THE ARBITRATION OF TRUSTS DISPUTES: SQUARING THE CIRCLE

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The possibility of arbitrating internal trust disputes has vexed lawyers for some time. Noting the remarkable growth of arbitration as a dispute resolution mechanism, and the importance of party consent for an arbitration to be valid and binding, a seemingly insuperable difficulty is obtaining the consent of beneficiaries. This difficulty may be more apparent than real. It is argued that various mechanisms may be deployed to properly obtain the consent of beneficiaries, or operate to deem consent to have been given. Further issues, like res judicata, are similarly analysed. Ultimately, trust disputes can—and, where appropriate, should—be arbitrated.

I. Introduction

1 Our starting point is a simple one. Why may A not conditionally settle his property on X, where X is bound to use the property for the benefit of B, subject to any terms as agreed between A and X?

2 There is no reason, in principle, why A should not provide that his property should be held for the use of B, subject to conditions. As a general proposition of law, A's property is A's to dispose of as A wishes. As B has no entitlement to the property other than by A's devise, B has no normative basis of complaining that the devise is subject to these conditions. Nevertheless, the English Law Commission has said, unequivocally, that "a clause in a trust instrument requiring disputes to be arbitrated is not binding" in that jurisdiction.[1]

[1] Law Commission, *Thirteenth Programme of Law Reform* (Law Com No 377, 2017) para 4.55. It is trite law that Jersey and Guernsey are often guided by English law in matters relating to trusts and to arbitration/civil procedure. However, in relation to whether or not an arbitral award binds a beneficiary of a Jersey trust, it has been said that the position is "less clear": Jersey Chief Minister's Department (11 April 2016), Consultation: Proposed Amendments to the Trusts (Jersey) Law 1984, <https://www.gov.je/SiteCollectionDocuments/Government%20and%20administration/C%20Proposed%20Amendments%20to%20the%20Trusts%20(Jersey)%20Law%201984%20consultation%20160411%20CB.pdf> last accessed 19 February 2023, para 4.3.

3 Nor is there any reason, in principle, why one of these conditions cannot be that, as between B and the person holding the property for B's use, *viz.* X, any disputes between them should be subject to determination by a further disinterested party.

4 It is submitted that there is therefore an imperative that the law provides the means to recognise such a devise. The only question is how this comes to be done.

II Whither trusts?

(a) *The question and trusts*

5 Once it is accepted that the law should provide a way for A to settle his property conditionally on X, where X is bound to use the property for the benefit of B, and any disputes between B and X should be subject to determination by a further disinterested party, the question is whether the law of trusts, as it stands, provides an adequate means by which this can be done.

6 Why then should a settlor ("S") be prevented from stipulating that his property should be held by a trustee ("T") for the use of a beneficiary ("B"), subject to the condition that any disputes between T and B be settled by a neutral third party, like an arbitrator? Such disputes may be referred to as internal trust or "beneficiary" disputes (as opposed to external disputes where the T and any third parties would be able to enter into arbitration agreements using relatively straightforward contractual methods).[2]

7 There is no inherent reason why such disputes should not be amenable to arbitration. It is right for a court to consider the intentions of S.[3] Typically, disputes that are not capable of being arbitrated engage some public interest—but even this is not an insuperable obstacle, as the arbitration of competition law disputes demonstrates;[4] further, while an arbitrator cannot give the same remedies as a judge, and historic precedents do not provide a clear direction, there is a first principles argument to be made in favour of arbitrating trust disputes.[5] In traditional family trusts, arbitration ought to be an attractive way of

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[2] *Alsop Wilkinson v Neary* [1996] 1 WLR 1220, at 1224–1225.

[3] See, for example, *T Choithram International SA v Pagarani* [2000] UKPC 46, at para 23.

[4] *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc* (1985) 473 US 614.

[5] Matthew Conaglen, "The Enforceability of Arbitration Clauses in Trusts" (2015) 74(3) *Cambridge Law Journal* 450, at 451–467.

resolving disputes where privacy and greater procedural control would be inherently more attractive for such clients.[6]

8 Of course, at this juncture, it is right to note that the courts of Jersey and Guernsey are well-versed in dealing with technical issues of law and fact in connection with trusts. Further, it is settled practice that certain trust-related applications may be heard in private or subject to reporting restrictions.[7] However, this is generally not the case for fully "hostile" litigation.[8] In any case, the normal practice after "in private" hearings is that an anonymised judgment is published—and the principle of open justice is such that the Royal Court of Jersey might opt to publish a non-anonymised judgment despite having sat in private, even in a case where "all parties [had] consent[ed] to a hearing in private and to publication only of an anonymised judgment".[9]

9 In sophisticated, commercially minded contexts, one is looking beyond the remit of the archetypal family trust. Certain commercial trusts can and should lend themselves more readily to contractarian analysis: in reality, a B under such a trust may have knowledge of, and have consciously acquiesced to, certain dispute resolution provisions in a trust instrument.[10] Why should a B not be bound to arbitrate in such a situation?

10 If, as some contend, an S compelling the arbitration of trusts disputes is impossible,[11] then the law either requires amending, or some other mechanism must be fashioned to devise property on this basis.[12] It is submitted that, if trusts law as it stands is incapable of fulfilling this need, it would be more straightforward for trusts law to be reformed

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[6] Nicholas Le Poidevin QC, 'Arbitration and Trusts: Can it be Done?' [2012] 18(4) *Trusts & Trustees* 307, at 307.

[7] See, for example, Jersey's Royal Court Rules 2004, RCR 17/1 and *Jersey Evening Post Ltd v Al Thani* 2002 JLR 542, at para 25.

8 Chief Minister's Department (11 April 2016), Consultation: Proposed Amendments to the Trusts (Jersey) Law 1984, < https://www.gov.je/SiteCollectionDocuments/Government%20and%20administration/C%20Proposed%20Amendments%20to%20the%20Trusts%20(Jersey)%20Law%201984%20consultation%2020160411%20CB.pdf> last accessed 19 February 2023, para 4.6.

9 *HSBC Trustee (CI) Ltd v Siu Hing Kwong* [2018] JRC 051A, at paras 66–68.

[10] Qinzhe Yao, 'Not So Strong Cause for Trust Jurisdiction Clauses—A Solution to a Non-problem?' (2017) 31(2) *Trust Law International* 51, at 52–55.

[11] See, for example, Trust Law Committee, "Arbitration of Trust Disputes", 25 November 2011, para 25, or English Law Commission, Thirteenth Programme of Law Reform (Law Com No 377, 2017) at para 4.55.

