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## Trust jurisdiction clauses: their proper ambit

Adam S. Hofri-Winogradov\*

This article investigates the proper ambit of trust jurisdiction clauses. The author proposes that whether a trust-related proceeding is or is not subject to any jurisdiction clause in the trust instrument should be decided according to two key criteria: the proximity of the parties to the proceeding to the drafting of the trust instrument and whether the issues under review in the proceeding are part of the routine running of the trust, an attempt to undermine the trust, or an attack on an officer's functioning within the trust framework. Other factors to be taken into account are the likely costs of proceedings before the chosen court and elsewhere (including difficulties over security for costs), the extent to which the chosen court offers a realistic prospect of a fair hearing, and the extent to which any court orders granted, whether by the court named in a jurisdiction clause or another court, are likely to be enforceable in practice.

**Keywords:** trust; trustee; beneficiary; jurisdiction; forum; choice; clause; courts

### A. Introduction

The question of the proper ambit of trust jurisdiction clauses – to which proceedings ought they apply? – has recently become prominent, having been extensively litigated in several jurisdictions.<sup>1</sup> The ambit of trust jurisdiction clauses will

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<sup>1</sup>See eg *E.M.M. Capricorn Trustees v Compass Trustees* [2001] JLR 205 (Royal Court of Jersey) (see comments: RM Antoine, *Trusts and Related Tax Issues in Offshore Financial Law* (Oxford University Press, 2nd edn, 2013), [21.41–21.49]; J Harris, “Jurisdiction and the Enforcement of Foreign Judgements in Transnational Trusts Litigation”, in D Hayton (ed), *The International Trust* (Jordan Publishing, 3rd edn, 2011), 3, [1.297]); *Koonmen v Bender* [2007] WTLR 293; [2003–2004] 6 ITEL 568 (Jersey CA); *In re Representation of AA and the D Discretionary Trust* [2010] JRC 164; *Crociani v Crociani* [2014] UKPC 40 (see comments: RY Tan, “Jurisdiction Clauses in Trust Instruments: Crociani v Crociani” [2015] *Lloyd's Maritime and Commercial Law Quarterly* 278; J MacDougald, “Crociani: the Proper Forum for Trust Disputes” (2015) 22 *Journal of International Tax, Trusts and Corporate Planning* 115). See generally L Tucker, N Le Poidevin and J Brightwell,

depend on the precise way they are drafted: they can be drafted as exclusive or non-exclusive, or, for example, as covering every possible sort of proceedings touching on the trust relationship or just some types of proceedings.<sup>2</sup> But even for a given drafting choice, courts can differ regarding a clause's construction. Courts and commentators have differed, for example, on the proper construction to be given to clauses, frequently met with in trust instruments, identifying "the forum for [or of] administration" of the trust. Some courts have construed such clauses as exclusive jurisdiction clauses applicable to all, or most, proceedings concerning the trust relationship, including contentious breach of trust proceedings.<sup>3</sup> Other courts have held them not to extend to contentious breach of trust

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*Lewin on Trusts* (Sweet & Maxwell, 19th edn, 2015), [11-047–11-076] (nb 1st Supplement); L Collins (gen ed), *Dicey, Morris & Collins on the Conflict of Laws* (Sweet & Maxwell, 15th edn, 2012) [29R-068–29-074] (nb 3rd Cumulative Supplement).

<sup>2</sup>See, eg the jurisdiction clause under discussion in *E.M.M.*, *supra* n 1:

[t]his declaration has been made by the original trustee in the island of Guernsey and the trusts hereby created are established under the law of the island of Guernsey *and the rights of all parties and the construction and effect of each and every provision hereof shall be subject to the exclusive jurisdiction of the Royal Courts of the island of Guernsey* and construed and regulated only according to the law of the island of Guernsey notwithstanding that one or more of the trustees may be or become from time to time resident or domiciled elsewhere than in the island of Guernsey ... (*ibid.*, 210; emphasis added);

that under discussion in *In re Representation of AA and the D Discretionary Trust*, *supra* n 1:

[...] this Trust is established under and shall be governed in all respects by the laws of the Island of Jersey which shall be the proper law of this Trust *and the courts thereof shall be the forum for the administration of this Trust* (*ibid.*, [3]; emphasis added);

and that under discussion in *Crociani*, *supra* n 1:

[...] the Trustees shall have power [...] to resign [...] and to appoint a new trustee [...] and upon such appointment being made [...] the Trust Fund shall continue to be held upon the trusts hereof but subject to and governed by the law of the country of residence or incorporation of such new Trustee or Trustees and thereafter *the rights of all persons and the construction and effect of each and every provision hereof shall be subject to the exclusive jurisdiction of and construed only according to the law of the said country which shall become the forum for the administration of the trusts hereunder.* (*ibid.*, [7]; emphasis added)

See also the quote from the jurisdiction clause in *Green v Jernigan*, next note.

<sup>3</sup>*Koonmen*, *supra* n 1, [47], *Green v Jernigan* [2003] BCSC 1097, (2003) 18 BCLR (4th) 366, [34]–[40] (though note the jurisdiction clause in this case was much put in stronger, more binding terms than those at issue in the other cases mentioned in this note, in n 1 and in the following note, including, beyond the usual references to the proper law and the forum for administration, a declaration that "the parties hereto submit to the jurisdiction of the High Court of St. Christopher and Nevis or its superior court in respect of all disputes which may arise in respect of this deed"); *Re A Trust* [2012] Bda LR, 79 (SC Bermuda) (see comment: N Le Poidevin and K Robinson, "Jurisdictional Conundrums" (2013) 19(8)

proceedings filed by beneficiaries against their trustees,<sup>4</sup> a view favoured by Paul Matthews.<sup>5</sup> Yet other courts have held them not to be concerned with jurisdiction at all, but rather with indicating the country where the trust was to be administered.<sup>6</sup>

The proper ambit of trust jurisdiction clauses can also depend on questions of policy: should the person drafting the trust instrument – perhaps the settlor’s advisor or the trustee – be able to dictate an exclusive forum to beneficiaries who did not execute the instrument and have not yet been born, or selected, when that instrument was drafted? Should drafters be able to dictate an exclusive forum to successor trustees and other trust officers appointed subsequently to the initial drafting of the instrument? One could, of course, tell beneficiaries and subsequently appointed trust officers, “if you do not like the trust provisions, disclaim your benefit under the trust, or refuse to be appointed as trustee, protector or some other trust officer; you have to take the benefit with the burden”. This, essentially, is the view of Jonathan Harris,<sup>7</sup> Gareth Jones,<sup>8</sup> Geraint Thomas and Alastair Hudson<sup>9</sup> and the authors of *Lewin on Trusts*<sup>10</sup> and *Underhill and Hayton’s Law Relating to Trusts and Trustees*.<sup>11</sup> The Jersey Court of Appeal adopted it in *Koonmen v Bender*<sup>12</sup> and *Crociani v Crociani*,<sup>13</sup> as did the Supreme Court of British Columbia in *Green v Jernigan*.<sup>14</sup> But should beneficial entitlements

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*Trusts & Trustees* 853). A similar view was advocated in Lewin, *supra* n 1, [11-050], [11-055]; But see criticism in Harris, *supra* n 1, [1.301].

<sup>4</sup>*In re Representation of AA* (n 1) (see comments: J Harris, “Jurisdiction and Judgments in International Trust Litigation – Surveying the Landscape” (2011) 17 *Trusts & Trustees* 250–255; Harris, *supra* n 1, [1.44–1.50], [1.302]; R MacRae and A Saunders, “In the Matter of the Representation of AA – Trust Jurisdiction Clauses in Jersey Trusts” (2011) 17 *Trusts & Trustees* 302; G Thomas and A Hudson, *The Law of Trusts* (Oxford University Press, 2nd edn, 2010), [44.73–44.75]). The same approach was adopted in dicta in *Helmsman Limited and Rothman Trustee Company Limited v Bank of New York Trust Company (Cayman) Limited* [2009] CILR 490, [10]–[12] (Grand Court of the Cayman Islands).

<sup>5</sup>P Matthews, “What Is a Trust Jurisdiction Clause?” (2003) 7 *Jersey Law Review* 232, [21]–[22].

<sup>6</sup>*Crociani v Crociani* [2014] JLR 426, [83], [94] (Jersey CA). The Privy Council accepted in *Crociani*, *supra* n 1, [17] that “the expression ‘forum of administration’ can refer to the court which is to enforce the trust”, while holding that it can also indicate “the place where the trust is administered in the sense of its affairs being organised”. The Privy Council’s view was applied in *Representation of the Manor House Trust and the Russian Trust* [2015] JRC 208, [45]–[48].

<sup>7</sup>Harris, *supra* n 1, [1.297].

<sup>8</sup>G Jones, “Trusts on Tour” (2015) 19 *Jersey and Guernsey Law Review* [53].

<sup>9</sup>Thomas and Hudson, *supra* n 4, [44.78], [44.83].

<sup>10</sup>Lewin, *supra* n 1, [11-058].

<sup>11</sup>D Hayton, P Matthews and C Mitchell, *Underhill & Hayton: Law of Trusts and Trustees* (LexisNexis, 19th edn, 2016) [100.225].

<sup>12</sup>*Koonmen*, *supra* n 1, [49].

<sup>13</sup>*Crociani* (CA), *supra* n 6, [115].

<sup>14</sup>*Green*, *supra* n 3, [48].

really be made conditional on beneficiaries' submitting to a faraway exclusive forum, even where exclusivity means that in practice beneficiaries have no realistic recourse against their trustees and other trust parties?

