TRUSTS ON TOUR

Jurisdiction clauses in trust instruments

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Commercial parties have grown accustomed to addressing questions as to the law governing disputes between them and the forum in which those disputes ought to be resolved in advance by making an appropriate stipulation in the document which will regulate their relationship. The law and practice of drafting and construing such provisions is well established. However, despite the evolution of the provision of fiduciary services into an international industry, the law relating to the construction and effect of similar provisions in a trust instrument remains less well developed. A clause purporting to specify the forum in which disputes arising in relation to the trust must be adjudicated was recently considered by the Judicial Committee of the Privy Council (the "Committee") in the case of Crociani v Crociani. *The Committee's judgment grapples with some of the questions arising from the existing jurisprudence, but does not, in the writer's respectful view, provide the clarity for which some may have hoped.*

The facts

1 The appeal from *Crociani v Crociani* arose from litigation commenced in the Royal Court of Jersey in January 2013 concerning a trust known as the Grand Trust (the "Trust").[1] The Trust was established by an agreement dated 24 December 1987 (the "Trust Agreement"), cl 15 of which provided that the proper law of the Trust at inception was Bahamian Law. The Bahamas were also specified to be the "forum for administration" of the Trust. However, cl 12 of the Trust Agreement permitted the original trustees (and, in turn, subsequent trustees) to resign in favour of trustees in another jurisdiction, and purported to provide for certain consequential effects upon the exercise of that power—these consequential provisions formed the subject matter of the dispute before the Committee.

[1] Reported at 2013 (2) JLR 369.

2 The full text of cl 12 was as follows (emphasis added)—

> "Notwithstanding any of the trusts, powers and provisions herein contained the Trustees shall have power at any time or times and from time to time before the Distribution Date and without infringing the rule against perpetuities at the absolute discretion of the Trustees by any irrevocable deed or deeds to resign as Trustees and to appoint a new trustee or new trustees outside the jurisdiction at that time applicable to the trusts hereunder as Trustees hereof and to declare that the trusts hereof shall be read and take effect according to the laws of the country of the residence or incorporation of such new Trustee or Trustees and upon such appointment being made the then Trustee or Trustees shall immediately stand possessed of the Trust Fund upon trust for the new Trustee or Trustees as soon as possible so that the Trust Fund shall continue to be held upon the trusts hereof but subject to and governed by the law of the country of residence or incorporation of such new Trustee or Trustees **and thereafter the rights of all persons and the construction and effect of each and every provision hereof shall be subject to the exclusive jurisdiction of and construed only according to the law of the said country which shall become the forum for the administration of the trusts hereunder** (but so that nonetheless the then Trustee or Trustees or the new Trustee or Trustees may by deed declare that the trusts hereof shall continue to be read and take effect according to the laws of the said Commonwealth of the Bahamas as provided by clause FIFTEENTH hereof) and clause FIFTEENTH hereof shall take effect and be subject to the provisions hereinbefore declared by this clause."

3 There were several changes of trustee following the initial settlement of the Trust. From October 2007, the institutional trustee of the Trust was BNP Paribas Jersey Trust Corporation Ltd, the third defendant in the action, "BNP Jersey" and, pursuant to cl 12, the proper law of the Trust was that of Jersey. At this point, there remained two personal trustees, the first and second defendants in the action.[2] The beneficiaries of the Trust were the two daughters of the settlor (who was also the first defendant) and their issue. A Bahamian foundation was also entitled to be considered for distributions from income.

4 In February 2012, a Deed of Retirement and Appointment of New Trustees (the "2012 Retirement") was executed, purporting to replace the incumbent trustees with a Mauritian institutional trustee (the fourth

[2] Whose residence was not material to the questions before the Committee.

defendant in the action, "Appleby Mauritius") such that Mauritian law became the proper law of the Trust from that point onwards.

5 The plaintiffs in the action were the settlor's younger daughter and her own two minor daughters, who sought to impugn both the 2012 Retirement itself and certain transactions taking place prior to the 2012 Retirement (*i.e.* whilst the proper law of the Trust was Jersey law). One further transaction, taking place after the 2012 Retirement and when the proper law of the Trust was Mauritian law, was also challenged.

6 In March 2013, the first to fourth defendants all sought to obtain a stay of the Jersey proceedings on the grounds of *forum non conveniens*, having commenced proceedings *ex parte* in Mauritius seeking various declarations, including as to the effectiveness of the 2012 Retirement. The *forum non conveniens* application was unsuccessful before the Royal Court, which also ordered the first to fourth defendants to procure that the Mauritian proceedings were stayed until the *forum non conveniens* issue had been resolved in Jersey. Both of those decisions of the Royal Court were appealed to the Court of Appeal, which upheld the Royal Court on both points. Permission was, however, granted for an appeal to the Privy Council on the general question of the effect of the words of cl 12 highlighted in the text above in light of the 2012 Retirement. The appellants argued that those words created an exclusive jurisdiction clause in favour of the courts of the Trust's "new" jurisdiction, namely Mauritius. The respondents argued that it had no such effect and that the proceedings should continue in Jersey.

7 In essence, it was clear that the Trust was designed from the outset to be internationally mobile. The plaintiffs did not challenge the provisions endowing the Trust with a "floating" proper law and appeared to accept that those provisions allowed the trust effectively to "migrate" between jurisdictions as the composition of its trusteeship changed over time. The question was as to the completeness of the "migration". Did cl 12 also provide that the courts of the jurisdiction whose laws were the proper law of the Trust at the relevant time had exclusive jurisdiction over the enforcement of rights (or the resolution of disputes) from time to time arising under the Trust such that the proper law of the Trust and the forum for the resolution of disputes should be aligned at any given time?

The Committee's Report

8 Attempts to create a "mobile" trust, in the sense just described, are not new. But reported cases are few and the various (but, apparently, universally awkward) forms of words deployed in an effort to achieve that end make it difficult to distil any general propositions from that

jurisprudence. The *Crociani* case was the first opportunity for either the Supreme Court or the Privy Council to address the questions of how a clause in a trust instrument that purported to confer "exclusive jurisdiction" on the courts of a particular jurisdiction is to be construed and of when (and against whom) such a clause should be enforced.

9 It is trite that the issue of construction inevitably turns upon the wording of the individual instrument.[3] It is, however, striking that the Committee studiously avoided any detailed analysis of the earlier jurisprudence (with which it declined to engage)[4] and confined its remarks to the precise clause in issue. As a result, it is difficult to extract from the Committee's report any general conclusions as to the construction of certain common forms of words (such as "exclusive jurisdiction of the laws of [a country]" or "forum for administration"). Those hoping for detailed guidance as to how the lower courts should deal with similar clauses in future will be disappointed.

10 Thus, whilst the Committee recognised the—

> "obvious force and, at least on an initial reading, very considerable attraction in the . . . argument, that a phrase which states that all rights and issues under a trust 'shall be subject to the exclusive jurisdiction' of a particular country is intended to confer exclusive jurisdiction on the courts of the country in question",

it ultimately held that cl 12, on its true construction, did not operate as an exclusive jurisdiction clause.

11 The fact that the country in question was also described as the "forum for the administration" of the Trust made no difference. That expression was not, in the Committee's opinion, a term of art and its construction would depend upon the context in which it was used. It could refer to the court which is to enforce the relevant trust, but could equally mean the physical place in which the affairs of the trust were administered. The Committee found that it bore the latter meaning in this case.

