

NOTES

CHANGING THE GAME: THE EFFECTS OF THE 2012 REVISION OF THE ICC ARBITRATION RULES ON THE ICC MODEL ARBITRATION CLAUSE FOR TRUST DISPUTES

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I. INTRODUCTION

Disputes over a testamentary instrument, whether between beneficiaries or between beneficiaries and executors, can be some of the most vicious, expensive, and time-consuming disputes in any area of law. The emotional nature of testamentary disputes, which typically involve family members or other close relations, prompted testators and their attorneys to try to devise ways to minimize the emotional impact of such disputes. Arbitration is an effective way to minimize the impact of any dispute; however, courts both in the United States and abroad have mixed opinions on the enforceability of such agreements to arbitrate.¹

The primary dispute regarding enforceability is the issue of weighing the rights of the beneficiaries against the intent of the testator.² One side of the argument is that beneficiaries, being non-signatory third parties to the testamentary instrument, should not be bound to give up their right to a day in court in order to receive their bequest.³ Standard contract principles, such as the necessity of consideration to form a binding contract, are the basis for this argument.⁴ Unfortunately, courts have consistently held that testamentary instruments are not contracts,⁵ and therefore the doctrine of separability should not apply.⁶ On the other hand, proponents of enforcing

¹ Compare *In re Meredith's Estate*, 266 N.W. 351 (Mich. 1936), *In re Jacobovitz's Will*, 295 N.Y.S.2d 527 (Surrogate's Ct. 1968), *In re Matter of Berger*, 437 N.Y.S.2d 690 (App. Div. 1981), *Schoneberger v. Oelze*, 96 P.3d 1078 (Ariz. Ct. App. 2004), and *In re Calomiris*, 894 A.2d 408 (D.C. 2006) (these courts reached the decision that an otherwise valid arbitration clause in a testamentary instrument was unenforceable), with *In re Johnson*, 127 N.W. 133 (Neb. 1910); *Rachal v. Reitz*, 403 S.W.3d 840 (Tex. 2013), *In re Kalikow*, 872 N.Y.S.2d 511 (App. Div. 2009), and *In re Estate of Heiney*, No. 1 CA-CV12-0456, 2013 WL 1846599 (Ariz. Ct. App. 2013) (these courts ruled in favor of enforceability, and the court in *Heiney* overturned the ruling in *Schoneberger* based on legislation enacted specifically stating testamentary arbitration clauses are enforceable).

² Erin Katzen, *Arbitration Clauses in Wills and Trusts: Defining the Parameters for Mandatory Arbitration of Wills and Trusts*, 24 QUINNIPIAC PROB. L.J. 118, 121–24 (2011).

³ See David Horton, *The Federal Arbitration Act and Testamentary Instruments*, 90 N.C. L. REV. 1027, 1075–76 (2012) (stating that a beneficiary's choice to receive their bequest is sufficient to satisfy the consideration requirement of standard contract law, and that by disclaiming their bequest beneficiaries can demonstrate a lack of consent to arbitration, but implying that beneficiaries should not have to make this choice in order to avoid arbitration).

⁴ See generally Horton, *supra* note 3.

⁵ *Schoneberger*, 96 P.3d at 1083; *Calomiris*, 894 A.2d at 409.

⁶ See Horton, *supra* note 3, at 1082–86 (discussing the difficulties of applying the doctrine of separability to probate law, and discussing the arguments against applying separability doctrine even in contract law).

these clauses argue that the intent of the testator, without whom the beneficiaries would receive nothing, should govern.⁷ Those in favor of enforcement counter this argument by simply stating that the receipt of benefits is sufficient consideration to bind the beneficiaries.⁸

This ambiguity in the law led legal theorists and organizations to draft model clauses that attempt to maximize the enforceability of arbitration agreements in testamentary instruments. In the United States, the enactment of the Federal Arbitration Act (FAA), which requires courts to honor valid agreements to arbitrate,⁹ and the establishment of the American Arbitration Association (AAA), which drafts arbitration rules and model clauses that parties may opt to include in contracts, have combined to usher in a period in which the enforceability of arbitration agreements in almost all areas of law, excluding testamentary disputes, is at its broadest.¹⁰

While the current state of arbitration law in the United States is both interesting and dynamic, the more relevant question for this Note is the enforceability of arbitration agreements included in testamentary instruments outside of the United States. While the United States has the FAA, there is no similarly binding authority on foreign nations.¹¹ In order to promote uniformity in the international setting, the International Chamber of

⁷ See S.I. Strong, *Empowering Settlers: How Proper Language Can Increase the Enforceability of a Mandatory Arbitration Provision in a Trust*, 47 REAL PROP. TR. & EST. L.J. 275, 294–95 (2012) (discussing how settlor/testator intent in including the arbitration agreement in the testamentary instrument is something one would not expect to see challenged, but is often what is at issue in disputes over the capacity of the testator and validity of the testamentary instrument on the whole); see also Stephen Wills Murphy, *Enforceable Arbitration Clauses in Wills and Trusts: A Critique*, 26 OHIO ST. J. ON DISP. RESOL. 627, 652–58 (2011) (discussing and critiquing the “Intent Theory” of enforcing arbitration in wills and trusts, stating that outside of arbitration agreements the intent of the donor almost always controls).

⁸ Horton, *supra* note 3.

⁹ See Federal Arbitration Act § 2, 9 U.S.C. § 2 (2012).

¹⁰ Janet Lee Herold, *Federal Preemption—Arbitration—Federal Arbitration Act Creates National Substantive Law Applicable in Federal and State Courts and Supercedes Contrary State Statutes*, 54 MISS. L.J. 571, 583 (1984) (“[S]tates with arbitration statutes of narrower scope than the federal Act must disregard their own law and apply the federal law in state court actions. Uniform application of the Act prevents forum shopping by establishing the federal law as controlling in both state and federal courts. Such uniformity promotes the legislative intent of encouraging arbitration since the Act favors arbitration agreements.”).

¹¹ The Council for Europe drafted and proposed a “European Convention Providing a Uniform Law on Arbitration” in 1966. This convention was ratified by a grand total of one nation. See European Convention Providing a Uniform Law on Arbitration, Jan. 20, 1966, C.E.T.S. No. 056.

Commerce (ICC) created a task force to draft model arbitration rules and clauses, similar to those of the AAA, for use in international contracts.¹²

The ICC's 2012 revision of its arbitration rules addressed several of the most glaring problems, particularly regarding the arbitration of ubiquitous multi-party disputes.¹³ Unfortunately, another problem has arisen since the revision: did the drafters of the model clause intend the clause to function solely under the rules it was designed under, or did they intend the clause to incorporate revisions to the rules going forward?

In order to answer this question, two other questions must be answered in turn. First, what were the goals of the 1998 ICC Rules and the 2006 Model Clause? Second, what was the intent of the drafters of the 2006 Model Clause?

After answering the question of whether the 2006 Model Clause should now operate under the 2012 Rules, a determination of whether the rules revision has affected the overall enforceability of the 2006 Clause can be made.

The subsequent sections begin with the differences between the 1998 and 2012 Rules, then discuss whether these changes promote or diminish the potential enforceability of the Model Clause based on the reasoning of courts that heard these disputes in the recent past.

II. BACKGROUND

In 1996, the ICC created a task force to revise the ICC's uniform set of rules used to govern arbitration agreements, particularly in the international arena. After two years the task force published the culmination of their work.¹⁴ The result was the 1998 ICC Model Arbitration Rules. The drafters envisaged these rules to govern a variety of arbitration agreements, but they designed the rules with commercial arbitration foremost in mind.¹⁵

¹² See *Commission on Arbitration and ADR*, INTERNATIONAL CHAMBER OF COMMERCE, <http://www.iccwbo.org/about-icc/policy-commissions/arbitration/> (last visited July 3, 2014) (highlighting specific goals of the ICC with regard to arbitration).

¹³ Compare RULES OF ARBITRATION OF THE INT'L CHAMBER OF COMMERCE (1998) [hereinafter 1998 RULES], with RULES OF ARBITRATION OF THE INT'L CHAMBER OF COMMERCE (2012) [hereinafter 2012 RULES] (specifically compare article 10 of the 1998 Rules with articles 7, 8, 9, and 10 of the 2012 Rules).

¹⁴ 1998 RULES, *supra* note 13.

¹⁵ *Id.* art. 1 ("The function of the Court is to provide for the settlement by arbitration of business disputes of an international character in accordance with the Rules of Arbitration of the International Chamber of Commerce (the 'Rules'). If so empowered by an arbitration

With the evolution of testamentary arbitration in recent years, the ICC felt the need to draft a specific Model Clause for Trust Disputes in order to homogenize and incorporate such disputes into the sphere of their arbitration system.¹⁶ This clause was published in 2006 and was designed to function under the 1998 ICC Rules.¹⁷ Unfortunately, the 1998 Rules contained certain provisions that created hurdles to uniform enforceability.¹⁸

A. Goals of the 1998 Rules and the Drafters' Intent

It is apparent that the primary goal of both the arbitration task force, which produced the 1998 Rules, and the ICC in commissioning the task force was to investigate the potential for uniform arbitral enforcement and to draft a set of rules furthering this goal.¹⁹ Outside of testamentary disputes, the success of the ICC Arbitration Rules is unquestionable.²⁰ However, at the time the 1998 Rules were drafted, the ICC was not yet contemplating applying those rules to testamentary disputes because the legal trend at that time was to consider such clauses unenforceable.²¹

agreement, the Court shall also provide for the settlement by arbitration in accordance with these Rules of business disputes not of an international character.”)