[12] Section I, above.

instead. Trusts are a familiar and well-established way of holding and managing property; and there should be no rush to throw the baby out with the bathwater. However, we submit that there are no insuperable obstacles preventing trusts law from fulfilling this need in the first place.

(b) *Common objections to arbitrating trusts disputes*

(i) *Historical objections*

11 Historically, courts have been jealous in guarding their jurisdiction to hear disputes. By the 19th century, however, it was widely accepted that force could essentially be given to agreements to arbitrate through the use of *Scott v Avery* clauses.[13] These typically stipulated that obtaining an award from an arbitrator was a pre-condition to any right of action to claim money—while the practical effect of such a clause was to compel arbitration, it did not involve the court actively surrendering its jurisdiction to a tribunal and therefore did not engage the historic rule against any apparent dereliction of judicial duty.[14]

12 For arbitration, the law has moved on. Global consensus in favour of arbitration led to the entry into force of the New York Convention.[15] Leading jurisdictions almost uniformly have clear and comprehensive legislation reflecting this, paving the way for the enforcement of arbitration agreements and of awards subsequently rendered.[16] It is obvious that parties should be held to their bargains,[17] and if they have agreed to arbitrate, then that decision ought to be respected.

13 To the extent that similar arguments might be canvassed against the arbitrating of trust disputes, public policy can and does—and has—moved on.[18] The arbitration of trust disputes may fall outside the four corners of the New York Convention for various reasons (considered

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[13] Named after the case of *Scott v Avery* (1856) 5 HLC 811.

[14] Nicholas Le Poidevin QC, "Arbitration and Trusts: Can it be Done?" (2012) 18(4) *Trusts & Trustees* 307, at 307–308.

[15] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) 330 UNTS 38 ("the New York Convention").

[16] See, for example, the Arbitration (Jersey) Law 1998 or the Arbitration (Guernsey) Law 2016, both of which take reference from the UK's Arbitration Act 1996.

[17] In Jersey, this is pithily captured by the maxim *la convention fait les lois des parties* ("the agreement forms the law of the parties"): *Trico Ltd v Buckingham* [2020] JRC 009, at para 69.

[18] Matthew Conaglen, "The Enforceability of Arbitration Clauses in Trusts" (2015) 74(3) *Cambridge Law Journal* 450, at 451–467.

further in Section 0 below), but the same public policy arguments in favour of arbitration ought equally to apply to the arbitration of trust disputes. It therefore has been argued that courts ought to compel the arbitration of trust disputes in certain circumstances as a matter of common law or in the exercise of judicial discretion.[19]

(ii) *The Role of Court Supervision of Trusts*

14 Of course, some consideration must be given to the particular relationship that exists between trusts and the courts. Courts do have an inherent jurisdiction to supervise the administration of trusts, and will intervene as appropriate. In such cases, the court has a wide discretion to make appropriate orders.[20] In relation to trusts, it has been considered that the position is different from that of a contract: the court has no inherent power to supervise the administration of a contract, whereas it has been said that there is an imperative to protect beneficiaries in the trust context.[21] Further, as a matter of practice, many prudent Ts are grateful for the possibility of availing themselves of the court's inherent jurisdiction in this area to seek guidance and clarification as required (and thereby absolve themselves of liability *via* the appropriate judicial "blessing").[22]

15 What is the justification for this special treatment of trusts? One might argue that Ts are fiduciaries, not mere contractual counterparties of equal bargaining power—and therefore judicial scrutiny is particularly important. However, is the relationship between Ts and Bs really so unique that the same analysis should lead to a different conclusion? [23] Further, there are other relationships where one party has more power than the other where there is a degree of trusting dependence, which are capable of arbitration. Indeed, in certain jurisdictions and in certain situations, internal company disputes involving company

[19] Nicholas Le Poidevin QC, "'Arbitration and Trusts: Can it be Done?" (2012) 18(4) *Trusts & Trustees* 307, at 308–312.
[20] *Schmidt v Rosewood Trust Ltd* [2003] UKPC 23, at paras 51 and 66.
[21] *Crociani v Crociani* [2014] UKPC 40; 2014 (2) JLR 508, at para 36.
[22] See, for example, *Public Trustee v Cooper* [2001] WTLR 901, *per* Hart J or *Kan v HSBC International Trustee Ltd* 2015 (1) JLR *N* [31].
[23] John H Langbein, "The Contractarian Basis of the Law of Trusts" [1995] 105 *Yale Law Journal* 625, 658; Qinzhe Yao, "Not So Strong Cause for Trust Jurisdiction Clauses—A Solution to a Non-problem?" [2017] 31(2) *Trust Law International* 51, at 52–55.

directors—who are also fiduciaries—may also be capable of arbitration.[24]

16 Ultimately, whether analysed from the perspective of proprietary rights or contractarian analysis, trust arbitration ought to be permissible as a matter of first principles. S has the right to settle property into a trust, subject to conditions—and, as will be discussed in Section 0, it is possible for the relevant parties to a trust dispute to agree to arbitration. If there is such agreement, there is no principled reason why the arbitration of trust disputes should be prevented as a general rule.

III An arbitration agreement binding the beneficiaries

17 How might both the T and B of a trust give valid consent to arbitration? The recognition and enforcement of arbitral awards under the New York Convention is predicated on the existence of an arbitration agreement.[25] While this term is not defined, it is evidently something bilateral.[26] If an arbitral award does not meet the New York Convention criteria, it may fall outside the scope of national arbitration legislation. However, even in such cases, in most common law jurisdictions, it would be open to a court to compel parties to arbitrate regardless—and courts ought to do this in appropriate circumstances.[27]

18 Evidently, it would be appropriate for a court to compel a T and B to arbitrate where there has been agreement to do so, or at least something akin to agreement. We therefore consider a number of scenarios, starting from the case of actual agreement and ending with cases where there may not be any such agreement and going through the various intermediate shades of grey.