12 Perhaps more surprising is that, when the Committee did make (*obiter*) observations as to the test for whether an exclusive jurisdiction clause in a trust instrument should be enforced—undoubtedly a matter of general interest—its analysis was brief and similarly confined to the facts of the instant case. The Committee found simply that the

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[3] The wording of the clause in question in the *Crociani* case followed the trend for obscurity.
[4] [2014] UKPC 40, [31]'.

rationale for enforcing exclusive jurisdiction clauses in contractual documents did not apply with equal force to beneficiaries under a trust and, hence, that it should be easier to displace the effect of such a clause in a trust instrument than it is in a contractual context. The lower standard (whatever that may be) was easily discharged on the facts of this case.

Construction of cl 12

13 The Committee approached the question of construction in two stages. First, it analysed whether the stipulation that the jurisdiction in which a replacement trustee was resident or incorporated (in this case, Mauritius) was to be the "forum for the administration of the trusts hereunder" operated as an exclusive jurisdiction clause in favour of the courts of Mauritius. Secondly, it addressed whether the words "thereafter the rights of all persons and the construction and effect of each and every provision hereof shall be subject to the exclusive jurisdiction of and construed only in accordance with the laws of [Mauritius]" also had that effect.

14 This approach is a little curious. The appellants' position had effectively been that the former phrase (concerning "forum for administration") confirmed or supported the construction of the latter phrase (concerning "exclusive jurisdiction"). In other words, the appellants' case on construction was cumulative, whereas the Committee appears to have treated the two salient parts of cl 12 separately, and in reverse order.[5]

"[E]xclusive jurisdiction of . . . the said country"

15 This approach is likely explained, however, by the Committee's rejection of the appellants' submissions that the words "exclusive jurisdiction" in cl 12 were intended to act as a stipulation of the forum in which disputes under the Trust were to be resolved. In light of that conclusion, it is not surprising that the Committee analysed the two phrases separately and that the appellants' cumulative argument fell away.

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[5] It is worth noting in passing that it does not seem to have been in dispute that, assuming the validity of the 2012 Retirement, cl 12 had been effective to change the proper law of the Grand Trust to the laws of Mauritius from the date of its execution onwards. On that basis, it appears that the clause ought to have been construed in accordance with Mauritian law and not Jersey law, though the point is a largely empty one since neither party sought to adduce any evidence that there is any material difference between the two laws as to the construction of trust instruments.

16 The key point on the construction of the effect of the words "exclusive jurisdiction" in cl 12 was essentially a grammatical one—did they refer simply to the country in question (Mauritius), or to the laws of that country? Either view was arguable based on the text of the clause alone, but the Committee agreed with the respondents that the words "exclusive jurisdiction" in cl 12 were intended to refer to the "laws of the said country" and not simply "the said country". Thus, the words "exclusive jurisdiction" were intended to emphasise the ubiquity of the proper law and thus avoid any suggestion of *depeçage* (*i.e.* where severable, that aspects of a trust are governed by different laws).[6]

17 Some of the Committee's reasons for this conclusion arose specifically from the scheme of the Trust Agreement.[7] No issue is taken with the cogency of those observations. However, the Committee also made some striking observations of a more general nature.

18 First, the Committee doubted that the draftsman of the Trust Agreement had intended the words "exclusive jurisdiction" to have the effect contended for by the appellants because, even if they did refer simply to a country and not to the laws of that country, it is nevertheless odd that the reference was not to the courts of the country if it had actually been the draftsman's intention to include a forum stipulation.[8] The Court of Appeal had also been preoccupied by its perception that a reference to the exclusive jurisdiction of a country (and not its courts) was "intrinsically awkward".[9] It is open to doubt whether that rationale can support the weight placed on it by either the Court of Appeal or the Committee. It is true that one would normally expect to see a reference to courts when dealing with questions of jurisdiction, but authority shows that a failure to do so does not preclude a stipulation from bearing that meaning.[10] By comparison, a reference to the jurisdiction of a substantive legal system is no less

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[6] [2014] UKPC40, [23]–[24].

[7] Reference was made at [25] to the absence of any equivalent jurisdiction stipulation in cl 15 of the Trust Agreement, which set out the proper law of the Trust when it was first settled, and at [26] to the apparently surprising results which might flow from the appellants' construction of cl 12 (as to the trustees' residual power to reinstate of Bahamian law which, if exercised, would leave the Mauritian courts with exclusive jurisdiction notwithstanding an inconsistent proper law provision).

[8] [2014] UKPC 40, [26].

[9] [2014] JCA 089, [66(ii)].

[10] *Commr of Stamp Duties (Queensland) v Livingston* [1965] AC 694.

obscure. Neither formulation is a model of clarity but it is respectfully submitted that the less "awkward" formulation is to construe a term providing for the "exclusive jurisdiction" of a country as being a reference to its courts rather than its substantive laws.[11] That conclusion possesses the additional attraction of according with the manner in which the term "jurisdiction" is more usually deployed in the drafting of legal documents.

19 Secondly, the Committee doubted that the insertion of the words "exclusive jurisdiction" in a clause otherwise concerned with the proper law of the relevant trust could ever sensibly be construed as having anything to do with jurisdiction at all.[12]

20 These observations are perhaps a little surprising because they are not easy to reconcile with previous authority, including the controversial decision of the Jersey Court of Appeal in *Koonmen v Bender* in which the court found that the combination of a reference to the "exclusive jurisdiction" of the laws of a place (not the courts of a place) combined with a stipulation that the same place should be the "forum for administration" of the trust constituted an exclusive jurisdiction clause in favour of the courts of that place.[13] The Committee did not, of course, necessarily need expressly to overrule *Koonmen* in order to reach a different conclusion as to the construction of a similar but different instrument, but it is surprising that it should have done so without detailed reference to or criticism of the analysis of similar points by the Jersey Court of Appeal in *Koonmen* (though we shall see below that the decision in *Koonmen* can be explained on other grounds).[14]

Forum for administration

21 If a clause subjecting the construction and effect of a trust instrument to the exclusive jurisdiction of a country probably no longer connotes an exclusive jurisdiction clause in favour of the courts of that country, what else might do so? It is apparent from *Koonmen*, and subsequent authorities in Bermuda[15] and Canada,[16] that the express selection of the courts of the same country as the "forum for administration" of the trust could do the trick.

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[11] This was the conclusion of the Jersey Court of Appeal in *Koonmen v Bender* [2002] JCA 218, [46].
[12] [2014] UKPC 40, [27].
[13] [2002] JCA 218, [47].
[14] See para 31(0), below.
[15] *Re A Trust* [2012] SC (Bda) 72.
[16] *Green v Jernigan* 2003 BCSC 1097.

22 The question of what is a "forum for administration" of a trust has been oft-discussed since the Jersey Court of Appeal's judgment in *Koonmen v Bender*.[17] Judicial approaches to its construction in the course of the *Crociani* litigation were diverse.

23 The Royal Court found that the designation of Mauritius as the forum for administration of the Trust operated as an exclusive jurisdiction clause in favour of the courts of Mauritius, but only as regards "applications involving the administration of the Trust". In reaching this conclusion, it was influenced by recent *dicta* of Kawaley CJ in the Bermudan case of *Re A Trust*,[18] *dicta* of Henderson, J expressed in the Grand Court of the Cayman Islands in *Helmsman Ltd v Bank of New York Trust Co Ltd*[19] and the commentary of Professor Paul Matthews in his October 2003 article in this publication[20] (the "Matthews Article").

