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THE ENFORCEABILITY OF ARBITRATION CLAUSES IN TRUSTS

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ABSTRACT. *This article considers the enforceability of arbitration clauses which are included in trust documentation. It focuses on two main questions. The first is whether internal trust disputes are capable of being settled by arbitration. The article offers arguments in favour of the arbitrability of such disputes. It then addresses the question of whether parties to an internal trust dispute can be forced to arbitrate, rather than litigate, where the trust documentation contains an arbitration clause. It is argued that there are real difficulties in the argument that such clauses can be enforced as arbitration agreements, under the ordinary arbitration statutes, but that the court could potentially enforce such a clause under its inherent jurisdiction to control its proceedings.*

KEYWORDS: *trusts, arbitration, arbitrability, public policy, repugnancy, inherent jurisdiction, arbitration agreement.*

I. INTRODUCTION

There has been growing interest in recent years in whether an arbitration clause in a trust deed is enforceable against a party who would rather litigate.[1] There is also a developing line of case law in the US on the question,[2] which is not dispositive on the question for English and other Commonwealth common law jurisdictions, but which merits attention. The growth in the number of such cases also suggests growing interest among settlors in including such clauses in trust deeds: "[t]here may be powerful commercial or domestic reasons for parties to have disputes

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[1] See e.g. L. Cohen and M. Staff, "The Arbitration of Trust Disputes" (1999) 7 J.I.T.C.P. 203; the Special Issue of Trusts and Trustees devoted to the topic: (2012) 18 T. & T. 279–372; T. Graham, "The Problems with Compulsory Arbitration of Trust Disputes" (2014) 20 T. & T. 17; D. Brownbill, "Arbitration of Trust Disputes" (2014) 20 T. & T. 30.

[2] See e.g. *Re Nestorovski Estate* (2009) 769 N.W. 2d 720 (MI CA); *Belzberg v Verus Investments Holdings Inc.* (2013) 999 N.E. 2d 1130 (NY CA); *Rachal v Reitz* (2013) 403 S.W. 3d 840 (TX SC); *McArthur v McArthur* (2014) 168 Cal. Rep. 3d 785.

between a trustee and beneficiary settled privately."[3] Interest in the topic has also led the International Chamber of Commerce to produce a model arbitration clause for inclusion in trust deeds.[4]

There are a number of difficult facets to this topic, not all of which can be addressed in an article such as this. This article focuses on two important aspects of the topic. The first is the preliminary question, which has largely been ignored in the literature to date, as to whether internal trust disputes are amenable to arbitration at all.[5] Drawing on historical material and recent case law, it will be argued that trust disputes are not inherently unarbitrable. That conclusion in turn generates a second question: can parties to an internal trust dispute be forced to arbitrate, rather than litigate, where a clause in the trust deed requires that disputes regarding the trust be submitted to arbitration? This question has been the focus of much of the practitioner literature. It will be argued that there are distinct weaknesses in a number of the arguments that have been advanced, but that there are ways in which arbitration of such disputes could potentially be justified.

II. Arbitrability of Trust Disputes

The first of these two issues directs attention to the "arbitrability" of trust disputes. The concept of arbitrability is distinct from the question whether the dispute in a given case falls within the category of disputes which the parties, by the terms of their arbitration clause, have agreed to settle by arbitration.[6] Arbitrability reflects the idea that certain types of dispute are not capable of settlement by arbitration. In some jurisdictions, statutes make it clear that the courts have power to set aside arbitral awards made in respect of non-arbitrable disputes,[7] but, even where that is not so, it is understood that courts can interfere on the basis that an arbitral tribunal lacks substantive jurisdiction in respect of non-arbitrable disputes.[8]

As Allsop J. explained in *Comandate Marine Corp. v Pan Australia Shipping Pty. Ltd.*:

[3] *Rinehart v Welker* [2012] NSWCA 95, at [175].
[4] See B.W. Boesch, "The ICC Initiative" (2012) 18 T. & T. 316.
[5] There is no doubt that *external* trust disputes, between trustees and third parties who deal with the trustee, can be legitimately resolved through arbitration, unless the trust deed manifests a contrary intention: see Trustee Act 1925, ss. 15(f), 69(2). This would also cover cases where beneficiaries sue "in the place of the trustee" (*Hayim v Citibank N.A.* [1987] A.C. 730, 747), exercising the trustees' rights under a *Vandepitte* procedure (see *Vandepitte v Preferred Accident Insurance Corp. of New York* [1933] A.C. 70; *Roberts v Gill* [2010] UKSC 22; [2011] 1 A.C. 240), but it does not directly authorise arbitration of *internal* trust disputes: see *Re Earl of Strafford* [1980] 1 Ch. 28, 32–33.
[6] See *Tanning Research Laboratories Inc. v O'Brien* (1990) 169 C.L.R. 332, 351; *Larsen Oil and Gas Pte. Ltd. v Petroprod Ltd.* [2011] SGCA 21, at [43]; [2011] 3 S.L.R. 414.
[7] See e.g. Commercial Arbitration Act 2010 (NSW), ss. 34(2)(b)(i), 36(1)(b)(i); International Arbitration Act 1974 (Cth), s. 8(7)(a); Arbitration Act (Sing), s. 48(1)(b). See also United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "New York Convention"), Article V(2)(a).
[8] D. Sutton, J. Gill, and M. Gearing, *Russell on Arbitration*, 23rd ed. (London 2007), at [1-034]; Arbitration Act 1996, s. 67(1).

> The types of disputes which national laws may see as not arbitrable . . . are disputes such as those concerning intellectual property, anti-trust and competition disputes, securities transactions and insolvency. . . . the common element to the notion of non-arbitrability was that there was a sufficient element of legitimate public interest in these subject matters making the enforceable private resolution of disputes concerning them outside the national court system inappropriate.[9]

The question for present purposes is whether private resolution of internal trust disputes through arbitration would be inappropriate.

The modern approach to arbitrability is to focus on the specific dispute between the parties in the case at hand, rather than on the general area of law which the dispute concerns. Thus, for example, whereas competition law disputes were traditionally considered unarbitrable, as Allsop J. mentioned in *Comandate*, there is now growing acceptance that certain disputes regarding competition law are arbitrable.[10] Thus, for example, civil claims brought under the Racketeer Influences and Corrupt Organizations Act 1970 (US) can be arbitrated.[11] The Court of Appeal also recently held that, while the decision as to whether a company should be wound up was exclusively within the court's jurisdiction, and thus unarbitrable, nothing prevents arbitration of a dispute in respect of which one party seeks to invoke the statutory provisions regarding unfair prejudice.[12]

It is, thus, somewhat dangerous to seek to answer the question whether internal trust disputes are, as a genus, capable of resolution by arbitration. However, it is in the nature of academic commentary that one must offer views without the benefit of a specific dispute to hand. What follows must be read with that caveat in mind.

Compared with other kinds of dispute, to date there has been little case law directly addressing the arbitrability of trust disputes. An important exception is the New South Wales Court of Appeal's decision in *Rinehart v Welker*.[13] In the majority, Bathurst C.J. and McColl J.A. held that a dispute regarding removal of the trustees from a family trust was arbitrable, but Young J.A. disagreed. The analysis here begins with Young J.A.'s objections, and offers reasons for disagreeing with his analysis, followed by further comments concerning the majority's view.

Young J.A.'s view on the arbitrability of the dispute in *Rinehart v Welker* was expressed briefly:

[9] *Comandate Marine Corp. v Pan Australia Shipping Pty. Ltd.* [2006] FCAFC 192, at [200]; (2006) 157 F.C.R. 45. See also *Larsen Oil and Gas Pte. Ltd.* [2011] SGCA 21, at [44]; [2011] 3 S.L.R. 414.

[10] Sutton et al., *Russell on Arbitration*, at [1-036]–[1-037]; D. Jones, *Commercial Arbitration in Australia*, 2nd ed. (Sydney, 2013), at [6.140].

[11] *Shearson/American Express Inc. v McMahon* (1987) 482 U.S. 220, 240–41.

[12] *Fulham Football Club (1987) Ltd. v Richards* [2011] EWCA Civ 855, at [76]–[78], [92]; [2012] Ch. 333 (permission to appeal was refused (see [2012] Ch. 362), but that signifies nothing either way: *Re Wilson* [1985] A.C. 750, 756). See also *ACD Tridon Inc. v Tridon Australia Pty. Ltd.* [2002] NSWSC 896, at [191]–[194].

[13] *Rinehart* [2012] NSWCA 95.

> … there is no authority directly on point. There are, as the Chief Justice has detailed, indications in some of the cases which give some support to his view. However, I consider that the difficulties in a court enforcing any decision of an arbitrator are so great (or could be so great if a party was uncooperative) that the opposite view is preferable. Whilst a court could make orders authorising a Registrar to sign transfers on behalf of the former trustee and direct the Registrar General to register them, removal and replacement of trustees usually involves the taking of accounts and an in personam order against the former trustee which if he or she disobeys it leads to imprisonment. It is stretching things to contemplate that an order for imprisonment would be an appropriate enforcement procedure to perfect an arbitrator's award.
>
> I believe that history supports this view. Nineteenth century attempts to merge common law and equity tended to fall down because only the Chancery had the proper machinery to enforce in personam orders.[14]

Young J.A.'s point seems to be that an arbitrator does not have the power that courts of equity have to make an award which commands the parties to act in a particular way, or at least does not have the power to make an award of that kind which can be enforced in the same way as a judgment of the court would. There are two difficulties with this argument.

A. Historical Instances of Equitable Arbitration

The first problem with Young J.A.'s position lies in his suggestion that, whatever may have been the case regarding the arbitrability of common law disputes before procedural fusion, arbitration would not have been a workable means of dealing with disputes regarding equitable rights and remedies. The difficulty with this lies in the historical instances of arbitration being used in equitable disputes.