¹⁶ Bruno W. Boesch, *The ICC Initiative*, 18 TRUSTS & TRUSTEES 316, 316 (2012) (“There was, at the time, as little surprise at the lack of interest hitherto in the resolution of trust disputes by way of arbitration as there was at the desire to remedy this and to expand the ever growing province of arbitration.”).

¹⁷ *Id.* at 317.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ The International Court of Arbitration, the ICC’s division that actually oversees and administrates requests for arbitration made to the ICC, has heard over 20,000 disputes involving parties and arbitrators from over 200 countries. See *Statistics*, INTERNATIONAL CHAMBER OF COMMERCE, <http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Introduction-to-ICC-Arbitration/Statistics/> (last visited July 3, 2014).

²¹ See *In re Meredith’s Estate*, 266 N.W. 351 (Mich. 1936), *In re Jacobovitz’s Will*, 295 N.Y.S.2d 527 (Surrogate’s Ct. 1968), *In re Matter of Berger*, 437 N.Y.S.2d 690 (App. Div. 1981) (highlighting nearly 100 years of American jurisprudence on the unenforceability of arbitration clauses in testamentary instruments); see also Boesch, *supra* note 16, at 318 (“Inasmuch as the reservation of trust litigation practitioners went to the arbitrability of trust disputes, it was noted, however, that other issues had been deemed not arbitrable in the past, yet over time arbitration had gained recognition there too, to wit, labour and, more interestingly, competition. The idea of ‘ousting the jurisdiction of the ordinary courts’ in itself did not seem anathema to the working group.”).

It is equally obvious that the 1998 Rules were intended to govern all the Model Arbitration Clauses that the ICC drafted.²² The drafters' intent,²³ as well as that of the ICC as a whole, was to create uniform enforceability, and to firmly and definitively provide binding rules that would provide final and binding judgments in arbitration agreements across a broad array of legal situations.²⁴

B. The 2006 Model Clause: Scope and Goals

The goal of the drafters of the original rules and of the other Model Clauses was to provide a framework for arbitration agreements that would be universally enforceable. This was also the aim of the drafters of the 2006 Model Arbitration Clause for Trust Disputes.²⁵ The real question lies in whether the drafters intended the 2006 Model Clause to operate solely based on the 1998 Rules, or to incorporate future rule revisions into its functionality. Ultimately, it is clear that the drafters did indeed intend the Clause to function under revised rules. Beyond the nonsensical argument that the drafters meant the Clause to forever function on an outdated version of the rules, the drafters' own words support the determination that the Clause was meant to operate under the modified rules.²⁶

In a letter to the national committees that appointed the task force members, the ICC task force conveyed the points that they had to come to

²² See 1998 RULES, *supra* note 13, art. 6(1) ("Where the parties have agreed to submit to arbitration under the Rules, they shall be deemed to have submitted ipso facto to the Rules in effect on the date of commencement of the arbitration proceedings, unless they have agreed to submit to the Rules in effect on the date of their arbitration agreement.") (implying that all agreements to arbitrate under the ICC Rules, whether via an ICC Model Clause or otherwise, will be governed by the Rules. Each Model Clause specifically states that the agreement is subject to the ICC Rules of Arbitration.).

²³ *Id.*; *Standard ICC Arbitration Clauses*, INTERNATIONAL CHAMBER OF COMMERCE, <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/standard-icc-arbitration-clauses/> (last visited July 3, 2014) (indicating that the drafters of the Model Clauses intended them to function under the ICC Rules based on the wording of the clauses, as "all disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce . . .").

²⁴ See 1998 RULES, *supra* note 13, art. 28(6) ("Every Award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.").

²⁵ 1998 RULES, *supra* note 13; *Standard ICC Arbitration Clauses*, *supra* note 23.

²⁶ Boesch, *supra* note 16, at 317.

unanimous agreement on.²⁷ Specifically, the task force told the committees they had agreed on “the appropriateness of the ICC rules, with no need to adopt specific new arbitration rules” in order to accommodate a Model Arbitration Clause for Trust Disputes.²⁸

Determining the goals and scope of the 2006 Clause is more complicated. It is clear that the ICC and its task force were of the opinion that, if it was workable, arbitration of testamentary disputes would become “if not the preferred avenue of resolution . . . a sound alternative.”²⁹ The thought was that if the ICC could create a working framework—the Rules—and a viable way to apply them—the Model Clause—the desirability of arbitrating testamentary disputes would cause a shift towards general enforceability because those jurisdictions that held on to the antiquated principle of general unenforceability would not want to “lose their appeal.”³⁰

Jurisdictions gain a surprising amount of revenue from having testamentary instruments devised within them, mostly arising from estate taxes and other fees imposed on both the estates and the beneficiaries as the price of doing business, so to speak, within a jurisdiction’s borders.³¹ The amount of monetary value generated from both cash transfers and asset transfers that occur as a result of testamentary bequests is staggering. For instance, France saw as much as \$196,503,920 in taxable assets bequeathed in 2011.³²

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 321.

³⁰ *Id.*

³¹ See *Revenue Statistics*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, <http://stats.oecd.org/Index.aspx> (enter “revenue statistics” in the “find in themes” search box; follow “Comparative Tables” hyperlink on the left side of the screen; select “estate and inheritance taxes” in the “tax” dropdown bar and “tax revenue as % of total revenue” in the variable dropdown bar) (last updated Oct. 2, 2013, 4:49 PM) (showing that most European nations receive between 0.5% and 0.8% of their tax revenue from estate and inheritance taxes, with Belgium receiving 1.3% of their \$226,456,400 total tax revenue from estate and inheritance taxes in 2011. That is almost \$3 million in revenue solely from estate and inheritance taxes.).

³² *Id.* (France receives 0.8% of their total tax revenue from inheritance and estate taxes, a total of \$9,825,196 in 2011); ERNST & YOUNG GLOBAL LIMITED, INTERNATIONAL ESTATE AND INHERITANCE TAX GUIDE 92 (2013), available at [http://www.ey.com/Publication/vwLUAsset/s/2013-international-estate-and-inheritance-tax-guide/\\$FILE/2013-international-estate-and-inheritance-tax-guide.pdf](http://www.ey.com/Publication/vwLUAsset/s/2013-international-estate-and-inheritance-tax-guide/$FILE/2013-international-estate-and-inheritance-tax-guide.pdf) (France’s inheritance tax rates are scaled based on the amount of the bequest, ranging from 5% for bequests of less than €8,072 to 45% for bequests of more than €1,805,677. The \$196 million high mark for bequests is based on assuming all transfers were

While it is unlikely that there is any nation where a significant portion of the government's tax revenue comes solely from estate taxes,³³ the amount at stake is still enough to make legislators think twice before ignoring the progression of estate law towards the enforceability of arbitration agreements in testamentary disputes.³⁴

The scope of the 2006 Model Clause is more difficult to determine. Up to this point, the ICC Rules and the International Court of Arbitration (ICC Court) were designed primarily for commercial arbitration,³⁵ and thus contained provisions that made their application across different areas of law difficult.³⁶ Therefore, when the Model Clause was published in 2006, the rules it operated under did not necessarily contemplate their own applicability to estate law.³⁷ This was a major obstacle that stood in the way of the uniform enforceability that the ICC aimed for, and resulted in several jurisdictions declining to enforce the Model Clause for Trust Disputes despite enforcing other arbitration clauses that operated under the 1998 ICC Rules.³⁸

It is clear the Model Clause was intended to cover testamentary disputes. Otherwise, there would not be a separate and distinct clause for trusts. However, the 1998 version of the Rules, under which the Model Clause was designed to operate, were not designed with that subject matter in mind.³⁹ This all changed, however, with the 2012 revision. The revision has "done away with any restriction of the use of the ICC institutional arbitration

taxed at 5%, though this is astronomically unlikely. The actual value of assets transferred in France in 2011 is assuredly lower, but must still be very high.)

³³ See *Revenue Statistics*, *supra* note 31.

³⁴ See Boesch, *supra* note 16, at 316 (stating that the nation which spearheaded the initiative to create the ICC task force to draft the Model Arbitration Clause for Trust Disputes was France); see also *Revenue Statistics*, *supra* note 31 (showing that France has one of the highest percentages of its national tax revenue coming from inheritance and estate taxes at 0.8%).

³⁵ 1998 RULES, *supra* note 13, art. 1(1) (stating explicitly that they were designed "for the settlement by arbitration . . . of business disputes not of an international character" (emphasis added)).

³⁶ Boesch, *supra* note 16.

³⁷ 1998 RULES, *supra* note 13.

³⁸ See R. Doak Bishop, *Drafting the ICC Arbitral Clause*, KING & SPALDING 17, <http://www.kslaw.com/library/pdf/bishop5.pdf>; see also *ICC Germany*, INTERNATIONAL CHAMBER OF COMMERCE, <http://www.iccwbo.org/worldwide-membership/national-committees/icc-germany/> (last visited Oct. 24, 2013); OLG Karlsruhe, NJW 688.

³⁹ Unlike the 2012 Rules, the 1998 Rules do not contain a clause for trusts or testamentary disputes. See 1998 RULES, *supra* note 13.

system to mere commercial disputes.”⁴⁰ This leads us to the most important question in determining the effect the 2012 revision of the Rules will have on the general enforceability of the 2006 Model Clause: what are the differences between the 1998 and 2012 rules?