(a) *Ad hoc arbitration agreements*

19 One can dispose of the simple case fairly swiftly. Assuming all Bs are *sui juris*, known and agreeable, Bs and T(s) may enter into an *ad hoc* arbitration agreement after a dispute has arisen. In such a case, there is actual consent—and the situation should be treated no differently

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[24] Diederik de Groot, "Arbitration and Company Law: An Introduction" [2015] 12(2) *European Company Law* 125, at 127.
[25] New York Convention, art 2(2).
[26] Matthew Conaglen, "The Enforceability of Arbitration Clauses in Trusts" (2015) 74(3) *Cambridge Law Journal* 450, at 467–478.
[27] Nicholas Le Poidevin QC, "Arbitration and Trusts: Can it be Done?" (2012) 18(4) *Trusts & Trustees* 307, at 308–312.

from other uncontroversial arbitration agreements.[28] Given actual consent, there is no normative reason to refuse to enforce the arbitration agreement.[29]

20 Similarly, there may be other situations where obtaining consent would be a relatively straightforward exercise. For example, in pension trusts, there are often important contractual provisions relating to pension rights that would be found in an employee's contract of employment.[30] Putting aside specific labour law regulatory requirements, an employer could arguably insert an arbitration clause into its employment contracts or employee handbook.[31] It is certainly plausible that, in various commercial agreements, trusts and contracts are grafted together.[32] Even if the arbitration agreement is found in the contract but not the trust deed, where the arbitration agreement is sufficiently broadly drafted, care should be taken to give effect to the commercial reality of the underlying, interlinked agreements.

(b) *Compelling arbitration—arbitration clause in trust deed*

21 One possibility is simply inserting a clause in a trust instrument specifying that any disputes under the trust are to be resolved *via* arbitration. This poses an immediate problem: even if a trust instrument could be called an agreement, this would be an agreement between S and T,[33] *but crucially not B*[34]—who may not even know of the existence

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[28] Michael Nueber and Hendrik Puschmann, "Arbitration of Foundation and Trust Disputes in Liechtenstein and the United Kingdom—a Comparative Analysis" (2018) 24(5) *Trust & Trustees* 418, at 425–426.

[29] See, for example, *Reinhart v Welker* [2012] NSWCA 95.

[30] David Pollard and Alison Chung, "Member Consent and Pension Trust Benefit Change" [2016] 30(1) *Trust Law International* 26, at 27.

[31] In some circumstances, an employer may have a power to unilaterally modify the terms of a contract of employment, such as via an employee handbook: *Bateman v ASDA Stores Ltd* (2010) UKEAT/0221/09/ZT, at para 28.

[32] See *eg* John H Langbein, "The Contractarian Basis of the Law of Trusts" (1995)] 105 *Yale Law Journal* 625, at 658.

[33] In this regard, it might be said that a successor T has voluntarily stepped into the shoes of a retiring T: G Jones, "Trusts on Tour—Jurisdiction Clauses in Trust Instruments" (2015) 19 *Jersey & Guernsey Law Review* 309, at para 52.

[34] Chief Minister's Department (11 April 2016), Consultation: Proposed Amendments to the Trusts (Jersey) Law 1984, < https://www.gov.je/SiteCollectionDocuments/Government%20and%20administration/C%20Proposed%20Amendments%20to%20the%20Trusts%20(Jersey)%20Law%201984%20consultation%2020160411%20CB.pdf> last accessed 19 February 2023, paras 4.2 and 4.3.

of the trust. This problem is exacerbated where a B cannot validly give consent, such as where they are minors, unborn or simply unascertained in the case of certain discretionary trusts.[35]

22 A helpful analogue may be the position of exclusive jurisdiction clauses.[36] In the Jersey appeal of *Crociani v Crociani*,[37] the Privy Council held that an exclusive jurisdiction clause in a trust instrument is *prima facie* binding upon all parties to a dispute, whether or not this was specifically agreed by them. However, whether effect is to be given to the clause does not turn on "the same test"[38] as that for a *contractual* exclusive jurisdiction clause: "the weight to be given to an exclusive jurisdiction clause [in a trust instrument] is less than the weight to be given to such a clause in a contract", and "it should be less difficult for a beneficiary to resist the enforcement of an exclusive jurisdiction clause".[39] In *Crociani*, the stay sought by the appellant in reliance on the exclusive jurisdiction clause was not granted.

23 This difference was explained on the basis that "the court is not faced with the argument that it should hold a contracting party to her contractual bargain".[40] The distinction was expressed, in *Crociani*, on two bases. First, even where a beneficiary expecting "to take advantage of a trust can be expected to accept that she is bound by the terms of the trust", this is "not a commitment of the same order as a contracting party being bound by the terms of a … contract."[41] Secondly, unlike a contract, "the court has an inherent jurisdiction to supervise the

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[35] Nicholas Le Poidevin QC, "Arbitration and Trusts: Can it be Done?" (2012) 18(4) *Trusts & Trustees* 307, at 307.

[36] Chief Minister's Department (11 April 2016), Consultation: Proposed Amendments to the Trusts (Jersey) Law 1984, < https://www.gov.je/SiteCollectionDocuments/Government%20and%20administration/C%20Proposed%20Amendments%20to%20the%20Trusts%20(Jersey)%20Law%201984%20consultation%2020160411%20CB.pdf> last accessed 19 February 2023, para 4.3.

[37] *Crociani v Crociani* [2014] UKPC 40; 2014 (2) JLR 508 ("*Crociani*").

[38] *Crociani* 2014 (2) JLR 508, at para 35.

[39] *Crociani* 2014 (2) JLR 508, at para 36.

[40] *Crociani* 2014 (2) JLR 508, at para 36.

[41] *Crociani* 2014 (2) JLR 508, at para 36. Respectfully, it is not clear that the Board's reference to a "commercial" contract adds much here, since there is no reason to believe that an arbitration clause, or an exclusive jurisdiction clause, would be less likely to be enforced in a *non-commercial* contract than in a commercial one.

administration of the trust", "primarily to protect the interests of beneficiaries".[42]

24 At a general level, the distinction is rightly drawn: the reasoning in the jurisprudence on exclusive jurisdiction clauses is fundamentally contractual.[43] The "benefit and burden" argument has some pedigree.[44] However, it has been observed that it arguably goes only as far as allowing the withdrawal of the benefit where the obligation imposed was not performed.[45] Further, the court's inherent jurisdiction to supervise the administration of a trust arises as a substantive rule of trusts law.[46] It is distinct from the rule of public policy against ousting the court's jurisdiction[47]—it is that latter rule that has been rowed back from by the increasing recognition of arbitration clauses.[48] In comparison, it is noted that the Royal Court of Jersey recently decided that an arbitration clause within a company's articles of association

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[42] *Crociani* 2014 (2) JLR 508, at para 36.

[43] *Donohue v Armco Ltd* [2002] 1 All ER 749, at para 24, Lord Bingham refers to "[c]ontracting parties", the importance of securing "compliance with the contractual bargain", and the "contractual forum". Similarly, Lord Hobhouse explains this in terms of "a contractual right to have the contract enforced" at para 45.

