

RETHINKING THE ARBITRATION OF TRUST DISPUTES IN INDIA

*Ranak Banerji**

*In India, trust disputes are considered wholly non-arbitrable. The Supreme Court conclusively established this in *Shri Vimal Kishor Shah & Ors. v. Jayesh Dinesh Shah & Ors.*, and since then, there has been little discussion on the subject. Recently, however, an English High Court, by its decision in *Grosskopf v. Grosskopf*, rekindled a worldwide discussion on the arbitrability of trust disputes. It held such disputes to be arbitrable despite the arbitrator’s inability to grant relief for each claim. This motivates a relook at the Indian position, given our tendency to trail English arbitration jurisprudence. As a policy measure, arbitration could possibly cater to the specific demands of trusts and ensure a more efficient resolution of disputes. This position, however, is not legally intuitive. The equitable origins of trusts place civil courts in a unique supervisory position, burdened with protecting a trust’s functioning. This may inherently be at odds with the private nature of the arbitration. Nevertheless, other jurisdictions have managed to reconcile these innate differences to allow trustees, beneficiaries and settlors of trusts to enjoy the benefits of arbitration. This paper seeks to argue that such models permitting the arbitration of trust disputes should be adopted for India, too. In doing so, it also suggests a framework around which to construct this Indian model.*

TABLE OF CONTENTS

I.	INTRODUCTION	2
II.	TRUSTS AND THEIR RELATED DISPUTES IN INDIA	4
III.	ARBITRABILITY OF TRUST DISPUTES — A GLOBAL PERSPECTIVE	5
A.	THE UNITED KINGDOM.....	5
B.	THE UNITED STATES.....	7
C.	AUSTRALIA	7
D.	NEW ZEALAND.....	8
E.	GUERNSEY.....	9
F.	JERSEY.....	9
G.	BAHAMAS.....	10
H.	MALTA.....	11
I.	INTERNATIONAL CHAMBER OF COMMERCE	11
IV.	TOWARDS THE ARBITRABILITY OF TRUST DISPUTES IN INDIA	12
A.	WHY ARBITRATE?.....	13
B.	ADDRESSING POTENTIAL CONCERNS	15
1.	INABILITY OF THE ARBITRATOR TO PROVIDE THE SOUGHT RELIEF	15

* The author is a fifth-year B.A. LL.B. (Hons.) student at the West Bengal National University of Juridical Sciences, Kolkata. The author would like to thank the NUJS Law Review for their comments. All errors, if any, are solely attributable to the author. The author may be reached at ranak221036@nujs.edu for any feedback.

2. ENFORCEABILITY OF AN ARBITRATION CLAUSE AGAINST ALL BENEFICIARIES..... 17

C. A SUGGESTED MODEL..... 18

V. CONCLUSION..... 19

I. INTRODUCTION

Subject-matter arbitrability determines whether the arbitral tribunal can adjudicate on the subject matter (class) of the dispute.¹ The leading position on determining subject-matter arbitrability of disputes in India is the four-fold test laid down in the *Vidya Drolia v. Durga Trading Corpn.* (‘Vidya Drolia’) judgment in 2021 by the Supreme Court of India (‘SC’).² If the subject matter falls under any of these four conditions, it will render such a dispute non-arbitrable, preventing an arbitral tribunal from adjudicating on the dispute.³

Interestingly, what is arbitrable varies greatly in different jurisdictions,⁴ and has changed substantially with the passage of time in India itself.⁵ Varying stances on the subject-matter arbitrability of disputes geographically and temporally are caused by the differing policy considerations of nations.⁶ This variance on arbitrability is an accepted fact in international discourse,⁷ with nations usually determining arbitrability by deciding (subjectively) which disputes affect third-party rights and have impacts in the public domain.⁸

Premised on such, this paper looks to examine the arbitrability of trust disputes in India. Disputes under the Indian Trusts Act of 1882 (‘Trusts Act’) are currently non-arbitrable in India. This position is clarified by the SC in its 2016 decision in *Shri Vimal Kishor Shah & Ors. v. Mr Jayesh Dinesh Shah & Ors* (‘Vimal Kishor’).⁹ The judgment is based on the understanding that a trust deed cannot be considered an arbitration agreement and that the presence of the Trusts Act places an implied bar on arbitration.¹⁰ For clarification, the Trusts Act and this paper only concern themselves with private trusts.¹¹

¹ Vasanth Rajasekaran, *Decoding Arbitrability and Determining the Boundaries of Arbitration in Indian Jurisprudence*, SCC ONLINE TIMES, July 7, 2023, available at <https://www.sconline.com/blog/post/2023/07/07/decoding-arbitrability-and-determining-the-boundaries-of-arbitration-in-indian-jurisprudence/> (Last visited on October 17, 2024).

² *Vidya Drolia v. Durga Trading Corpn.*, (2021) 2 SCC 1, ¶76 (‘Vidya Drolia’).

³ The test renders the following disputes not arbitrable: arising from a right *in rem*, having an effect on third-party rights, relating to inalienable public interests, or by a necessary implication of a statute.

⁴ Prakhar Khandal & Jitesh Lakra, *Arbitrability of Shareholder Disputes in India: Addressing “Dressed-Up” Corporate Oppression Claims*, IRCCL, July 19, 2024, available at <https://www.irccl.in/post/arbitrability-of-shareholder-disputes-in-india-addressing-dressed-up-corporate-oppression-claims#:~:text=These%20judgments%20indicate%20that%20arbitration,the%20rights%20of%20third%20parties> (Last visited on October 19, 2024).

⁵ See Kingshuk Banerjee, *Non-Arbitrable Disputes — The Law in India*, INTERNATIONAL BAR ASSOCIATION, June 3, 2021, available at https://www.ibanet.org/nonarbdisputesindia#_edn35 (Last visited on October 18, 2024).

⁶ Penny Madden & Ceyda Knoebel, *Arbitrability and Public Policy Challenges*, GLOBAL ARBITRATION REVIEW, May 17, 2023, available at <https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/3rd-edition/article/arbitrability-and-public-policy-challenges> (Last visited on October 18, 2024).

⁷ See Margaret L. Moses, *THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION*, 68 (Cambridge University Press, 2008).

⁸ *Id.*, 216.

⁹ *Vimal Kishor Shah & Ors v. Jayesh Dinesh Shah*, 2016 SCC OnLine SC 825 (‘Vimal Kishor’).

¹⁰ *Id.*, ¶¶25–27, 50.

¹¹ The Indian Trusts Act, 1882, Preamble.

This position, however, is at odds with multiple other ‘pro-arbitration’ common law and civil law jurisdictions.¹² This current Indian stance has also been criticised,¹³ which could possibly affect its ambition to be recognised as a global arbitration hub.¹⁴ Recently, the England and Wales High Court (Chancery Division), in its judgment in *Grosskopf v. Grosskopf* (‘Grosskopf’), upheld the arbitrability of trust disputes despite the inability of an arbitrator to appoint a trustee.¹⁵ This is considered a major development in arbitral law.¹⁶

Moreover, the nature of trusts has been changing. They are increasingly being used in commercial, non-traditional contexts,¹⁷ which India’s 19th-century trust legislation was not enacted to cater to. This paper discusses personal trusts (trusts usually exercised for estate planning, tax and wealth management within a familial set-up) and commercial trusts (trusts used for investments, asset protection during insolvency, trusts around commercial loans, etc.).¹⁸ However, for clarity, it should be noted that a family could very well use a trust for commercial purposes.

A combination of these reasons motivates a relook at the Indian jurisprudence on the arbitrability of trust disputes, including from a policy-based perspective, to determine whether a shift is necessary. Such an exercise has not been carried out, to this paper’s extent,¹⁹ yet.

To forward the same, Part II of this paper will flesh out the legal and practical position surrounding trusts and related disputes in India to contextualise our discussion. Part III will continue the discourse by providing an overview of the arbitrability of trust disputes in

¹² See S.I. Strong, *Arbitration of Trust Disputes: Two Bodies of Law Collide*, Vol. 45, VAND. J. TRANSNAT’L L., 1181–1245 (2012); For an expanded discussion on these jurisdictions and their take on the arbitration of trust disputes, see *infra* Part III on “Arbitrability of Trust Disputes — A Global Perspective”.

¹³ Devika Jayaraj, *Arbitrability of Trust Disputes in India: Critical Analysis of the SC Judgment*, VIAC, available at <https://viamediationcentre.org/readnews/MTQzOQ==/Arbitrability-of-Trust-Disputes-in-India-Critical-Analysis-of-the-SC-judgment> (Last visited on October 18, 2024).

