

Equity, Trusts and Private International Law

Enforcement of Trusts in Private International Law: Jurisdiction Clauses and Arbitrability

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Introduction

- 1 In 1987, writing extra-judicially, Justice Geoffrey Kennedy wrote that economic, technological and global developments continue to catalyse “a resurgence of equity by giving encouragement to the creation of trusts in a variety forms”.² In Australia, economic and taxation reforms sparked the explosion of unit and discretionary trusts in the 1980s, while the introduction of superannuation schemes led to the birth of large substantial trusts.³ Technological evolution has spurred the growth of intermediated securities in relation to cryptocurrencies, and the expansion of “data trusts” in response to the commercialisation of personal data.⁴
- 2 As to global developments, the now ubiquitous nature of borderless trade has demanded from equity a further evolution: the offshore trust. This creature generates complex and fascinating questions at the intersection of equity and private international law. And they are worth fighting over: trusts play a significant role in the global economy, holding trillions of dollars’ worth of assets,

¹ I acknowledge the significant assistance of my Researcher, Mr John Lidbetter BActlStd, LLB, BCL, in the preparation of this paper.

² Justice G A Kennedy, “Equity in a Commercial Context” in P D Finn (ed), *Equity and Commercial Relationships* (LawBook Co, 1987) 1.

³ Ibid.

⁴ See N Tiverios and M Crawford, “Equitable property and the law of the horse: Assignment, intermediated, securities, and data trusts” (2020) 14 *Journal of Equity* 272.

and generating billions in revenue and trustees' fees each year.⁵ It is not surprising in this context that disputes arise which are high value and hard fought.

- 3 Certainty is a cardinal value to both equity and private international law. It is essential to the functioning of modern commerce that parties understand their equitable rights and obligations – whether it be the efficacy of an equitable assignment or the nature of a beneficial interest in a trust. The importance of maintaining commercial certainty through the principles of equity was emphasised by Robert Goff LJ in *Scandinavian Trading Tanker*.⁶

“It is of the utmost importance in commercial transactions that [parties] should know where they stand. The court should so far as possible desist from placing obstacles in the way of either party ascertaining his legal position... because it may be commercially desirable for action to be taken without delay”

- 4 Justice Leeming, writing extra-curially, remarked that equity's successful promotion of commercial stability is exemplified by the fact that “large proportions of structured finance turn on equitable interests; the trillions of dollars of assets where only equitable rights are involved is inconsistent with any significantly deleterious uncertainty”.⁷ Similarly, Professor Tolhurst explains that modern living standards depend upon the reliable provision of credit, which is made possible through our predictable system of equitable assignment.⁸

- 5 Certainty is equally critical in the context of private international law. Litigating in an unexpected venue can be expensive, inconvenient and can impose significant disadvantages upon defendants, as the applicable procedural rules are determined by the law of the forum.⁹ And the scope of what is procedural

⁵ A Holden, “The Arbitration of Trust Disputes: Theoretical Problems and Practical Possibilities” (2014) 21 *Trusts & Trustees* 546, 546. SI Strong, “Introduction: Global Developments in Trust Arbitration” in SI Strong (ed), *Arbitration of Trust Disputes: Issues in National and International Law* (OUP, 2016) [1.04].

⁶ *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana* [1983] QB 529, 540 (Robert Goff LJ).

⁷ M Leeming, “The Role of Equity in 21st Century Commercial Disputes” (2019) 47 *Australian Bar Review* 137, 151.

⁸ G J Tolhurst, “Assignment” in JT Gleeson, JA Watson and E Peden (eds), *Historical Foundations of Australian Law* vol II (Federation Press, 2013) 342-343.

⁹ See A S Bell, *Forum Shopping and Venue in Transnational Litigation* (OUP, 2003) ch 2.

and what is substantive is not uniform between jurisdictions, as Professor Garnett points out in his *magnum opus* on the topic.¹⁰ Differences in both procedure and choice of law rules may incentivize parties to fight over the venue in which litigation occurs, the phenomenon known as forum shopping.

- 6 Professor Garnett's article focuses on the fascinating question of what response a common law court should make when confronted with a dispute involving a trust with connections to a civil law jurisdiction where the institution of a trust or anything resembling a trust is known. He has correctly highlighted the important role of the 1985 *Hague Trusts Convention* and shown how article 2 has indirectly expanded and exported wider conceptions of trusts, citing this as an example where "private international law rules have been adapted to accommodate legal systems that do not recognise the precise concept of the trust as developed in common law jurisdictions".
- 7 The Professor also explains that, "where a settlor wishes to create a trust in respect of assets in a jurisdiction that does not recognise the concept, choice of the law of a common law country to govern the trust may achieve that result." In the case of express trusts, the choice of law rules are contained in chapter II of the *Convention*. In the case of constructive and implied trusts, the applicable law will be identified by the common law choice of law rule.¹¹
- 8 I compliment Professor Garnett on his excellent article. What I wish to do in this short piece is to *complement* that article with some observations about two related topics that do not relate to choice of law but, rather to jurisdiction clauses in trust instruments and arbitrability, that is, the question of which, if any, trust disputes are "capable of settlement by arbitration", to pick up the language of

¹⁰ R Garnett, *Substance and Procedure in Private International Law* (OUP, 2012).

¹¹ See A Chong, "The Common Law Choice of Law Rules for Resulting and Constructive Trusts" (2005) 54(4) *ICLQ* 855; Y Khai Liew, "Choice of Law Rules in Australia for Resulting and Constructive Trusts" (2022) 44 *Sydney Law Review* 441; J Harris, "Constructive Trusts and Private International Law: Determining the Applicable Law" (2012) 18(10) *Trusts & Trustees* 965; see also L Forrester, "Resulting Trusts in the Conflict of Laws: An Australian Perspective" (2021) 12(2) *Journal of Private International Law* 193 .

the *International Arbitration Act 1974* (Cth) ('IAA') and the *New York Convention*.

- 9 Parties should be capable of being advised on where they can expect to sue, or be sued, in respect of a particular agreement. To this end, many commercial transactions contain jurisdiction clauses, which, as Professor Juenger explained long ago, “reduce the international risks to which multistate [agreements] are exposed by reason of disparate laws, jurisdictional overlap and the conflict of laws’ failure to offer certainty and predictability”.¹² For this reason, jurisdiction and dispute resolution clauses are a potential means of addressing what might be styled “venue risk” however the plethora of cases involving disputes in relation to such clauses highlights the fact that the mere existence of such clauses is no panacea or guarantee against adjectival litigation about where to litigate.
- 10 The role of jurisdiction and arbitration clauses in the context of trust instruments is not a topic that has attracted a great deal of attention, at least until relatively recently.¹³ The analysis that informs so much of the law relating to jurisdiction and arbitration clauses, namely the principle of *pacta sunt servanda* or holding parties to their bargains, does not readily translate to express trusts to which the notion of a contractual bargain is remote. The relevant intention is not that objectively ascertained and attributed to *contracting* parties but, rather, the intention of the settlor of the trust in question.
- 11 On the question of arbitrability, the traditional role of courts of equity in supervising trustees (including, for example, the jurisdiction to remove them) which is enshrined in the *Trustee Act 1925* (NSW) and cognate Acts in other States and foreign jurisdictions might be thought to be incompatible with the

¹² FK Juenger, *Choice of Law and Multistate Justice* (Nijhoff, 1993) 214.

¹³ See, for example, P Matthews, “What is a Trust Jurisdiction Clause?” (2003) *Jersey Law Review* 232; M Conaglen, “The Enforceability of Arbitration Clauses in Trusts” (2015) 74(3) *Cambridge Law Journal* 450; R Garnett and YK Liew, “Trusts Jurisdiction Clauses: An Analysis” (2025) 141 *Law Quarterly Review* 357.

reference of such disputes to private arbitration. There are a number of relatively recent cases on this topic.

