Trust Proliferation: A View from the Field

*Adam Hofri-Winogradow**

Introduction

The last few decades have seen a global expansion and transformation of both trust law and trust practice. The trust, a legal institution once unique to England and its erstwhile colonies, has now spread to dozens of additional jurisdictions, from the Far East[1] to Russia and Eastern Europe[2] to nearly every Latin American jurisdiction.[3] Many states of the United States (US), English Crown Dependencies and UK Overseas Territories have developed innovative trust models directed primarily, and sometimes exclusively, at a non-resident clientele. New trust regimes from Virginia to Vanuatu often discard centuries-old rules of trust law so as to provide alternative rules offering maximum appeal to trust service providers' potential clients. This vigorous development of new trust regimes has been met with a similar expansion in global trust practice. Jurisdictions like Italy, Brazil, Israel, the United Arab Emirates and dozens more are now home to a large and growing number of trust practitioners – professionals providing trust-related services – including lawyers, accountants, bankers, tax advisers and others.[4] More than ever before, the trust is now heavily used across most of the globe as a key means for individual and family wealth planning, for structuring transactions, for secured lending and securitisation, for individual and collective investment, for pension management, charitable giving and more.

The great majority of this vast recent worldwide growth and transformation of trust practice has remained empirically uncharted. Europe Economics has in early 2002 published some 1990s data on the then UK trust market, including the results of a survey of 23 members of the Association of Corporate Trustees (TACT) regarding their practice in the years 1996–98. This survey covered amounts and types of trusts administered, amounts of beneficiaries and trust capital values across trust types, trust service provider revenues and wages and providers' impressions of the reasons clients used trusts and of operations which would have been impossible without trust law.[5] Also in 2002, the Law Commission published the results of a survey Alison Dunn conducted of 345 trustees and legal advisers, focusing on

* DPhil (Oxon); Senior Lecturer, Hebrew University of Jerusalem, Faculty of Law; Visiting Professor, Western Ontario University Faculty of Law.

1 L Ho and R Lee (eds), *Trust Law in Asian Civil Law Jurisdictions* (CUP, 2013).

2 T Richter, 'National Report for the Czech Republic' in S Kortmann et al (eds), *Towards an EU Directive on Protected Funds* (Kluwer Legal Publishers, 2009) 59; B Dutoit, 'Russian Civil Law between Remnants of the Past and Flavor of the Present' in W Simons (ed), *Private and Civil Law in the Russian Federation* (Martinus Nijhoff, 2009) 185-195; I Sándor, 'The New Hungarian Fiduciary Asset Management Contract (Trust) from Comparative Aspect' (2015) 12 US-China L Rev 600.

3 N Malumian, *Trusts in Latin America* (OUP, 2009). The reception of the trust in many legal systems outside the common law world has recently been reviewed by D Clarry, 'Fiduciary Ownership and Trusts in a Comparative Perspective' (2014) 63 ICLQ 901.

4 Society of Trusts and Estates Practitioners, *STEP Directory and Yearbook* (STEP, 2017).

5 Europe Economics, 'Economic and Financial Analysis of Commercial and Private Trusts in the United Kingdom' (The Association of Corporate Trustees, January 2002) 59–80: available at http://www.tact.uk.net/.

settlors' attitudes towards trustee exemption clauses.[6] American scholars have provided empirical treatments of two questions:

(1) what impact did US states' abolition of the rule against perpetuities have on the quantity of trust assets administered in each state and the average size of trust accounts administered there;[7] and
(2) what impact did the 1990s reform of US trust investment law have on trustees' investment practices and the volatility of trust corpus.[8]

An Italian law student has in 2014 conducted an empirical study of the Italian trust industry, based on a survey of Italian trust service providers.[9] But that is essentially all: we do not know to what extent each of the many other innovations dozens of jurisdictions have recently inserted in their trust laws has been utilised, who has been utilising them, for what purposes, and under which circumstances. This dearth of data casts a pall over the validity of conclusions drawn in normative studies addressing the current proliferation of trusts. Several such studies conclude that many recent trust law innovations are normatively undesirable: that much of the recent rapid proliferation and evolution of the law and practice of private trusts is a harmful race to the bottom, facilitating the erosion of tax bases as well as of traditional protections accorded to trust users' creditors, spouses, children, and other claimants.[10]

The absence of empirical data pertaining to trust practice rendered much of the normative debate conjectural, manifesting the need for a broad empirical inquiry into modern trust practice, extending beyond the UK and US to the myriad jurisdictions that now serve as busy hotbeds of that practice. This article reports the results of just such an inquiry: a survey I conducted of 409 trust service providers worldwide – the largest, most diverse respondent group ever obtained in survey research targeting trust service providers – complemented by interviews with 28 additional providers in five jurisdictions: the UK, US, Italy, Switzerland and Israel. I focus on three features of modern trust practice. The first issue I examine is the choice as to the law governing trusts of legal systems other than those of settlors' or beneficiaries' jurisdictions of residence. As the Hague Convention on the Law Applicable to Trusts and on their Recognition provides that trust settlors may choose the law to govern their trusts,[11] and 'does not require the law chosen to have any objective connection with the trust',[12] the residents of any state party to the Convention, such as the

6 Law Commission, *Trustee Exemption Clauses* (Law Com CP No 171, 2002) 30-46.
7 R Sitkoff and M Schanzenbach, 'Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes' (2005) 115 YLJ 356; R Sitkoff and M Schanzenbach, 'Perpetuities or Taxes? Explaining the Rise of the Perpetual Trust' (2006) 27 Cardozo L Rev 2465; J Hines, 'How Important Are Perpetual Tax Savings?' (2013) 27 Tax Policy & the Economy 101.
8 M D Begleiter, 'Does the Prudent Investor Need the Prudent Investor Act-An Empirical Study of Trust Investment Practices' (1999) 51 Maine L Rev 28; R Sitkoff and M Schanzenbach, 'Did Reform of Prudent Trust Investment Laws Change Trust Portfolio Allocation?' (2007) 50 J of L and Econ 681; R Sitkoff and M Schanzenbach, 'The Prudent Investor Rule and Trust Asset Allocation: An Empirical Analysis' (2010) 35 ACTEC Journal 314; R Sitkoff and M Schanzenbach, 'The Prudent Investor Rule and Market Risk: an Empirical Analysis' (2017) 14 J Empirical Leg Stud 129.
9 L Ferrari, 'Il settore del TRUST in Italia' (thesis, Laurea Specialistica in Management, Università L Bocconi – Milano 2014) 79-100: available at https://rmauro.academia.edu/lorenzoferrari.
10 For such hypotheses, see, eg L Smith, 'Mistaking the Trust' (2010) 40 HKLJ 787; M W Lau, *The Economic Structure of Trusts* (OUP, 2011) 165–179.
11 Hague Conference on Private International Law, 1 July 1985, Treaty Series 1985, 141, art 6.
12 L Tucker, N Le Poidevin and J Brightwell, *Lewin on Trusts*, 19th edn (Sweet & Maxwell/Thomson Reuters, 2015), [11-200].

UK, can escape the application of the law of their state of residence to trusts they create.[13] Free choice of governing law is a condition for the success of trust regimes directed at a non-resident clientele. But are trusts governed by legal systems other than those of settlors' or beneficiaries' jurisdictions of residence in fact more prone than other trusts to be used for tax and creditor avoidance? What type of client tends to use trusts governed by such 'foreign' laws, and for what purposes? How often are offshore jurisdictions' legal systems chosen as the law governing trusts settled by residents of other jurisdictions?

The second issue to be examined is the use of forum choice clauses in trust instruments.[14] In theory, this use has significant abusive potential: the award of exclusive jurisdiction over a trust to a court which the persons likely to challenge the trust would find distant and expensive to litigate in is likely to drive many potential challengers to accept a settlement less favourable than that they would have insisted on given a more accessible forum. But how often are forum choice clauses in fact included in trust instruments? Are they included in order to impede expected challenges to the trust, or for innocuous reasons such as a given court's expertise in trust litigation?

The third issue I consider is the use of clauses restricting or ousting beneficiaries' rights to information about the trust and its administration (so-called 'information control clauses').[15] The use of such clauses undermines the basic traditional schema of trust use, which posited beneficiaries as the exclusive monitors of trustee behaviour. Where beneficiaries know nothing about their entitlements under trust, they cannot take action to protect them, and trustees may breach their trust with impunity. Even where a non-beneficiary enforcer is appointed, it may police the trustees' conduct and enforce their duties with less alacrity than a beneficiary whose interests under trust are directly impacted by trustee defalcations. The restriction or ousting of beneficiaries' rights to information may also indicate that the trust is not in fact intended to benefit the persons designated as its

13 The limited restrictions the Convention places, in its arts 15, 16, 18 and 19, on the free choice of governing law are unlikely to reach many cases where the law of the state of residence is defeated by choice of another law to govern a trust: Lewin (n 12), [11-200].

14 On trust jurisdiction clauses see *EMM Capricorn Trustees Ltd* v *Compass Trustees Ltd* [2001] JLR 205; *Koonmen* v *Bender* (2003-04) 6 ITELR 568 (Jersey CA); *Charalambous* v *Charalambous* [2004] EWCA Civ 1030, [2005] Fam 250; *Helmsman Limited and Rothman Trustee Company Ltd* v *Bank of New York Trust Company (Cayman) Ltd* [2009] CILR 490 (Grand Court of the Cayman Islands); *In re Representation of AA and the D Discretionary Trust* [2010] JRC 164; *Re A Trust* [2012] Bda LR 79 (SC Bermuda); *Crociani* v *Crociani* [2014] UKPC 40, [2015] AC 616; J Harris, 'Jurisdiction and the Enforcement of Foreign Judgements in Transnational Trusts Litigation' in D Hayton (ed) *The International Trust*, 3rd edn (Jordan Publishing, 2011), [1.44]–[1.50], [1.117]–[1.118], [1.296]–[1.302]; L Luttermann, 'Jurisdiction Clauses in Trust Instruments—Creating Certainty or Muddying the Waters?' (2011) 17 Trusts & Trustees 293; Lewin (n 12) [11-047]–[11-076]; P Matthews, 'What is a Trust Jurisdiction Clause?' (2003) 7 Jersey L Rev 232.

15 For such clauses see *Schmidt v Rosewood Trust Ltd*. [2003] UKPC 26, [2003] 2 AC 709; *McDonald* v *Ellis* [2007] NSWSC 1068, (2008–09) 72 NSWLR 605; *Breakspear* v *Ackland* [2009] Ch 32; *Re an Application for Information about a Trust* [2013] SC (Bda) 16 Civ, (2013) 16 ITELR 85, upheld on appeal: [2013] CA (Bda) 8 Civ; *In the Matter of the Y Trust* [2014] JRC 027; Lewin (n 12) [23]; Scottish Law Commission, *Report on Trust Law* (Scot Law Com No 239, 2014) ch 11; New Zealand Law Commission, *Review of the Law of Trusts: a Trusts Act for New Zealand*, Report No 130 (2013) 103-106; New Zealand Law Commission, *Review of the Law of Trusts: Preferred Approach*, Issues Paper No 31 (2012) 65-71; D W M Waters, M Gillen and L Smith, *Waters' Law of Trusts in Canada*, 4th edn (Carswell/Thomson Reuters, 2012) 1119-1134; New Zealand Law Commission, *The Duties, Office and Powers of a Trustee: Review of the Law of Trusts, Fourth Issues Paper*, Issues Paper No 26 (2011), Ch 2; E Campbell and J Hilliard, 'Disclosure of Information by Trustees' in D Hayton (ed) *The International Trust* (n 14) Ch 9; P Panico, *International Trust Laws* (OUP, 2010) Ch 9 and [12.159]-[12.195]; G Thomas and A Hudson, *The Law of Trusts*, 2nd edn (OUP, 2010) Ch 12; T P Gallanis, 'The Trustee's Duty to Inform' (2007) 85 North Carolina L Rev 1595; G Lightman, 'The Trustees' Duty to Provide Information to Beneficiaries' [2004] PCB 23; L Smith, 'Access to Trust Information: Schmidt v Rosewood Trust Ltd.' (2003) 23 Estates, Trusts & Pensions J 1; J Wadham, *Willoughby's Misplaced Trust*, 2nd edn (Gostick Hall Publications, 2002) Ch 12; D Hayton, 'Developing the Obligation Characteristic of the Trust' (2001) 117 LQR 97.

beneficiaries on the face of the trust instrument. On the other hand, such restriction or elimination of beneficiaries' rights may merely express the settlor's unfavourable estimate of their ability to appropriately use any monitoring opportunities they are given. The same sober estimate of beneficiaries' aptitude for managing their economic affairs may have moved the settlor to create the trust in the first place. It will be useful to know how popular are clauses thus restricting beneficiaries' rights, what type of client makes use of them a-propos what type of beneficiary, and to what extent do they express the settlor's true allocative intentions being other than those manifest in the trust instrument.