For example, in *Palmer v Dean of Canterbury* (1584), Bromley L.C. identified that the case raised "some question or points in law" and ordered that it be sent to three Justices for their opinions, although he reserved "any matter which shall appear in equity, to abide the order and judgment of the said Lord Chancellor".[15] Similar orders were made by Hatton L.C. in *Shernebrooke v Shernebrooke* (1588)[16] and in *Needham v Beamond* (1589).[17] These orders reserved to the Lord Chancellor the power to rule on any matter of equity that might arise in the case, but that was not always so. As John Dawson said: "In some instances the issues appeared to be purely legal and appropriate for common law trial. In many cases, however, it was perfectly clear that the claim for relief was equitable, and the arbitral

[14] Ibid., at paras. [226]–[227].
[15] Reported in C. Monro, *Acta Cancellariæ* (London 1847), 540.
[16] Ibid., at pp. 587–88.
[17] Ibid., at pp. 591–92.

commission was instructed to make an award according to 'conscience' or 'equity'."[18]

Mompesson v Ley (1589), for example, involved a dispute regarding a trust to pay debts, the settlor/beneficiary arguing that his trustees had defrauded him of the trust property. The Privy Council sent the dispute to commissioners to call before them the parties, examine the complaint and determine "with such farther consideracion as in equitie shalbe thowght fit"[19] how the situation should be remedied. Similarly, in *Gurlin v Gurlin* (1590), the Privy Council wrote to commissioners regarding another trust to pay debts. The settlor/beneficiary alleged that he had now reached a compromise with his creditors, but the trustee was refusing to redeliver the trust property to him so he was unable to pay the creditors. The commissioners were required to call the trustee and settlor before them "and upon examynacion of his controversie to bring the same to such fynall determynacion as the equytye of the cause deserveth".[20] And, in *Yonge v Yeo* (1590), the Privy Council wrote to commissioners regarding a complaint brought by the widow of a settlor who had settled property on trust to his own use. The widow alleged that the trustee had conspired with others to defeat the settlor of his interest in the property. "Forasmuch as (yf th'enformacion be true) such unconsconable proceedings would be redressed by some good and orderly cowrse", the Privy Council charged the commissioners with hearing and examining the allegations "to do your best endevours for redressing of the said fowle abuse and restoring the widdow to the premysses accordinge to equitie and conscience, and as to you shall seem fit and reasonable".[21]

The doctrines and principles of equity were obviously still in a developmental stage at this point, and so it would be unsafe to treat these orders as modern precedents. However, they do support the view that equitable disputes, including those regarding trusts, are not inherently unarbitrable. As Dawson has observed, "[t]hroughout all phases of Tudor equity arbitration was common and one may say, preferred. It was freely used in the Chancery and Court of Requests".[22] Indeed, John Guy suggests that a shift of litigation "business" to these courts is in part explained by advice given by common lawyers "who saw real advantages for their clients in Chancery's procedure, with its facilities for arbitration and extra-legal

[18] J. Dawson, "The Privy Council and Private Law in the Tudor and Stuart Periods: I" (1950) 48 Mich.L. Rev. 393, 427. See also W. Jones, *The Elizabethan Court of Chancery* (Oxford 1967) 273.

[19] See J.R. Dasent (ed.), *Acts of the Privy Council of England: Vol. XVII* (London 1898), 302.

[20] See J.R. Dasent (ed.), *Acts of the Privy Council of England: Vol. XIX* (London 1899), 33. The commissioners were subsequently given authority to examine the trustee and other witnesses upon oath: see pp. 173–74.

[21] See ibid., at p. 191. Similarly, see *Hewicke v Kaysar* (1574) in J.R. Dasent (ed.), *Acts of the Privy Council of England: Vol. VIII* (London 1894), 359.

[22] Dawson, "The Privy Council", p. 425; see also p. 427. And see Jones, *The Elizabethan Court of Chancery*, pp. 242, 268–269, 271, 286, 482.

compromise, and its relatively impressive armoury of enforcement potential".[23] Dawson has also explained that the Privy Council at this time:

> . . . clearly was, among other things, a court of equity . . .. In the field of express trust there were several orders directed to trustees to compel their compliance with trust obligations, and in one case measures were taken against a purchaser with notice to prevent defeat of a trust obligation. To these cases of direct intervention in the field of trust there should be added the fairly numerous instances of examination or arbitration ordered in disputes over alleged breaches of trust, in some of which the Council clearly expressed its own support for a policy of enforcement.[24]

As Sir John Baker has explained, this mode of dealing with disputes was also employed later in Chancery:

> Inevitably the routine judicial business was widely delegated. Some of it was transacted before the master of the rolls; yet, as there was but one court, he could only sit when the chancellor was absent – often in the evening – and his decisions were subject to review by the chancellor. Enquiries into facts were either referred to masters of the court or to laymen in the country. In Tudor and Stuart times the latter was commonly effected by reference to lay commissioners appointed to "hear and end according to equity and good conscience", in effect a form of arbitration.[25]

Dawson further explains how such commissions were implemented:

> . . . the arbitral commissions were considered to be agents of the Council in the sense that a refusal by litigants to appear before them could lead to arrest for contempt of the Council. When an award was finally rendered, the Council quite often undertook to compel compliance. The party who refused to comply might be called before it to explain his obstinacy; this prospect alone must have been terrifying enough to ordinary citizens. The council, without such hearing, might confirm the award and direct that it be executed. Or continued refusal to perform could lead to a litigant's arrest for contempt of the Council itself.[26]

Historically, therefore, equitable disputes, including disputes regarding trusts, were not thought to involve a subject matter which was unfit for arbitration, and the equitable courts made mechanisms available by which arbitral awards could be enforced.

This view is further supported by the use, more recently than Tudor and Stuart times, of arbitration as a means for resolving disputes regarding trust

[23] J.A. Guy, "The Development of Equitable Jurisdictions, 1450–1550" in E.W. Ives and A.H. Manchester (eds.), *Law, Litigants and the Legal Profession* (London 1983), 80, 84.
[24] Dawson, "The Privy Council", p. 420. The House of Lords exercised a similar jurisdiction at times: see J.S. Hart, *Justice upon Petition* (London 1991), 133–34.
[25] J.H. Baker, *An Introduction to English Legal History*, 4th ed. (London 2002), 111.
[26] Dawson, "The Privy Council", p. 424.

accounts. In *Auriol v Smith*,[27] for example, disputes regarding a trustee's stewardship over a 40-year period were referred to arbitration. The submission was made a rule of court, under the Act for Determining Differences by Arbitration 1698,[28] by the court of King's Bench. The plaintiffs were, however, unsatisfied with the arbitrator's award (charging the trustee with payment of over £33,000) and sought to have the account reopened in Chancery. Plumer V.-C. held that the award could only be challenged in the court of which the submission to arbitration was made a rule under the statute – here the King's Bench – and so Chancery lacked jurisdiction,[29] notwithstanding the plaintiffs' allegations of fraud and notwithstanding that the dispute concerned trust accounts. Lord Eldon L.C. affirmed Plumer V.-C.'s decree.[30] This decision concerns the 1698 statute, but nowhere in the judgments in Chancery is it suggested that the dispute was incapable of being resolved by arbitration on the grounds that it concerned an internal dispute between beneficiaries and their trustee.

The arbitrability of internal trust disputes is also supported, yet more recently, by the existence of precedents for arbitral awards concerning disputes between trustee and beneficiaries under a will where breaches of trust were alleged.[31] Such precedents would be unnecessary, and indeed nonsensical, if such disputes could not be the subject of arbitration. There are, thus, reasons for doubting arguments that the history of equity supports the view that such disputes are not arbitrable.

B. Arbitrators' Remedies

The second difficulty with Young J.A.'s argument against the arbitrability of internal trust disputes lies in his reliance on the remedies available to courts and arbitrators respectively. Before procedural fusion, common law judgments were determinations of right between the parties, whereas Chancery decrees were a command laid upon the person.[32] The Court of Chancery did not have jurisdiction "[n]akedly to declare a right, without doing or directing anything else relating to the right".[33] However, since 1850, equity courts have progressively been given power to make declarations, and the power to make mere declarations, even in equity, has been clear since 1883.[34] More importantly, the fact that an arbitrator may be unable to make orders which can be enforced in the same way as a court order

[27] *Auriol v Smith* (1813) Turn. & R. 121 (37 E.R. 1041).
[28] Differences by Arbitration 1698, 9 & 10 William III, c. 15.
[29] *Auriol* (1813) Turn. & R. 121, 124, 126 (37 E.R. 1041).
[30] Ibid., at p. 136.
[31] See e.g. *Encyclopædia of Forms and Precedents*, 4th ed., vol. 2 (London 1964), 469–72.
[32] See *Pearson v Arcadia Stores Guyra Ltd. (No. 2)* (1935) 53 C.L.R. 587, 590–91, 592.
[33] *Clough v Ratcliffe* (1847) 1 De G. & S.M. 164, 178 (63 E.R. 1016).
[34] S.E. Williams and F. Guthrie-Smith, *Daniell's Chancery Practice*, 8th ed., vol. 1 (London 1914), 689.

does not, by itself, establish that the dispute cannot be resolved by arbitration. As Longmore L.J. has said:

> It is well settled that the fact that an arbitrator cannot give all the remedies which a court could does not afford any reason for treating an arbitration agreement as of no effect …. The inability to give a particular remedy is just an incident of the agreement which the parties have made as to the method by which their disputes are to be resolved.[35]

An arbitrator cannot compel obedience to his award in the way a court can.[36] But, as Lord Selborne L.C. made clear in *Willesford v Watson*, limitations in an arbitrator's remedial armoury, particularly as to equitable remedies, can be circumvented: "it is said that the arbitrator could not grant an injunction. No doubt he could not grant an injunction; but he might say that the thing was not to be done, and there being liberty to apply to this Court, this Court would then grant the injunction."[37]

This observation is apposite in respect of the sort of dispute in *Rinehart v Welker* because, where trustees are removed from office, the court often makes a vesting order, divesting the trust property from the removed trustees and vesting it in the new trustees. That sort of order, concerned as it is with property ownership, operates in rem, and is thus beyond the power of an arbitrator.[38] But, as Bathurst C.J. said:

> The fact that an arbitrator may not have power to remove a trustee or make a vesting order does not alter this position. An arbitrator could give effect to a claim for removal by ordering the trustee to resign, to appoint a new trustee and to convey the trust property to that person. Such an award could be enforced as a judgment under, in this case, the *Commercial Arbitration Act* s. 33.[39]

C. Ousting Courts

The concept of arbitrability is, at base, concerned with "public policy considerations".[40] This points to another potential basis on which arbitration might be thought to be an inappropriate vehicle for resolving internal trust disputes. "It is, of course, a cardinal principle of trust law that the High Court has an inherent jurisdiction to supervise the administration of

[35] *Fulham Football Club (1987) Ltd.* [2011] EWCA Civ 855, at [103]; [2012] Ch. 33; see also at [84], per Patten L.J. See also *Assaubayev v Michael Wilson & Partners Ltd.* [2014] EWCA Civ 1491, at [68].
[36] *Auburn Council v Austin Australia Pty. Ltd.* [2004] NSWSC 141, at [23]; (2004) 22 A.C.L.C. 766; *Hi-Fert Pty. Ltd. v Kiukiang Maritime Carriers Inc. (No. 5)* (1998) 90 F.C.R. 1 (FC), 14.
[37] *Willesford v Watson* (1873) L.R. 8 Ch. App. 473, 480 (L.C. & L.JJ.).
[38] See e.g. *Raukura Moana Fisheries Ltd. v The Ship "Irina Zharkikh"* [2001] 2 N.Z.L.R. 801, at [45].
[39] *Rinehart* [2012] NSWCA 95, at [176]; see also at [210], per McColl J.A. This also resonates with the historical approach discussed by Dawson: see text accompanying note 26 above.
[40] *ACD Tridon Inc.* [2002] NSWSC 896, at [192]. See also *Larsen Oil and Gas Pte. Ltd.* [2011] SGCA 21, at [44]; [2011] 3 S.L.R. 414; and the text accompanying note 9 above.