Jurisdiction clauses in trust deeds

12 Professors Garnett and Liew have recently observed that:¹⁴

“The 20th century saw the rise of offshore and “mid-shore” jurisdictions designed primarily to cater to foreign settlors, as well as increased inter-jurisdiction movement. With the emergence of cross-border trusts, the use of jurisdiction clauses in trust deeds has increased dramatically. The range of international connections means that the earlier mentioned jurisdictional risks which arise in the contractual context are also increasingly present in the trusts context. This makes the inclusion of jurisdiction clauses important in order to achieve certainty.”

13 Three initial points may be made. First, unlike contracts, which are generally bilateral, trusts reflect the unilateral intention of the settlor.¹⁵ In turn, as already noted, the strong respect for party autonomy and enforcing bargains which one sees in cases involving exclusive jurisdiction clauses in contracts does not readily apply to trusts. Garnett and Liew suggest, therefore, that the unilateral nature of trusts is a key reason for why “trusts jurisdiction clauses cannot simply be analysed as choice of court agreements as in the contractual context”.¹⁶ This is undoubtedly correct.

14 The 2014 decision of the Privy Council in *Crociani v Crociani* makes this plain.¹⁷ The Board, speaking through Lord Neuberger, expressed the opinion that:

- “it should be less difficult for a beneficiary to resist the enforcement of an exclusive jurisdiction clause in a trust deed than for a contracting party to resist the enforcement of such a clause in a contract”;¹⁸
- “in the case of a trust deed, the weight to be given to an exclusive jurisdiction clause is less than the weight to be given to such a clause in a contract”;¹⁹ and

¹⁴ Garnett and Liew (n 13) 359.

¹⁵ Ibid 360.

¹⁶ Ibid 360.

¹⁷ *Crociani v Crociani* [2014] UKPC 40, [35] (“*Crociani*”).

¹⁸ Ibid [35].

¹⁹ Ibid.

- the same proposition was expressed conversely as “the strength of the case that needs to be made out to avoid the enforcement of such a clause is less great where the clause is in a trust deed”.²⁰

15 Lord Neuberger continued:²¹

“In the case of a clause in a trust, the court is not faced with the argument that it should hold a contracting party to her contractual bargain. It is, of course, true that a beneficiary, who wishes to take advantage of a trust can be expected to accept that she is bound by the terms of the trust, but it is not a commitment of the same order as a contracting party being bound by the terms of a commercial contract. Where, as here (and as presumably would usually be the case), it is a beneficiary who wishes to avoid the clause and the trustees who wish to enforce it, one would normally expect the trustees to come up with a good reason for adhering to the clause, albeit that their failure to do so would not prevent them from invoking the presumption that the clause should be enforced. In the case of a trust, unlike a contract, the court has an inherent jurisdiction to supervise the administration of the trust – see eg *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26, [2003] 2 AC 709 para 51, where Lord Walker of Gestingthorpe referred to ‘the court’s inherent jurisdiction to supervise, and if necessary to intervene in, the administration of trusts’. This is not to suggest that a court has some freewheeling unfettered discretion to do whatever seems fair when it comes to trusts. However, what is clear is that the court does have a power to supervise the administration of trusts, primarily to protect the interests of beneficiaries, which represents a clear and, for present purposes, significant distinction between trusts and contracts.”

16 The second point to be noted, as Professor Lionel Smith has observed, is that trusts “always have significant effects on outside parties”, while contracts generally only bind parties who are privy to the agreement.²² The interests of third parties are often a strong consideration that courts take into account when determining whether to stay proceedings by reason of a jurisdiction clause.²³ To this extent, there is a convergence rather than divergence of approach.

17 Thirdly, while the form of a jurisdiction clause is as wide as the imagination of its drafter,²⁴ the peculiar style in which some jurisdiction agreements in trust instruments have been drafted bears on their efficacy in terms of affording

²⁰ Ibid.

²¹ Ibid [36].

²² Lionel Smith, “Give the People What They Want? The Onshoring of the Offshore” (2018) 103 *Iowa Law Review* 2155, 2164, cited in Garnett and Liew (n 13) 360.

²³ See, eg, *Global Partners Fund Ltd v Babcock & Brown Ltd (in liq)* [2010] NSWCA 196; (2010) 79 ACSR 383 (“*Global Partners*”); *HNOE Limited v Angus & Julia Stone Pty Ltd* [2024] NSWCA 271 (“*HNOE*”).

²⁴ *Inghams Enterprises Pty Ltd v Hannigan* (2020) 379 ALR 196.

jurisdictional certainty.²⁵ This is borne out by reference to *Crociani v Crociani*.²⁶

Clause 12 of the trust deed under consideration in that case provided that:

“The rights of all persons and the construction and effect of each and every provision hereof shall be subject to the exclusive jurisdiction of and construed only according to the law of the said country [Mauritius] which shall become the forum for administration of the trusts hereunder.”

- 18 The plaintiff beneficiary brought proceedings in Jersey. Most of the claims were based on allegations against Jersey trustees and were governed by Jersey law but clause 12 appeared to provide that the courts of Mauritius had exclusive jurisdiction. All courts in the Guernsey judicial hierarchy held, somewhat surprisingly, that the clause did not in fact constitute an exclusive jurisdiction clause. Although the clause used the phrase “exclusive jurisdiction” and was broad as to its scope, making “[t]he rights of all persons and the construction and effect of each and every provision hereof” subject to the exclusive jurisdiction of Mauritius, the clause did not in terms refer to “the courts” of Mauritius. This ellipsis proved critical. This was because, as Lord Neuberger explained:²⁷

“if the stipulation was intended to indicate the country whose courts were to determine disputes, rather than the country in which the trust was to be managed, one would have expected the draftsman to refer to the courts of the country, as opposed to the country simpliciter, as being the forum.”

- 19 This aspect of the decision has attracted criticism²⁸ with which I would respectfully venture to agree. The construction could be described as involving a “surrender to formalism”²⁹ which runs counter to the broad and generous construction afforded by modern common law courts to dispute resolution clauses. In the contractual context, the absence of mandatory words such as “shall”, “will” and “must” does not preclude a characterisation of a clause as being exclusive.³⁰ Indeed, in *Google LLC v Nao Tsargrad Media*,³¹ the Court

²⁵ Garnett and Liew (n 13) 360.

²⁶ See *Crociani* (n 17).

²⁷ *Ibid* [20].

²⁸ Garnett and Liew (n 13) 362.

²⁹ *Continental Bank NA v Aeakos Compania Naviera SA* [1994] 1 WLR 588, 594.

³⁰ See M Davies, A S Bell, M Douglas and P Herzfeld, *Nygh’s Conflict of Laws in Australia* (LexisNexis, 11th ed, 2025) [7.68] (“Nygh’s”).

³¹ *Google LLC v Nao Tsargrad Media* [2025] EWHC 94 (Comm), [88]-[92].

held that a jurisdiction clause which stated that the parties “may” sue in England was, when construed as a whole, considered to be an *exclusive* jurisdiction clause. Another example of the court’s preference for substance over form can be seen in the courts’ rejection as illusory of an approach which provides that transitive jurisdiction clauses (e.g., “the parties submit disputes”) and intransitive jurisdiction clauses (e.g., “the parties submit themselves”) are necessarily exclusive and non-exclusive, respectively.³²

- 20 It is also worth noting what Lord Neuberger said in relation to the expression “forum for the administration of the trusts hereunder”. In short, he rejected an argument that “forum” should be taken to be a reference to courts. Thus, his Lordship said:³³

“‘Forum’ can be a reference to a court, but it can equally well be used to refer to a place for any purpose, and that is how the draftsman of the 1987 Deed could have intended it to be understood. In that connection, the Board was shown a contemporaneous example of a trust precedent where the expression ‘forum’ was used in the sense argued for by the respondents in this case (*Encyclopaedia of Forms and Precedents*, 4th edition, 1971, Vol 20, Form I:H:40). Additionally, it is to be noted that in two passages outside clauses 12 and 15, the draftsman of the 1987 Deed referred to ‘courts’, and nowhere else did he refer to fora. Further, in relation to a trust, while ‘administration’ is used to refer to the function of the court, it is also used to refer to the running of the trust. Thus, in section 52(1) of the *Capital Gains Tax Act 1979* (re-enacted as section 69(1) of the *Taxation of Chargeable Gains Act 1992*), reference was made to the place where ‘the general administration of the trusts is ordinarily carried on’. In any event, there is no reason to think that the draftsman of the 1987 Deed would have had in mind any of the three cases relied on by the appellants, which were concerned with succession duty and not with the interpretation of a trust instrument.