The ground-breaking nature of my research project is largely a result of the particular difficulty of eliciting information on donative trust practice. Under many legal systems, neither donative trusts nor their trustees, as such, are subject to registration. While settlors, trustees, beneficiaries and financial institutions where trust assets are deposited report data about trusts to national tax authorities, the latter only require such data as is useful for tax collection.[16] There is no publicly accessible cache of donative trust instruments, analogous to the universe of corporate contracts disclosed to the US Securities and Exchange Commission and utilised by Eisenberg and Miller,[17] Coates,[18] Cain and Davidoff,[19] and Sanga.[20] The missing data can only be obtained by approaching practitioners directly. A direct approach, however, is liable to an aggravated non-response problem, worse than the non-response problem plaguing survey research generally.[21] The particular difficulty in surveying trust service providers derives from the confidentiality ethos characteristic of donative trust practice, often described as a major cause of the popularity of donative trusts, an ethos often respected by lawmakers, judges, regulators and practitioners. Despite these unpropitious circumstances, I obtained survey responses from a highly diverse group of respondents, and held extended interviews with additional practitioners in five very different countries. My respondent pool, spread across the globe, is larger, as well as far more diverse, than those accessed in the few previous empirical research projects focused on trust practice.[22] As shown in detail below, data received appear to provide a richer picture of global donative trust practice, addressing an unprecedentedly broad range of issues, than has ever been obtained.

The article is structured as follows. The next section describes my survey and the interviews I held. The third section describes my survey respondents. The fourth section presents and analyses data contributed by survey respondents and the practitioners I interviewed regarding the trust features at issue. The fifth and final section draws some conclusions regarding each of those five features, and outlines implications for legal policy. An appendix concludes the article, classifying jurisdictions into onshore, offshore and midshore.

16 See the next section of this article for more information on reporting requirements currently imposed on trust parties.

17 T Eisenberg and G Miller, 'Ex Ante Choices of Law and Forum: An Empirical Analysis of Corporate Merger Agreements'(2006*)* 59 Vanderbilt L Rev 1973; T Eisenberg and G Miller, 'The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts' (2009) 30 Cardozo L Rev 1475.

18 J Coates, 'Managing Disputes through Contract: Evidence from M&A' (2012) 2 Harvard Bus L Rev 295.

19 M D Cain and S M Davidoff, 'Delaware's Competitive Reach' (2012) 9 J Empirical Leg Stud 92.

20 S Sanga, 'Choice of Law: an Empirical Analysis' (2014) 11 J Empirical Leg Stud 894.

21 DS Massey and R Tourangeau, 'New Challenges to Social Measurement' (2013) 645 *Annals of the American Academy of Political and Social Science* 6.

22 B Longstreth, *Modern Investment Management and the Prudent Man Rule* (OUP, 1986); F J Collin, M A Heckscher and R W Roth, 'A Report on the Results of a Survey about Everyday Ethical Concerns in the Trust and Estate Practice' (1995) 20 ACTEC Notes 201; Begleiter (n 8); Law Commission (n 6) 30-46.

Research methods employed

Obtaining detailed, accurate information on specific administrative or dispositive characteristics of those donative trusts currently being administered is challenging. While many trustees file tax returns for trusts they administer, those returns only include such data as is useful for tax collection. Both HMRC and the US Internal Revenue Service collect and make publicly available aggregate data on income earned and tax paid by trusts subject to UK and US taxation respectively,[23] but not data on the administrative or dispositive characteristics of reporting trusts.[24] Data released also does not include the identities of reporting trusts' settlors, trustees or beneficiaries. Even should trust users be identified, many are unlikely to divulge information about their trusts to researchers. Data sourced from reports filed with non-tax regulators can also be quite limited. For example, the US institutional trustees Robert Sitkoff and Max Schanzenbach studied report to federal banking regulators their 'trust holdings, including total assets and number of accounts'[25] as well as income earned on their trust and fiduciary holdings, expenses incurred and any losses suffered[26] but not the administrative or dispositive characteristics of trusts the assets of which they hold.[27]

Some jurisdictions have established trust registries, independent of their tax regimes and bank regulation. Unfortunately for researchers, these registries are either inaccessible or do not include information on the contents of individual fiduciary structures. Belize, for example, requires registration of the names of the trust, the trustee, and the trust's local agent, as well as the date of the trust's creation; these requirements do not apply to trusts created by residents of Belize.[28] The Belizean trusts registry is not open to the public.[29] The Cayman Islands, which, unlike Belize, in some cases require a copy of the trust instrument to be deposited with their trusts registry, do not make instruments deposited available to the public.[30] France has, on 5 July 2016, made its trusts registry accessible online to all French taxpayers, only for the French Constitutional Council to strike the publicly available registry

23 HMRC, 'Trusts Statistics: Number of Trusts making Self Assessment Returns, Total Tax Paid by Trusts and Total income by Type of Trust' (2017), available at https://www.gov.uk/government/statistics/trusts-statistics; IRS, 'SOI Tax Stats – Income from Estates and Trusts Statistics' (2017), available at http://www.irs.gov/uac/SOI-Tax-Stats-Income-from-Estates-and-Trusts-Statistics.

24 The self-classification of trusts filing returns with the US Internal Revenue Service (IRS) into simple, complex, grantor, split-interest, qualified disability and qualified funeral trusts is reflected in statistics released by the IRS (n 23). This classification provides some rough data on the distribution of reporting trusts across these trust types, which each have their administrative and/or dispositive characteristics. While trusts filing returns with HMRC classify themselves as either interest in possession, unauthorised unit trusts, employment related, heritage maintenance funds, employer financed retirement benefit schemes, settlor-interested, vulnerable beneficiary or non-resident trusts, statistics released by HMRC (last note) simply categorise filing trusts as either interest in possession trusts or trusts paying income tax at the special trusts rate.

25 Sitkoff and Schanzenbach (n 7), 388.

26 Federal Deposit Insurance Corporation [FDIC], 'Uniform Bank Performance Report User's Guide: Fiduciary & Related Services' (2015), 22–37, available at https://cdr.ffiec.gov/public/DownloadUBPRUserGuide.aspx.

27 For data regulated US financial institutions must report to federal banking regulators regarding fiduciary services they provide, see FDIC, last note.

28 GC Gandhi, 'Notice: Registration of International Trusts' (International Financial Services Commission Belize, 1 Sept 2008), available at http://www.ifsc.gov.bz/international-trust-registry/, emphasising that '[n]o confidential or private information needs to be disclosed to the Registry and it is **not** necessary that a copy of the Trust Deed be filed with the Registry. . . . The International Trusts Registry is not open to the public. It is a closed Registry. The confidentiality of a trust is fully protected' (emphasis in original).

29 *Ibid*.

30 The Cayman Islands General Registry notes on its website that one of the three types of trusts available under Cayman law, 'exempted trusts', 'require[s] that a trust deed be delivered to the Registrar of Trusts. The filed trust documents are open to inspection by the trustee and any other person authorized by the trust, but they are not open for public inspection': 'Trusts' (Cayman Islands General Registry, 22 Jan 2014), available at http://www.ciregistry.gov.ky/portal/page/portal/reghome/trusts.

down as unconstitutional on 21 October of the same year. Even while it was available, the French registry included personal information on parties to trusts with a French connection rather than information on the contents of registered trusts, such as is necessary for studying the frequency with which specific features appear in trust instruments.[31]

Other recent transparency initiatives concerning trusts similarly focus on the identities of settlors, trustees and beneficiaries, as well as the value of the trust property, but do not extend to the specific provisions of trust instruments. Regimes governing the exchange of tax-relevant information between jurisdictions entail the annual reporting of information concerning trusts. Under both the US Foreign Account Tax Compliance Act (FATCA) and the OECD Common Reporting Standard (CRS), reporting financial institutions must provide, for each reportable person (a class including all trust settlors, trustees, beneficiaries, protectors and any other natural person who directly or indirectly controls a trust), his or her name, address, jurisdiction of residence, Taxpayer Identification Number, account number at the reporting institution, either the account value on the last day of the year or the average account value for the year, gross interest, dividends and other income paid into the account, gross proceeds from the sale or redemption of financial assets paid or credited to the account, and the gross amount paid or credited to the account holder with respect to the account.[32] Even the unprecedented extension of reporting requirements concerning trusts under FATCA and the CRS, then, does not extend to the reporting of data on the administrative or dispositive characteristics of reporting, or reportable, trusts. The same can be said of the EU's recent Directive on preventing the use of the financial system for money laundering or terrorist financing, including the July 2016 proposal for its amendment. While the Directive obliges Member States to create trust registries and the proposal even obliges them to make data regarding all trusts run by professional trustees publicly available,[33] the data made available, even assuming full transposition of the Directive into Member States' legal systems, will once again not include information on the parameters at the focus of this study: the legal system governing each trust, the presence and contents of forum choice clauses and the presence of clauses curtailing beneficiaries' rights to information about the trust.

31 The French trusts registry was created in the Code général des impôts, §1649AB (http://tinyurl.com/j6sfm7z), as amended in the Loi 2013-1117 du 6 décembre 2013 relative à la lutte contre la fraude fiscale et la grande délinquance économique et financière, *Journal Officiel De La République Française* [JO], 7 décembre 2013, p 19941, §11(2) available at goo.gl/DlWM6M, and implemented in the Décret 2016-567 du 10 mai 2016 relatif au registre public des trusts, JO, 11 mai 2016, available at goo.gl/06IkKT. It became available online on July 5, 2016: F Mege, 'The French Trust Registry is Now Online' (Gowling WLG, 8 July 2016) available at goo.gl/nwKmxH. On 22 July 2016, a Judge of the French Conseil d'Etat, France's highest administrative court, ordered the suspension of the online registry pending a constitutional challenge: CE, ordonnance No 400913 du 22 juillet 2016, Mme B… available at goo.gl/MDgb97. The Conseil Constitutionel held the publicly-available registry unconstitutional in its Décision no 2016-591 QPC du 21 octobre 2016, available at goo.gl/RgJ6x3.

32 IRC § 1471(c)(1) (2012), Treas Reg §§ 1.1471-4(d)(3)(ii)-(iv), 1.1471-4(d)(4) (as amended in 2014) (information required to be reported under FATCA); IRC § 1473(2)(A)(iii) (2012), Treas Reg § 1.1473-1(b) (2013) (definition, in the trusts context, of a 'substantial United States owner' of an 'account holder which is a United States owned foreign entity'; 'substantial United States owners' are reportable persons for FATCA purposes); OECD, *Standard for Automatic Exchange of Financial Information in Tax Matters, Implementation Handbook* (2015), 72–75, 77–86. Reporting requirements under FATCA do not apply to trusts in which no non-US financial institution is involved.

33 Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, OJ L141/73**,** recital 17 and art 13(1)(b); Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and amending Directive 2009/101/EC, recitals 33-35, art 1(10) [amending art 31 of the 2015 Directive], and article 2 [inserting arts 1a and 7b into the 2009 Directive], available at ec.europa.eu/justice/criminal/document/files/aml-directive_en.pdf.