This article reviews the problems raised by trust jurisdiction clauses and proposes solutions. Section B reviews the views offered thus far on the topic, including in the EU Judgments Regulation (recast), in case law and in the academic and practitioner literatures. Section C delineates proposed solutions, building on the views in the cases and the literature in an attempt to pull them into a systematic framework. It is proposed that whether a trust-related proceeding is or is not subject to any jurisdiction clause in the trust instrument should be decided according to two key criteria: the proximity of the parties to the proceeding to the drafting of the trust instrument and the nature of the issues under discussion in the proceedings. Other factors which should be taken into account are the likely costs of proceedings before the chosen court and elsewhere, the extent to which the chosen court offers a realistic prospect of a fair hearing, and the extent to which any court orders granted, whether by the court named in a jurisdiction clause or another court, are likely to be enforceable in practice. Section D concludes the article.

## **B. Existing views**

This section reviews the views aired so far regarding the proper ambit of trust jurisdiction clauses, focusing on three key issues: the application of trust jurisdiction clauses to beneficiaries, to successor trustees and to trust challengers – persons who, not being beneficiaries, litigate in order to obtain access to settled funds.

### **1. *Should jurisdiction clauses bind beneficiaries?***

Take a trust where all the beneficiaries are resident in France, while the trust instrument grants exclusive jurisdiction over all proceedings having to do with the trust to a Mauritius court. Must beneficiaries who want to sue their trustees sue in Mauritius, a distant jurisdiction with which they have no connections beyond the trust jurisdiction clause? Two principal, and very different, views have been aired regarding the subjection of beneficiaries to trust jurisdiction clauses. On one view, which expands the ambit of application of such clauses to include all beneficiaries and which I will call the expansive view, beneficiaries have either to take the benefit allotted them along with any burdens the settlor chose to impose, including jurisdiction clauses, or give up both benefit and burden.<sup>15</sup> As Conaglen

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<sup>15</sup>See, for cases and literature espousing this view, sources cited in nn 7–14; Lewin, *supra* n 1, [11-067]. See also N Williams, “Jurisdiction in the Dock” (2015) 13 *Trust Quarterly Review* 30, emphasizing that the courts’ inherent jurisdiction “to supervise and if necessary intervene in the administration of trusts” (*Schmidt v Rosewood Trust Ltd* [2003] UKPC 26,

pointed out in his study of trust arbitration clauses, some US courts have recently adopted this view by way of a doctrine of “direct benefits estoppel”, providing that “a nonsignatory may be compelled to arbitrate where the nonsignatory ‘knowingly exploits’ the benefits of an agreement containing an arbitration clause, and receives benefits flowing directly from the agreement”.<sup>16</sup>

Additional arguments have been brought for the expansive view. Subjecting beneficiaries to jurisdiction clauses is said to prevent “an untidy fragmentation of proceedings”.<sup>17</sup> It is further said to embody the merit of judicial restraint: judges should enforce trusts, including any jurisdiction clauses, as written, not rewrite them by excluding certain proceedings from the clauses’ ambit of application.<sup>18</sup> Finally, as jurisdictions chosen are often those where trustees reside and trust documentation is kept, having clauses bind can be convenient for trustees. This convenience may translate into comparatively low litigation costs.<sup>19</sup> To the extent that litigation costs trustees bear will be paid or reimbursed from the trust fund, minimizing them suits beneficiaries’ interests, which may to some degree counterbalance the inconvenience beneficiaries may suffer as a result of being bound by jurisdiction clauses in favour of jurisdictions other than those where they reside.<sup>20</sup>

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[2003] 2 AC 709, [51]) should only operate subject to the provisions of the trust deed, including any jurisdiction clauses. A similar theory of benefit and burden has been developed as a basis for subjecting third parties to contractual jurisdiction clauses: *Coastal Steel Corp v Tilghman Wheelabrator Ltd* 709 F2d 190 (3rd Cir 1983).

<sup>16</sup>*Belzberg v Verus Invs. Holdings Inc.* (2013) 999 NE2d 1130, 1134 (NY CA) quoted in M Conaglen, “The Enforceability of Arbitration Clauses in Trusts” (2015) 74 *Cambridge Law Journal* 474. As Conaglen explains, US courts developed “direct benefits estoppel” either so as to conclude that trust beneficiaries “agree” to arbitration, as required under US arbitration law in order that they be subject to arbitration (*Rachal v Reitz* (2013) 403 SW3d 845 (TX SC)), or so as to impute an intention to arbitrate on their part (*Belzberg*, 1133). See also *In re Kellogg Brown & Root LLC* (2005) 166 SW3d 732 (Texas SC); D Faust, “International Trust Litigation, Jurisdiction and Enforcement”, in A Kaplan (ed), *Trusts in Prime Jurisdictions* (Globe Law and Business, 4th edn, 2016), 485; M Radford, “Trust Arbitration in the USA”, in S I Strong (ed) *Arbitration of Trust Disputes* (Oxford University Press, 2016), [8.11]–[8.44].

<sup>17</sup>Harris, *supra* n 4; Harris, *supra* n 1, [1.297]. The point that fragmentation is undesirable was made in the House of Lords apropos an arbitration clause: *Premium Nafta Products Limited v Fili Shipping Company Limited* [2007] UKHL 40, [2007] BusLR 1719, [7], [13] (Lord Hoffmann), [28] (Lord Scott).

<sup>18</sup>Williams, *supra* n 15.

<sup>19</sup>Faust, *supra* n 16, 490.

<sup>20</sup>Where litigation “brought against a settlor, trustee or beneficiary” is subject to the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1 (hereinafter: Regulation (recast)), art 7(6), such litigation is, in the absence of a jurisdiction clause, to be brought “in the courts of the Member State in which the trust is domiciled” (*ibid*). The Regulation provides, in art 63(3), that “[i]n order to determine whether a trust is domiciled in the Member State

The expansive view can be seen to underlie Article 25(3) of the recent EU Judgments Regulation (recast), which provides that:

the court or courts of a Member State on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between those persons or their rights or obligations under the trust are involved.<sup>21</sup>

This provision appears to create a rather incoherent state of affairs. On the one hand, actions beneficiaries bring against their trustees regarding trust matters are to be governed by jurisdiction clauses, even if the clause grants jurisdiction to a court beneficiaries are likely to find inaccessible, in order to make court access by beneficiaries difficult. Further, read literally, the Article seems to turn all clauses conferring jurisdiction on a member state court into *exclusive* jurisdiction clauses,

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whose courts are seised of the matter, the court shall apply its rules of private international law". Under English private international law, "[a] trust is domiciled in a part of the United Kingdom if and only if the system of law of that part is the system of law with which the trust has its closest and most real connection" (Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, sch 1, [12]). The Court of Appeal stated in *Gómez v Gómez-Monche Vives* [2008] EWCA Civ 1065, [2009] Ch 245 that

where the governing law of the trusts had been expressly chosen by the parties, this would almost always be the system of law with which the trust had its closest and most real connection for the purposes of determining its domicile under art 5(6)

of the predecessor Regulation (Dicey, *supra* n 1, [29-072]). It, therefore, appears that where a jurisdiction clause bestows jurisdiction on the courts of the jurisdiction the law of which is expressly chosen to govern the trust, whether the jurisdiction clause is to be applied or dis-applied makes no difference regarding the court having jurisdiction over litigation brought against settlors, trustees or beneficiaries.

<sup>21</sup>Regulation (recast). See also *ibid*, art 31(2)–(4); and discussion in D Hayton, "Trusts in Private International Law" (2014) 366 *Recueil des Cours de l'Académie de Droit International de la Haye* 17, 50–51; Underhill and Hayton, *supra* n 11, [100.225]; F Garcimartin, "Prorogation of Jurisdiction", in A Dickinson and E Lein (eds), *The Brussels I Regulation Recast* (Oxford University Press, 2015), 302, 303–304 (stating that "Art 25 (3) establishes the validity and effectiveness of [choice-of-court clauses in trust instruments], resulting in the exclusive jurisdiction of the designated court or courts to rule on any controversy deriving from the "internal relationships" in the trust"); A Briggs, *Private International Law in English Courts* (Oxford University Press, 2014) 206, 241–245, 252–253, 285–286; A Briggs, *Civil Jurisdiction and Judgments* (Informa Law from Routledge, 6th edn, 2015), [2.147]; G Cuniberti, "Lis pendens and Jurisdiction Clauses – Open Issues", in B Hess, M Bergstrom and E Storskrubb (eds), *EU Civil Justice – Current Issues and Future Outlook* (Hart Publishing, 2016), 26; Faust, *supra* n 16, 492. See also comments on the predecessor Judgments Regulation, Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1, in Harris, *supra* n 1, [1.09–1.98].

even if not drafted as such.<sup>22</sup> While the parallel provision concerned with contractual jurisdiction clauses provides that “[contractually bestowed] jurisdiction shall be exclusive unless the parties have agreed otherwise”,<sup>23</sup> Article 25(3) seems to say that all trust jurisdiction clauses, however formulated, are to have an exclusive effect. While Proudman J has recently held, apropos the similar text of Article 23(4) of the predecessor Judgments Regulation, that it:

does not contain any magic which elevates a non-exclusive jurisdiction clause into an exclusive one. The reference to “exclusive jurisdiction” simply means that the parties’ choice of forum should take effect to the exclusion of jurisdictions identified by the other articles of the Brussels Regulation,<sup>24</sup>

it is not clear how an exclusion of those other jurisdictions could not result in the chosen jurisdiction becoming exclusive. On the other hand, Article 25(3) may be read to provide that trust-related proceedings brought against trust parties other than the classical triad of settlor, trustee and beneficiaries, such as protectors, appointors, enforcers and trust committee members, are outside the ambit of any jurisdiction clause in a trust instrument, unless the defendant is also settlor, trustee or beneficiary.<sup>25</sup>

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<sup>22</sup>Lewin, *supra* n 1, [11-073].

<sup>23</sup>Regulation (recast), *supra* n 20, art 25(1).

