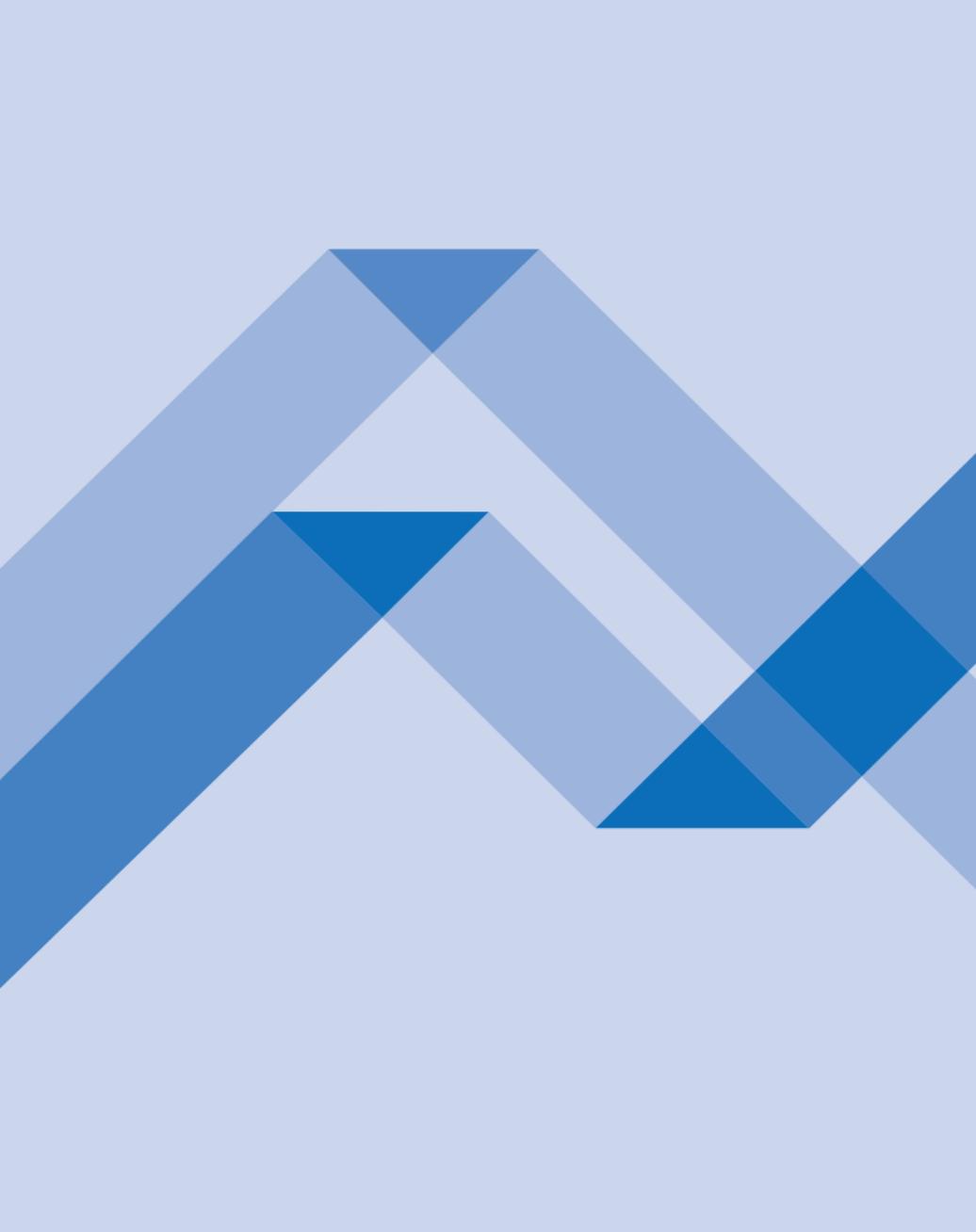


# ICC ARBITRATION CLAUSE FOR TRUST DISPUTES

## AND EXPLANATORY NOTE



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# ICC Arbitration Clause for Trust Disputes

*All disputes arising out of or in connection with this Trust [as defined in the trust instrument] shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.*

*The settlor, the original trustee(s) and the original [protector(s)] [other original power-holder(s)] hereby agree to the provisions of this arbitration clause, and each successor trustee and [protector] [other power-holder], by acting or agreeing to act under the Trust, also agree, or shall be deemed to have agreed, to the provisions of this arbitration clause.*

*Any beneficiary claiming or accepting any benefit, interest or right under the Trust, shall be bound by, and shall be deemed to have agreed to, the provisions of this arbitration clause.*

*Subject to the law governing the Trust and without prejudice to any other confidentiality obligation that may apply:*

- a) the arbitral proceedings, including the fact that they are taking place, have taken place or will take place, are private and confidential; and*
- b) any award or decision rendered by the arbitral tribunal or any settlement agreement between the parties shall be kept confidential and shall not be disclosed to any person, except to the extent that disclosure is required by law or pursuant to any rule, requirement or request of any regulatory or governmental authority or stock exchange, or is necessary or advisable in the administration of the Trust or for the implementation or enforcement of the award or decision.*

### **TRUST DISPUTES AND INTERIM RELIEF**

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Should there be a need for interim measures, the ICC Arbitration Rules allow conservative and interim measures to be sought under Article 28 or, when such measures cannot await the constitution of the arbitral tribunal, allow emergency arbitrator proceedings to be initiated pursuant to the Emergency Arbitrator Provisions.

