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RESEARCH ARTICLE

Exclusive jurisdiction clauses in international trust deeds

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Abstract

Jurisdiction clauses commonly feature in high-value international contracts. Recently, these clauses are also increasingly utilised in international trust instruments. At common law, a contentious issue vis-à-vis exclusive jurisdiction clauses in trust deeds has been whether they should be upheld in the same way as their contractual equivalents. In *obiter* remarks in *Crociani v Crociani*, in 2014, the Privy Council stated that these clauses should be afforded less weight in trusts than in contracts. However, as this paper seeks to demonstrate, the reasoning underpinning the treatment of exclusive jurisdiction clauses in trust deeds in this manner is questionable. The paper's key contention is that exclusive jurisdiction clauses in trust deeds should be enforced in the same way as those in contracts. Accordingly, an exclusive jurisdiction clause in a trust instrument should be upheld, unless the claimant can establish a strong cause why the matter should be litigated elsewhere.

Keywords: Private international law; international trust deeds; cross-border disputes; exclusive jurisdiction clauses

Introduction

International contracts often contain a clause which sets out to subject the parties' disputes to the exclusive jurisdiction of a court in a particular territory. These clauses allow contracting parties to identify the court where claims arising from their bargain should be brought. As highlighted in various judicial pronouncements, jurisdiction clauses 'create certainty and security in transaction',[1] and 'provide international commercial relations with stability and foreseeability'.[2] Thus, they are an effective means of managing risks inherent in international commercial litigation. Generally, parties can decide to afford exclusive or non-exclusive jurisdiction to the chosen forum.[3] Exclusive jurisdiction clauses signify that contracting parties undertake *not* to commence proceedings in any court other than the one designated in the contract. Courts are customarily strict in upholding these terms, unless the parties who seek to circumvent them can establish a 'strong cause' why the matter should be entertained elsewhere. Accordingly, exclusive jurisdiction clauses provide maximum certainty about the forum where the parties should pursue their contractual claims. By contrast, non-exclusive jurisdiction clauses allow more flexibility, meaning that the contracting parties are not obliged to initiate proceedings only in the contracted forum.

Since the late twentieth century, jurisdiction clauses have also begun to be utilised more frequently in international trust deeds.[4] This development is reflective of the rise in the internationalisation of trusts in

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[1]*ZI Pompey Industrie v ECU-Line NV* 2003 SCC 27 at [20] per Bastarache J.

[2]*GreCon Dimter Inc v JR Normand Inc* 2005 SCC 46 at [22] per LeBel J.

[3]They can also opt for an 'asymmetric' jurisdiction clause, where one party contracts to sue in state A, and the other undertakes to commence proceedings in state B: see L Merrett 'The future enforcement of asymmetric jurisdiction agreements' (2018) 67 ICLQ 37.

[4]P Matthews 'What is a trust jurisdiction clause?' (2003) 7 Jersey Law Review 232 at [10].

recent times. It is now customary for a settlor domiciled in country A to create a trust on behalf of beneficiaries, who might be resident in that forum (or elsewhere), which (often for tax purposes) is administered by trustees based in country B. Trust documents can also contain a clause which permits the original trustees to resign, and appoint new trustees who might be domiciled in territories other than the ones where the original trustees, the settlor, or the beneficiaries are based. In short, trusts are traversing borders at an ever-growing rate. In these circumstances, many of the same risks that are intrinsic to international commercial litigation could also beset the litigation of trust disputes. In seeking to avoid some of these risks – particularly, the ensuing costs from uncertainty about where trust disputes should be commenced – jurisdiction clauses have been employed in trust instruments.

With the greater prevalence of trust choice-of-court clauses, several thorny legal questions have emerged that deserve closer attention. One of these questions, which is at the heart of the discussion in this paper, has been whether a clause in a trust instrument that seeks to confer exclusive jurisdiction on the court in a specific territory should be treated in the same way as its contractual equivalent.[5] More specifically, the question is whether such a clause, when it appears in a trust deed, should be upheld as a matter of course, except when the claimant can show a strong cause to the contrary. An assessment of case law and commentary at common law concerning the treatment of exclusive choice-of-court clauses in trust deeds highlights that opinion regarding how this question should be answered has been divided. While the predominant approach in cases has been to uphold exclusive jurisdiction clauses in trust instruments in the same way as their counterparts in contracts, these terms have occasionally been accorded less weight. Most notably, in 2014, in *obiter* remarks in *Crociani v Crociani*,[6] the Privy Council stated that an exclusive jurisdiction clause in a trust deed should be enforced less readily against a beneficiary. According to the ruling, a beneficiary would find it easier to sidestep the clause than a contracting party who seeks to avoid a similar term in the contract. However, as the forthcoming analysis seeks to demonstrate, the foundations for the Privy Council's *obiter* ruling are vulnerable to attack. Furthermore, independent reasons are advanced in support of the contention that, ordinarily, an exclusive jurisdiction clause in a trust instrument should be upheld, unless the claimant can establish a strong cause why the matter should be litigated elsewhere.

The main body of the paper contains three parts. The discussion begins, in section 1, by outlining the common law courts' treatment of exclusive choice-of-court clauses in contracts. It then proceeds, in Section 2, to examine the approaches in case law and commentary to the question of what effect should be given to exclusive jurisdiction clauses in trust deeds. Finally, in Section 3, reasoned arguments are advanced to show why the same approach should be applied to the enforcement of exclusive jurisdiction clauses in trust instruments and contracts.

1. Exclusive jurisdiction clauses in contracts and their treatment

Common law courts tend to uphold exclusive choice-of-court clauses in contracts based on both theoretical and practical factors.[7] The theoretical factor at play is the principle of party autonomy.[8] As Lord Diplock observed in *Photo Production Ltd v Securicor Transport Ltd*,

[5]The related question of whether the so-called 'forum of/for administration clauses' in trust deeds amounts to jurisdiction clauses falls *outside* the purview of this paper. These clauses have been examined in detail in the case law and commentary: eg *Koonmen v Bender* [2002] JCA 218, 6 ITELR 56 (Jersey); *Green v Jernigan* (2003) 18 BCLR (4th) 366 (British Columbia); *NABB Brothers Ltd v Lloyds Bank International (Guernsey) Ltd* [2005] EWHC 405 (Ch), [2005] ILPr 37 (England); *EMM Capricorn Traders Ltd v Compass Trustees Ltd* [2001] JLR 205 (Jersey); *Helmsman Ltd v Bank of New York Trust Company (Cayman) Ltd* [2009] CILR 490 (Cayman Islands); *In the matter of A Trust* [2012] Bda LR 9 (Bermuda); *Ivanishvili v Credit Suisse AG* [2020] SGCA 62 (Singapore); Matthews, ibid; and N Le Poidevin QC and K Robinson 'Jurisdictional conundrum' (2013) 19 Trusts & Trustees 848.

[6][2014] UKPC 40.

[7]See eg *Donohue v Armco Inc* [2001] UKHL 64, [2002] 1 All ER 749 (England); *ZI Pompey*, above n 1 (Canada); *Ace Insurance Ltd v Moose Enterprise Pty Ltd* [2009] NSWSC 175 (Australia); and, *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 (Singapore).

[8]See H Beale et al *Chitty on Contracts* (London: Sweet & Maxwell, 33rd edn, 2018) paras 1-031–1-040.

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> [a] basic principle of the common law of contract … is that parties to a contract are free to determine for themselves what primary obligations they will accept. They may state these in express words in the contract itself and, where they do, the statement is determinative.[9]

Choice-of-court clauses are much the same as any other contractual provision. In the absence of vitiating circumstances, the point of departure at common law is to affirm the contracting parties' mutual undertaking to subject their disputes to the exclusive jurisdiction of the court in a specific territory.[10]

As for the practical reason why these clauses are usually enforced, the key consideration is the desire to make international commercial litigation more predictable. In a contract, an exclusive jurisdiction clause identifies the forum where the claim should be initiated, thereby enabling the parties to protect themselves against one of the major uncertainties inherent in the court-based resolution of cross-border commercial disputes. Accordingly, wherever possible, contracting parties should be encouraged to rely on such terms. The habitual upholding of exclusive choice-of-court clauses would, in turn, incentivise contracting parties to include them in their agreements.