<sup>24</sup>*Plaza BV v The Law Debenture Trust Corp. plc* [2015] EWHC (Ch) 43, [74]. Proudman J took this construction of the term “exclusive jurisdiction” from Hoffman J’s decision in *Kurz v Stella Musical Veranstaltungen GmbH* [1992] Ch 196, 203–204. At the time of *Kurz*, the term appeared in art 17 of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 (the Brussels Convention). See discussion in Underhill and Hayton, *supra* n 11, [100.225].

<sup>25</sup>See discussion in Underhill and Hayton, *supra* n 11, [100.225], [100.229]; D Hayton, “The Increasing Significance of Conflict of Laws Issues” (2014) 20 *Trusts & Trustees* 1069, 1074:

[i]t would seem that if a settlor or a beneficiary is also a protector with rights and obligations as such under the trust, then the relevant court would have jurisdiction to deal with these matters affecting the settlor or beneficiary as protector as well as matters affecting the settlor or beneficiary as settlor or beneficiary. Indeed, such a distinction might be unrealistic when the rights as protector were conferred upon the person because being the settlor or the particular beneficiary.

Cf., writing apropos the similar language in art 23(4) of the predecessor Regulation, Harris, *supra* n 1, [1.45] (suggesting that trust officers other than trustees could be seen as having “reached an ‘agreement’ with the settlor to be bound by the jurisdiction clause upon accepting office”, thus coming within art 23(1) of the predecessor Regulation). And see Gómez (n 20), holding that a fiduciary appointor, empowered to distribute a trust fund between fixed beneficiaries, was not a “trustee” within art 5(6) of the predecessor Regulation, which gave the courts of the Member State in which a trust is domiciled jurisdiction over suits against settlors, trustees and beneficiaries, as such (see comment: Dicey, *supra* n 1, [29-072] (nb 3rd Cumulative Supplement); D Hayton, “Trust Disputes Within Article 5(6) of Brussels I” (2009) 23 *Trust Law International* 9, pointing out that arts 5(6) and 23(4) of the predecessor



The other key view which has been aired on the proper ambit of trust jurisdiction clauses is more restrictive, rejecting, for actions involving beneficiaries, the “taking the benefit with the burden” view. The Privy Council took this alternative perspective recently in *Crociani v Crociani*,<sup>26</sup> opining that because trusts are not contracts and beneficiaries are often not consenting parties to the trust instrument,

[I]t should be less difficult for a beneficiary to resist the enforcement of an exclusive jurisdiction clause in a trust deed than for a contracting party to resist the enforcement of such a clause in a contract. ... in the case of a trust deed, the weight to be given to an exclusive jurisdiction clause is less than the weight to be given to such a clause in a contract. ... the strength of the case that needs to be made out to avoid the enforcement of such a clause is less great where the clause is in a trust deed. ... Where ... it is a beneficiary who wishes to avoid the clause and the trustees who wish to enforce it, one would normally expect the trustees to come up with a good reason for adhering to the clause, albeit that their failure to do so would not prevent them from invoking the presumption that the clause should be enforced.<sup>27</sup>

The Privy Council mentioned, as a justification for its view, “the court’s inherent jurisdiction to supervise, and if necessary to intervene in, the administration of trusts”,<sup>28</sup> which exists “primarily to protect the interests of

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Regulation (the current arts 7(6) and 25(3)) contain text which has been carried, with only minor changes, since the 1978 Accession Convention by which the UK and Ireland acceded to the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments. As protectors were not in 1978 a familiar element of trust practice, they are not mentioned in either sub-Article). The current authors of Underhill and Hayton, *supra* n 11, point out at [100.87] that unlike the former art 5(6), the current art 7(6) no longer requires, as a condition for the courts of the Member State where a trust is domiciled having jurisdiction, that settlors, trustees and beneficiaries are sued as such. Jurisdiction may now be acquired over a suit against a settlor, trustee or beneficiary even where the suit pertains to activities of that person in a different capacity, such as protector or appointor. Cf. Briggs, *Civil Jurisdiction*, *supra* n 17, [2.221].

<sup>26</sup>*Crociani*, *supra* n 1.

<sup>27</sup>*Ibid*, [35]–[36]; a similar approach has earlier been propounded in Jersey: E.M.M., *supra* n 1, [18]–[19]. See discussion in N Le Poidevin, “*Crociani v Crociani*: Trust Jurisdiction Clauses” (New Square Chambers), <http://www.newsquarechambers.co.uk/articles/27/trust-jurisdiction-clauses-crociani-v-crociani> accessed on 11 June 2017, arguing at 4 that since:

the only “good reason” for enforcing the clause which comes to mind is that the courts of another country are a more convenient forum ... [which] would justify a stay in their favour even if there were no jurisdiction clause[, i]t remains to be seen whether the Privy Council’s approach has emasculated such clauses.

For the same view, see also L Tucker, N Le Poidevin and J Brightwell, *Lewin on Trusts, First Supplement to the 19th Edition* (Sweet & Maxwell, 2015), [11-060]; E Cumming, “Clause and Effect: Landmark Decision on Jurisdiction Clauses in Trusts” (2015) *Private Client Business* 240. Both Cumming and Le Poidevin appeared before the Privy Council in *Crociani*.

<sup>28</sup>*Crociani*, *supra* n 1, [36], quoting from *Schmidt*, *supra* n 15, [51].

beneficiaries”.<sup>29</sup> The Privy Council presumably meant to say that because all courts have such a paternalist jurisdiction over trusts, and should exercise it in appropriate cases to protect beneficiaries, courts other than that indicated in a jurisdiction clause should, when seised of a beneficiary’s action against its trustee, be slower to stay the proceedings before them than in a comparable case of a contractual jurisdiction clause. The Privy Council’s view can be explained as based on the vulnerability of many beneficiaries: it is because they tend to be ill-equipped to protect themselves from the sophisticated relatives and professionals controlling their money in a fiduciary capacity that courts have an inherent jurisdiction to protect them, and that jurisdiction clauses should bind them less forcefully than they bind contractual parties.<sup>30</sup>

Authors have mentioned additional justifications for the restrictive view, beyond some beneficiaries not having consented to the trust instrument or participated in its formulation.<sup>31</sup> Lutterman noted that as trustees are often nowadays given wide-ranging powers to amend the trust instrument, if beneficiaries are to be held to jurisdiction clauses, they might be held not just to settlors’ choices of inaccessible courts but also to similar choices by trustees.<sup>32</sup> While an argument can be made that, given the donative nature of family trusts and the common law tradition’s characteristic attachment to donative freedom, enabling settlors to determine the extent of their bounty, settlors’ choices of inaccessible courts should be respected, similar choices by trustees, adopted to make breach of trust litigation difficult, hardly merit a similar respect. Where trustees exercise a power of amendment in order to make breach of trust litigation difficult, the exercise may be held of no effect as a fraud on a power.<sup>33</sup>

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<sup>29</sup>*Crociani, supra n 1*, [36].

<sup>30</sup>For the law governing contractual jurisdiction clauses see Regulation (recast), *supra n 20*, art 25(1); *Perella Weinberg Partners UK LLP v Codere SA* [2016] EWHC 1182 (Comm); Dicey, *supra n 1*, [12R-098]–[12-168] (nb changes made to these paragraphs in the 3rd Cumulative Supplement); Briggs, *Private International Law, supra n 21*, [4.179–4.218]; A Briggs, “The Subtle Variety of Jurisdiction Agreements” [2012] *Lloyd’s Maritime and Commercial Law Quarterly* 364; Garcimartin, *supra n 21*, 277. For US law on point see *The Bremen v Zapata Off-Shore Co.*, 407 US 1 (1972); *Carnival Cruise Lines, Inc. v Shute*, 499 US 585 (1991); *Atlantic Marine Const. v. US Dist. Court*, 134 SCt 568 (2013).

<sup>31</sup>Some beneficiaries do consent to the trust instrument, because they are also settlors or trustees and, as such, parties to the instrument, or because they consent to the instrument in another instrument, such as a simultaneously concluded contract.

<sup>32</sup>He noted that “if there is a jurisdiction clause the trustees can often amend it without reference to anyone else (albeit that they ought to act within the scope of their fiduciary duties)”: L Lutterman, “Jurisdiction Clauses in Trust Instruments: Creating Certainty or Muddying the Waters?” (2011) 17 *Trusts & Trustees* 293.

<sup>33</sup>For the “fraud on a power” doctrine see *Topham v The Duke of Portland* (1864) 11 HL Cas 32; 11 ER 1242; *Cloutte v Storey* [1911] 1 Ch 18; *Vatcher v Paull* [1915] AC 372, 378 (PC); *Hillsdown Holdings plc v Pensions Ombudsman* [1997] 1 All ER 862; *Klug v Klug* [1918] 2 Ch 67; and see discussion in *Lewin, supra n 1*, [29-289]–[29-316]; MJ

Complementing the Privy Council's normative approach, Paul Matthews responded to the benefits/burdens point from a conceptual point of view, arguing that the "burdens" of a trust, such as the obligation to remunerate the trustee and indemnify him or her against their reasonable costs and expenses, are not personal obligations or liabilities of the beneficiaries, so they should not be personally bound by trust jurisdiction clauses either.<sup>34</sup> In my view, it is not clear that the analogy from trustee remuneration and indemnification to jurisdiction clauses provides a convincing answer to the benefits/burdens view. While many (not all<sup>35</sup>) beneficiaries are not liable to personally remunerate or indemnify the trustee, the subjection of beneficiaries to trust jurisdiction clauses could be seen as part of the "burden" of a trust in a wider, less technical sense: the term "burden" as used by proponents of the benefits/burdens view should be understood as referring to the fact that participating in proceedings held outside one's jurisdiction of residence is costly and cumbersome, not to any obligation or liability owed by the beneficiaries. As Matthews says, in other situations where a person is entitled to a benefit twinned with a burden, "that person [is not] *personally* liable for the obligation [or burden] in question":<sup>36</sup> he may choose to forgo both benefit and burden. As proponents of the benefits/burdens view observe, however, the same is true of trust beneficiaries and trust jurisdiction clauses: if beneficiaries do not like their recourse to a court being directed to the court named in the jurisdiction clause, they may disclaim their entitlement. The doctrinal argument against the benefits/burdens view has more recently been discussed by Conaglen, apropos trust arbitration clauses:

[T]he English doctrine [of benefit and burden] ... does not require that everyone who receives a benefit must accept an associated burden. The burden is to be suffered where it is made a condition of taking the benefit ... but "[t]he mere fact that the same instrument creates both the benefit and the burden, or that they both relate to the same subject matter, cannot possibly ... make the one conditional on the other."<sup>37</sup> In other words, it is a question of construction whether the benefit is a conditional right. Unless the terms of the trust state so explicitly, it will be unusual for a beneficiary's rights to be found to be conditional on submission of disputes to arbitration, as a beneficiary's rights normally arise as soon as the trust is created: they are not conditional on the beneficiary's failure to disclaim the trust ... The mere fact of being a beneficiary cannot be sufficient choice [to create such conditionality], given

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Ashdown, *Trustee Decision Making: The Rule in Re Hastings-Bass* (Oxford University Press, 2015) 157–182.

