International Jurisdiction Agreements and the Recognition and Enforcement of Judgments in Australian Litigation: Is There a Need for the Hague Convention on Choice of Court Agreements?

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ABSTRACT

One of the difficulties faced by judges and practitioners when dealing with disputes arising from international commercial transactions is in the application and enforcement of a choice of court or foreign jurisdiction clause to determine the relevant court to adjudicate the dispute. This article explores the process undertaken by Australian courts when deciding whether they should exercise jurisdiction. In addition, the legal uncertainty arising from the distinction drawn between exclusive and non-exclusive jurisdiction clauses, and the ambiguous approach employed in the enforcement of a jurisdiction clause is considered. The Hague Conference on Private International Law has developed the *Hague Convention on Choice of Courts Agreement 2005* and it is intended to promote the enforceability of exclusive choice of court agreements and establish the international recognition and enforcement of resulting judgments. This article considers whether Australia should, like its American and European counterparts, take steps to sign and ratify the *Hague Convention*. Further, the article also assesses the impact the Convention will have in resolving jurisdictional issues faced by Australian courts and the recognition and enforcement of a resulting decision. Finally, the article posits that the *Hague Convention* will clarify the uncertainties facing Australian courts in international jurisdictional disputes.

Introduction

In early 2009, two of the world's major economies signed the *Hague Convention on Choice of Court Agreements* ('*Hague Convention*'). The United States (19 January 2009) and the European

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Community (1 April 2009) signed the *Hague Convention*, while other States like Argentina, Canada and Singapore continue to actively consider ratification (or accession to) the *Hague Convention*. After accession by Mexico on 26 September 1997, the Convention awaits a second ratification or accession before it will come into force.[1]

The *Hague Convention* was designed to reduce the time and expense courts and businesses face when dealing with international jurisdictional issues, and the recognition and enforcement of foreign court decisions. Thus, litigants are assured that any disputes adjudicated between them will be resolved in their chosen forum.

The use of choice of court or foreign jurisdiction clauses in Australia however is not always upheld due to the distinction drawn between exclusive and non-exclusive jurisdiction clauses. Further, the approach employed in ascertaining whether jurisdiction clauses will be enforced is not always clear. The uncertainty that results from both these issues raises the question of whether Australia should, like its American and European counterparts, take steps to sign and ratify the *Hague Convention*. If Australia were to ratify the *Hague Convention*, resulting judgments will also benefit in the same way that international arbitration agreements and awards have benefited under the highly successful New York Convention,[2] through the recognition and enforcement provisions.

Before any of these issues can be explored further, it is necessary to first, by way of background, trace the development of the *Hague Convention* (discussed in Part 1 of this article). Part 2 will then explore and assess the Australian approach when resolving jurisdictional issues involving choice of court agreements before turning to the question of whether Australia should adopt the *Hague Convention* (discussed in Part 3). A discussion on the impact of the recognition and enforcement of foreign judgments in Australia upon concluding the Convention will be reviewed in Part 4. This is followed by concluding remarks in Part 5.

1. The Hague Convention as a Binding Legal Instrument

The *Hague Convention* was negotiated and concluded in the framework of the Hague Conference on Private International Law ('Hague Conference').[3] The Convention seeks to reinforce exclusive choice of court agreements and additionally, to ensure mutual recognition and enforcement of judgments between Contracting States.

A. History of Negotiations

The Hague Convention evolved from the earlier Hague Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters ('1971 Hague Convention') which unfortunately never came to fruition due to the lack of ratifications.[4] Subsequently, the Hague Conference received a letter from the United States

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[1] *Hague Convention on Choice of Court Agreements*, opened for signature 30 June 2005 (not yet in force) art 31.

[2] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, opened for signature 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959 ('New York Convention').

[3] The Hague Conference is a global inter-governmental organisation with 69 Member States. Since 1893, it has worked towards the progressive unification of the rules of private international law, accessed online at <http://www.hcch.net>.