There are two principal ways in which the parties who promise to subject their claims exclusively to the jurisdiction of the court in a particular territory are protected at common law.[11] One is for the common law court to stay *its own proceedings* that have been commenced in contravention of the exclusive foreign choice-of-court clause. In this context, the stay decision could be mandatory or discretionary. For example, under English law, courts are obliged to suspend or dismiss an action that has been brought before them in breach of an exclusive jurisdiction clause that falls within the scope of the Hague Choice of Court Convention.[12] Similarly, and without prejudice to Brussels Ia Regulation,[13] Articles 24 or 26, English courts are obliged to decline jurisdiction where an EU Member State has competence pursuant to Brussels Ia Regulation, Article 25. However, where rules under English national law provide the basis for the courts' jurisdiction, they have a discretion whether to entertain the case.[14] Typically, the position under English law,[15] and the law in other major common law jurisdictions,[16] is to grant a stay, unless the claimant – who has otherwise breached the choice-of-court clause – can point to a 'strong cause' why the proceedings should be sustained. In deciding whether a strong cause for sustaining the proceedings has been established, the following (non-exhaustive) factors, outlined in Brandon J's judgment in *The Eleftheria*, are consulted:

> (4) In exercising its discretion the court should take into account all the circumstances of the particular case.

[9][1980] AC 827, at 848.

[10]See A Briggs *Agreements on Jurisdiction and Choice of Law* (Oxford: Oxford University Press, 2008) para 2.66.

[11]In principle, common law courts could also award damages against the party which has commenced proceedings in a forum other than the one chosen one under the agreement: eg *Barclays Bank plc v Ente Nazionale di Previdenza ed Assistenza dei Medici e degli Odontoiatri* [2016] EWCA Civ 1261, [2016] 2 CLC 859 (England), and *Compagnie des Messageries Maritime v Wilson* [1954] HCA 62, 94 CLR 577 (Australia).

[12]Convention on Choice of Court Agreements, Hague, 30 June 2005, Art 6.

[13]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 L 351/1 (the Brussels Ia Regulation).

[14]The situation is more complicated where the English court's jurisdiction derives from the Brussels Ia Regulation, and the agreement contains an exclusive jurisdiction clause in favour of a court in a country outside the EU. For a discussion of the possible approaches which English courts might adopt in such an instance, see eg *Ferrexpo AG v Gilson Investments Ltd* [2012] EWHC 721 (Comm), [2012] 1 Lloyd's Rep 588, and J Hill and M Ní Shúilleabháin *Clarkson & Hill's Conflict of Laws* (Oxford: Oxford University Press, 5th edn, 2016) paras 2.270–2.279.

[15]Eg *Donohue*, above n 7. See also A Briggs *Civil Jurisdiction and Judgments* (Abingdon: Informa Law from Routledge, 6th edn, 2015) para 4.52 (*Civil Jurisdiction and Judgments*), and Lord Collins of Mapesbury et al *Dicey, Morris & Collins on the Conflict of Laws* (London: Sweet & Maxwell, 15th edn, 2012) paras 12-149–12-156 (*Dicey, Morris & Collins*).

[16]Eg *ZI Pompey*, above n 1, and *Douez v Facebook Inc* 2017 SCC 33 (Canada), *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197 (Australia), and *Vinmar*, above n 7 (Singapore).

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(5) In particular, but without prejudice to (4), the following matters, where they arise, may properly be regarded:
(a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts.
(b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects.
(c) With what country either party is connected, and how closely.
(d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.
(e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would: (i) be deprived of security for their claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time-bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.[17]

This has come to be known as the 'strong cause test'. Generally, there are few cases where claimants succeed at establishing a strong cause for resisting a stay order in favour of the contracted forum. They chiefly include instances where endorsing the jurisdiction clause – by granting a stay – would risk fragmenting proceedings between the relevant common law court and the chosen forum, or where the action concerns multiple defendants who are not all privy to the choice-of-court clause.[18] Strong cause for sustaining the action is also likely to be established if the common law court is persuaded that, on the facts of the case, the contracted forum cannot justly dispose of the parties' claims.[19]

The other way in which common law courts seek to give effect to exclusive jurisdiction clauses is by granting anti-suit injunctions.[20] Under English law, and subject to some limitations,[21] courts may grant injunctions to restrain parties that have initiated (or are about to initiate) proceedings abroad, in breach of exclusive English jurisdiction clauses. Moreover, it has been suggested that English courts can issue anti-suit injunctions in relation to claims that have (or soon will be) commenced elsewhere in breach of exclusive jurisdiction clauses that designate courts in forums other than England.[22] Injunctions are usually issued unless the party who is (or would be) the claimant in the foreign proceedings can show a strong cause why the case should be heard in the non-contracted forum.[23]

In sum, common law courts mostly uphold the contracting parties' choice of an exclusive jurisdiction clause. Instances where they have decided to override the parties' intention are rare. Therefore, jurisdiction clauses provide an effective means of creating a greater degree of predictability in international commercial litigation.

2. Exclusive jurisdiction clauses in trust deeds and their treatment

While choice-of-court clauses have had a long history of featuring in international contracts, their inclusion in trust instruments is a relatively recent development. Consequently, until the beginning of this century, there has been little meaningful discussion of trust jurisdiction clauses in the leading

[17][1970] P 94 at 99–100.

[18]Eg *The El Amria* [1981] 2 Lloyd's Rep 119, and *Citi-march Ltd v Neptune Orient Lines Ltd* [1996] 1 WLR 1367. For more discussion, see *Dicey, Morris & Collins*, above n 15, para 12-152, and *Civil Jurisdiction and Judgments*, above n 15, para 4.53.

[19]Eg *Carvalho v Hull Blyth (Angola) Ltd* [1979] 1 WLR 1228.

[20]Eg *Aggeliki Charis Compania Maritime SA v Pagnan Spa (The Angelic Grace)* [1995] 1 Lloyd's Rep 87 (England); *The Jian He* [2000] 1 SLR 8 (Singapore); and *Ace Insurance Ltd v Moose Enterprise Pty Ltd* [2009] NSWSC 724 (Australia).

[21]Under EU law, English courts are prohibited from granting anti-suit injunctions to restrain litigants from commencing (or continuing) proceedings in an EU Member State, even if the action is brought in bad faith (Case C-159/02 *Turner v Grovit* [2004] ECR I-3565, [2005] 1 AC 101), or in breach of an arbitration agreement (Case C-185/07 *Allianz SpA (formerly Riunione Adriatica di Sicurtà SpA, Generali Assicurazioni Generali SpA) v West Tankers Incorporation* [2009] ECR I-663, [2009] 1 AC 1138).

[22]See *Civil Jurisdiction and Judgments*, above n 15, para 5.38, drawing on *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35, [2013] 1 WLR 1889.

[23]See eg Lord Bingham of Cornhill in *Donohue*, above n 7, at [23]–[39].

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treatises on trusts law or conflict of laws.[24] A key reason for the prevalence of jurisdiction clauses in trust deeds is the growth in settlements with cross-border elements. Increasingly, and often for tax purposes, settlors create trusts in offshore territories. These trusts are international in nature because, almost invariably, the settlors and beneficiaries reside in forums other than where the trust assets, or the trustees, are located. Additionally, many of these settlements contain provisions which allow for the management of the funds to be transferred from one set of trustees (who could be in one territory) to a different group (based in another). It tends to be trustees who seek the insertion of these clauses in trust instruments, chiefly to forestall uncertainties about where disputes vis-à-vis international trust instruments should be heard.

With the greater prominence of jurisdiction clauses in trust settlements, several difficult questions have come to the fore. An especially vexed one has concerned the treatment of exclusive jurisdiction clauses in international trust deeds. In particular, the question arises whether, like their counterparts in contracts, such clauses should be generally upheld, unless the claimant can show a strong cause why the matter should be litigated in a different court. An examination of the relevant legal sources in this area highlights that the approaches to answering this question under the Brussels regime,[25] on the one hand, and at common law, on the other, are at odds.

(a) The treatment of exclusive jurisdiction clauses in trust deeds under the Brussels regime and at common law

At face value, the Brussels-based jurisdiction rules treat trust and contractual jurisdiction clauses in the same manner.[26] Under Brussels Ia Regulation, Article 25(3), a court in the EU Member State that has been afforded exclusive jurisdiction under the trust shall have competence regarding 'any proceedings brought against a settlor, trustee or beneficiary, if relations between those persons or their rights or obligations under the trust are involved'.[27] In relation to contracts, Article 25(1) provides that the EU Member State court chosen by the parties in their agreement is presumed to have exclusive jurisdiction to hear the disputes arising in the context of their bargain.[28] There is, however, one main difference in how the Brussels regime treats exclusive jurisdiction clauses in contracts as opposed to trust deeds. To be valid, jurisdiction clauses in contracts must comply with certain formal requirements outlined under Article 25(1). By contrast, Article 25(3) is silent as to the existence of any such preconditions for the purpose of exclusive jurisdiction clauses in trust documents. Thus, broadly, the Brussels regime affords the same weight to jurisdiction clauses, irrespective of whether they are included in trust instruments or contracts.