<sup>34</sup>Matthews, *supra* n 5, [32].

<sup>35</sup>Beneficiaries entitled, individually (as with so-called simple trusts) or collectively, to terminate the trust under the rule in *Saunders v Vautier* are so liable: *Hardoon v Belilios* [1901] AC 118, and discussion in Lewin, *supra* n 1, [21-056]–[21-057]; Underhill and Hayton, *supra* n 11, [81.37]–[81.45]; JA McGhee (gen ed), *Snell's Equity* (Sweet & Maxwell, 33rd edn, 2015) [7-035].

<sup>36</sup>Matthews, *supra* n 5, [32].

<sup>37</sup>*Tito v Waddell (No. 2)* [1977] Ch. 106, 303.

that status can arise without the beneficiary even being aware of the trust, but it could potentially be argued that, where a beneficiary seeks to assert his or her rights under the trust, thereby choosing to take its benefit, the burden of an arbitration clause (if it is relevant to the assertion of those rights) could apply.<sup>38</sup>

With most commentators and several courts in favour of the benefits/burdens view and the Privy Council to the contrary, the question of trust jurisdiction clauses binding beneficiaries is presently hanging in the balance. Before I offer my view of the question in Section C, I briefly review views aired regarding the application of such clauses to two other types of parties: successor trustees and trust challengers.

## 2. *Should jurisdiction clauses bind successor trustees?*

Some commentators have addressed the question whether trust jurisdiction clauses should bind trustees who, not having been original parties to the trust instrument, undertake the trusteeship subsequently to its execution. Harris and the authors of *Lewin on Trusts* believe that the benefits/burdens view seems easily applicable to professional, for-profit trustees, even if subsequently appointed: the burden of any applicable jurisdiction clause can be seen as part of what they get paid for.<sup>39</sup> Further, since where successor trustees reside in a different jurisdiction than their predecessors, trustee replacement is often accompanied by a change in the jurisdiction to which any jurisdiction clause in the instrument points to the new trustees' jurisdiction of residence and professional activity,<sup>40</sup> successor trustees are likely to find jurisdiction clauses a protection against relevant proceedings being held before courts which are, from their perspective, less easily accessible. A contrary view, that trust jurisdiction clauses should not always bind successor trustees, was expressed by the Jersey Royal Court in *E.M.M. Capricorn Trustees v Compass Trustees*. The court held that because trust beneficiaries should be able, more easily than contractual parties, to sue in courts other than that prescribed in the clause,<sup>41</sup> and because successor trustees effectively sue on behalf of all the beneficiaries,

[w]e think it would be difficult, if not impossible, to adopt a different approach for actions brought by trustees as compared with actions brought by beneficiaries. In some cases, it might be a matter of chance as to whether an action for breach of trust against a former trustee was brought by the present trustee or by a beneficiary.<sup>42</sup>

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<sup>38</sup>Conaglen, *supra* n 16, 475; see also Tan, *supra* n 1, 483, and sources cited there, focusing, like Conaglen, on trust arbitration clauses.

<sup>39</sup>Harris, *supra* n 1, [1.45], [1.297]; Lewin, *supra* n 1, [11-067].

<sup>40</sup>Trustees and jurisdictions of choice are often replaced together: see clause 12 of the trust instrument in *Crociani*, *supra* n 1.

<sup>41</sup>*E.M.M.*, *supra* n 1, [18]–[19].

<sup>42</sup>*Ibid*, [17].

As with the application of trust jurisdiction clauses to beneficiaries, then, the question of their application to successor trustees is presently hanging in the balance, with most commentators arguing that such clauses should bind successor trustees and a single influential court holding to the contrary. I offer my view of the question in Section C.

### 3. *Should jurisdiction clauses bind trust challengers?*

Trust challengers are persons who, not being beneficiaries, litigate in order to obtain access to trust funds, whether by having a court declare the trust void or avoid it, by having a court declare the trust fund to be subject to the claimants' rights, by being added as beneficiaries, or by a court varying the trust in their favour. Given trust challengers' adversary posture vis-à-vis the trust and the fact that the legal basis for their claims rests not in the trust instrument, but in matrimonial law, the law of succession, contract, tort, tax, the law of debtor and creditor or other law, their not being bound by any jurisdiction clause in that instrument appears the more intuitive position. This intuition is bolstered by the Court of Appeal having held in *Charalambous v Charalambous*, an action by a wife for variation of a post-nuptial settlement under the Matrimonial Causes Act 1973,<sup>43</sup> that the Jersey jurisdiction clause in the trust instrument:

cannot extend beyond an election for the law of Jersey in determining any question as to the construction or operation of the settlement qua settlement.<sup>44</sup> Th[e] power to vary is derived not from the settlement but from the matrimonial regime of the state. Equally the right to seek variation derives not from the settlement but from the matrimonial regime of the jurisdiction that dissolves the marriage.<sup>45</sup>

The view that trust challengers should not be bound by jurisdiction clauses in the trusts they challenge is further bolstered by recent empirical findings showing that some practitioners grant jurisdiction over trusts to certain courts because they hope those courts will protect the trust from precisely such challenges. A worldwide survey of service providers to trusts which I conducted in 2014/2015 included a question as to why forum choice clauses, otherwise known as trust jurisdiction clauses, are included in trust instruments. 21.8% of the 371 practitioners who provided an answer to this question said such clauses are used because the chosen

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<sup>43</sup>s 24(c).

<sup>44</sup>Despite the trust instrument including separate choice of law and choice of forum clauses, the court treated the choice of forum clause as a choice of law clause.

<sup>45</sup>*Charalambous v Charalambous* [2004] EWCA Civ 1030, [2005] 2 WLR 241, [30] (see comments: J Harris, "Variation of Trusts Governed by Foreign Law upon Divorce" (2005) 121 *Law Quarterly Review* 16; J Rimmer, "Somewhere, Across the Sea" [2005] 2 *Private Client Business* 88); see also Lewin, *supra* n 1, [11-068]. As Lady Arden noted, *ibid* [54], to have a variation order obtained in England bind Jersey trustees, separate proceedings will have to be taken out against them, probably in Jersey.

jurisdiction is unlikely to recognise foreign rules of law adverse to the trust, while 16.2% of the same respondents said such clauses are used because the chosen jurisdiction is unlikely to recognise foreign court orders adverse to the trust. I then held a series of extended interviews with 28 further service providers to trusts, resident and practicing in five jurisdictions. Two of the 28 expressly said they have trusts with which they are involved subjected to the jurisdiction of courts which they expect to protect the trust from hostile actions.<sup>46</sup> Given that at least some actions challenging trusts are meritorious, the existence of jurisdiction planning intended to rebuff trust challengers supports trust jurisdiction clauses not binding such challengers.

On the other hand, one argument for jurisdiction clauses binding trust challengers is that where a jurisdiction clause exists, a challenger victory before a court other than that in the chosen jurisdiction would have to be followed by enforcement proceedings before the chosen court, at least where the trust assets are located in the jurisdiction of the chosen court. The chosen court may also be likelier than others to have all the relevant parties before it. Further, as Lawrence Collins J (as he then was) held in *NABB Bros. Ltd. v Lloyds Bank Int'l (Guernsey) Ltd.*, the chosen court:

would not only be able to give directions to the trustee, but it would also be in a position to consider whether any of the beneficiaries should be parties to a claim by the claimant (and, if so, which), and how to protect the interest of minor and unborn beneficiaries.<sup>47</sup>

Despite the intuitive appeal of jurisdiction clauses not binding trust challengers, then, there are cogent arguments for both that and the converse position. I will attempt to find the balance of these arguments in Section C.

### C. A systematic proposal

Having summarized the key views aired so far on the proper ambit of trust jurisdiction clauses, I will now propose a series of solutions, striving for a more systematic approach than those advanced hitherto while identifying and building on the guiding principles in the cases and the literature. On this basis, it is suggested that two criteria are of primary importance for identifying whether given proceedings ought or ought not be governed by a trust jurisdiction clause.

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<sup>46</sup>For technical information about my survey of 2014/2015 and interview series of 2015/2016 see A Hofri-Winogradow, "The Demand for Fiduciary Services: Evidence from the Market in Private Donative Trusts" (2017) 68 *Hastings Law Journal* 931, 965–978. For the survey itself, see [goo.gl/hyFy4i](http://goo.gl/hyFy4i). The question concerned with forum choice clauses was Question 18. To preserve confidentiality, the names of the two interviewees who said they grant jurisdiction over trusts to courts which will protect the trust from hostile actions cannot be disclosed; one was English, the other Swiss.