[4] The Hague Judgments Convention and its Protocol are in force only for three States: the Netherlands, Portugal and Cyprus. Its lack of success can be attributed to the success of the Brussels Convention (which built to a large extent on the *Hague Convention* and was negotiated in part by the same States), followed by the Lugano Convention. Additionally, it took an unusual and complex form. 'Some Reflections of the Permanent Bureau on a General

[footnote continued on the next page]

on 5 May 1992 which proposed a future convention in the field of recognition of and enforcement of judicial decisions ('Judgements Project').[5] The matter was considered by the Special Commission on General Affairs and Policy in June 1992 and in its Recommendations and Decisions it was decided that a Working Group would convene before the Seventeenth Session (10-29 May 1993) to study the United States' proposal on the recognition and enforcement of judgments.[6] The Working Group met between 29 and 31 October 1992 and it unanimously agreed on the desirability of attempting to negotiate, through the Hague Conference, a new general convention on jurisdiction and recognition and enforcements of judgments.[7]

Thus the Judgements Project went forth, endeavouring to replicate the success of the Brussels and Lugano Convention.[8] However, in the years that followed there was great difficulty extending it to a wider geographical frame work.[9] There was disagreement between countries on issues like the form the Convention would take, the bases of jurisdiction and the difficulties seemed insurmountable. However, renewed negotiations on a new *Hague Convention* commenced in June of 1997 and by November 1998 a Drafting Committee produced the first preliminary draft text.[10] This evolved into the development of the 1999 Preliminary Draft Convention text[11] and the June 2001 Interim Text,[12] but substantial consensus towards a comprehensive convention remained elusive. Eventually, in an effort to facilitate the Judgments Project, the Permanent Bureau suggested in February 2002 that a group of experts convene later in the year and distribute a text (with comments) by either the end of 2002 or early 2003.[13] By March 2003, the expert group produced a preliminary text focussed on choice of forum and the recognition and enforcement of judgments in civil and commercial matters.[14] The draft was subsequently put before the Special Commission in

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Convention on Enforcement of Judgments', Preliminary Document No 17 of May 1992, in *Proceedings of the Seventeenth Session*, Vol I (SDU Publishers, 1995) 231 [3].

[5] Ibid 231 [1].

[6] Ibid 239 [25]; 'Some Reflections of the Permanent Bureau on a General Convention on Enforcement of Judgments', Preliminary Document No 18 of August 1992, in *Proceedings of the Seventeenth Session*, Vol I (SDU Publishers, 1995), 255 [XXI].

[7] 'Some Reflections of the Permanent Bureau on a General Convention on Enforcement of Judgments', Preliminary Document No 19 of November 1992, in *Proceedings of the Seventeenth Session*, Vol I (SDU Publishers, 1995) 263.

[8] Ibid 253.

[9] *Special Commissions on the Judgments Project*, held in June 1997, March and November 1998, and June and October 1999. Also see discussion in Paul Beaumont, 'Hague Choice of Court Agreements Convention 2005: Background, Negotiations, Analysis and Current Status' (2009) 5(1) *Journal of Private International Law* 125, 127-34.

[10] *Special Commission on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matters* (Working Document No 14, Hague Conference on Private International Law, 1998).

[11] *Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters*, adopted by the Special Commission on October 30 1999, Preliminary Document No 11 of August 2000, Proceedings of the Nineteenth Session of June 2001.

[12] Hague Conference on Private International Law, *Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference (6 to 22 June 2001)*, accessed online at <http://www.hcch.net/index_en.php?act=publications.details&pid=3499&dtid=35>.

[13] 'Some Reflections on the Present State of Negotiations on the Judgments Project in the Context of the Future Work Programme of the Conference', Permanent Bureau, Preliminary Document No 16 of February 2002, *Proceedings of the Nineteenth Session*, Vol I (Koninklijke Brill NV, 2008) 434 [17].

[14] This third meeting (the first in October 2002 and the second in January 2003) took place immediately before the meeting of Commission I on General Affairs and Policy of the Hague Conference which met from 1 to 3 April 2003. See also Andrea Schulz, First Secretary, 'Report on the Work of the Informal Working Group on the Judgments Project, in Particular of the Preliminary Text Achieved at its Third Meeting, 25-28 March 2003',

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December 2003[15] and April 2004.[16] Finally in June 2005, the *Hague Convention* was adopted at the Diplomatic Session.[17]

B. Outline of the Hague Convention

The *Hague Convention* seeks to promote enforceability of exclusive choice of court agreements and establishes the international recognition and enforcement of resulting judgments. It applies to cases that are international in nature (Article 1) but also outlines several matters that do not fall within its scope of application. They include disputes about employment, consumer contracts, family law, insolvency and the validity of intellectual property rights other than copyright and related rights (Article 2). The Convention also initially sets out that a court selected by parties must act in every case as long as the choice of court agreement is not null and void (Article 5). Therefore, if parties select Australia as a venue, the *Hague Convention* gives full effect to the parties' intentions by requiring the chosen Australian court to hear the case if the choice of court agreement is valid according to the established standards. In particular, there is no discretion (on *forum non conveniens* or other grounds) in favour of courts of another State. Secondly, the Convention also provides that any other court seized but not chosen must dismiss the case unless the exceptions listed in the Convention apply (Article 6). Lastly, a judgment rendered by the court of a Contracting State must be recognised and enforced by other Contracting States (Article 8) unless one of the exceptions established by the Convention applies (Article 9).