24 The Court of Appeal in *Crociani* also appeared to be persuaded by the argument that the "well known distinction between matters of administration, on the one hand, and hostile trust litigation, on the other" meant that, if the words "forum for administration" operated as a jurisdiction clause at all, they were effective only as a selection of the courts of the relevant jurisdiction to resolve "matters of administration".[21] However much it found itself persuaded by the analysis in the Matthews Article, the Court of Appeal did not rest its decision on that point and instead agreed with the respondents that the phrase simply meant the physical place in which the day-to-day administration of the Trust was to be carried out.

25 The Committee agreed with the Court of Appeal, placing reliance on the observation that effective tax planning might often require it to be demonstrated that the administration of a trust did not take place in an onshore tax jurisdiction (such as in the case of the applicable provisions of UK tax legislation) which would have made it expedient for the draftsman of the Trust to specify where the administration of the Trust *did* take place.

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[17] [2002] JCA 218.
[18] [2012] SC (Bda) 72, [64].
[19] 2009 CILR 490.
[20] Matthews, "What is a trust jurisdiction clause?" (2003) 7 Jersey Law Review 232.
[21] [2014] JCA 089, [92]. However, the Court of Appeal also accepted that this distinction was not always an easy one to draw (at [92]) and effectively conceded that, in practice, the distinction was to a large extent formal as well as substantive (at [93]).

26 All three courts each made different observations as to the provenance and meaning of the phrase "forum for administration", each canvassing different arguments as to what it may or may not mean. Why should such an apparently common phrase in the drafting of trust instruments be capable of bearing so many different meanings?

27 The first reason is a simple reminder that the phrase "forum for administration" must be construed in the context of the clause in which it appears, the instrument as a whole and the relevant factual matrix—just as any other words must be so construed. The nature of that exercise is specific to the particular instrument in question and the relevant factual background,[22] and the courts should be reluctant to encourage any question of construction to develop the character of doctrine.

28 The second and perhaps more significant reason is that the authorities on this question appear confused and inconsistent, which difficulty the Committee's decision has done little to ameliorate. However, some order may be imposed by analysing each case according to three basic questions:

(a) Does a clause purporting to identify "the forum for administration" of a trust have the effect of a jurisdiction clause at all (in the sense of conferring jurisdiction upon a particular tribunal where previously there was none);

(b) What is the scope of the jurisdiction thereby conferred; and

(c) If so, does such a clause confer exclusive jurisdiction within that scope?

29 The part which the Committee's decision in *Crociani* has to play in this exercise is relatively limited because it addressed only the first question, which is purely a matter of construction. It "accepted" that, whilst the "expression 'forum for administration' can refer to the court which is to enforce the trust", it was not a term of art and could simply refer to "the place where the trust is administered in the sense of its affairs being organised".[23]

(a) *Is it a jurisdiction clause at all?*

30 The effect of a selection in a trust instrument of a "forum for administration" can have very different meanings depending upon the context in which it is deployed and what exactly is described as the object of the stipulation. It may be open to question whether the

[22] *Re AA, in re D Discretionary Trust* [2010] JRC 164, [30].
[23] [2014] UKPC 40, [17].

various trust draftsmen who have deployed this phrase over the years would have appreciated that the question of its legal effect, if ever challenged, would turn on such narrow points.

31 The Committee found that, as deployed in cl 12, the phrase bore the latter meaning. The principal reason given, in addition to various arguments as to why it was "perfectly feasible" to think that the draftsman of the Trust would have seen fit to stipulate where the Trust's affairs were to be organised or run,[24] was that cl 12 referred not to the *courts* of a particular jurisdiction as being the "forum for administration", but rather to the country itself. In the Committee's view, this suggested that the reference to the "forum for administration" was not intended by the draftsman to operate as a jurisdiction clause.[25] The significance of whether or not the clause refers to the courts of a particular jurisdiction is reflected in previous authorities:

(a) In *Helmsman Ltd v Bank of New York Trust Co Ltd*,[26] the Grand Court of the Cayman Islands was faced with a clause providing that—

> "[t]he forum for the administration of this settlement shall (subject and without prejudice to any change made under the power conferred by para. 5 of the Second Schedule in the forum and administration of this settlement) be *the courts* of England and Wales". [Emphasis added.]

Henderson J appeared to accept that a clause in these terms could operate as a jurisdiction clause in favour of the relevant court in relation to certain matters, though he doubted that its effect would extend to breach of trust litigation such as the claim being advanced by the current trustees against former trustees in the case before him. In doing so, he expressed support for the views expressed in the Matthews Article as to the scope of proceedings covered by a jurisdiction clause couched in terms of "forum for administration" (discussed below). It is not surprising that Henderson J should have approached the clause in this way, the reference in the clause to a particular court creating the natural inference that it was in some way intended to operate as a jurisdiction clause. However, the *ratio* in that case turned upon the exercise of a power to change the forum for the administration of the trust in question "to the Cayman Islands"

[24] *Ibid*, [19].
[25] *Ibid*, [20].
[26] 2009 CILR 490.

(the jurisdiction in which the action had been brought) prior to proceedings being taken, so the bulk of the discussion was *obiter*.[27]

(b) Similarly, in *Re A Trust*[28] (which arose from Bermudan proceedings seeking an injunction against the pursuit by a beneficiary of a threatened onshore application for the disclosure of information on the ground that such an application would be in breach of an exclusive jurisdiction clause in the relevant trust instrument), the clause in question referred to the courts of Bermuda as the "forum for administration" of the trust. When combined with the selection of Bermudan law as the proper law of the trust, Kawaley CJ held that the forum stipulation operated as an exclusive jurisdiction clause in favour of the courts of Bermuda,[29] though he left open the question of whether certain proceedings may not be caught by the clause.

(c) In *Koonmen v Bender*, the clause in issue said simply that "[Anguilla] shall be the forum for the administration hereof", thus suffering from the same apparent defect as that identified by the Committee in relation to cl 12 in referring to the jurisdiction *simpliciter*, and not to its courts. However, in a subsequent clause of the relevant trust instrument (clause 14, which related to a change in the proper law of the trust, which had not been exercised on the facts of *Koonmen*), the stipulation was that

> "as from the date of any such declaration [that the proper law of the trust was to be changed] the law of the state or territory named therein shall be the law applicable to the Settlement and *the courts thereof* shall be the forum for the administration thereof . . ." [emphasis added.]

Thus, although the conclusion of the Court of Appeal in *Koonmen* appears difficult to reconcile with the Committee's remarks in *Crociani*, it can be explained on the basis that it was clear, at least as far as cl 14 was concerned, that the draftsman intended that the phrase "forum for administration" was to connote a judicial forum and not simply a place and that this should be taken to have informed the construction of the clause in issue.[30]

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[27] *Ibid*, [13].
[28] [2012] SC (Bda) 72.
[29] [2012] SC (Bda) 72, [64]–[66].
[30] [2002] JCA 218, [47].

32 Following the Committee's decision in *Crociani*, it therefore appears that the phrase "forum for administration" will probably not be held to have the effect of a jurisdiction clause unless it refers to the courts of a particular jurisdiction. That is consistent with previous jurisprudence and, it is submitted, must be correct in principle—where the "forum for administration" is said to be a place *simpliciter*, it would be difficult in the absence of supportive indications elsewhere in the instrument to construe such a stipulation as a jurisdiction clause purely on the basis that the word "*forum*" might be understood, in other contexts, by lawyers to refer to a court.