[44] See D Hayton, "Problems in attaining binding determinations of trust issues by alternative dispute resolution", in R Atherton (ed), *Papers of the International Academy of Estate and Trust Law 2000* (2001, Kluwer Law International), 13, 18–19.

[45] P Matthews, "What is a Trust Jurisdiction Clause?" (2003) *Jersey Law Review* 232, at para 32.

[46] *Morice v Bishop of Durham* (1805) 32 ER 947 (Ch), at 954: "the execution of a trust shall be under the controul [*sic*] of the court, it must be of such a nature, that it can be under that control …"

[47] *Scott v Avery* (1856) 5 HLC 811, at 823:

> "In this view the doctrine referred to by the Plaintiff's counsel, that no agreement of parties can oust the courts of law of jurisdiction, is inapplicable to the present case; for in all the cases in which that doctrine has been applied, there has been a clear cause of action existing upon the covenant or agreement, independently of the particular covenant or agreement to refer."

[48] *West of England Shipowners Mutual Insurance Association (Luxembourg) v Cristal Ltd* [1996] 1 Lloyd's Rep 370 (CA), *per* Neill LJ:

> "There are many circumstances in which the powers of the High Court to review decisions made by persons or bodies outside the court system may be restricted … [but] [i]t remains the general rule of common law that an agreement wholly to oust the jurisdiction of the courts is against public policy and void."

(which *do* have contractual force) meant that a just and equitable winding up petition should be stayed.[49]

25 In addition to the simple point that little guidance is available as to the weight to be given to the trust instrument being non-contractual,[50] three further observations should be made.

26 The first observation is that a distinction should be drawn between the case where a *stay* in particular proceedings is sought because those proceedings were brought in violation of an exclusive jurisdiction or arbitration clause; and the case where an *anti-suit injunction* is sought, because proceedings in another jurisdiction (which are sought to be restrained) were brought in violation of the exclusive jurisdiction clause. *Crociani* was a case of the former,[51] while cases such as *Donohue* were cases of the latter.[52] In the latter cases, the contractual basis of the agreement is particularly important: absent this, one recalls Scrutton LJ's *dictum* that the jurisdiction to restrain a claimant from suing abroad, while existing, "is a jurisdiction … to be resorted to with great care and on ample evidence produced by the applicant that the action abroad is really vexatious and useless."[53] A stay is far less intrusive than an injunction—and it is far from clear that *Crociani* supports the proposition that a party seeking to rely on the clause should (even *prima facie*) be entitled to injunctive relief barring strong cause.[54]

27 This has several implications in the context of arbitration. Most notably, while the court of the seat might ordinarily be able to grant injunctive relief against proceedings commenced in other jurisdictions

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[49] *Shinhan Securities Co Ltd v KS Asia Absolute Return Fund LC* [2022] JRC 293, at paras 29 and 42, citing with approval *Tomolugen Holdings Ltd v Silica Investors Ltd* [2015] SGCA 57, at para 75.

[50] For instance, see E Rajah QC and A Robinson, "Jurisdiction Clauses in Trusts", 21(5) *Trusts and Trustees* 557, at 563.

[51] As is a line of Jersey cases considering exclusive jurisdiction clauses in trusts: *EMM Capricorn Trustees v Compass Trustees* 2001 JLR 205; *Koonmen v Bender* 2002 JLR 407.

[52] *Donohue v Armco Ltd* [2002] 1 All ER 749.

[53] *Cohen v Rothfield* [1919] 1 KB 410, at 415 (Scrutton LJ).

[54] In context of the statutory arbitration regime, see also the distinction between the remedies of a stay (*eg* UK Arbitration Act 1996, s 9) and an anti-suit injunction (*eg* UK Arbitration Act 1996, s 44). We hope that we will be forgiven for not (universally) providing the relevant parallel statutory references to the Arbitration (Jersey) Law 1998 or to the Arbitration (Guernsey) Law 2016.

in contravention of the arbitration agreement,[55] this is not necessarily the case in the case of a trusts arbitration clause.[56]

28 The second observation is that, if the purpose of the court's inherent jurisdiction is "primarily to protect the interests of beneficiaries",[57] it is unclear that a trusts arbitration clause would necessarily be adverse to the interests of beneficiaries. As distinct from, say, a trustee exoneration clause, a trusts arbitration clause does not reduce the substantive rights of a beneficiary. As to procedural rights, while a different forum necessarily entails benefits and disadvantages, these are very much trade-offs absent some special reason that arbitration would particularly disadvantage a beneficiary.[58]

29 The third observation is that the foregoing analysis has proceeded on the footing that the trusts arbitration clause is a derogation from the beneficiary's rights. But it is equally conceivable that drafters avoid this problem altogether by providing the arbitration as simply being determinative of the *scope* of the beneficiaries' rights altogether. This is precedented: where a beneficiary's entitlements turned on his being married to "an approved wife", to be determined "in case of dispute or doubt [by] the decision of the Chief Rabbi in London of either the Portuguese or Anglo German Community", no objection was made that

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[55] See *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] 1 WLR 1889.

[56] For instance, if the jurisdiction is founded on s 37 of the Senior Courts Act 1981, the power in s 37 is confined to the situations where (a) where one party can show that the other party has invaded, or threatens to invade, a legal or equitable right of the former for the enforcement of which the latter is amenable to the jurisdiction of the court, and (b) where one party to any action has behaved, or threatens to behave, in a manner which is unconscionable: *South Carolina Insurance Co v Assurantie Maatschappij "de Zeven Provincien" NV* [1987] AC 24, at 40. Since the "legal or equitable right" refers to the right not to be sued in a way non-compliant with the clause: *AES Ust-Kamenogorsk*, at para 20, it appears that the trust instrument creates no such right here as between B and T, leaving matters to rest on the second limb. But it is far from clear that, by commencing proceedings in a method which is non-compliant with the clause (whether or not B has received a benefit under the trust instrument), B is acting "in a manner which is unconscionable", since this merely presumes the consequent.

[57] *Crociani*, 2014 (2) JLR 508, at para 36.

[58] Particularly, arbitral tribunals are nowadays generally able to grant most remedies that a court would otherwise have been able to grant—and so availability of remedies would not be a difficulty for a beneficiary.

this, somehow, constituted an arbitration clause which might have been in some way unenforceable.[59]

30 On the whole, then, while there is potential for weight to be given to arbitration clauses *simpliciter* in a trust instrument, the weight to be given remains indeterminate. Equally, they are unlikely to provide the certainty which one would ordinarily expect from an arbitration clause. Arbitration clauses *simpliciter* may not, therefore, be the most promising path towards a *general* enforceability of trusts arbitration clauses.