C. Substantive Differences from the 2012 Revision

It is unclear whether the 2012 revision of the Rules will be interpreted as providing substantive changes that will affect the enforceability of the Model Clause or simply providing inconsequential changes that will have no impact on the Model Clause. At least with regard to their effect on the Model Arbitration Clause for Trust Disputes, it seems clear that the changes are not simply inconsequential as major changes were made to provisions of the Rules regarding multi-party arbitration,⁴¹ the consolidation of multiple claims,⁴² the disclosure obligations of the arbitrator,⁴³ confidentiality requirements,⁴⁴ and the scope and validity of the Rules as a whole.⁴⁵

⁴⁰ Boesch, *supra* note 16, at 317 & n.4 (citing 2012 RULES, *supra* note 13, art. 2(4)).

⁴¹ Compare 2012 RULES, *supra* note 13, art. 7 (articulating the framework for the joinder of additional parties to a request for arbitration), with 1998 RULES, *supra* note 13, art. 10 (making no mention of “multiple parties” outside of discussing the rules for appointing arbitrators when multiple parties are involved).

⁴² The 1998 Rules only mention additional claims and the consolidation of claims when discussing the rules for appointing arbitrators when there are multiple parties or claims between them. The 2012 Rules contain provisions that deal specifically with the consolidation of claims and claims between parties. Compare 1998 RULES, *supra* note 13, art. 10, with 2012 RULES, *supra* note 13, art. 8.

⁴³ Compare 1998 RULES, *supra* note 13, art. 7(i)–(2) (requiring arbitrators to disclose any conflicts that would bring the “independence” of the arbitrator from the parties and dispute into question), with 2012 RULES, *supra* note 13, art. 11(1)–(2) (requiring arbitrators to remain “impartial and independent” from the parties and the dispute, and requiring disclosure of anything that would call their impartiality or independence into question (emphasis added)).

⁴⁴ The 1998 Rules have no specific provision dealing with the confidentiality of any arbitral proceeding or award, implying that the arbitral tribunal may take *sua sponte* action to keep the proceedings confidential. See 1998 RULES, *supra* note 13, art. 20(7). But see 2012 RULES, *supra* note 13, art. 22(3) (authorizing the arbitral tribunal to “make orders concerning the confidentiality of the arbitration proceedings” upon the request of a party, but reserving the tribunals right to make such orders of their own accord).

⁴⁵ Compare 1998 RULES, *supra* note 13, art. 1(1) (“The function of the [ICC] Court is to provide for settlement by arbitration of [international] business disputes” (emphasis added)), with 2012 RULES, *supra* note 13, art. 1(2) (“[The ICC Court] administers resolution of disputes by arbitral tribunals in accordance with the [ICC Rules]. The Court is the only body authorized to administer arbitrations under the [ICC] Rules.” (emphasis added)).

1. *Multi-Party Disputes*

Where the 1998 Rules gave scant attention to the issue of multi-party arbitration, mainly dealing with the approval and appointment of the arbitrators but leaving the issue of joinder of additional parties vague,⁴⁶ the 2012 revision provides a much more detailed framework for proceeding with arbitration involving multiple parties.⁴⁷

Specifically, the 2012 Rules allow for the unilateral joinder of additional parties to an arbitration proceeding before an arbitrator is appointed, and with the consent of all parties involved, after the arbitrator's appointment.⁴⁸ This may be the most important change to the ICC Rules for the purposes of enforcing the Model Clause; the ambiguity in the prior Rules about the ability to join additional parties is one the greatest obstacles in the way of general enforceability. Considering that the majority of trust disputes involve multiple parties, some who may be amenable to the disposition of assets and some who may not, the ability to join additional parties is crucial to fair and efficient, and therefore desirable, testamentary arbitration.

2. *Joinder of Claims*

The revised Rules also provide a significantly more defined framework for the joinder of additional claims.⁴⁹ The new rules allow parties, if there are more than two, to assert any additional claims they have against the other parties.⁵⁰ This is a major change from the 1998 Rules, which did not contemplate the assertion of claims between multiple parties to an arbitration proceeding outside of the assertion of counterclaims in the answer.⁵¹

This is a necessary function if the 2012 Rules are to increase the efficacy and enforceability of the 2006 Model Clause,⁵² as trust disputes are often complex in terms of both the number of parties involved as well as the claims each party has against each other. For any arbitral award to be meaningful, parties must be able to bring all of their grievances to the table. If not all aspects of a dispute can be resolved during arbitration, it seems

⁴⁶ 1998 RULES, *supra* note 13, art. 10.

⁴⁷ 2012 RULES, *supra* note 13, art. 7.

⁴⁸ *Id.*

⁴⁹ *Id.* arts. 5(5), 8.

⁵⁰ *Id.* art. 8.

⁵¹ See 1998 RULES, *supra* note 13, arts. 5(5), 10 (making no mention of additional claims outside of the counter-claims asserted in the answer).

⁵² See Boesch, *supra* note 16, at 316–17.

intuitive that those unresolved issues could surface again, potentially leading to a challenge of the arbitral award. The possibility of such challenges directly contradicts the goals of efficiency and finality set forth by the ICC.⁵³ This problem is acute in the context of trust disputes and was compounded under the 1998 Rules.

3. Disclosure

Ethical and professional codes and standards of conduct are prevalent in most professions, even more so in the legal profession.⁵⁴ Arbitrators, both domestic and international, are bound by ethical and professional codes and standards of conduct just as any attorney or judge.⁵⁵ Under the 2012 Rules, arbitrators must now disclose any conflicts of interest, or any other ethical dilemma they might have, to all parties involved.⁵⁶

While the issue of disclosure by the arbitrator seems like it would only be minor given the ethical responsibilities imposed on them by their profession, it is in fact quite troublesome in testamentary arbitration. In commercial arbitration, the arbitrator is often a third party either chosen by the parties from a list provided by the ICC or appointed by the ICC itself.⁵⁷ Conversely, many arbitrators in testamentary disputes are known to either one or more

⁵³ See *Commission on Arbitration and ADR*, *supra* note 12.

⁵⁴ AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT (2013), available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html; INTERNATIONAL BAR ASSOCIATION, IBA INTERNATIONAL PRINCIPLES ON CONDUCT IN THE LEGAL PROFESSION (2011), available at http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#ethics.

⁵⁵ ABA MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 54; INTERNATIONAL PRINCIPLES ON CONDUCT FOR THE LEGAL PROFESSION, *supra* note 54; AMERICAN ARBITRATION ASSOCIATION, THE CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES (2004), available at https://www.adr.org/aaa/ShowProperty?nodeId=%2FUCM%2FADRSTG_003867&revision=latestreleased; INTERNATIONAL BAR ASSOCIATION, IBA GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION (2014), available at http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#ethics.

⁵⁶ Compare 1998 RULES, *supra* note 13, art. 7(1)–(2), with 2012 RULES, *supra* note 13, art. 11(1)–(2). Compare 1998 RULES, *supra* note 13, art. 11(1), with 2012 RULES, *supra* note 13, art. 14(1).

⁵⁷ See 2012 RULES, *supra* note 13, art. 13(3)–(4) (stating that the ICC Court will appoint arbitrators upon the proposal of an ICC national committee if the proposal is deemed “appropriate,” or directly when one or more party to the arbitration is “a state or claims to be a state entity”); see also 1998 RULES, *supra* note 13, art. 9 (stating essentially the same as above, but restricting the circumstances under which the ICC Court may directly appoint an arbitrator).

parties, and can potentially be the executor of the estate when the parties in conflict are all beneficiaries.⁵⁸

The ICC addressed issues that arise fairly frequently in testamentary disputes relating to disclosure in its 2012 revision of the Rules. Most importantly, the 2012 revision addressed the grounds upon which parties may challenge an otherwise duly appointed arbitrator.⁵⁹ In the 1998 version of the ICC's Rules, all that an arbitrator was required to do was "be and remain independent of the parties" and "sign a statement of independence and disclose in writing . . . any facts or circumstances which might . . . call into question [his] independence."⁶⁰ The limitation of the requirement to "independence" was criticized as not being in line with many other arbitration organizations.⁶¹ Criticism also came, despite the aforementioned professional code of ethics, because the "independence" requirement caused discomfort among potential parties to arbitration.⁶² While an arbitrator may indeed be independent from any of the parties, that is not necessarily indicative of his impartiality. *Black's Law Dictionary* defines "impartial" as "[u]nbiased"⁶³ or "[d]isinterested,"⁶⁴ and defines "independent" as "[n]ot subject to the control or influence of another"⁶⁵ and "[n]ot associated with another (often larger) entity."⁶⁶ It is plain that there is a fairly significant distinction between the terms in how they relate to arbitrators. An "independent" arbitrator need only be outside the control or influence of the

⁵⁸ See 2012 RULES, *supra* note 13, art. 4(3) (showing that the 1998 Rules require parties to include "all relevant particulars [regarding] the number of arbitrators and their choice . . . and any nomination of an arbitrator . . ." where the 2012 Rules allow for "all relevant particulars and any observations or proposals . . ." (emphasis added)).

⁵⁹ *Id.* art. 11(1).

⁶⁰ 1998 RULES, *supra* note 13, art. 7(1)–(2).