trusts."[41] Under this jurisdiction, the court can effectively take over the administration of a trust, on the application of trustees or beneficiaries.[42] Under an order for general administration, the "court would order that the trust was to be specifically performed under its supervision, that nothing was to be done without its imprimatur, that accounts should be taken to see what the trust assets were and the court would give directions as to how the trust would be carried out".[43] Alternatively, the inherent jurisdiction enables the court to make more specific orders regarding the administration of trusts, including: giving advice and directions to trustees in a way that immunises the trustees from suit if they follow the advice[44]; permitting the trustees to take remuneration, even where remuneration is already permitted by the trust deed[45]; executing trust powers[46]; authorising compromises of trust disputes on behalf of unborn and minor beneficiaries[47]; "ancillary to its principal duty, to see that the trusts are properly executed",[48] changing the trustees, including against their will[49]; and, in emergency situations, empowering trustees to enter transactions which they are otherwise incapable of lawfully entering.[50]

This inherent supervisory jurisdiction has been recognised for centuries.[51] Lord Eldon L.C. considered it axiomatic "that the execution of a trust shall be under the controul of the Court".[52] As the Privy Council said more recently, in *Schmidt v Rosewood Trust Ltd.*, "[i]t is fundamental to the law of

[41] *Hall v Coulter* [2014] NICh 23, at [20]. See also *Chapman v Chapman* [1954] A.C. 429, 474; *McLean v Burns Philp Trustee Co. Pty. Ltd.* (1985) 2 N.S.W.L.R. 623, 633; *Re Rabaiotti 1989 Settlement* [2000] W.T.L.R. 953, 970 (J.R.C.); *Saipem S.p.A. v Rafidain Bank* [2007] EWHC 3119 (Ch), at [35]; *Rinehart* [2012] NSWCA 95, at [173]; *Crociani v Crociani* [2014] UKPC 40, at [36]; (2014) 17 I.T.E.L.R. 624; G. Thomas and A. Hudson, *The Law of Trusts*, 2nd ed., (Oxford, 2010), at [24.05]; *Halsbury's Laws of England*, 5th ed., vol. 98, (London 2013) at [652]; L. Tucker, N. Le Poidevin, and J. Brightwell, *Lewin on Trusts*, 19th ed. (London 2015), at [23-020].

[42] D.J. Hayton, *Underhill and Hayton's Law Relating to Trusts and Trustees*, 18th ed. (London, 2010), at [86.1]; *Halsbury's Laws of England*, at [660].

[43] *McLean* (1985) 2 N.S.W.L.R. 623, 633. See also Thomas and Hudson, *The Law of Trusts*, at [21.35].

[44] *Re MF Global UK Ltd. (No. 3)* [2013] EWHC 1655 (Ch), at [26]; [2013] 1 W.L.R. 3874; *Re Worldspreads Ltd.* [2015] EWHC 1719 (Ch), at [24]; *Re GB Nathan & Co. Pty. Ltd.* (1991) 24 N.S.W.L.R. 674, 677; *Halsbury's Laws of England*, at [642]; Tucker et al., *Lewin on Trusts*, at [27-076].

[45] *Re Duke of Norfolk's Settlement Trusts* [1982] Ch. 61, 75–79 & 80 (CA); *Foster v Spencer* [1996] 2 All E.R. 672, 678–80; Thomas and Hudson, *The Law of Trusts*, at [21.07].

[46] *McPhail v Doulton* [1971] A.C. 424, 444, 457. See also *Klug v Klug* [1918] 2 Ch. 67, 70–71; *Re Just (dec'd)* (1971) 7 S.A.S.R. 508, 514; *Mettoy Pension Trustee Ltd. v Evans* [1990] 1 W.L.R. 1587, 1617–18.

[47] *Halsbury's Laws of England*, at [645]; Tucker et al., *Lewin on Trusts*, at [45-010]. The limits of this particular power are discussed in *Chapman* [1954] A.C. 429.

[48] *Letterstedt v Broers* (1884) 9 App. Cas. 371 (PC), 386. See also *Chapman* [1954] A.C. 429, 443.

[49] *Re Chetwynd's Settlement* [1902] 1 Ch. 692, 693; *Re Wrightson* [1908] 1 Ch. 789, 798; *Re Harrison's Settlement Trusts* [1965] 1 W.L.R. 1492, 1497; *Monty Financial Services Ltd. v Delmo* [1996] 1 V.R. 65, 76; *Porteous v Rinehart* (1998) 19 W.A.R. 495, 507–08. See also *Forshaw v Higginson* (1855) 20 Beav. 485, 487 (52 E.R. 690); Hayton, *Underhill and Hayton's Law Relating to Trusts and Trustees*, at [70.16], [71.32]; Thomas and Hudson, *The Law of Trusts*, at [22.33], [22.63], [22.67]; Tucker et al., *Lewin on Trusts*, at [13-062], [13-066].

[50] *Re New* [1901] 2 Ch. 534 (CA), 544–45; Tucker et al., *Lewin on Trusts*, at [45-005].

[51] *Re Downshire Settled Estates* [1953] Ch. 218 (CA), 232.

[52] *Morice v Bishop of Durham* (1805) 10 Ves. 522, 539 (32 E.R. 947). See also *Re Astor's Settlement Trusts* [1952] Ch. 534, 549; *Chapman* [1954] A.C. 429, 446; *McPhail* [1971] A.C. 424, 440.

trusts that the court has jurisdiction to supervise and if appropriate intervene in the administration of a trust".[53] This "peculiar relationship of trusts to the Court of Chancery . . . founded in the jurisdiction of [the] court in an appropriate case itself to execute a trust"[54] is not present in other legal contexts. The fundamental and long-standing nature of this inherent jurisdiction provides a potential foundation for arguing that internal trust disputes ought to be considered unarbitrable, on the basis that it would be contrary to public policy for a settlor to be able to oust the court's inherent jurisdiction to supervise the due administration of the trust.

Support for that view could be mustered out of the history of the common law's approach to arbitration clauses generally, which "reveals a long tradition of distrust of arbitration".[55] The Court of King's Bench famously said, concerning an insurance policy containing an arbitration clause, that "the agreement of the parties cannot oust this Court",[56] and Lord Eldon L.C. pointed out in *Street v Rigby* that "no instance is to be found of a decree for specific performance of an agreement to name arbitrators".[57] In a similar vein, in *Czarnikow v Roth, Schmidt & Co.*, Scrutton L.J. said that "[t]he Courts always decline to recognize an agreement to refer all disputes to arbitration as compelling them to stay an action, and do so because such an agreement would oust the jurisdiction of the King's Courts".[58]

However, the courts' views on this aspect of public policy have shifted over time. As the Privy Council has observed, "the determination of what is contrary to the so-called 'policy of the law' necessarily varies from time to time. Many transactions are upheld now by our own Courts which a former generation would have avoided as contrary to the supposed policy of the law".[59] The judiciary is no longer as hostile to arbitration as it was previously.[60] In part, this change in judicial attitude has been a response to statutory intervention in the field.[61]

[53] *Schmidt v Rosewood Trust Ltd.* [2003] UKPC 26, at [36]; [2003] 2 A.C. 709; see also at [51], [66]. See also *CPT Custodian Pty. Ltd. v Commissioner of State Revenue* [2005] HCA 53, at [17]; (2005) 224 C.L.R. 98.

[54] *Public Trustee v Cooper* [2001] W.T.L.R. 901, 922.

[55] *Raguz v Sullivan* [2000] NSWCA 240, at [46]; (2000) 50 N.S.W.L.R. 236. This tradition appears to have begun in the seventeenth century: see G. Williams, "The Doctrine of Repugnancy – II: In the Law of Arbitration" (1944) 60 L.Q.R. 69.

[56] *Kill v Hollister* (1746) 1 Wils. K.B. 129, 129 (95 E.R. 532).

[57] *Street v Rigby* (1802) 6 Ves. 815, 818 (31 E.R. 1323). See also *Mitchell v Harris* (1793) 2 Ves. Jun. 129, 137 (30 E.R. 557); *Gourlay v Duke of Somerset* (1815) 19 Ves. 429, 431 (34 E.R. 576); *Agar v Macklew* (1825) 2 Sim. & St. 418, 423 (57 E.R. 405); J. Story, *Commentaries on Equity Jurisprudence*, 13th ed., vol. 2, by M. Bigelow (Boston 1886), 793–94; E.P. Hewitt and J.B. Richardson, *White & Tudor's Leading Cases in Equity*, 9th ed. (London 1928), 394; G. Jones & W. Goodhart, *Specific Performance*, 2nd ed. (London 1996), 189. However, if an arbitration had been conducted, and an award had been made, courts of equity would order specific performance of the award (see Story at pp. 794–95) unless the award was "exceptionable" for fraud, partiality, misconduct or error on the face of the award: see Story at pp. 786–93.

[58] *Czarnikow v Roth, Schmidt & Co.* [1922] 2 K.B. 478 (CA), 489.

[59] *Evanturel v Evanturel* (1874) L.R. 6 P.C. 1, 29.

[60] Jones, *Commercial Arbitration in Australia*, at [10.360]; see also at [6.130].

[61] *Raguz* [2000] NSWCA 240, at [50]–[51]; (2000) 50 N.S.W.L.R. 236.

For example, where there was an agreement to arbitrate a dispute, but one of the parties had sought to litigate instead, s. 11 of the Common Law Procedure Act 1854 had given the court power to stay litigation "upon being satisfied that no sufficient Reason exists why such Matters cannot be or ought not to be referred to Arbitration".[62] This power was re-enacted in the Arbitration Act 1889.[63] Further, s. 1 of the 1889 Act provided that an agreement to arbitrate had effect as if it were an order of the court, thus avoiding the need to get the court to order that the submission to arbitration was a rule of court (as had been necessary since 1698[64] if the submission to arbitration was sought to be made without instigating litigation in respect of the dispute).[65] This had the effect of bringing "virtually all [arbitral] references under the direct and continuous supervision of the Court".[66] At the same time, the court's ability to oversee the legal correctness of the arbitrator's decision was preserved by the "case-stated" procedure, the object of which was to "secure that the law that is administered by an arbitrator is in substance the law of the land and not some home-made law of the particular arbitrator".[67] Section 19 of the 1889 Act provided that an arbitrator could (and, if directed by a court, must) ask a court for its opinion on any question of law arising in the arbitration by stating a case to the court.