However, common law courts have not been so consistent in their treatment of exclusive choice-of-court clauses in trust deeds. When deciding what effect should be given to these terms, in the majority of cases decided in the 2000s, common law courts relied on the principles governing the enforcement of exclusive jurisdiction clauses in contracts. Put differently, the prevailing view in that era was that exclusive choice-of-court clauses in trust deeds should be enforced, unless the claimant can show a strong cause to the contrary. For instance, in *Koonmen v Bender*,[29] having established that the trust deed contained an exclusive jurisdiction clause, the Jersey Court of Appeal found that it should be upheld. The following passage in Rokinson JA's judgment highlights the view favoured by the court that the same legal principles govern the treatment of exclusive jurisdiction clauses in trust instruments and contracts:

> the courts still retain a discretion to override an express choice of forum in a contract or trust deed. But prima facie, the court's function is to interpret and apply the agreement of the parties

[24]See E Rajah QC and A Robinson 'Jurisdiction clauses in trusts' (2015) 21 Trusts & Trustees 1 at 4 (fn 20).

[25]The Brussels regime covers provisions within Brussels Ia Regulation, and the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2007] OJ L 339/3 (Lugano II Convention).

[26]See A Dickinson and E Lein *The Brussels I Regulation Recast* (Oxford: Oxford University Press, 2015) paras 9.89–9.90.

[27]The position is identical under the Lugano II Convention: Art 23(4).

[28]The position is identical under the Lugano II Convention: Art 23(1).

[29][2002] JCA 218, 6 ITELR 56.

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> or the expressed intention of those creating the trust deed, and as a general rule the courts will give effect to a choice of forum. The court will override an agreed choice of forum only in exceptional circumstances. The rule [concerning the treatment of exclusive jurisdiction clauses in contracts] is clearly stated in Dicey and Morris in Rule 32(2)[30] and in the following text and the cases thereafter cited. Although it may be argued that the presumption in favour of applying the express provisions of a trust deed may not be as strong as that in favour of holding parties to a contract to the terms of their agreement, I see no reason why the presumption should not be just as strong as between the Settlor and those claiming to have been 'standing behind' the Settlor […] and the Trustees. Further, I consider that, as an important element in the structure of the trust in respect of which any would-be beneficiary claims an interest, it should prima facie be binding on such beneficiary.[31]

This approach to the treatment of exclusive choice-of-court clauses in trust documents found favour with other common law courts, too. In *Green v Jernigan*,[32] the Supreme Court of British Columbia concluded that the trust contained an exclusive jurisdiction clause. It then ruled that the same factors as those relevant in giving effect to contractual exclusive jurisdiction clauses under the strong cause test applied to the enforcement of equivalent terms in trust deeds. To support its reasoning, the court drew on[33] Canadian authorities relating to the treatment of contractual exclusive jurisdiction clauses – such as *Sarabia v The Oceanic Mindoro*[34] and *ZI Pompey Industrie v ECU-Line NV*.[35] Ultimately, it was held that no strong cause had been shown to justify litigation in a forum other than the one designated in the trust deed. In England, too, courts turned to the strong cause test in deciding whether to uphold an exclusive jurisdiction clause in a trust instrument. A helpful example here is *Bank of New York Mellon v GV Films Ltd*.[36] The claimant (B) was a US bank which had a London branch. The defendant (G) was an Indian company. In 2006, G made two trust deeds which both contained identical jurisdiction clauses (clause 25.2). The clause stated that

> The Courts of England are to have jurisdiction to settle any disputes which may arise out of or in connection with this Trust Deed or the Bonds and accordingly any legal action or proceedings arising out of or in connection with this Trust Deed or the Bonds ('Proceedings') may be brought in such courts. The Company irrevocably submits to the jurisdiction of such courts and waives any objections to Proceedings in such courts on the ground of venue or on the ground that the Proceedings have been brought in an inconvenient forum. This submission is for the benefit of the Trustee and each of the Bondholders and shall not limit the right of any of them to take Proceedings in any other court of competent jurisdiction nor shall the taking of Proceedings in any one or more jurisdictions preclude the taking of Proceedings in any other jurisdiction.

Following a dispute between the parties, G commenced proceedings in India. Shortly thereafter, B initiated an action in England. The parties made two competing applications to the English court: G sought to stay the English proceedings, pointing to the ongoing trial in India; and, B applied for an anti-suit injunction to restrain G from continuing with the litigation in India, arguing that it had been brought in breach of clause 25.2. Fundamentally, the decision in the case turned on two questions: (i) did clause 25.2 confer exclusive jurisdiction on the courts in England; and, if so, (ii) what effect should be afforded to it? In answer to the first question, Field J ruled that the clause

[30] L Collins et al *Dicey & Morris on The Conflict of Laws* (London: Sweet & Maxwell, 13th edn, 2000) para 12R–074. This rule related to the treatment of exclusive jurisdiction clauses in contracts.

[31] [2002] JCA 218, 6 ITELR 568 at [49] per Groberman J.

[32] (2003) 18 BCLR (4th) 366.

[33] Ibid, at [49].

[34] 1996 26 BCLR (3d) 143.

[35] 2003 SCC 27.

[36] [2009] EWHC 2338 (Comm), [2010] 1 Lloyd's Rep 365.

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amounted to an exclusive jurisdiction clause. As for the second, his Lordship drew on the passage in Lord Bingham of Cornhill's speech in *Donohue v Armco*, concerning the treatment of exclusive jurisdiction clauses in contracts. Field J stated that a party seeking to circumvent an exclusive choice-of-court clause in a trust instrument must show a strong cause why such clause should not be upheld.[37] Consequently, B's application to obtain an anti-suit injunction was successful, while G's plea for a stay of proceedings in England was rejected.

In the early 2010s, support for the view that exclusive choice-of-court clauses should be accorded the same weight whether they feature in trust settlements or contracts could also be found within the academic commentary. For example, in explaining why an exclusive jurisdiction clause in a trust deed should be enforced against successor trustees, Professor Harris observed that they 'may be taken to have agreed to be bound by the terms of the trust instrument, even if they were not party to the initial agreement'.[38] Moreover, in Professor Harris's view, such clauses should be strongly enforced against beneficiaries:

> [b]eneficiaries take the benefit of an interest under the trust and, even if they do not expressly agree to the jurisdiction clause, it is arguable that they should equally take the 'burden' of being bound by the terms of the trust, including an exclusive jurisdiction clause.[39]

In many ways, the treatment of exclusive jurisdiction clauses in trust deeds in cases such as *Koonmen*, *Green*, and *Bank of New York Mellon* could be deemed as having represented the dominant practice at common law at the beginning of the twenty-first century. Nevertheless, the study of the relevant sources also reveals the existence of an opposing stance, which contended that exclusive jurisdiction clauses in trust deeds should receive less weight than their contractual equivalents. Especially noteworthy, in this context, is the judgment of the Royal Court in Jersey in *EMM Capricorn Traders Ltd v Compass Trustees Ltd*.[40] The case concerned actions brought in Jersey by EMM, the settlement's incumbent trustees, against its predecessor, C, for breach of contract and breach of trust. The settlement document contained an exclusive jurisdiction clause in favour of courts in Guernsey. Pointing to this clause, the defendant applied to the court in Jersey to relinquish its jurisdiction in relation to the breach-of-trust claim or, failing that, to stay those proceedings pending the determination of the contractual claims.

An important question for the court's determination was what effect should be given to the Guernsey exclusive jurisdiction clause in the trust deed. The defendant submitted that reliance should be placed on the strong cause test in deciding whether the clause should be upheld.[41] The plaintiff, however, argued that, in deciding the stay application, the court in Jersey should rely on *forum non conveniens*.[42] *Forum non conveniens* provides the basis for common law courts to stay their proceedings in cases where the action before them has *not* been initiated in breach of an exclusive jurisdiction clause. It affords courts a discretion to stay their proceedings if persuaded that another foreign forum is more appropriate for hearing the claim.[43] Through its submission, the plaintiff was effectively inviting the Jersey court to expand the *forum non conveniens* doctrine beyond its ordinary ambit.