In the Board’s view, the forum stipulation has the effect for which the respondents contend. First, it is perfectly feasible to think that the draftsman of the 1987 Deed would consider it appropriate to stipulate where the Grand Trust’s affairs were to be organised or run, as it could affect the way in which the trustees are taxed. It would have been appreciated by the draftsman of the 1987 Deed that it could be important in order to avoid tax to be able to show that a trust has no connection with a particular country, and in connection with some taxes the place of administration of the trust is of significance. In this connection, by way of example, reference can be made to section 52(1) of the *Capital Gains Tax Act 1979*, referred to in the preceding paragraph.”

³² *AXIS Corporate Capital UK II Ltd v ABSA Group Ltd* [2021] EWHC 225 (Comm) at [49]; *BNP Paribas S.A v Anchorage Capital Europe LLP* [2013] EWHC 3073 (Comm), [86], cited in *Dicey, Morris & Collins on the Conflict of Laws* (16th ed, Sweet & Maxwell, 2022) 638 [12-074].

³³ *Crociani* (n 17) [18]-[19].

- 21 The Singapore Court of Appeal also addressed “forum for the administration” clauses in *Ivanishvili v Credit Suisse AG*.³⁴ There, Judith Prakash JA, with whom Menon CJ agreed, observed:³⁵

“Not surprisingly, there have been several cases across the Commonwealth where the courts have been called upon to determine the meaning of the term ‘forum for the administration’ in trust deed clauses similar to cl 2 here. We will call them ‘forum for administration clauses’ for convenience, although the language and structure of such clauses are not uniform. Numerous authorities were cited by the parties both before us and to the Judge: see the Judgment at [32]–[41]. They reveal that two closely related questions are raised by a forum for administration clause: first, whether the clause is intended to confer jurisdiction on a court (whether exclusively or otherwise); and second, the scope of the clause and therefore the kinds of disputes it applies to. On one end of the spectrum, some forum for administration clauses have been interpreted as not being concerned with the jurisdiction of the courts at all, but instead as merely referring to the place where the affairs of the trust are to be run: see, eg, *Crociani and others v Crociani and others (Princess Camilla de Bourbon des Deux Siciles intervening)* 17 ITELR 624 (*‘Crociani (PC)’*) at [19]. On the other end, other forum for administration clauses have been found to function as exclusive jurisdiction clauses applicable both to questions regarding the administration of the trust and to contentious disputes relating to the trust: see, eg, *Re a Trust* 16 ITELR 195 (*‘Re a Trust’*) at [66] and [68].

We reiterate, however, that forum for administration clauses are not uniform: they differ in both language and structure. There is no special rule of construction that applies to the interpretation of such clauses, and everything must therefore depend on how the particular clause is framed and the context in which it appears: see *Koonmen v Bender and others* 6 ITELR 568 (*‘Koonmen’*) at [45]; and *Re a Trust* at [60].”

- 22 One interesting argument that may be noted, as observed in *Ivanishvili*,³⁶ is that the phrase “exclusive jurisdiction” which has a clear meaning to a litigator may mean something different to a drafter of trust deeds with the suggestion being that, in conjunction with the notion of the expression “forum for administration”, it is really an emphatic reference to the law that is to govern all trusts disputes.³⁷
- 23 The majority in *Ivanishvili* took the view that the expression “forum for the administration” was intended to “refer to the court or jurisdiction which would settle questions arising in the day to day administration of the trust, and to denote the supervisory and authorising court for actions the trustee might need

³⁴ [2020] SGCA 62. See for other cases See, eg, *Helmsman Ltd v Bank of New York Trust Co Ltd* (2009) 13 I.T.E.L.R. 177 (Grand Court of Cayman Islands) (*‘Helmsman’*); *Re A Trust* (2012) 16 I.T.E.L.R. 195 (Supreme Court of Bermuda).

³⁵ *Ivanishvili* (n 34) [52]–[53].

³⁶ *Ibid* [64].

³⁷ See also in this regard, *Helmsman* (n 34).

to take which were not specifically covered by the trust deed or where its terms were ambiguous”.³⁸ On this view, it would not comprehend or include within its scope disputes between beneficiaries and trustees. This has been explained as being because: (i) the purpose of trust deeds is primarily to dictate the administration of a trust; and (ii) the trust jurisdiction clause reflects a unilateral undertaking by the trustee, with typically minimal input from the beneficiaries.³⁹

- 24 *Ivanishvili* was applied more recently in Singapore in *Sir Cornelius Sean Sullivan v Hill Capital Pte Ltd*, where the clause provided that “the Proper Law of this Settlement shall be the law of the Isle of Man the Courts of which shall be the forum for the Administration thereof”. It was held that the clause applied only to the “day-to-day administration of the trusts” rather than “contentious disputes between trustees and beneficiaries”.⁴⁰
- 25 In their very recent article, Professors Garnett and Liew criticise the narrow construction of “forum for administration” trust jurisdiction clauses on four bases. First, the scope of an administrative action has always extended beyond administrative matters, and has included claims for breach of trust.⁴¹ Secondly, a beneficiary seeking to commence a breach of trust claim is often enforcing the trust’s “proper administration”, such as through reconstituting the trust fund.⁴² Thirdly, the characterisation of certain “hostile” disputes can equally be characterised as administrative, such as an application to remove a trustee.⁴³ Fourthly, certain authorities have taken a more expansive approach, especially where the application is made against a trustee, who can be assumed to have agreed to the forum clause.⁴⁴
- 26 More conventionally drafted “exclusive jurisdiction” trust clauses provide greater certainty. Thus, in *EMM Capricorn Trustees Ltd v Compass Trustees*,

³⁸ *Ivanishvili* (n 34) [76].

³⁹ See Garnett and Liew (n 13) 362.

⁴⁰ *Sir Cornelius Sean Sullivan v Hill Capital Pte Ltd* [2024] SGHC 157, [15], [20]-[21].

⁴¹ See Garnett and Liew (n 13) 364.

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Ibid* 365.

it was held that an action for breach of trust by a successor trustee fell within the scope of the following clause:⁴⁵

“the rights of all parties and the construction and effect of each and every provision [of the deed] shall be subject to the exclusive jurisdiction of the courts ... of Guernsey”.

- 27 An unexplored question is whether the scope of trust jurisdiction clauses should be analysed by reference to the “subject matter” and “party scope” of the clause, as presently occurs for contractual jurisdiction clauses.⁴⁶ In *Global Partners*, Spigelman CJ utilised the language of “party scope” and “subject matter scope” to structure and divide his analysis between whether the clause applied to third parties, and to determine the nature of disputes falling within the clause.⁴⁷ Similarly, in *HNOE*, the Court utilised the notion of “party scope” to determine whether parties who were not privy to the impugned jurisdiction clause, but were related to signatories of the agreement, should be bound.⁴⁸ The benefit of differentiating party and subject matter scope is that it encourages clarity as to which aspect of “scope” is referred to. Such clarity would be welcome in the trusts context.