¹⁴ Neha Joshi, *India Wants to Be an Arbitration Hub. It Won’t Be an Easy Task.*, MINT, October 27, 2024, available at <https://www.livemint.com/industry/arbitration-appeal-tribunals-need-right-talent-to-yield-results-11730011075540.html> (Last visited on January 5, 2024); Monica Behrua, *NLP to Make India an Arbitration Hub*, ECONOMIC TIMES, June 4, 2024, available at <https://legal.economictimes.indiatimes.com/news/editors-desk/nlp-to-make-india-an-arbitration-hub/110993899> (Last visited on January 5, 2024); PRESS INFORMATION BUREAU, *Arbitration Council of India and New Delhi International Arbitration Centre Needs to be Set Up to Achieve PM’s Vision to Develop India as an International Arbitration Hub: Says Law Minister Shri Kiren Rijiju*, July 15, 2021, available at <https://www.pib.gov.in/Pressreleaseshare.aspx?PRID=1735976> (Last visited on January 5, 2024); Sanjay Raman Sinha & Sangeeta Sharma, “*Our Focus Right Now Is To Streamline The Arbitration Process*”, INDIA LEGAL, March 16, 2023, available at <https://indialegalive.com/magazine/justice-hemant-gupta-chairperson-india-international-arbitration-centre-interview/> (Last visited on January 5, 2024).

¹⁵ *Grosskopf v. Grosskopf*, [2024] EWHC 291 (Ch) (‘Grosskopf’).

¹⁶ Tom McPhail & Oliver Blundell, *Grosskopf v Grosskopf: What Next for the Arbitration of Trust Disputes?*, FARRER & CO., July 12, 2024, available at <https://www.farrer.co.uk/news-and-insights/grosskopf-v-grosskopf-what-next-for-the-arbitration-of-trust-disputes/#:~:text=Analysis,no%20such%20agreement%20in%20place.> (Last visited on October 19, 2024)

¹⁷ Ruiqiao Zhang, *The New Role Played by Trusts in Commercial Contexts* in THE COMMERCIAL USES OF TRUSTS, RETHINKING THE TRADITIONAL APPROACH (Bloomsbury Publishing, 2024).

¹⁸ Ruiqiao Zhang, *Principal Forms of Commercial Trusts in the UK and the Rethinking of Traditional Approaches*, Vol. 28(8), TRUSTS & TRUSTEES, 787–789, 792, 795 (2022) (‘Ruiqiao’); Alex Solo, *Commercial Trusts: Uses & Key Distinctions for Owners*, SPRINTLAW, April 21, 2025, available at <https://sprintlaw.co.uk/articles/commercial-trusts-uses-key-distinctions-for-owners/> (Last visited on June 14, 2025).

¹⁹ See Siddhant Ahuja, *Is There a Future for the Arbitrability of Trusts in India?*, GNLU SRDC-ADR MAGAZINE, 2022, available at <https://gnlusrdcadrmagazine.com/wp-content/uploads/2022/02/GNLU-SRDC-ADR-Magazine-Volume-I-Issue-I-Article-8.pdf> (Last visited on March 25, 2025); Ishaan Vyas et al., *In Civil Courts We ‘Trust’: Trust Disputes Non-arbitrable in India*, NISHITH DESAI ASSOCIATES, August 23, 2016, available at <https://www.nishithdesai.com/generateHTML/6030/4> (Last visited on March 25, 2025).

major jurisdictions. Lessons drawn from this portion will assist in drawing up a structure for a future Indian model that allows the arbitration of trust disputes to rest on. Part IV will forward some policy-based considerations for allowing the arbitrability of trust disputes while assuaging any concerns that may be present. This Part will also provide the suggested framework model. Part V will provide a few concluding thoughts.

II. TRUSTS AND THEIR RELATED DISPUTES IN INDIA

The Trusts Act currently governs the functioning of private trusts in the nation.²⁰ Even though it is an archaic piece of legislation, it is suspected that trusts are regularly used in estate planning and wealth management in India, especially by the ultra-rich.²¹ This makes the discussion in the paper relevant and of practical importance.

The court in *Vimal Kishor* stressed the fact that this Act was legislated with the intent to be an exhaustive statute,²² which excludes the applicability of other statutes such as the Arbitration and Conciliation Act, 1996 ('Arbitration Act').²³ It adds that the remedies under the Trusts Act can only be granted by a civil court and not an arbitrator.²⁴

Notably, this is an important determination by the court when declaring trust disputes as non-arbitrable. It assumes that arbitrability should be determined by the ability of the arbitrator to grant specific reliefs under a piece of legislation; in *Vimal Kishor*, this statute was the Trusts Act. Thus, if there is any intent in a statute for only a civil court to exercise remedies under it, disputes under that statute become non-arbitrable.²⁵ This assumption of the Court will be addressed later in this paper when trying to lay out a model allowing the arbitration of trust disputes in India.²⁶

On a separate point, the Court in *Vimal Kishor* also ruled that a trust deed cannot be considered an arbitration agreement.²⁷ It reasoned that as the beneficiaries do not sign the trust deed, it cannot even be considered an agreement.²⁸ It looked at the requirements of a valid arbitration agreement in §7 of the Arbitration Act and determined that they were not met by a trust deed, even if it included an arbitration clause.²⁹ Specifically, the Court found a lack of "parties"³⁰ and an "arbitration agreement",³¹ presumably flowing from the previous discussion of the beneficiaries not having signed the trust deed.

The Court also endorses the judgment of the Calcutta High Court in *Bijoy Ballav Kundu v. Tapeti Ranjan Kundu*,³² which holds that by agreeing to a trust deed, an arbitration agreement cannot be 'inferred' between co-trustees and beneficiaries.³³ The court held so, as an agreement requires a proposal and an acceptance, and it would be "sheer absurdity" to

²⁰ The Indian Trusts Act, 1882.

²¹ See BUSINESS STANDARD, *Are India's Super Rich Ring-Fencing their Wealth Using Trusts?*, December 3, 2021, available at <https://mybs.in/2Zjg71d> (Last visited on October 19, 2024).

²² *Vimal Kishor*, *supra* note 9, ¶¶44–47.

²³ The Arbitration and Conciliation Act, 1996; See *Id.*, ¶¶47, 50.

²⁴ *Id.*, ¶¶45, 50.

²⁵ See *Id.*, ¶50.

²⁶ See *infra* Part IV.B.1 on "Inability of the Arbitrator to Provide the Sought Relief".

²⁷ *Vimal Kishor*, *supra* note 9, ¶¶27, 36.

²⁸ *Id.*, ¶¶25, 26.

²⁹ The Arbitration and Conciliation Act, 1996, §7; *Id.*, ¶27.

³⁰ The Arbitration and Conciliation Act, 1996, §2(h); *Vimal Kishore*, *supra* note 9, ¶25.

³¹ The Arbitration and Conciliation Act, 1996, §2(b); *Vimal Kishore*, *supra* note 9, ¶25.

³² *Vimal Kishore*, *supra* note 9, ¶¶32–35; *Bijoy Ballav Kundu v. Tapeti Ranjan Kundu*, AIR 1965 Cal 628.

³³ *Vimal Kishore*, *supra* note 9, ¶¶33–35.

imagine that the trustees and beneficiaries have proposed and accepted each individual clause of the trust deed.³⁴ It is to be noted that this does not constitute a finding on the arbitrability of trust disputes but on party consent to arbitration.

In all, according to Vimal Kishor, trust deeds do not constitute arbitration agreements, and even if they did, disputes under them are barred from being settled by arbitration due to the scheme of the Trusts Act. Both of these legal concerns will be addressed in Part IV of this paper; however, admittedly, only the latter concern is a question of arbitrability, while the former remains a concern with the jurisdiction of the tribunal.

On a related note, disputes under the Trusts Act are primarily of two kinds: those challenging the validity of the trust deed and those claiming a breach of the trust deed.³⁵ These, generally, are also the common kinds of trust disputes globally.³⁶ While claims challenging the validity of a trust might not always involve compensation, §23 of the Trusts Act recognises the obligation of a trustee to “make good the loss” caused by a breach of trust.³⁷ This primary compensatory relief in a breach of trust will aid our discussion in Part IV of the paper.

III. ARBITRABILITY OF TRUST DISPUTES — A GLOBAL PERSPECTIVE

This section of the paper will provide a comparative analysis of the arbitrability of trust disputes in common law nations that have had a dedicated discussion on this point.³⁸ Despite the variance in arbitrability between common and civil law nations noted above,³⁹ it is not necessary to carry out an analysis of the civil law nations here. This is so, as India, by virtue of being a common law nation,⁴⁰ does not take inspiration from civil law countries while rethinking settled positions of law.

Naturally then, only the jurisdictions discussed below could provide encouragement for India to change its position and guide the specificities of such a potential change. This section aims to serve our legislature if they choose to discuss the arbitrability of trust disputes, and as an ancillary objective, it can act as a starting point for parties looking to establish trusts.

A. THE UNITED KINGDOM

The United Kingdom (‘UK’) would take centre stage in the comparative discussion here due to its role in moulding the Indian legal system and being a hub for

³⁴ Vimal Kishore, *supra* note 9, ¶34.