It is possible to exclude recourse to the Emergency Arbitrator Provisions. If this is desired, it should be expressly stated by adding the following wording to the arbitration clause:

*The Emergency Arbitrator Provisions shall not apply.*

### **TRUST DISPUTES AND EXPEDITED PROCEDURE**

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Article 30 of the ICC Arbitration Rules provides for the application of an expedited procedure. If this procedure should not be applied, it should be expressly stated by adding the following wording to the arbitration clause:

*The Expedited Procedure Provisions shall not apply.*

# Explanatory Note

## Accompanying the ICC Arbitration Clause for Trust Disputes

### INTRODUCTION

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- 1 The previous version of the ICC Arbitration Clause for Trust Disputes was issued in 2009. Since then, legislative and other developments in the field of trusts have led to increasing demand and interest in bringing trust disputes to arbitration, highlighting the need to review the clause in light of the ICC Arbitration Rules as revised in 2012 and subsequently amended in 2017.
- 2 Trust law practitioners point to the following reasons why arbitration is an attractive option for resolving trust disputes:
  - confidentiality of the process;
  - possible to choose an expert decision-maker;
  - possible to adapt procedures to the circumstances of the case;
  - possible to tailor the arbitration clause to the particular circumstances of the trust; and
  - possible to bring proceedings in a single forum rather than in multiple fora.
- 3 These advantages are relevant in trust disputes, particularly at a time when trusts are gaining wider international recognition (in part due to the 1985 Hague Convention on the Law Applicable to Trusts and their Recognition) and have outgrown their traditional field of use.

## EXPLANATORY NOTE ACCOMPANYING THE ICC ARBITRATION CLAUSE FOR TRUST DISPUTES

### “ALL DISPUTES”

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- 4 It is important to identify which trust disputes are suitable for arbitration under an arbitration clause contained in a trust.
- 5 Disputes involving trusts fall into two broad categories:
  - Internal disputes – i.e. disputes between trustees, between trustees and power-holders, between beneficiaries, or between trustees/power-holders and beneficiaries – are amenable to arbitration.
  - External disputes – i.e. disputes between trustees and third parties (such as persons with whom the trustee has contracted or persons claiming the trust assets or otherwise challenging the existence of the trust) – are not covered by the arbitration clause contained in the trust, as the clause cannot bind third parties. However, such disputes may be subject to arbitration under the terms of the contract with the trustee or where the parties agree to arbitrate after a dispute has arisen.
- 6 The arbitration clause contained in the trust therefore applies to internal trust disputes only.
- 7 The reference to “all disputes arising out of and in connection with” is intended to apply to internal disputes between two or more persons. The arbitration clause would therefore not prevent trustees from seeking directions *ex parte* from the competent courts as long as this action is not contested by any person bound by the arbitration clause in the trust, i.e. protectors, beneficiaries, trustees, etc. However, if a trustee’s wish to seek such directions is itself disputed or arises out of a dispute to which the arbitration clause applies, then the matter would have to be referred to arbitration.
- 8 Subject to the law governing the trust, it may be appropriate to provide that *ex parte* applications to a court for administrative directions shall not contravene the arbitration agreement.

- 9 Three situations must be considered. The first two involve non-contentious cases where the trustee and beneficiaries seek the court's guidance on a particular point.
- The first situation is where the trustee makes an ex parte application and the competent court is satisfied that the views of the relevant beneficiaries have been obtained and that there is no need to join those beneficiaries formally.
  - The second situation also concerns applications, usually by trustees, where beneficiaries with an interest in the matter will be joined. The parties are seeking a solution to a problem but the circumstances are such that this cannot be achieved by agreement among the trustees and beneficiaries, so an application to the court is necessary. This situation is akin to seeking declaratory relief and will be covered by the arbitration clause.
  - The third situation might involve the exact same type of questions raised in the first two situations, except that the parties are in disagreement. Such cases clearly fall within the scope of the arbitration clause.

## **THE AGREEMENT TO ARBITRATE**

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- 10 A trust is not a contract but a unilateral act of disposition. The ICC Arbitration Clause for Trust Disputes is formulated as an agreement which is binding on the original parties to the trust by virtue of their executing the trust instrument, and on all others by virtue of their having acted under, or claimed or accepted benefits under, the trust.
- 11 The arbitration clause should be included in the trust instrument after the choice-of-law provision, if any. If the arbitration clause is not included in the initial trust instrument, it may be included in a subsequent deed of variation, provided there is a suitable power of variation which can be so exercised. Parties may also agree upon arbitration after the trust dispute has arisen.

# EXPLANATORY NOTE ACCOMPANYING THE ICC ARBITRATION CLAUSE FOR TRUST DISPUTES

- 12 By assuming their responsibilities under the trust instrument, trustees and other power-holders such as protectors are presumed to have given their consent to the arbitration clause.
- 13 Beneficiaries are deemed to have agreed to the arbitration clause when they obtain benefit or otherwise derive advantage from the trust.