Enforcement of Trust Jurisdiction Clauses

- 28 Where a plaintiff commences proceedings relating to a trust in a jurisdiction which is not designated by a trust jurisdiction clause, the defendant may wish to enforce the jurisdiction clause through an application for a stay of proceedings or an anti-suit injunction.
- 29 A critical question is whether a trust jurisdiction clause should, similar to the approach to contracts, be enforced whether by stay or anti-suit injunction unless “strong reasons” apply.⁴⁹ The current position, as already noted by

⁴⁵ *EMM Capricorn Trustees Ltd v Compass Trustees Ltd* (2001) 4 I.T.E.L.R. 34 (Royal Court of Jersey) (“*EMM Capricorn*”). See Garnett and Liew (n 13) 365.

⁴⁶ See *HNOE* (n 23); *Global Partners* (n 23).

⁴⁷ *Global Partners* (n 23).

⁴⁸ *HNOE* (n 23).

⁴⁹ A Arzandeh, “Exclusive Jurisdiction Clauses in International Trust Deeds” (2021) 41(4) *Legal Studies* 527, 528.

reference to *Crociani*, is that courts do not apply a “strong reasons” standard,⁵⁰ and instead impose a less stringent standard – dividing commentators.⁵¹

- 30 In most Commonwealth jurisdictions, where a party commences proceedings in breach of a *contractual* exclusive jurisdiction clause, courts will generally stay proceedings or restrain proceedings commenced in a non-stipulated forum unless “strong reasons” or “strong countervailing reasons” apply.⁵² The rationale for adopting a “strong bias” towards enforcing contractual exclusive jurisdiction clauses is based upon the enforcement of the parties’ bargains.⁵³ The importance of upholding contractual bargains is illustrated by the recent decision of *Capital Designated Activity Co v PJSC Insurance Co Universalna*,⁵⁴ where the Court stayed English proceedings by reference to a Ukrainian exclusive jurisdiction clause, holding that there were no strong reasons to depart from the clause despite the ongoing war in Ukraine, and associated risks of power outages and court delays.⁵⁵
- 31 In *Koonmen v Bender*, the Jersey Court of Appeal held that exclusive jurisdiction clauses in *trusts* could be treated equivalently to contracts where the dispute was between the settlor and “those claiming to have been ‘standing behind’ the Settlor...and the Trustees”.⁵⁶
- 32 There are various justifications for this approach. Upholding the settlor’s intention provides the “strongest justification for enforcing arbitration clauses in trusts’ against beneficiaries”.⁵⁷ Further, it could be said that enforcing trust jurisdiction clauses against beneficiaries is justified because beneficiaries who

⁵⁰ *Crociani* (n 17) [35]-[37].

⁵¹ See Arzandeh (n 49) 527. Cf Garnett and Liew (n 13).

⁵² In Australia, see *Karpik v Carnival PLC* (2023) 98 ALJR 45, [66]; *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197, 259; *Akai Pty Ltd v People’s Insurance Co Ltd* (1996) 188 CLR 418, 429, 445; *HNOE* (n 23) [89], [108]-[109], [115]. In England, see *UniCredit Bank GmbH v RusChemAlliance LLC* [2024] 3 WLR 659, [67]; *Donohue v Armco Inc* [2002] 1 Lloyd’s Rep 425, 433. In Singapore, see *Asiana Airlines Inc v Gate Gourmet Korea Co Ltd* [2024] SGCA(I) 8, [61(a)]; *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732, [68]. See Nygh’s (n 30) [7.92] ff.

⁵³ *Huddart Parker Ltd v Ship ‘Mill Hill’* (1950) 81 CLR 502, 509.

⁵⁴. [2024] EWHC 1365 (Comm).

⁵⁵. *Aercap Ireland Capital Designated Activity Co v PJSC Insurance Co Universalna* [2024] EWHC 1365 (Comm), [295]-[318]. See Nygh’s (n 30) [7.93].

⁵⁶ *Koonmen v Bender* (2002) 6 I.T.E.L.R. 56, [49]. See Garnett and Liew (n 13) 366.

⁵⁷ Conaglen (n 13) 476.

accept the benefits of a trust must also accept the terms of the trust deed, including the jurisdiction clause.

- 33 Nonetheless, the view expressed in *Koonmen* was not adopted by the Royal Court of Jersey in *EMM Capricorn*, where the Court held that exclusive jurisdiction clauses in trusts were distinguishable from those in contracts because the former:⁵⁸

“will have been agreed only between the settlor and the original trustee. Actions in relation to the trust may be brought by beneficiaries who were never parties to the trust deed ... [and] who played no part in the choice of exclusive jurisdiction made in the trust deed.”

- 34 Garnett and Liew have explained that the Court in *EMM Capricorn* therefore adapted the contractual “strong reasons” test to incorporate a “good reason” test – imposing a lower threshold, while not introducing an unduly flexible test such as the *forum non conveniens* standard.⁵⁹ I have already referred to the less stringent approach to the enforcement of exclusive jurisdiction trust clauses in *Crociani*. Both cases involve consideration of wider factors such as convenience and connection to forum which are not usually in play where a contractual exclusive jurisdiction clause is in play.⁶⁰

- 35 Arzandeh critiques Lord Neuberger’s approach, based upon the fact that beneficiaries do not consent to terms in the same way a contractual party does, on the basis that:⁶¹

“there are many terms in trust instruments which are enforced against beneficiaries, with full force and effect, despite their having not agreed to the initial insertion of these clauses in trust settlements. Some such clauses are actually more extensive in curtailing the beneficiaries’ rights than exclusive jurisdiction clauses. Particularly illustrative, in this regard, are exemption clauses.”

- 36 Garnett and Liew defend the privileged position which beneficiaries enjoy as compared to trustees and settlors in escaping a trust jurisdiction clause.⁶² They

⁵⁸ *EMM Capricorn* (n 45) [16], quoted in Garnett and Liew (n 13) 366.

⁵⁹ Garnett and Liew (n 13) 367.

⁶⁰ *Ibid.* And see *Incitec Ltd v Alkimos Shipping Corporation* (2004) 138 FCR 496.

⁶¹ Arzandeh (n 49) 538.

⁶² Garnett and Liew (n 13) 368-370.

also note that sensitivity is required in referring to “beneficiaries”, as they are not a homogenous group, but may range from a sophisticated settlor-beneficiary to an infant beneficiary who is unaware of the trust.⁶³ In the latter circumstance, the authors argue that a beneficiary “should not invariably be treated like a well-informed commercial party who enters a contract with full knowledge of its terms”.⁶⁴

Arbitrability of international trust disputes

37 I now turn to the issue of arbitrability of international trust disputes. Despite the increasing popularity of international commercial arbitration, it was said in 2016 that the arbitration of trust disputes has been “almost unknown” and “at best a rarity” among Commonwealth jurisdictions.⁶⁵ It would be interesting to have some empirical data some 10 years later as to whether this remains the case. I suspect not.

38 Arbitration offers at least five *arguable* advantages to settlors, trustees and beneficiaries, which can render it a highly attractive mode of dispute resolution:

- First, arbitration can reduce costs and delays of proceedings.⁶⁶
- Secondly, arbitration maintains confidentiality for parties seeking to shelter sensitive commercial or family disputes from the public.⁶⁷
- Thirdly, arbitration can offer flexibility to parties, both in terms of the identity of the arbitrator, and the procedures used.⁶⁸
- Fourthly, parties can ensure the finality of arbitral awards by restricting rights of appeal.⁶⁹ A cautionary tale can be seen in the long-running dispute over the trust property concerning the Macedonian Orthodox Community Church.

⁶³ Ibid 370.

⁶⁴ Ibid.

⁶⁵ M Herbert, “Trust Arbitration in England and Wales: The Trust Law Committee” in SI Strong (ed), *Arbitration of Trust Disputes: Issues in National and International Law* (OUP, 2016) [10.01].

⁶⁶ LC Alcolea, *Arbitration of Trust Disputes* (Elgar, 2022) [1.001].