³⁵ The Indian Trusts Act, 1882, §§4–10, 23.

³⁶ ELLIS LAW GROUP, *Common Disputes That Can Spark Trust Litigation*, September 29, 2023, available at <https://www.ellis-law.com/blog/common-disputes-that-can-spark-trust-litigation/> (Last visited on October 21, 2024); MHPS LAW, *What Are the Most Common Types of Trust Disputes?*, February 9, 2022, available at <https://www.mhpslaw.com/blog/wealth-preservation/common-types-of-trust-disputes/> (Last visited on October 21, 2024).

³⁷ The Indian Trusts Act, 1882, §23.

³⁸ It should be noted that Malta is traditionally a civil law country but has been inspired by common law and is considered a mixed-law nation now. For a discussion on this point, see Dr Patrick J. Galea, *A Brief Overview of Malta, a Roman-Civil Law Country, With Common Law Adoption as Rules of Civil Evidence*, Vol. 5, DIGIT. EVID. & ELEC. SIGNATURE L. REV., 202 (2008).

³⁹ See *supra* Part I on “Introduction”.

⁴⁰ Mahendra Pal Singh & Niraj Kumar, *THE INDIAN LEGAL SYSTEM: AN ENQUIRY*, Chapter 1, xxxi–lvi (Oxford Academic, 2019).

international arbitration.⁴¹ As briefly mentioned above, the judgment in *Grosskopf* has triggered this current discussion on the arbitrability of trust disputes. A part of the dispute surrounded the arbitrability of a breach of trust claim, which sought the appointment of a judicial trustee.⁴² Interestingly, the Claimant in the original arbitral proceedings subsequently challenged its arbitrability in front of the Court.⁴³ Arbitrability was challenged on the ground that an arbitrator could not appoint a judicial trustee; only a court could,⁴⁴ and multiple classes of beneficiaries, such as unborn persons, minors, and charitable institutions, were incapable of submitting to arbitration in the first place.⁴⁵

First, the Court stated that there is no public policy rule against the out-of-court resolution of trust disputes, including claims which may require the arbitrator to ‘order’ a trustee to vacate their office.⁴⁶

Second, it clarified that the supervisory jurisdiction of courts over private trusts is not diluted away by the arbitral process, and parties are free to invoke such when they feel necessary.⁴⁷ It offers a parallel by pointing to the possibility of settlements between beneficiaries and trustees after the initiation of a dispute in front of a court, where a trustee may be required to step down.⁴⁸ As these settlements do not require the involvement of each beneficiary, arbitrations should not either.⁴⁹

Third, the Court found no issue with the power of an arbitral tribunal to appoint a trustee as beneficiaries have “no general right to control the exercise of a power of appointment of new trustees”.⁵⁰ It recognised that in some circumstances, the beneficiaries may need to be consulted or informed.⁵¹ In all, the arbitral tribunal could ‘order’ a trustee to vacate their office and seek the appointment of one via the process required by the trust deed.⁵² If such fails, the Court could always be moved for the appointment of a judicial trustee.⁵³ Finally, the Court makes a quintessential finding for arbitration law in general: the incapacity of a tribunal to provide the relief specified in the claim does not make the dispute non-arbitrable.⁵⁴

Though much discussion could be had about India’s position as an arbitration jurisdiction solely using the finding above, this paper is only concerned with the arbitrability of trust disputes. To conclude, trust disputes are wholly arbitrable in the UK. However, it should be noted that the *Grosskopf* judgment makes no determination as to the enforceability of arbitration clauses in a trust deed, as the arbitration agreement, in that case, was signed after the dispute arose. Accordingly, the decision in *Grosskopf* does not provide any assistance when

⁴¹ Yarik Kryvoi, *London as the World’s Leading Dispute Resolution Hub: Numbers and Challenges*, BRITISH INSTITUTE OF INTERNATIONAL AND COMPARATIVE LAW, May 17, 2023, available at <https://www.biicl.org/blog/58/london-as-the-worlds-leading-dispute-resolution-hub-numbers-and-challenges?cookieset=1&ts=1729846560> (Last visited on October 25, 2024); For an understanding of how the English law of trusts developed and influenced the Trusts Act, see B.M. Gandhi, *EQUITY, TRUSTS AND SPECIFIC RELIEF*, 206–211 (4th edn., Eastern Book Company, 2007).

⁴² *Grosskopf*, *supra* note 15, ¶56.

⁴³ *Id.*

⁴⁴ *Id.*, ¶56.

⁴⁵ *Id.*, ¶58.

⁴⁶ *Id.*, ¶61.

⁴⁷ *Id.*, ¶62.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*, ¶64.

⁵¹ *Id.*

⁵² *Id.*, ¶65.

⁵³ *Id.*

⁵⁴ *Id.*, ¶72.

attempting to provide a model for enforcing arbitration agreements in trust deeds in India. However, other decisions and models do, as has been discussed later in the paper.⁵⁵

B. THE UNITED STATES

Before beginning with the substantive discussion in this section, it is necessary to highlight what arbitrability means in the United States ('US').⁵⁶ The meaning of the term is broader in the US, as it covers issues which one generally discusses under the aegis of jurisdiction and admissibility.⁵⁷ Arbitrability, in this paper, however, only refers to subject-matter arbitrability.

By and large, there is no bar on the arbitration of particular classes of disputes at the federal level.⁵⁸ The Federal Arbitration Act was recently amended in 2022 to exempt sexual harassment disputes from mandatory arbitration.⁵⁹ There is, thus, no federal bar on the arbitration of trust disputes.⁶⁰

At the state level, New Hampshire, Washington, Arizona, South Dakota, Missouri, Florida and Ohio specifically recognise the enforceability of arbitration clauses in trust deeds.⁶¹ For example, the South Dakotan law reads, "[...] a provision in a trust requiring the arbitration of a dispute between or among the beneficiaries, a fiduciary under the will or trust, or any combination of them, is enforceable [...]".⁶² The Supreme Courts of other states, such as Texas, have given effect to arbitration agreements in trust deeds.⁶³

Therefore, trust disputes are arbitrable at the federal level, and arbitration agreements in trust deeds are enforceable in multiple states. The absence of state-wide legislation which specifically recognises this enforceability does not automatically make such arbitration clauses unenforceable.

C. AUSTRALIA

In Australia, questions regarding a breach of trust, or even the existence of the trust itself (provided the clause is broad enough), are arbitrable.⁶⁴ In *Fitzpatrick v. Emerald Grain*, the Court held that disputes which seek to determine if a contractual relationship gives

⁵⁵ See *infra* Part IV.B.2 on "Enforceability of an Arbitration Clause Against all Beneficiaries".

⁵⁶ George A. Bermann, *Arbitrability Trouble*, Vol. 23, AM. REV. INT'L ARB., 367 (2012).

⁵⁷ *Id.*; Here, "one generally discusses" refers to the world of international arbitration and other non-US jurisdictions.

⁵⁸ The Federal Arbitration Act, Title 9, U.S. Code, §§1–14 1925 (United States of America); ICLG, *International Arbitration Laws and Regulations USA 2024*, September 13, 2024, available at <https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/usa> (Last visited on October 26, 2024).

⁵⁹ Title 9, U.S. Code, §402 (United States of America).

⁶⁰ It should also be noted that trusts are governed at the state level; For more information on this, see TRUST LAWS IN THE UNITED STATES (Globe Law and Business, 2025).

⁶¹ Leah Albert, *The Case for Arbitration of Trust and Estate Disputes*, MILES MEDIATION & ARBITRATION, June 5, 2023, available at <https://milesmediation.com/blog/learn-why-arbitration-should-be-used-for-trust-and-estate-disputes/> (Last visited on October 29, 2024).

⁶² S.D. Codified Laws, §55-1-54 (South Dakota, United States of America).

⁶³ *Rachal v. Reitz*, 403 SW3d 840 (Tex 2013) (The Supreme Court of Texas).

⁶⁴ *Rinehart v. Hancock Prospecting Pty Ltd* (2019) 267 CLR 514 (The High Court of Australia); Leon Chung et al., *High Court Rules on Arbitration Clauses*, HERBERT SMITH FREEHILLS, May 9, 2019, available at <https://www.herbertsmithfreehills.com/insights/2019-05/high-court-rules-on-arbitration-clauses> (Last visited on October 29, 2024).

rise to a trust are also arbitrable.⁶⁵ It clarified that only under very limited circumstances would a dispute be held to be non-arbitrable,⁶⁶ which did not include trust disputes.⁶⁷ Even disputes seeking the removal of a trustee are also arbitrable.⁶⁸

The stance in Australia, however, is not exactly as clear on the enforceability of arbitration agreements. The New South Wales Court of Appeal in *Rhinehart v. Welker* ('Rhinehart') left the "difficult question" of whether an arbitration agreement can bind all beneficiaries to the deed unanswered.⁶⁹ Due to this, the general enforceability of arbitration agreements in trust deeds is unclear.⁷⁰ This would probably be settled on a case-to-case basis, depending on the nature of the dispute and the specific wording of the arbitration clause.⁷¹

In all, there is no public policy bar on the arbitration of trust disputes in Australia, and courts generally have a broad view of its arbitrability.