[37]Ibid, at [16].

[38]J Harris 'Jurisdiction and judgments in international trusts litigation – surveying the landscape' (2011) 17 Trusts & Trustees 236 at 254.

[39]Ibid. See also L Tucker et al *Lewin on Trusts* (London: Sweet & Maxwell, 19th edn, 2014) para 11-058.

[40][2001] JLR 205.

[41]Ibid, at [12].

[42]Ibid, at [14].

[43]*Spiliada Maritime Corpn v Cansulex Ltd* [1987] AC 460 (England); *The Adhiguna Meranti* [1988] 1 Lloyd's Rep 384 (Hong Kong); *Brinkerhoff Maritime Drilling Corp v PT Airfast Services Indonesia* [1992] 2 SLR 776 (Singapore); and *McConnell Dowell Constructors Ltd v Lloyd's Syndicate 396* [1988] 2 NZLR 257 (New Zealand). In the context of private-international-law disputes in Australia, the *forum non conveniens* doctrine enables Australian courts to stay their proceedings if they are satisfied that Australia is a clearly inappropriate forum for entertaining the dispute: *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.

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Superficially, the type of factors underpinning the courts' approaches to stay applications under the strong cause test and the *forum non conveniens* doctrine is broadly similar. When applying both doctrines, these considerations enable courts to identify the forum to which the dispute belongs. Yet, the two are distinct concepts. Indeed, in England, the courts' power to stay their proceedings based on the strong cause test was acknowledged in *The Eleftheria* more than a decade and a half before the formal adoption of *forum non conveniens* in *Spiliada* in 1986. All else being equal, a defendant that seeks a stay of proceedings under the strong cause test has better prospects of realising that objective than a defendant that tries to persuade the court to relinquish its otherwise soundly-founded jurisdiction in favour of a more appropriate foreign forum under *forum non conveniens*. After all, when applying the strong cause test, the presumption is that an exclusive jurisdiction clause should be enforced. Accordingly, in stay applications of this nature, the common law courts' starting point is to allow the defendant's motion, unless the claimant can establish exceptional reasons why the proceedings brought in breach of an exclusive jurisdiction clause should still be sustained. No such presumption exists when stay applications are made pursuant to the *forum non conveniens* doctrine. Therefore, in arguing that *forum non conveniens* should provide the basis for the court's treatment of the Guernsey exclusive jurisdiction clause, the plaintiff was effectively inviting the Jersey court to adopt an approach which made it easier to bypass exclusive jurisdiction clauses in trust deeds than in contracts.

Ultimately, the Jersey court rejected the defendant's contention that the same approach to the enforcement of exclusive jurisdiction clauses in contracts should apply to such terms in trust instruments. In reaching this conclusion, the conceptual distinction between trusts and contracts was the decisive factor:

> If A and B agree in a contract that they will refer any disputes to the courts of a particular country, one can well understand why they should generally be held to their bargain … But the position is very different in relation to a trust. The exclusive jurisdiction provisions of a trust deed will have been agreed only between the settlor and the original trustees. Actions in relation to the trust may be brought by beneficiaries who were never parties to the trust deed; indeed they may not even have been alive at the time of its execution. The policy considerations which lead to a party to a contract being held to his choice of exclusive jurisdiction cannot apply to a beneficiary who played no part in the choice of exclusive jurisdiction made in the trust deed.[44]

The court stated that the policy considerations which warrant for contractual exclusive jurisdiction clauses to be upheld strictly are not in play vis-à-vis trusts. More specifically, the lack of agreement on the part of the plaintiffs to the inclusion of exclusive jurisdiction clauses in trust settlements was a significant reason for this finding. At the same time, the Royal Court refused to accept the plaintiffs' submission that the *forum non conveniens* doctrine should provide the basis for granting a stay, stating that it would 'ignore completely the existence of the exclusive jurisdiction clause in the trust deed'.[45] Instead, the court chose to devise a different test by adapting the considerations at the heart of the operation of the strong cause test. It emphasised that under the new test 'the burden upon the plaintiff [should be] less onerous than in contract cases'.[46] The Royal Court's position on the treatment of exclusive jurisdiction clauses in trust instruments was that they should be upheld, unless the plaintiff can show '*good reason* why a stay should not be granted'.[47] The court considered that, the 'good reason test' makes it easier for a party who wishes to circumvent an exclusive jurisdiction clause in a trust deed to do so than the strong cause test would have allowed. Yet, the court found that the good reason test presents a sterner test to a beneficiary seeking to sidestep an exclusive

[44] *EMM Capricorn*, above n 5, at [16] per Deputy Bailiff Birt.
[45] Ibid, at [18].
[46] Ibid, at [19].
[47] Ibid, at [31] (emphasis added).

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choice-of-court clause than would have been the case under the *forum non conveniens* doctrine. Applying the good reason test to the facts in *EMM Capricorn*, the court pointed to a related action for breach of contract that was due to be heard in Jersey as the factor which tilted the balance in favour of sustaining the Jersey proceedings. Thus, the defendant's stay application was dismissed.

The view that the approach to the treatment of exclusive jurisdiction clauses in contracts should not be employed in enforcing equivalent clauses in trust instruments is supported by certain trust experts. For example, Professor Matthews[48] has observed that it was 'strange' to include jurisdiction clauses in trust deeds, arguing that they belonged to contracts.[49] In his opinion, even the fact that these terms are generated in the context of (what is effectively) an agreement between settlors and trustees was not enough to make them binding on beneficiaries.[50] Much like the Royal Court in *EMM Capricorn*, Professor Matthews's opposition to the equal treatment of exclusive jurisdiction clauses in trust instruments and contracts was rooted in the conceptual distinction between trusts and contracts.

(b) The Privy Council ruling in Crociani

In 2014, an opportunity to have an authoritative answer to the question of what effect should be given to exclusive jurisdiction clauses in trust deeds presented itself when the litigation in *Crociani* reached the Privy Council. Broadly, the case concerned allegations of breach of trust. In 1987, a mother had created a trust for the benefit of her daughters. Pursuant to clause 15 of the settlement, the law of the Bahamas governed the trust. Under clause 12, the incumbent trustees had the power to resign, appoint new trustees in another jurisdiction, and declare that the trust should take effect in line with the laws of the country of the residence (or incorporation) of the new trustees. Were these steps to be taken, subparagraph (6) of clause 12 stipulated that the trust would be held

> 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.

During its existence, the management of the trust assets changed hands. Between 2007 and 2011, the trust was managed by the settlor, a Mr Foortse, and a Jersey-based firm of trustees (hereinafter Jersey Trustees). In 2012, the Jersey Trustees resigned, and appointed a Mauritian company as the sole trustee. Meanwhile, the relationship between the settlor and one of her daughters became fraught. In correspondence, over a two-year period, the daughter accused the Jersey Trustees of various wrongdoings in relation to the trust. Ultimately, in early 2013, the daughter and her two children commenced proceedings before the Royal Court in Jersey against the Jersey Trustees and the Mauritian trusts firm. The claimants accused the Jersey Trustees, inter alia, of misappropriating trust funds, and sought to challenge the validity of steps taken by the trustees as being a fraud on their powers. They also sought to reverse the appointment of the company in Mauritius as new trustees. In response, the defendants applied to stay the Jersey proceedings, contending that clause 12(6) of the trust conferred exclusive jurisdiction on the courts in Mauritius (as the place of incorporation of new trustees). The Royal Court rejected the defendants' stay application. The defendants' subsequent appeal to the Jersey Court of Appeal was dismissed.[51] Thereafter, they appealed to the Privy Council.

Before ruling on the defendants' stay motion, the Privy Council had to decide if clause 12(6) of the trust deed had in fact afforded exclusive jurisdiction to the court in Mauritius. For this purpose, Lord

[48]Now His Honour Judge Matthews, following promotion to the Circuit Bench of England and Wales.
[49]Matthews, above n 4, at [9].
[50]Ibid, at [10].
[51][2014] JCA 89.