2. The Difficulty in Establishing Jurisdiction in Australia

Australian courts are inclined to hold commercial parties to their contractual bargains and will seek to enforce a valid choice of court agreement and stay proceedings commenced in breach of the agreement. However, given the overriding discretionary nature of superior courts' jurisdiction, the enforcement of a choice of court or foreign jurisdiction clause will not be automatic in each instance. In this context, Australian courts have drawn a distinction between exclusive and non-exclusive jurisdiction clauses (EJCs and Non-EJCs respectively); a difference that limits the scope of application and enforcement of a foreign jurisdiction clause (FJC). The difficulties that arise in the application of a FJC discussed below underscores the need for a new regime.

A. Inherent Powers of a Superior Court

Once an Australian court is satisfied that the proceedings have been regularly commenced in accordance with the relevant Rules of Court[18], it may still have to consider the effect of a FJC

Preliminary Document No 22 of June 2003, accessed online at <http://www.hcch.net/upload/wop/jdgm_pd22e.pdf>.

[15] 'Special Commission on Jurisdiction, Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (1-9 December 2003)' (Working Document No 49E, Hague Conference on Private International Law) accessed online at <http://www.hcch.net/upload/wop/workdoc49e.pdf>.

[16] 'Special Commission on Jurisdiction, Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (21-27 April 2004)' (Working Document No 110E, Hague Conference on Private International Law) accessed online at <http://www.hcch.net/upload/wop/jdgm _wd110_e.pdf>.

[17] The second reading is based on the *Draft Convention in Working Document No 88*, Commission II, Twentieth Session: Jurisdiction, Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, Minutes No 24 [3] (soon to be published).

where the plaintiff has brought proceedings in contravention of the parties' agreed choice of forum. In such cases, the court's overriding consideration will be the need to hold parties to their agreement.[19] However, in exercising the 'inherent power… to regulate proceedings before them' a forum court may also refuse to enforce the choice of court agreement and accept jurisdiction instead.[20] Whether a choice of court clause will be enforced depends on whether it is exclusive or non-exclusive in nature. This distinction is examined in the following section.

B. Exclusive Jurisdiction Clauses

EJCs impose a contractual obligation to only litigate in the selected forum, thus precluding any other court as a possible forum for resolving the dispute.[21] Australian courts give considerable weight to the parties' choice of forum and thus will require good reasons to allow for proceedings that have been commenced in contravention of an EJC to continue. However, an Australian court may choose to assume jurisdiction, albeit in breach of an EJC, where there are 'strong causes'[22] or countervailing reasons for doing so.[23] There are numerous considerations that a court can take into account when assessing whether there are strong causes or countervailing reasons; these have been set out by Brandon J in the case of *The Eleftheria*.[24] In *Lewis Construction Pty Ltd v Tichauer Societe Anonyme*, the Victorian Supreme Court refused to stay proceedings, despite the existence of an EJC to litigate in the Commercial Court of Lyon in France.[25] It was found that the questions to be litigated were much more closely concerned with Victoria than with France and therefore there were strong causes for refusing to enforce the choice EJC.[26] As this case illustrates, even though Australian courts have recognised the importance of enforcing EJCs[27], they will override the parties' express intention to litigate in another forum when there are strong or countervailing reasons against the application of an EJC.

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[18] As a general rule, courts must have the necessary legal authority or jurisdiction to hear and determine the cases before them. This inquiry must be undertaken by the court at the outset of proceedings: *Contender 1 Ltd v LEP International Pty Ltd* (1988) 82 ALR 394, 399 (Brennan J). Most of the Australian law pertaining to a court's jurisdiction, and the procedural requirements for valid service on defendant, is now contained in the various Rules of Court. See, e.g. in Victoria, Order 7.03 and 7.09- 7.15 of the *Supreme Court (General Civil Procedure) Rules 1996* (Vic).

[19] In *Akai Pty Ltd v The Peoples Insurance Company Ltd* (1996) 188 CLR 418 and 427, the High Court of Australia (Dawson and McHugh JJ) held that 'the law has always been solicitous that when parties contract to submit their disputes to the exclusive jurisdiction of the courts of another country they should be held to that bargain'.

[20] Michael Tilbury, Gary Davis and Brian Opeskin, *Conflicts of Laws in Australia* (Oxford University Press, 1st ed, 2002) 82.