D. NEW ZEALAND

Trust disputes in New Zealand are arbitrable, or rather, are amenable to "alternative dispute resolution" ('ADR') processes under its recent Trusts Act enacted in 2019.⁷² Notably, a majority of the discussion in New Zealand surrounds the enforceability of arbitral clauses in trust deeds and the differing capacities of parties to agree to arbitrate after a dispute arises.⁷³ This revolves around a distinction drawn between "external" and "internal" disputes.⁷⁴

In "internal" matters, the ones involving trustees, co-trustees and/or beneficiaries, a court can enforce an arbitration clause in a trust deed or, in its absence, refer the matter to ADR, provided there is no specific intention to the contrary in the deed.⁷⁵ In cases where unascertained beneficiaries are impacted, the court is bound to appoint legal representatives for them and approve the settlement/award.⁷⁶

In "external" matters, the ones involving a trustee(s) and third parties which affect the trust property, the trustee can refer the matter to arbitration on its own initiative if the trust deed contains an arbitration clause.⁷⁷ If there is no such clause, however, the trustee only

⁶⁵ See *Fitzpatrick v. Emerald Grain Pty Ltd*, [2017] WASC 206, ¶¶90–95 (The Supreme Court of Western Australia).

⁶⁶ For a general discussion on these "circumstances", see *Id.*, ¶91.

⁶⁷ *Id.*, ¶90; For the general Australian stance on the arbitrability of disputes, see *Pipeline Services WA Pty. Ltd. v. ATCO Gas Australia Pty. Ltd.*, [2014] WASC 10 (The Supreme Court of Western Australia), ¶80.

⁶⁸ *Rhinehart v. Welker*, [2012] NSWCA 95, ¶¶175, 176 (The Supreme Court of New South Wales), ('Rhinehart').

⁶⁹ *Id.*, ¶177.

⁷⁰ Albert Monichino, *Arbitration of Shareholder and Trust Disputes*, July 23, 2020, RESOLUTION INSTITUTE, 88, available at <https://classic.austlii.edu.au/au/journals/ANZRIArbMedr/2021/8.pdf> (Last visited on October 28, 2024).

⁷¹ *Id.*

⁷² The Trusts Act, 2019, §§142–148 (New Zealand).

⁷³ See James A. Holland, *The Arbitration of Trust Disputes in New Zealand — A New Frontier?*, Vol. 28(5), TRUSTS & TRUSTEES, 376–380 (2022); See Jeremy Johnson & Wynn Williams, *The Arbitration of Trust Disputes: Opportunities and Risks*, ARBITRATORS' AND MEDIATORS' INSTITUTE OF NEW ZEALAND'S ANNUAL CONFERENCE, 99–120 (2014).

⁷⁴ The Trusts Act, 2019, §142 (New Zealand).

⁷⁵ *Id.*, §145.

⁷⁶ *Id.*, §144.

⁷⁷ *Id.*, §143.

needs the consent of the parties affected by the external dispute to refer the matter to arbitration.⁷⁸

Crucially, beneficiaries are not considered parties to an external dispute.⁷⁹ Then, the beneficiaries' consent is not necessary for such arbitrations, which (presumptively) indicates towards lesser hurdles in enforcing an arbitration agreement in the realm of trust disputes. This should ideally bring about an ease of enforcement of arbitration agreements due to a reduced scope of third-party (here, beneficiary) challenges. Such should assist in the management of the trust by allowing the trustee to take third parties to arbitration more readily.

The New Zealand Trusts Act, due to its recency and clarity, should play an important role when debating changes to the Indian trusts regime. A more dedicated discussion on this is present later in the paper.⁸⁰

E. GUERNSEY

Guernsey, a Channel Island, is a premier location for trusts due to its favourable laws, legal expertise and stable environment.⁸¹ This makes its trust laws a pivotal template to draw on when considering reform to the trust laws of one's own jurisdiction. According to its trust laws, any breach of trust claim can be submitted to ADR (including arbitration), the outcome of which would bind each beneficiary of the trust if they have been given adequate notice.⁸² This may seem to indicate certainty in arbitrating trust disputes; however, some consider the clause restrictive.⁸³ There are other disputes between co-trustees and co-beneficiaries that may arise, which would not technically be considered a breach of trust, such as claims against other beneficiaries, actions for disclosure of trust documents, removal of a trustee for reasons other than breach, etc. Such are not amenable to ADR (arbitration).⁸⁴ Principally, though, there is no bar on the arbitrability of breach of trust claims in Guernsey.

F. JERSEY

Jersey, another Channel Island, is also considered a leading jurisdiction for the establishment and management of trusts.⁸⁵ Interestingly, though, there is no law, either under their arbitration statute or their trusts statute, recognising the arbitrability of trust disputes.⁸⁶ At first glance, this may seem detrimental to the argument forwarded in this paper; however, a closer look reveals otherwise.

An amendment to their trusts statute was discussed in 2018, which would make arbitration clauses in trust deeds binding.⁸⁷ This was rejected as it was considered that Jersey

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ See *infra* Part IV.C on "A Suggested Model".

⁸¹ Catherine Moore, *Trusts in Guernsey*, OGIER, June 6, 2023, available at <https://www.ogier.com/news-and-insights/insights/trusts-in-guernsey/> (Last visited on October 29, 2024).

⁸² The Trusts Law, 2007, §63 (Guernsey).

⁸³ Christian Hay, *Arbitration of Trust Disputes in England, Wales and Channel Islands: A Feasible Alternative?*, COLLAS CRILL, April 12, 2021, available at <https://www.collascrill.com/articles/arbitration-of-trust-disputes-in-england-wales-and-channel-islands-a-feasible-alternative/> (Last visited on October 29, 2024).

⁸⁴ *Id.*

⁸⁵ CAREY OLSEN, *An Overview of the Types and Uses of Jersey Law Trusts*, March 2017, available at https://www.careyolsen.com/sites/default/files/CO_JSY_T%26PW_An%20overview%20of%20the%20types%20and%20uses%20of%20Jersey%20law%20trusts_3.17_0.pdf (Last visited on October 29, 2024) ('Olsen').

⁸⁶ The Trusts Law, 1984 (Jersey); The Arbitration Law, 1998 (Jersey).

⁸⁷ The Trusts (Amendment No. 7) Law, 2018 (Jersey).

courts are extremely efficient in adjudicating trust disputes.⁸⁸ There is also a system of “representation” proceedings in Jersey, which frequently cover trust disputes and are confidential, quick and flexible.⁸⁹ These practically encompass the major benefits of arbitration. Furthermore, courts in Jersey frequently refer trust disputes to other forms of ADR, such as mediation.⁹⁰ Thus, the arbitrability of trust disputes has not been recognised in Jersey, as there is no need to do so.

It should be noted that none of these circumstances, as will be explained below, apply to India.⁹¹ Then, Jersey, despite its status as a ‘trust-savvy’ nation, cannot be used as an example to argue against allowing the arbitration of trust disputes in India.

G. BAHAMAS

Next, the jurisdiction of the Bahamas is crucial to analyse due to its status as a favourable destination for trusts and other forms of asset management.⁹² Trust disputes are wholly arbitrable in the Bahamas.⁹³ Recent judicial decisions and legislative amendments have strengthened the position of the Caribbean nation as a favourable destination for trust arbitration.

The Bahamas Supreme Court in *Gabriele Volpi v. Delanson Services Limited & 2 Others* and *Delanson Services Limited v. Matteo Volpi and 2 Others* (a consolidated decision) upheld the inability of the court to entertain an appeal to an arbitral award in the absence of all parties consenting to the same.⁹⁴ The decision takes a pro-arbitration stance, narrowing the scope of appeal, even in trust disputes.⁹⁵

The Bahamas also recently amended its arbitration statute to integrate it with its trusts statute.⁹⁶ The 2023 amendment to its arbitration law lays down a detailed framework for trust arbitration in the statute itself.⁹⁷ It even provides for mechanisms to appoint representatives for unascertained, disabled or unborn beneficiaries while recognising the enforceability of arbitration clauses in trust deeds.⁹⁸ While doing so, it provides the tribunal with the same powers as a court in appointing representatives for any beneficiary,⁹⁹ including

⁸⁸ Olsen, *supra* note 85.

⁸⁹ *Id.*; For more information on representation proceedings and their use in semi-contentious trust disputes, see DICKINSON GLEESON, *Conducting Civil Proceedings in Jersey*, April 2017, available at <https://www.dgadvocates.com/wp-content/uploads/2025/01/1.-Conducting-civil-proceedings-in-Jersey.pdf> (Last visited on October 31, 2024).