## MINOR, UNBORN AND UNASCERTAINED BENEFICIARIES

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- 14 Where a dispute affects the interests of unborn or other unascertained beneficiaries, or beneficiaries who are minors or otherwise lack capacity, an award will be binding on them only if their interests have been represented in the arbitration. In court proceedings this is usually done through the appointment of a litigation friend (on behalf of minors or other beneficiaries lacking capacity) or a representative (on behalf of unascertained beneficiaries). Frequently, the trustee (if not the subject of the dispute) is appointed to represent the interests of such beneficiaries. Also in court proceedings, where there is a sizeable group of beneficiaries, it is possible to appoint a representative on behalf of those with a common interest. This avoids having to join and effect service upon each beneficiary, thereby considerably increasing the efficiency of the proceedings.
- 15 It is advisable to include in the terms of the trust a mechanism for the appointment of litigation friends and representatives to represent incapacitated or unascertained beneficiaries in the arbitration.

## FORM OF AGREEMENT

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- 16 The clause assumes that the settlor, the original trustees, and the original power-holders will execute the instrument under which the trust is established. The reference in the clause to “[protector(s)] [other original power-holder(s)]” simply reflects the facts that (i) persons given the type of auxiliary power typically granted to “protectors” may not be described as such; and (ii) powers may be given to other persons who, in appropriate cases, should also execute the trust instrument.

## **CONFIDENTIALITY**

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- 17 Confidentiality is of paramount importance in most trust disputes. The ICC Arbitration Clause for Trust Disputes, as drafted, recognises this by including provisions on confidentiality within the clause itself.

## **AIDE-MEMOIRE ON CERTAIN FEATURES OF THE ARBITRATION PROCESS**

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- 18 The arbitration clause may be adapted to the particular circumstances of the trust.
- 19 The place (i.e. seat) of the arbitration is of particular importance in trust disputes and should be carefully considered in light of the specific arbitration and trust legislation in the relevant jurisdiction. It should be specified in the arbitration clause.
- 20 If not specified in the arbitration clause, and failing a subsequent agreement of the parties, the place of arbitration will be fixed by the ICC International Court of Arbitration pursuant to Article 18(1) of the ICC Arbitration Rules.
- 21 Careful consideration should also be given to the applicable law as some national laws are favourable to arbitration of trust disputes, whereas other national laws provide less or no clear support for arbitration of trust disputes.
- 22 Parties may wish to specify the number of arbitrators, given that the ICC Arbitration Rules contain a presumption in favour of a sole arbitrator. Trust disputes often involve multiple parties. In such cases, the ICC default mechanism providing for the appointment of all members of the arbitral tribunal by the ICC International Court of Arbitration pursuant to Article 12(8) of the ICC Arbitration Rules, allows party equality to be preserved.
- 23 In addition, it is prudent practice for the clause to specify the language of the arbitration, which may differ from the language used in the trust instrument.
- 24 The Task Force appreciates that in a number of cases the issue of jurisdiction over non-signatories, and to a lesser extent the issue of arbitrability, will require special and country-specific consideration. Given

## EXPLANATORY NOTE ACCOMPANYING THE ICC ARBITRATION CLAUSE FOR TRUST DISPUTES

that the arbitral resolution of trust disputes is still a new and evolving area of practice where case law is inexistent or unsettled in most jurisdictions, the parties are invited to consider with special care if and how the recommended ICC Arbitration clause should be adapted to a particular case in order to ensure the validity of the award.

- 25 ICC cannot be held liable for the consequences of court decisions rendered in any jurisdiction with respect to a trust dispute involving the recommended ICC Arbitration clause.

## **ICC COMMISSION ON ARBITRATION AND ADR**

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The Commission on Arbitration and ADR brings together experts in the field of international dispute resolution from all over the globe and from numerous jurisdictions. In its research capacity, the Commission produces reports and guidelines on legal, procedural and practical aspects of dispute resolution. The Commission also discusses and contributes to the drafting of proposed revisions to the ICC Rules of Arbitration and other arbitration rules and drafts and approves the ICC Mediation Rules, Expert Rules and Dispute Board Rules.

The Commission currently has over 850 members from some 100 countries. It holds two plenary sessions each year, at which proposed Reports and other products are discussed, debated and voted upon. Between these sessions, the Commission's work is often carried out in smaller task forces. The Commission's products are made available at [www.iccwbo.org](http://www.iccwbo.org) and <http://library.iccwbo.org/>.

The Commission aims to:

- Provide guidance on a range of topics of current relevance to the world of international dispute resolution.
- Propose tools for efficient and cost-effective settlement of international disputes by means of arbitration, mediation, expertise and dispute boards to enable ICC dispute resolution to respond effectively to users' needs.
- Create a link among arbitrators, mediators, experts, academics, practitioners, counsel and users of dispute resolution services and provide them with a forum to exchange ideas and experiences with a view to improve dispute resolution services.

**ICC Commission on Arbitration and ADR**

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