(c) *Compelling arbitration—deemed consent*

Deemed consent in the arbitration agreement

31 A permutation of the situation considered in Section III.0 above would be an arbitration clauses contained in the trust instrument, expressing that Bs are *deemed* (often upon receiving any benefit under the trust) to have consented to arbitration.

32 One example is the ICC Arbitration Clause for Trust Disputes, which materially provides:

> "Any beneficiary claiming or accepting any benefit, interest or right under the Trust shall be bound by, and shall be deemed to have agreed to, the provisions of this arbitration clause."[60]

33 It is highly telling, however, that the Explanatory Note does not purport to explain how this clause would operate to bind beneficiaries, other than to reiterate that they are deemed to have agreed to it.[61]

34 It is submitted that a deeming provision of this nature in a trust instrument is unlikely to contribute significantly to the enforceability of the arbitration agreement, above an arbitration clause *simpliciter*. Like an arbitration clause *simpliciter*, an arbitration clause with a deeming provision is either the unilateral act of S, or an agreement between S and T—neither entails the consent of Bs.

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[59] *In re Tuck's Settlement Trusts* [1978] Ch 49. But, while this may be apt to resolve factual disputes (cl 1(3) of the trust deed, in fact, referred specifically to "*facts* in case of doubt or dispute the decision of [the Rabbi] shall be conclusive"), it is not clear that this method would adequately empower an arbitrator to decide questions of law, and, as such, be an arbitration in the conventionally understood sense.

[60] ICC Arbitration Clause for Trust Disputes and Explanatory Note, October 2018 ("*Explanatory Note*"), p 3.

[61] Explanatory Note, p 8, at para 13.

35 At its highest, it may be said that a B receiving benefits under a trust instrument, whilst on notice of the existence of the deeming provision in the arbitration clause, thereby constructively consents to arbitration. But it is not inconceivable that, even in such a case, a B is content to receive benefits whilst protesting both the deeming provision and the arbitration clause, in which case it is unlikely that B can be taken to have constructively consented.[62]

Direct benefits estoppel

36 An emerging, and related, doctrine of US jurisprudence is that of "direct benefits estoppel". This is a rule providing that any B who attempts to enforce rights that would not exist without the trust manifests their assent to the trust's arbitration clause.[63]

37 While visibly elegant, this seems simply to be a different take on the "benefit and burden" doctrine discussed at Section III(0) above. As far as we know, the "direct benefits estoppel" doctrine has not received significant support outside the US. In any event, the doctrine needs development if it is not to be so blunt an instrument as to elide the distinction between contractual and non-contractual dispute resolution clauses canvassed above generally.[64]

(d) *Compelling arbitration—Bs' express adoption of the arbitration agreement*

38 Perhaps a more promising basis on which to compel trusts arbitrations is to simply have Bs sign the arbitration provision in the trust instrument itself.

39 This can be effected in various ways. For instance, it has been suggested that Bs' rights under a trust deed could be expressly made subject to a condition precedent of Bs' actual acceptance of the

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[62] Perhaps an analogy might be drawn with challenging the jurisdiction of the court—see, for example, Royal Court Rules 2004, RCR 6/7(3) and (9) in Jersey, in this regard.

[63] *Rachal v Reitz* 403 SW3d 840 (Texas Supreme Court 2013). Also see: *MAG Portfolio Consult, GMBH v Merlin Biomed Group LLC*, 268 F.3d 58, at 61–64 (United States Court of Appeals for the 2nd Circuit 2001); *World Omni Fin. Corp v ACE Capital Re Inc*., 64 F. App'x 809, at 812 (United States Court of Appeals for the 2nd Circuit 2003); and *Bridas S.A.P.I.C. v Govt of Turkmenistan*, 345 F.3d 347, at 356 (United States Court of Appeals for the 5th Circuit 2003).

[64] Section III.b.

arbitration agreement,[65] or that a discretionary trust could be structured in such a way that the class of would-be beneficiaries is restricted to entities which have consented to arbitration.[66]

40 However this is to be achieved, this solution is likely to have several practical benefits over other methods of binding beneficiaries.

41 First, where carefully drafted, it is likely to fulfil the requirements of an arbitration agreement in writing under the New York Convention,[67] and domestic arbitration legislation.[68] This will ensure both that the requisite stays can be obtained from courts before which claims are brought,[69] and that enforcement of any consequent award is likely.[70]

42 Secondly, given the prospective parties' actual consent, such an arbitration agreement is more likely to be held valid, and therefore, capable of founding an arbitral tribunal's jurisdiction.[71] The question of the actual validity of the arbitration agreement is distinct from that of its *prima facie* validity—while the former merely allows a party to obtain interim relief such as a stay or an anti-suit injunction to enforce the negative obligation in an arbitration agreement,[72] without the latter,

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[65] A Holden, "The Arbitration of Trust Disputes: Theoretical Problems and Practical Possibilities" (2015) 21 *Trusts & Trustees* 546, at 550; L Clover Alcolea, 'Trust Arbitration: 99 Problems and 99 Solutions" (2020) 26(3) *Trusts & Trustees* 260.

[66] A Holden, "The Arbitration of Trust Disputes: Theoretical Problems and Practical Possibilities" (2015) 21(5) *Trusts & Trustees* 546, at 550; L Clover Alcolea, "Trust Arbitration: 99 Problems and 99 Solutions" (2020) 26(3) *Trusts & Trustees* 260.

[67] New York Convention, art II.

[68] *Eg*, Arbitration (Jersey) Law 1998, art 1; and Arbitration (Guernsey) Law 2018, art 1. The English equivalent would be the UK's Arbitration Act 1996, s 5.

[69] Giving effect to New York Convention, art I(3)—assuming, always, that trusts disputes are not inherently unarbitrable. There is no reason to think that they are, as argued above.

[70] Given the restrictive provisions of the New York Convention where derogating from enforcement: Contracting States to the Convention can recognise no more than the seven recognised derogations in art V of the Convention.

[71] See *eg* Arbitration (Guernsey) Law 2018, art 24, or UK Arbitration Act 1996, s 30. The Jersey view is that this is a matter of context/interpretation: *Makarenko v CIS Emerging Growth Ltd* 2001 JLR 348, at paras 17–20.