33 However, the Committee in *Crociani* did not address in any detail (because it did not have to) the second question as to whether, and if so where, the distinction between "matters of administration" and "contentious trust litigation" as discussed in the Matthews Article is to be drawn. Nor did the Committee engage with the third question of whether whatever jurisdiction was conferred by the phrase "forum for administration" was exclusive.[31] Those are arguably more taxing questions, in relation to which the Committee's judgment has very little to say, with the result that there remains some uncertainty as to the answers to them.

34 The authorities have shown some propensity by the courts involved to collapse these two questions into one. To some extent, this is understandable and, in practice, it will not affect the outcome of the case whether a court finds that there is no mandatory jurisdiction on one ground or the other. Separating the two might, however, help to unravel the confusion in the jurisprudence.

(b) *What is the scope of the jurisdiction?*

35 The vexed question of what the scope is of the jurisdiction conferred by a clause which names the courts of a particular jurisdiction as the "forum for administration" of a trust is by far the more complicated of these two further questions. The emerging judicial consensus, following the decisions in *Helmsman*,[32] and *Re AA, in re D Discretionary Trust*[33] and the remarks of both the Royal Court[34] and the Court of Appeal[35] in *Crociani* itself is that such a

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[31] The Committee simply doubted whether the use of the definite article before "forum for administration" was sufficiently clearly expressed to render any jurisdiction thereby conferred exclusive [2014] UKPC 40, [22].
[32] 2009 CILR 490, [10]–[12].
[33] [2010] JRC 164, [31].
[34] [2013] JRC 194A, [53]–[58].
[35] [2014] JCA 089, [68] and [72]–[73].

clause will not cover "hostile" actions against trustees by beneficiaries or successor trustees. Even in *Re A*, the court acknowledged that there would be a limit to the scope of matters that would fall within the concept of "administration", though it did not accept that the line was to be drawn between "hostile" and other actions.[36] This line of authority stems from the Matthews Article in which Professor Paul Matthews criticised the decision in *Koonmen* on the basis, *inter alia*, that—

> "The 'forum for administration' of a trust is a quite different concept from an exclusive jurisdiction for the resolution of disputes (whether arising from trusts or otherwise). The administration referred to here is not intended to include contentious breach of trust litigation. On the contrary, it is concerned with aspects of the administration of the trust which, for one reason or another, require the assistance of the court."[37]

36 All of the judicial analysis in this regard has, however, so far been exclusively *obiter* (though argument does seem to have been heard on the point in at least *Helmsman* and *Re AA, in re D Discretionary Trust*). Before Professor Matthews' views are authoritatively endorsed, it is worth pausing to consider whether the distinction which he drew between "hostile" actions and matters of "administration" (which he described as "aspects of the administration of the trust which, for one reason or another, require the assistance of the court") is sound in principle and operable in practice. It is respectfully submitted that such a distinction is not without difficulties.

(a) The underlying thesis, that a designation of the "forum for administration" of a trust is limited in scope to matters within the scope of the old administration action is not universally supported by previous authority because there is at least some authority for the proposition that a reference to the "forum for administration" of a trust can be used to denote the jurisdiction in which proceedings could be brought to enforce its proper administration and, thus, to enforce rights and duties dependent on the trust.[38] A beneficiary bringing a claim for breach of trust arguably does no more than attempt to enforce the proper administration of the trust by seeking, for example, reconstitution of the trust fund. Similarly, beneficiaries applying to set aside the *intra vires*

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[36] *Re A* [2012] SC (Bda) 72, [66]–[67].

[37] Matthews, at [21].

[38] *Att-Gen v Campbell* (1872) LR 5 HL 524, *Att-Gen v Jewish Colonization Assoc* [1900] 1 QB 123, and *Commr of Stamp Duties (Queensland) v Livingston* [1965] AC 694.

exercise of a power of appointment which had the effect of removing them from benefit is undoubtedly "hostile" litigation,[39] but it is strongly arguable that the question of who should or should not be a beneficiary is a matter of the internal administration of the relevant trust. Conversely, an application by a trustee for directions in relation to its decision to widen the class of beneficiaries is likely to raise similar issues even though it would not fall to be categorised as "hostile" litigation (and, in any event, is likely to be no less contentious if, as is usually the case, the existing beneficiaries are convened to the application).[40]

(b) It is, therefore, difficult in practice to define when litigation ceases to be a matter of administration. The Court of Appeal in *Crociani* referred to "a well-known distinction between matters of administration, on the one hand, and hostile trust litigation, on the other".[41] But the authority cited by the Court of Appeal was concerned with a trustee's application for directions to defend proceedings challenging the validity of the relevant trust (not the court's jurisdiction to determine those proceedings) and set out a tripartite distinction between "trust disputes", "beneficiaries disputes" and "third party disputes". The distinction between the first two does not appear to correspond with a distinction between "hostile" actions and matters of "administration"—a claim by a beneficiary to remove a trustee from office would be a beneficiaries dispute (or a "hostile" claim) but is undoubtedly a matter of administration. Thus any such distinction is liable to confuse, and indeed has already been shown to be confusing.[42]

(c) The Matthews Article seeks to draw the line between "hostile" litigation and matters of "administration" by reference to the scope of the old English administration action which, Professor Matthews suggests "was a means of dealing with matters of administration and construction. It was not—could not be—used to deal with breach of trust issues . . .".[43] The starkness of that assertion is not, however, necessarily supported by authority, as

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[39] As in *Re C Trust* [2012] JRC 086B, [105].

[40] See, for example, *In re A Trust* [2012] JRC 066.

[41] [2014] JCA 089, [91] and [92], citing Lightman J's decision in *Alsop Wilkinson v Neary* [1996] 1 WLR 1220.

[42] Indeed, Lightman J went on to observe that "[t]he line between friendly and hostile litigation, which is relevant to the incidence of costs, is not always easy to draw . . .".

[43] Matthews Article, at [22].

the Court of Appeal appeared to acknowledge in *Crociani*.[44] It therefore appears that the difficulty of where to draw the line between "hostile" disputes and matters of "administration" is not entirely solved by basing the distinction upon the scope of the old English administration action, which authority shows to have been potentially broader in scope than is represented by Professor Matthews.[45]

(d) In any event, it is not obvious how any such distinction could be easily reconciled with Jersey law. Article 9(1)(d) of the Trusts (Jersey) Law 1984, describes questions concerning "the administration" of a trust very broadly as "including questions as to the powers, obligations, liabilities and rights of trustees and their appointment or removal". On its face, this language appears to encompass actions commenced by both trustees (for assistance and/or directions, or against former trustees for breach of duty) and beneficiaries (against current or former trustees). Take for example the issues in dispute in *Crociani* itself, principal amongst which were a disputed appointment of trust assets (said by the plaintiffs to have been unauthorised according to the terms of the Trust Agreement) and a disputed retirement by the former trustees (said to have been made with the improper purpose of frustrating the plaintiffs' claims). The trustees might have applied for directions in respect of either one of those decisions which, on Professor Matthews' analysis, would have rendered the application a matter of "administration" falling within a jurisdiction clause couched in terms of "forum for administration", whereas the very same "questions as to the powers . . . [and] liabilities . . . of trustees and their . . . removal"

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[44] [2014] JCA 089, [74]—see, for example, *Re Wrightson* [1908] 1 Ch 789, where it was held that in an administration action the court had jurisdiction to remove trustees (at the instance of a beneficiary or of its own motion) if it considered such removal necessary for the preservation of the trust estate or the welfare of beneficiary(ies).