Given the severely limited nature of publicly available data on donative trust practice, eliciting additional data on that practice should be a high-priority item on any trust research agenda. And given the tendency of trust users to be unknown, or – if known – not forthcoming with data about their trust affairs, approaching those providing trust services appears a more promising approach. Trust service providers are also likely, due to their professional training and involvement in multiple trusts, to comprehend the characteristics of trusts with which they have been, and are, involved better than trust users. A survey of trust practitioners, however, is itself a difficult undertaking. Three difficulties stand out. One is that for most jurisdictions, complete lists of trust service providers are neither available nor possible to compile. For complete lists of those providing a given service to be available, the service has to be regulated, tracked by a government agency, or self-organised in a monopolist guild. However, unlike banking, legal practice, accountancy, insurance and many other services, trust practice remains, in many jurisdictions, unregulated and unorganised per se, with some providers subject to regulatory regimes because they are banks, attorneys, accountants, insurers, or suppliers of other regulated services, while other providers remain free of any regulation or organisation. Another difficulty is that like members of other elite groups, many trust service providers will not respond to queries regarding their practice.[34] The secretive nature of trust practice and its being subject to less thorough regulation than alternative economic arrangements are commonly thought to contribute to the demand for trust services.[35] Many trust service providers may see themselves as having little to gain from the production and dissemination of more and better data either on their own practices or on trust practice generally. These drivers of non-response exacerbate the more general non-response problem encountered in conventional surveys of the general population.[36] A final difficulty is that even those trust service providers who choose to respond to a survey may not respond truthfully to direct questions about their own practice, perhaps looking to convey a certain impression regarding their practice, regardless of its accuracy. Absent a complementary data source such as an accessible registry where trust instruments are deposited, inaccurate survey responses are likely to remain unidentified.

I addressed all three difficulties by attempting to reach the largest possible number of trust service providers, reasoning that the more responses I obtain, the smaller the distortionary impact of inaccurate responses will be. Having formulated a questionnaire[37] and uploaded it to a dedicated website, I sent, using mass-mailing software, email messages to 26,605 addressees identified as potential trust service providers, inviting them to take the survey. The addressee list was populated with the membership of the three leading organisations of the trust and estate planning profession: the Society of Trust and Estate Practitioners (STEP), the American College of Trust and Estate Counsel (ACTEC) and the American Bar Association Section of Real Property, Trust and Estate Law (ABA RPTE section). While the membership of STEP is worldwide, with members in dozens of jurisdictions both onshore and off, on every continent except Antarctica and in many island

34 On the difficulties of research into elite practices see, eg J Conti and M O'Neil, 'Studying Power: Qualitative Methods and the Global Elite' (2007) 7 Qualitative Research 63; B Harrington, 'Immersion Ethnography of Elites' in K D Elsbach and R M Kramer (eds), *Handbook of Qualitative Organizational Research: Innovative Pathways and Methods* (Routledge, 2015); R Mikecz, 'Interviewing Elites: Addressing Methodological Issues' (2012) 18 Qualitative Inquiry 483; D Richards, 'Elite Interviews: Approaches and Pitfalls' (1996) 16 Politics 200.

35 For the access difficulties characteristic of the wealth management profession, see B Harrington, *Capital without Borders: Wealth Managers and the One Percent* (HUP, 2016) 22–35 and sources cited.

36 Massey and Tourangeau (n 21).

37 The questionnaire is reproduced in the online supplement to this article, available at https://osf.io/356sr/.

jurisdictions,[38] the membership of both ACTEC and the ABA RPTE section is nearly exclusively US-resident. Given that STEP is comparatively unpopular among US trust practitioners, having grown its global ambit from an English and (non-US) offshore core, the memberships of the three organisations create, when put together, as balanced a sampling frame as is currently attainable of the global population of professional trust service providers.[39]

The likelihood of significant self-selection bias being present in my results appears small: as I show in the next section, the 409 respondents who provided useable survey responses proved a remarkably diverse group, which was not significantly different, regarding each of the characteristics examined (jurisdiction where based, proportion based in the US, and gender), from the sampling frame of addressees invited to take the survey. The addressee group was itself representative of professional trust service providers worldwide.

To further bolster the reliability of my findings, I followed up the survey with 28 qualitative interviews with trust service providers in the US, UK, Italy, Switzerland and Israel who did not take part in the survey. Interview research is a common strategy for researching inaccessible and non-cooperative populations.[40] Interview targets were selected so as to create maximum variability as to their professional expertise (lawyers, accountants, bankers and trust company employees) and the profile of their client populations, with some serving the ultra-rich and others a more local clientele of relatively modest means. The interviews, more than an hour long on average, were semi-structured, starting from a developed version of the survey questionnaire but departing therefrom as necessary to provide a degree of detail unobtainable through survey research. Professionals interviewed are listed in a confidential codebook and are referred to in this article using codes.[41]

One limitation on the validity of the data I obtained is that my data describes trust service providers' perceptions of the market in which they are active. As each provider is only familiar with some part, rather than the whole of the market, providers' perceptions may differ from reality. Still, given the lack of publicly available data on the contents of donative trusts, providers' perceptions are the best data source available on these contents. To the extent that respondents provided misleading responses or were unrepresentative of the population of service providers to private donative trusts, these problems are likely to have resulted in an underestimate, not an overestimate, of the frequency of such controversial phenomena as the use of offshore legal systems and information control clauses. Since professional trust service providers are generally well aware of the negative publicity attending such phenomena, those service providers who make frequent use of such phenomena were especially unlikely to respond truthfully to my survey, or to respond at all. Service providers who make little or no use of controversial trust features were more likely than others to respond, and respond truthfully. That, despite these incentives, my resulting estimates of the frequency of the controversial trust features in question are quite high is a significant finding: it provides a lower bound for their true frequency, since they must be used at least as frequently as my respondents reported them to be used.

38 Society of Trusts and Estates Practitioners (n 4).

39 Persons serving in trust-related capacities, such as trustee or trust protector, other than as remunerated professionals are, given the professionalisation of trusteeship (for which see J H Langbein, 'The Rise of the Management Trust' (2004) 143 Trusts & Estates 52), probably now a minority of those serving in such capacities. Contacting even a representative sample of such persons appears impossible.

40 See Harrington's use of interview research in her recent work on wealth managers: Harrington (n 35).

41 To preserve anonymity, the codebook will not be publicly released.

The respondent group

My data derives from survey responses by 409 trust service providers and interviews with 28 additional such providers, resident and practicing in five jurisdictions: the US, UK, Italy, Switzerland and Israel. In order not to deter potential respondents, I avoided asking addressees to provide personal descriptors such as their gender, income or age; I later obtained information about addressees' and most respondents' gender indirectly. I did, however, ask addressees to provide a limited extent of descriptive information more closely connected with their professional activities. One descriptor I asked addressees to provide was the jurisdiction in which each is based. I asked addressees to both name that jurisdiction and classify it as either onshore or offshore. In response, 75.6 per cent of respondents reported being based in onshore jurisdictions, which can be defined for present purposes as jurisdictions where a large part of trust services supplied in the jurisdiction are consumed by local residents. The proportion of respondents who reported being based in offshore jurisdictions, which can be defined for present purposes as jurisdictions where most, and sometimes all, trust services supplied in the jurisdiction are consumed by non-residents, was 16.4 per cent. Finally, 4.4 per cent of respondents reported being based in one of the two 'midshore' jurisdictions, New Hampshire and New Zealand, which maintain both an onshore-type trust practice, serving locally resident trust users, and an offshore-type trust practice, serving foreigners attracted to the jurisdiction's trust regime and/or to its resident trust service providers.[42] Data regarding jurisdictions where each of the addressees invited to take the survey is based were not significantly different: 82.1 per cent were based in onshore jurisdictions while 16.1 per cent were based offshore.[43]

When asked to name the specific jurisdiction where they are based, 4.4 per cent of respondents did not respond while 1 per cent reported being based in multiple jurisdictions. The remaining respondents reported being based in 82 different jurisdictions. 56 per cent were based in the US, and the remaining 38.6 per cent in 39 non-US jurisdictions. Once again, data for the population of addressees invited to take the survey were not significantly different: 63.53 per cent of those addressees were based in the US.[44]

Tables 1 and 2 list respondents' jurisdictions of operation, internationally and among US states, respectively.

42 The Appendix classifies all the jurisdictions respondents mentioned into onshore, offshore and midshore jurisdictions.

43 $\chi^2 = .53$, $p > .1$.

44 $\chi^2 = .94$, $p > .1$.

Table 1. *Jurisdictions where respondents reported being based*

	N of observations	%		*N* of observations	%
USA	229	56	Mexico	2	0.5
England	22	5.4	Monaco	2	0.5
Canada	20	4.9	Singapore	2	0.5
Switzerland	12	2.9	South Africa	2	0.5
Australia	10	2.4	Argentina	1	0.2
Jersey	9	2.2	Bahamas	1	0.2
Italy	7	1.7	Barbados	1	0.2
New Zealand	7	1.7	Brunei	1	0.2
Israel	6	1.5	Cayman	1	0.2
United Arab Emirates	5	1.2	Channel Islands	1	0.2
Bermuda	4	1.0	Cyprus	1	0.2
Brazil	4	1.0	Czech Republic	1	0.2
Guernsey	4	1.0	Gibraltar	1	0.2
Mauritius	4	1.0	Hungary	1	0.2
Scotland	4	1.0	India	1	0.2
France	3	0.7	Ireland	1	0.2
Isle of Man	3	0.7	Puerto Rico	1	0.2
Northern Ireland	3	0.7	Taiwan	1	0.2
Austria	2	0.5	Vanuatu	1	0.2
British Virgin Islands	2	0.5	Not specified	18	4.4
Hong Kong	2	0.5	Multiple	4	1.0
Malta	2	0.5			

Table 2. *Base jurisdictions of US-based respondents, by State*

	N of observations	% (of US-based total)		*N* of observations	% (of US-based total)
Illinois	15	6.6	Wisconsin	3	1.3
New York	14	6.1	Alaska	2	0.9
Texas	11	4.8	Hawaii	2	0.9
Ohio	10	4.4	Mississippi	2	0.9
Virginia	10	4.4	Utah	2	0.9
Pennsylvania	9	3.9	Washington, DC	2	0.9
Georgia	8	3.5	Alabama	1	0.4
Missouri	8	3.5	Arizona	1	0.4
New Jersey	8	3.5	Delaware	1	0.4
Colorado	7	3.1	Idaho	1	0.4
Florida	7	3.1	Indiana	1	0.4
Maryland	7	3.1	Iowa	1	0.4
California	6	2.6	Kansas	1	0.4
Massachusetts	6	2.6	Kentucky	1	0.4
Michigan	6	2.6	Nebraska	1	0.4
New Hampshire	6	2.6	Nevada	1	0.4
Minnesota	6	2.6	New Mexico	1	0.4
North Carolina	5	2.2	Oregon	1	0.4
Tennessee	5	2.2	Virgin Islands	1	0.4
Oklahoma	4	1.7	Washington	1	0.4

Table 2. *continued*

	N of observations	% (of US-based total)		*N* of observations	% (of US-based total)
South Carolina	4	1.7	Multiple States	3	1.3
Louisiana	3	1.3	State Unspecified	31	13.5
South Dakota	3	1.3			

To further examine whether the respondent group was significantly different from the population of addressees invited to take the survey, I identified the gender of each addressee, as well as that of the majority of respondents who chose to identify themselves.[45] The gender ratios of the two populations were strikingly similar: among addressees, there was one woman for every 2.009 men, while among respondents who chose to identify themselves and whose gender I was able to ascertain, there was one woman for every 1.97 men.[46]

The extent of respondents' experience and acquaintance with trusts can be approximated by the amount of trusts they and their firm service in a typical year. As Table 3 demonstrates, most survey participants service between 10 and 100 trusts annually. Those respondents based in offshore jurisdictions appear to service significantly fewer trusts per year than other respondents.[47] US-based respondents appear to service significantly more trusts per year than other respondents.[48]

Table 3. *Amount of trusts serviced per year*

	N of observations	%
Amount of trusts serviced by respondent in a typical year		
1–10	133	32.5
10–100	213	52.1
100–200	40	9.8
200–500	12	2.9
>500	4	1.0
No response	7	1.7
Amount of trusts serviced by firms respondents work at in a typical year		
1–10	77	18.8
10–100	137	33.5
100–200	57	13.9
200–500	54	13.2
500–1000	23	5.6
1000–2000	13	3.2
2000–5000	8	2.0
>5000	6	1.5
No response	34	8.3

45 While addressees were not required to identify themselves, 313 respondents gave their email addresses and could thus be identified. I was only able, however, to ascertain the gender of 282 respondents; it is the gender ratio for this group that is given above.

46 $\chi^2 = .026$, $p > .1$.

47 $\chi^2(4) = 12.6$, $p = .013$.

48 $\chi^2(4) = 15.28$, $p = .004$.