⁶⁷ *Rinehart v Welker* (2012) 95 NSWLR 221, [178] (Bathurst CJ) (“*Welker*”). See also A Monichino, “Arbitration of shareholder and trust disputes” (2021) 40(1) *Arbitrator & Mediator* 76, 89-90.

⁶⁸ Chew, “Arbitrability of Trusts” in P Davies and J Penner (eds), *Equity, Trusts & Commerce* (Hart, 2017) 204; See Holden (n 5) 555-556. Monichino (n 67) 89-90.

⁶⁹ Monichino (n 67) 89-90.

Despite numerous ADR attempts, the parties fought over the administration of the trust for years – resulting in 50 judgments and 12 proceedings before the NSW Court of Appeal.⁷⁰

- Fifthly, the international enforcement of foreign arbitral awards is simplified and secured by the widespread adoption of the *New York Convention*.⁷¹ This is particularly important where trust property is sited overseas, and where the trustees and beneficiaries are spread throughout the globe.⁷²

39 Parties seeking to arbitrate a trust dispute will be faced with two preliminary issues. The first issue is whether the trust dispute falls within the arbitration clause – the question of scope which I have already discussed. If the trust dispute does fall within the scope of the jurisdiction clause, the next issue is whether the trust dispute is arbitrable, or, put differently, whether the matter is capable of being resolved through arbitration. This second issue introduces considerable potential complexity and uncertainty for parties although in the few cases that have considered the issue, a pro-arbitrability approach may be discerned.

Defining arbitrability

40 The doctrine of non-arbitrability refers to the notion that “some matters so pervasively involve public rights, or interests of third parties, which are the subjects of the uniquely governmental authority, that agreements to resolve such disputes by ‘private’ arbitration should not be given effect”.⁷³ Or, as McColl JA observed in *Welker*, non-arbitrable matters are those where the public interest in the subject matter of the dispute renders private dispute resolution “outside the national court system inappropriate”.⁷⁴ In turn, as Gordon and Gleeson JJ observed in *Tesseract International*, issues of “arbitrability and

⁷⁰ D Clarry, “The Removal of Trustees by Arbitration: Australia and England” in SI Strong (ed), *Arbitration of Trust Disputes: Issues in National and International Law* (OUP, 2016) [11.07].

⁷¹ Monichino (n 67) 89-90.

⁷² Chew (n 68) 204. Holden (n 5) 555-556.

⁷³ *Fitzpatrick v Emerald Grain Pty Ltd* [2017] WASC 206, [90] (“*Fitzpatrick*”), referring to Born GB, *International Commercial Arbitration* (2009) 768.

⁷⁴ *Welker* (n 67) [211] (McColl JA).

public policy are separate but interrelated”.⁷⁵ Such issues can be raised either before the arbitral tribunal in respect of jurisdiction, or can be raised before a court after an arbitral award has been delivered.⁷⁶

- 41 Courts are empowered to set aside arbitral awards made in respect of non-arbitrable disputes.⁷⁷ Where a dispute is not arbitrable, the parties cannot refer the matter to arbitration, irrespective of the litigants’ consent.⁷⁸
- 42 Matters which have been considered non-arbitrable include criminal prosecutions, bankruptcy, divorce, winding up in insolvency and certain competition and intellectual property matters.⁷⁹ These areas have broadly been described as non-arbitrable as they are matters “plainly for the public authorities of the state”.⁸⁰ Despite this, as Professor Conaglen has explained, the modern approach to arbitrability is to “focus on the specific dispute...rather than on the general area of law which the dispute concerns”.⁸¹

Criteria for Determining Arbitrability

- 43 But how does the Court determine whether a particular trust dispute is arbitrable? There is significant variation as to the approach of legislatures worldwide in setting the boundaries concerning the arbitrability of trust disputes. Some jurisdictions, including the Bahamas, Guernsey, Malta, Arizona and Florida, have expressly legislated to facilitate the arbitration of trust disputes.⁸² The IAA refers to the concept of an arbitration agreement being “incapable of being performed”.⁸³ Such matters are not arbitrable.

⁷⁵ *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* [2024] HCA 24; (2024) 98 ALJR 880, [139].

⁷⁶ *Ibid.*

⁷⁷ *Commercial Arbitration Act 2010* (NSW), ss 34(2)(b)(i), 36(l)(b)(i); *International Arbitration Act 1974* (Cth), s 8(7)(a). See also *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958* (‘New York Convention’), Article V(2)(a).

⁷⁸ Monichino (n 67) 81, citing *Robotunits Pty Ltd v Mennel* (2015) 49 VR 323, 352 [65] (Croft J).

⁷⁹ *Welker* (n 67) [212] (McColl JA).

⁸⁰ *Larkden Pty Ltd v Lloyd Energy Systems Pty Ltd* (2011) 279 ALR 772; [2011] NSWSC 268, [64] (Hammerschlag J) (‘*Larkden*’). See also *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45, [200]. *Welker* (n 67) [212] (McColl JA).

⁸¹ Conaglen (n 13) 452.

⁸² Chew (n 68) 201.

⁸³ *International Arbitration Act 1974* (Cth) s 7(5).

44 In *Welker*, Bathurst CJ held that, in 2012, there were no “firm principles that determine whether a particular dispute is capable of being resolved by arbitration”.⁸⁴ Nonetheless, the Chief Justice emphasised that the starting point is that “it is only in extremely limited circumstances that a dispute which the parties have agreed to refer to arbitration will held to be non-arbitrable”.⁸⁵ That is, as Hammerschlag J held in *Larkden*, “[g]enerally, any dispute or claim which can be the subject of an enforceable award is capable of being settled by arbitration”.⁸⁶

45 Three key defining features of non-arbitrability were identified by Allsop J in *Comandate Marine Corp*:

- (1) there is 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”;⁸⁷
- (2) “the identification and control of these subjects was the legitimate domain of national legislatures and courts”;⁸⁸ and
- (3) arbitrability should not be assessed by reference to whether the arbitral proceedings would be conducted “in the same way and to the same extent as it would be ventilated in a national court applying national laws”.⁸⁹

46 Furthermore, in *Tesseract International*,⁹⁰ Gageler CJ held that:

“Where, as here, the place of the arbitration also supplies the law applicable to the substance of the dispute and the relevant law is statutory, the question of non-arbitrability of the subject matter of the dispute reduces to a single question of statutory interpretation: does anything in the statutory text or structure or subject matter or purpose evince a legislative intention to exclude arbitration of the statutory rights or liabilities in issue in the arbitration?”.⁹¹

⁸⁴ *Welker* (n 67) [164] (Bathurst CJ).

⁸⁵ *Ibid* [167] (Bathurst CJ).

⁸⁶ *Larkden* (n 72) [62].

⁸⁷ *Comandate* (n 80) [200]. See also *Welker* (n 67) [211] (McColl JA).

⁸⁸ *Comandate* (n 80) [200].

⁸⁹ *Ibid*.

⁹⁰ (2024) 98 ALJR 880.

⁹¹ *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* (2024) 98 ALJR 880, [70].

47 While the Chief Justice’s observation was made in a different context, it is applicable to many trust disputes, where applications such as for the removal of trustees is made pursuant to statute.⁹²

48 Turning specifically to trust disputes, Master Clark recently observed in *Grosskopf v Grosskopf* that there is no “statutory prohibition or policy rule against trust disputes being resolved out of court”.⁹³ In turn, there is “no reason in principle” why issues such as the administration of trusts or removal of a trustee cannot be resolved through arbitration.⁹⁴ The rationale for this position is that:⁹⁵

“Unless and until it is invoked, private trusts are left to operate outside court. Trustees are frequently appointed and replaced outside court. Where a beneficiary makes a complaint against a trustee (or applies for removal), this may be compromised, without any reference to the court, by the trustee agreeing to step down. If that happens, then the complaint is never considered by the court. Some of the beneficiaries may not even become involved in the dispute.”