It is important in understanding *Czarnikow* to recognise that it concerned an arbitration agreement which purported to oust the ability of any of the parties to the arbitration to apply to the court to require the arbitrator to state a case to the court. It was this which was considered contrary to public policy as ousting the jurisdiction of the court.

The objection was not that arbitration was itself an illegitimate ousting of the court's jurisdiction,[68] but rather that the court's jurisdiction to supervise the arbitration, and particularly the statutory "case-stated" procedure,[69] could not be ousted.

This is important because the court's role in supervising arbitrations has been progressively diminished in subsequent statutory regimes. The Arbitration Act 1950 repealed the 1889 Act, sweeping away (apparently unnoticed[70]) the court's role under s. 1 of the 1889 Act. The inefficiencies of the "case stated" procedure also came under scrutiny,[71] and it was

[62] See e.g. *Plews v Baker* (1873) L.R. 16 Eq. 564; *Gillett v Thornton* (1875) L.R. 19 Eq. 599, 604. Despite its name, the statute applied to courts of equity as well: *Re Warner & Powell's Arbitration* (1866) L.R. 3 Eq. 261, 266.
[63] Section 4.
[64] 9 & 10 William III, c. 15.
[65] See M.J. Mustill and S.C. Boyd, *Commercial Arbitration in England*, 2nd ed. (London 1989), 433, 437.
[66] Ibid., at p. 447.
[67] *Czarnikow* [1922] 2 K.B. 478 (CA), 484.
[68] The House of Lords had already held that it was not an illegitimate ouster of the court's jurisdiction for parties to an agreement to stipulate that no right of action accrued until an arbitral award had been obtained on the dispute: *Scott v Avery* (1856) 5 H.L.C. 811 (10 E.R. 1121).
[69] See *Czarnikow* [1922] 2 K.B. 478 (CA), 485–89, 487, 489, 491.
[70] Mustill and Boyd, *Commercial Arbitration in England*, pp. 447–48.
[71] Ibid., at p. 452; M. Kerr, "The Arbitration Act 1979", p. 46.

abolished by the Arbitration Act 1979, along with the court's power to set aside an arbitral award for error on the face of the award. In their place, a procedure by way of "appeal" was created, if the parties consented or if the court gave leave.[72] The parties to the agreement could, however, exclude the right of recourse to the court on questions of law,[73] although, for domestic arbitration agreements, any such exclusion had to be agreed after the arbitration had been commenced.[74]

Similarly, under the Arbitration Act 1996, the court has power to make preliminary determinations on questions of law, but the parties can agree otherwise.[75] The parties can appeal to the court on a question of law arising out of an award, but only with agreement of the parties or the leave of the court.[76] And, again, such an appeal cannot be brought if the parties have agreed otherwise.[77]

These legislative changes appear to have influenced the judicial attitude towards arbitration generally. That should not be surprising, given the "symbiotic relationship of legislation and the common law".[78] The Arbitration Act 1979 "transformed the relationship between the courts and arbitrations in England and Wales".[79] It would promote incoherence in the law for the courts to fail to move consistently with such changes.[80] Consistently with this approach, the House of Lords held in *Channel Tunnel Group Ltd. v Balfour Beatty Construction Ltd.* that an agreement to submit a dispute to a panel of experts, which was "nearly an immediately effective agreement to arbitrate, albeit not quite",[81] provided sufficient grounds for the court staying litigation brought in breach of the agreement. And, in 1997, Hobhouse L.J. observed of a charterparty arbitration clause that it is "a contractual right of the time charterers that the dispute be referred to arbitration, a contractual right which equity requires the insurance company to recognize".[82] These decisions are inconsistent with the attitude evident in the nineteenth- and early-twentieth-century decisions.

[72] Arbitration Act 1979, ss. 1(2), 1(3).
[73] Ibid., s. 3(1).
[74] Ibid., s. 3(6).
[75] Arbitration Act 1996, s. 45(1).
[76] Ibid., s. 69(2).
[77] Ibid., s. 69(1). The statute provides, similarly to the 1979 Act, that exclusion agreements for domestic arbitrations are only effective where entered into after the arbitration has commenced (see s. 87(1)), but this provision has not been brought into force.
[78] *Commonwealth Bank of Australia v Barker* [2014] HCA 32, at [17]; (2014) 88 A.L.J.R. 814; see also at [92], [118]. And see *Brodie v Singleton Shire Council* [2001] HCA 29, at [31]; (2001) 206 C.L.R. 512.
[79] M. Kerr, "The Arbitration Act 1979" (1980) 43 M.L.R. 45, 45.
[80] *Erven Warnink Besloten Vennootschap v J Townend & Sons (Hull) Ltd.* [1979] A.C. 731, 743; *Esso Australia Resources Ltd. v Federal Commissioner of Taxation* [1999] HCA 67, at [18]–[28]; (1999) 201 C.L.R. 49; J. Beatson, "Has the Common Law a Future?" [1997] C.L.J. 291; W.M.C. Gummow, *Change and Continuity* (Oxford, 1999), 1–3, 11–18; J. Beatson, "The Role of Statute in the Development of Common Law Doctrine" (2001) 117 L.Q.R. 247.
[81] *Channel Tunnel Group Ltd. v Balfour Beatty Construction Ltd.* [1993] A.C. 334, 352.
[82] *Schiffahrtsgesellschaft Detlev Von Appen G.m.b.H. v Voest Alpine Intertrading G.m.b.H.* [1997] 2 Lloyd's Rep. 279 (CA), 286.

A similar softening of the court's attitude towards arbitration can also be detected in trust cases over time. In *Re Wynn*,[83] for example, Danckwerts J. held ineffective a clause that purported to give trustees the power to determine, in a "conclusive and binding" manner, all questions and matters of doubt arising in the execution of the trusts. Referring to *Czarnikow* by way of analogy, he pointed out that arbitration clauses in contracts were valid provided they merely made the arbitral award a condition precedent to bringing legal proceedings,[84] but "anything which goes beyond that, and attempts to deprive the parties of their right to bring an action is unlawful as an attempt to oust the jurisdiction of the court".[85] Danckwerts J. considered that the law's policy regarding the construction and administration of a will was "still more severe"[86] than that applied to contracts. The clause was void "because it is contrary to public policy as being an attempt to oust the jurisdiction of the court to construe and control the construction and administration of the testator's will and estate".[87]

However, a little over two months after *Wynn* was decided, the House of Lords unanimously upheld a provision in a will which gave the trustees "sole and absolute discretion" to determine whether a hospital had been taken over by the state. Lord Normand said:

> It was objected that on this view the testator had committed to his trustees the construction both of his will and incidentally of the meaning and effect of the statute.[88] I would not deny that; but no case was cited to us nor do I know of any which would compel me to treat as invalid the condition as I have construed it.[89]

In his speech, Lord Tucker analogised directly with arbitration to uphold the clause:

> The proviso in this case is, in my view, designed to put the trustees in much the same position as an arbitrator under an arbitration clause in a contract. The words "in their sole and absolute discretion" in their present context mean, I think, that the trustees are to be the sole judges of matters which, in the present instance, may involve mixed questions of fact and law and that their decision both as to the relevance of the matters to be considered and as to the resulting conclusion is to be final.[90]

[83] *Re Wynn* [1952] 1 Ch. 271.
[84] Referring to *Scott* (1856) 5 H.L.C. 811 (10 E.R. 1121), as to which see note 68 above.
[85] *Re Wynn* [1952] 1 Ch. 271, 276.
[86] Ibid., at p. 278.
[87] Ibid., at pp. 278–79.
[88] This refers to the question of whether the National Health (Scotland) Service Act 1947 had the effect that the relevant hospital had been taken over by the state.
[89] *Board of Management of Dundee General Hospitals v Walker* 1952 S.C. (HL) 78, 86 (also reported in [1952] 1 All E.R. 896).
[90] Ibid., at p. 94. Similarly, Lord Denning M.R. famously suggested that uncertainty in trusts could be "cured" by giving someone else the power to resolve doubt: *Re Tuck's Settlement Trusts* [1978] 1 Ch. 49, 60–62. However, the authority of this decision is weak, given Eveleigh L.J. disagreed (at p. 66) and Lord Russell refused to decide the point (at p. 65). The case was actually decided on the basis that the clause was not uncertain.

This did not, however, leave the trustees free to make decisions uncontrolled by the court, as Lord Reid explained:

> But, by making his trustees the sole judges of a question, a testator does not entirely exclude recourse to the Court by persons aggrieved by the trustees' decision. If it can be shown that the trustees considered the wrong question, or that, although they purported to consider the right question, they did not really apply their minds to it or perversely shut their eyes to the facts, or that they did not act honestly or in good faith, then there was no true decision and the Court will intervene: but nothing of that kind is alleged in this case.[91]

A similar conclusion was reached by the majority in *Rinehart v Welker*. Bathurst C.J. referred to the court's inherent jurisdiction to supervise trusts,[92] but concluded that it was not inconsistent with public policy for the dispute in that case to be referred to arbitration, provided the court retained a supervisory role:

> … at least in circumstances where the trustee and each beneficiary have expressly agreed to their disputes being referred to arbitration, a court should give effect to that agreement. The supervisory jurisdiction of the court is not ousted. It continues to have the supervisory role conferred upon it by the relevant legislation …. It does not seem to me that the matters to which I have referred above should preclude a court from giving effect to such an agreement provided the jurisdiction of the court is not ousted entirely. … it does not seem to me to be contrary to public policy for the beneficiaries under the Trust and the trustee to agree to resolve their disputes by arbitration, provided the supervisory jurisdiction of the court contained in the relevant legislation is maintained.[93]

Given the statutory regime of judicial supervision applies to all arbitrations under the relevant Act, not merely to trust arbitration, the court appears here to be disagreeing with Danckwerts J.'s view in *Wynn* that a higher standard of judicial scrutiny is applied to trusts or wills than mere contracts.