[45] This was also the conclusion of Kawaley CJ in *Re A* [2012] SC (Bda) 72, [68]–[69] who found, by reference to the domestic procedural rules applicable in Bermuda, that—

> "[t]he better view is that a modern draftsman using the terms 'administration' in a trust forum clause does not have in mind now rare administration actions but, rather, is merely seeking to signify the administration of a trust in a general sense by the domiciliary courts of the trust."

were considered a "hostile" action when brought by the beneficiaries.[46]

(e) It is true that, as a matter of court procedure, the prospective determination by the court of the extent of a trustee's powers under the relevant trust instrument is not the same as a retrospective determination that those powers have been exceeded (with appropriate remedial orders being granted as a result). The key substantive question of the lawful extent of the trustee's power is, however, the same in both cases. Thus any rule of law based upon a distinction between "hostile" litigation and matters of "administration" places the timing of the application and the identity of the person seeking the court's assistance above the substance of the essential question which the court is being asked to determine. It is submitted that it would be unsatisfactory if the law required that the effect of a forum selection clause (which must be assumed to have been inserted in the interests of clarity and certainty) should turn on such formal, narrow and fact-sensitive distinctions.

(c) *Is the jurisdiction exclusive?*

37 There are, therefore, analytical and practical difficulties with the emerging consensus that the phrase "forum for administration", if it does operate as a jurisdiction clause, is to be limited in the scope of proceedings to which it applies. But even if that emerging consensus is correct (notwithstanding the doubts expressed above), that does not mean that the jurisdiction so conferred is not exclusive within its own scope.

38 The authorities have not always recognised this distinction, with the result that decisions which were actually based upon an answer to the preceding question are occasionally couched in terms of the present question of exclusivity. *Re AA, in re D Discretionary Trust*[47] is such a case. In that case, the relevant clause selected Jersey law as the proper law of the trust and provided that "the courts thereof shall be the forum for the administration of this Trust". The question of whether this clause operated as a jurisdiction clause *per se* did not arise because it was clear as a result of the foregoing facts that both the Jersey and Guernsey courts had jurisdiction by virtue of their respective domestic trust legislation. The Royal Court held that this did not create an *exclusive* jurisdiction clause. In his reasoning, Clyde-

[46] See [2013] JRC 194A, [50] (Royal Court) and [2014] JRC 089, [68] (Court of Appeal).
[47] [2010] JRC 164.

Smith Commr cited the endorsement in the *Helmsman* case of the passages in the Matthews Article setting out the proposition that a "forum for administration" clause did not cover "hostile litigation",[48] which description he found applied to the application before him.[49] *Koonmen* was distinguished on the grounds that the description of the proper law in that case as having "exclusive jurisdiction" was not present in the trust instrument with which it was concerned.[50] Thus, although the learned Commissioner's decision was couched in terms of exclusivity, it appears that his decision in fact turned more on his conclusions as to the scope of the jurisdiction conferred by the selection of a particular court as the "forum for administration" of a trust than upon the question of whether the clause conferred exclusive jurisdiction within the confines of that scope.

39 Indeed, the reality is that, insofar as the selection of the "forum for administration" of a trust is found to operate as a forum selection clause at all, it will in most cases confer exclusive jurisdiction in relation to the matters which are found to fall within the ambit of "administration". This is so for two reasons:

(a) first, the "forum for administration" is almost always referred to in the definite article, and compulsory language such as that it "shall" [be the forum for administration] is almost always used when selecting it. Although the Committee doubted whether the use of the definite article alone was sufficient to render exclusive any jurisdiction conferred by the "forum for administration" provision,[51] its remarks were *obiter* and very difficult to reconcile with the ratio in both *Koonmen*[52] and *Re A Trust.*[53]

(b) secondly, assuming the selection of the "forum for administration" is found to have been intended as a jurisdiction clause at all, the selection of the "forum for administration" combined with the selection of a coincident proper law creates a

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[48] [2010] JRC 164, [26], [28]. In any event, it is equally apparent that he did not consider Jersey to be an appropriate forum—see [34] where Clyde-Smith Commr remarked *obiter* that he would have exercised his discretion not to give effect to the clause in the particular circumstances of the case because of uncontested evidence that Jersey law had been selected on tax advice only and the trust had always been intended to be run from Guernsey by its Guernsey trustee.

[49] [2010] JRC 164, [33].

[50] [2010] JRC 164, [31].

[51] [2014] UKPC 40, [22].

[52] [2002] JCA 218, [48].

[53] [2012] SC (Bda) 72, [62]–[64].

> strong indication of exclusivity, whatever "administration" may mean. This is because the courts of the jurisdiction whose laws are the proper law of the trust typically have jurisdiction to hear matters arising in relation to the trust in any event (often by statute, as in Jersey, or more generally because they are the courts of the jurisdiction in which the trust will typically be treated as being domiciled, the connection between a trust and its proper law being recognised as a close and real one which more often than not indicates the domicile of the trust[54]). If the relevant forum would have jurisdiction anyway, then the forum selection clause would effectively be superfluous unless it created exclusive jurisdiction within the scope of its terms, suggesting that exclusive effect was intended by the draftsman.

40 When the mandatory language of the stipulation is combined with the inference that the jurisdiction clause would be redundant unless it were intended to confer exclusive jurisdiction, this creates a strong suggestion that the selection of the "forum for administration" of a trust should operate as an exclusive jurisdiction clause, whatever may be the scope of "administration". This analysis appears to be the best explanation for the apparently difficult British Columbian case of *Green v Jernigan*.[55] The relevant trust instrument was a jumble of duplicative and not entirely consistent provisions dealing principally with the proper law of the trust.[56] Groberman J treated the references to the proper law of the trust as having conferred jurisdiction on the courts of Nevis, in addition to the express submission to the jurisdiction of "the High Court of St. Christopher and Nevis or its superior court in respect of all disputes which may arise in respect of this deed", to which he referred separately.[57] Having so found, he relied upon the reference to Nevis being "the forum for the administration" of the trust as evidencing an intention to "make the courts the exclusive venue for legal disputes under the deed". The most plausible explanation for this conclusion is that it was the use of the definite article ("the forum for administration"), combined with his finding that the courts of Nevis had jurisdiction in any event which led him to conclude that the reference to the courts of Nevis as "the forum

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[54] *Gomez v Gomez-Monche Vives* [2009] Ch 245, [63].
[55] 2003 BCSC 1097.
[56] In total, there were four, two of which appear to have been later additions—see 2003 BCSC 1097, [34]–[39].
[57] 2003 BCSC 1097, [40].

for administration" must have been intended to render that jurisdiction exclusive.[58]

Conclusions on construction

41 The Matthews Article asked the question "what is a trust jurisdiction clause?". Twelve years on, it is a pity that we are little closer to the answer and that the same advice with which the Matthews Article concluded continues to ring true:

> "trusts draftsmen the world over must revisit their precedents and decide, in the light of this case, whether to make any amendments. In particular, they may decide to suppress the use of the words 'exclusive jurisdiction' if they appear in what is otherwise a definition of the proper law. Secondly, they may wish either to omit reference to the 'forum for administration', or at least make clear exactly what it is intended to refer to. Thirdly, they should consider whether they wish to insert an exclusive jurisdiction clause for the resolution of disputes."[59]

42 In short, nobody appears to have listened to Professor Matthews' undoubtedly prudent advice. There are, with great respect, some difficulties with Professor Matthews' hypothesis, despite the widespread judicial willingness to accept it. The Committee's decision in *Crociani* may be remembered as a missed opportunity to lay these arguments to rest, but it does serve as an eloquent reminder that they would be best laid to rest by clearer drafting of jurisdiction and proper law provisions in trust instruments.