49 The topic of arbitrability on the context of applications to remove a trustee was the subject of extensive, albeit *obiter*, consideration in *Rinehart v Welker* (“*Welker*”).⁹⁶ The issues in that case were whether: (i) the dispute fell within an arbitration clause in the trust deed; and (ii) if so, whether the dispute as to Gina Rinehart’s removal as trustee was arbitrable. The Court answered the first issue of scope in the negative so that the second issue of arbitrability did not strictly arise. Nonetheless, Bathurst CJ (McColl JA agreeing) held that “at least in circumstances where the trustee and each beneficiary have expressly agreed to their disputes being referred to arbitration”,⁹⁷ an application to remove a trustee was arbitrable having regard to the following propositions:

(1) the doctrine of non-arbitrability is “extremely limited”;⁹⁸

⁹² See, eg, *Trustee Act 1925* (NSW).

⁹³ *Grosskopf v Grosskopf* [2024] EWHC 291 (Ch), [61] (Master Clark) (*‘Grosskopf’*).

⁹⁴ *Ibid*.

⁹⁵ *Ibid* [62] (Master Clark).

⁹⁶ (2012) 95 NSWLR 221.

⁹⁷ *Welker* (n 67) [175] (Bathurst CJ).

⁹⁸ *Ibid* [167] (Bathurst CJ).

- (2) “the fact that an arbitrator cannot grant all the relief a court is empowered to grant does not mean the dispute is incapable of arbitration”;⁹⁹
- (3) “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”;¹⁰⁰
- (4) the supervisory jurisdiction of the court is not ousted by arbitration, but rather “continues to have the supervisory role conferred upon it by the relevant legislation, in this case the *Commercial Arbitration Act*”;¹⁰¹
- (5) the matter could remain arbitrable despite the “fact that an arbitrator may not have power to remove a trustee or make a vesting order”;¹⁰² and
- (6) the arbitrator’s remedial limitations could be practically overcome through seeking to enforce the arbitral award as a judgment.¹⁰³

50 In addition, McColl JA held that “the mere fact that a power is conferred on a court by statute, does not mean that an arbitrator cannot exercise such a power. The question turns on the language of the arbitration clause”.¹⁰⁴ While agreeing with the first clause, Clarry has argued that McColl JA’s observation that arbitrability depends on the “language of the arbitration clause” unduly elides the distinct and separate processes of: (i) construing the scope of a jurisdiction clause; and (ii) determining the arbitrability of a dispute.¹⁰⁵

51 Returning to *Grosskopf*, the claimant was a beneficiary of a family trust, seeking to remove and replace the trustee with a judicial trustee due to alleged misconduct. The family trust in *Grosskopf* was distinguishable from the trust in *Welker* because, in *Grosskopf*, the class of beneficiaries was not closed, and

⁹⁹ Ibid [170] (Bathurst CJ).

¹⁰⁰ Ibid [175] (Bathurst CJ).

¹⁰¹ Ibid [177] (Bathurst CJ).

¹⁰² Ibid [176] (Bathurst CJ).

¹⁰³ Ibid.

¹⁰⁴ Ibid [214] (McColl JA).

¹⁰⁵ Clarry (n 70) [11.18].

included approximately 62 grandchildren, hundreds of great grandchildren, and various charitable institutions.¹⁰⁶

52 The parties entered an arbitration agreement for the dispute to be determined by the Beth Din of the Federation of Synagogues. The arbitral tribunal issued four interim awards, including extensive disclosure orders and for an account of the trust. During the arbitral proceedings, the claimant applied to the English High Court to remove the defendants. The defendants applied to stay the claim.¹⁰⁷

53 Similar to *Welker*, the key issue was whether the removal and replacement of a judicial trustee was arbitrable, which raised consideration of the fact that the arbitrator did not have power to replace the trustee and the dispute involved allegations of serious misconduct. Master Clark held, along similar lines to Bathurst CJ's reasoning in *Welker*, that neither the arbitrator's limited remedial powers nor the seriousness of the allegations precluded the matter being arbitrable. Counsel for the defendant sought to distinguish *Welker* on the basis that an arbitral award would impermissibly affect beneficiaries of the trust who had not agreed to resolving the dispute by arbitration. This argument was rejected by Master Clark, who held that:¹⁰⁸

“[arbitration] would not have a prejudicial impact on the other beneficiaries. Their rights as beneficiaries are not affected by a change of trustee. They retain their rights to invoke the supervisory jurisdiction of the court, if necessary. The risk of inconsistent findings were another beneficiary to go to court is only a risk for the trustee, not the beneficiaries. That might be a practical reason why a trustee would not agree to arbitration. It is not, in my judgment, a principled reason for concluding that such a dispute is not arbitrable.”

54 In turn, the Master rejected the argument that “the fact that the other beneficiaries are not parties to the arbitration agreement means that the Tribunal cannot decide whether the defendants should step down.”¹⁰⁹

¹⁰⁶ *Grosskopf* (n 93) [9]-[10].

¹⁰⁷ Pursuant to s 9 of the *Arbitration Act 1996* (UK).

¹⁰⁸ *Grosskopf* (n 93) [63] (Master Clark).

¹⁰⁹ *Ibid* [66] (Master Clark).

55 Questions relating to the formation of trusts have also been held to be arbitrable. In *Fitzpatrick*, 47 grain growers commenced proceedings against Emerald Grain Pty Ltd, relating to disputes arising from separate contracts between each of the growers and Emerald. The issue was whether contracts between the parties gave rise to a trust relationship. Each of the contracts contained an arbitration clause, which provided that:

“Any dispute or claim arising out of, relating to or in connection with these Terms and Conditions... including any question regarding the existence of a contract, the validity or its termination, and which cannot be resolved between the parties, shall be resolved by arbitration...”

56 A key question was whether the issue as to the formation of a trust was arbitrable. It was contended that the circumstances in *Fitzpatrick* was distinguishable from those in *Welker* because: (i) not all the growers supported the reference to arbitration (unlike *Welker*, where all beneficiaries and the only third party supported arbitration);¹¹⁰ (ii) the position of third parties whose interests might be affected was unknown;¹¹¹ and (iii) the purported trust in *Fitzpatrick* arose from the terms of an arm’s length commercial contract, unlike *Welker*, which involved an express trust created for the benefit of members of a family.¹¹²

57 Nonetheless, Martin CJ held that the issue was arbitrable, and that the “court must refer the parties to arbitration and stay the proceedings for that purpose”.¹¹³ His Honour observed that the following factors did not preclude the dispute being arbitrable: (i) that the rights asserted by the parties were equitable;¹¹⁴ (ii) that the dispute may affect the interests of those who are not party to the arbitration agreement;¹¹⁵ and (iii) that the arbitrator had limited remedial powers as compared to a court.¹¹⁶

¹¹⁰ *Fitzpatrick* (n 73) [97].

¹¹¹ *Ibid*.

¹¹² *Ibid* [98].

¹¹³ *Ibid* [104].

¹¹⁴ *Ibid* [99].

¹¹⁵ *Ibid* [102].

¹¹⁶ *Fitzpatrick* (n 73) [100], citing *Welker* (n 67) [170] (Bathurst CJ); *IBM Australia Ltd v National Distribution Services Ltd* (1991) 22 NSWLR 466 (Clarke JA, Handley JA agreeing) (*‘Ibin’*); *Re Ikon Group Ltd [No 2]* [2015] NSWSC 981 [23] (Brereton J).

Objections to the Arbitrability of Trust Disputes

58 Commentators and counsel have sought to object to the arbitrability of trust disputes on the basis of: the court's supervisory jurisdiction over trusts; the limited remedial relief available to arbitrators; and fact-specific considerations such as the seriousness of the impugned conduct.