The statutory regime to which Bathurst C.J. referred was contained in the Commercial Arbitration Act 1985 (WA). That statute provided that the court could not set aside an arbitral award for error on the face of the award,[94] but that an appeal lay on a question of law where (i) the court gave leave to appeal *or* (ii) the parties agreed to an appeal, unless the parties had agreed to exclude the right of appeal.[95] This statute has now been repealed, and replaced with a uniform regime across Australia. Under the new regime, the court can only entertain an appeal on a question of law

[91] *Board of Management of Dundee General Hospitals* 1952 S.C. (HL) 78, 92.
[92] *Rinehart* [2012] NSWCA 95, at [173].
[93] Ibid., at paras. [175], [177].
[94] Commercial Arbitration Act 1985 (WA), s. 38(1).
[95] Ibid., ss. 38, 40.

if the court gives leave *and* the parties agree to an appeal.[96] This change makes it harder to appeal against arbitral awards: practically, it limits appeals to situations where the parties have agreed in the arbitration clause (or after the arbitration is commenced but before the award has been made) that there can be an appeal.[97] This differs from the English position, where the court can grant leave to appeal on a question of law unless the parties have agreed that no appeal shall lie.[98]

It is unclear from Bathurst C.J.'s reasoning in *Rinehart v Welker* whether this change would affect the result if the case were decided in circumstances governed by the new statutory regime. One of the criteria stated in his judgment – "provided the jurisdiction of the court is not ousted *entirely*" – remains met, but the other – that "the supervisory jurisdiction of the court contained in the relevant legislation is *maintained*" – may no longer be met. Where an arbitration is governed by the Act, the court is now statutorily instructed not to intervene, except insofar as the Act provides.[99] But the Act continues to provide for the courts, in addition to their now more limited role in dealing with appeals, to be involved in the arbitration process in other ways, including: appointing arbitrators where the parties fail to do so[100]; deciding on challenges to arbitrators[101]; ruling on the jurisdiction of the tribunal where a party so requests[102]; ordering interim measures where necessary[103]; giving leave to enforce orders made by the tribunal during the proceedings[104]; assisting in taking evidence[105]; issuing subpoenas[106]; deciding whether information regarding the proceedings can be disclosed[107]; unless otherwise agreed by the parties, determining a preliminary point of law, if the arbitrator requests or the parties agree[108]; and determining whether to set aside the award on the basis that a party was under some incapacity or was given insufficient notice, or the award deals with matters which were not submitted, or the dispute was not arbitrable or the award is in conflict with public policy.[109] Given Bathurst C.J. also referred to "the expansive view"[110] which the courts have accepted generally as to the arbitrability of disputes, there is reason to think that the changes to the statutory regime would not alter the court's view as to the arbitrability of trust disputes.

[96] Commercial Act 2012 (WA), s. 34A(1); see also s. 34.
[97] Jones, *Commercial Arbitration in Australia*, at [10.550].
[98] Arbitration Act 1996, s. 69.
[99] Commercial Arbitration Act 2010 (NSW), s. 5. See similarly Arbitration Act 1996, s. 1(c).
[100] Commercial Arbitration Act 2010 (NSW), s. 11(3). See also Arbitration Act 1996, ss. 17(3), 18.
[101] Commercial Arbitration Act 2010 (NSW), s. 13(4). See also Arbitration Act 1996, s. 24.
[102] Commercial Arbitration Act 2010 (NSW), s. 16(9). See also Arbitration Act 1996, ss. 32, 67.
[103] Commercial Arbitration Act 2010 (NSW), s. 17J(1) (although see also s. 17(1)).
[104] Commercial Arbitration Act 2010 (NSW), s. 19(6).
[105] Commercial Arbitration Act 2010 (NSW), s. 27. See also Arbitration Act 1996, s. 44.
[106] Commercial Arbitration Act 2010 (NSW), s. 27A.
[107] Commercial Arbitration Act 2010 (NSW), ss. 27H–27I.
[108] Commercial Arbitration Act 2010 (NSW), s. 27J. See also Arbitration Act 1996, s. 45.
[109] Commercial Arbitration Act 2010 (NSW), ss. 34, 36. See also Arbitration Act 1996, s. 68.
[110] *Rinehart* [2012] NSWCA 95, at [167].

Where statute gives the court power to act in a particular way, *Rinehart v Welker* shows that this does not prevent the parties from submitting a dispute to arbitration and asking the arbitrator to exercise an equivalent power.[111] Where, however, the statutory power is granted in a way which makes it clear that it is granted to the courts exclusively, as in *Czarnikow*, the parties cannot vest such power in an arbitrator to the exclusion of the court.[112] But such provisions are rare, particularly in the context of trusts. There are, thus, grounds for believing that internal trust disputes can potentially be the subject of arbitration.

This view is further reinforced by the approach taken in respect of the court's inherent supervisory jurisdiction over solicitors, as officers of the court. A claim to supervisory relief of that sort is not arbitrable, on the basis that the jurisdiction belongs exclusively to the court and no arbitrator can exercise it.[113] However, the Court of Appeal has accepted that, where a dispute involving solicitors is sought to be arbitrated, the arbitration is not contrary to public policy merely because the matters to be decided in the arbitration are also part of the subject matter over which the court's supervisory jurisdiction extends.[114] As Christopher Clarke L.J. said:

> The fact that the arbitrator cannot exercise the Court's supervisory jurisdiction is no reason to refuse a stay [of the judicial proceedings]. No one is asking him to exercise that jurisdiction. … The fact that the consideration by the Court whether to exercise its own jurisdiction might cover some of the same ground as that of the arbitrator does not mean that in staying the claims the Court is ceding to the arbitrator any part of its jurisdiction.[115]

When one bears in mind that the supervisory jurisdiction over solicitors is "essentially 'punitive and disciplinary' in nature",[116] which is not the case with the supervisory jurisdiction over trusts, the case is even stronger for thinking that internal trust disputes can potentially be the subject of arbitration.

D. Repugnancy

The doctrine of repugnancy provides another basis on which the court might potentially refuse to give effect to an arbitration clause contained in a trust. Where a condition is attached to a gift in a way which is repugnant to the gift, the courts have held the condition void. Thus, for example, where an absolute gift is made conditional, on pain of divestiture, on the

[111] Ibid., at paras. [168]–[169], [214]–[215].
[112] *Fulham Football Club (1987) Ltd.* [2011] EWCA Civ 855, at [41]–[43], [96]; [2012] Ch. 33. See also *Shearson/American Express Inc.* (1987) 482 U.S. 220, 226–27, 238–39.
[113] *Assaubayev v Michael Wilson and Partners Ltd.* [2014] EWCA Civ 1491, at [19].
[114] Ibid., at paras. [65]–[69].
[115] Ibid., at paras. [68]–[69].
[116] Ibid., at para. [31] (quoting *Re Grey* [1892] 2 Q.B. 440, 443).

recipient not suing in respect of the gift, the condition is repugnant to the gift because it prevents the recipient from suing to enforce the gift.[117] As Harvey C.J. in Eq. said in *Permanent Trustee Co. v Dougall*:

> The Court . . . treats conditions which have the object and effect of preventing a beneficiary from having recourse to the Courts of law for the protection and ascertainment of his rights as contrary to public policy. In my opinion the condition against taking any proceedings whatever is too wide as it would have the effect of preventing any questions of administration without limit, and would prevent the beneficiaries from securing the due administration of the trusts of the will by the trustees. So far, therefore, as the clause restrains the beneficiaries from taking any proceedings whatever, from in any way interfering with the dispositions of the will, the clause in my opinion is bad as an attempt to oust the jurisdiction of the Court.[118]

This might be thought to support the view that an arbitration clause in a trust may be void as a matter of public policy on the basis that it prevents a beneficiary from having recourse to the court in order to enforce his or her rights.

Two points should be made. First, Harvey C.J.'s decision is a product of its time. It might be objected that an arbitration clause is repugnant to the terms of the trust because it prevents the trust from being enforced according to *law*, as determined by the courts, rather than according to the views of an arbitrator. However, that argument cannot stand in the light of the marked shift, mentioned in the preceding section, in the courts' views as to whether clauses which prevent the courts from ruling on disputes are inconsistent with public policy. Otherwise, arbitration clauses would be void on the ground of repugnancy in normal contract situations as well.

Secondly, while it is clearly related to public policy concerns, the notion of repugnancy is distinct.[119] It is more concerned with the logical inconsistency[120] between granting rights (e.g. by making a gift) while, at the same time, preventing the enforcement of those rights (e.g. by providing for forfeiture if the recipient sues on the gift). Thus, for example, the courts have held (including in *Permanent Trustee v Dougall*[121] itself) that conditions are not repugnant where they provide for forfeiture if the recipient *attacks* the validity of the disposition, as distinct from litigating to *enforce* the disposition.[122] Such conditions are not inconsistent with, and therefore not repugnant to, the disposition. The mere fact that a condition is capable of

[117] *Rhodes v Muswell Hill Land Co.* (1861) 29 Beav. 560, 563–64 (54 E.R. 745). The clause can be valid if it shows that the parties' intention was that the arrangement was merely binding in honour: e.g. *Rose and Frank Co. v JR Crompton & Bros Ltd.* [1925] A.C. 445.
[118] *Permanent Trustee Co. v Dougall* (1934) 34 S.R. (N.S.W.) 83, 86–87.
[119] See e.g. *Re Wynn* [1952] 1 Ch. 271, 275, 278.
[120] G. Williams, "The Doctrine of Repugnancy – I: Conditions in Gifts" (1943) 59 L.Q.R. 343, 343.
[121] *Permanent Trustee Co.* (1934) 34 S.R. (N.S.W.) 83, 87.
[122] *Evanturel* (1874) L.R. 6 P.C. 1.

having a deterrent effect vis-à-vis litigation is not sufficient to make it repugnant if there is no logical inconsistency between the condition and the disposition.[123] In light of the shift in judicial policy outlined earlier, towards greater acceptance of arbitration as a legitimate means by which parties can choose to resolve disputes as to their rights and obligations, it is arguable that the repugnancy doctrine must now be concerned with clauses which prevent *enforcement* of rights which have purportedly been granted, rather than with preventing *enforcement through the courts* of such rights. Arbitration is a mechanism for enforcing rights and obligations, and so an arbitration clause in a trust ought not to fail on the grounds of repugnancy, provided the clause is not logically inconsistent with the trust.

III. Enforceability of Trust Arbitration Clauses

The preceding analysis shows reason for thinking that internal trust disputes are not necessarily inherently unarbitrable. This in turn emphasises the importance of determining whether trustees and beneficiaries are *bound* to submit an internal trust dispute to arbitration where the trust deed so provides.

The presence of such a clause will not prevent litigation of the dispute if all of the parties to the dispute wish to litigate rather than pursue arbitration.[124] The more difficult question arises where the beneficiaries wish to litigate, but the trustee would prefer arbitration, or vice versa. This question is more difficult because of the difficulty in rationalising the enforceability of the arbitration clause in a situation where the trustee and beneficiaries will not normally have formally agreed to the clause in a contract. Trusts can, of course, comprise contracts, and the arbitration clause could then potentially be enforced as a term of that contract, as would any other arbitration clause contained in a contract. However, not all trusts involve a contract between trustee and beneficiaries: the enforceability of an arbitration clause in a donative trust, for example, could not be rationalised in that way. On what basis, then, is the arbitration clause enforceable, if at all? There are a number of different mechanisms by which this might occur.