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Neuberger, who gave the Board's judgment,[52] focused on the interpretation of two phrases within clause 12(6): 'the exclusive jurisdiction of … the law of the said country', and 'the forum for the administration of the trusts'. His Lordship found that the phrase 'the exclusive jurisdiction of … the law of the said country' was actually a choice-of-law provision that sought to subject all issues regarding the trust to the law of the country where the new trustees were based.[53] As for the forum of administration, his Lordship considered that the expression did not have a specific technical meaning. Therefore, it could signify either the *court* which is to enforce the trust, or the *place* where the trust is administered.[54] On the facts, clause 12(6) was held to imply the location where the trust was to be managed, as its wording did not state that the *courts* of the country where the new trustees were based shall become the forum for the administration of the trusts.[55] The broader implication of Lord Neuberger's analysis of the so-called forum of/for administration clauses is that for such a term to be deemed as identifying the court which is to enforce the trust, it must specifically mention the court of the relevant country in its wording. It appears that, even where the forum of/for administration clause does mention the courts of a country, the court in question is competent to entertain only actions brought by trustees relating to the administration of the trust – as opposed to contentious, breach-of-trust claims.[56]

Because the Privy Council held that clause 12(6) was not an exclusive jurisdiction clause, it no longer had to decide whether (and on what basis) it should be enforced. Nevertheless, owing to the importance of the matter, the Board proceeded to examine whether the action in Jersey should have been stayed, had clause 12(6) been found to have conferred exclusive jurisdiction on the Mauritian court. Effectively, the court set out to determine whether exclusive jurisdiction clauses in trust instruments should be treated in the same manner as equivalent terms in contracts. It is this aspect of the judgment which is central to the present discussion.

In answer to the question, Lord Neuberger opined that 'it 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'.[57] The main justification for this observation was that trusts and contracts were different legal constructs. As his Lordship noted,

> [i]n the case of a clause in a trust, the court is not faced with the argument that it should hold a contracting party to her contractual bargain. It is, of course, true that a beneficiary, who wishes to take advantage of a trust can be expected to accept that she is bound by the terms of the trust, but it is not a commitment of the same order as a contracting party being bound by the terms of a commercial contract.[58]

Lord Neuberger went on to state that, in a trust, 'the court has an inherent jurisdiction to supervise the administration of the trust … primarily to protect the interests of beneficiaries'.[59] This power, in his Lordship's view, meant that there is a 'clear and … significant distinction between trusts and contracts'.[60] Consequently, Lord Neuberger considered that 'the weight to be given to an exclusive jurisdiction clause [in a trust deed] is less than the weight to be given to such a clause in a contract'.[61] Thus,

[52]The Board consisting of Lord Mance, Lord Reed, Lord Hughes, and Lord Hodge.

[53]*Crociani*, above n 6, at [23]–[29].

[54]Ibid, at [17].

[55]Ibid, at [20].

[56]Eg *Crociani*, above n 51, at [73]–[74] and [83]–[85] (unchanged by the Privy Council's judgment); *Helmsman*, above n 5; RY Tan 'Jurisdiction clauses in trust instruments' [2015] Lloyd's Maritime and Commercial Law Quarterly 278 at 280; and Matthews, above n 4, at [21]–[22].

[57]*Crociani*, above n 6, at [35].

[58]Ibid, at [36].

[59]Ibid, citing Lord Walker of Gestingthorpe's remarks in *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26, [2003] 2 AC 709 at [51].

[60]Ibid.

[61]Ibid, at [35].

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it would be less difficult for a beneficiary to sidestep the clause than it would be for a contracting party wishing to bypass a similar stipulation in a contract.

To complete the analysis, Lord Neuberger examined how the stay application would have been treated in *Crociani*, had it still been a live issue in the appeal.[62] His Lordship did not outline the relevant test in determining whether a stay should be granted. However, the exclusive jurisdiction clause, the dispute's governing law, location of the evidence and witnesses, and statements made in the pre-action correspondence between the parties were cited as being germane in deciding whether the proceedings in Jersey should have been stayed, to uphold the Mauritian jurisdiction clause. This part of Lord Neuberger's judgment resembles the application of the *forum non conveniens* doctrine.[63] Therefore, it is possible that his Lordship was relying on this doctrine, even though this was not expressed in the judgment. Nevertheless, Lord Neuberger's reasoning in *Crociani* also bears the hallmarks of the Jersey Royal Court's judgment in *EMM Capricorn*. As discussed earlier, in that case the court developed the good reason test to decide whether to sustain proceedings brought in breach of an exclusive choice-of-court clause in a trust deed. It is possible to regard Lord Neuberger's *obiter dicta* as having the good reason test as its doctrinal foundation. In any event, it is clear that the doctrinal basis which supports his Lordship's analysis – be it *forum non conveniens* or the good reason test – affords courts a much broader discretion than the strong cause test would have allowed.

In the end, Lord Neuberger found that the matter was more closely connected with Jersey. The connection between the parties and their dispute to Mauritius was not sufficient to justify staying the Jersey action. Hence, it was held that, had the court been compelled to address the defendants' stay application, it would have dismissed it. It is worth noting that the connection between the claim and Jersey would likely have been too tenuous to secure an order for the continuation of the proceedings under the strong cause test.[64]

3. How should exclusive jurisdiction clauses in trust deeds be treated?

To the extent that the Privy Council in *Crociani* attempted to answer the contentious question of what effect should be given to exclusive jurisdiction clauses in trust deeds, its judgment is commendable. Nevertheless, as the analysis in this part seeks to demonstrate, the Board's approach to the treatment of such clauses is ultimately unpersuasive. It is argued that a more defensible position would have been to hold that, much like their contractual counterparts, exclusive jurisdiction clauses in trust deeds should usually be upheld, unless the claimant can show a strong cause to the contrary.

The primary reason for making this contention is that the grounds for the Privy Council's *obiter* ruling concerning the treatment of exclusive jurisdiction clauses in trust instruments are questionable. To begin with, consider the court's main rationale for its position – namely, that the element of mutual bargain, which is present in contracts, is absent in trusts.[65] As Lord Neuberger observed, in the context of exclusive choice-of-court clauses in trust deeds, 'the court is not faced with the argument that it should hold a contracting party to her contractual bargain', and a trust beneficiary is not making a 'commitment of the same order as a contracting party being bound by the terms of a commercial contract'.[66] In other words, since beneficiaries are strangers to the 'agreement' between the settlors and trustees, it was deemed appropriate to make it easier for them to avoid exclusive jurisdiction clauses in trust deeds.

At first blush, this reasoning, which is essentially akin to the basis for the Jersey Royal Court's judgment in *EMM Capricorn*, might seem convincing. A closer inspection of it, though, suggests otherwise.[67]

[62]Ibid, at [38]–[47].

[63]See also A Scott 'Jurisdiction clauses in deeds of trust: *Crociani v Crociani*' (2015) 85 BYIL 279 at 283.

[64]Ibid.

[65]*Crociani*, above n 6, at [33]–[35].

[66]Ibid, at [36].

[67]For different grounds for critiquing the Privy Council's reasoning, see G Jones 'Trusts on tour: jurisdiction clauses in trust instruments' (2015) 19 JGLR 309 at 334, and Q Yao '"Not so strong" cause for trust jurisdiction clause – a solution to a non-problem?' (2017) 31 Trust Law International 51.

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Lord Neuberger acknowledged in *Crociani* that trusts are not contracts.[68] Yet, the absence of an ingredient essential for the purpose of contracts – namely, mutual agreement – provided the main ground for the Board's stance on the treatment of these terms. However, it seems curious to draw on the absence of consent on the part of the beneficiaries, to the inclusion of these clauses, to justify a more relaxed attitude to their enforcement. After all, as one commentator has observed, '[i]f the type of mutual bargain or consent found in the contractual paradigm is necessary to enforce an exclusive jurisdiction clause in a trust instrument to its fullest extent, then the inquiry is surely a non-starter'.[69] Indeed, there are many terms in trust instruments which are enforced against beneficiaries, with full force and effect, despite their having not agreed to the initial insertion of these clauses in trust settlements. Some such clauses are actually more extensive in curtailing the beneficiaries' rights than exclusive jurisdiction clauses. Particularly illustrative, in this regard, are exemption clauses.[70]

Exemption clauses have had a considerably longer history of featuring in trust deeds than choice-of-court clauses. As long ago as in the mid-nineteenth century, common law courts have faced questions pertaining to the scope of trust exemption clauses.[71] Exemption and jurisdiction clauses are obviously different from one another. However, in a broad sense, they perform a similar role. Both terms are included in trust instruments, subject to the settlors' final approval, to protect the trustees against certain risks that they could encounter if disputes relating to the trusts arise. Exemption clauses serve to shield trustees against possible liabilities for loss due to their management of trusts.[72] Without these clauses, it can become prohibitively expensive for trustees to operate, forcing many of them to go out of business. As touched on earlier, exclusive jurisdiction clauses are utilised in international trust instruments partly with the aim of reducing the possible risk of protracted and expensive litigation about where the claims concerning the trust should be brought. Additionally, trustees insist on inserting these clauses so that any breach-of-trust accusations that might be levelled against them are heard in a forum which is, both legally and practically, most favourable to them.[73] It is because of this overall similarity in risk-control functions that an assessment of the treatment of trust exemption clauses would provide a helpful source of comparison for how exclusive jurisdiction clauses in trust deeds might be treated.