⁶¹ See Richard Power, *Briefing Note on ICC Rule Changes*, KLUWER ARBITRATION BLOG (Oct. 6, 2011), <http://kluwerarbitrationblog.com/blog/2011/10/06/briefing-note-on-icc-rule-changes/>.

⁶² See Ben Giaretta & Ronnie King, *Independence, Impartiality and Challenging the Appointment of an Arbitrator*, in INTERNATIONAL COMPARATIVE LEGAL GUIDE TO INTERNATIONAL ARBITRATION 26, 27 (2005) (discussing the effect bias on the part of the arbitrator has on the parties, stating that "it is of vital importance that confidence and trust in the tribunal's ability to act fairly is established and maintained"), available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCkQFjAA&url=http%3A%2F%2Fwww.afshurst.com%2Fpage.aspx%3Fid_content%3D1538&ei=pylpUr7BFlu-kQfwx4CQAQ&usg=AFQjCNGjKEUjb75ZyVHnGclXwdEJMdz2w&bvm=bv.55123115,d.eW0.

⁶³ BLACK'S LAW DICTIONARY 869 (10th ed. 2014).

⁶⁴ *Id.*

⁶⁵ *Id.* at 887.

⁶⁶ *Id.*

parties, thus requiring arbitrators only to be independent does not prevent them from harboring internal biases toward either party. Requiring arbitrators to affirm that they are both independent, not under the control of either party, and impartial, without bias towards either party, is firmly in line with the interests of fairness.

The drafters of the 2012 Rules, however, seem to have made an attempt to minimize the challenges to arbitrator nominations by fostering confidence in potential parties to arbitration proceedings that the arbitrators will be fair. Specifically, the drafters included a provision in the 2012 Rules requiring the arbitrator to “sign a statement of acceptance, availability, *impartiality*, and independence” from the parties.⁶⁷ The 2012 Rules also state that in addition to the disclosure of any facts or circumstances that could call the arbitrators independence into question, the arbitrators must also disclose “any circumstances that could give rise to *reasonable doubts as to [his] impartiality*.”⁶⁸

Realistically, it seems unlikely that this change will elicit any major change in conduct on the part of arbitrators. As a matter of common sense, there is an assumption that the majority of arbitrators do not brazenly ignore their own rules of professional conduct, which requires the arbitrator to disclose any conflict of interest.⁶⁹ Nevertheless, the change may serve to increase public confidence in arbitrators given the requirement to disclose any facts affecting impartiality in addition to independence.

4. Confidentiality Requirements

Closely tied to the issue of disclosure is the issue of confidentiality. On the one hand, parties to arbitration are often concerned with the impartiality of the arbitrators, and desire them to disclose any conflicts of interest that may bias the result. On the other hand, parties to arbitration may be even

⁶⁷ 2012 RULES, *supra* note 13, art. 11(2) (emphasis added).

⁶⁸ *Id.*

⁶⁹ See AMERICAN ARBITRATION ASSOCIATION, *supra* note 55, at I (laying out the ethical obligations of the appointed arbitrators); INTERNATIONAL BAR ASSOCIATION, RULES OF ETHICS FOR INT'L ARBITRATORS, arts. 3–4 (1987) (discussing the ethical obligations of arbitrators when confronted with conflicts of interest), available at <http://www.ibanet.org/Search/Default.aspx?q=rules%20of%20ethics%20for%20international%20arbitrators&SearchOption=0&MatchCriteria=0&MatchWholeWords=1>; INTERNATIONAL BAR ASSOCIATION, *supra* note 55, at 1–17 (discussing and laying out the framework for what is a conflict of interest, when an arbitrator must disclose such circumstances, and the circumstances under which the parties may “waive” the conflict of interest).

more concerned with what the arbitrator might disclose to others about their arbitration, both hearings and awards. The 2012 Rules attempt to assuage this concern by adding a specific provision providing for measures to ensure confidentiality.⁷⁰

The ICC's 1998 Rules do not include a specific provision dealing with the confidentiality requirements of both arbitrators and parties during and after an arbitration proceeding.⁷¹ Instead, they only convey a power to the arbitral tribunal to take "measures," *sua sponte*, regarding the confidentiality of the arbitration proceedings in order to "protect[] trade secrets and confidential information."⁷² This change is illustrative of the drafters' intent to broaden the scope of the Rules. The 1998 provision, with its focus on trade secrets,⁷³ seemingly contemplates confidentiality solely in commercial arbitration—the intended area of application for the Rules from their inception up to the 1998 version.⁷⁴

Given the ICC's desire to expand the scope of the Rules, as evidenced by its endeavors in the area of trust law,⁷⁵ it is probable the drafters of the 2012 Rules revised the Rules with this in mind. The 2012 confidentiality provision departs from the "business dispute" focus by allowing, in addition to the *sua sponte* power of the tribunal to ensure the confidentiality of trade secrets, for either party to the proceedings to request the tribunal to "make orders concerning the confidentiality of the arbitration proceedings."⁷⁶ This allows parties with solely personal or emotional reasons to desire confidentiality to request it, and though the tribunal is not required to honor the request⁷⁷ they now have the ability to do so if they choose.

5. Overall Scope of the Rules

As has been discussed previously in this Note, the overall scope of the ICC's Rules for Arbitration have changed significantly as a result of the

⁷⁰ 2012 RULES, *supra* note 13, art. 22(3).

⁷¹ See generally 1998 RULES, *supra* note 13.

⁷² *Id.* art. 20(7).

⁷³ *Id.*

⁷⁴ See *id.* art. 1(1) (stating that the "function of the [ICC] Court is to provide for the settlement by arbitration of business disputes of an international character in accordance with the [ICC Rules]").

⁷⁵ See Boesch, *supra* note 16, at 317 (discussing ICC's creation of and orders to the Model Arbitration Clause for Trust Disputes task force).

⁷⁶ 2012 RULES, *supra* note 13, art. 22(3).

⁷⁷ *Id.* ("The tribunal may, [if requested by a party], make orders . . ." (emphasis added)).

2012 Rules revisions. While this change is specifically embodied in Article 1 of the Rules,⁷⁸ the changes made to other provisions throughout the Rules also evidence the intent of the drafters to modify their scope.

The addition of provisions dealing with case management and cost efficiency may not seem to further the goal of expanding the scope of the Rules beyond commercial disputes, however the cost of arbitration can be just as high as litigation when not managed properly,⁷⁹ and thus can discourage parties without the means to pursue their claims.

The arbitration of testamentary disputes does not, for the most part, involve parties with unlimited funds who can afford to drag out the arbitration proceedings and rack up excessive arbitration costs. One notable exception is arbitration between the executor of the decedent's estate and one or more beneficiaries as executors often have the means to pay for a dragged out arbitration proceeding while the beneficiaries cannot. Thus, beneficiaries may be discouraged from pursuing their claims for financial reasons if the executor is able to actively delay and unreasonably extend the proceedings.

The 2012 Rules give arbitration tribunals the power to impose procedural requirements on the parties to ensure cost-effective management of the proceedings.⁸⁰ Additionally, the 2012 Rules impose an obligation on both the arbitral tribunal as well as the parties to "make every effort to conduct the arbitration in an expeditious and cost-effective manner."⁸¹ In order to give these provisions some bite, and theoretically to provide more protection to potential parties without the financial means to engage in lengthy proceedings, the drafters of the 2012 Rules included a provision that allows the tribunal to modify the costs to be levied on the parties based on their conduct.⁸² Article 37(5) of the 2012 Rules expressly states that the tribunal is able, as a result of their power to modify costs based on conduct, to base their decisions on factors including the extent to which the parties have conducted the arbitration expeditiously and cost effectively.⁸³

⁷⁸ Compare 1998 RULES, *supra* note 13, art. 1(1), with 2012 RULES, *supra* note 13, art. 1(1).

⁷⁹ Where attorney fees from litigating trust disputes depend on which attorney or law firm the parties have representing them, and thus are relatively incalculable, the AAA and International Centre for Dispute Resolution publish fee schedules for their arbitration. These fees are fixed in relation to the amount of the claim, and are relatively low. See *International Dispute Resolution Procedures*, INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION 2 (2014), https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_004338.

⁸⁰ 2012 RULES, *supra* note 13, arts. 22(2), 24(1)–(2).

⁸¹ *Id.* art. 22(1).

⁸² See generally *id.* art. 37(5).

⁸³ *Id.*

To reiterate, the drafters of the 2012 Rules made headway into expanding the scope of the Rules by modifying the confidentiality provisions of the Rules.⁸⁴ The change may seem minor, but modifying the provision that allows the tribunal to impose measures to protect the confidentiality of corporate, commercial, and trade secrets⁸⁵ to include the confidentiality of essentially anything, based on a party's request,⁸⁶ may actually effectuate a large change in the volume of arbitration of non-commercial disputes under the ICC Rules.