[72] See *eg AES Ust-Kamenogorsk*. The negative obligation here is the obligation of either party *not* to commence a claim otherwise than by arbitration, while the positive obligations include the obligations to actually participate in the arbitration and to respect its result.

it is the latter which allows a tribunal to determine the substantive merits of a dispute.[73] Arbitration clauses actually adopted by Bs would therefore reduce the risk of proceedings dragging out, where a tribunal ultimately considers that it has no jurisdiction.[74]

43 Despite the attractions evident in having Bs expressly adopt the trusts arbitration clause, this mode of binding beneficiaries is not universally applicable. As it already requires the trust instrument to be drafted in a particular way so as to provide for Bs' express adoption of that clause,[75] this solution is confined to those trust instruments which already make such provisions, or which allow for subsequent modification and are subsequently modified to include these provisions.

44 A further difficulty is in the case of minor beneficiaries, unborn beneficiaries, and beneficiaries otherwise lacking capacity.[76] In these cases, the beneficiary (or potential beneficiary, as it may be) is unlikely to be able to consent to the arbitration agreement—and cannot, therefore, have an interest in the trust if it is structured in this way. This may militate against the use of this structure in a family trust.

(e) *Statutory intervention—possible approaches*

45 It is of course open for the legislatures of various jurisdictions to introduce local legislation which gives trusts arbitration clauses binding effect on Bs. Importantly, a number of key jurisdictions—including Guernsey—have done so,[77] through a range of different means.

46 It is worthwhile reproducing the relevant Guernsey legislation, art 63 of the Trusts (Guernsey) Law 2007, in full:

> "(1) Where—
>
> (a) the terms of a trust direct or authorise, or the Court so orders, that any claim against a trustee founded on breach of trust may be referred to alternative dispute resolution ('ADR'),

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[73] A similar (but perhaps not identical) distinction is drawn in the case of exclusive jurisdiction clauses, where the grant of a stay or an anti-suit injunction is a different exercise from the decision, by a nominated court, of whether it is seized of (or should exercise) jurisdiction.

[74] Analogously with exclusive jurisdiction clauses, where the nominated court refuses to exercise jurisdiction.

[75] See the suggestions by which this mode can be implemented, canvassed at Section III.d.

[76] See, *eg*, A Holden, "The Arbitration of Trust Disputes: Theoretical Problems and Practical Possibilities" (2015) 21(5) *Trusts & Trustees* 546, at 550.

[77] Bahamian Trustee Act 1998, ss 91A, 91B and 91D; Trusts (Guernsey) Law 2007, art 63; and New Zealand Trusts Act 2019, ss 142–148.

(b) such a claim arises and, in accordance with the terms of the trust or the Court's order, is referred to ADR, and

(c) the ADR results in a settlement of the claim which is recorded in a document signed by or on behalf of all parties,

the settlement is binding on all beneficiaries of the trust, whether or not yet ascertained or in existence, and whether or not minors or persons under legal disability.

(2) Subsection (1) applies in respect of a beneficiary only if—

(a) he was represented in the ADR proceedings (whether personally, or by his guardian, or as the member of a class, or otherwise), or

(b) if not so represented, he had notice of the ADR proceedings and a reasonable opportunity of being heard,

and only if, in the case of a beneficiary who is not yet ascertained or in existence, or who is a minor or person under legal disability, the person conducting the ADR proceedings certifies that he was independently represented by a person appointed for the purpose by a court of law.

'Notice' in paragraph (b) means 14 days' notice or such other period as the person conducting the ADR proceedings may direct.

(3) A person who represents a beneficiary in the ADR proceedings for the purposes of subsection (2)(a) is under a duty of care to the beneficiary.

(4) For the avoidance of doubt, the ADR proceedings need not be conducted in Guernsey or in accordance with the procedural law of Guernsey.

(5) In this section—

'ADR' includes conciliation, mediation, early neutral evaluation, adjudication, expert determination and arbitration, and

'proceedings' includes oral and written proceedings."[78]

47 There is limited Guernsey case law on the interpretation of this provision, but *A Trust Co v F*, which concerned certain questions concerning the finality of a post-mediation settlement agreement as between the T and Bs of a Guernsey trust, suggests that art 63 may be applied straightforwardly. It was said that art 63:

[78] Trusts (Guernsey) Law 2007, art 63.

> "establishes a mechanism under which breach of trust claims can be resolved in a binding fashion through alternative dispute resolution. There are two routes by which this can occur. The first is if the terms of the trust so direct or authorize ... The second is if the court so orders .... There are then procedural safeguards to ensure that the beneficiaries' interests are represented, or there was at least the opportunity for them to be represented, in the alternative dispute resolution proceedings. In relation to a beneficiary who is not yet ascertained nor in existence, nor a minor, which would have been the case here, there would need to be an independent court-appointed individual who the person conducting the proceedings certifies represented the beneficiaries in question."[79]

48 It appears most straightforward if a jurisdiction were simply to state that a B is bound by an arbitration clause in a trust instrument. As set out above, this is the approach adopted by Guernsey. This is also the approach adopted by Malta.[80] Slightly more circuitously, legislation may provide that the trusts arbitration clause is *deemed* to bind beneficiaries as in the Bahamas.[81]

49 A more blunt method is to allow the courts to compel the parties to arbitrate, as is done in New Zealand.[82] This method makes no provision for the effect of the arbitration clause on the parties, and accordingly may have implications if enforcement of the award is subsequently sought under the New York Convention or under local legislation.

50 Various jurisdictions are considering—or have considered—such legislative reform. In England, reform in this area has been considered by the English Law Commission, where giving the arbitration of trust disputes statutory footing was said to be supported by the Justice Committee, the Bar Council and the Society of Trustee and Estate Practitioners.[83] In Jersey, the introduction of statutory provisions to

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[79] *A Trust Company v F* 2014 GLR 31, at para 13.
[80] Maltese Arbitration Act 1996 (*Cap* 387), ss 15A–15B.
[81] Bahamas Trustees Act s 91A(2): "that provision shall, for all purposes under the Arbitration Act, have effect as between those parties as if it were an arbitration agreement and as if those parties were parties to that agreement."
[82] New Zealand Trusts Act 2019, s 145(1)–(2).
[83] English Law Commission, *Thirteenth Programme of Law Reform* (Law Com No 377, 2017) para 4.55. The Law Commission has since suggested that a fuller study on the possible introduction of reforms in relation to trusts arbitrations in England is forthcoming in the upcoming Fourteenth Programme: English Law Commission, Review of the Arbitration Act 1996: A Consultation Paper (Law Com Consultation Paper No 257, 2022), para 1.8.

provide for the binding arbitration of trust disputes was considered in 2016, but, ultimately, the relevant working group concluded that they were "not aware of any evidence of a strong market demand for this option", and were of the view that such legislation was "not desirable … at this time".[84] Accordingly, no such reform made its way into the Trusts (Amendment No 7) (Jersey) Law 2018. However, given Jersey "naturally wishes to be a vanguard for new developments for the trusts industry",[85] it may be timely for Jersey to revisit this question if "Guernsey-style" legislation is adopted in England in relation to the arbitration of trust disputes.