Supervisory jurisdiction

59 A fundamental objection to arbitrating trust disputes is that it undermines the court's "supervisory jurisdiction". Given that trusts are a creature of equity, the courts "maintain an inherent supervisory jurisdiction over the administration of trusts".¹¹⁷ That is, as Lord Neuberger held in *Crociani v Crociani*, in "the case of a trust, unlike a contract, the court has an inherent jurisdiction to supervise the administration of the trust".¹¹⁸

60 The court's supervisory jurisdiction over trusts relates to the "irreducible core of the trust", which is understood as requiring that the courts: (i) "supervise and if appropriate intervene in the administration of a trust";¹¹⁹ and (ii) ensure that beneficiaries can enforce their rights through a "judicial mechanism".¹²⁰ For this reason, "it is a maxim that the execution of a trust shall be under the control of the court".¹²¹

61 Arbitration of trust disputes ostensibly undermines the court's supervisory jurisdiction because "an arbitral tribunal is not a court; and even if courts retain some supervision over the arbitral process, such supervision is extremely limited as compared to the powers they could exercise directly in trust litigation matters".¹²² According to this perspective, the determination of trust disputes through arbitration has been said impermissibly to oust the court's supervision over the administration of trusts, rendering the matter non-arbitrable.¹²³ Such

¹¹⁷ *Welker* (n 67) [173] (Bathurst CJ).

¹¹⁸ *Crociani* (n 17) [36].

¹¹⁹ *Schmidt v Rosewood Trust Ltd* (2003) 2 AC 709, 724.

¹²⁰ *Alcolea* (n 66) [2.051].

¹²¹ *Morice v Bishop of Durham* 10 (1805) Ves 522, 529 (High Court).

¹²² *Alcolea* (n 66) [2.056].

¹²³ *Chew* (n 68) 206.

concerns led Scrutton LJ in *Czarnikow v Roth* to remark 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”.¹²⁴

62 However, the force of such objections is undermined by the fact that, as Bathurst CJ explained in *Welker*, the supervisory jurisdiction of the court is not ousted by arbitration because the court “continues to have the supervisory role conferred upon it by the relevant legislation”.¹²⁵

63 Notably, however, Bathurst CJ was considering the *Commercial Arbitration Act 2012* (WA), where an appeal was only available on questions of law where the court granted leave *or* the parties agreed to appeal. However, such statutory rights of appeal have since been repealed in favour of a uniform approach across Australia, which permits appeals on questions of law only where the court grants leave *and* where the parties agree.¹²⁶ This legislative amendment significantly reduces the court's supervisory jurisdiction over arbitral awards in respect of appeals on questions of law.

64 Nonetheless, Professor Conaglen has explained that the Court maintains oversight over arbitral proceedings in various respects, including:¹²⁷

- appointing arbitrators where parties cannot agree;
- ruling on the jurisdiction of the tribunal;
- ordering interim measures;
- enforcing orders made by the tribunal;
- assisting in taking evidence;
- issuing subpoenas;

¹²⁴ *Czarnikow v Roth, Schmidt & Co* [1922] 2 KB 478 (CA), 489.

¹²⁵ *Welker* (n 67) [175] (Bathurst CJ). Cf *Fitzpatrick* (n 73) [96].

¹²⁶ See *Commercial Act 2012* (WA), s 34A(l).

¹²⁷ Conaglen (n 13) 464.

- determining preliminary questions of law where the arbitrator requests, or the parties agree; and
- deciding whether to set aside an arbitral award.

65 In further support of Bathurst CJ's views in *Welker*, Alcolea contends that:¹²⁸

"there is nothing in the concept of the irreducible core that necessarily precludes compulsory arbitration. The principle is that the trustee must be sufficiently accountable so that his status as the non-beneficial owner of the assets vested in him is practically real'. There is no reason in principle why arbitration cannot ensure accountability over trusts as effectively as the courts."

66 For a similar reason, Clarry contends that "Arbitration and access to the Court ought not to be viewed as mutually exclusive sphere, such that enlivening one completely abnegates the other".¹²⁹ Furthermore, judicial attitudes to arbitration have changed significantly over time, as Spigelman CJ and Mason P observed in *Raguz v Sullivan*:¹³⁰

"[49] In the case of international commercial arbitration, opposition from common lawyers also stemmed from ignorance of legal systems outside their own ken (especially civil systems). Fear of the unknown will often produce distrust and opposition.

[50] Despite continuing professional and judicial hostility, the commercial community has continued to support arbitration. If necessary, it was prepared to seek out legal regimes more sympathetic to party autonomy and readier to recognise the reasons lying behind the continued popularity of arbitration in particular fields. Legislatures and latterly judges have belatedly sat up and listened. Widespread adoption of the UNCITRAL Model Law and the Australia-wide scheme of which the Act forms part reflect these developments.

[51] Courts have listened and responded with understanding and acceptance... Some judges resisted the call longer than others. But, in his own words, even Kirby P recognised that 'the inclination of the judges (including myself) to review arbitral awards and to re-examine facts had to be brought to a halt' in light of 'the clear preference of Parliaments throughout Australia'."

67 Consequently, given that "the supervisory jurisdiction over trust administration exists to facilitate the performance of trusts", where the performance of a trust is reasonably assured through private mechanisms, "the underlying policy that

¹²⁸ Alcolea (n 66) 24.

¹²⁹ Clarry (n 70) [11.75].

¹³⁰ *Raguz v Sullivan* (2000) 50 NSWLR 236, [49]-[51].

justifies judicial intervention in trust administration is already fulfilled”.¹³¹ As such, the arbitrability of trust disputes is not inconsistent with the court’s supervisory jurisdiction over trusts.

Remedies available to arbitrators

- 68 A further objection to the arbitrability of trust matters is that the remedies required for the resolution of trust disputes are not available to arbitrators.¹³² That is, as Chew explains, arbitrating trust matters is inappropriate because “the arbitral tribunal cannot match the court’s ability to grant the accounting and instructional reliefs often sought in respect of trust disputes”.¹³³
- 69 Such concerns divided the New South Wales Court of Appeal in *Rinehart v Welker*, which related to an application to remove Gina Rinehart as trustee of a family trust. The issue was that, while a court could remove a trustee by directing the removal and appointment of a new trustee pursuant to statute, an arbitrator could not.¹³⁴ Similarly, a court could imprison a trustee who refused to give proper taking of accounts, which was unavailable to an arbitrator.¹³⁵
- 70 The arbitrator’s remedial limitations led Young JA in *Welker* to dissent on the issue of arbitrability, finding that it was “stretching things to contemplate that an order for imprisonment would be an appropriate enforcement procedure to perfect an arbitrator’s award”.¹³⁶ That is, his Honour suggested that arbitration was not a workable means of dealing with disputes concerning equitable rights and remedies.¹³⁷
- 71 Two responses can be made to Young JA’s general concerns regarding the suitability of arbitrating equitable disputes.¹³⁸ First, as Dawson contends, equitable matters have historically been the subject of early forms of arbitration,

¹³¹ Clarry (n 70) [11.20].

¹³² Chew (n 68) 206.

¹³³ Ibid 208.

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ *Welker* (n 67) [226] (Young JA).

¹³⁷ Conaglen (n 13) 453.

¹³⁸ Ibid 453-457.

and “[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”.¹³⁹ This included instances where the “claim for relief was equitable, and the arbitral commission was instructed to make an award according to ‘conscience’ or ‘equity’”.¹⁴⁰ Indeed, Guy suggests that the shift of litigation towards the Chancery courts related to its “facilities for arbitration and extra-legal compromise”.¹⁴¹ As Sir John Baker has observed, in the Chancery Courts:¹⁴²

“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.”