Enforceability of an exclusive jurisdiction clause in a trust instrument

43 The issues of construction which arose in *Crociani* can be cured by clearer drafting and the Committee's observations in this regard will not necessarily be strictly binding on future courts (of any seniority) in light of the inherently fact-specific nature of the exercise of construing any particular trust instrument. By far the more problematic and lasting legacy of the Committee's judgment (both as a matter of principle and for practitioners seeking to advise on the approach that may be adopted by future courts) is likely to be its remarks in relation to the enforcement of exclusive jurisdiction clauses in trust instruments.

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[58] In any event, it is clear from the rest of the judgment that the question of exclusivity did not matter because Groberman J was of the view that the proper forum for the resolution of the claims were the courts of Nevis.
[59] Matthews Article, at [33].

44 A preliminary point arises from the fact that this was an application for a stay on the grounds of *forum non conveniens*, not a question of jurisdiction.[60] Ordinarily, this is a distinction of some substance because the burden of proof is different—where a plaintiff seeks service out of the jurisdiction, he must positively show that Jersey is the most appropriate forum in which to resolve his claims; where a defendant seeks a stay on the grounds of *forum non conveniens*, it is he who must show that there exists another court of competent jurisdiction which is clearly or distinctly the more appropriate forum for the resolution of the dispute (or, negatively, that the Royal Court is *not* the most appropriate forum for the determination of the plaintiff's claims). In many cases this may not matter, but the location of the burden might make the difference where the application is finely balanced. With the introduction of an exclusive jurisdiction clause, however, the distinction becomes virtually illusory (at least in contractual cases) because in either circumstance, the presumption is that the court will give effect to the clause (either by exercising its discretion to grant the stay, or by declining a discretionary order permitting service out of the jurisdiction) such that, even where the defendant seeks a stay on the grounds of *forum non conveniens*, the burden effectively shifts to the plaintiff seeking to sue in breach of the clause to show why it should not be enforced.

45 That is the position in relation to contractual jurisdiction clauses, so the question that arose in *Crociani* was whether it should be the same in relation to trust jurisdiction clauses. The Royal Court took a curious approach, which both the Court of Appeal and the Committee agreed was erroneous, by which it simply applied what might be described as a "pure" *Spiliada*[61] approach in which the existence of an exclusive jurisdiction clause was simply treated as one of the factors which ought to be weighed in deciding whether the interests of justice required a stay to be granted so that the action could continue elsewhere; it was given no precedence. It appears to have been common ground before the Committee that this was not correct, and that there should nevertheless be a presumption that an exclusive jurisdiction clause in a trust instrument will be enforced. The real question, therefore, was how easily that presumption could be displaced by the party seeking to sue in breach of the clause.

46 On this issue, the Committee held (at [35] of its judgment) that—

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[60] The appellants having either been served as of right or submitted to the jurisdiction of the Royal Court.
[61] [1987] AC 460.

> "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. The Board is of the opinion that 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. Given that a balancing exercise is involved, this could also be expressed by saying that 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."

47 Two arguments were offered by way of rationale for this decision. First, it was said that the contractual paradigm of holding a contracting party to his bargain, including agreed stipulations as to the forum for the resolution of disputes arising from his contract, applies uneasily to the enforcement of an exclusive jurisdiction clause in a trust instrument, where a beneficiary is not a contracting party and there is no "bargain" in any meaningful sense.[62] The second was that, in the context of the enforcement of trust instruments but not in a contractual context, the court possessed an inherent jurisdiction to ensure that the trusts contained in the trust instrument are discharged in a manner which is in the general interest of the beneficiaries.[63]

48 These joint ideas were expressed at [36] of the Committee's judgment—

> "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

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[62] No reference was made to the decision of the Royal Court in *EMM Capricorn Trustees Ltd v Compass Trustees Ltd* 2001 JLR 205, [16] in which a similar point was made, nor were the like observations in the Matthews Article at [29]–[32].

[63] No authority was cited for this proposition. The case of *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26 was referred to, but that case is simply authority for the existence of such a jurisdiction, rather than as authority for its effect upon an exclusive jurisdiction clause in a trust instrument.

> 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 *e.g. 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."

49 It is submitted that, with the greatest of respect to their Lordships, there are some difficulties with the Committee's conclusions on this point.

50 First, the Committee appears to have assumed (as is apparent from the parenthesis beginning in the seventh line of the above extract) that it will usually be the beneficiaries of a trust against whom an exclusive jurisdiction clause is sought to be enforced. That is not necessarily an unsound assumption as far as it goes, but the Committee's reasoning was addressed almost entirely to the scenario in which an exclusive jurisdiction clause was invoked against a beneficiary. Its analysis dealt only with this factual scenario. Whilst it is not surprising that it should have done so given that this was the scenario with which it was faced, the difficulty is that the Committee went on to use it as the basis for much more general conclusions of principle. Some slight variations of the facts which obtained in *Crociani* would produce the result that enforcement of cl 12 could equally have been sought against parties other than the beneficiaries, thus undermining the premise from which the Committee's reasoning proceeded—

(a) Suppose, for instance, that the "transfer" between jurisdictions had happened in reverse and that the original trustee had been Appleby Mauritius. The trusteeship had transferred to BNP Jersey which, when it became apparent that the beneficiaries (the plaintiffs/respondents) were contemplating litigation, sought to commence defensive proceedings in Mauritius for declarations that there had been no breach of trust by its predecessor—in those circumstances, it would be the beneficiaries who one would expect would seek to enforce cl 12 against the new trustees (and, no doubt, also against the outgoing trustees);

(b) Equally, it is possible to conceive of circumstances in which it might be the new trustee who seeks to enforce such a clause against the outgoing trustee—suppose again that the original

trustee had been Appleby Mauritius and that the trusteeship had transferred to BNP Jersey but that, this time, BNP Jersey, as successor trustee began making enquiries which suggested breach of trust claims were imminent against Appleby Mauritius, which issued protective proceedings in Mauritius; or

(c) Conversely, suppose that the "transfer" between jurisdictions had happened as it in fact happened (from Jersey to Mauritius) but that the beneficiaries (the plaintiffs/respondents) had been able to convince Appleby Mauritius that there had been wrongdoing by the outgoing trustees and that Appleby Mauritius ought to bring proceedings against them in Jersey on behalf of the Trust—in that case, one would still expect the outgoing trustees to seek enforcement of cl 12 so that the dispute was heard in Mauritius, but the potentially frustrated plaintiff would be the new trustee, Appleby Mauritius, and not the beneficiaries.