51 Where there are no provisions giving explicit effect to an arbitration agreement or arbitral award, some have argued that existing arbitration legislation can be read in ways to allow Bs to be bound. One often-advanced argument is that Bs claim "under" or "through" S, who would be said to be a party to the arbitration agreement contained in the trust instrument.[86]

In a response to the Law Commission's Consultation Paper on its Review of the Arbitration Act, the Chancery Bar Association has emphasised the crucial nature of such reform, calling it "the most significant current lacuna" in the present arbitration legislation in England and Wales: Chancery Bar Association, Law Commission Consultation Paper 257 – Review of the Arbitration Act 1996: A response on behalf of the Chancery Bar Association, 14 December 2022.

[84] Jersey Chief Minister's Department (11 April 2016), Consultation: Proposed Amendments to the Trusts (Jersey) Law 1984, < https://www.gov.je/SiteCollectionDocuments/Government%20and%20administration/C%20Proposed%20Amendments%20to%20the%20Trusts%20(Jersey)%20Law%201984%20consultation%2020160411%20CB.pdf> last accessed 19 February 2023, para 4.10.

[85] Chief Minister's Department (11 April 2016), Consultation: Proposed Amendments to the Trusts (Jersey) Law 1984, < https://www.gov.je/SiteCollectionDocuments/Government%20and%20administration/C%20Proposed%20Amendments%20to%20the%20Trusts%20(Jersey)%20Law%201984%20consultation%2020160411%20CB.pdf> last accessed 19 February 2023, para 4.10.

[86] See *eg* s 82(2) of the Arbitration Act 1996, and the discussion of this in, *eg*, L Cohen and M Staff, "The Arbitration of Trust Disputes" (1999) 7 JITCP 203, at 221; L Cohen and J Poole, "Trust Arbitration—Is It Desirable and Does It Work?" (2012) 18 *Trusts & Trustees* 324, at 327–328; M Conaglen, "The Enforceability of Arbitration Clauses in Trusts" [2015] 74(3) CLJ 450, at 469–472; M Herbert, "Trust Arbitration in England and Wales: The Trust Law Committee", in SI Strong (ed), *Arbitration of Trust Disputes* (OUP 2016) at 228, paras 10.47—10.52.

52 While the (strict) necessity of legislative intervention is perhaps debatable,[87] it seems to be the consensus view that simple, straightforward legislation in this area would increase legal certainty.[88]

IV The mechanics of a trust arbitration

(a) *Not ousting the jurisdiction of the court*

53 There is no reason to think that the submission of a trusts dispute to arbitration would necessarily contradict the inherent supervisory jurisdiction of the court.[89] In addition to the fact that the precise scope of the supervisory jurisdiction is "rather ill-defined",[90] several key inroads have been made.

54 In the first place, as has been previously canvassed,[91] it is possible to determine questions of fact of who is a beneficiary, without ousting the jurisdiction of the court,[92] and determining other questions of fact should equally not be an instance of ousting the jurisdiction of the court.[93] Admittedly, there is no express authority that questions of law can be submitted in this way, but this should not be an insuperable obstacle.

55 Second, if the beneficiaries' interests were in the first place conditional upon accepting resolution of disputes by arbitration, no reason to consider these arbitration agreements to oust the jurisdiction of the court.[94]

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[87] Compare the different approaches argued for in Jersey: Chief Minister's Department, Consultation Paper on Proposed Amendments to the Trusts (Jersey) Law 1984, at 27–30, and England and Wales: Trust Law Committee paper on Arbitration of Trust Disputes, para 50.

[88] N Le Poidevin QC, "Arbitration and Trusts: Can it be Done?"' [2012] 18(4) *Trusts & Trustees* 307, at 315.

[89] Even though the spectre of such a potential contradiction was raised in *Crociani v Crociani*.

[90] *Re Royal Society's Charitable Trusts* [1956] Ch 87, 91. See, *eg*, E Talbot Rice QC and A Holden, "The Trust Supervisory Jurisdiction: How Broad is it Really? How Far Can it be Stretched?' 25(5) *Trusts & Trustees* 523; R Nolan, "'The Execution of a Trust Shall be Under the Control of the Court': A Maxim in Modern Times" (2016) 2(2) Can J CCL 469.

[91] III.b. above.

[92] *Re Tuck's Settlement Trusts* [1978] Ch 49.

[93] Since nothing in *Re Tuck* appeared to turn on the fact of who was a beneficiary.

[94] This was canvassed above at III.d.

56 Finally, the court's supervisory jurisdiction (if it is the court of the seat) to supervise the arbitration means that there is no public policy reason to complain about jurisdiction being ousted: there is still a means of dispute resolution; which, being subject to ultimate control by the courts, is *prima facie* fair.

57 These are, admittedly, piecemeal solutions; but they demonstrate that the notion of the court's inherent jurisdiction is at best malleable, if not obscure.[95]

(b) ***Availability of remedies***

58 A key consideration for the arbitration of a trusts dispute is the availability of particular remedies, some of which seemingly requiring of court intervention.

59 Where an arbitration falls within the scope of the New York Convention, any resulting arbitral awards will be enforced in line with the Convention's provisions.[96] This includes partial or interim awards, thereby allowing arbitrators to make any order that a court would have been able to make.

60 Apart from the New York Convention, similar measures have been adopted by domestic legislation in various major trusts jurisdictions. For instance, a partial award made in England which disposes of at least some of the disputed issues may be enforced in the same way as a final award may be enforced, as long as it is final and binding.[97] This is also thought to represent the Jersey position.[98] There is no reason why a tribunal in a trust dispute should feel as if they are in some way fettered compared to any other duly-constituted arbitral tribunal in the arsenal of remedies available to it.

61 Certain trust arbitrations may fall outside of both the provisions of the New York Convention, and the relevant domestic legislation.[99] In common law jurisdictions, awards resulting from these arbitrations may fall to be enforced by bringing an "action on the award" at common law. It has been said that the common law action on the award is

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[95] Tellingly, neither *Crociani* nor *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 even deign to attempt at defining the inherent jurisdiction.

[96] New York Convention, art V.

[97] Arbitration Act 1996 (UK), ss 47, 58(1) and 66.