[21] *S & W Berisford PLC v New Hampshire Insurance* (1990) 2 QB 631, 636 (Hobhouse J) ('Berisford').

[22] *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197, 259 (Gaudron J); *Akai* (1996) 188 CLR 418, 445 (Toohey, Gaudron and Gummow JJ), 427-29 (Dawson and McHugh JJ); *Huddart Parker v The Ship the Mill Hill* (1950) 81 CLR 502, 509 ('*Huddart Parker*'); *FAI General Insurance Co Ltd v Ocean Marine Mutual Protection and Indemnity Association* (1997) 41 NSWLR 559 ('*FAI Insurance*').

[23] See *Oceanic Sun Line Shipping* (1988) 165 CLR 197 and 224, where Brennan J held that 'countervailing reasons' were required before a court would refuse to decline and exercise of their jurisdiction of a proceeding brought in breach of an EJC . This position was reaffirmed by the majority of the High Court of Australia in *Akai* (1996) 188 CLR 418, 445-47 (Toohey, Gaudron and Gummow JJ).

[24] The Australian approach also adopts the principles set out by Brandon J in *The Eleftheria* [1970] P 94, 99-100.

[25] *Lewis Construction Pty Ltd v Tichauer Societe Anonyme* [1966] VR 341 ('Lewis Construction').

[26] Ibid 349 (Hudson J).

[27] Ibid 347. Hudson J held that Australian courts had a 'strong bias in favour of maintaining the special bargain and holding parties to their contract'.

C. Non-exclusive Jurisdiction Clauses

When the parties use a Non-EJC, the clause is seen as a mere submission to the selected jurisdiction, rather than a contractually binding requirement to litigate in that forum.[28] Thus it does not preclude a plaintiff from commencing litigation in another forum.[29] Accordingly, when the defendant makes an application for a stay of local proceedings, it will be based on a claim of *forum non conveniens* rather than a breach of a contractual promise.[30]

The Australian requirement for forum non conveniens is to show that the local court is 'clearly inappropriate'.[31] In such cases, it is the defendant who bears the onus of proving to the forum court that it is not the appropriate forum to resolve the dispute. The Voth case establishes that this is done by reference to 'connecting factors' assessed upon the balance of convenience.[32] The 'connecting factors'[33] (between the action and the forum) to be considered are namely factors affecting convenience or expense (such as availability of witnesses), the law governing the relevant transaction as well as the parties' places of residence or business.[34] When an application to stay proceedings is made, the Non-EJC will become another connecting factor to be weighed in consideration amongst others and not as a determinative factor.[35] In addition, the court will also consider any legitimate juridical advantages for the plaintiff to establish whether the plaintiff will obtain justice or suffer a substantial injustice in the foreign forum.

D. Difficulties in Applying and Enforcing Jurisdiction Agreements

The difficulties faced in Australia, where foreign jurisdiction clauses are concerned, extend equally to its formulation, application and enforcement. There are four main issues that both parties and practitioners are faced with when seeking to enforce foreign jurisdiction clauses in Australian litigation.

1. Formulation: Determining the Nature of a Clause

Whether a jurisdiction clause is exclusive is a question of construction and courts look to circumstances surrounding the contract to ascertain the nature of the jurisdiction agreement.

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[28] *Lewis Construction*, [1966] VR 341, 96.

[29] *Contractors Ltd v MTE Control Gear Ltd* (1964) SASR 47 (Travers J) ('Contractors v MTE Control Gear').

[30] See discussion in Peter Nygh and Martin Davies, *Conflict of Laws in Australia* (LexisNexis Butterworths, 7th ed, 2002), 197-98; *Akai* (1996) 188 CLR 418; *Contractors v MTE Control Gear* (1964) SASR 47; See also *Aldred v Australian Building Industries Pty Ltd* (1987) 48 NTR 59.

[31] In contrast the English test requires parties to prove that there is a 'more appropriate' forum than that selected by the plaintiff. That is, Australia adopts a materially different *forum non conveniens* test (clearly inappropriate test) vis-à-vis the *Spiliada* approach taken in England (below n 33) and other common law jurisdictions (more appropriate test) such as New Zealand: *Club Mediterranée NZ v Wendell* [1989] 1 NZLR 216; *McConnell Dowell Constructors Ltd v Lloyd's Syndicate* 396 [1988] 257; *Society of Lloyd's v Hyslop* [1993] 3 NZLR 135; *Longbeach Holdings Ltd v Bhanabhai & Co Ltd* [1994] 2 NZLR 28; *Mackay Refined Sugars NZ v NZ Sugar Co* [1997] 3 NZLR 476; Canada: *Amchem Products Inc v Workers Compensation Board* [1993] 1 SCR 897; *Frymer v Brettschneider* (1994) 115 DLR (4th) 744; Hong Kong: *the Adhiguna Meranti* [1988] 1 Lloyd's Rep 384, [1987] HKLR 904.