72 For instance, in 1589, the Privy Council in *Mompesson v Ley* referred a dispute concerning the alleged defrauding of a settlor-beneficiary by a trustee to commissioners to examine the complaint and give “such farther consideracion as in equitie shallbe thought fit”.¹⁴³

73 Secondly, as Bathurst CJ held in *Welker* “the fact that an arbitrator cannot grant all the relief a court is empowered to grant does not mean the dispute is incapable of arbitration”.¹⁴⁴ Rather, as Patten LJ held in *Fulham Football Club*:¹⁴⁵

“these jurisdictional limitations on what an arbitration can achieve are not decisive of the question whether the subject-matter of the dispute is arbitrable. They are no more than the practical consequences of choosing that method of dispute resolution...”

74 In turn, Bathurst CJ adopted the practical view that the “fact that the claim seeks relief which the Tribunal cannot grant does not, in my judgment, make the

¹³⁹ J Dawson, “The Privy Council and Private Law in the Tudor and Stuart Periods” (1950) 48 *Michigan Law Review* 393, 425.

¹⁴⁰ *Ibid* 427.

¹⁴¹ JA 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.

¹⁴² JH Baker, *An Introduction to English Legal History* (London, 4th ed, 2002) 111.

¹⁴³ Conaglen (n 13) 454.

¹⁴⁴ *Welker* (n 67) [170] (Bathurst CJ).

¹⁴⁵ *Ibid* [216] (McColl JA), quoting *Fulham Football Club (1987) Ltd v Richards* [2012] 1 All ER 414; [2011] EWCA Civ 855, [84].

dispute inarbitrable since... the Tribunal would have the power to make a direction as to the defendants' position which could, if necessary, be enforced outside the arbitration".¹⁴⁶ This could be achieved through seeking to enforce the arbitral award as a judgment.¹⁴⁷ This general approach is orthodox. As early as 1873, Lord Selborne LC held in *Willesford v Watson* that:¹⁴⁸

"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."

75 Bathurst CJ's approach in *Welker* was broadly applied in *Fitzpatrick*¹⁴⁹ and *Grosskopf*,¹⁵⁰ which both concerned whether a trust dispute was arbitrable.

76 In *Fitzpatrick*, Martin CJ held that "the fact that an arbitrator cannot grant all the relief a court is empowered to grant does not mean that the dispute is incapable of arbitration".¹⁵¹ Similarly, Master Clark held in *Grosskopf* that the "non-availability of the remedy is simply a consequence of the fact that the parties agreed to resolve their disputes by arbitration under a different system of law with different procedures and remedies".¹⁵²

77 Master Clark applied such reasoning in *Grosskopf* to the trust dispute by analogising to Lord Hodge's recent dicta in *FamilyMart*,¹⁵³ where shareholder disputes concerning winding up petitions were held to be arbitrable notwithstanding that only a court could make a winding up order.¹⁵⁴

"Matters, such as whether one party has breached its obligations under a shareholders' agreement or whether equitable rights arising out of a relationship between the parties have been flouted, are arbitrable in the context of an application to wind up a company on the just and equitable ground and the arbitration agreement is not inoperative because the arbitral tribunal cannot make a winding up order."

¹⁴⁶ *Welker* (n 67) [72] (Bathurst CJ).

¹⁴⁷ *Ibid* [176] (Bathurst CJ).

¹⁴⁸ *Willesford v Watson* (1873) L.R. 8 Ch. App. 473, 480.

¹⁴⁹ *Fitzpatrick* (n 73).

¹⁵⁰ *Grosskopf* (n 93).

¹⁵¹ *Fitzpatrick* (n 73); *IBM* (n 116); *Re Ikon Group Ltd [No 2]* [2015] NSWSC 981 [23] (Brereton J).

¹⁵² *Grosskopf* (n 93) [73].

¹⁵³ *FamilyMart China Holding Co Ltd v Ting Chaun (Cayman Islands) Holding Corporation* [2023] UKPC 33.

¹⁵⁴ *Ibid* [49].

78 Referring to *FamilyMart*, Master Clark observed that there was “no material difference where the relationship between the parties is one of beneficiary and trustee”.¹⁵⁵ Similar reasoning has been adopted in the Australian real property context, such as in *Hansell v Noorinya Holdings Pty Ltd*.¹⁵⁶ Here, the Court held that, while an arbitrator cannot make an order under s 60 of the *Real Property Act 1900* (NSW), “the underlying questions of fact and law concerning whether the Security Trustee is entitled to possession can be determined by the arbitrator and recorded in an arbitral award that will bind the parties and can be enforced in accordance with s 8” of the IAA.¹⁵⁷ Consequently, the prevailing approach suggests that the remedial limitations upon arbitrators in respect of trust disputes does not necessarily render the matter non-arbitrable.

Miscellaneous objections

79 Counsel have also sought to contend that a trust dispute was non-arbitrable on the basis that arbitration would undermine public scrutiny. In *Welker*, it was contended that “the proper conduct of trustees was a matter which required close public scrutiny”,¹⁵⁸ and that given the confidential nature of arbitration, there was a “public interest in the removal of trustees being the subject of public scrutiny in judicial proceedings and judgments”.¹⁵⁹

80 Clarry advances three reasons why considerations of public scrutiny should not render trust disputes non-arbitrable. First, trustees routinely resign from office without publicising that fact.¹⁶⁰ Secondly, trustees are often removed from office without judicial intervention, through, for example, protectors.¹⁶¹ Thirdly, and finally, where a court removes a trustee from office, it can do so in chambers or privately without the publication of a judgment.¹⁶² This last reason is problematic, in my view.

¹⁵⁵ *Grosskopf* (n 93) [70] (Master Clark).

¹⁵⁶ (2021) 364 FLR 216, [55].

¹⁵⁷ *Ibid*.

¹⁵⁸ *Welker* (n 67) [52] (Bathurst CJ).

¹⁵⁹ *Clarry* (n 70) [11.61].

¹⁶⁰ *Ibid* [11.62].

¹⁶¹ *Ibid*.

¹⁶² *Ibid*.

- 81 In *Welker*, Bathurst CJ rejected a further objection to arbitrability based on the fact that the trust dispute involved misconduct, holding that “where the allegations of serious misconduct are made against the party seeking the stay the fact that the allegations involve serious misconduct is relevant in the exercise of the discretion, but does not mean that a court as a matter of course would refuse a stay”.¹⁶³ Clarry further supports Bathurst CJ’s conclusion, noting that cases involving serious misconduct are often settled without trial, and without a judgment being published.¹⁶⁴
- 82 Bathurst CJ also held that the fact the claim involved the status or position of the trustee did not affect the position as to arbitrability.¹⁶⁵ That his Honour did not find this factor persuasive in *Welker* does not preclude it from being considered in future and different cases. For instance, in a different context, the Court in *Airservices Australia* held that a dispute considering the breach of an enterprise agreement under s 50 of the *Fair Work Act 2009* (Cth) was not arbitrable because, amongst other reasons, the issue could affect a person’s “legal status”.¹⁶⁶

Conclusion

- 83 As Professor Garnett’s article and this accompanying article illustrate, a host of complex issues arise in cases where trusts operate on a transnational scale. That should not be surprising. And other issues, not dealt with in either of these two papers, may arise where the trust in question is not express but imposed as an equitable remedy. This is an area where questions of characterisation loom large. These questions have also attracted much recent academic attention.¹⁶⁷

¹⁶³ *Welker* (n 67) [180] (Bathurst CJ).

¹⁶⁴ Clarry (n 70) [11.65]-[11.66].

¹⁶⁵ *Welker* (n 67) [181] (Bathurst CJ).

¹⁶⁶ *Airservices Australia v Civil Air Operations Officers’ Association of Australia* (2022) 295 FCR 36, [93]; Nygh’s (n 30) [7.56].

¹⁶⁷ See A Chong, ‘Characterisation and Choice of Law for Knowing Receipt’ (2023) 72 *ICLQ* 147; Forrester (n 11); Khai Liew (n 11). And see Nygh’s (n 30) ch 14.