⁹⁰ *Id.*

⁹¹ See *infra* Part IV.A on “Why Arbitrate?”.

⁹² NOMAD CAPITALIST, *Bahamas Trust: Benefits, Types, and How to Set One Up*, May 16, 2023, available at <https://nomadcapitalist.com/finance/offshore/bahamas-trust-benefits-types/> (Last visited on October 29, 2024).

⁹³ The Trustees Act, 1998, §91A (Bahamas).

⁹⁴ *Gabriele Volpi v. Delanson Services Limited & 2 Others* 2020/APP/sts/00013, 2020/APP/sts/00018 (The Supreme Court of the Commonwealth of the Bahamas); *Delanson Services Limited v. Matteo Volpi and 2 Others*, 2020/CLE/gen/00632 (The Supreme Court of the Commonwealth of the Bahamas).

⁹⁵ Efemena Iluezi-Ogbaudu, *More Reasons to Trust Arbitration in the Bahamas: Examining the Key Takeaways from Gabriele Volpi v. Delanson Services Limited & 2 Others*, KLUWER ARBITRATION BLOG, April 29, 2024, available at <https://arbitrationblog.kluwerarbitration.com/2024/04/29/more-reasons-to-trust-arbitration-in-the-bahamas-examining-the-key-takeaways-from-gabriele-volpi-v-delanson-services-limited-2-others/> (Last visited on October 31, 2024).

⁹⁶ Dwayne Whylyly & Nastassia Rigby, *An Update on Trust Arbitration in the Bahamas*, STEP, September 17, 2024, available at <https://www.step.org/sponsored-content/update-trust-arbitration-bahamas> (Last visited on October 31, 2024).

⁹⁷ See The Arbitration (Amendment) Act, 2023 (Bahamas).

⁹⁸ *Id.*, §§2, 12.

⁹⁹ This must be in accordance with the trust deed.

the above-mentioned classes.¹⁰⁰ The amendment also strengthens the confidentiality requirements of arbitrations, making its breach an offence for parties and a ground for denying fees to the arbitrator(s).¹⁰¹ These changes demonstrate faith in the arbitral process during trust disputes; a lesson that India could benefit from.

H. MALTA

Malta is also an attractive jurisdiction for setting up trusts for estate planning and wealth management purposes due to its taxation laws and favourable fee regime.¹⁰² The arbitration statute provides recognition to arbitration clauses in trust deeds.¹⁰³ It reads, “[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”.¹⁰⁴ The statute retains the discretionary and supervisory jurisdiction of the courts under the Maltese Trusts and Trustees Act.¹⁰⁵

Notably, the beneficiaries are bound by an arbitral clause in the trust deed without any additional requirements for representatives to be appointed for minor, unascertained or disabled beneficiaries.¹⁰⁶ However, as the discretionary powers of the court are retained, a case-specific approach would be taken.¹⁰⁷ It should also be highlighted that only the settlor of a trust can insert an arbitration clause in the deed.¹⁰⁸ This indicates that any future modification of the trust deed by a trustee in relation to an arbitral clause would not be permitted.¹⁰⁹ This could be viewed as a measure protecting the inherent interests of the beneficiaries from the discretionary actions of a trustee in anticipation of a dispute.¹¹⁰

I. INTERNATIONAL CHAMBER OF COMMERCE

Though not a jurisdiction, the International Chamber of Commerce (‘ICC’) in Paris has played a pivotal role in the development of international arbitration as a practice and a body of law.¹¹¹ In 2018, it released a model arbitration clause for trust deeds, along with an explanatory note.¹¹² It has not been reproduced here in the interest of brevity. It provides for “final settlement” of “all disputes” arising in relation to the trust.¹¹³ It directly binds the settlor, the trustee(s) and the protector(s) of the trust directly. For beneficiaries, it prefers a “deemed consent model”, where they are deemed to be bound by the arbitration clause if they choose to

¹⁰⁰ The Arbitration (Amendment) Act, 2023, §12 (Bahamas).

¹⁰¹ *Id.*, §11.

¹⁰² Jonatan Vassallo, *Establishing a Trust in Malta and Why It Can Be So Beneficial*, MONDAQ, January 18, 2023, available at <https://www.mondaq.com/financial-services/1272266/establishing-a-trust-in-malta-and-why-it-can-be-so-beneficial> (Last visited on October 31, 2024).

¹⁰³ The Malta Arbitration Act, 1998, Art. 15A(2), (Malta).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*, Art. 15A(3).

¹⁰⁶ *Id.*, Art. 15A(1).

¹⁰⁷ *Id.*, Art. 15A(3).

¹⁰⁸ *See Id.*, Art. 15A.

¹⁰⁹ Anthony Cremona, *Successful Arbitration of Internal Trust Disputes the Maltese Way*, Vol. 18(4), TRUSTS & TRUSTEES, 368 (2012).

¹¹⁰ *Id.*

¹¹¹ CLIFFORD CHANCE, *Introduction to ICC Arbitration*, December 2012, available at <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2012/12/introduction-to-icc-arbitration.pdf> (Last visited on October 31, 2024).

¹¹² International Chamber of Commerce (ICC), *ICC Arbitration Clause for Trust Disputes*, 2018, available at <https://iccwbo.org/wp-content/uploads/sites/3/2018/11/icc-clause-for-trust-disputes.pdf> (‘ICC Clause’).

¹¹³ *Id.*, Arbitration Clause.

claim or accept any benefit under the trust deed.¹¹⁴ The explanatory note to the ICC Clause provides a mechanism to appoint representatives for the interests of the unascertained or incapacitated beneficiaries.¹¹⁵ It also recognises the importance of confidentiality in trust disputes.¹¹⁶

Apart from the jurisdictions referred to, even Liechtenstein provides for the arbitration of trust disputes.¹¹⁷ However, in light of the discussion above, highlighting its stance is not necessary for the purposes of our discussion.

Below is a table summarising each nation’s stance for ease of reference.

Table 1

Question¹¹⁸	UK	US*	Aust.	NZ	Guern.	Jersey	Bah.	Malta
Are trust disputes arbitrable?	No bar	No bar	No bar	Yes	Yes	No recognition	Yes	Yes
Are breach of trust disputes arbitrable?	Yes	Yes	Yes	Yes	Yes	NA	Yes	Yes
Are validity of trust disputes arbitrable?	No bar	Some states bar it. Ex. Florida. ¹¹⁹	Yes	No bar	No	NA	No bar	No bar
Are there mechanisms present or recognised to protect unascertained or incapacitated beneficiaries?	No	No	No	Yes	Yes	NA	Yes	No
Are the supervisory powers of the Court restricted?	No	No	No	No	No	No	Somewhat	No

IV. TOWARDS THE ARBITRABILITY OF TRUST DISPUTES IN INDIA

Parts II and III above have provided a premise to suggest a framework towards the arbitrability of trust disputes in India. It should be noted that this section, or this paper, is not a legal critique of Vimal Kishor. The author believes that the judgment is legally sound and

¹¹⁴ *Id.*, Arbitration Clause.

¹¹⁵ *Id.*, Explanatory Note, ¶¶14, 15.

¹¹⁶ *Id.*, Arbitration Clause, Cl. a, b; Explanatory Note, ¶17.

¹¹⁷ CLIFFORD CHANCE, *Arbitration Agreements in Trust Instruments — Are They Binding on Beneficiaries?*, June 2013, available at <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2013/06/arbitration-agreements-in-trust-instruments-are-they-binding-on-beneficiaries.pdf> (Last visited on October 31, 2024); Micheal Nueber & Hendrik Puschmann, *Arbitration of Foundation and Trust Disputes in Liechtenstein and the United Kingdom — A Comparative Analysis*, Vol. 24(5), TRUSTS & TRUSTEES, 418–426 (2018); It should be noted that Liechtenstein is a civil law country.

¹¹⁸ “No bar” refers to the lack of a statutory or judicial bar against something. “Yes”, refers to explicit statutory recognition of something.

* Federal stance only. A brief of the stances of comprising states is present in Part III.B on “The United States”.

¹¹⁹ Title XLII, §731.401(1) (Florida, United States of America); The law reads “A provision in a will or trust requiring the arbitration of disputes, other than disputes of the validity of all or a part of a will or trust, between or among the beneficiaries and a fiduciary under the will or trust, or any combination of such persons or entities, is enforceable”.

correctly applied the test to check the arbitrability of disputes prevailing then.¹²⁰ This portion looks to advocate for a legislative change (amendment to the Trusts Act) in the current position of Indian law.

To begin, it is relevant to look at the policy reasons to arbitrate trust disputes in India.