51 Once it is accepted that the litigant against whom enforcement of a clause in a trust instrument which purports to be an exclusive jurisdiction clause is sought may be a trustee (no explanation is offered for the assumption in the judgment (at [36]) that it will "usually" be a beneficiary), the Committee's reasoning in favour of a "lower" test begins to unravel. Depending upon the exact circumstances of the case, the issue of the court's inherent jurisdiction now may pull in the opposite direction (if the general interest of the beneficiaries favours enforcement of the clause against the trustee) and the "absence of bargain" argument becomes less persuasive.

52 For instance, the "absence of bargain" argument carries little force as against a trustee—

(a) Particularly in the case of the original trustee, it is possible to say in a very real sense that the original trustee has reached an express agreement with the settlor by which the original trustee should be held bound. The settlor, in the trust instrument, indicates the terms on which he proposes to convey the trust property to the trustee (of which an exclusive jurisdiction clause forms part) and the trustee, by accepting the conveyance of the property, agrees to be bound by and to discharge the obligations of the office he has accepted in accordance with those terms. The trustee has, at least in everyday parlance, agreed with the settlor that he will be bound by the terms of the trust instrument pursuant to which the trust property is conveyed to him. There can be little question that a trustee will be bound by stipulations in the trust instrument as to the manner in which beneficiaries are to receive their interest under the trust, or any stipulations as to when they may become entitled to do so. Why should his acceptance of an exclusive jurisdiction clause carry any less force?

(b) The case of a successor trustee is less straightforward. Although it is still true that a successor trustee accepts his office in the knowledge that the obligations of his office will be framed by the terms of the trust instrument (including an exclusive jurisdiction clause), there is no longer any privity between the successor trustee and the settlor so that it is not possible to say that the successor trustee directly agreed to the settlor's terms. However, the same is true of an assignee of the benefit of a contractual obligation, who remains bound by both an arbitration clause[64] or an exclusive jurisdiction clause[65] in the original contract in which the right of which he has taken an assignment was contained. The rationale in such cases is that the right assigned is impregnated with the same inherent conditions as to its enforcement that were contained in the original contract—that reasoning applies with equal force to a trustee who accepts the appointment from a prior trustee who did, in fact, reach an agreement with the settlor as to the manner in which the trust was to be enforced (including the courts which were to have jurisdiction to do so).

53 Even as against a beneficiary, however, it is possible to undermine the proposition that an exclusive jurisdiction clause should be less readily enforced against him because he has not "agreed" to it. To the extent that there ever is an "agreement" between a trustee (even a successor trustee) and the settlor, the beneficiary is a stranger to that agreement. Yet he is still, in a loose sense, bound by it because his interest in the trust property only arises as a result of the terms of the "agreement" between settlor and trustee (namely the trust instrument). Thus, even a beneficiary is, albeit in an indirect sense, bound by the "agreement" between the settlor and the trustee because he accepts the benefit of the settlor's bounty subject to whatever conditions are expressed in the trust instrument.[66]

54 It must, however, be acknowledged that the language of benefit and burden can only carry the enquiry so far. Whilst it is possible to describe an exclusive jurisdiction clause in a trust instrument as part of an "agreement" between settlor and trustee, the "burden" of that restriction confers no "benefit" upon the settlor by its enforcement (other than that the settlor's wish is respected). Similarly, although a

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[64] *West Tankers Inc v Ras Riunione Adriatica Di Sicurta SpA* [2005] EWHC 454 (Comm).

[65] *Glencore International AG v Metro Trading International Inc* [1999] 2 All ER (Comm) 899.

[66] Hayton *The International Trust* (3rd ed), [1.297]. Compare the Matthews Article at [32].

beneficiary can be said to accept the "benefit" of the settlor's bounty subject to whatever terms the settlor has seen fit to impose, it is slightly awkward to describe those terms as imposing a "burden" on a beneficiary seeking to claim a windfall by virtue of his interest under the trust. In short, the contractual paradigm has become inappropriate.

55 This gives rise to the anterior question of whether the traditional, inherently contractual reasoning is appropriate at all in the context of litigation concerning a trust. Most of the authorities adopt the contractual language of enforcing a bargain amongst the parties.[67] So too the Committee.[68] But it is not clear that the judicial persistence in seeking to force the enforcement of exclusive jurisdiction clauses in trust instruments into a contractual paradigm is appropriate. Whilst the proposition that the courts will give effect to jurisdiction stipulations in trust instruments is probably now beyond any real challenge (given the growing jurisprudence on the question of *when* they should do so, including the judgments of all three courts which considered the question in the *Crociani* litigation[69]), the question of *why* such clauses ought to be enforced has been the subject of precious little detailed analysis.

56 This is not solely the province of academia—if the authorities do not speak with one voice on the question of *why* an exclusive jurisdiction clause in a trust instrument ought to be enforced, how can we expect a coherent answer to the question of *when* it should not? The Committee cannot be criticised for making observations as to the apparent differences between the contractual paradigm on the one hand, and the relationship between the parties to a trust instrument and the beneficiaries of the trust on the other—the flaw in the Committee's reasoning was in failing to recognise that there may be a different reason, other than the enforcement of a "bargain", to enforce an exclusive jurisdiction clause in a trust instrument.

57 One such reason may be out of respect for settlor autonomy. It is, after all, the settlor who has chosen to entrust his assets to the trustee (who, these days, may often expect to receive remuneration for so acting) with the intention that the trustee should hold and deal with those assets for the benefit of those whom the settlor has decided should be entitled to benefit from them and on the terms the settlor has

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[67] See, for example, *EMM Capricorn v Compass Trustees* 2001 JLR 205, at [16]–[18], *Koonmen v Bender* [2002] JCA 218, at [49], *Green v Jernigan* 2003 BCSC 1097, at [48], and the Court of Appeal in *Crociani* [2014] JCA 089, at [114]–[115].
[68] [2014] UKPC 40, [36].
[69] [2014] UKPC 40, [2014] JCA 089, 2013 (2) JLR 369.

decided that they should so benefit. Thus, if a settlor provides that a beneficiary is to benefit in a prescribed proportion from the trust assets, but only upon reaching the age of 21 years, the beneficiary cannot call for a distribution of "his" share of the property to him until he reaches the age of 21 years. He benefits from the settlor's bounty subject to the terms of the trust instrument. Similarly, a settlor may provide for the forfeiture of a beneficiary's interest (even a beneficiary previously absolutely entitled under the terms of the trust) upon the occurrence of certain events.[70] In both of those cases, the right of the beneficiary to assert his interest under the trust is curtailed by the terms of the trust instrument. If it is sufficient for the enforcement of these provisions according to their terms that the settlor intended the beneficiaries' interest to take effect subject to them, why should a jurisdiction clause be treated any differently? The settlor has, equally, specified either a forum for the resolution of disputes or a mechanism by which that forum is to be identified.[71]

58 It is, therefore, submitted that the contractual analysis of "enforcing a bargain" is not appropriate in the trust context. The court enforces other provisions of a trust instrument because they represent the terms upon which the settlor settled his property on trust, not because of any implied bargain between the settlor and the first trustee(s). The same rationale applies to the enforcement of an exclusive jurisdiction clause in a trust instrument, which should ordinarily be enforced according to its terms (subject to the ordinary judicial discretion which exists under the rules of private international law to require that a dispute is resolved elsewhere than in the specified forum if the circumstances of the case so require).