To provide a rudimentary characterisation of the population making use of donative trusts, I asked respondents to estimate the overall wealth, in and out of any trusts, of their typical donative trust client, so far as known. Given the property sharing arrangements common to many families, not to mention their use of trusts, clients could enjoy, and even control, property owned by other family members. I thus asked respondents to also estimate the overall wealth, in and out of any trusts, of the entire family of their typical donative trust client, so far as known. Responses received, detailed in Table 4, reveal that most respondents do much of their trust-related work for clients whose wealth ranges between $1 million and $10 million dollars. For US-based respondents, the amount of trusts the firm they work at services in a typical year is correlated with both the wealth of their typical donative trust client[49] and that of their typical donative trust client's family.[50] Such correlations were not found for respondents based outside the US. At the same time, respondents based in offshore jurisdictions attract wealthier clients than other respondents; this result holds both as regards each client's own wealth,[51] and that of his or her family.[52]

Table 4. *A typical client's and a typical client's entire family's wealth*

US $	A typical client's wealth		A typical client's entire family's wealth	
	N of observations	%	*N* of observations	%
500,000–1m	49	12	30	7.3
1m–2m	60	14.7	33	8.1
2m–5m	88	21.5	78	19.1
5m–10m	73	17.8	81	19.8
10m–20m	47	11.5	41	10
20m–50m	38	9.3	52	12.7
50m–100m	14	3.4	24	5.9
100m–200m	13	3.2	19	4.6
200m–500m	6	1.5	11	2.7
500m–1bn	7	1.7	8	2
1bn–2bn	0	0	4	1.0
2bn–5bn	1	.2	1	.2
No response	13	3.2	27	6.6

The above description of respondents to this first attempt to survey the global population of service providers to donative trusts highlights the extreme diversity of the respondent group. Respondents differ along several margins. They are distributed between onshore and offshore jurisdictions. They serve a variety of client bases, some focused on the middle class while others concentrate on the wealthy. The extent of their experience with trusts ranges from servicing a few trusts per year to servicing more than a hundred trusts per year. They were not significantly different from the population of trust service providers I invited to take the survey respecting any of the descriptive parameters I examined.

49 $r_s = .28$, $p < .001$. As much of the data I obtained was not normally distributed, I used Spearman's nonparametric correlation (r_s) throughout the article.
50 $r_s = .24$, $p < .001$.
51 $\chi^2(10) = 23.7$, $p = .008$.
52 $\chi^2(10) = 23.9$, $p = .013$.

Results

In this section, I describe and analyse the data trust service providers I surveyed and interviewed provided concerning three trust features which have attracted great interest among trust scholars, practitioners and policymakers.

Choice of governing law

Survey respondents estimated, on average, that 36.2 per cent of trusts are governed by a legal system other than those of the settlor's or beneficiaries' jurisdictions of residence. The wealthier a respondent's clients, the higher his or her estimate of the proportion of settlors who create trusts subject to such a 'foreign' governing law.[53] Respondents whose estimates of the proportion of trusts which include clauses negating beneficiaries' traditional right to receive information about the trust were >10 per cent tended to give higher estimates of the frequency of trusts governed by 'foreign' legal systems than other respondents.[54] Respondents whose estimates of the proportion of trusts which include clauses negating beneficiaries' power to enforce the trust were >0 also tended to estimate the frequency of trusts governed by 'foreign' legal systems as higher than did other respondents.[55] Respondents' estimates of the frequency of trusts governed by 'foreign' legal systems were correlated with their estimates of the frequency of trusts supposed, according to the trust instrument, to last more than 100 years, as well as with their estimates of the frequency of trusts supposed, according to the trust instrument, to last in perpetuity.[56] These last two results are not merely an effect of wealthier clients tending, more than other clients, both to settle extremely long-term trusts and to settle trusts subject to a 'foreign' governing law: controlling for the wealth of respondents' typical donative trust client, an average of responses to the two questions regarding trust duration is still correlated to respondents' estimates of the frequency of trusts being settled subject to 'foreign' legal systems.[57] These results appear to confirm the commonsensical hypothesis that since the legal systems of many heavily populated jurisdictions, such as England, do not allow trust features such as perpetual trusts and the exclusion of beneficiary enforcement,[58] many settlors who want their trusts to include such features have recourse to 'foreign' legal systems.[59]

The correlation between client wealth and the use of 'foreign' governing laws reappeared in interviews I held with Israeli trust service providers: while a trust officer at a bank subsidiary serving an upper middle class clientele reported she never uses foreign laws, as using them necessitates use of foreign service providers, which adds expense with no compensating advantages, an attorney at a law firm serving wealthy clients reported a general preference for foreign governing laws.[60]

---

53 $r_s = .415$, $p < .001$ (wealth of typical donative trust client); $r_s = .46$, $p < .001$ (wealth of typical donative trust client's family).

54 *KS* Z = 2.2, $p < .001$. The Kolmogorov-Smirnov two-sample test (*KS Z*) is a nonparametric method that allows comparing two non-normal distributions. See GW Corder and DI Foreman, *Nonparametric Statistics: A Step-by-Step Approach* (Wiley, 2014).

55 *KS* Z = 2, $p = .001$.

56 $r_s = .296$; $p < .001$ and $r_s = .311$; $p < .001$ respectively.

57 $r = .217$, $p < .001$.

58 England now allows perpetuity periods of up to 125 years: Perpetuities and Accumulations Act 2009, s 5. The exclusion of enforcement by beneficiaries is still seen as contrary to the principles of English trust law: Lewin (n 12), [1-005].

59 As one of the UK practitioners I interviewed (UK1) commented, 'given the choice to have a perpetual trust, clients want a perpetual trust, a trust without a stop date, so that necessitates using an offshore system.'

60 IS4 and IS5 respectively.

To further characterise the population of settlors who settle trusts subject to 'foreign' legal systems and that of the service providers serving them, I conducted multivariate regression analysis, regressing (i) the amount of trusts each respondent services in a typical year, (ii) the wealth of each respondent's typical donative trust client, (iii) a binary variable signifying whether each respondent is or is not based in the US, (iv) an interaction between respondents being, or not being, based in the US and the amount of trusts each services in a typical year, (v) an interaction between respondents being, or not being, based in the US and the wealth of each respondent's typical donative trust client, and (vi) an interaction of all three factors, on respondents' estimates of the proportion of trusts subject to a 'foreign' legal system. As is apparent from Table 5, I found that the more trusts a respondent services in a typical year, the lower his or her estimate of the proportion of trusts governed by a 'foreign' legal system.[61] The wealthier a respondent's clients, the higher his or her estimate of the proportion of trusts governed by 'foreign' systems.[62] Respondents based in the US estimated the proportion of trusts governed by 'foreign' systems to be significantly lower than other respondents.[63] US-based respondents' mean estimate of the proportion of trusts governed by 'foreign' systems was 23.7 per cent, while the mean estimate of non-US-based respondents was 53.1 per cent. This last finding is illustrated in Figure 1.

Table 5. *Effects of clients' and service providers' characteristics on the latter's estimates of the proportion of trusts subject to a 'foreign' legal system*

	Coefficient (standardized)	SE	Level of significance (p)
(i) amount of trusts each respondent services in a typical year	–.1614	.0426	.0002
(ii) wealth of each respondent's typical donative trust client	.3763	.042	.0000
(iii) respondents being, or not being, based in the US	–.3639	.0421	.0000
(iv) interaction between respondents being, or not being, based in the US and the amount of trusts each services in a typical year	.0505	.0424	.2319
(v) interaction between respondents being, or not being, based in the US and the wealth of each respondent's typical donative trust client	–.144	.0417	.0006
(vi) interaction of all three factors	.0151	.042	.7183

NOTE: The table presents results of a multivariate linear regression. The model was highly significant, *Adjusted R2* = .361, F 6,370) = 36.3, p < .001.

61 b = -.16, t = 3.8, p < .001. b is the standardized estimate of β. I use Student's t-test to check goodness of fit, ie whether my estimate b fits the data better than a simple average.
62 b = .376, t = 9, p < .001.
63 b = -.364, t = 8.692, p < .001.

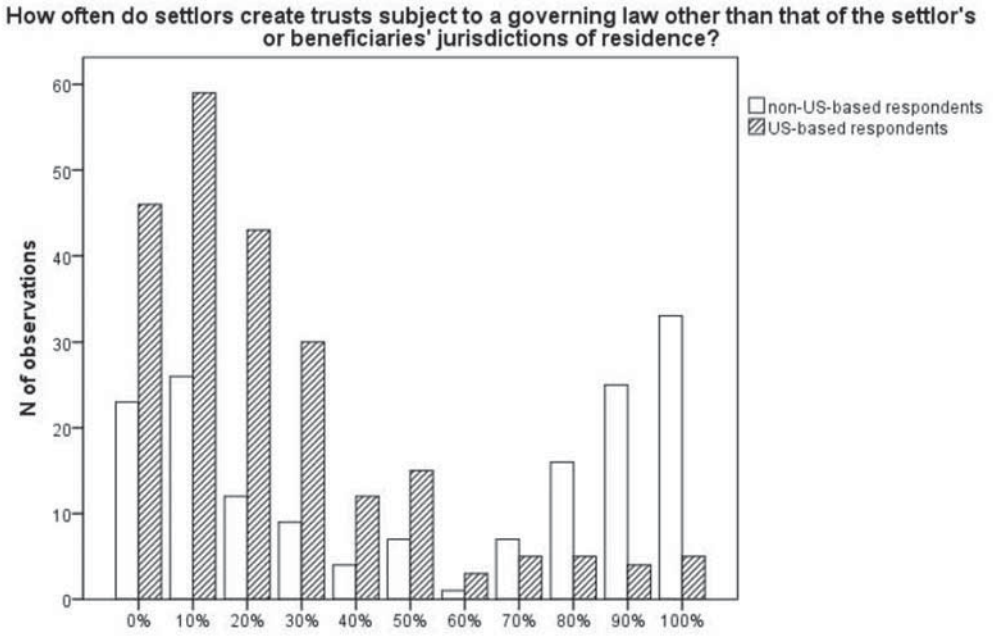

Figure 1 *Estimates by US-based and other respondents of the frequency of trusts governed by legal systems other than those of the settlor's or beneficiaries' jurisdictions of residence*

The interaction of estimated client wealth and being based in the US had a negative impact on respondents' estimates of the frequency with which 'foreign' systems are used,[64] meaning the correlation between the estimated wealth of a respondent's typical donative trust client and his or her estimate of the proportion of trusts governed by 'foreign' systems is much stronger for non-US-based than for US-based respondents.[65]

Because a majority of onshore-based respondents are US-based, the impact of a respondent being based on- or offshore on his or her estimate of the proportion of trusts subject to 'foreign' legal systems cannot be cleanly distinguished from the impact of the same respondent being, or not being, US-based on the same estimate. For the same reason, a respondent being based on- or offshore and his or her being, or not being, based in the US cannot both be included as variables in one regression model. I therefore analysed the relation between respondents being based on- or offshore and their estimates of the proportion of trusts which are governed by a 'foreign' legal system separately. I compared estimates of the frequency with which 'foreign' systems are said to be used to govern trusts by (i) respondents who are based onshore and mentioned only onshore legal systems as commonly used to govern trusts, (ii) respondents based onshore who mentioned both onshore and offshore legal systems as common used to govern trusts, and (iii) respondents based offshore. Respondents in group (i) gave the lowest estimates of the frequency with which 'foreign' systems are used to govern trusts. Group (iii) gave the highest estimates. The

64 $b = .-144$, $t = 3.458$, $p = .001$.

65 $r_s = .5$, $p < .001$ and $r_s = .334$, $p < .001$ respectively. All six independent variables together explain 36.1% of the variance of estimates of the proportion of trusts governed by 'foreign' systems: *adjusted* $R^2 = .361$, $F(3, 370) = 36.3$, $p < .001$.