<sup>47</sup>[2005] EWHC 405 (Ch), [2005] ILPr 3.

One is the proximity of the parties to the proceedings to the drafting of the trust instrument: did they participate in the drafting, join the trust framework subsequently to the drafting with knowledge of the instrument's contents, or have nothing to do with the trust framework? The other key criterion is the nature of the issues under discussion in the proceedings: whether the proceedings are part of the routine running of the trust, an attempt to undermine the trust or an attack on an officer's functioning within the trust framework, without an attempt to topple that framework. It is proposed that whenever a court, or other decision-maker, has to form a view as to whether trust-related proceedings filed before it are, or are not, subject to a trust jurisdiction clause, the decision-maker evaluate the proceedings based on these two criteria. The rest of this section works out each of the two in detail, as well as addressing several additional considerations which decision-makers should take into account in assessing the ambit of a given jurisdiction clause: (i) the likely costs of proceedings before the chosen court and elsewhere, including difficulties over security for costs, (ii) whether the clause points to a jurisdiction the law of which governs the trust, (iii) whether the jurisdiction the law of which governs the trust has enacted statutory provisions to the effect that where trusts are governed by its law, its courts shall neither recognize nor enforce foreign court orders concerning those trusts, (iv) the extent to which the chosen court offers a realistic prospect of a fair hearing and (v) whether the object of the proceedings is tied to a specific jurisdiction, other than that named in the clause. The reasons for not applying a trust jurisdiction clause or "disapplication factors" discussed throughout this section should be applied cumulatively: the presence of one such factor should suffice to oust proceedings from the clause's ambit of application, even if other characteristics of the parties, the chosen court or the proceedings point towards application.

### **1. Criterion 1: the parties' proximity to the trust drafting process**

The first of the two proposed primary criteria for identifying whether given proceedings should or should not be seen as within the ambit of a given trust jurisdiction clause is the proximity of the parties to the proceedings to the drafting of the trust instrument. The operative principle powering this criterion is that the closer a party was to participation in the drafting of the instrument, the more appropriate is subjecting him, her or it to any jurisdiction clause in that instrument. We will now review the results of applying this criterion across the key types of parties to trust-related proceedings.

First, where an action is filed between persons who were consenting parties to the trust instrument, any jurisdiction clause in the instrument should, as a result of their consent, bind them.<sup>48</sup> Where the settlor is also a beneficiary, a trust protector

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<sup>48</sup>Lewin, *supra* n 1, [11-057]; and see V Black and SGA Pitel, "Forum Selection Clauses: Beyond the Contracting Parties" (2016) 12 *Journal of Private International Law* 26.

or occupies another position within the trust structure, any proceedings between that person or body and the trustee should be subject to the jurisdiction clause, even where the settlor sues or is sued in his or her capacity as beneficiary, as protector or in another capacity other than that of settlor.<sup>49</sup> Further, where proceedings are filed between persons who were consenting parties to the trust instrument, the disapplication factors discussed throughout this section should apply with a reduced force. The parties' consents to the trust instrument may, so long as they were freely given and were based on the parties' consideration of correct and sufficient information, quite often override such concerns as the cost of proceedings before the court indicated in the jurisdiction clause and the accessibility of that court. Thus, such proceedings may be subjected to a trust jurisdiction clause even, for example, if a court other than that named in the clause could resolve the dispute in question or provide the parties with advice more affordably or more conveniently than the court named in the clause.

Claims *by* beneficiaries who never consented to the trust instrument, that is, who were not settlors, were not otherwise consenting parties to the instrument, and neither were nor are trustees or other trust officers, are a less obvious case. I have already discussed the key views others put forward regarding whether such non-consenting beneficiaries should be bound by jurisdiction clauses. The most problematic cases are likely to be ones where settlors, trustees or others able to determine the forum having jurisdiction over a trust intentionally invest a forum some or all beneficiaries would find highly inaccessible with exclusive jurisdiction over proceedings concerning the trust. That some such cases occur in practice is apparent from one respondent to my survey of trust service providers having written that he or she use trust jurisdiction clauses because they "require ... out of state beneficiaries to come to Nebraska to sue the trustee".<sup>50</sup> No less problematic are cases where the court named in the clause is likely to place such procedural obstacles in plaintiff's way as not to offer a realistic prospect of a fair hearing of the plaintiff beneficiary's concerns. Such obstacles include unreasonably large filing fees, unreasonably large security for costs, a limited opportunity for disclosure of documents under defendants' control, short limitation periods and a limited practical availability of the court, as where the court is only able to schedule a hearing at such a distance of time as to render the proceedings futile for plaintiff. Obstacles of this sort exist in some offshore jurisdictions.<sup>51</sup>

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<sup>49</sup>Antoine, *Trusts and Related Tax Issues*, *supra* n 1, [22.44]. Proceedings between settlors, as such, and trustees were rare under traditional trust law, which did not give settlors any powers over trustees or the trust property once the trust was constituted. The modern trend of settlors reserving powers over the trustee or the trust fund creates an increased likelihood that settlors and trustees become parties to litigation, whether contentious or friendly.

<sup>50</sup>For my survey, see *supra* n 46. For the comment quoted, see <https://osf.io/356sr/> and select the file "Responses to Question 18, under 'Other'".

<sup>51</sup>Under Mauritian trust law, beneficiaries have no *prima facie* right to disclosure of information about the trust, and minor beneficiaries, contingent beneficiaries, and beneficiaries



They may infringe, if European human rights law is applicable, beneficiaries' rights under the European Convention of Human Rights to "a fair ... hearing within a reasonable time".<sup>52</sup>

Knowing that some beneficiaries are likely to harass their trustees and/or other trust parties with constant inquiries, demands and inappropriate litigation, some settlors and trustees may be tempted to contain the latter by granting exclusive jurisdiction over trust-related proceedings to a court those beneficiaries will find inaccessible. An exclusive jurisdiction clause in favour of an inaccessible court or one not offering a realistic prospect of a fair and timely hearing may also indirectly restrain beneficiaries from making constant inquiries and demands of other trust parties, once those beneficiaries understand that other trust parties may refuse or ignore their demands for information and distributions with less fear of effective judicial scrutiny.<sup>53</sup>

As O'Hara noted, in a contractual context "parties might use forum-selection clauses to increase the costs of formal dispute resolution. ... From an ex ante perspective ... an onerous forum-selection provision adds value to the contract [because it makes court disputes less likely]".<sup>54</sup> Similarly, troublesome beneficiaries or discretionary objects may appear, from an ex ante perspective, to render exclusive jurisdiction clauses in favour of inaccessible courts a value-adding trust feature, which benefits all beneficiaries except those prone to excessive litigation: given such clauses, trustees may be saved the work which would have resulted from the beneficiary inquiries and demands and the consequent litigation prevented. In so far as trustees' fees are correlated, partly or wholly, with the amount of work they expend on a given trust, such prevention may economize on fees, which would have been charged to the trust fund. The same argument applies even more clearly to fees which would have been charged by solicitors and barristers trustees would have engaged to represent them in defending the beneficiary claims prevented.

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suffering from an incapacity appear not to have such a right even where the trust instrument authorizes the trustee to disclose such information. Information is only available by court order: Trusts Act 2001, ss 33(1)(c), (e). Beneficiaries' actions against trustees, based on allegations that the latter have breached their trust, are limited to two years from the date on which the beneficiary first has knowledge of the breach: *ibid*, s 68(2)(b). See discussion in *Crociani v Crociani* [2013] JRC 194A, [76]. See also the Bahamas' Trustee Act 1998, ss 83(8) and (10), discussed in *Dawson – Damer v Taylor Wessing* [2017] EWCA Civ 64.<sup>52</sup> Art 6.

<sup>53</sup>Even given an exclusive jurisdiction clause in favour of an inaccessible court, trustees are not likely to ignore their beneficiaries where those beneficiaries have a power to replace the trustees without a court order, or to bring the trust to a premature end under the rule in *Saunders v Vautier* (1841) 4 Beav 115, 49 ER 282; (1841) Cr & Ph 240, 41 ER 482.

<sup>54</sup>EA O'Hara, "The Jurisprudence and Politics of Forum-Selection Clauses" (2002) 3 *Chicago Journal of International Law* 311. Compare the view of the US Supreme Court that a "seriously inconvenient" forum is a reason to disregard a jurisdiction clause even in a contractual situation, regarding a contracting party: *The Bremen*, *supra* n 30, 16–17.

As attractive as such savings appear, exclusive jurisdiction clauses in favour of inaccessible courts or courts not offering a fair and timely hearing based on adequate disclosure of pertinent information create a real risk of trustees and other empowered trust parties infringing their duties and benefitting themselves at beneficiaries' expense, secure in the knowledge that they are unlikely to be effectively held to account. Such clauses appear a disproportionate response to potential harassment of trustees and other trust parties by beneficiaries. As a result, while jurisdiction clauses should generally bind beneficiaries, where the clause names an inaccessible court, or one which, while accessible, does not offer a fair and timely hearing based on adequate disclosure of pertinent information, courts other than that named in the clause should consider hearing an action filed by a beneficiary despite the presence of the clause, and not be too quick to grant a stay of such an action based on the presence of the clause. Courts not named in the clause should proceed despite the presence of the clause where a more respectful approach to the clause appears likely to generate a situation where a plaintiff beneficiary has no effective recourse against a trustee, other trust officers, a settlor who has reserved powers under the trust, or another beneficiary.