Testamentary disputes often involve strictly, and sometimes deeply buried, familial issues and disputes, and no one wants their family's proverbial dirty laundry to be aired out to anyone and everyone. The 1998 Rules did not have a provision allowing the arbitration tribunal to impose confidentiality requirements outside of those involving commercial or trade secrets,⁸⁷ so parties to a testamentary arbitration proceeding were unable to request that the tribunal keep the proceedings closed and confidential. The 2012 Rules solved this issue by allowing either party to request that measures be taken to ensure the confidentiality of nearly anything in the proceeding.⁸⁸

The 2012 revision has undeniably brought about significant substantive changes to the ICC's Rules, especially when approached from the point of view of those who want to use and enforce the Model Arbitration Clause for Trust Disputes when drafting their testamentary instrument. That these changes have been made is, however, only part of the picture. Before the question of whether these changes to the Rules will have an effect on the general enforceability of the Model Clause can be answered, the state of the law must be examined. The 2012 revision made testamentary arbitration, as an alternative to litigation, much more attractive to parties. But this means next to nothing if courts in the U.S. and abroad continue to refuse to enforce agreements to arbitrate testamentary disputes.

⁸⁴ See *supra* Part II.C.4 (explaining how the 2012 Rules were drafted to include a method to ensure confidentiality of arbitration proceedings).

⁸⁵ 1998 RULES, *supra* note 13, art. 20(vii).

⁸⁶ 2012 RULES, *supra* note 13, art. 22(iii).

⁸⁷ 1998 RULES, *supra* note 13, art. 20(vii).

⁸⁸ 2012 RULES, *supra* note 13, art. 22(iii).

D. The Current State of the Law

Despite the existence of the FAA, courts in the U.S. have continued holding agreements to arbitrate testamentary disputes to be unenforceable.⁸⁹ The prevailing consensus, however, has begun to shift towards enforceability in the past few years,⁹⁰ which, on the whole, seems likely to increase the chances a testamentary instrument including the ICC's Model Arbitration Clause for Trust Disputes would be enforced. Unfortunately, the dominant legal regime governing arbitration in the United States is the FAA.⁹¹ Examining the 2012 ICC Rules through the lens of the FAA may have a significant effect on the enforceability of the Model Clause in U.S. courts, though what that effect may be is yet to be seen.

The examination of the state of the law abroad is not as simple. With as many legal regimes as there are sovereign nations, it would be impossible to discuss the view on the enforceability of agreements to arbitrate in testamentary instruments of each in this Note. This section will examine the admittedly few opinions of the courts of several nations in Europe and South America that have taken divergent views on the issue.

As a general rule, "the law of the seat of the arbitration determines what type of dispute is arbitrable."⁹² This question can be multi-faceted, requiring a determination of whether the type of dispute is arbitrable under the jurisdiction's laws as well as whether the specific issue in dispute is arbitrable.⁹³ In trust disputes, many times the issue in dispute is personal, such as mental capacity or competency, or the existence of a marital or filial

⁸⁹ See *In re Meredith's Estate*, 266 N.W. 351 (Mich. 1936); *In re Jacobovitz's Will*, 295 N.Y.S.2d 527 (Surrogate's Ct. 1968); *In re Matter of Berger*, 437 N.Y.S.2d 690 (App. Div. 1981) (discussing the general unenforceability of agreements to arbitrate in testamentary instruments based on standard contract law principles, including lack of consideration and acceptance).

⁹⁰ See *Rachal v. Reitz*, 403 S.W.3d 840 (Tex. 2013); *In re Kalikow*, 872 N.Y.S.2d 511 (App. Div. 2009); *In re Heiney*, No. 1 CA-CV12-0456, 2013 WL 1846599 (Ariz. Ct. App. 2013) (discussing the general enforceability of agreements to arbitrate in testamentary instruments based on the intent of the donor, and using contract principles such as consideration and acceptance to support enforceability).

⁹¹ Federal Arbitration Act § 2, 9 U.S.C. § 2 (2013).

⁹² Christopher P. Koch, *A Tale of Two Cities! – Arbitrating Trust Disputes and the ICC's Arbitration Clause for Trust Disputes*, in 2 YEARBOOK ON INTERNATIONAL ARBITRATION 179, 187 (Marianne Roth & Michael Geistlinger ed., 2012).

⁹³ *Id.*

relationship between the testator and a beneficiary, and the courts of several jurisdictions have held such disputes are non-arbitrable.⁹⁴

The predominant way national governments are able to make agreements to arbitrate testamentary disputes enforceable, whether under the ICC Rules or otherwise, is to create a statutory regime that explicitly authorizes their validity. This is analogous to how the FAA handles commercial disputes. Germany, which has an ICC National Committee,⁹⁵ is one such European country that has enacted legislation dealing directly with the arbitration of trust disputes.⁹⁶ Germany's Civil Code requires its courts to enforce agreements to arbitrate in trust disputes and qualifies this requirement by requiring the arbitral tribunal to be "established[] in a manner permissible under statute."⁹⁷ However, this provision can be interpreted as not requiring enforcement at all because, as German case law shows,⁹⁸ establishment under the statute involves a fact-based balancing test to determine whether or not the issue in dispute is legally arbitrable. German courts have weighed "the testator's freedom to dispose of her estate against the protection that probate law afforded heirs."⁹⁹ Accordingly, German law states that "an arbitration clause in testamentary trust is enforceable only to the extent that the trust deals with assets that the testator could freely dispose of."¹⁰⁰

Spain takes a different approach. Spain's Arbitration Act provides that "[a]rbitration may be validly provided for in a testamentary disposition to resolve disputes between beneficiaries or legatees in matters relating to the

⁹⁴ *Id.*; see *In re Fellman*, 604 A.2d 263, 266 (Pa. Super. Ct. 1992) (stating that because there are statutory protections for the rights of incompetents which provide procedural safeguards not present in arbitration, "arbitration is not an appropriate vehicle for determining the incompetency of an individual"); Oberlandesgericht Karlsruhe [OLG Karlsruhe][Higher Regional Court of Karlsruhe] July 28, 2009, *Neue Juristische Wochenschrift* [NJW] 688, 689 (Ger.), available at https://www.jurion.de/Urteile/OLG-Karlsruhe/2009-07-28/11-WX-94_07.

⁹⁵ *ICC Germany*, *supra* note 38.

⁹⁶ See ZIVILPROZESSORDNUNG [ZPO][Code of Civil Procedure], Jan. 30, 1877, BUNDESGESETZBLATT [BGBl.] 3202, as amended, § 1066 (Ger.) ("The stipulations of the present Book shall apply mutatis mutandis to the arbitral tribunals established, in a manner permissible under statute, by last wills or other rulings not based on an agreement.").

⁹⁷ *Id.*

⁹⁸ OLG Karlsruhe, *supra* note 38 (the testator included in the arbitration clause that any dispute arising from an attempt to remove the executor would be taken to arbitration. The German court held that because the Civil Code provided an heir with the ability to petition a probate court to remove the executor, to reserve that issue for arbitration was outside of the testator's powers.).

⁹⁹ Koch, *supra* note 92, at 195.

¹⁰⁰ *Id.*

distribution or administration of the estate.”¹⁰¹ This provision removes the vague “established under statute”¹⁰² language present in the German Code, and strictly limits the scope of arbitrability to the disposition of assets.¹⁰³ Several former Spanish colonies, following Spain’s lead, have adopted similar systems to deal with testamentary arbitration within their own courts.¹⁰⁴

Another European nation, Malta, has taken a much more aggressive approach to ensure the enforcement of testamentary arbitration clauses. Malta’s Arbitration Act explicitly and strictly provides that “[i]t shall be lawful for a settlor of a trust to insert an arbitration clause in a deed of trust and such clause shall be binding on all trustees, protectors and any beneficiaries under the trust in relation to matters arising under or in relation to the trust.”¹⁰⁵ This construction of the Act completely removes the ambiguity present in both the Spanish Act and the German Code, and provides an extraordinarily broad scope to enforcement of agreements to arbitrate. Theoretically, even the issues that are deemed unarbitrable in other European jurisdictions, like competency and mental capacity, can be subject to arbitration under Malta’s Arbitration Act.

All of the changes from the 1998 to the 2012 Rules listed above will have a significant effect on the enforceability of the Model Arbitration Clause for Trust Disputes going forward. However, the formal and textual differences between the versions of the Rules are only part of the picture. In the following sections, this Note will discuss how and why these changes affect the enforceability of the Model Clause.

III. DISCUSSION

The drafters of the ICC Model Arbitration Clause for Trust Disputes clearly intended for it to function under the ICC Rules going forward and to continue operating under the Rules if they were revised in the future.¹⁰⁶ The

¹⁰¹ Spanish Arbitration Act, art. X (2011, 11), available at http://www.tab.es/images/documentos/normativa/reforma_ley_60-2003_eng.pdf.

¹⁰² See Code of Civil Procedure, *supra* note 96.

¹⁰³ See Koch, *supra* note 92, at 196 (discussing the implications of the wording of the Spanish Arbitration Act).

¹⁰⁴ See *id.* (discussing how Peru, Honduras, and Bolivia have all followed Spain’s lead).

¹⁰⁵ Arbitration Act, 1996, c. 387, § 15(2) (Malta), available at <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8854>.

¹⁰⁶ See *supra* Part II.A (explaining how the original drafters intended for the Rules to be interpreted).

question now becomes whether the changes made to the ICC Rules in the 2012 revision will affect the enforceability of agreements to arbitrate testamentary disputes going forward. This Note asserts that the revision will cause an increase in the general enforceability of such agreements, as the changes made were substantial and relevant to the concerns many courts expressed with enforcing such agreements. Due to the sparse publication of opinions from foreign courts regarding this issue, this Note will focus on how the 2012 revision addressed the concerns U.S. courts had with enforcing agreements to arbitrate in testamentary instruments.