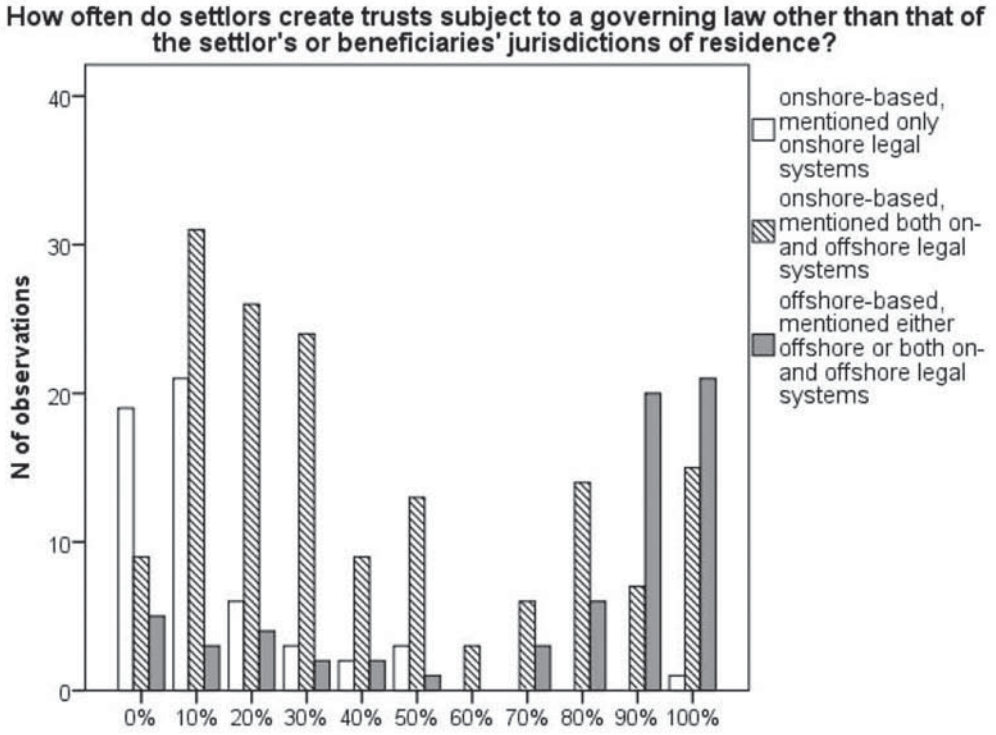

Figure 2 *Estimates of the frequency of trusts governed by legal systems other than those of the settlor's or beneficiaries' jurisdictions of residence by onshore-based respondents who mentioned only onshore legal systems as commonly used to govern trusts, onshore-based respondents who mentioned both onshore and offshore legal systems as commonly used to govern trusts, and offshore-based respondents*

differences between each two of the three groups were highly significant.[66] These results are illustrated in Figure 2.

I interpret the results above to show that the trust services market is divided into two sub-markets. One sub-market focuses on providing trust services to wealthy clients. Trusts settled and managed for such clients tend to be relatively more bespoke, less routine, than other trusts. Trusts for wealthy clients are governed by legal systems other than those of the settlor's or beneficiaries' jurisdictions of residence more often than other trusts. This tendency is especially pronounced among service providers outside the US. The other sub-market is focused on the provision of relatively routine trusts to relatively less wealthy clients. Here the use of 'foreign' legal systems is less frequent, except where the client's jurisdiction of residence does not have a domestic trust regime, as in Italy.[67] The US trust services market differs from that elsewhere in that, in the US, a higher proportion even of wealthy clients tend to settle trusts subject to the law of their own, or of their beneficiaries', jurisdictions of residence. The positive correlation, described in the previous section, between the amount of trusts the firm US-based respondents work at services in a typical year and the wealth of their typical

66 All KS Zs >3, all ps $<.001$.

67 Italian *trusts interni*, trusts of Italian property settled by Italians for Italians, are always governed by foreign governing laws: IT1, IT2, IT3, IT4, IT5, IT6, IT7.

donative trust client, means that US-based practitioners' wealthy clients tend, more than their other clients, to purchase trust services from large firms.

I next asked respondents to name the five legal systems most commonly used to govern trusts. 118 respondents (28.9 per cent) left this question unanswered. Of the remainder, 58.8 per cent said practitioners use the trust regime of their jurisdiction of residence, as did five of the practitioners I interviewed.[68] A further 16.8 per cent said practitioners use the trust regime of their clients' – settlors' or beneficiaries' – jurisdiction of residence. The great majority of respondents who gave either of these answers also mentioned specific legal systems as commonly used to govern trusts. As expected given results reported above, those among my survey respondents based in onshore jurisdictions who only mentioned the legal systems of onshore jurisdictions as commonly used to govern trusts serve clients who are significantly less wealthy than those served by onshore-based respondents who mentioned both onshore and offshore legal systems as commonly used.[69] This finding is demonstrated in Figures 3 and 4.

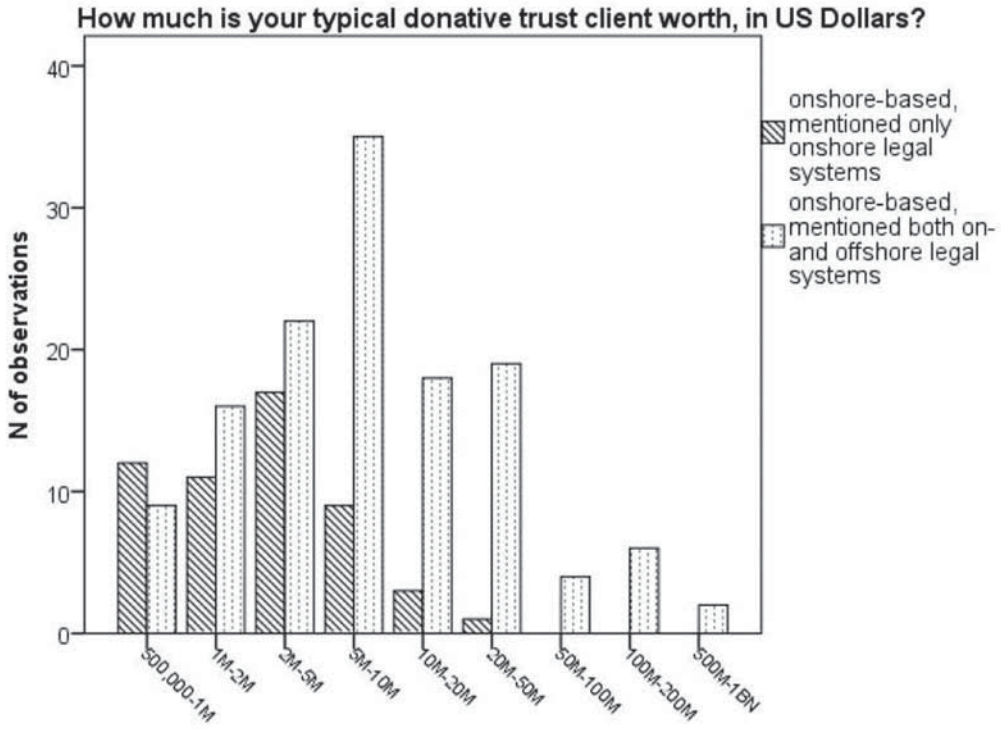

Figure 3 *Onshore-based respondents' estimates of the wealth of their typical donative trust client*

68 US3, UK3, IS1, IS4, IS5. A sixth practitioner noted that large law firms choose, in drafting trusts, the law of jurisdictions where they have affiliated trust companies, so that these companies can be appointed trustees: SW1.

69 *KS* Z = 2.43, p <.001 (wealth of typical donative trust client), *KS* Z = 2.27, p <.001 (wealth of typical donative trust client's family).

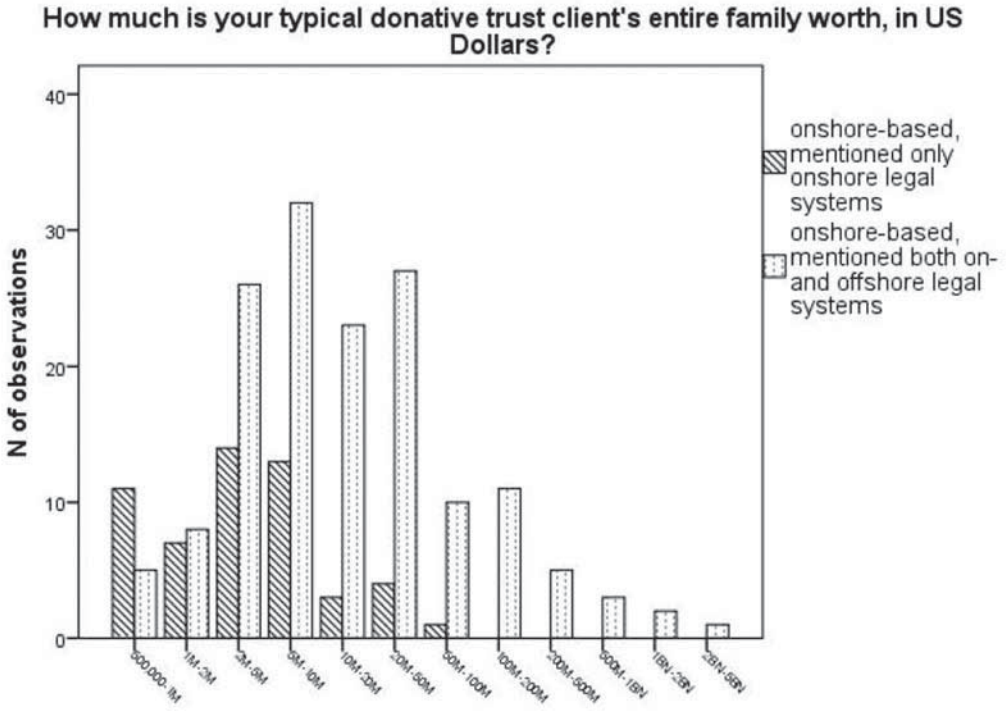

Figure 4 *Onshore-based respondents' estimates of the wealth of their typical donative trust client's entire family*

Table 6 lists the legal systems respondents mentioned as most commonly used to govern trusts, in descending order, starting with the system reported as popular by the largest amount of respondents, the law of Delaware. For each system, I give the amount of respondents who mentioned it as commonly used to govern trusts, both absolutely and in percentage terms. As respondents were asked to mention multiple legal systems, and many did, the sum of percentages exceeds 100 per cent.

Table 6 *Legal systems commonly used to govern trusts*

	N of observations	%		*N* of observations	%
Delaware	89	21.76	Virginia	4	0.98
England	75	18.34	Barbados	3	0.73
Jersey	73	17.84	Colorado	3	0.73
Cayman Islands	49	11.98	Israel	3	0.73
Nevada	49	11.98	Luxembourg	3	0.73
Guernsey	46	11.25	'Offshore' (jurisdiction unspecified)	3	0.73
Florida	44	10.76	Panama	3	0.73
British Virgin Islands	42	10.27	Seychelles	3	0.73
South Dakota	41	10.02	District of Columbia	2	0.49
Alaska	39	9.53	Michigan	2	0.49
New Zealand	37	9.05	Mississippi	2	0.49

Table 6 *continued*

	N of observations	%		*N* of observations	%
'USA' (state unspecified)	33	8.07	North Dakota	2	0.49
Isle of Man	25	6.11	Northern Ireland	2	0.49
Bahamas	24	5.87	South Africa	2	0.49
New York	24	5.87	South Carolina	2	0.49
Australia	19	4.64	Spain	2	0.49
Bermuda	17	4.15	Alabama	1	0.24
Singapore	16	3.91	Alberta	1	0.24
Canada	12	2.93	'British Channel Islands' (island unspecified)	1	0.24
New Hampshire	11	2.69	Brunei	1	0.24
California	9	2.2	'Caribbean' (jurisdiction unspecified)	1	0.24
Liechtenstein	9	2.2	'Dakotas' (jurisdiction unspecified)	1	0.24
Malta	9	2.2	United Arab Emirates	1	0.24
Switzerland	9	2.2	'Europe' (jurisdiction unspecified)	1	0.24
Wyoming	9	2.2	'Foreign' (jurisdiction unspecified)	1	0.24
New Jersey	8	1.95	France	1	0.24
Cook Islands	7	1.71	Georgia	1	0.24
Illinois	7	1.71	Hawaii	1	0.24
Mauritius	7	1.71	India	1	0.24
North Carolina	7	1.71	Kansas	1	0.24
Cyprus	6	1.47	Kentucky	1	0.24
Gibraltar	6	1.47	Labuan	1	0.24
Hong Kong	6	1.47	Louisiana	1	0.24
Maryland	6	1.47	Maine	1	0.24
Pennsylvania	6	1.47	Manitoba	1	0.24
Scotland	6	1.47	Mexico	1	0.24
Tennessee	6	1.47	Netherlands	1	0.24
Texas	6	1.47	New Mexico	1	0.24
'Channel Islands' (island unspecified)	5	1.22	Oklahoma	1	0.24
Massachusetts	5	1.22	Puerto Rico	1	0.24
Missouri	5	1.22	'Rest of the world' (jurisdiction unspecified)	1	0.24
Nevis	5	1.22	'South Pacific' (jurisdiction unspecified)	1	0.24
Ohio	5	1.22	Turks and Caicos Islands	1	0.24
San Marino	5	1.22	'Virgin Islands' (jurisdiction unspecified)	1	0.24
Arizona	4	0.98	Washington	1	0.24
Belize	4	0.98	Wisconsin	1	0.24
Ireland	4	0.98			