A. Arbitration Acts

The most obvious potential mechanism for enforcing an arbitration clause in a trust is through the Arbitration Act 1996, and its equivalents in other jurisdictions. The wording of such statutes differs between jurisdictions, but there is broad consistency across a number of jurisdictions which have passed statutes based on the UNCITRAL Model Law on International Commercial Arbitration. These statutes focus on the presence

[123] *Nathan v Leonard* [2002] EWHC 1701 (Ch), at [10], [15]; [2003] 1 W.L.R. 827.
[124] *Raukura Moana Fisheries Ltd.* [2001] 2 N.Z.L.R. 801, at [38].

of an arbitration "agreement", because the conceptual justification for arbitration lies in the consent of the parties.[125] The agreement between the parties, to resolve the dispute by arbitration rather than litigation, is what generates the arbitral tribunal's jurisdiction to rule on the dispute, and the agreement binds the parties to abide by the arbitral tribunal's award.

Under the statutes, an arbitration agreement generally means "an agreement to submit to arbitration present or future disputes (whether they are contractual or not)".[126] The mere fact that the dispute is not contractual – as in the case of most internal trust disputes – does not prevent it from being arbitrated. However, it remains necessary to identify an "agreement" between the parties that the dispute will be arbitrated.[127] A central difficulty with enforcing arbitration clauses in trusts under these statutes lies in identifying the necessary agreement.

This issue was not addressed in *Rinehart v Welker*, as the agreement to arbitrate in that case was contained in a separate deed signed by all the parties (in settlement of a previous dispute) rather than in the trust deed itself.[128] The New South Wales Court of Appeal held that arbitration agreement did not cover the dispute at hand, and so the parties proceeded to litigation but, if that had not been so, the court noted that the presence of the separate deed meant it was "not necessary … to deal with a more difficult question which would arise if the arbitration clause was contained in the Trust Deed and purported to bind all persons beneficially entitled under the Trust".[129] It is that more difficult question which must be addressed here.

It will be possible in some trusts to identify a contractual arrangement between the beneficiaries and the trustee, particularly in unit trusts and other commercial trusts. In such cases, an arbitration clause in the trust deed could potentially be an "agreement" under the statutes, which the investors agree to when they buy into the contractual arrangement. But many trusts do not involve any form of contract between the trustee and beneficiaries.

Lawrence Cohen Q.C. has argued, with Marcus Staff,[130] and separately with Joanna Poole,[131] that arbitration clauses in trusts can be enforced under the Arbitration Act 1996, as has Nicholas Le Poidevin Q.C.[132] They argue that the necessary agreement to arbitrate can be identified between the settlor and the trustee, given the arbitration clause was included

[125] Sutton et al., *Russell on Arbitration*, at [2-002].
[126] Arbitration Act 1996, s. 6(1). See also Commercial Arbitration Act 2010 (NSW), s. 7(1).
[127] Such agreements must generally be in writing, although the writing may merely evidence the agreement and need not be signed: see Arbitration Act 1996, s. 5; Commercial Arbitration Act 2010 (NSW), s. 7.
[128] Similarly, see *Re Nestorovski Estate* (2009) 769 N.W. 2d 720 (MI CA), 732.
[129] *Rinehart* [2012] NSWCA 95, at [177].
[130] Cohen and Staff, "The Arbitration of Trust Disputes".
[131] L. Cohen and J. Poole, "Trust Arbitration – Is It Desirable and Does It Work?" (2012) 18 T. & T. 324.
[132] N. Le Poidevin, "Arbitration and Trusts: Can It Be Done?" (2012) 18 T. & T. 307, 309.

in the agreement between those parties when the trust was created.[133] The beneficiaries are then bound into that agreement, either on the basis that the beneficiaries "must be taken to acquiesce in the arbitration agreement"[134] or because the Act provides that "a party to an arbitration agreement include[s] any person claiming under or through a party to the agreement".[135]

There are, however, difficulties with this analysis. First, the argument has been doubted by other leading practitioners. In a discussion paper prepared for the Trust Law Committee, John Wood, David Brownbill Q.C., and Christopher McCall Q.C. reportedly considered it "not open to question",[136] that it is "plainly impossible under English law for a settlor or testator validly and enforceably to require beneficiaries to submit any dispute to arbitration".[137] The Trust Law Committee agreed.[138] However, the reason advanced for this conclusion can itself be criticised. The Trust Law Committee paraphrased the principal reason for this conclusion as being "that the trust concept is itself the creature of the courts … so that the legal rights of beneficiaries and trustees can validly be determined only by the courts".[139] The problem with this is that many other legal concepts and institutions are also creatures of the courts, and yet disputes regarding them can be arbitrated.[140]

Secondly, Cohen's analysis will not work well where the arbitration clause is included in a unilateral declaration of trust,[141] unless the courts are prepared to treat the settlor as having agreed with himself. A person can, by statute, convey land to himself,[142] but the meaning of that provision is difficult[143] and it does not extend to providing that a person can contract with himself alone.

Thirdly, even in cases where the trust was created by a transfer from settlor to trustee, the "agreement" between the settlor and the trustee is an unusual type of agreement to support arbitration. Once the trust has been created, the settlor has no power to enforce the terms of the trust,[144] unless

[133] Cohen and Staff, "The Arbitration of Trust Disputes", p. 219; Cohen and Poole, "Trust Arbitration", p. 327. Cohen and Poole recognise that this highlights the importance of the arbitration clause being drafted so as to constitute an *agreement*, as distinct from a *direction* by the settlor: see p. 327.

[134] Cohen and Staff, ibid., at p. 221.

[135] Arbitration Act 1996, s. 82(2). See Cohen and Poole, "Trust Arbitration", pp. 327–28; Cohen and Staff, ibid., at p. 221. This statutory formulation can be traced at least as far back as the Common Law Procedure Act 1854, s. 11.

[136] Trust Law Committee, "Arbitration of Trust Disputes" (2012) 18 T. & T. 296, 300. The discussion paper is not publicly available.

[137] Ibid., at p. 296.

[138] Ibid., at p. 301.

[139] Ibid., at p. 300.

[140] See also Le Poidevin, "Arbitration and Trusts", p. 307 (note 4), citing the example of contracts.

[141] See also ibid., at p. 308.

[142] Law of Property Act 1925, s. 72(3).

[143] See *Rye v Rye* [1962] A.C. 496.

[144] *Re Astor's Settlement Trusts* [1952] Ch. 534, 542; *Murphy v Murphy* [1999] 1 W.L.R. 282, 295; Hayton, *Underhill and Hayton's Law Relating to Trusts and Trustees*, at [1.1(6)].

such a power was reserved.[145] Where a breach of trust is alleged regarding a trust deed which contains an arbitration clause, the settlor cannot bring arbitration proceedings against the trustee for that breach. Nor can the trustee enforce the terms of the trust against the settlor. While the arbitration statutes refer to arbitration "agreements" rather than "contracts",[146] it is odd even to call the arbitration clause in a trust an "agreement" between the settlor and trustee: an agreement which can be enforced neither by nor against one of the two parties is an unusual agreement. The issue is, ultimately, one of statutory construction as to what the Arbitration Act means when it refers to an agreement, and there is real reason to doubt Cohen's view that a trust falls within that meaning.

Fourthly, even assuming that the (unenforceable) agreement between settlor and trustee is a sufficient "agreement" for the purposes of the statutes, it is not clear that the beneficiaries are claiming "through or under" the parties to the agreement in the sense meant in the Act. Cohen argues that "it is difficult to explain where the beneficiary gets his interest from if it is not derivatively either from the settlor or the trustee, ie the two parties to the arbitration agreement"[147] and describes as "perverse" the idea that a beneficiary could exempt himself from the terms of the trust. But again, the point is one of statutory construction – specifically, the meaning of the statute when it refers to someone claiming "through or under" someone else. The fact that something may appear perverse does not mean that the statute deals with that situation, and Cohen admits that "it has been fairly observed that the words of the Act were most definitely not written specifically with trust beneficiaries in mind".[148]

The phrase in the statute is clearly intended to capture the situation of assignment, in order to obviate the effect of the common law rule that one can only assign the benefit of a contract, not its burden.[149] An assignee's entitlement is derivative upon the assignor's entitlement, and thus the assignee claims through or under the assignor. Thus, the statute deems the assignee to be a party to the original agreement for the purposes of holding the assignee bound by an arbitration clause in that agreement.[150] Hence, for example, if a court were prepared to treat an arbitration clause in a trust deed as a binding agreement between the settlor and the trustee, a successor trustee could be bound as someone claiming through or under the original trustee.[151]

[145] See Hayton, ibid., at paras. [8.166]–[8.167].
[146] Cf. Graham, "The Problems with Compulsory Arbitration", p. 21.
[147] Cohen and Poole, "Trust Arbitration", p. 328.
[148] Ibid.
[149] *Linden Gardens Trust Ltd. v Lenesta Sludge Disposals Ltd.* [1994] 1 A.C. 85, 103.
[150] See *Ramput (Panama) S.A. v Islamic Republic of Iran Shipping Lines (The "League")* [1984] 2 Lloyds Rep. 259, 262; *Schiffahrtsgesellschaft Detlev Von Appen G.m.b.H.* [1997] 2 Lloyd's Rep. 279 (CA), 285.
[151] This would, however, be the case in any event as the obligations of a trustee are obligations attached to the office of trustee, rather than purely contractual obligations, and so are capable of binding successor trustees notwithstanding the lack of any contractual privity.

Discussing what it means to claim "through or under", the High Court of Australia has said:

> . . . the prepositions "through" and "under" convey the notion of a derivative cause of action or ground of defence, that is to say, a cause of action or ground of defence derived from the party. In other words, an essential element of the cause of action or defence must be or must have been vested in or exercisable by the party before the person claiming through or under the party can rely on the cause of action or ground of defence.[152]

The concept of a derivative claim (or defence) of the sort discussed there is not apposite to the position of trust beneficiaries. A beneficiary's rights are not derived from the trustee's rights. They arise because of equity's willingness to hold the trustee to his undertaking to act as such, and are "engrafted onto, not carved out of, the legal estate".[153] Where a beneficiary brings claims based on those rights, he does so in his own right, not "through or under" either the trustee or the settlor.