[98] *Makarenko v CIS Emerging Markets Growth Ltd* 2001 JLR 348, at para 32.

[99] For instance, the arbitration agreement may fall afoul the relevant formal requirements in a particular jurisdiction, such as by not being in writing.

flexible.[100] But whatever its present flexibility, it is unclear that an action on the award is available where the award does not arise from a contractual arbitration agreement—particularly where this area of the law has been somewhat underdeveloped following the introduction of methods of enforcing awards based on the Convention.

62 Of course, as a matter of practicality, there will be certain orders that a tribunal could not make as easily as a court in the trust context. An arbitrator may not be able to replace a trustee in the way a court can, but an arbitral tribunal, where the current trustee has consented to the arbitration, could certainly require the trustee to resign, appoint a new trustee and to appoint trust property to the new trustee instead.[101] Ultimately, if the parties to the dispute have either actively participated in proceedings or in some way given their consent to be enjoined, there is no principled reason why remedies which might in some way affect their rights or interests would be inappropriate or unfair.[102]

(c) *Enforceability*

63 A key dilemma is where not all of Ts, Bs, or some combination of the two, are parties to an arbitration. Where a person who is party to an arbitration simply refuses to participate in it, the resulting award is nevertheless enforceable against her.[103] But this is not so as against a person who is simply not a party to the arbitral proceedings, against whom an award is not enforceable,[104] and gives rise to no *res*

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[100] *Xiamen Xinjingdi Group Co Ltd v Eton Properties Ltd* [2016] 2 HKLRD 1106, at para 115.

[101] *Rinehart v Welker* [2012] NSWCA 96, at para 176.

[102] Nicholas Le Poidevin QC, "Arbitration and Trusts: Can it be Done?" [2012] 18(4) *Trusts & Trustees* 307, at 308–312; *Racecourse Betting Control Board v Secretary for Air* [1994] Ch 114 (CA), at 126.

[103] See, for example, art 37(2)(b) of the Arbitration (Jersey) Law 1998—what matters is whether or not the relevant parties were given the opportunity to participate: a foreign award shall not be enforceable in Jersey if—

> "the party against whom it is sought to enforce the award was not given notice of the arbitration proceedings in sufficient time to enable the party to present the party's case, or was under some legal incapacity and was not properly represented."

[104] Lord Millett has explained "a third party debt order is not an *in personam* order against the third party; it has proprietary consequences and takes effect as an order *in rem* against the debt owed by the third party to the judgment debtor": *Société Eram Ltd v Cie Internationale* [2004] 1 AC 260 HL, at para 88. This has been cited with approval in *FG Hemisphere Associates LLC v Democratic Republic of Congo* 2010 JLR 524, at para 149 by HWB Page, QC, Commissioner, in relation to the customary law *arrêt entre mains*.

judicata.[105] Ts cannot rely on the awards or any consequent orders as against them. For instance, Ts would still be potentially liable to Bs who were not party to the arbitration, for disbursements made as a result of orders made by the tribunal.

64 Where the failure to join all the interested parties is the result of Ts' own omissions, the position is less difficult. Ts cannot be heard to say that they would be put to added expense in defending a subsequent claim, or even potentially liable to these Bs in breach of trust, where all of this resulted from Ts' own neglect.[106]

65 The position is more difficult where the failure to join all of the interested parties was no fault of Ts. Where Bs are minors, unborn, lack capacity, or are otherwise unascertained, they may be represented by litigation friends or representatives.[107]

66 But this is of no assistance where those interested parties were not parties to the arbitration simply because a tribunal considered that it had no substantive jurisdiction over them, perhaps for want of consent to the arbitration agreement.[108] Exposing Ts to liability as against these parties would be onerous. There does not appear to be a panacea to this. While possible solutions such as applications to the court provide stopgaps, these equally have the potential to defeat the objectives of finality and expedition that arbitration may offer.

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[105] *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2014] 1 AC 160; *Johnson v Gore-Wood* [2001] 2 WLR 72. For these purposes, one beneficiary is not likely to be the privy of another, particularly if their interests are entirely different; but *see*, in contrast, the recent Hong Kong decision of *Lo Kai Shui v HSBC International Trustee Ltd* [2021] HKCFI 1539, at paras 102–109.

[106] Which, in any event, must have been a breach of their duty of care and skill: hence the representor-T's eagerness to join the Bs as parties to an application for directions, although considered not universally required/depending on "circumstances": *In the matter of a Settlement* 1994 JLR 139, at 144. Further, it is submitted that Ts' liability in this respect would not change even if there was an exemption clause for their breaches of the duty of care and skill.

[107] Analogously with the position in litigation, the English CPR Pt 21.2. The relevant legislation in several jurisdictions makes express provisions for the appointment of these representatives: *eg* Bahamas Trustee Act, s 1B(3)–(4), (6)–(7), providing that this may be done by the trust instrument or by the tribunal; or the Trusts (Guernsey) Law 2007, art 63(2), by the court. It is not clear whether this last statutory provision in Guernsey, which allows for alternative dispute resolution to be binding upon unascertained beneficiaries in certain circumstances, has been effective in practice.

[108] This possibility is canvassed above, at Section III.d.

V Conclusions and legislative change

(a) *The legislative landscape*

67 As discussed above, a number of jurisdictions have introduced legislation to support the arbitration of trust disputes.[109]

68 While the necessity of legislative change has been debated, such legislative change has the virtue of being able to introduce general solutions (notably regarding the binding of beneficiaries, and the binding status of awards) without having to resort to piecemeal responses and fictions that would otherwise be required.

69 Regrettably, there is little by way of decided cases, or academic literature, on the effect of such legislation, although it is hoped that, given their relatively large potential effect and the recent flurry of academic interest in the possibility of trusts arbitrations, this is liable to change in the near future.

(b) *Conclusions*

70 The courts of various offshore jurisdictions are used to addressing complex issues concerning the law of trusts promptly and—often—with privacy restrictions in place. However, anecdotally, practitioners in Jersey and Guernsey do sometimes receive queries on the possibility of inserting arbitration clauses into trust instruments. There is, in any case, a normative justification for the law to provide a means for trusts disputes to be resolved by arbitration, should S wish to settle his property on such terms.

71 The positive law seems to lag behind: piecemeal solutions in individual cases are available, but none of these seems to lead to a clear, general, solution. This may be because we attempt to put round pegs into square holes:[110] existing tools are simply not designed for arbitration, and cannot be expected to fit snugly.

72 But that is why we must square the circle.

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[109] These have broadly been canvassed at III(e).
[110] If the mixed metaphor can be forgiven.