Survey respondents and practitioners I interviewed gave reasons for the popularity of many of the systems they mentioned. Reasons given make clear the attractiveness of offshore legal systems based on the common law tradition: users are attracted to such systems both because of the many innovative trust features they permit and because of their perceived connection to the longstanding common law tradition of trust use and adjudication. The most frequently cited reason for the popularity of offshore legal systems were the tax advantages of using them, including those systems' not imposing tax on either income accruing on fiduciary-held assets or on non-resident beneficiaries. The tax issue was mentioned by 71 survey respondents (24.4 per cent of respondents who provided information on the legal systems most commonly used to govern trusts) as well as by 11 of the 28 practitioners I interviewed.[70] Another trust feature respondents and practitioners interviewed value, which often drives them to have trusts governed by offshore trust regimes, is so-called 'asset protection', blocking claims to the trust property by settlors' and beneficiaries' creditors, including family members made creditors under family law principles, settlors' heirs under civil law systems' forced heirship schemes, and other claimants. This issue was specifically mentioned by 53 survey respondents (18.2 per cent) and six of the practitioners I interviewed.[71] Such asset protection is particularly valued where a legal system makes it available to self-settled trusts, the settlor of which is also their principal, or only, beneficiary. The availability in offshore financial centres of large numbers of legal and financial service providers, as well as that of expert, experienced courts, were cited as reasons for offshore legal systems' popularity by 26 and 12 survey respondents respectively (8.9 and 4.1 per cent), as well as by three of the 28 practitioners I interviewed.[72] Practitioners further value the abolition of the rule against perpetuities, the validation of reserving extensive powers to the settlor and the availability of trust decanting.

Respondents explained the popularity of Delaware law by noting that, as one respondent put it, Delaware is 'marketing itself aggressively and thus enacts most cutting edge changes'. One popular such change is the state's 'directed trusts' regime, which permits shifting responsibility for investment from trustees to a so-called 'investment advisor', who can be the settlor. The regime therefore makes possible holding under-diversified portfolios, such as a piece of real estate, on trust without trustees being liable to loss resulting from under-diversification. Many trustees refuse to serve as trustees of such portfolios absent this sort of indemnity.[73] Some respondents noted that Delaware enjoys its proximity to New York City, which has a large resident population of wealthy persons, a large concentration of legal and financial service providers – and a traditional, slow-moving trust regime, which drives wealthy New Yorkers and their advisers to look elsewhere. Delaware also profits from synergies between its trust offerings and its popular corporate law.[74] One practitioner I interviewed added that Delaware imposes no income tax on non-resident trusts. Two interviewed practitioners said that its courts take care not to be perceived as in the industry's pocket: clients occasionally defeat their trustees in court.[75]

As Delaware profits from its proximity to New York, so the English Crown Dependencies of Jersey, Guernsey and the Isle of Man profit from providing liberal, facilitative, long-tested trust regimes and a 'deep talent pool' of service providers, all a short

70 US1, US3, US5, US6, UK1, UK5, IS1, IS2, IS5, SW2, SW3.
71 UK1, UK5, IS1, SW1, SW2, SW5.
72 UK1, IS5, SW1.
73 US3.
74 US1.
75 US1, US5.

distance from England.[76] Their trust regimes and resident trust practitioners are also well appreciated outside England: Jersey law has become a default choice for Italian trust practitioners, with Italian judgments interpreting the provisions of the Trusts (Jersey) Law and thereby creating ease of access, confidence and predictability for Italian courts, practitioners and clients.[77] Swiss practitioners I interviewed noted that the popularity of Jersey and Guernsey has increased now that they have established their own trust regimes and shown that they do not adhere to every English court judgment.[78] Clients expect that the authorities of whichever other jurisdictions are relevant will respect trusts governed by the laws of the two dependencies.[79] Earlier fears that data about Channel Islands trusts would be transparent to the UK authorities have been made irrelevant by the global demise of confidentiality, and in terms of expense, the Channel Islands are no longer more expensive than Switzerland.[80] The law of Florida is chosen to govern trusts both because clients are Florida residents and because of its attendant tax advantages. New Zealand was singled out as a flexible, tax-advantageous jurisdiction with a compliant, onshore image.[81] Some survey respondents highlighted cost differentials between trust, legal and financial services available in different offshore jurisdictions, with Jersey singled out as expensive and the British Virgin Islands as affordable.[82]

Choice of forum

Survey respondents estimated, on average, that 70 per cent of trusts include a forum choice clause, expressly indicating the court or court system that is to have jurisdiction over the trust. With the mode at 100 per cent, 55.3 per cent of respondents said that $\geqslant 90$ per cent of trusts include such clauses. Of the practitioners I interviewed, most of those whose practice has an international dimension, whether they service clients from abroad or use foreign legal systems for domestic clients, reported that forum choice clauses are either always or commonly used.[83]

To characterise the populations of clients and service providers making more and less use of forum choice clauses, I ran a multivariate logistic regression with respondents' estimates of the frequency of forum choice clauses as the dependent variable, transformed into a binary form comparing those respondents who said < 90 per cent of trusts include forum choice clauses with the rest. Predictors were:

76 SW1.
77 IT1, IT2, IT3, IT4, IT5, IT6, IT7.
78 SW1.
79 SW5.
80 SW1.
81 SW1.
82 See the online supplement to this article, available at https://osf.io/356sr/, for: (i) a full list of the reasons respondents gave for the popularity of the 11 legal systems most frequently mentioned as commonly used to govern trusts; (ii) a breakdown of all the reasons respondents mentioned for the use of various legal systems to govern trusts into 35 categories, each category matched with the systems the choice of which it was said to support, by residents of the jurisdiction offering each system and (separately) by others; and (iii) a list of the 35 categories by frequency with which respondents mentioned them.
83 IS5, IT1, IT2, IT3, IT4, IT5, IT6, SW1, SW2, SW4, SW5. One UK practitioner whose practice includes a large international element reported that such clauses are only occasionally used: UK1. Two practitioners whose practice is largely domestic said such clauses are never used: UK3, IS4. One other said she has never really looked at these clauses and so cannot provide information regarding them: SW3. The other practitioners I interviewed, including all those based in the US, said nothing on the subject. American practitioners I interviewed appeared to address choice of law and choice of forum together, assuming that the courts of the jurisdiction the law of which governs the trust will always have jurisdiction over the trust. Survey respondents, on the other hand, including the Americans among them, were encouraged to address the two issues separately by their being the subject of separate questions.

(i) the amount of trusts each respondent services in a typical year;
(ii) the amount of trusts each respondent's firm services in a typical year;
(iii) the wealth of each respondent's typical donative trust client;
(iv) a binary variable signifying whether each respondent is or is not based in the US;
(v) an interaction between respondents being, or not being, based in the US and the amount of trusts each services in a typical year;
(vi) an interaction between respondents being, or not being, based in the US and the amount of trusts the respondents' firm services in a typical year; and
(vii) an interaction between respondents being, or not being, based in the US and the wealth of each respondent's typical donative trust client.

I found that the more trusts the firm a respondent belongs to provides services to per year, the lower his or her estimate of the proportion of trusts which include forum choice clauses.[84] Controlling, however, for the amount of trusts the firm a respondent belongs to provides services to per year, the more trusts a respondent personally services in a typical year, the more frequent he or she estimates the use of forum choice clauses to be.[85] This last effect was particularly strong among US-based respondents: an interaction of the amount of trusts a respondent services in a typical year with him or her being, or not being, US-based proved to have a strong positive effect on estimates of the frequency of forum choice clauses.[86] Client wealth also had a mildly positive effect on respondents' estimates of the frequency with which forum choice clauses are used.[87] The regression results are reported in full in Table 7.

Table 7 *Effects of settlors' and service providers' characteristics on the latter's estimates of the frequency of forum choice clauses*

	Coefficient	SE	Wald	Level of significance (p)
(i) amount of trusts each respondent services in a typical year	.4307	.1930	4.98	.0257
(ii) amount of trusts each respondent's firm services in a typical year	–.3265	.0952	11.76	.0006
(iii) wealth of each respondent's typical donative trust client	.1616	.0590	7.49	.0062
(iv) respondents being, or not being, based in the US	–.2123	.2303	.85	.3568
(v) interaction between respondents being, or not being, based in the US and the amount of trusts each services in a typical year	.8527	.3861	4.88	.0272
(vi) interaction between respondents being, or not being, based in the US and the amount of trusts the respondents' firm services in a typical year	–.2143	.1904	1.27	.2604
(vii) interaction between respondents being, or not being, based in the US and the wealth of each respondent's typical donative trust client	–.1978	.1181	2.81	.0939

Note: The table presents results of a multivariate logistic regression. The model was highly significant, *–2 log likelihood* = 454.2, $\chi 2(7) = 28.4$, $p < .001$. All coefficients are non-standardised.

84 b = -.33, *Wald* = 11.76, p = .001.
85 b = .431, *Wald* = 4.98, p = .026.
86 b = .853, *Wald* = 4.88, p = .027.
87 b = .16, *Wald* = 7.5, p = .006.

These results can be interpreted, consistently with my interpretation of results concerning the use of 'foreign' legal systems, as follows. Firms servicing large amounts of trusts tend to service relatively routine trusts, which are often purely domestic affairs, governed by the law of the settlor's and beneficiaries' jurisdiction of residence and having little need for forum choice clauses.[88] More sophisticated, international trusts, where more use of 'foreign' legal systems and forum choice clauses is made, are often serviced by smaller, boutique firms, each of which services a limited number of trusts. At each firm, of whatever size, those practitioners who service larger amounts of trusts than their colleagues at the same firm see more forum choice clauses than those colleagues, and as a result tend to give higher estimates of their frequency.

I next asked survey respondents why forum choice clauses are included, listed a series of possible reasons for their inclusion and asked respondents to check all that apply, inviting them to list further reasons under an 'other' option. A breakdown of responses provided by the 371 respondents who responded to this question follows in Figure 5.

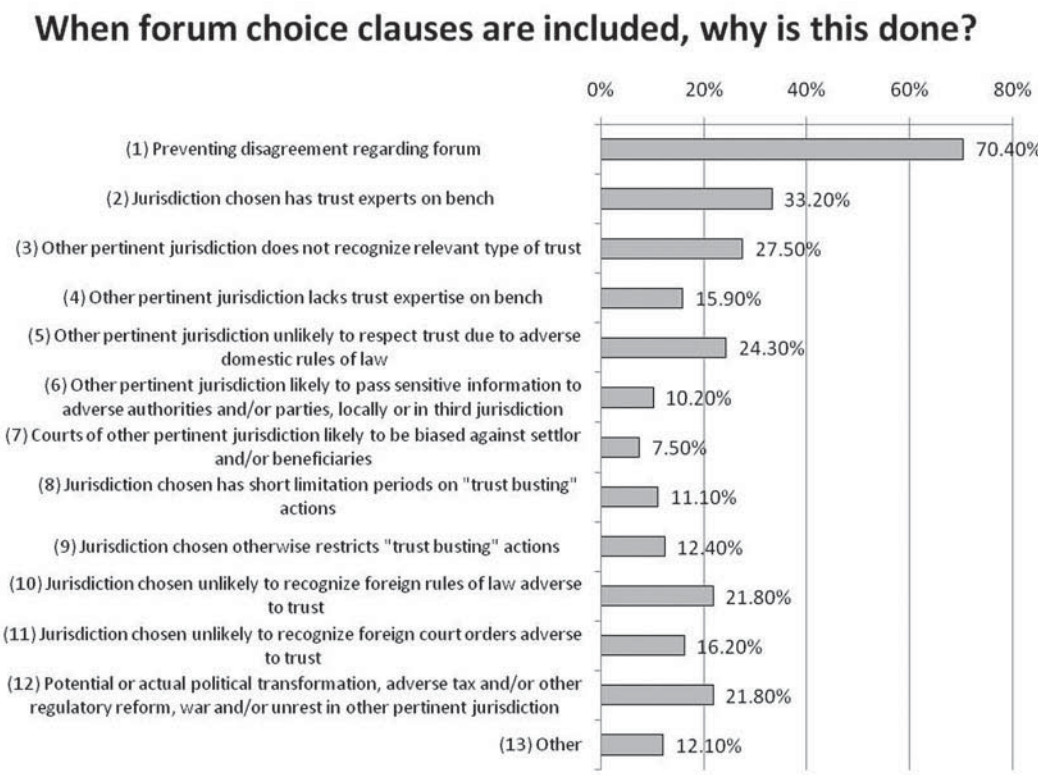

Figure 5 *Respondents' choices from among a menu of reasons for the use of forum choice clauses in trust instruments. Percentages are out of 371 respondents who provided data on this point.*

88 Alternatively, such routine trusts can contain forum choice clauses for the domestic forum. One practitioner I interviewed, who serves as trustee for many bond issues, said every Israeli debenture trust deed includes a forum choice clause for the Israeli courts, governing litigation between an issuer and its bondholders: IS3.