A. Enforcement Against Nonsignatory Third Parties

One of the rationales courts have relied on when holding agreements to arbitrate in testamentary instruments unenforceable is based in contract law.¹⁰⁷ The reasoning behind these holdings is that an agreement to arbitrate is essentially a contract, and courts are hesitant to bind non-signatory third parties to the terms of contracts unless the third parties are intended beneficiaries. Theorists argue, and some courts have held, that testamentary instruments are not contracts, and thus the beneficiaries cannot be bound.¹⁰⁸ The argument is that beneficiaries, who are not signatories to the testamentary instrument, have not received consideration sufficient to imply an acceptance of the agreement on their part unless they have accepted their bequests.¹⁰⁹ The logical progression of this argument is that, at least in the U.S., a person's right to have their day in court is so fundamental that it

¹⁰⁷ See *Schoneberger v. Oelez*, 96 P.3d 1078, 1083 (Ariz. Ct. App. 2004) (reasoning that an agreement to arbitrate in a testamentary instrument is not a contract because of lack of consideration and consent, an "exchange of promises," on the part of the beneficiary); *id.* at 1081 (discussing the argument that non-signatories cannot be bound unless they receive consideration or a "direct benefit" from the testamentary instrument); *In re Calomiris*, 894 A.2d 408, 409 (D.C. 2006) (mirrors the sentiment expressed in *Schoneberger* that an arbitration clause in a testamentary instrument does not constitute a "written contract or agreement," and citing the *Schoneberger* decision as "instructive").

¹⁰⁸ *Calomiris*, 894 A.2d at 410 (quoting *Schoneberger*, 96 P.3d at 1083 ("Arbitration rests on an exchange of promises. Parties to a contract may decide to exchange promises to substitute an arbitral for a judicial forum. Their agreement to do so may end up binding (or benefitting) nonsignatories. In contrast, a trust does not rest on an exchange of promises.")).

¹⁰⁹ See *Schoneberger*, 96 P.3d at 1081-82 (discussing that by claiming the benefits of the testamentary instrument, or of any contract, non-signatory third parties agree to all of the terms of the contract. The opinion implies that this is a persuasive argument, but goes on to rule the beneficiaries of the instrument were not bound to arbitrate because the instrument, an inter vivos trust, was not a written contract.).

cannot be waived without consideration. There are, however, myriad arguments that oppose this view.

In his critique of the trend towards enforceability, Stephen Willis Murphy puts forward three theories upon which courts have enforced such agreements.¹¹⁰ While all three approaches have merit, only one is relevant for the purpose of discussing the effects of the revision to the ICC Rules.

By what Murphy calls “benefit theory,”¹¹¹ courts have enforced agreements to arbitrate in testamentary instruments by relying on the rationale that by accepting the benefit conveyed by the instrument, beneficiaries have received consideration and accepted the terms of the instrument.¹¹² Murphy criticizes this rationale, however, on the basis that trustees and executors would not be bound because they have not received any benefit or consideration.¹¹³ Murphy argues that trustees and executors would be free to resort to litigation to resolve any disputes while beneficiaries would be bound to rely solely on arbitration.¹¹⁴

The argument that executors have not received consideration, and therefore that this basis for enforcing arbitration agreements is faulty, is a moot argument. The primary concern with courts in enforcing these agreements is that they would be binding a *non-signatory* third party to a contract. Executors and trustees are, by definition, signatories to the testamentary instrument. By consenting to administer the estate of the decedent by becoming a signatory to the instrument, executors and trustees have agreed to the entire instrument, including the agreement to arbitrate. Additionally, many trustees and executors receive a fee for the maintenance of the trust or estate, and therefore have received monetary payment as consideration for their agreement to be bound by the testamentary instrument.

Probate law in the U.S. usually requires beneficiaries to challenge the validity of a testamentary instrument as a whole and does not allow them to challenge provisions of the instrument on a piecemeal basis unless they are

¹¹⁰ See generally Murphy, *supra* note 7, at 660–61 (enumerating three theories on which enforcement such agreements and then criticizing and refuting each of these theories).

¹¹¹ *Id.* at 648–49.

¹¹² See *Schoneberger*, 96 P.3d at 1081–82 (citing *Am. Bureau of Shipping v. Tencara Shipyards S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999) (holding that non-signatories were not bound by the arbitration agreement without receiving a direct benefit from the agreement. The case was subsequently overruled by legislative action but this particular aspect of the holding survived)).

¹¹³ Murphy, *supra* note 7, at 649.

¹¹⁴ *Id.*

contrary to public policy.¹¹⁵ This presents some beneficiaries with a quandary: to accept their bequest, and by doing so accept the validity of the instrument as a whole; or to disclaim their bequest, forgoing their legal right to it, and challenge the validity of the testamentary instrument as a whole.

Some legal theorists have suggested that as a way to get around the nonsignatory third party issue the doctrine of separability should apply.¹¹⁶ Under this doctrine, beneficiaries would be able to accept that the testamentary instrument on the whole is valid and simply challenge the validity of the arbitration clause. As a logical result, beneficiaries would be able to receive their bequest, but still be able to challenge the validity of the agreement to arbitrate. The 2012 ICC Rules revision has an answer to this argument. The new rules have streamlined the entire process of challenging the validity of both the instrument and the clause.

The 1998 version of the Rules state that when there is a challenge to the “existence, validity, or scope”¹¹⁷ of an arbitration clause, the *ICC Court may* make a prima facie determination as to the *existence* of an ICC arbitration clause.¹¹⁸ This implies the ability to only determine the existence of a clause, though it’s scope and validity may be challenged. Further, the use of ‘may’ is indicative that such a determination is not a mandatory response to any challenge. Additionally, the 1998 Rules require the ICC to make the determination, which would undoubtedly be a lengthy process given the Court’s caseload.

¹¹⁵ *Williams v. Crickman*, 405 N.E.2d 799, 803–04 (Ill. 1980) (“[P]art of an instrument may be declared invalid and the remainder allowed to stand where the invalid portions can be separated from the instrument as a whole without defeating the intent of the testator. We agree with plaintiff, for example, that if the contested provisions were fraudulently inserted by a third party, the court would have the power to deny probate to that provision alone.” (citations omitted)); *Fineman v. Cent. Nat’l Bank of Cleveland*, 175 N.E.2d 837, 842 (Ohio Ct. App. 1961) (“It may be said that many cases hold that invalid conditions precedent to bequests, especially of personal property, need not be performed, and that the donee takes free from the condition. Likewise that, if the main purpose was to make a gift to a legatee, but incidentally to require an act contrary to public policy, such as a divorce, then the gift, in so far as the unlawful condition is concerned, is unconditional.”). By virtue of the FAA, arbitration is regarded as in favor of and furthering public policy, and thus would not be separable from the instrument as a whole.

¹¹⁶ See *Horton*, *supra* note 3, at 1082–83 (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402–04 (1967) (discussing how the doctrine of separability is implied within the FAA itself. “[T]he Court has interpreted the phrase ‘agreement for arbitration’ in section 4 to signify the arbitration clause, rather than the ‘container’ contract in which the arbitration clause appears.”)).

¹¹⁷ 1998 RULES, *supra* note 13, art. 6(2).

¹¹⁸ *Id.*

The new rules, on the other hand, provide that “[any challenges to] the *existence, validity*, or scope of the arbitration agreement . . . shall be decided directly by the *arbitral tribunal*.”¹¹⁹ The fact that the drafters specifically included both “existence” and “validity” is telling. Parties are able to challenge the existence of an agreement to arbitrate, which is analogous to challenging the validity of the entire instrument. Clearly, if there is a clause within the instrument but a party is challenging its existence, the party must be challenging the validity of the entire will. The additional, but separate and distinct, ability of parties to challenge the validity of the agreement to arbitrate is analogous to severing the clause from the rest of the instrument.

In this way, the 2012 Rules address the problem of binding non-signatories to the agreement to arbitrate regardless of whether they accept their bequest. A beneficiary is able to challenge the validity of the entire will by challenging the existence of an included arbitration clause, and still accept their bequest without agreeing to the validity of the instrument on the whole. Alternatively, beneficiaries who believe the instrument is valid, and by accepting their bequests agree to the instrument as a whole, are still able to challenge the validity of the arbitration clause. However, this does not solve all the problems. The ICC Rules provide that the Secretariat of the ICC Court is to determine the existence and validity of the clause.¹²⁰ This means that the parties will still have to request a determination from the arbitrating body before learning whether or not they can litigate. However, this is a better alternative for beneficiaries than either refusing a bequest and litigating the validity of the instrument as a whole or accepting a bequest and being bound by all of the terms of the instrument.

B. The Issue of Process

The second major enforcement issue that courts have with agreements to arbitrate is that many clauses are either vague or completely silent on many crucial procedural issues.¹²¹ Erin Katzen argues that one of the main justifications for enforcing arbitration agreements is that it is a cheap and fast alternative to litigation, the favoring of which reduces the caseload of the courts.¹²² Katzen acknowledges this but concludes that the procedural deficiencies of many arbitration clauses undermine this justification for

¹¹⁹ 2012 RULES, *supra* note 13, art. 6(3) (emphasis added).

¹²⁰ *Id.*

¹²¹ Katzen, *supra* note 2.