As for claims *against* beneficiaries who were not consenting parties to the trust instrument, as where a trustee made a mistaken distribution and claims it back from the recipient beneficiary, if the defendant beneficiary is not resident in the jurisdiction of the chosen forum, holding the defendant to the clause means the defendant has to defend in a foreign country. The judgment delivered there may then have to be enforced, possibly at trust expense, in the beneficiary's jurisdiction of residence, as where the property to be restored is located there. Such non-consenting defendant beneficiaries should only be bound by trust jurisdiction clauses where this is likely to reduce the overall costs of litigation. In the common case where trustees are resident in the jurisdiction named in the clause, total litigation costs may be smaller if trustees sue there, even given a potential need for later enforcement proceedings in the defendant beneficiary's jurisdiction of residence, than if trustees sue in the latter jurisdiction in the first place. Because the defendant beneficiaries considered in this paragraph were not consenting parties to the trust instrument, total litigation costs, both those charged to the trust and those borne by beneficiaries themselves, are to be taken into account in determining whether trust jurisdiction clauses should govern proceedings filed against them. The respect with which trust jurisdiction clauses should be treated under the benefit and burden view should in this context be instantiated by a presumption in favour of the jurisdiction clause, which defendant beneficiaries could rebut by showing that the overall costs of hearing the trustee's action before the courts of the beneficiary's home jurisdiction would be less than those of hearing it before the court indicated in the clause.

What about successor trustees and other trust officers, such as protectors, appointors and trust committee members, who were not parties to the formulation or execution of the trust instrument? It is suggested that such trust officers, too, should be subject to any applicable jurisdiction clause. Like Harris and Jones,

I believe that trustees and other trust officers who consent to act under a trust instrument should be seen, for this purpose, as having consented to the contents of the instrument, including any jurisdiction clause, even if their implied consent only went into effect many years after the instrument was drafted.<sup>55</sup> Such a rule will encourage candidates for offices under trusts to read the trust instrument prior to accepting office. That trust officers are bound by jurisdiction clauses should concern those officers who hold their powers in a fiduciary capacity, while trust officers who hold their powers in a personal, non-fiduciary capacity may refrain from litigating where the jurisdiction clause renders litigation inconvenient for them.

The hardest cases in the trust officer context are those involving unremunerated trust officers, such as family members or friends of the settlor, who hold their powers in a fiduciary capacity. Should they be forced to litigate outside their jurisdictions of residence? Basic principles of the economic analysis of law point to a conclusion that unremunerated trust officers, too, should be bound by trust jurisdiction clauses: as in the case of remunerated, professional trust officers, such a rule would provide family members and friends with an incentive for reading trust instruments before they accept offices under those instruments. The costs trustees bear as a result of being party to proceedings before a faraway court will in many cases, if not recovered from another party to the litigation, be either paid or reimbursed from the trust property, with authority for this granted by statute,<sup>56</sup> in the trust instrument, by the necessary consents having been received, or, if need be, by way of a *Beddoe* application<sup>57</sup> or other court order. Payment or reimbursement of justified litigation expenses from the trust fund is normally available to trustees; it is less clearly available to other types of trust officers, such as protectors and appointors, unless expressly provided for by the trust instrument or accepted as resulting from the fiduciary nature of such officers' duties. Where payment or reimbursement from the trust fund is not clearly available, the costs of being party to an action heard by a faraway court may deter trust officers from filing or defending such actions, stopping them from effectively fulfilling their functions under the trust structure. To

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<sup>55</sup>For application of trust jurisdiction clauses to successor trustees see Jones, *supra* n 8, [52 (b)]; Harris, *supra* n 1, [1.45] (discussing the point in the context of the original Judgments Regulation, art 23(4)). And see a similar argument applied to "a stranger to the original contract [who] has succeeded to the obligations of the contract" in Collins, *supra* n 4, [12-139]. A line of US cases addresses the application of contractual jurisdiction clauses to parties' affiliates: see eg *Adams v. Raintree Vacation Exch., LLC* 702 F3d 436 (7th Cir. 2012), and discussion in ML Woodard, "Ghosts Have Rights Too! A New Era in Contractual Rights: Third-Party Invocation in Forum Selection Clauses" (2014) 26 *St Thomas Law Review* 467.

<sup>56</sup>See, in England, Trustee Act 2000, s 31(1); see discussion in Snell, *supra* n 35, [7-030]–[7-032]; Lewin, *supra* n 1, [21-004]–[21-009]; Underhill and Hayton, *supra* n 11, [81.4].

<sup>57</sup>For *Beddoe* applications see Snell, *supra* n 35, [7-033]; Lewin, *supra* n 1, [27-236]–[27-262]; Underhill and Hayton, *supra* n 11, [81.16]–[81.20].

protect beneficiaries from the potential adverse consequences of trust officer inaction resulting from holding officers to jurisdiction clauses, officer access to the trust fund for litigation funding purposes should be streamlined, by legislation if necessary. Where proceedings before the court indicated in a trust jurisdiction clause are more expensive, from trust officers' perspective, than proceedings before another court with a claim to jurisdiction, and trust officers do not enjoy access to the trust fund to cover those justified litigation costs not recouped from a counterparty, they should not be bound by jurisdiction clauses, so as not to unduly deter them from filing or defending actions in the beneficiaries' interest.

As noted above, the Jersey Royal Court held in *E.M.M. Capricorn* that the arguments for a restrictive approach to the application of trust jurisdiction clauses when beneficiaries sue should also apply when successor trustees sue, because successor trustees effectively sue on behalf of all the beneficiaries.<sup>58</sup> One difference between trustees' and beneficiaries' powers, however, is that trustees often have access to the trust fund to the extent necessary in order to fund litigation. As a result, fewer types of obstacles chosen jurisdictions place in the way of claims are likely to hinder trustee claimants, compared to beneficiary claimants. Short limitation periods and the practical unavailability of courts may hinder trustee claimants no less than they hinder beneficiaries, but not so the expense burden related to the claim, at least where that burden is within the means of the trust fund. Because jurisdiction clauses should, as a rule, bind successor trustees, such trustees, where they enjoy access to the trust fund for litigation funding purposes, should be excepted from those clauses' ambit of application only where the chosen jurisdiction imposes obstacles which are likely to prevent a fair hearing within a reasonable time, based on adequate disclosure of pertinent information.

Finally, trust non-parties, persons who have no role in the trust structure, should not as a rule be made subject to trust jurisdiction clauses, since they have not consented to those clauses either expressly or impliedly and are not to receive benefits under the trust. Yet some distinctions should be made. Third parties with whom the trustee transacted – trust creditors, trust debtors and purchasers of trust assets – while bound by any jurisdiction clauses incorporated in their contract with the trustee, should not as a rule be bound by jurisdiction clauses in the trust instrument, unless they had notice of those clauses.<sup>59</sup> Subjecting commercial litigation resulting from transactions trustees enter into with trust non-parties to trust jurisdiction clauses despite non-parties not having notice of the jurisdiction clause when formulating the transaction gives trustees an inappropriate advantage

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<sup>58</sup>*E.M.M.*, *supra* n 1, [17].

<sup>59</sup>See *Booilushagg Trust Co. Ltd v Kaye & Miller* (1992) 13 GLJ 14, where an action for an order that defendants, trust non-parties, account for funds allegedly received and belonging to the trust, was stayed because “there [was] no allegation that the defendants were informed of the provisions of [the jurisdiction clause]” (at 3). See a similar approach to the subjection of non-parties to contractual jurisdiction clauses in *Collins*, *supra* n 4, [12-139]. See also *Lewin*, *supra* n 1, [11-069].

over other contracting parties, since the costs of litigating in an unfamiliar court, and much more so those of litigating in a distant court, are likely to drive trustees' counterparties to settle for less than they would otherwise have accepted. Subjecting trustees' commercial counterparties to trust jurisdiction clauses of which they had no notice is also likely to increase the costs of commercial transactions: having been bitten once by the burden of litigating in an unfamiliar, and often distant, court, and, no doubt, of reaching a disappointing settlement, despite the absence of a jurisdiction clause in favour of such a court from the contract between the parties, or having otherwise become aware that such a clause may exist and bind them despite that absence, commercial parties will inquire of every prospective counterparty whether a jurisdiction clause is in place in some document beyond the contract the parties conclude. Such inquiries are likely to render commercial negotiations more protracted and costlier; as a result, some otherwise-efficient transactions will not be concluded. Commercial parties may even avoid transacting with trustees altogether for fear of hidden jurisdiction clauses.

While as noted above, trustees should generally be subject to jurisdiction clauses in their trust instrument, either because they were parties to the execution of that instrument or in order to incentivize them to read the trust instrument prior to undertaking the trusteeship, trustees' commercial counterparties should, absent notice, be excepted from such clauses' ambit of application, so that trustees do not enjoy a covert advantage over other contracting parties and so that trustees' counterparties do not stop, on entering every commercial transaction, to find out whether a jurisdiction clause lurks in some document they have not seen. That one party to proceedings should be excepted from the jurisdiction clause suffices for the proceedings to be outside its ambit of application. While the disapplication of jurisdiction clauses could at times lead to fragmentation of judicial proceedings, the subjection of plaintiff beneficiaries to jurisdiction clauses in favour of courts which will not provide them with an effective recourse, or that of trustees' commercial counterparties to jurisdiction clauses of which they had no notice, are too high a price to pay for preventing fragmentation. While fragmented proceedings are generally undesirable, they are preferable to a single proceeding which does not provide the parties with an effective recourse, or which is to be held at a forum some parties are likely to find so unfamiliar and inaccessible as to create a chilling effect, prevent future, otherwise-efficient transactions and thereby create costs and inefficiencies which may rival or exceed those of fragmentation.