While the two most frequently cited reasons for using forum choice clauses were the prevention of disagreement regarding forum and the fact that the jurisdiction chosen has trust experts on the bench, a significant number of respondents cited reasons which highlight aspects of trust practice concerned with avoiding or evading norms applicable to trust users. Of the respondents who provided an answer on this point, 27.5 per cent noted forum choice clauses are used because a pertinent jurisdiction, the courts of which could have had jurisdiction over the trust, does not recognise the relevant type of trust. I used the vague term 'pertinent jurisdiction', rather than, for example, 'the settlor's jurisdiction of residence', so as to provide respondents with a degree of comfort in describing avoidance-related aspects of trust practice. Of respondents who provided an answer, 24.3 per cent said forum choice clauses are used because a pertinent jurisdiction is unlikely to respect the trust, due to adverse domestic rules of law, whilst 10.2 per cent noted that such clauses are used because a pertinent jurisdiction is likely to pass sensitive information to adverse authorities and/or parties, locally or in a third jurisdiction. It was noted by 21.8 per cent of respondents that such clauses are used because the chosen jurisdiction is unlikely to recognise foreign rules of law adverse to the trust, whilst 16.2 per cent noted that forum choice clauses are used because the chosen jurisdiction is unlikely to recognise foreign court orders adverse to the trust. Of respondents who provided an answer, 12.1 per cent checked the 'other' option, pointing out various additional reasons for the use of forum choice clauses. Along with such innocuous reasons as 'convenience', the chosen court being that of the 'settlor's domicile' and 'certainty', a few respondents noted, each using different language, that a (presumably, foreign) forum is chosen in order to, as one respondent put it, 'avoid local income tax in other jurisdiction'. Another respondent noted that a forum choice clause is included because it 'requires out of state beneficiaries to come to Nebraska to sue the trustee'.[89]

Of practitioners I interviewed, eight said they use forum choice clauses to pick a court with the appropriate expertise.[90] Four said they pick a convenient court – the court of the city where the trustee, the settlor or beneficiaries reside.[91] Two practitioners said they choose a court which will protect the trust from hostile actions.[92] One simply said that forum choice clauses are used where there is a risk of litigation.[93] Another said he chooses a court where uncontentious proceedings are available.[94]

Information control clauses

One controversial aspect of modern trust practice is the negation of beneficiaries' traditional rights to receive information from their trustees about the trust and its administration.[95] Survey respondents estimate, on average, that 25.9 per cent of donative trusts include clauses negating these rights. Not all respondents are familiar with the use of information control clauses: 26 per cent of respondents believe no trusts include such clauses. With both the

89 For a full list of reasons respondents who checked the 'other' option gave for the use of forum choice clauses, see the online supplement to this article, available at https://osf.io/356sr/.

90 IS5, IT1, IT2, IT4, IT6, SW1, SW2, SW4. Practitioners interviewed may have regarded the reason for using such clauses most favored by the survey respondents – preventing disagreement regarding forum – as obvious and so not worth an explicit mention. Survey respondents, on the other hand, were faced with a list of prepared reasons including the prevention of disagreement regarding forum.

91 IT2, IT3, SW4, SW5. Convenience was not on the list of prepared reasons supplied to survey respondents; some respondents mentioned it under the 'other' option.

92 UK1, SW4.

93 UK1.

94 IT5.

95 See cases and commentary at n 15.

median and mode at 10 per cent, it is clear that even those respondents familiar with information control clauses believe their use to be restricted to a minority of trusts. Data contributed by practitioners I interviewed confirms these findings. One of the five UK practitioners I interviewed, two of the five Israelis and two of the seven Italians said such clauses are used often.[96] One of the six Americans, one UK practitioner, one Israeli, three Italians and three of the five Swiss practitioners said such clauses are sometimes used,[97] while one practitioner from each of the UK, Israel and Italy said they are either never or almost never used.[98] Practitioners interviewed highlighted the various nature of information control clauses: some such clauses merely turn trustees' default duty to provide beneficiaries with information into a discretionary power,[99] others deflect trustees' reports from beneficiaries to alternate recipients such as protectors, family office personnel or beneficiaries' attorneys,[100] while yet others merely stop trustees from providing each beneficiary with information about other beneficiaries' entitlements, but not with information about his or her own entitlement.[101]

I next asked the survey respondents why information control clauses are used, listed a series of possible reasons for their use and asked respondents to check all that apply, inviting them to list further reasons under an 'other' option. A breakdown of responses provided by the 309 respondents who provided information on this topic follows in Figure 6.

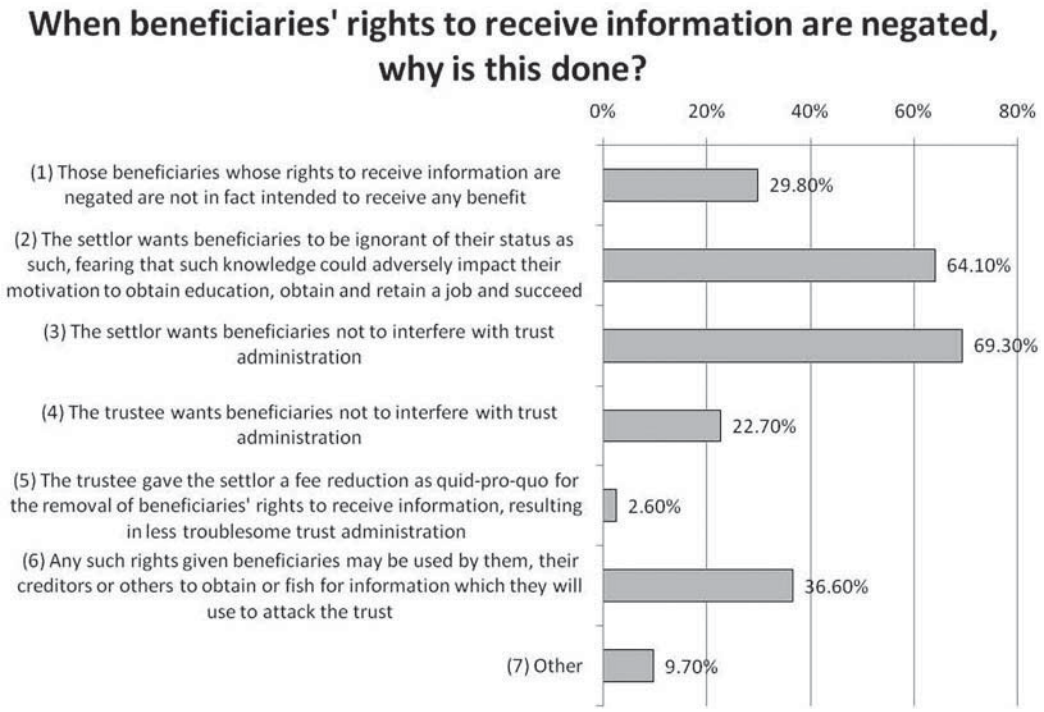

Figure 6 *Respondents' choices from among a menu of reasons for the use of information control clauses in trust instruments. Percentages are out of 309 respondents who provided data on this point.*

96 UK2, IS1, IS4, IT2, IT5.
97 US5, UK1, IS5, IT1, IT3, IT6, SW1, SW3, SW5.
98 UK5, IS2, IT4.
99 UK2.
100 IS4, IT6.
101 IT5.

The two reasons respondents most frequently cited for the use of information control clauses are settlors' wish for beneficiaries not to interfere with trust administration (cited by 69.3 per cent of respondents who provided information on this topic) and settlors' wish for beneficiaries to be ignorant of their status as such, fearing that such knowledge could adversely impact their motivation to obtain education, obtain and retain a job and succeed (cited by 64.1 per cent of the same respondents). Of those respondents, 45.31 per cent cited both of these reasons, whilst 22.7 per cent of the same respondents cited trustees' wish for beneficiaries not to interfere with trust administration as a reason for the inclusion of information control clauses. No less than 36.6 per cent of the same respondents opined that beneficiaries' rights to trust information are curtailed since any such rights may be used by beneficiaries, their creditors or others to obtain or fish for information which they will use to attack the trust. Finally, 29.8 per cent of the same respondents noted that beneficiaries whose rights to information are negated are not in fact intended to receive any benefit, exposing the nature of some trusts as facades for allocative intentions other than those apparent from the trust instrument. The use of information control clauses to prevent trust information from flowing to persons described as beneficiaries on the face of the instrument, who are not in fact intended to receive any benefit, is further demonstrated by the interaction of responses regarding the frequency with which information control clauses are used with responses to a different question: what share of trusts which on their face are intended to benefit others are in fact intended to benefit the (formal or substantial) settlor? Having transformed responses to the former question into binary form, comparing respondents who said >10 per cent of trusts include information control clauses with all others, I find that those respondents who believe information control clauses to be rare give significantly lower estimates of the frequency of trusts which, though on their face intended to benefit others, are in fact intended to benefit the settlor, compared to respondents who believe information control clauses to be more frequent.[102] This result is illustrated in Figure 7.

Of respondents who provided reasons for the use of information control clauses, 9.7 per cent checked the 'other' option. They cited a wide range of additional reasons for their use. These included trustees of charitable trusts wanting to avoid being solicited by 'fundraisers representing charitable beneficiaries', beneficiaries not being named, their being mere contingent objects of trustee discretion, their being minors, 'vulnerable to undue influence, on drugs, mentally ill, etc', trusts being 'blind' in the sense of having to demonstrate full immunity from beneficiary involvement, the existence of alternative information recipients such as trust protectors, beneficiaries voluntarily waiving their rights to information 'for convenience in administration', the protection of different beneficiaries' privacy from each other's prying, the protection of settlors' privacy, reducing administrative costs, avoiding English matrimonial jurisdiction and unidentified 'tax reasons'.[103]

Practitioners I interviewed mentioned similar motives for the use of information control clauses: a wish to keep young beneficiaries from growing up knowing that a large fund will be distributed to them at some future time;[104] a wish to prevent information to which beneficiaries are entitled from reaching persons attacking the trust, such as beneficiaries' divorcing spouses;[105] trustees' interest in a quiet administration, undisturbed by beneficiaries' demands;[106]

102 $KS\ Z = 2.086$, $p < .001$.

103 For a full list of reasons respondents who checked the 'other' option gave for the use of information control clauses, see the online supplement to this article, available at https://osf.io/356sr/.