Exemption clauses in trust deeds can be phrased in different ways.[74] Nowadays, they are mostly worded broadly to afford trustees maximum protection against the greater array of liabilities that could ensue from their investment of funds in ever more novel and tangled ways. The approach taken to the enforcement of these terms is not uniform across the common law world. For example, the law in Jersey states that, '[n]othing in the terms of a trust shall relieve, release or exonerate a trustee from liability for breach of trust arising from his own fraud, wilful misconduct or gross negligence'.[75]

[68]The existence of this distinction has been questioned in certain corners. For example, it has been stated that 'the deal between settlor and trustee is functionally indistinguishable from the modern third-party-beneficiary contract. Trusts are contracts': JH Langbein 'The contractarian basis of the law of trusts' (1985) 105 Yale Law Journal 625 at 627. Similarly, it has been observed that 'the traditional distinctiveness of fiduciary relationships has been eroded: fiduciary relationships are not now fundamentally different from contractual relationships': AS Hofri-Winogradow 'Contract, trust and corporation: from contrast to convergence' (2017) 102 Iowa Law Review 1691 at 1717.

[69]See Tan, above n 56, at 283.

[70]Different phrases – eg 'trustee exoneration clauses', 'trustee scope-of-duty clauses', and 'trustee exclusion clauses' – are used to characterise terms which seek to limit or expunge liability on the part of trustees to beneficiaries, among others. For present purposes, the term 'trustee exemption clauses' is employed. For a brief discussion of the different types of trust exemption clauses see P Matthews 'The efficacy of trustee exemption clauses in English law' (1989) 4 Conveyancer and Property Lawyer 42 at 43–44.

[71]Eg *Wilkins v Hogg* (1861) 66 ER 346; *Pass v Dundas* (1880) 43 LT 665; and *Knox v Mackinnon* (1888) 13 App Cas 753. See G McCormack 'The liability of trustees for gross negligence' (1998) 13 Conveyancer and Property Lawyer 100 at 100–104.

[72]See L Tucker et al *Lewin on Trusts* (London: Sweet & Maxwell, 20th edn, 2020) paras 41-131–41-132.

[73]Risks of a similar nature could affect parties in commercial litigation: see R Fentiman *International Commercial Litigation* (Oxford: Oxford University Press, 2nd edn, 2015) ch 1.

[74]See J Kessler QC and C John *Drafting Trusts and Will Trusts* (London: Sweet & Maxwell, 14th edn, 2019) paras 6.19–6.29.

[75]Trusts (Jersey) Law 1984, s 26(9), as amended by the Trusts (Amendment) (Jersey) Law 1989, Art 5.

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An identical provision is also in operation in Guernsey.[76] In the same vein, the Trusts Act 2019, section 40 in New Zealand, which came into force on 30 January 2021, prescribes that 'a trust must not limit or exclude a trustee's liability for any breach of trust arising from the trustee's dishonesty, wilful misconduct, or gross negligence'.

By comparison, the law in England and Wales shows a less restrictive approach to trust exemption clauses. It allows trustees to shield from liability for any loss other than that resulting from actual fraud on their part. This has been the position following the ruling in *Armitage v Nurse*.[77] The exemption clause central to the dispute in *Armitage* stated that

> No trustee shall be liable for any loss or damage which may happen to [the Trust Fund] or any part thereof or the income thereof at any time or from any cause whatsoever unless such loss or damage shall be caused by his own actual fraud.

Millett LJ considered that the clause 'exempt[ed] the trustee from liability for loss or damage to the trust property no matter how indolent, imprudent, lacking in diligence, negligent or wilful he may have been, so long as he has not acted dishonestly'.[78] According to his Lordship, there is evidence of dishonesty when the trustee 'acts in a way which he does not honestly believe is in [the beneficiaries'] interests', no matter that he set out to make a gain from his actions.[79]

The breadth of protection available to trustees, against (predominantly) the beneficiaries' breach-of-trust accusations in England and Wales, prompted calls for the scope or use of trust exemption clauses to be curbed.[80] However, after reviewing this area of law in England and Wales, the Law Commission opted against recommending the imposition of statutory restrictions on the use and ambit of these measures.[81] Instead, it was proposed that paid trustees who seek to exclude or limit negligence liability through exemption clauses must take reasonable steps to 'ensure that the settlor is aware of the meaning and effect of the clause'.[82] This proposal came about in part following the Law Commission's finding that exemption clauses are included in trust deeds to 'control risk and to keep costs down, thereby encouraging a sufficient number of trustees to operate in the market'.[83] It was noted that the introduction of statutory formality requirements for exemption clauses 'would give rise to unacceptable uncertainty as it would open trustees' reliance on trust terms to subsequent legal challenge'.[84] In turn, this uncertainty would precipitate added expense and risk, leading to the depletion of trust assets, and the infliction of harm to the beneficiaries' interests.[85]

Whether in jurisdictions like New Zealand – where the approach to trustees' exclusion of liability is less permissive – or in England and Wales – where trustees can exclude liability to beneficiaries for any conduct falling short of fraud – courts have enforced trust exemption clauses, regardless of the

[76]Trusts (Guernsey) Law Act 1989, s 34(7), as amended by the Trusts (Amendment) (Guernsey) Law 1990.

[77][1998] Ch 241.

[78]Ibid, at 251. Before the Court of Appeal's ruling in *Armitage*, it was considered that a clause of the kind under litigation in the case would not protect trustees against liability for losses arising from gross negligence: see eg *Wilkins*, above n 71; *Pass*, above n 71; *Rae v Meek* (1889) 14 App Cas 55. See generally Matthews, above n 70, at 47–50.

[79]*Armitage*, above n 77, at 251.

[80]Notably, in April 2000, during debates in the House of Lords concerning the Trustee Bill – which broadly concerned trustees' powers and duties – Lord Goodhart was critical of the Bill for its failure 'to restrict the inclusion of trustee exemption clauses in trust instruments'. He was concerned that the English law's treatment of trust exemption clauses had meant that '[h]owever negligent, lazy or misguided the trustees may have been, they cannot be held liable for the loss that they have caused to the trust fund': Trustee Bill [HL], *Hansard* (HL), 14 April 2000, vol 612, col 383.

[81]Law Commission Report No 301, *Trustee Exemption Clauses* (Cm 6874), Executive Summary, paras 1.7–1.11. Some of the main reasons for this stance were set out at para 1.06(5).

[82]Law Commission Report No 301, *Trustee Exemption Clauses* (Cm 6874), Full Report, 2006, para 6.65.

[83]Law Commission 'Executive summary', above n 81, para 1.16.

[84]Law Commission 'Full Report', above n 82, para 6.25.

[85]See an acknowledgement of this possibility in Law Commission 'Executive summary', above n 81, para 1.09.

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beneficiaries' lack of consent to their inclusion in the settlement.[86] The absence of the beneficiaries' agreement to the inclusion of these clauses has not led to less weight being attached to them. Trust exemption clauses are upheld with full force and effect, unless doing so is prohibited by statute, repugnant to the trust, or contrary to public policy. Consequently, it is unconvincing to point to the beneficiaries' lack of consent to the inclusion of exclusive choice-of-court clauses in trust deeds as the chief reason why beneficiaries should be able to circumvent them more easily.