A. WHY ARBITRATE?

Admittedly, the benefits of arbitration over litigation, especially in India, are well discussed.¹²¹ However, for the purposes of our discussion, it is necessary to highlight them in a trust-specific context, too. This is what this portion endeavours to achieve.

Firstly, arbitrations are confidential.¹²² Trusts are instruments which may be chosen over other testamentary forms of succession for privacy reasons.¹²³ Furthermore, trust disputes usually take place within a family set-up, involving high-profile, related individuals and sensitive assets.¹²⁴ This mix of a family set-up, sensitive assets in a testamentary backdrop (all unique to trust disputes) exacerbates the need for privacy here as compared to other, general civil litigation.

Moreover, due to the high-profile individuals and families involved, trust disputes can attract a lot of critical media attention, which may be detrimental to the family structure and the effective resolution of the dispute.¹²⁵ This particular idiosyncrasy of trust disputes has been discussed to recommend its arbitration before.¹²⁶ Recently, India has seen a flurry of cases that have attracted sensationalising and inimical attention from the media.¹²⁷ As a specific example, the Khetri Trust dispute received constant media attention and took thirty-

¹²⁰ Vimal Kishor, *supra* note 9, ¶40; The prevailing test of arbitrability then was *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd.*, (2011) 5 SCC 532. For the current test on arbitrability, see Vidya Drolia, *supra* note 3, ¶76. It is not argued that Vimal Kishor violates the current test either.

¹²¹ Akshat Khetan, *Indian Arbitration System on Path To Global Recognition And Economic Growth*, LIVE LAW, January 24, 2024, available at <https://www.livewlaw.in/law-firms/law-firm-articles-/indian-arbitration-system-global-recognition-economic-growth-247524> (Last visited on October 31, 2024); Mirza & Associates, *The Pros And Cons of Arbitration vs. Litigation: What's The Best Option for Your Business?*, MONDAQ, May 21, 2023, available at <https://www.mondaq.com/india/arbitration-dispute-resolution/1308440/the-pros-and-cons-of-arbitration-vs-litigation-whats-the-best-option-for-your-business> (Last visited on October 31, 2024) ('Mirza'); Rishab Gupta, *Arbitration in India: Pros and Cons*, ASIAN LEGAL BUSINESS, August 27, 2018, available at <https://www.legalbusinessonline.com/news/arbitration-india-pros-and-cons/76302> (Last visited on October 31, 2024).

¹²² The Arbitration and Conciliation Act, 1996, §42-A; For a detailed discussion, see Vasanth Rajasekaran & Harshvardhan Korada, *Confidentiality in Arbitration: Legal and Practical Challenges in India*, SCC ONLINE TIMES, July 30, 2024, available at <https://www.sconline.com/blog/post/2024/07/30/confidentiality-in-arbitration-legal-and-practical-challenges-in-india/> (Last visited on October 31, 2024).

¹²³ Strong, *supra* note 12, 26; Frances S. Foster, *Trust Privacy*, Vol. 93, CORNELL L. REV., 563, 610, 611, 615 (2008).

¹²⁴ Johnson & Williams, *supra* note 72, 102.

¹²⁵ George Rix, *This House Believes that Trust Arbitration is Not Going to Succeed in Resolving Trusts Disputes Debate*, GLOBAL ARBITRATION NEWS, July 8, 2024, available at <https://www.globalarbitrationnews.com/2024/07/08/this-house-believes-that-trust-arbitration-is-not-going-to-succeed-in-resolving-trusts-disputes-debate/> (Last visited on October 31, 2024).

¹²⁶ Steven Kempster, *When Two Worlds Collide: Offshore Trusts and Arbitration*, IFC REVIEW, September 6, 2023, available at <https://www.ifcreview.com/articles/2023/september/when-two-worlds-collide-offshore-trusts-and-arbitration/> (Last visited on November 2, 2024).

¹²⁷ See Kaustubh Kumar, *How Media Trials Deeply Affect the Indian Judicial System*, MONDAQ, September 21, 2023, available at <https://www.mondaq.com/india/trials-appeals-compensation/1367214/how-media-trials-deeply-affect-the-indian-judicial-system> (Last visited on October 31, 2024).

six years to be resolved by the Indian court system.¹²⁸ Thus, wealthy families seeking to establish trusts would probably prefer a private and confidential resolution of a trust dispute, as offered by arbitration. Even in a purely commercial trust, with no familial set-up, during the resolution of the dispute, which probably involves sensitive financial information, the parties would prefer confidentiality.¹²⁹

Secondly, arbitrations are quicker, provide flexibility and are less vindictive than courts.¹³⁰ Indian courts have acquired a ubiquitous reputation for being clogged, slow and cumbersome.¹³¹ This status needs no further highlighting. In *M.V. Ramasubbiar v. Manicka Narasimachari*, a dispute involving the duties and obligations of a trustee took about twenty years to reach a final resolution.¹³² The Khetri Trust dispute, as mentioned, took thirty-six years.¹³³ Arbitration would offer a quicker resolution of what may inevitably be a dispute in a family set-up, with the added advantage of procedural flexibility. As is understood, an arbitration would provide the parties with the freedom to choose their own timelines, mechanisms for argument, etc.¹³⁴ This flexibility shortens the total period of the dispute, which,¹³⁵ combined with the lower vindictiveness of arbitration, may be critical in ensuring that a family structure remains after the dispute. A longer, more drawn-out dispute would have a greater tendency to negatively affect the relations between the disputing parties. It should be noted that the attributes of speed and flexibility would benefit purely commercial trusts, too.

Thirdly, arbitrations provide one with the opportunity to choose one's own 'decision-maker', which includes expertise in decision-making.¹³⁶ Trust disputes require a nuanced understanding of property law, commercial law and equity to be accurately adjudicated, which may not always be possible for each general court to offer.¹³⁷ Accordingly, for the depth of the dispute to be appreciated, the parties are better off appointing an arbitrator

¹²⁸ THE TIMES OF INDIA, *Trust Wins a Legal Battle Against State, to Own Khetri Rulers' Assets*, July 13, 2023, available at <https://timesofindia.indiatimes.com/city/jodhpur/trust-wins-a-legal-battle-against-state-to-own-khetri-rulers-assets/articleshow/101721016.cms> (Last visited on November 2, 2024).

¹²⁹ Drasti Jain & Aryan Deshmukh, *A Conflict of Principles: Confidentiality and Open Justice in Arbitration Disputes in Court*, SCC ONLINE TIMES, April 13, 2022, available at <https://www.sconline.com/blog/post/2022/04/13/confidentiality-and-open-justice-in-arbitration-disputes-in-court/> (Last visited on June 14, 2025).

¹³⁰ Khetan, *supra* note 121; Mirza, *supra* note 121; Gupta, *supra* note 121; For the conclusion on vindictiveness of arbitration as a process as compared to traditional courts, see Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, Vol. 10, NEGOTIATION J., 53 (1994).

¹³¹ ARTIFICIAL LAWYER, *In India Civil Cases Take 13 Years, But Presolv360 Has a Better Solution*, March 16, 2020, available at <https://www.artificiallawyer.com/2020/03/16/in-india-civil-cases-take-13-years-but-presolv360-has-a-better-solution/> (Last visited on November 2, 2024); See Vipul Kumar, *Towards Quicker Resolution of Civil Cases*, BAR AND BENCH, available at <https://www.barandbench.com/columns/towards-quicker-resolution-of-civil-cases> (Last visited on November 2, 2024).

¹³² *M.V. Ramasubbiar v. Manicka Narasimachari*, (1979) 2 SCC 65 771, ¶¶3, 4.

¹³³ *Supra* note 128.

¹³⁴ DENTONS, *Flexibility: A Key Advantage of Arbitration*, July 27, 2021, available at <https://www.dentons.com/en/insights/articles/2021/july/27/flexibility-a-key-advantage-of-arbitration> (Last visited on November 2, 2024).

¹³⁵ Elizabeth Carter, *The Power of Choice: How Flexibility in Arbitration Drives Better Outcomes*, JAMS ADR INSIGHTS, March 19, 2025, available at <https://www.jamsadr.com/blog/2025/the-power-of-choice-how-flexibility-in-arbitration-drives-better-outcomes> (Last visited on June 2, 2025).

¹³⁶ See CLYDE & CO., *How to Choose an Arbitrator?*, March 25, 2024, available at <https://www.clydeco.com/en/insights/2024/03/how-to-choose-an-arbitrator/> (Last visited on November 2, 2024); Johnson & Williams, *supra* note 72, 103.

¹³⁷ Tony Molloy & Tony Graham, *Trust Jurisdictions: The Path from Incipience to Refulgence*, Vol. 16(3), TRUSTS & TRUSTEES, 116–121 (2010).

familiar with trust law to decide the dispute instead of taking it to a general civil court. This reason would be further exemplified in cases of purely commercial disputes.