59 Turning to the second element of the Committee's reasoning, it is not easy to see what difference the existence of the court's inherent jurisdiction should make to this question. There is no question that, if art 5 of the Trusts (Jersey) Law 1984 is engaged, the Royal Court has jurisdiction regardless of the terms of the relevant trust instrument. But that does not preclude the application of the usual rules as to whether the Royal Court should exercise that jurisdiction, or whether it should decline to exercise it in favour of the specified forum.

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[70] Trusts (Jersey) Law 1984, art 35. Jersey cases on art 35 are rare—in *Re Goin Settlement* 25 October 2002, judgment 2002/204, [15]–[16], unreported, the Royal Court found that such a provision was not engaged on the facts of the case, but did not appear to question that it would have been effective.

[71] A similar view was canvassed in Hayton *The International Trust* (3rd ed), 1.170.

60 Furthermore, the authority referred to (the *Schmidt v Rosewood* case,[72] in which the Privy Council referred to "the court's inherent jurisdiction to supervise, and if necessary to intervene in, the administration of trusts") arose in an entirely different context. In that case, the question was whether a person seeking the disclosure of trust information from a trust needed to have a proprietary interest in the trust property in order to call for trust information, in circumstances when the disclosure was being sought in order to investigate alleged breaches of duty by the trustee. The answer given was that, in these circumstances, the better view was that the court had a jurisdiction to order the provision of such information as part of a general jurisdiction to supervise and intervene in the proper administration of the trust. In other words, the court's intervention in the affairs of the trust was justified in order to prevent maladministration of the trust going undetected or uncorrected. It is difficult to see how this jurisdiction to intervene against potential breaches of duty would justify a court's decision to derogate from the terms of the trust instrument, since the question of whether an exclusive jurisdiction clause ought to be enforced is separate from the question of whether there may have been a breach of duty and whether action needs to be taken to investigate or correct any such breach. As the Committee rightly recognised, the jurisdiction referred to in *Schmidt v Rosewood* is not "some unfettered, freewheeling discretion to do whatever seems fair".[73]

61 The most that can perhaps be said is that the court's inherent jurisdiction might justify it declining to enforce an exclusive jurisdiction clause if it appeared from the circumstances of the case that this was necessary to safeguard the proper administration of the trust (such as if, for instance, the speed of justice in the contractually mandated forum was such that it would be too late by the time the matter were resolved there).[74] Those are, however, matters to which the court would in any event be entitled to have regard in exercising its discretion to override an exclusive jurisdiction clause in a contract—the overlay of the Royal Court's inherent jurisdiction in respect of trusts does not necessarily add to or alter the nature of that discretion so as to require a different test in the context of a trust instrument than that which obtains in a contractual context.

62 There is a further, practical difficulty—there is no explanation in the Committee's judgment of the extent to which the case against the enforcement of an exclusive jurisdiction clause in a trust instrument

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[72] *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26.
[73] [2014] JCPC 40, [36].
[74] See, for example, *Chellaram v Chellaram* [1985] Ch 409, 436.

may be "less strong" in order to resist its enforcement. This will almost certainly give rise to difficulties in its application. In the context of exclusive jurisdiction clauses in contracts, there is already some difficulty in the practical application of the various phrases deployed by courts to explain the circumstances in which an exclusive jurisdiction clause can be displaced,[75] but at least these can be reconciled within the complimentary proposition that such a clause will "ordinarily" be enforced.[76] The ground is now less certain in the context of an exclusive jurisdiction clause in a trust instrument. Are we now to guide ourselves by the maxim that exclusive jurisdiction clauses in trust instruments will "sometimes", perhaps even "often" be enforced? Is the test for whether such a clause ought to be displaced in the circumstances whether "good" or "cogent" reasons can be shown for doing so?

63 The Committee's judgment contains little guidance on this point. In applying the "lower" test, the Committee simply referred to five factors which it held suggested that the more appropriate forum for the resolution of the dispute was the Jersey courts,[77] and noted that the one factor relied upon positively by the appellants in favour of Mauritius (other than cl 12) was unimpressive and added little to the case for enforcing the clause.[78] It is striking that five of the eight reasons

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[75] Formulations have included, for example, "strong reasons" (*Donahue v Armco* [2002] 1 All ER 749, [45]); "overwhelming, or at least very strong reasons" (*Amtec International Ltd v Biosafety USA, Inc* [2006] EWHC 47, [7]); "strong cause" (*The Eleftheria* [1969] 2 All ER 641, 645); and "very strong reasons" (*Mackender v Feldia AG* [1967] 2 QB 590, 604).

[76] *Donahue v Armco* [2001] UKHL 64, [24].

[77] [2014] UKPC 40, at [41]–[45]. The reasons given were that (i) Jersey law applied to most of the impugned transactions, and Jersey courts can be expected to apply Jersey law more easily and consistently than the courts of Mauritius; (ii) because most of the impugned transactions took place when the Trust was administered by a Jersey institutional trustee, it was likely that most of the documents and/or witnesses would be in Jersey; (iii) the exclusive jurisdiction clause provides for a "shifting" jurisdiction, suggesting that it was intended to operate in favour of the courts of the jurisdiction in which the institutional trustee was based and whose law was the proper law of the Trust (which was said to point to Jersey); (iv) the appellants had submitted to the jurisdiction of the Jersey courts; and (v) the deed by which the outgoing trustees purported to retire in favour of the Mauritius trustee itself contained a jurisdiction clause in favour of the Jersey courts.

[78] [2014] UKPC 40, at [47].

canvassed by the Royal Court,[79] which found that there were "exceptional circumstances" in the present case so as to justify displacing cl 12 if, in fact, it was to be treated as an exclusive jurisdiction clause[80] were also relied upon by the Committee. Thus it is not clear whether, in the Committee's judgment, the "higher" test would have been satisfied anyway or, to put it another way, whether and to what extent the application of the "lower" test made any difference to the Committee's conclusion. We are, thus, none the wiser as to the impact in practice of the "lower" test which the Committee found ought to be applied to exclusive jurisdiction clauses in trust instruments.

Conclusions on enforceability

64 There are, therefore, good reasons for doubting the soundness and practicability of the Committee's decision in relation to the enforcement of exclusive jurisdiction clauses in trust instruments. It is respectfully submitted that the Committee's *obiter* remarks should not be allowed to set the courts on a course which can only lead to confusion arising from narrow and largely academic distinctions which create substantial difficulties in their application.

65 On the contrary, the approach of the Court of Appeal[81] in equating the test in relation to exclusive jurisdiction clauses in trust instruments with that applicable to such clauses in contracts is to be preferred. As the Court of Appeal rightly observed, whilst it is correct that in a trusts context there is no "bargain" in the ordinary sense to enforce, that is for present purposes a distinction which makes no difference. This is because the better rationale for enforcing an exclusive jurisdiction clause in a trust instrument has nothing to do with the enforcement of a bargain and instead arises from the principle of settlor autonomy. Courts are thus freed from the analytical straitjacket of the contractual reasoning that has so far governed their reasoning, enabling them to enforce exclusive jurisdiction clauses in the same way as they would any other stipulation in a trust instrument which purported to define the terms subject to which the beneficiaries of the trust are to benefit from the settlor's bounty.

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[79] [2013] JRC 194A, [24]–[28], [45]–[46], [75]–[82].
[80] [2013] JRC 194A, [83].
[81] [2014] JCA 089, [110]–[116].

for beneficiaries) and in complex commercial disputes, has experience in contentious regulatory matters and planning appeals and also advises on non-contentious and contentious employment matters.