¹²² *Id.* at 119.

enforcing arbitration agreements because the ambiguity inevitably leads to a long and costly determination of what the actual terms of the arbitration agreement are.¹²³ On the other hand, it has been argued that as a result of the beneficiaries, inability to negotiate any procedural aspects that are specified in the clause prior to arbitration, many terms that are specified are substantively unconscionable.¹²⁴

It is this argument against the enforcement of agreements to arbitrate testamentary disputes that the 2012 ICC Rules address most directly. Given the text of the ICC Model Clause, it is clear that on its own it does little to satisfy any basic requirements for process. However, when read in conjunction with the underlying rules, the majority of the procedural deficiencies melt away.

The major procedural concerns within the scope of this Note are the potential ambiguity in the place of arbitration, the ambiguity in the process of choosing and appointing arbitrators, and the issue of potential procedural gaps in the underlying regulatory scheme. Additionally, this Note will discuss various minor procedural issues that the 2012 Rules revision has also ameliorated.

1. Place of Arbitration

One of the concerns with regard to the procedural deficiencies of arbitration rules, and by proxy the clauses that operate under them, is the fact that the parties may be located in different jurisdictions. It stands to reason that each would want to compel arbitration in their own locale, and in non-testamentary situations the parties are able to negotiate and decide between themselves where arbitration will take place during the drafting of the contract. In a testamentary dispute, however, we have seen that beneficiaries are non-signatories and thus have no power to negotiate for arbitration to take place in a favorable forum. The 2012 ICC Rules, however, provide beneficiaries and all parties to the proceedings an ad hoc ability to influence the place of arbitration.¹²⁵

Where the 1998 version of the Rules provide parties requesting arbitration the opportunity to submit “comments”¹²⁶ on the place of arbitration, the 2012

¹²³ *Id.* at 129.

¹²⁴ *Id.* at 127, 132–35.

¹²⁵ 2012 RULES, *supra* note 13, art. 4(3).

¹²⁶ 1998 RULES, *supra* note 13, art. 4(3)(h).

Rules add the ability to submit “observations *or proposals*.”¹²⁷ Testators may or may not decide to include a forum selection clause as an annex to the Model Arbitration Clause. In my view, this addition to the Rules solves two issues.

First, if the agreement to arbitrate does not include a specified forum, the Secretariat of the ICC Court is able to review the proposals of the parties and determine the most equitable location for the arbitration proceedings.¹²⁸

Second, if a location is specified within the testamentary instrument, the ability to submit proposals allows parties to challenge the unconscionable nature or reasonableness of that provision. A mirror issue to the concern that clauses lack a defined location for arbitration proceedings is that if a location is specified, it may be considered substantively unconscionable to require one or more of the parties to arbitrate there. A modified provision in the 2012 Rules allows parties to challenge the specified location through their “observations or proposals.”¹²⁹ This would allow the Secretariat to determine whether or not the specified location is reasonable and whether requiring arbitration to proceed in the stated location would be unconscionable.

2. *Appointment of Arbitrators*

Another major procedural concern with enforcing agreements to arbitrate is that they often do not include rules for appointing arbitrators. On the unconscionability side of the argument, testators theoretically could provide for the appointment of specific arbitrators in the testamentary instrument. The 2012 Rules address both of these concerns through two provisions.

In addition to providing the parties to the proceedings the opportunity to submit “observations or proposals” for the place of arbitration, the 2012 Rules also allow submissions regarding the number of arbitrators and “any nomination of an arbitrator” as well.¹³⁰ The same argument that can be made that this revision solves the procedural deficiency of an unspecified forum can be made for the problem of selecting arbitrators. In a situation where no arbitrators have been specified in the clause or instrument, the parties can submit their proposals to the Secretariat and expect an equitable result.

¹²⁷ 2012 RULES, *supra* note 13, art. 4(3)(h) (emphasis added).

¹²⁸ *Id.* arts. 4(3)(h), 18(i).

¹²⁹ *Id.* arts. 4(3)(h), 18(1).

¹³⁰ *Id.* art. 4(3)(g)–(h).

Unlike the issue of forum selection, where the selection of any given forum may impose a hardship on one or more parties, the selection of arbitrators does not. In terms of the potential substantive unconscionability of appointing an arbitrator specified in the instrument, the 2012 Rules provide two avenues to challenge that appointment.¹³¹

First, parties may submit observations and proposals as to whether or not the specified arbitrator should be appointed in their initial request for arbitration.¹³² The Secretariat has the opportunity to appoint arbitrators based on those proposals, or to allow the specified arbitrator to go forward with the proceedings.

If the Secretariat declines to remove the specified arbitrator, the aggrieved party may still challenge that appointment.¹³³ Parties can challenge the appointment of an arbitrator by challenging their “impartiality or independence, *or otherwise*” via written submission to the Secretariat.¹³⁴ The Secretariat then has a second chance to review the appointment, essentially giving parties the ability to appeal a determination that an appointed arbitrator is appropriate.

The availability of a pseudo-appeal process under the 2012 Rules addresses concerns about the ambiguity in many arbitration clauses as to who the arbitrators will be and how they will be chosen. They allow for the review of all potential appointments for substantive unconscionability. Because all arbitration clauses operating under the ICC Rules must follow them, this review process cannot be waived. Thus, it protects both the intent of the testator if they choose to specify arbitrators as well as the beneficiaries if those choices were ill advised. It also provides a fallback framework as to how the parties should appoint arbitrators if the clause and testamentary instrument do not.

3. *Procedural Gaps in the Rules*

A third major concern courts and legal theorists have with enforcing agreements to arbitrate in testamentary disputes is that the underlying regulatory scheme may contain procedural gaps, as the nonsignatory beneficiaries are unable to negotiate the terms of the arbitration agreement

¹³¹ *Id.* arts. 4(3)(g), 14(1).

¹³² *Id.* art. 4(3)(g).

¹³³ *Id.* art. 14(1).

¹³⁴ *Id.* (emphasis added).

prior to being bound by them.¹³⁵ An example of this is that where the Federal Rules of Civil Procedure provide an extensive set of rules governing discovery,¹³⁶ the ICC Rules contain only one article divided into six provisions on the subject.¹³⁷ This is a major concern for courts because if parties are bound to arbitrate under a regulatory scheme that is vague as to the procedural rules that will govern the case, their right to due process may be offended.

The rules governing the applicable rules of law in an arbitration proceeding were carried over from the 1998 Rules to the 2012 version without revision. Article 21 of the 2012 Rules provides that the “parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal,”¹³⁸ and in the absence of any such agreement “the arbitral tribunal shall apply the rules of law which it [deems] appropriate.”¹³⁹ The wording of the provision specifically says “to be applied by the arbitral tribunal *to the merits of the dispute*,”¹⁴⁰ which arguably can be read as applying this provision solely to the substantive rules of law of the case. This Note asserts, however, both the procedural and substantive law of the chosen legal regime should apply where the ICC Rules and the agreement itself are silent.

Legal commentators have opined that the ICC Rules were intended to rely on a relevant national legal regime to fill the gaps to begin with. This makes sense when the multi-national character of the Rules and of the ICC itself is taken into account. What better way to encourage the adoption and recognition of their international regulatory scheme than to have the relevant local legal regime fill any gaps in the Rules? A party could hardly argue that it had been denied due process when the arbitration proceeded under substantially the same procedural guidelines that a litigated dispute would have.

¹³⁵ See Katzen, *supra* note 2, at 134–35 (discussing how a “complete set” of mandatory procedures included in an arbitration regulatory scheme, such as the ICC or AAA Rules, would be overly onerous. Katzen uses this as a basis for the argument that, as a result, arbitration rules often contain a multitude of gaps in regulating the procedural elements of the arbitration.).

¹³⁶ See FED. R. CIV. P. 26–37.

¹³⁷ 2012 RULES, *supra* note 13, art. 25.

¹³⁸ *Id.* art. 21(2). The same provision can be found in the 1998 version of the Rules. See 1998 RULES, *supra* note 13, art. 17(i).

¹³⁹ 2012 RULES, *supra* note 13, art. 21(2).

¹⁴⁰ *Id.* (emphasis added).

4. *Minor Procedural Issues Resolved*

In addition to addressing the primary concerns many legal theorists and judges have regarding the enforcement of arbitration agreements in testamentary instruments, the 2012 Rules contain several provisions that remedy minor issues relating to the procedural elements of an arbitration proceeding. Specifically, the 2012 Rules establish provisions that govern counterclaims,¹⁴¹ the joinder of additional parties,¹⁴² the arbitration of claims between multiple parties to the arbitration,¹⁴³ and the consolidation of multiple arbitration proceedings between the same parties.¹⁴⁴ While the resolution of procedural concerns in these areas is unlikely to sway courts towards enforceability by themselves, when taken in aggregate with the alleviation of the major concerns I believe the cumulative effect of the 2012 revision will do so.

While the 1998 version of the rules contained a provision relating to bringing counterclaims, it was ambiguous and did not provide an adequate framework on how these claims were to be presented.¹⁴⁵ The 2012 version has revised this provision, and sets forth substantially more defined parameters for asserting a counterclaim. The 2012 Rules require a more defined assertion of “the amounts of any quantified [counterclaims] and . . . an estimate of the monetary value of any other counterclaims.”¹⁴⁶ The 2012 Rules also provide, in conjunction with the new provisions regarding the consolidation of claims,¹⁴⁷ the ability to assert counterclaims that arise under more than one arbitration agreement.¹⁴⁸ This promotes efficiency, as parties are now able to arbitrate all of their disputes in one proceeding instead of being forced to either litigate or participate in multiple arbitration proceedings.