Persons challenging the trust because, they claim, the settlor created the trust in order to shrink an asset pool in which they have rights, such as the settlor's creditors, spouses present and past, or corporations the settlor served as officer, should not be made subject to jurisdiction clauses in the trust instrument absent their express or implied consent.<sup>60</sup> Absent such consent, private legal arrangements

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<sup>60</sup>See *Re Larry Portnoy*, 201 BR 685, 697 footnote 9 (1996) (US Bankruptcy Court for the Southern District of New York): “[t]o whatever extent [an exclusive jurisdiction clause in a

cannot generally take away the rights of non-parties under the adjectival law of their jurisdictions of residence. In a context such as divorce proceedings, courts should be slow to deduce consent from notice: that one spouse knew of the other's having settled his or her wealth on trust does not necessarily signify consent that the settled wealth be subtracted from the asset pool in which the former spouse has rights. While unfounded harassment actions by trust non-parties are a possibility, and could in theory be countered by subjecting them to jurisdiction clauses in favour of inaccessible courts, such a strategy appears disproportionate to the risk of harassment. Non-parties with valid claims on the settlor and/or the trust property should not have their facility of litigating before the courts of their jurisdictions of residence taken away by the same trusts which, they claim, have undermined their substantive rights. As for deterring harassment actions, the upfront costs of filing such actions have a significant deterrent effect. Further, courts before which such actions are brought are likely to make the issue of any meaningful order conditional on the applicant showing, at the very least, a *prima facie* case, which frivolous applicants are unlikely to successfully show.<sup>61</sup>

## 2. Criterion 2: nature of issues under discussion in the proceedings

The other primary criterion relevant for determining whether given proceedings should be subject to a trust jurisdiction clause is the nature of the issues under discussion in the proceedings. The operative principle powering this criterion is that proceedings which are part of the routine operations of a trust should generally be subject to any jurisdiction clause, while proceedings intended to undermine a trust should not generally be subject to such clauses. I will now work this criterion into rules applicable to each of the key types of trust-related proceedings.

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Jersey trust instrument] may be binding on [a settlor/debtor] and the trustee, it certainly cannot bind [the settlor/debtor's] creditors"; Lewin, *supra* n 1, [11-070]. For spousal challenges to trusts see eg *Charman v Charman* [2007] EWCA Civ 503, [2007] 1 FLR 1246 (where the court was persuaded to treat the trust assets as effectively those of the defending spouse and on that basis grant an order for financial provision which could not be met without recourse to the trust assets); *Minwalla v Minwalla* [2004] EWHC 2823 (Fam), [2005] 1 FLR 771; Thomas and Hudson, *supra* n 4, [99], [103]–[104]; N Francis and C Wagstaffe, "Variation of Ante- and Post-Nuptial Settlements in England: The Jurisdiction of the Family Division" (2011) 17 *Trusts & Trustees* 291.

<sup>61</sup>See eg the onerous test for setting a trust aside as a sham, detailed in *Shalson v Russo* [2003] EWHC 1637 (Ch), [2005] Ch 281, [187]–[191]; *A v A* [2007] EWHC 99 (Fam), [2007] 2 FLR 467, [34]–[52]; *Official Assignee v Wilson* [2007] NZCA 122, [2008] 3 NZLR 45, [26]–[59]; and discussed in eg M Conaglen, "Sham Trusts" (2008) 67 *Cambridge Law Journal* 176; J Palmer, "What Makes a Trust a Sham?" [2008] *New Zealand Law Journal* 319; M Conaglen, "Sham and Trusts", in E Simpson and M Stewart (eds), *Sham Transactions* (Oxford University Press, 2013) 122.

The types of proceedings most clearly proper to be bound by trust jurisdiction clauses are proceedings concerned with the day-to-day running of the trust, such as applications for the court to construe the trust instrument, applications for directions,<sup>62</sup> *Beddoe* applications,<sup>63</sup> applications for a *Benjamin* order<sup>64</sup> and applications for the court's blessing of a proposed momentous decision as within the parameters of the trustees' discretionary powers. At the other extreme, at least some proceedings challenging the trust, asking the court to declare it void, avoid it, declare that the trust property is part of an asset pool available to the settlor's creditors or spouse, or vary the trust to give a non-party rights in the trust property under divorce legislation, should not be subject to any jurisdiction clause in the trust instrument, lest such clauses serve as an instrument for the evasion of family law liabilities,<sup>65</sup> corporate law liabilities<sup>66</sup> or other liabilities.<sup>67</sup> One type of case where some trust jurisdiction clauses should be disapplied are proceedings for the enforcement of rights under the family law of the jurisdiction of residence of a non-settlor spouse, ex-spouse or child of a settlor or beneficiary: that applying an arguably applicable trust jurisdiction clause would make enforcing such rights more difficult than it would have been had the clause been disapplied is a good reason to disapply it. While as Karayanni noted in summarizing US case law on jurisdiction clauses in commercial contracts, "the international setting of the relationship between the parties" has often stopped courts from "employ [ing] the public policy exception to the enforcement of a forum selection clause",<sup>68</sup> public policy considerations should have more purchase in cases of international families than in those of international commercial relationships, especially the public policy considerations of non-settlor spouses', ex-spouses' or children's jurisdictions of residence. Further, causes of action pleaded by such trust challengers often arise under the law of a country other than that chosen in the jurisdiction clause.<sup>69</sup> The courts of the country under the law of

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<sup>62</sup>See eg *Royal Trust Corporation of Canada v A.S. (W.) S.*, 2004 ABQB 284; *In Re Fountain Trust* [2005] JLR 359; *In the matter of the H Trust* [2006] JLR 280.

<sup>63</sup>n 57.

<sup>64</sup>For *Benjamin* orders see Lewin, *supra* n 1, [27-027]–[27-032].

<sup>65</sup>*Charalambous*, *supra* n 45, esp at [30]. For the use of trusts to avoid family law liabilities see eg *Minwalla*, *supra* n 60.

<sup>66</sup>*NABB*, *supra* n 47.

<sup>67</sup>Thomas and Hudson, *supra* n 4, noted at [44.84] that "[o]n the face of it a jurisdiction clause is of no relevance to proceedings against trust assets which do not rely on the terms of the trust (for example claims asserting prior title to the assets)".

<sup>68</sup>MM Karayanni, "The Public Policy Exception to the Enforcement of Forum Selection Clauses" (1996) 34 *Duquesne Law Review* 1024.

<sup>69</sup>Even where the Hague Convention on the Law Applicable to Trusts and on their Recognition applies, such causes of action are unlikely to be governed by the trust's governing law, which is likely to be that of the country the courts of which are granted jurisdiction in any jurisdiction clause in the instrument. Actions challenging the trust are quite likely to fall under one or more of the many exceptions the Convention creates, in arts 4, 15–16 and 18–19, to the application of the governing law. For example, an order varying a

which those causes of action arise are likely to be more expert in applying their law than the court chosen in the trust instrument: this in itself should point towards the disapplication of the jurisdiction clause.

The case may be different, however, with proceedings challenging the trust initiated by trust parties, as where due to some unexpectedly adverse tax consequences trust parties ask the court to hold a trust void or rescind it, whether under the doctrine of equitable mistake or under the rule in *Re Hastings-Bass*, as recently reformulated.<sup>70</sup> Where a person uses a trust, complete with a foreign jurisdiction clause, for tax planning purposes, only to later ask a domestic court, rendered relevant by the domestic location of the trust assets, to declare the trust voidable so that the person, a family member or a related entity could escape paying a large sum in domestic tax, the domestic court may well disregard the jurisdiction clause out of fear that the foreign court indicated in the clause may be too forthcoming with the declaration, at a cost to the domestic treasury.<sup>71</sup> Should trust parties, however, ask a domestic court, despite the presence of a foreign jurisdiction clause, to rescind the trust or hold it void, in the absence of pressing issues of domestic public policy such as rights under family law or tax obligations, the court may well decline to hear the case, leaving the parties to the mercies of the jurisdiction they chose.

Proceedings deriving from a loan, purchase or sale entered into by the trustee with a trust non-party, such as proceedings concerning the foreclosure and sale of an asset a mortgage of which is held on trust, should not be subject to trust jurisdiction clauses unless the trust non-party had notice of the clause.<sup>72</sup> Such commercial litigation does not usually have much to do with the relationships delineated in the trust instrument, to which jurisdiction clauses are meant to apply. The same rule should apply to contests for the trust assets between beneficiaries and trustees' private (non-trust) creditors or purchasers of trust property: such contests have little to do with the relationships delineated in the trust instrument, and involve

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post-nuptial settlement under Matrimonial Causes Act 1973, s 24(1)(c) was held in *Charalambous*, *supra* n 45, [42] to fall under art 15 of the Convention.

<sup>70</sup>Both doctrines were reformulated in *Pitt v HMRC*, *Futter v HMRC* [2013] UKSC 26, [2013] 2 AC 108. See discussion in Ashdown, *supra* n 33; B Häcker, "Mistaken Gifts After Pitt v Holt" (2014) 67 *Current Legal Problems* 333; Lewin, *supra* n 1, [4-058]–[4-081], [29-255]–[29-259]; Underhill and Hayton, *supra* n 11, [15.29]–[15.36]; R Walker, "When Will the Court Grant Relief for Trustees' Mistakes? Pitt v Holt and Futter v Futter" [2014] *Hong Kong Law Journal* 759.

<sup>71</sup>Jersey and Bermuda have both enacted broad statutory versions of the doctrine of equitable mistake and the rule in *re Hastings-Bass*: Trusts (Jersey) Law 1984, ss 47B–47J; Trustee Act 1975 (Bermuda), s 47A. Their courts have also occasionally proven generous at invalidating trusts at trust parties' request to the cost of onshore treasuries, reasoning that "Leviathan can look after itself": *In Re R* [2011] JRC 117, [39].

<sup>72</sup>*Booilushagg*, *supra* n 59; see also *British South Africa Co v De Beers Consolidated Mines Ltd* [1910] 2 Ch 502.



trust non-parties, who should not be subject to trust jurisdiction clauses absent notice.