Mustill and Boyd have suggested that the "through or under" provision also captures agency situations.[154] It is not clear that this is necessary (except perhaps in an undisclosed agency situation[155]), as there

> . . . is no doubt whatever as to the general rule as regards an agent, that where a person contracts as agent for a principal the contract is the contract of the principal, and not that of the agent; and primâ facie, at common law the only person who may sue is the principal, and the only person who can be sued is the principal.[156]

Where that contract contains an arbitration clause, the principal is bound by the arbitration clause directly, rather than because he claims through or under the agent, and the agent is not a party and so is neither bound by the arbitration clause nor able to arbitrate. While the application of the statutory provision to agency is not directly on point in the present discussion, it is important because Mustill and Boyd suggest that the same analysis applies to a trust.[157] Equating trusts with agency in this way misunderstands the different ways in which trustees and agents enter into contracts: trustees enter into contracts directly, as parties to those contracts, rather than as agents for their beneficiaries.[158] That confusion is

[152] *Tanning Research Laboratories Inc.* (1990) 169 C.L.R. 332, 342.
[153] *Re Transphere Pty. Ltd.* (1986) 5 N.S.W.L.R. 309, 311. See also *DKLR Holding Co. (No. 2) Pty. Ltd. v Commissioner of Stamp Duties (New South Wales)* (1982) 149 C.L.R. 431, 474.
[154] Mustill and Boyd, *Commercial Arbitration in England*, pp. 136–37.
[155] See P. Watts (ed.), *Bowstead & Reynolds on Agency*, 19th ed. (London 2010), at [9-012]; *Siu v Eastern Insurance Co. Ltd.* [1994] 2 A.C. 199 (PC), 207.
[156] *Montgomerie v United Kingdom Mutual Steamship Association Ltd.* [1891] 1 Q.B. 370, 371.
[157] Mustill and Boyd, *Commercial Arbitration in England*, p. 136. Similarly, see Jones, *Commercial Arbitration in Australia*, at [4.380], which merely cites Mustill and Boyd as authority.
[158] See M. Conaglen and R. Nolan, "Contracts and Knowing Receipt: Principles and Application" (2013) 129 L.Q.R. 359.

compounded by the confusion as to whether agency situations are best explained by reference to the "through or under" provisions. Further, although they do not express themselves in this way, insofar as Mustill and Boyd's comments relate to trusts, the analogy with agency suggests that they are thinking of suits concerning contracts entered into by the trustee on behalf of the trust, which will involve external trust disputes rather than internal disputes of the sort under consideration here. Their observations are thus uninformative, if not misleading, regarding internal trust disputes.

The Contracts (Rights of Third Parties) Act 1999 provides a further reason to doubt Cohen's argument that beneficiaries claim "though or under" the settlor or trustee for the purposes of the Arbitration Act 1996. Under the 1999 Act, a person can enforce a term of a contract which confers a benefit on the person, even if that person is not a party to the contract. This is functionally analogous to the right of a beneficiary to enforce a trust against the trustee. On Cohen's analysis, if the contract contains an arbitration clause, the third party who benefits from the contract ought to be bound by that arbitration clause as someone claiming through or under the parties to the contract. Section 8(1) of the 1999 Act expressly provides that, where the contract contains an arbitration agreement, the third party is treated as a party to the arbitration agreement, and thus bound by it. Importantly, however, s. 8(1) appears not to have been enacted for the avoidance of doubt, but rather because it was thought that without s. 8(1) "the main provisions of the Arbitration Act 1996 would not apply because a third party is not a party to the arbitration agreement between the promisor and the promisee".[159] This view, taken in respect of a functionally analogous situation, undermines the argument that trust beneficiaries are necessarily bound by an arbitration clause under the 1996 Act. Beneficiaries' rights under trusts do arise as a result of the initial arrangements entered into between the settlor and trustee, but it is far from clear that the provisions of the 1996 Act capture the position of trust beneficiaries.

B. Inherent Jurisdiction

There may, however, be other bases on which a court could potentially give effect to an arbitration clause contained in a trust. The arbitration statutes do not rule out the possibility of arbitration in circumstances not captured by them.[160] One possibility lies in the court potentially exercising its inherent jurisdiction to control its proceedings to stay litigation where an arbitration clause exists.[161] As has already been mentioned, in *Channel Tunnel v Balfour Beatty*, the House of Lords held that the court could stay

[159] *Nisshin Shipping Co. Ltd. v Cleaves & Co. Ltd.* [2003] EWHC 2602, at [36]; [2004] 1 Lloyd's Rep. 38.
[160] Sutton et al., *Russell on Arbitration*, at [2-015]–[2-016].
[161] See Mustill and Boyd, *Commercial Arbitration in England*, pp. 461–62.

proceedings which had been brought in breach of an agreement to decide the disputes in some other way, even if that agreement did not constitute an immediately effective agreement to arbitrate under the relevant Arbitration Act.[162] The inherent jurisdiction is not an exercise of statutory power, and so is not limited to formal "agreements" which fall within the terms of the statutory provisions. Similarly, in *Roussel-Uclaf v GD Searle & Co. Ltd.*, Graham J. concluded that, "apart altogether from the Arbitration Act 1975",[163] a stay of proceedings should be granted under the court's inherent jurisdiction. Courts might, therefore, be prepared to stay proceedings which have been brought in breach of an arbitration clause contained in a trust.[164]

Section 24(5) of the Supreme Court of Judicature Act 1873 removed the court's power to restrain proceedings by injunction, but the court's inherent jurisdiction to stay proceedings was preserved in the same provision, and remains so under s. 49(3) of the Senior Courts Act 1981. The English courts have emphasised that the jurisdiction is part of the court's inherent jurisdiction and have held that it can be exercised where the justice of the case requires, not merely where the proceedings are oppressive or vexatious.[165] Nor is the jurisdiction limited by the subject matter of the proceedings. It could, thus, potentially be employed in a trust dispute. As has been seen already, there are historical examples of trust disputes being sent to arbitration in a way similar to that which would obtain if a stay of proceedings were granted.[166] In these historical examples, the court order for what amounts to arbitration was generally made with the consent of the parties.[167] However, there are instances of arbitration being ordered where there is no reference to the parties consenting.[168] Furthermore, in *Shernebrooke v Shernebrooke*, the order was made "because both the said counsel do *in effect* agree"[169] and, in *Needham v Beamond*, Hatton L.C. made the order "with the consent of the counsel on both parts"[170] but it was also recorded that, "if the said parties, or

[162] *Channel Tunnel Group Ltd.* [1993] A.C. 334, 352. See also *Etri Fans Ltd. v NMB (UK) Ltd.* [1987] 1 W.L.R. 1110, 1114; *Alfred McAlpine Construction Ltd. v Unex Corp.* (1994) 38 Con. L.R. 63; *Al-Naimi v Islamic Press Agency Inc.* [2000] 1 Lloyd's Rep. 522 (CA), 525, 528; *A. v B.* [2006] EWHC 2006 (Comm), at [107]; [2007] 1 All E.R. (Comm.) 591; *Joint Stock Co. "Aeroflot Russian Airlines" v Berezovsky* [2013] EWCA Civ 784, at [73]; [2013] 2 Lloyd's Rep. 242. Cf. *Harris v Reynolds* (1845) 7 Q.B. 71 (115 E.R. 414).

[163] *Roussel-Uclaf v GD Searle & Co. Ltd.* [1978] R.P.C. 747 (ChD), 754.

[164] See also Le Poidevin, "Arbitration and Trusts", pp. 310–11.

[165] *Rockware Glass Ltd. v MacShannon* [1978] A.C. 795, 817–18; *Texan Management Ltd. v Pacific Electric Wire & Cable Co. Ltd.* [2009] UKPC 46, at [49]–[55]; cf. *Oceanic Sun Line Special Shipping Co. Inc. v Fay* (1988) 165 C.L.R. 197, 232–33, 239–240.

[166] See text accompanying notes 15–21 above.

[167] See e.g. *Cooper v Allaine* (1562) in Monro, *Acta Cancellariæ*, p. 342; *Palmer v Dean of Canterbury* (1584) in Monro, *Acta Cancellariæ*, p. 540.

[168] See e.g. *Mompesson v Ley* (1589) in Dasent, *Vol. XVII*, pp. 301–02; *Gurlin v Gurlin* (1590) in Dasent, *Vol. XIX*, p. 33; *Yonge v Yeo* (1590) in Dasent, *Vol XIX*, pp. 190–91.

[169] See C. Monro, *Acta Cancellariæ*, p. 587, emphasis added.

[170] See ibid., at p. 592.

their counsellors, shall not agree in setting down the said cause",[171] then one of the arbitrators would decide the differences between them. As William Jones has observed of cases from this era: "In point of fact 'consent', as in other aspects of Chancery practice such as the formulation of decrees, could be a formality. If the Lord Chancellor or any other judge felt the need for further evidence, the agreement or objection of the parties was not likely to carry much weight."[172]

The historical position is, thus, not completely divorced from the possibility of a modern court ordering a stay of proceedings, even without consent. Indeed, the orders in the old cases have some parallel with the more recent development of the court's power to order someone to give consent to a search of their premises.[173]

However, the fact that it may be possible for a court to order a stay of proceedings concerning a trust dispute, in order that the dispute can be taken to arbitration instead, does raise a question as to the justification for such a stay being ordered. In other words, if trust beneficiaries are not bound by an agreement to arbitrate of the sort that would trigger the arbitration statutes, why should they, in effect,[174] be forced to arbitrate by the grant of a stay of proceedings?

Some courts in the US have recently adopted a doctrine known as "direct benefits estoppel" in answer to this question. This doctrine, which is said to be a form of equitable estoppel,[175] recognises that arbitration is grounded in the agreement of the parties, so that non-signatories are generally not bound by arbitration agreements,[176] but provides 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".[177] In Texas, this has been explained on the basis that the receipt of benefit manifests assent to the arbitration clause, thus providing an "agreement" for the purposes of the arbitration statutes.[178] However, as has been emphasised already, that is a matter of statutory construction which will not necessarily carry over to the Commonwealth statutes.[179] In contrast to Texas, the New York courts have explained the direct benefits estoppel doctrine as an abrogation of the general principle that non-signatories are not party to the agreement, and as

[171] See ibid.
[172] Jones, *The Elizabethan Court of Chancery*, p. 251.
[173] *Anton Piller K.G. v Manufacturing Processes Ltd.* [1976] 1 Ch. 55 (CA), 58, 60.
[174] Technically, the court does not force the parties to arbitrate. But the stay of proceedings clearly encourages that outcome: see Brownbill, "Arbitration of Trust Disputes", pp. 32–33.
[175] *Rachal* (2013) 403 S.W. 3d 840 (TX SC), 846 (note 5).
[176] *Belzberg* (2013) 999 N.E. 2d 1130 (NY CA), 1133.
[177] Ibid., at p. 1134.
[178] *Rachal* (2013) 403 S.W. 3d 840 (TX SC), 845.
[179] *ACD Tridon Inc.* [2002] NSWSC 896, [122]–[123].

involving the imputation of an intention to arbitrate,[180] which is harder to justify under the arbitration statutes.

This form of estoppel appears to be limited to arbitrations,[181] and seems unknown in Commonwealth law generally. However, it may have some parallels with the English doctrine of benefit and burden, under which a party who takes the benefit of a right under a deed or agreement must also accept the burden which comes with that benefit.[182]

However, the English doctrine is more complex than the US doctrine, as the English doctrine 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 (so that the benefit is a qualified or conditional right[183]), 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".[184] In other words, it is a question of construction whether the benefit is a conditional right.[185] 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.[186]

Where the burden is not a formal condition of the benefit conferred by the deed, the House of Lords has denied the existence of a "pure principle of benefit and burden",[187] accepting only that a burden can be attached to a power where the burden is relevant to the exercise of the right and where the person has a choice as to whether to enjoy the right.[188] The mere fact of being a beneficiary cannot be sufficient choice for these purposes, given 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.