Arbitrations also provide a host of other benefits over litigation,¹³⁸ but these have been sufficiently discussed in other literature and do not need to be separately highlighted in a trust-specific context.

On a related point, the changing nature of trusts and their disputes should be given due weight. Trusts, originally, started as a manifestation of equity and were recognised by English courts accordingly.¹³⁹ In contrast, trusts find shape as a product of statute (not equity) in certain common-law jurisdictions,¹⁴⁰ and for our specific concerns, India, too.¹⁴¹ Moreover, trusts are increasingly being used in commercial, non-traditional contexts.¹⁴² Arbitration, then, inherently a commercial tool,¹⁴³ would cater to these now prevalent, non-traditional, commercial uses of trusts, as shown above. This changed commercial nature of trusts, in the author's opinion, dilutes public policy considerations that may have been attached to it before.¹⁴⁴ These considerations could include protecting the rights of minors, persons of unsound mind, and unborn persons, which would not arise in purely commercial trusts (for instance, a security trust set-up to facilitate business-to-business borrowing).¹⁴⁵

In all, whether we refer to personal trusts, commercial trusts within a family set-up, or purely commercial trusts, arbitration seems to trump litigation as a more favourable form of dispute resolution.

B. ADDRESSING POTENTIAL CONCERNS

Admittedly, allowing the arbitration of trust disputes would come with its own set of issues. Two such issues need to be necessarily addressed to forward a holistic framework for such arbitrations. Namely, they are the potential inability of the arbitrator to provide the relief sought in the claim and the enforceability of arbitral clauses in trust deeds in relation to the beneficiaries of the trust.

1. INABILITY OF THE ARBITRATOR TO PROVIDE THE SOUGHT RELIEF

The statutory regime of the Trusts Act, as noted by Vimal Kishor, poses multiple occasions where the settlor, trustee(s) or beneficiary(s) may invite court intervention.¹⁴⁶ The court has a host of powers under the Trusts Act, such as awarding compensation,¹⁴⁷ giving their “opinion” about the correct management of a trust,¹⁴⁸ suspending a trustee's powers,¹⁴⁹

¹³⁸ Khetan, *supra* note 121; Mirza, *supra* note 121; Gupta, *supra* note 121.

¹³⁹ Philip H. Pettit, *EQUITY AND THE LAW OF TRUSTS*, 1–25 (Oxford University Press, 12th edn., 2012).

¹⁴⁰ See *supra* Parts III.B on “The United States”, III.C on “Australia”, III.D “New Zealand”.

¹⁴¹ The Indian Trusts Act, 1882.

¹⁴² Zhang, *supra* note 17.

¹⁴³ TV EDWARDS SOLICITORS, *Disputes with Commercial Arbitration: Guidance for Businesses*, available at <https://tvedwards.com/news-and-blogs/blogs/disputes-with-commercial-arbitration-guidance-for-businesses/> (Last visited on November 2, 2024).

¹⁴⁴ For a brief of public policy considerations when determining arbitrability, see *supra* note 3.

¹⁴⁵ As the public policy fallout of allowing the arbitration of trust disputes has not been discussed in Vidya Drolia, or any other case, one can only hypothesise that these considerations may be; For an understanding of a security trust set-up to facilitate business-to-business borrowing, see Ruiqiao, *supra* note 18, 797.

¹⁴⁶ See Vimal Kishor, *supra* note 9, ¶46.

¹⁴⁷ The Indian Trusts Act, 1882, §23.

¹⁴⁸ *Id.*, §34.

¹⁴⁹ *Id.*, §45.

appointing a trustee,¹⁵⁰ replacing a trustee,¹⁵¹ providing consent on behalf of an incompetent beneficiary,¹⁵² etc. However, this should not pose an inherent bar to arbitration. As trust claims usually involve the validity of trust or breach of trust issues, we can divide our discussion accordingly.¹⁵³

Addressing the former, an arbitral tribunal, based on the principle of competence-competence, can very well adjudicate on the existence of its own jurisdiction.¹⁵⁴ So, it could adjudicate on the validity of the arbitration agreement contained in the trust deed and, by extension, the trust deed itself, unless specifically restricted by the deed. This understanding is better contextualised in light of the deemed-consent model proposed below.¹⁵⁵ Either way, if, for policy purposes, it is best reasoned that the validity of trust disputes is better left to the courts, India could take the Florida or Guernsey approach of not allowing the arbitration of claims challenging the validity of a trust.¹⁵⁶

Addressing the latter, under the Trusts Act, the trustee is liable to “make good the loss” to the beneficiary.¹⁵⁷ §23 of the Trusts Act also lays down a detailed structure for the payment of interest.¹⁵⁸ This relief, and its concomitant determination, is inherently factual and monetary. There is no reason why an arbitrator is not in a position to examine a trust deed, decide it has been breached and then grant such relief. In the jurisdictions analysed above, where trust disputes can be arbitrated, a breach of trust claim can be too.¹⁵⁹

Another relief that should be addressed is the disqualification and appointment of a trustee by a civil court. Under the Trusts Act, §§73 and 74 lay down the rules for such a disqualification and appointment, respectively.¹⁶⁰ In the author’s opinion, this cannot be a bar on the arbitrability of such a claim. The arbitrator can determine whether a trustee should be disqualified and ‘order’ them to step down. They can also follow rules and direct the appointment of a trustee according to what’s contained in the trust deed. This would operate similarly to personal injunction orders, such as an order by an arbitrator against the dissipation of assets or the sale of property.¹⁶¹ However, if such fails, the supervisory jurisdiction of the court is not diminished, and the beneficiary is free to approach the courts for a judicial appointment of a trustee.¹⁶² This is precisely the discussion that was had in Grosskopf.¹⁶³

One could even draw another lesson from it. The decision in Grosskopf held that the inability of an arbitrator to provide a relief sought is not a bar to the arbitrability of a dispute.¹⁶⁴ Practically, this would translate to an award of an arbitrator, which may not be directly enforceable (due to their inability to grant that statutory relief) but could be indirectly

¹⁵⁰ *Id.*, §74.

¹⁵¹ *Id.*, 1882, §73.

¹⁵² The Indian Trusts Act, 1882, §11.

¹⁵³ See *supra* Part II “Trusts and their Related Disputes in India”.

¹⁵⁴ The Arbitration and Conciliation Act, 1996, §16; Vasanth Rajasekaran & Harshvardhan Korada, *Competence-Competence Doctrine in Indian Arbitration Law Jurisprudence: An In-Depth Analysis*, SCC ONLINE TIMES, November 1, 2023, available at <https://www.sconline.com/blog/post/2023/11/01/competence-competence-doctrine-indian-arbitration-law-jurisprudence-in-depth-analysis/> (Last visited on November 2, 2024).

¹⁵⁵ See *infra* Part IV.B.2 on “Enforceability of an Arbitration Clause Against all Beneficiaries”.

¹⁵⁶ See *supra* Table 1.

¹⁵⁷ The Indian Trusts Act, 1882, §23.

¹⁵⁸ *Id.*

¹⁵⁹ See *supra* Table 1.

¹⁶⁰ The Indian Trusts Act, 1882, §§73, 74.

¹⁶¹ See The Arbitration and Conciliation Act, 1996, §17(1)(ii).

¹⁶² *Id.*, §74.

¹⁶³ Grosskopf, *supra* note 15, ¶65.

¹⁶⁴ *Id.*, ¶72.

enforced by courts by invoking their statutory powers and relying on the arbitrator's award as evidence. This model, however, cannot be replicated in matters with pressing public policy considerations, such as the appointment of a trustee in case of a lone beneficiary of unsound mind or removal of a trustee due to allegations of fraud. They would require an independent appreciation of the facts by the courts. Although, as noted above, the changing nature of trusts has reduced such considerations that may have been present before.¹⁶⁵

In all, based on its policy considerations, India could choose to allow arbitration for only specific classes of trust disputes (e.g., compensation sought for a breach of trust), while wholly retaining court jurisdiction for others (e.g., removal of trustees for fraud). The ensuing arbitral award here would be directly enforceable here as a decree of the court.¹⁶⁶ Or it could allow arbitration for a broader, general array of disputes, and then indirectly enforce the ensuing award if the arbitrator is incapable of providing the sought relief. This would end up determining the extent of the supervisory jurisdiction of the courts retained.

2. ENFORCEABILITY OF AN ARBITRATION CLAUSE AGAINST ALL BENEFICIARIES

This “difficult question”, as noted in Rhinehart,¹⁶⁷ has been subject to much discussion.¹⁶⁸ The core issue lies in resolving the lack of consent on the part of the beneficiaries to form a binding agreement, as expanded on in Vimal Kishor.¹⁶⁹ However, a reference to the ICC Clause for trusts may offer a solution.¹⁷⁰ Such a clause, which ‘deems’ all beneficiaries accepting any benefit under the trust deed to be bound by the arbitration clause, provides certainty to the arbitral process and resolves any consent issues.