The joinder provisions included in the 2012 Rules bring the ICC Rules more in line, procedurally speaking, with the federal legal regime of the U.S.

¹⁴¹ *Id.* art. 5(5).

¹⁴² *See supra* note 48.

¹⁴³ *See supra* note 50.

¹⁴⁴ 2012 RULES, *supra* note 13, art. 10.

¹⁴⁵ 1998 RULES, *supra* note 13, art. 5(v) (states only that counterclaims must be asserted in the answer to the request for arbitration, include a description of the dispute, and “a statement of the relief sought”).

¹⁴⁶ 2012 RULES, *supra* note 13, art. 4(3)(d).

¹⁴⁷ *Id.* art. 10.

¹⁴⁸ *Id.*

Federal Rules of Civil Procedure¹⁴⁹ and allow for the joinder of additional parties subject to certain criteria being met. The 2012 Rules provide that, upon request of a party and before the appointment of arbitrators, an additional party may be joined to the proceedings.¹⁵⁰ Alternatively, additional parties may be joined at any time upon the consent of all parties including the party to be joined.¹⁵¹

While not a crucial procedural issue, in my view, courts will be more likely to enforce arbitration agreements in testamentary disputes, which often involve a multitude of parties that potentially receive notice of the proceedings at varying times, if the parties are afforded essentially the same procedural tools for joinder that are guaranteed by our federal system.

Furthering the argument that the 2012 revision will bring the ICC Rules more in line with the procedural guidelines of the United States, and therefore make their model arbitration clauses more enforceable in the view of United States courts, is the new provision pertaining to claims between multiple parties. As we have seen, testamentary disputes often involve a multitude of parties. This being the case, and given the familial context of such disputes, there may be more than two sides to the dispute. Where the 1998 Rules did not contain any provision relating to asserting claims against multiple parties outside of the request for arbitration and the answer,¹⁵² the 2012 Rules allow for claims to be asserted “by any party against any other party.”¹⁵³ This is a crucial addition to the Rules when the addition of a joinder provision is taken into account. Under Article 7, it is possible for parties to be joined to the arbitration after the tribunal has been appointed, which would mean the request and answer had already been filed with the Secretariat.¹⁵⁴ If parties were unable to assert claims against any other party outside of the answer to the request, the implication is that parties joined by consent after the appointment of the arbitrators would essentially be immune to claims against them by the other parties. Allowing parties to file claims outside of the request and answer against “any other party”¹⁵⁵ brings the 2012 Rules into line with the Federal Rules of Civil Procedure, which

¹⁴⁹ See generally FED. R. CIV. P. 19–20.

¹⁵⁰ See *supra* note 47.

¹⁵¹ See *supra* note 47.

¹⁵² See generally 1998 RULES, *supra* note 13.

¹⁵³ See *supra* note 50.

¹⁵⁴ See *supra* note 47.

¹⁵⁵ See *supra* note 50.

provide a litigating party the ability to join “as many claims as it has against an opposing party.”¹⁵⁶

Again, while the resolution of each these minor procedural issues with the 1998 version of the Rules would probably not sway a court from the opinion the Rules are procedural deficient on their own, when taken in aggregate I believe the effect is persuasive.

IV. CONCLUSION

While the overall perception of the validity of agreements to arbitrate in testamentary instruments has historically been that they are unenforceable, the winds of change are blowing. Under the FAA, arbitration as an alternative to litigation has become a matter of public policy, and that policy is to enforce arbitration agreements in order to increase judicial efficiency and limit the costs of resolving disputes. But the application of this point of view to arbitration agreements in testamentary instruments has run into several obstacles. In order to increase the presumptive enforceability of their model arbitration clauses, including their Model Arbitration Clause for Trust Disputes, the ICC has made revisions to the set of rules governing its arbitration proceedings accordingly. This Note has taken the position that the changes made in 2012 will increase the enforceability of the ICC Model Clause for Trust Disputes, particularly in the United States.

In almost all other probate situations, the testator’s intent is what governs the resolution of a dispute. This is not so in the case of agreements to arbitrate any testamentary disputes. The major concerns that U.S. courts and legal theorists have expressed regarding the enforcement of these agreements focus around two major issues: the application of contract law principles to probate law, and the procedural deficiencies and ambiguities in the regulatory schemes under which such arbitration clauses operate.

With regard to the concern that application of contract law principles to arbitration clauses in the probate context will essentially displace probate law, the 2012 Rules provide a solution. A major issue is that in order to bind a non-signatory third party to an arbitration agreement, that party must be an intended beneficiary of the agreement. It cannot be contended that the beneficiaries of a trust or will are not the intended beneficiaries of said trust or will. In a commercial contract, the beneficiaries would be bound by the acceptance of the benefits of the contract, in the probate context this is the

¹⁵⁶ FED. R. CIV. P. 18(a).

bequest. The problem occurs when a beneficiary wishes to accept the bequest but also wishes to challenge the arbitration agreement.

Probate courts in the United States have long allowed beneficiaries to receive their bequest and still challenge a restriction on receiving that bequest as being against public policy (e.g., being able to receive your bequest on the condition you divorce your wife). It could be argued that an agreement to arbitrate is a restriction placed on the bequest. Unfortunately for beneficiaries wishing to avoid arbitration, the FAA resulted in a public policy of encouraging and enforcing agreements to arbitrate, meaning a probate court would likely be unwilling to sever the arbitration clause from the rest of the instrument.

In contract law, the doctrine of separability would apply, and, therefore, the beneficiary could argue that while the contract as a whole is valid, the arbitration provision is not. However, courts have consistently ruled that testamentary instruments are not “contracts” as such between the testator and the beneficiaries. Therefore, the doctrine of separability, a purely contract law principle, cannot apply to these disputes and a beneficiary is stuck making the decision to accept the bequest and submit to arbitration, or to challenge the validity of the instrument as a whole in probate court.

The 2012 ICC Rules allow parties to challenge the *existence* of the arbitration clause, which implies the instrument as a whole considering the clause is going to be located within the instrument, or to challenge the validity of said clause. Challenging the *validity* of the clause is analogous to severing the clause from the entire instrument, admitting its existence, but charging that the specific provision of the instrument containing it is invalid. This would allow courts to refrain from applying a contract principle to probate law directly, and instead follow the FAA in honoring the agreement to arbitrate under the prescribed set of rules, in this case the ICC Rules. This also will solve the dilemma that many beneficiaries may face: to accept a potentially much needed bequest or to challenge what may be in their minds a fraudulent or invalid testamentary instrument.

With regard to the concern that there may be procedural deficiencies that would essentially rob a beneficiary of due process if they were compelled to arbitrate, the 2012 ICC Rules provide a much more concrete resolution. One of the main procedural concerns relating to enforcing arbitration agreements, whether commercial or testamentary, is that often the rules under which the agreement will operate are either ambiguous, absent, or substantively unconscionable. In the commercial context, these issues are resolved in the negotiation stage because both parties have, presumably, relatively equal

bargaining power and they will be able to include procedural guidelines as they see necessary. This is unfortunately not the case in testamentary disputes. There is no bargaining power on the part of the beneficiary, they simply are named in an instrument and are unable to negotiate for any procedural safeguards at all.

The 2012 Rules include various provisions governing procedural aspects of the arbitration, some of which directly address concerns theorists and judges have put forward as reasons to invalidate agreements to arbitrate testamentary disputes. Namely, deficiencies in rules governing where an arbitration will take place, who will be appointed as arbitrators, and, in the U.S., that there may be underlying gaps in the rules on important procedural mechanisms such as discovery.

While the 2012 Rules do not specifically address these issues in the sense that they do not lay out exactly where arbitration will take place and who will be appointed, they do create an appellate-like process for those decisions. Under the 2012 Rules, parties can submit observations or proposals on nearly every procedural aspect of an arbitration proceeding to the Secretariat of the ICC Court in either the request for arbitration or the answer to the request. Therefore, if an arbitration agreement does not specify a location or a list of potential, or specific, arbitrators, the parties are able to submit their proposals to the ICC Court and expect an equitable result. On the other hand, if the arbitration agreement does set out these procedural elements with specificity, parties may still submit their observations and proposals. If, based on those proposals, the Secretariat finds them to be unconscionable, it will be able to modify the provisions of the agreement so as to make them equitable.

The ICC Rules are also intended to function with a reliance on domestic law to cover any gaps. While this is not an effect of the 2012 revision, it does address the concern that the Rules themselves are under-inclusive in terms of procedural safeguards. It cannot be argued that a party has been denied due process due to a deficiency in the underlying rules if, when compelled to arbitrate, it is protected by the procedural safeguards it would have been entitled to if it had gone to litigation.

While the main concerns may not have been completely resolved by the revision, the question posed in this Note is whether or not the 2012 revision has increased the enforceability of the Clause. My answer is yes. Overall, given the current trend in U.S. law and public policy towards the enforceability of agreements to arbitrate in testamentary instruments, I believe the enforcement of the ICC Model Arbitration Clause for Trust

Disputes will increase in the aggregate. The 2012 revision addressed the major concerns courts have expressed with enforcing these clauses, as well as some of those posed by legal theorists upon which courts have not opined. Given how recent the revisions were, their true effect will most likely not be visible for several years. In terms of enforceability, I believe the only way to go is up.