104 US5, UK5, IT1, SW3.

105 UK5, SW3, SW5.

106 UK5, IT3.

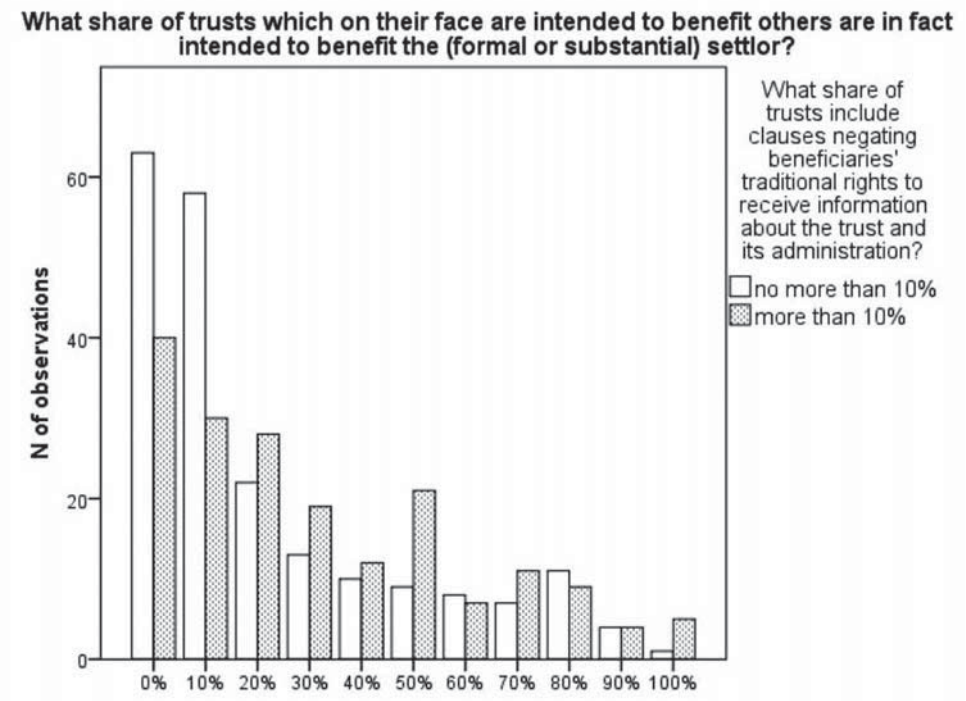

Figure 7 *Estimates of the frequency of trusts which, though on their face intended to benefit others, are in fact intended to benefit the settlor, by respondents who estimated the frequency of information control clauses as >10% and others*

beneficiaries' interest in demonstrating their lack of control over the trustee to the tax authorities;[107] and their interest in convincingly showing those authorities that they are unable to provide them with information about the trust.[108] Other motives mentioned were settlors' wish for each beneficiary to remain ignorant of sums distributed to others, so as to prevent disputes,[109] settlors' wish for family- or trust-related information which has hitherto been secret to remain so,[110] and settlors' wish for directions of which courts may disapprove to escape their scrutiny.[111]

I conducted multivariate logistic regression analysis with responses regarding the frequency with which information control clauses are used, in the binary form described above, as the dependent variable, and the following predictors:

(i) respondents' estimates of the share of trusts which, while intended, on their face, to benefit others are in fact intended to benefit the settlor;
(ii) the amount of trusts each respondent services in a typical year;
(iii) the amount of trusts each respondent's firm services in a typical year;
(iv) the wealth of each respondent's typical donative trust client;
(v) an interaction between predictors (i) and (ii);

107 SW3.
108 IS1, IS5, SW1.
109 IT2, SW3.
110 UK2, IT2.
111 UK2.

(vi) an interaction between predictors (i) and (iii); and
(vii) an interaction between predictors (i) and (iv).

I again found that respondents who believe that a larger proportion of trusts which appear, on their face, intended to benefit others are in fact intended to benefit the settlor also believe that a larger proportion of trusts negate beneficiaries' rights to receive information.[112] The more trusts the firm to which a respondent belongs services annually, the lower his or her estimate of the proportion of trusts that include information control clauses.[113] The wealthier a respondent's typical donative trust client, however, the higher his or her estimate of the proportion of trusts which include information control clauses.[114] The regression results appear in full in Table 8.

Table 8 *Effects of settlors' and service providers' characteristics and of providers' estimates of the proportion of trusts which are intended to benefit the settlor despite appearing to benefit others on providers' estimates of the frequency of information control clauses*

	Coefficient	SE	Wald	Level of significance (p)
(i) respondents' estimates of the share of trusts which, while intended, on their face, to benefit others are in fact intended to benefit the settlor	.1167	.0441	7.01	.0081
(ii) amount of trusts each respondent services in a typical year	.3482	.1980	3.09	.0787
(iii) amount of trusts each respondent's firm services in a typical year	–.2106	.0980	4.61	.0317
(iv) wealth of each respondent's typical donative trust client	.1875	.0568	10.92	.0010
(v) interaction between the amount of trusts each respondent services in a typical year and his or her estimate of the share of trusts which, despite being intended, on their face, to benefit others, are in fact intended to benefit the settlor	.1310	.0872	2.25	.1332
(vi) interaction between the amount of trusts each respondent's firm services in a typical year and his or her estimate of the share of trusts which, despite being intended, on their face, to benefit others, are in fact intended to benefit the settlor	–.0916	.0413	4.92	.0266
(vii) interaction between the wealth of each respondent's typical donative trust client and his or her estimate of the share of trusts which, despite being intended, on their face, to benefit others, are in fact intended to benefit the settlor	-.0111	.0212	.27	.6005

Note: The table presents results of a multivariate logistic regression. The model was highly significant, *–2 log likelihood* = 457.6, $\chi 2(7) = 30.76$, $p < .001$. All coefficients are non-standardised.

112 $b = .117$. *Wald* = 7, $p = .008$.
113 $b = -.211$, *Wald* = 4.6, $p = .032$.
114 $b = .188$, *Wald* = 10.9, $p = .001$. One US practitioner I interviewed confirmed the association of information control clauses with wealthier clients, saying that unlike her wealthiest clients, so called 'mid-level' clients, worth less than US $10 million, are usually not concerned about beneficiaries' rights to information: US5.

Respondents estimating the frequency of information control clauses at ⩽10 per cent also believed other non-traditional trust features to be similarly rare: these include 'flee clauses', which empower the trustee to move the trust administration to a different jurisdiction should any difficulties arise in the jurisdiction where it is currently administered; 'event of duress' mechanisms, which provide that on the occurrence of one or more of a specified list of events, specified changes will automatically be made to the trust; and decanting powers, which empower trustees of an existing trust to declare a new trust with different terms and appoint the current trust fund to the trustees of the new trust.[115]

I interpret these results as once again demonstrating the bifurcation of the trust services sector. One sub-sector is populated with firms servicing a relatively large number of routine trusts, which do not typically include sophisticated features such as information control clauses, flee clauses, event of duress mechanisms or decanting powers. These trusts are typically intended to benefit the persons named as beneficiaries on the face of the trust instrument. The other sub-sector is populated with firms each of which services a relatively smaller number of more sophisticated, bespoke trusts. Many of these trusts are created by wealthier clients. Some of them are not in fact intended to benefit the persons named as beneficiaries.

Summary and implications

The recent global proliferation of trust regimes and trust service providers has produced much apprehensive normative commentary, but little concrete data regarding the consequences of the far-reaching reforms dozens of jurisdictions have made to their trust regimes, or of the growth of trust practice in dozens of previously trust-free jurisdictions. This article reported the results of a global survey and interview series with trust service providers, focused on these processes.

The results show the law of Delaware to be the most popular legal system governing trusts, with that of England in second place and the rest of the top ten nearly exclusively populated with trust regimes offered by various offshore jurisdictions. Wealthier clients tend, more than other clients, to settle trusts governed by legal systems other than those of their, or their beneficiaries', jurisdictions of residence. Wealthier clients also use offshore legal systems to govern their trusts more often than other clients. The tax advantages available by way of using offshore legal systems to govern trusts are the leading reason for their use. Those advantages are followed by the availability under offshore systems of trust features unavailable elsewhere, such as heightened asset protection and extended settlor power retention. Practitioners servicing large numbers of trusts tend to mainly service trusts governed by the law of settlors' or beneficiaries' jurisdictions of residence, while trusts governed by 'foreign' legal systems appear to be serviced by respondents involved with relatively fewer trusts. US trust practitioners use 'foreign' legal systems less frequently than trust practitioners based elsewhere. Practitioners using offshore legal systems to govern trusts and practitioners who themselves work out of offshore jurisdictions are likelier than other practitioners to service trusts governed by legal systems other than those of their clients' jurisdictions of residence.

A large majority of trusts contain forum choice clauses. Their frequency is about double that of the choice of a 'foreign' governing law. A sizable minority of forum choice clauses are inserted in trust instruments in order to avoid norms otherwise applicable to the trust users:

115 $\chi^2 = 21.53$, $p < .001$, $\chi^2 = 26.16$, $p < .001$, and $\chi^2 = 9.14$, $p = .002$ respectively.

some such clauses are inserted because the court which would otherwise have had jurisdiction over the trust would have been unlikely to respect it, others because the chosen court is unlikely to respect foreign rules of law and/or foreign court orders to which the users are subject. Some respondents explicitly said that forum choice clauses are used for tax avoidance purposes.

Information control clauses, restricting or abolishing beneficiaries' rights to information about the trust and its administration, appear in about a quarter of donative trusts. In many cases, such clauses are an attempt to protect the integrity of the trust fund, its smooth administration, or beneficiaries themselves, settlors believing that supplying beneficiaries with trust information will lead them to unhelpfully interfere in trust administration, to lead lives of sloth, counting on the trust fund for support, or to attack the trust in order to increase their take. In other cases, however, information control clauses are a sign that persons designated as beneficiaries on the face of the trust instrument are not in fact intended to receive any benefit.

The data show the trust services market to fall into two sub-markets. Some firms service relatively large numbers of fairly routine trusts, which only rarely contain such non-traditional trust features as information control clauses, flee clauses, extremely long duration or decanting powers. Other firms service smaller numbers of more sophisticated trusts, which more frequently contain such features. The latter sub-market caters to typically wealthier clients, making more use of legal systems other than those of settlors' and beneficiaries' jurisdictions of residence, as well as of offshore legal systems. The US trust industry differs from that elsewhere in that US practitioners' wealthy clients appear to purchase trust services from larger firms, and perhaps to use more routine trusts, usually subject to the law of their jurisdictions of residence, than wealthy clients elsewhere.

It thus appears that according to trust practitioners themselves, many of their wealthy clients use offshore jurisdictions' trust regimes to obstruct their creditors and minimise their tax burden. Offshore trust regimes permit, indeed encourage, the settling of trusts the ostensible beneficiaries of which know nothing about the trust and their entitlements thereunder and are unlikely to eventually enjoy any benefit.

Appendix: Classification of jurisdictions – onshore, offshore and midshore

Onshore

England, Canada, Australia, Italy, Israel, Brazil, Scotland, Mexico, South Africa, Argentina, Czech Republic, Hungary, India, France, Northern Ireland, Austria, Republic of Ireland, Taiwan, Illinois, New York, Texas, Ohio, Virginia, Pennsylvania, Georgia, Missouri, New Jersey, Colorado, Florida, Maryland, California, Massachusetts, Michigan, Minnesota, North Carolina, Tennessee, Oklahoma, South Carolina, Louisiana, Wisconsin, Hawaii, Mississippi, Utah, Washington, DC, Alabama, Arizona, Idaho, Indiana, Iowa, Kansas, Kentucky, Nebraska, New Mexico, Oregon, US Virgin Islands, Washington State, North Dakota, Spain, Alberta, Maine, Manitoba

Offshore

Switzerland, Jersey, UAE, Bermuda, Guernsey, Mauritius, Hong Kong, Malta, Monaco, Singapore, Puerto Rico, Bahamas, Barbados, Brunei, Cayman Islands, Cyprus, Gibraltar,

Isle of Man, British Virgin Islands, Vanuatu, Alaska, Delaware, Nevada, Liechtenstein, Cook Islands, Luxembourg, Panama, Seychelles, South Dakota, Labuan, Nevis, San Marino, Belize, Netherlands, Wyoming, Turks and Caicos Islands

Midshore

New Zealand, New Hampshire
Note: I classify jurisdictions as onshore, offshore or midshore for trust law purposes. I define an onshore jurisdiction as one where a large part of trust services supplied in the jurisdiction are consumed by local residents. I define an offshore jurisdiction as one where most, and sometimes all, trust services supplied in the jurisdiction are consumed by non-residents. I define a midshore jurisdiction as one where a significant quantity of trust services is locally supplied for consumption by local residents, simultaneously with the provision of such services to non-residents on the offshore pattern.

The US in its entirety could not be classified, since it is composed of both onshore and offshore jurisdictions. Other federations, such as Canada and Australia, are classifiable, since all of their component jurisdictions are onshore in nature.

Corrigendum

In *Trust Law International* Vol 31, No 2 we inadvertently spelled the name of a contributor incorrectly. The author of '"Not so strong" cause for trust jurisdiction clauses – a solution to a non-problem?' was **Yao Qinzhe**. *Trust Law International* apologises for any embarrassment caused by this error.