Staying proceedings where the trust deed contains an arbitration clause would also have some resonance with equity's maxim that "he who seeks equity must do equity". This too has some pedigree in the case law. In *Cheslyn v Dalby*, for example, the plaintiff had agreed to arbitrate, but had subsequently sought equitable relief in the courts when the

[180] *Belzberg* (2013) 999 N.E. 2d 1130 (NY CA), 1133.
[181] Ibid., at pp. 1133, 1136.
[182] See e.g. *Halsall v Brizell* [1957] 1 Ch. 169, 183.
[183] *Tito v Waddell (No. 2)* [1977] Ch. 106, 290.
[184] Ibid., at p. 303.
[185] Ibid., at pp. 299, 302.
[186] *Lady Naas v Westminster Bank Ltd.* [1940] A.C. 366.
[187] See *Tito* [1977] Ch. 106, 292, 302, 309.
[188] *Rhone v Stephens* [1994] 2 A.C. 310, 322.

arbitrator died. Alderson B. said: "[h]ere the Plaintiff comes into Equity to ask relief, and before he can obtain that relief he must of course perform what the Court shall deem to be equitable, that is to say, the substance of his agreement."[189] However, equity's maxims are not formal principles or rules of law, but rather broad themes underlying equitable concepts and principles,[190] and so it would be a mistake to place too much weight on them.

The strongest justification for enforcing arbitration clauses in trusts seems, as with the other terms of the trust, to lie in giving effect to the settlor's intention.[191] Commonwealth courts have placed somewhat less weight on the settlor's intention than have courts in the US, as the differing approaches to the rule in *Saunders v Vautier*[192] indicate.[193] However, as Evershed M.R. said, with the approval of Lord Morton on appeal[194]: "The general rule ... is that the court will 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."[195]

If arbitration of trust disputes is not considered repugnant to the gifts which have been made in a trust and is not contrary to public policy as it does not illegitimately oust the jurisdiction of the court, then a stay of proceedings granted under the inherent jurisdiction of the court may be an effective means of giving effect to the settlor's intention as to how the trust would operate.

A further potential benefit to this approach to the issue lies in the degree of control that the court maintains over the dispute resolution process. Because the stay of proceedings lies in the court's discretion, rather than being mandated as it is under the arbitration statutes (where they apply), the court could refuse a stay where it considered arbitration inappropriate. Consistently with what the Privy Council has said regarding the "balancing exercise"[196] that is involved where a court determines whether to give effect to an exclusive jurisdiction clause, the fact that the clause is contained in a trust rather than a contract affects the weight to be given to the existence of the clause.[197] Other relevant considerations can also be taken into account. For example, in circumstances where a full resolution of the dispute might affect parties who are not involved in the proceedings, the court could

[189] *Cheslyn v Dalby* (1836) 2 Y. & C. Ex. 170, 197 (160 E.R. 357).
[190] *Corin v Patton* (1990) 169 C.L.R. 540, 557.
[191] See e.g. *Rachal* (2013) 403 S.W. 3d 840 (TX SC), 844.
[192] *Saunders v Vautier* (1841) 4 Beav. 115, 116 (49 E.R. 282).
[193] See the discussion in P. Matthews, "The Comparative Importance of the Rule in *Saunders* v. *Vautier*" (2006) 122 L.Q.R. 266. See also *Chapman* [1954] A.C. 429, 445, 455.
[194] *Chapman*, ibid., at p. 451.
[195] *Re Downshire Settled Estates* [1953] Ch. 218 (CA), 234. See also *Hartigan Nominees Pty. Ltd. v Rydge* (1992) 29 N.S.W.L.R. 405 (CA), 436.
[196] *Crociani* [2014] UKPC 40, at [35]; (2014) 17 I.T.E.L.R. 624.
[197] Ibid., at paras. [35]–[36].

potentially refuse to stay the proceedings if an arbitral award would produce a result which would not bind those other parties. This may also depend on the number of third parties who are potentially affected, and their position regarding the potential arbitration. For example, in *Rinehart v Welker*, one argument against arbitration was that an identified third party was potentially affected. But, as Bathurst C.J. said, there was only one such third party identified, and it supported the reference to arbitration, so its "position could be readily accommodated by making a stay conditional upon it submitting to the arbitration and agreeing to be bound by the result".[198] A similar condition could potentially be placed on a stay granted under the court's inherent jurisdiction.

The court may also be more willing to provide remedies which are not available to an arbitrator in a case where the arbitration has been a sanctioned and controlled part of the court process. For example, in cases where judicial advice is sought in respect of a decision being taken by trustees, it has been argued that concerns as to whether such advice could be granted by an arbitrator can be resolved by the arbitrator rendering a declarative award.[199] But it is not immediately clear that the mere making of an arbitral declaration of that sort would have the effect of immunising the trustees from liability if they comply with the advice, in the way that trustees are immunised by judicial advice. This difficulty could potentially be resolved by the arbitrator finding relevant facts and making suggestions as to what advice ought to be given, and the court then giving such advice if it considers that to be appropriate in the circumstances as found, with the effect that the judicial advice provides the trustees with the normal immunity.

Further, where proceedings are stayed under the court's inherent jurisdiction, rather than under statutory arbitration regimes, it seems also to follow that the court would retain its traditional jurisdiction to review the arbitral award for its legal correctness.[200] The court's jurisdiction to control arbitrations and arbitral awards was greatly narrowed by successive arbitration statutes but, where they do not interfere with the traditional jurisdiction, because they do not apply to the arbitration, the court's traditional jurisdiction can potentially still be exercised.[201] In particular, this jurisdiction involved review of the arbitral award for error of law "in a palpable and material point"[202] on the face of the award, although Story points out that the arbitrators' "decision upon a doubtful point of law, or in a case where the question of law itself is designedly left to their judgment and decision, will

[198] *Rinehart* [2012] NSWCA 95, at [179].
[199] S. Strong, "Arbitration of Trust Disputes: Two Bodies of Law Collide" (2012) 45 Vand.J.Trans.L. 1157, 1205.
[200] Mustill and Boyd, *Commercial Arbitration in England*, p. 32.
[201] Story, *Commentaries on Equity Jurisprudence*, p. 786.
[202] Ibid., at p. 792.

generally be held conclusive".[203] The latter point indicates the potential importance, when deciding whether to stay court proceedings, of the court's considering the degree to which the settlor understood what the arbitration process would involve and the degree to which it could involve decisions different from those which a court of equity might potentially reach. The potential for this review jurisdiction to need to be exercised is, in turn, another factor which the court will take into account in exercising its discretion as to whether the court proceedings ought to be stayed in the first place, given the additional cost it may entail.

One difficulty with this means of enforcing trust arbitration clauses may lie in the fact that the court's stay of proceedings effectively forces the parties to arbitrate the dispute. That may breach Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, given arbitration is not normally conducted in public. Detailed discussion of this point is beyond the scope of this article, in part for reasons of space but also because the difficulty, while affecting England, does not arise in most Commonwealth common law jurisdictions where the other principles under discussion in this article are applicable. However, even in England, Article 6 may potentially be complied with, if the court, in exercising its inherent jurisdiction, concludes that private arbitration of a particular trust dispute is necessary in the interests of justice.[204]

IV. Conclusions

This article is not concerned to demonstrate that arbitration of internal trust disputes is necessarily a good thing.[205] Rather, assuming that a settlor wishes to have such disputes arbitrated instead of litigated, the focus has been on the question of whether a clause to that effect in the trust documentation is enforceable. There are a number of difficult aspects to that question. The two which have been the centre of attention in this article concern, first, the arbitrability of such disputes and, secondly, the mechanism by which such a clause might be enforced. It has been argued that trust disputes are not necessarily inherently unarbitrable. It has also been argued that an arbitration clause in a trust deed is not repugnant to the trust it creates, and that the shift in the court's attitude towards the public

[203] Ibid., at pp. 792–93.
[204] M. Herbert, "The Arbitration of Trust Disputes" [2012] P.C.B. 138.
[205] The increasing adoption of legislation making trust arbitration clauses enforceable (see Arbitration Act, Cap. 387 (Malta), Article 15A; Trusts (Guernsey) Law 2007, s. 63; Trustee Act 1998 (Bahamas), ss. 91A–91C; Florida Statutes, Title XLII, Ch. 731, s. 401; Arizona Revised Statutes, Title 14, Ch. 11, s. 10205), and the calls to extend that to England (see Trust Law Committee, "Arbitration of Trust Disputes"; Herbert, "The Arbitration of Trust Disputes", p. 138) and New Zealand (see New Zealand Law Commission, *Review of the Law of Trusts: A Trusts Act for New Zealand* (Rep. 130, 2013) R42(2)), indicate that others are of that view. See also Cohen and Staff, "The Arbitration of Trust Disputes", p. 203.

policy of arbitration generally supports the view that trust disputes can be arbitrated.

That conclusion leads to the second question, as to whether – and how – an arbitration clause can be enforced against a party to the trust who wishes to litigate. Contrary to arguments presented by others, it has been suggested that there are substantial difficulties in enforcing trust arbitration clauses under the arbitration statutes that are predicated on the presence of an "arbitration agreement". However, the court could potentially give effect to an arbitration clause by employing its inherent jurisdiction to stay litigation brought in circumstances where the clause requires arbitration.

Compared with arbitrations conducted under the standard arbitration statutes, there is an increased level of judicial control over arbitrations which take place in consequence of a court's exercise of its inherent jurisdiction. This may not please arbitration enthusiasts, for whom it seems to be something of an article of faith that arbitration ought to be as free from judicial interference as possible. But that conception of arbitration has been developed in the context of arbitral agreements between parties which are basically, if not technically, legally binding contracts. One can understand the inclination to leave parties to such contracts – particularly commercial parties – to the consequences of their agreements. In contrast, trusts are created and operate differently from contracts in important regards, and the courts have for centuries been involved in the execution of trusts in ways which have no parallels with the ways they involved themselves in the execution of contractual promises.[206] The increased level of court involvement in arbitration of trust disputes which takes place pursuant to the inherent jurisdiction may provide an appropriate *via media*. Some may consider such dispute resolution does not involve true arbitration, but semantic debates of that sort are not particularly informative. The court's increased involvement may also have additional benefits in trust cases, in the sense that it may help to assuage any judicial concerns as to the appropriateness of arbitration as a means of resolving trust disputes.

[206] *Crociani* [2014] UKPC 40, at [36]; (2014) 17 I.T.E.L.R. 624.