Equally questionable is the second ground for the Board's decision in *Crociani* to make it easier for beneficiaries to bypass exclusive jurisdiction clauses in trust instruments. As outlined earlier, Lord Neuberger, during his *obiter* remarks, pointed to the courts' 'inherent jurisdiction to supervise, and, if necessary, intervene in the administration of trusts'.[87] However, the reference to the relevance of inherent jurisdiction to the treatment of exclusive choice-of-court clauses in trust deeds was brief, made in passing, and without meaningful justification. It is, therefore, doubtful that Lord Neuberger cited it as an independent basis for why exclusive jurisdiction clauses in trust deeds should not be treated in the same way as their contractual counterparts. Indeed, Lord Neuberger's dictum could be seen as merely a reiteration of the main basis for the decision that beneficiaries should be able to circumvent exclusive jurisdiction clauses in trust deeds more easily, because they did not consent to them in the first place.[88] Put differently, Lord Neuberger may have referred to the inherent jurisdiction to supervise trusts to underscore that, conceptually, trusts and contracts are different.[89]

But, indeed, even if Lord Neuberger used the existence of the inherent jurisdiction in trusts as a separate ground for affording less weight to exclusive jurisdiction clauses in trust deeds, it does not provide a persuasive basis for favouring this approach. At common law, the power to supervise trusts has deep roots.[90] The scope for this power is expansive, although courts tend to utilise it in relation to the management of trusts.[91] Inter alia, courts can exercise their inherent jurisdiction in the appointment or removal of trustees,[92] permitting trustees to use trust funds to partake in court hearings,[93] and deciding whether trust information can be released to beneficiaries.[94] However, in *Crociani*, the Board appears to have relied on the inherent supervisory jurisdiction in finding (*obiter*) that the beneficiaries' interest in pursuing their claim in a forum other than the one designated in the deed should supersede the trustees' right to insist on the litigation in that forum. The Board's deployment of the inherent supervisory jurisdiction in this manner has been criticised on the basis that *Crociani* concerned a '*hostile* action – [where] the court [was] asked to find out that the trustee is at fault'.[95] Even if this criticism is discounted, Lord Neuberger's reference to the relevance of inherent jurisdiction to the treatment of exclusive choice-of-court clauses in trust deeds is problematic, as it presupposes the very point in question – namely, which court is competent to entertain the claim. In a cross-border trust dispute, the inherent jurisdiction of a court is engaged only if the court has competence over the dispute. His Lordship's remarks, therefore, are liable to be seen as extending inherent jurisdiction from being a matter of substantive law to being a source of jurisdiction (in the private-international-law sense).

Aside from the reservations with the grounds for the Privy Council's *obiter* pronouncements in *Crociani*, four additional reasons can be submitted in support of the contention that exclusive

[86]See also Tan, above n 56, at 283.

[87]*Crociani*, above n 6, at [36].

[88]See N Williams 'Jurisdiction in the dock' (2015) 13 Trust Quarterly Review 30 at 36.

[89]See R Nolan '"The execution of a trust shall be under the control of the court": a maxim in modern times' (2016) 2 Canadian Journal of Comparative and Contemporary Law 469 at 489.

[90]Eg *Morice v Bishop of Durham* (1805) 32 ER 947; *Chapman v Chapman* [1954] AC 429; *McLean v Burns Philp Trustee Co Pty Ltd* (1985) 2 NSWLR 623; *Re Rabaiotti 1989 Settlement* [2000] WTLR 953; and *Schmidt*, above n 59.

[91]For an illustrative summary of the type of situations in which the courts' inherent jurisdiction to supervise trusts is of relevance see Nolan, above n 89, at 471–483.

[92]Eg *Re Chetwynd's Settlement* [1902] 1 Ch 692; *Re Harrison's Settlement Trusts* [1965] 3 All ER 795; and *Chellaram v Chellaram* [1985] Ch 409.

[93]Eg *Re Beddoe* [1893] 1 Ch 547.

[94]Eg *Schmidt*, above n 59.

[95]Yao, above n 67, at 54.

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jurisdiction clauses in trust deeds should be upheld, unless the claimant can show a strong cause to the contrary. First, this approach to the treatment of these clauses provides the best means of honouring the settlors' intentions.[96] At common law, the contents of trust deeds are mostly interpreted and applied so to uphold the settlors' will. The following remarks in Evershed MR's judgment in *Chapman v Chapman* illustrate this point:

> just as the court has always insisted on the due and proper observance by trustees of the terms of their trusts, so also will it in its own orders depart as little as possible from the strict letter of the trust instrument.[97]

The Master of the Rolls then proceeded to reiterate that the court will, by and large, 'give effect, as it requires the trustees themselves to do, to the intentions of a settlor as expressed in the trust instrument, and has not arrogated to itself any overriding power to disregard or re-write the trusts'.[98] In an article published in the *Cambridge Law Journal*, Professor Conaglen has drawn on these pronouncements in stating that upholding the settlor's will is '[t]he strongest justification for enforcing arbitration clauses in trusts' against beneficiaries whom, notwithstanding the existence of such clauses, seek to commence court proceedings against trustees.[99] Elsewhere,[100] Professor Conaglen has also relied on *Rachal v Reitz*, where the Texas Supreme Court emphasised the importance of honouring the settlor's intentions in enforcing an arbitration clause against the trust's beneficiary.[101] It is argued that the same claim can be made regarding the enforcement of exclusive jurisdiction clauses in trust deeds against beneficiaries. To ensure that the settlor's will is honoured, the beneficiaries should bring contentious trust disputes before the court designated in the instrument as having exclusive jurisdiction.

The principle of 'benefit and burden' provides the second independent basis for treating exclusive jurisdiction clauses in trusts in the same manner as their contractual counterparts.[102] When setting up an express trust, a settlor engages a trustee to manage the assets for the benefit of the trust's beneficiaries, according to the trust's terms. These terms embody the 'agreement' between the settlor and the trustee on the running of the trust. They also define the scope of the trust and, as part of that, create and delineate the beneficiaries' interests, as prescribed by the settlor. The benefit-and-burden principle states that if the beneficiaries are to enjoy the benefits conferred to them under the terms of the trust, they should also bear the burdens which the instrument imposes on them. The benefit-and-burden principle has been cited as a possible justification for enforcing arbitration clauses in trust settlements against the beneficiaries.[103] With regard to exclusive jurisdiction clauses in trust deeds, the principle was approved by the Jersey Court of Appeal in the *Crociani* case, where it stated (*obiter*) that these terms should be treated in the same manner as their contractual counterparts.[104] The benefit-and-burden principle could also explain the courts' decision to apply the strong cause test in deciding whether to give effect to exclusive jurisdiction clauses in trust deeds in *Koonmen* (Jersey), *Green* (British Columbia), and *Bank of New York Mellon* (England). It, therefore, provides a clear justification for giving full weight to exclusive jurisdiction clauses in trust deeds against beneficiaries.

[96]See similarly Jones, above n 67, at 337.

[97][1953] Ch 218 at 234.

[98]Ibid, cited with approval by Lord Morton of Henryton on appeal: *Chapman*, above n 90, at 451.

[99]M Conaglen 'The enforceability of arbitration clauses in trusts' (2015) 74 Cambridge Law Journal 450 at 476.

[100]M Conaglen 'Trust arbitration clauses' in RC Nolan et al (eds) *Trusts and Modern Wealth Management* (Cambridge: Cambridge University Press, 2018) p 113.

[101]403 SW 3d 840 at 844 (Tex SC, 2013).

[102]See also Harris, above n 38, at 254, and Yao, above n 67, at 56 and 58.

[103]Eg Conaglen, above n 99, at 475.

[104]*Crociani*, above n 51, at [105], citing, with approval, Professor Harris's view on the matter: J Harris 'Jurisdiction and the enforcement of foreign judgments in transnational trusts litigation' in D Hayton (ed) *The International Trust* (Bristol: Jordan Publishing Ltd, 3rd edn, 2011) para 1.297.

