* (i.e. Article 172(2) PIL). Similarly, an arbitrator in arbitral proceedings conducted in Switzerland, would most likely look at the underlying trust law to assess the validity of a forfeiture clause. On the other hand, the Swiss *lex arbitri* (Article 178(1) PIL) is relevant as to whether a beneficiary needs to agree explicitly to the arbitration clause in the trust deed in writing or whether claiming or accepting a gift from the trustee could be considered as validly agreeing to arbitrate.

### 5.2.2 Requirements as to the form

According to Swiss legal commentary, it is debatable whether it is sufficient that an arbitration agreement be drafted by one party and simply accepted orally or tacitly by the other party. Given the liberal approach under Article 178(1) PIL and provided the beneficiary is made aware of the arbitration clause in the trust deed, accepting or claiming benefits under the trust deed could in the author's view be regarded as valid formal consent of the beneficiary to the arbitration clause in the trust deed.

Considering Article 149b(1) PIL and similarly Article 6 of the Hague Trust Convention, according to which a settlor or even a third party designated by the settlor under the trust deed may *unilaterally* prorogate a Swiss or other court as exclusive forum for trust disputes, binding trustees, protectors and/or beneficiaries as the case may be, there is further sound argument that an arbitration clause in a trust deed providing for arbitration in Switzerland would be equally enforceable upon a beneficiary without the need for the latter's written consent. Unfortunately, the Swiss legislator failed to address the issue of trust arbitration when implementing the Hague Trust Convention and related jurisdictional provisions in the PIL. It remains to be seen whether the Swiss legislator will compensate for this omission in the pending revision of the PIL provisions on international arbitration (Articles 176 *et seq.* PIL).

In light of the stricter form requirements under Articles II(2) of the New York Convention on the Recognition and Enforcement of

Foreign Arbitral Awards 1958 (New York Convention), it is certainly preferable for now to have the arbitration clause signed by all parties concerned whenever possible. A forfeiture clause may help to procure the beneficiary's written consent to the arbitration clause. Where it is not possible to obtain the written consent of a beneficiary to the arbitration clause, a trust arbitration award may nevertheless be enforced under Article VII(1) New York Convention if such a unilateral clause is admissible under the law of the country where the enforcement and recognition of the award is sought.

### 5.3 Waiver to file an action to set aside the award (Art. 192 PIL)

Going back to sports arbitration and the Swiss Federal Court's decision in the Cañas case, the question arises whether a trust arbitration clause providing for a waiver to file setting aside proceedings in the sense of Article 192 PIL (exclusion agreement) would be enforceable if the beneficiary did not expressly consent to the arbitration clause in writing but merely implicitly by accepting or claiming benefits from the trust.

In the Cañas case, the Swiss Federal Court held that the waiver of the jurisdiction of the state courts cannot be considered as a waiver of a right of the athlete but rather consists in a "trade off" as the TAS is a better alternative; by contrast, the waiver of the action to set aside the award actually *deprives* the athlete of the remedy "...to complain about breaches of fundamental principles and essential procedural guarantees which may be committed by the arbitrators...". Consequently, the court noted that while a liberal approach is applied relating to the formal requirements for arbitration agreements, an exclusion agreement cannot be made in an indirect manner, e.g. by reference, but must be clearly expressed by both parties and be made of free will.

According to the case law of the Swiss Federal Court, it will remain a matter of interpretation to determine whether a waiver is valid. Hence, an exclusion of the right to apply to set aside a Swiss arbitral award may be upheld in some cases but not in others, depending on the conditions of the entering into of the exclusion agreement, including whether the party was assisted by lawyers or whether the party was factually forced into arbitration like in sports arbitration.

The UK Trust Commission considered in light of Art. 6 (1) of the Human Rights Convention and, more particularly, the right to a public hearing that "...some right of appeal is necessary and may be



significant...". They thus propose to include provisions for appeal in accordance with sections 67 to 69 of the UK Arbitration Act 1996.<sup>35</sup>

Moreover, in the *Weissfisch* case the UK judge dismissed the application to restrain the arbitrator in Switzerland from conducting the arbitration considering that "the decision of the arbitrator will not be final, at least where the seat of the arbitration is in a country such as Switzerland where the courts exercise an appropriate supervisory function over arbitration".

Given the above, while it cannot be said that a beneficiary of a trust is forced into arbitration like an athlete into sports arbitration, care must be taken with exclusion agreements in trust deeds. This may be even more so in case the trust deed contains an ICC Trust Arbitration clause as the latter currently foresees that the arbitrators are not chosen by the parties but by the ICC International Court of Arbitration. In any event, a beneficiary of a trust would have explicitly to agree in writing to the exclusion agreement, being properly represented and fully aware of the consequences of such waiver; a mere implicit acceptance may not be sufficient in light of the case law of the Swiss Federal Supreme Court in relation to Article 192 PIL.

## 6. OUTLOOK/CONCLUDING REMARKS

Settlors and testators increasingly concerned about the prospects of court proceedings find arbitration an appealing alternative. The arbitration of trust disputes has developed over recent years in the sense that, in particular, settlors and trustees outside the traditional trust jurisdictions have started inserting arbitration clauses into their trust deeds. While there have been so far only few known trust arbitration cases both in Switzerland and the common law trust jurisdictions, it may not take long until trust arbitration clauses and more particularly the ICC Arbitration Clause will be tested.

The legislative developments in Florida, Arizona, Guernsey, Jersey and the Bahamas, the initiative of the UK Trust Law Commission to amend the UK Arbitration Act 1996 as well as the approach adopted by the ICC and AAA have brought some uniformity and certainty to the trust industry and they reflect a tendency to reconcile trust law and arbitration practice. It is to be expected that other trust jurisdictions will follow this trend which will limit the potential risk of parallel proceedings and enforceability problems. However, while there is sound legal basis for arbitration clauses in trust deeds to be effective, the waters remain untested. For the time

<sup>35</sup> Cf. also Tony Molloy and Toby Graham, FN 8, 289-290.



being, a degree of caution must be exercised by trust practitioners when inserting arbitration clauses in trust deeds in an attempt to bind beneficiaries to international arbitration proceedings. Unfortunately, the Swiss legislator failed to address the issue of trust arbitration when implementing the Hague Trust Convention and related jurisdictional provisions in the PIL. It is hoped that this oversight will be corrected in the pending revision of the PIL provisions on international arbitration.

Whether Switzerland will be at the forefront of trust arbitration and establish itself as a preferred trust arbitration venue is in the hands of the Swiss arbitration practitioners and arbitral institutions such as the Swiss Chambers' Arbitration institution ([www.swissarbitration.org](http://www.swissarbitration.org)). The trust and estate practitioners in Switzerland have spotted this new business opportunity and they started promoting trust and estate arbitration accordingly. As an example, the Trust & Arbitration Geneva Working Group, of which the author is a member, was created at the beginning of 2012 and a moot case was presented by Swiss and foreign arbitration practitioners on 27 November 2012 with the support of STEP Suisse-Romande and the Swiss Association of Trust Companies (SATC), dealing with a trust arbitration case under the Swiss Rules with the seat of the arbitration in Bahamas.

To help facilitate the building up of "trust arbitration expertise", like in sports arbitration, the Swiss Chambers' Arbitration institution administering arbitrations under the Swiss Rules may consider setting up a list of arbitrators with both extensive arbitration and trust expertise to be appointed in case the parties fail to make such appointment. Trust Arbitration will, however, only work if both the trust and arbitration practitioners actively promote Switzerland as a center of international trust arbitration.