This approach of ‘deemed’ consent has also been applied as “agreement by estoppel” in the US to compel non-signatories “to arbitrate where the non-signatory ‘knowingly exploits’ the benefits of an agreement containing an arbitration clause”.¹⁷¹ In the UK, a similar approach of deeming consent has been adopted, where the agreement contains a burden and a benefit; the one accepting the benefit must also accept the burden if the agreement provides for such.¹⁷²

Admittedly, such ‘deemed’ consent clauses in trust deeds have run into issues. They have been rejected by courts in New Zealand as incapable of binding minor beneficiaries.¹⁷³ Their validity is also subject to much debate.¹⁷⁴ In essence, such clauses are a method of binding non-signatories to an arbitration agreement.

In India, judicially, there has been no conclusive discussion on models to bind non-signatories to an arbitration agreement, barring the “Group of Companies” Doctrine.¹⁷⁵ In

¹⁶⁵ See *supra* Part III.A on “The United Kingdom”.

¹⁶⁶ The Arbitration and Conciliation Act, 1996, §36.

¹⁶⁷ Rhinehart, *supra* note 68, ¶177.

¹⁶⁸ Matthew Conaglen, *The Enforceability of Arbitration Clauses in Trusts*, Vol. 74(3), CAMBRIDGE L. J., 450–479 (2015).

¹⁶⁹ Vimal Kishor, *supra* note 9, ¶¶27, 36.

¹⁷⁰ See ICC Clause, *supra* note 112.

¹⁷¹ *Belzberg v. Verus Investments Holdings Inc.*, (2013) 999 N.E. 2d 1130 (NY CA), 1134 (New York Court of Appeals).

¹⁷² *Tito v. Waddell* (No 2), [1977] Ch 106, 290, 303 (High Court, Chancery Division).

¹⁷³ *Ryan v. Lobb*, [2020] NZHC 3085, ¶¶108–109 (The High Court of New Zealand).

¹⁷⁴ *McPhail & Blundell*, *supra* note 16; Toby Graham, *The Problems with Compulsory Arbitration of Trust Disputes*, Vol. 20(1), TRUSTS & TRUSTEES, 20–29 (2014).

¹⁷⁵ See *Cox & Kings Ltd. v. SAP India (P) Ltd.*, (2024) 4 SCC 1, ¶170; For a contextual discussion of other jurisdictions’ models to bind non-signatories to an arbitration agreement, including ‘agreement by estoppel’, see *Cox & Kings Ltd. v. SAP India (P) Ltd.*, (2024) 4 SCC 1, ¶¶40–61, 86.

Vimal Kishor the arbitration clause was not a ‘deeming’ one,¹⁷⁶ so one cannot say, hypothetically, whether an Indian court would enforce a deemed consent clause. The confusion, of course, is academic; such a question cannot come up until the arbitration of trust disputes is permitted in some form first.

Accordingly, then, for a deemed consent arbitration clause, like the ICC Clause, in a trust deed to be binding against all beneficiaries with certainty, there has to be legislative recognition of such clauses. A legislative recognition could take the shape of an explicit term in our statute that recognises the enforceability of arbitration clauses contained in trust deeds, as seen in the Bahamas.¹⁷⁷ Thus, such clauses might appear as clever drafting but cannot be implemented with certainty in India without a supporting statutory framework.

C. A SUGGESTED MODEL

From the above discussions, a conclusion to be drawn is that in the absence of a supporting statutory framework, the arbitration of trust disputes runs into a host of (possible) issues. For example, the UK allows the arbitration of trust disputes without any statutory mechanism to protect the interests of minor, unascertained beneficiaries.¹⁷⁸ Grosskopf does not address this question either.¹⁷⁹ Consequently, if an arbitral award affecting the interests of incapacitated or unascertained beneficiaries is challenged in UK courts, there is no certainty as to how it would deal with it.¹⁸⁰ Such an award would probably be set aside or rendered unenforceable.¹⁸¹ This, of course, does not promote the arbitration of trust disputes.

Ideally, India should adopt a statutory framework by amending our Trusts Act to allow and support the arbitration of trust disputes. For the reasons discussed above,¹⁸² any reform would have to be legislative and not judicial. A template to follow could be the structure recently adopted by New Zealand.¹⁸³ The concrete division between “internal” and “external” disputes provides certainty to any dispute,¹⁸⁴ its resolution by arbitration and its subsequent challenge/enforcement.

Most importantly, we could borrow from how it tackles the issue of incapacitated and unascertained beneficiaries by necessitating court supervision and appointment of representatives.¹⁸⁵ The Bahamian amendment and the faith it places in the arbitral process could also be looked at when appointing such representatives.¹⁸⁶ Currently, our arbitration statute allows for the appointment of a “guardian” for minors and persons of unsound mind by an arbitrator for the purposes of the arbitration.¹⁸⁷ Thus, there should not be any issue in extending this to trust disputes, while adding the necessary procedures for dealing with unascertained beneficiaries.

¹⁷⁶ Vimal Kishor, *supra* note 9, ¶3.

¹⁷⁷ The Arbitration (Amendment) Act, 2023, §2 (Bahamas).

¹⁷⁸ *See supra* Table 1.

¹⁷⁹ *See generally*, Grosskopf, *supra* note 15.

¹⁸⁰ McPhail & Blundell, *supra* note 16.

¹⁸¹ Oliver Marsden & Rebecca Zard, *Challenging and Enforcing Arbitration Awards: United Kingdom — England & Wales*, GLOBAL ARBITRATION REVIEW, April 8, 2024, available at <https://globalarbitrationreview.com/insight/know-how/challenging-and-enforcing-arbitration-awards/report/united-kingdom> (Last visited on November 3, 2024).

¹⁸² *See supra* Part II on “Trusts and its Related Disputes in India”.

¹⁸³ *See supra* Part III.D on “New Zealand”.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *See supra* Part III.G on “Bahamas”.

¹⁸⁷ The Arbitration and Conciliation Act, 1996, §17(1)(i).

Additionally, on the point of enforceability of arbitration clauses in trust disputes, a ‘deemed consent’ (or similar) model could be considered.¹⁸⁸ Lessons could be drawn from the legislation in the Bahamas and Guernsey, which directly provides for mechanisms to bind non-signatory parties in a trust dispute.¹⁸⁹

As a note of caution, however, trusts should not be equated with contracts as the beneficiary does not need to accept the trust, or even be aware of it, for it to be binding on the trustee.¹⁹⁰ Doing so may muddy the understanding of a court’s inherent supervisory jurisdiction over trusts.¹⁹¹ The extent of this supervisory jurisdiction, as mentioned above,¹⁹² is a decision that, based on policy, would have to be taken by our legislators.¹⁹³

The above should suffice as at least a starting point for a legislative model promoting the arbitration of trust disputes in India. As the decision in *Vimal Kishor* is legally correct,¹⁹⁴ there are not, in the author’s opinion, any possible judicial interpretations which can allow the arbitration of trust disputes.

V. CONCLUSION

This paper operates with the goal of promoting the arbitration of trust disputes. To do so, it first summarised the current position of such disputes and their arbitrability by looking at the judgment of *Vimal Kishor*. The positions of law recognised by the Apex Court in that judgment, though not at fault, should, in the author’s opinion, be subject to change. This would bring India to par with other jurisdictions experienced in matters of arbitration, trusts, or both. This change is necessary as the arbitration of trust disputes could offer parties much-needed solutions to issues which are imposed on them by the ailing Indian litigation system. This recommendation has been made while considering the changing nature of trusts. If Indian legislators were to allow the arbitration of trust disputes, the authors believe that there is much to learn and borrow from these other, more experienced jurisdictions. However, any legislative model allowing the arbitration of trust disputes should explicitly recognise the same, specifically state the types of trust disputes that could be arbitrated, and comment on the enforceability of arbitration clauses in trust deeds. Furthermore, a statutory mechanism should also exist to protect the needs of unascertained or incapacitated beneficiaries if their interests are affected by the dispute. A legislative change to this effect could also go a long way in ensuring that India’s growing image as a hub for private commercial dispute resolution continues to strengthen.

¹⁸⁸ See *supra* Part IV.B.2 on “Enforceability of an Arbitration Clause Against all Beneficiaries”.

¹⁸⁹ See *supra* Parts III.E on “Guernsey”, III.G on “Bahamas”.

¹⁹⁰ See The Indian Trusts Act, 1882, §§6, 9, 11.

¹⁹¹ *Crociani and others (Appellants) v. Crociani and others (Respondents)*, [2014] UKPC 40, ¶36 (Judicial Committee of the Privy Council).

¹⁹² See *supra* Part IV.B.1 on “Inability of the Arbitrator to Provide the Sought Relief”.

¹⁹³ *Id.*

¹⁹⁴ See *supra* Part II on “Trusts and its Related Disputes in India”.