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The law's treatment of the effect of dispute-resolution clauses on third parties in contracts provides a third ground for upholding exclusive jurisdiction clauses in trust instruments in the same manner as the ones in contracts. There is an analogy between how third parties in contracts, and beneficiaries in trusts, are affected by dispute-resolution clauses in the relevant instruments.[105] The Privy Council's decision in *The Pioneer Container* highlights how third parties in contracts are affected by dispute-resolution clauses.[106] In this case, the plaintiff cargo owners (bailor) engaged the carriers (bailee) to ship the cargo by sea. The bills of lading gave the bailee the right to sub-contract the whole or part of the voyage 'on any terms'. The goods were sub-bailed to the defendant shipowners (sub-bailee). Under the bills of lading between the bailee and sub-bailee, any claim or other dispute arising from the carriage of the goods was subjected to the exclusive jurisdiction of the courts in Taiwan. A collision occurred involving the sub-bailee's vessel and another ship, leading to the loss of the bailor's cargo. Subsequently, the bailor commenced proceedings against the sub-bailee in Hong Kong, claiming damages for its losses. The key issue for consideration was whether the bailor was bound by the Taiwanese exclusive jurisdiction clause in the bills of lading between the bailee and sub-bailee, despite not being privy to the agreement. On the bailor's appeal from the decision of the Court of Appeal of Hong Kong, the Board ruled that the bailor was bound by the exclusive jurisdiction clause, because it had permitted the bailee to sub-contract the whole or part of the carriage of the goods 'on any terms'.[107]

Following the enactment of the Contracts (Rights of Third Parties) Act 1999 in England, a third party can seek to enforce a term within the agreement between two contracting parties that set outs expressly,[108] or by implication,[109] to confer a benefit on the third party. In such a situation, if the agreement also contains an arbitration clause that is in writing,[110] it binds the third party, under section 8(1) of the Act,[111] whether as a claimant or a defendant. The 1999 Act is silent on the effect of jurisdiction clauses on third parties.[112] Nevertheless, it has been observed that, similar to the position vis-à-vis arbitration clauses,

> [i]f a non-party claims the benefit of a contract made between others, as he was intended to, and that contract provided that an action by the non-party to enforce the contract must be brought in a nominated court, this also will be binding on the non-party …, even though the jurisdiction agreement may be, when viewed in isolation, a burden rather than a benefit.[113]

In short, a third party to a contract, who receives a benefit under its terms, is, not unlike the contracting parties themselves, bound by the jurisdiction clause in the agreement. Beneficiaries' relationship with the trust instruments is much like that of third parties and contracts. It is argued that, by analogy, they, too, should be bound by the jurisdiction clause, unless they can establish a strong cause why the dispute should be heard in a forum other than the one designated in the trust instrument.

[105]See also Conaglen, above n 99, at 474 (in relation to arbitration clauses in trust deeds), and Yao, above n 67, at 56–57.

[106][1994] 2 AC 324.

[107]Contrast the Privy Council decision in *The Mahkutai* [1996] AC 650, another case concerning an appeal from the Court of Appeal of Hong Kong. In this case, it was held that a third party was not able to enforce an exclusive jurisdiction clause in favour of courts in Indonesia because the term was held to fall outside the scope of the Himalaya clause in the bills of lading.

[108]Contracts (Rights of Third Parties) Act 1999, s 1(1)(a).

[109]Contracts (Rights of Third Parties) Act 1999, s 1(1)(b), s 1(2), and s 1(3).

[110]By virtue of Arbitration Act 1996, Part 1.

[111]Eg *Nisshin Shipping Co Ltd v Cleaves & Co Ltd* [2003] EWHC 2602 (Comm), [2004] 1 Lloyd's Rep 38.

[112]See, however, *Explanatory Notes on Contracts (Rights of Third Parties) Act 1999* (HMSO, 1999), [32], which assumes that jurisdiction clauses, too, are covered by the Act.

[113]*Civil Jurisdiction and Judgments*, above n 15, para 4.47 (citations omitted). See also A Burrows 'The Contracts (Rights of Third Parties) Act 1999 and its implications for commercial contracts' [1999] Lloyd's Maritime and Commercial Law Quarterly 540 at 552 (fn 28), and N Andrews 'Strangers to justice no longer: the reversal of the privity rule under the Contracts (Rights of Third Parties) Act 1999' (2001) 60 Cambridge Law Journal 353 at 375.

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Finally, and perhaps more importantly, adopting a more relaxed approach to the enforcement of exclusive jurisdiction clauses in trust documents, based on *forum non conveniens* or the good reason test, is likely to give rise to serious practical problems. The breadth of discretion available to courts when applying the *forum non conveniens* doctrine (which is almost identical to the good reason test) has long been criticised for leading to unpredictable, drawn-out, and costly litigation. For example, the factors underpinning the application of *forum non conveniens* are said to be 'too "legion" and imponderable to be enumerated or assigned weights', thus making the operation of the test 'extremely costly', with 'seemingly indistinguishable cases' frequently reaching 'diametrically opposite results'.[114] Even the doctrine's proponents acknowledge that the type of considerations underpinning the *forum non conveniens* test 'depend on the circumstances of the individual case: many may be listed, but the weight of any of them depends on the context in which it arises'.[115] Thus, litigants, especially in high-value disputes, routinely have to adduce a large volume of documentary evidence to persuade the court that the doctrine should be applied in their favour. Indeed, judges have occasionally censured the quantity of evidence presented to courts, and the amount of time taken up to investigate where the claim should be brought.[116] It is not only the application of the English version of the *forum non conveniens* doctrine that has been subjected to these criticisms. Largely similar complaints have also been made regarding the operation of the doctrine in private-international-law disputes in Australia.[117]

If the *forum non conveniens* doctrine is used to determine whether exclusive jurisdiction clauses in trust deeds should be upheld, then the same problems are also bound to afflict this enquiry. Neither the beneficiaries, by whom or on whose behalf the breach-of-trust proceedings are instigated, nor the trustees, facing those claims, can know with reasonable certainty from the outset whether the exclusive jurisdiction clause in the trust deed would be upheld. It is not hard to see that a disproportionate amount of time and (trust) resources are likely to be expended before it becomes clear which court has jurisdiction to hear the trust dispute.[118] This state of affairs is all the more unwelcome because, principally, exclusive jurisdiction clauses have been inserted in trust deeds to eliminate the doubts about where trust disputes should be entertained. If they are, by virtue of the *obiter* ruling in *Crociani*, only to be enforceable when the dispute has, on balance, closer connection with the designated forum, then it is questionable whether there is much point in including such stipulations in trust instruments to begin with. To avoid these problems, it is contended that exclusive jurisdiction clauses in trust deeds should be upheld in the same manner as their counterparts in contracts.

Conclusion

The chief purpose of this paper has been to revisit the issue of the enforcement of exclusive jurisdiction clauses in trust instruments. It is contended that, although considered, the Privy Council's approach in *Crociani* to this vexed matter is ultimately unconvincing. As the analysis has sought to illustrate, it is questionable to cite the beneficiaries' lack of consent to the insertion of exclusive jurisdiction clauses in trust deeds as the reason why less weight should be afforded to these clauses than their contractual counterparts. Equally, the reasoning that the courts' inherent supervisory jurisdiction over trusts supports the view that exclusive jurisdiction clauses in trust settlements should be more easily circumvented was shown to be unpersuasive.

[114]DW Robertson '*Forum non conveniens* in America and England: "a rather fantastic fiction"' (1987) 103 Law Quarterly Review 398 at 414. See also AG Slater 'Forum non conveniens: a view from the shop floor' (1988) 104 Law Quarterly Review 554, and J Hill 'Jurisdiction in civil and commercial matters: is there a third way?' (2001) Current Legal Problems 439 at 449–450.

[115]*Civil Jurisdiction and Judgments*, above n 15, para 4.23.

[116]See most recently *Lungowe v Vedanta Resources plc* [2019] UKSC 20, [2019] 2 WLR 1051 at [6]–[14] per Lord Briggs.

[117]Eg *Colosseum Investment Holdings Pty Ltd v Vanguard Logistics Services Pty Ltd* [2005] NSWSC 803 at [72] per Palmer J, and *Suzlon Energy Ltd v Bangad (No 3)* [2012] FCA 123 at [51] per Rares J.

[118]See similarly AS Hofri-Winogradow 'Trust jurisdiction clauses: their true ambit' (2017) 13 Journal of Private International Law 519 at 523, citing D Faust 'International trust litigation, jurisdiction and enforcement' in A Kaplan (ed) *Trusts in Prime Jurisdictions* (London: Globe Law and Business Ltd, 4th edn, 2016) p 490.

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It is argued that exclusive jurisdiction clauses in trust instruments should be enforced in the same way as their contractual counterparts. In other words, generally, an exclusive jurisdiction clause in a trust instrument should be upheld, unless the claimant can establish a strong cause in support of the matter being litigated in a different forum. The endorsement of this approach has the advantage of ensuring that the settlors' will, as expressed in the trust deed, is fulfilled. It can be rationalised based on the benefit-and-burden principle, and (by analogy) the law's treatment of the effect of dispute-resolution clauses on third parties in contracts. More importantly, according full force and effect to exclusive jurisdiction clauses in trust instruments would help to pre-empt practical problems which are liable to arise if these terms are enforced less readily than contractual ones. In turn, the avoidance of these problems would help to reduce instances of wasteful and drawn-out litigation about where trust disputes should be entertained.

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