Tort proceedings filed by a person injured by trust property should not be subject to jurisdiction clauses: any other position would make such clauses effective mechanisms for escaping liability in tort. Proceedings against a trustee for breach of trust, including proceedings challenging the validity of an appointment of trust assets, and whether filed by a beneficiary,<sup>73</sup> a successor trustee,<sup>74</sup> a protector, an enforcer or some other party who has been given power to file them,<sup>75</sup> should presumptively be bound by jurisdiction clauses; however, this presumption should be rebutted where subjection to the clause will make a trustee unaccountable in practice, as where the settlor granted exclusive jurisdiction to an inaccessible court or one where a fair hearing within a reasonable time, based on adequate disclosure of pertinent information, cannot realistically be expected. Finally, rectification claims are an intermediate case: while they are sometimes used by persons short-changed by a document's current text, such persons want to leave the document in place, and indeed often want to benefit under that document. As Le Poidevin proposed, claims that a trust document be rectified should normally, under a benefits/burdens logic, be governed by any jurisdiction clause in that document.<sup>76</sup> Exceptions should be made where the clause grants jurisdiction to a court so inaccessible that respecting it would leave claimants with no effective recourse.

### 3. *Additional considerations*

Special difficulties arise where trustees, and more so trust assets, are located in one of the numerous offshore jurisdictions that have enacted statutory provisions to the effect that where trusts are governed by their law, their courts shall neither recognize nor enforce foreign court orders concerning those trusts.<sup>77</sup> Under such circumstances, a decision by a court outside such a jurisdiction to disregard a

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<sup>73</sup>*Crociani, supra* n 1.

<sup>74</sup>*E.M.M., supra* n 1; *Helmsman, supra* n 4; *In re Representation of AA, supra* n 1.

<sup>75</sup>In *Green, supra* n 3, the settlor and protector sued the trustee for ill-judged investments.

<sup>76</sup>Le Poidevin, *supra* n 27, 4.

<sup>77</sup>See eg Trusts (Jersey) Law 1984, s 9(4); Trusts (Guernsey) Law 2007, s 14(4); Trusts Law (2011 Revision), s 93 (Cayman Islands); Trusts (Choice of Governing Law) Act 1989, s 10 (Bahamas); International Trust Act 1984, s 13D (Cook Islands); Trusts (Special Provisions) Act 1989, s 11(2) (Bermuda); Trust Act 1992, s 7(6) (Belize); International Trusts Act 1995, s 27 (Nevis); Dubai International Financial Centre Trust Law 2005, s 17; Trusts Act 2001, s 11(5) (Mauritius); Trustee Ordinance 1961, s 83A(19) (British Virgin Islands); The International Trusts (Consolidated) Law of 1992 and 2012, s 4(b)(ii) (Cyprus); Trusts Ordinance (Amendment) 2000, s 63(b) (Anguilla); International Trust Act 2007, s 80 (Antigua & Barbuda); Trusts Act 1995, s 5(2)-(4), as amended by Trusts (Amendment) Act 2015, s 6 (Isle of Man); Trusts (Private International Law) Act 2015, s 4(2), (5) (Gibraltar). See discussion in D Hochberg, "Enforcement of Foreign Judgments and Firewall Legislation" (2015) 21 *Trusts & Trustees* 1006.

jurisdiction clause in favour of that jurisdiction may not prove of practical assistance to a claimant, such as a beneficiary suing the trustee following an alleged breach or a trust non-party challenging the trust. Where the courts of the chosen jurisdiction have a track record of enforcing that jurisdiction's so-called statutory "firewall", practical considerations may move courts elsewhere to respect the clause, since decisions rendered in defiance of the clause may not in practice be enforceable. This is especially so where no trust party with a practical influence on the offshore trustee is present in the jurisdiction of the non-chosen court. Where such a party is present in that jurisdiction and is a party to the case before the non-chosen court, that court may, as a last resort, hold that party in contempt of court and apply sanctions to that party, including imprisonment, in order to have him or her influence the trustee to secure compliance with the court order.<sup>78</sup>

Because the courts of each jurisdiction are more expert than other courts in applying the law of that jurisdiction, jurisdiction clauses in favour of the courts of a country other than that the law of which governs the trust should arguably be approached with less respect than other jurisdiction clauses. Clauses in favour of the courts of any country except the trustees' jurisdiction(s) of professional activity should also command diminished respect, especially if the country of the chosen court is not otherwise connected to the trust, as in being some trust parties' jurisdiction of residence or in having trust assets in the jurisdiction. Clauses of both the aforementioned types make trust litigation more expensive, whether by necessitating the introduction of evidence concerning the governing law or by necessitating trustee travel for litigation purposes. Both types of expenses are in many cases likely to be borne by the trust fund, and so should be minimized by adopting an approach less respectful of the clauses than that appropriate in other cases.

Finally, decision-makers should ascribe little weight to trust jurisdiction clauses regarding proceedings the object of which is tied to a specific jurisdiction, other than that named in the clause. Such tying can occur either in a physical sense, as where "proceedings ... have as their object rights in rem in immovable property or tenancies of immovable property",<sup>79</sup> or by proceedings being concerned with

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<sup>78</sup>US courts have imprisoned trust parties, holding them in contempt of court, in order to drive them to direct non-US trustees to transfer trust assets held outside the US back to the US: *Federal Trade Commission v Affordable Media LLC*, 179 F.3d 1228 (9th Cir. 1999); *Lawrence v. Goldberg*, 279 F.3d 1294 (11th Cir. 2002); *In Re: Stephan Jay Lawrence, Debtor*, 251 B.R. 630 (U.S. District Ct. for the Southern Dist. of Florida, 2000). See discussion in Stewart Sterk, "Asset Protection Trusts: Trust Law's Race to the Bottom?", 85 *Cornell L Rev* 1035 (2000).

<sup>79</sup>See eg Regulation (recast), *supra* n 20, art 24(1), giving "the courts of the Member State in which the property is situated" exclusive jurisdiction over such proceedings, "regardless of the domicile of the parties"; and see *ibid*, art 25(4), providing that "[a]greements or provisions of a trust instrument conferring jurisdiction shall have no legal force if ... the courts

entries in registries of a jurisdiction other than that named in the clause, as where proceedings “have as their object the validity of entries in public registers ... [or] the registration or validity of patents, trade marks, designs, or other similar rights required to be deposited or registered”.<sup>80</sup> Court orders rendered in such proceedings by courts other than those of the jurisdiction where the real/immovable property or the public registry concerned are located are likely to be neither recognized nor enforced by the courts of the latter jurisdiction.<sup>81</sup>

#### D. Conclusion

This article investigated the proper ambit of trust jurisdiction clauses. It is proposed that whether a trust-related proceeding is or is not subject to any jurisdiction clause in the trust instrument should be decided according to two key criteria: the proximity of the parties to the proceeding to the drafting of the trust instrument and the nature of the issues under discussion in the proceeding. Regarding the first criterion, it is argued that consenting parties to the trust instrument should be bound by any jurisdiction clause therein. Beneficiaries’ actions against other trust parties should be bound, except where the court indicated is inaccessible, or places such procedural obstacles in plaintiffs’ way as not to offer a realistic prospect of a fair hearing, based on adequate disclosure of pertinent information. Claims against beneficiaries should be subjected to the jurisdiction clause where hearing them at the chosen forum is likely to reduce litigation costs overall, compared to the costs of hearing them at relevant alternative fora. Successor trustees and other trust officers who were not parties to the execution of the trust instrument should be bound by jurisdiction clauses in that instrument, except where proceedings before the court indicated in the clause are more expensive, from trust officers’ perspective, than proceedings before another court with a claim to jurisdiction, and officers do not enjoy access to the trust fund to cover those justified litigation costs not recouped from a counterparty. Trustees and other trust officers not party to the execution of the trust instrument should also escape the burden of

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whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 24”.

<sup>80</sup>See eg Regulation (recast), *supra* n 20, art 24(3)–(4), giving “the courts of the Member State in which the register is kept” and “the courts of the Member State in which the deposit or registration has been applied for, has taken place or is under the terms of an instrument of the Union or an international convention deemed to have taken place” (respectively) exclusive jurisdiction over such proceedings, “regardless of the domicile of the parties”; and see *ibid*, art 25(4).

<sup>81</sup>See eg Regulation (recast), *supra* n 20, arts 45(1)(e)(ii) (providing that “on the application of any interested party, the recognition of a judgment shall be refused ... if the judgment conflicts with ... Section 6 of Chapter II [which includes art 24]”); 46 (providing that “on the application of the person against whom enforcement is sought, the enforcement of a judgment shall be refused where one of the grounds referred to in Article 45 is found to exist”).

any jurisdiction clause in that instrument where the chosen jurisdiction places such procedural obstacles in plaintiffs' way as not to offer a realistic prospect of a fair hearing, based on adequate disclosure of pertinent information. Litigants who are not parties to the trust in any capacity, except commercial counterparties who had notice of the trust, should not be subjected to jurisdiction clauses. As for the second criterion, proceedings concerned with the day-to-day running of the trust should be bound by trust jurisdiction clauses. Proceedings aimed at undermining a trust should as a rule not be bound by such clauses, except where such proceedings are initiated by trust parties and raise no issue of domestic public policy. Proceedings against the trustee for breach of trust should be bound by trust jurisdiction clauses, unless the court indicated is inaccessible or does not provide a fair hearing, based on adequate disclosure of pertinent information. Jurisdiction clauses in favour of courts outside the country the law of which governs the trust and courts outside the trustee's jurisdiction(s) of professional activity are likely to make trust litigation more expensive and should therefore command reduced respect. Jurisdiction clauses in favour of the courts of offshore jurisdictions which have enacted statutory "firewalls" should command special respect if as a result of the "firewall", orders of courts outside the offshore jurisdiction are in practice likely to be unenforceable. Where the object of the proceeding is tied to a specific jurisdiction, jurisdiction clauses in favour of courts in other jurisdictions should command little respect. The presence of one of the above "dis-application factors" should suffice to remove proceedings from a jurisdiction clause's ambit of application.

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