[32] *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538, 564-65 ('*Voth*'). Gaudron J held (at 556-557) that, a 'selected forum should not be seen as an inappropriate forum if it is fairly arguable that the substantive law of the forum is applicable in the determination of the rights and liabilities (including the extent of liability) of the parties'.

[33] The factors to be considered in the *Voth* test include those enumerated by Lord Goff in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] 1 AC 460, 477-78, 482-84 ('*Spiliada*').

[34] See *Voth*, [1987] 1 AC 460, 556-57. For further discussion see Richard Garnett, 'Stay of Proceedings in Australia: a "Clearly Inappropriate" Test?' (1999) 23(1) *Melbourne University Law Review* 30 ('*Garnett*').

[35] *Eurogold Ltd v Oxus Holdings (Malta) Ltd* [2007] FCA 811, 44, 48, 60 (Siopsis J).

[36] However it appears Australian courts have demonstrated their inclination towards finding choice of clauses exclusive.[37] In *FAI General Insurance Co Ltd v Ocean Marine Mutual Protection and Indemnity Association*,[38] Giles J found that the jurisdiction clause providing that '[t]his Reinsurance is subject to English jurisdiction' was exclusive and buttressed by the choice of law clause stipulating English law was applicable.[39] In favouring an exclusive interpretation of the choice of court agreement, Australian courts essentially confer the right to an applicant to litigate in the selected forum[40] rather than merely insisting that the other party may not oppose jurisdiction of another forum seized of the matter.[41]

This position is in contrast with other common law countries such as the United States[42] and Canada[43] which appear to presume choice of court agreements to be non-exclusive, absent express words to the contrary. Thus it is not only the distinction between exclusive and non-exclusive choice of court agreements adopted by Australian courts that lead to divergent outcomes.[44] It is also the tendency to regard ambiguous choice of court clauses as exclusive that further produces inconsistent results in international litigation vis-à-vis other state courts.

2. Applying a Jurisdiction Clause: the Different Tests

Once the nature of a jurisdiction clause is determined, the application for the enforcement of a FJC may still be faced with difficulties. In deciding whether to accept or refuse jurisdiction, an Australian court will apply different standards depending on whether the jurisdiction clause in question is exclusive or non-exclusive. This can cause considerable confusion for foreign litigants especially those originating from civil law traditions whose courts are inclined

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[36] *FAI General Insurance Co Ltd v Ocean Marine Mutual Protection and Indemnity Association and Another* (1997) 41 NSWLR 117, 126 (Giles CJ).

[37] See e.g. Ibid; *McGuid v Office De Commercialisation et D'Exportation* [1999] NSWSC 931 (*'McGuid'*); *Armacel Pty Ltd v Smurfit Stone Container Corporation* [2008] FCA 592, 88 (*'Armacel v Smurfit'*).

[38] See above n 36.

[39] It appears in Australia that if both the applicable law to the contract and choice of court clause select the same State, the jurisdiction agreement is more likely to be considered as exclusive in nature. See for instance *Gem Plastics v Satrex Marine* (1995) 8 ANZ InsCas 61-283. Cf *Constructors v MTE Control Gear Ltd* (1964) SASR 47.

[40] Although there is a tendency to regard jurisdiction clauses as exclusive, Australian courts also consider the circumstances surrounding the contract. See *FAI General Insurance* (1997) 41 NSWLR 117; *McGuid* [1999] NSWSC 931, 49.

[41] Andrew Bell, 'Forum Shopping and Venue in Transnational Litigation', *Oxford Private International Law Series*, (Oxford University Press, 2003) 306.

[42] In *K & V Scientific Co. v. Bayerische Motoren Werke Aktiengesellschaft*, 314 F.3d 494 (10th Cir. 2002), the Court held that 'where venue is specified with mandatory or obligatory language, the clause will be enforced; where only jurisdiction is specified, the clause will generally not be enforced unless there is some further language indicating the parties' intent to make venue exclusive'. Discussed in V Nanda, 'International Academy of Commercial and Consumer Law Changing Law for Changing Times, 13th Biennial Meeting: The Landmark 2005 *Hague Convention* on Choice of Court Agreements' (2007) 42 *Texas International Law Journal* 773, 779. See also *The Pacific Senator* [2001] 2 Lloyd's Rep 674, 676-77.

[43] Similarly, in Canada, the Court of Appeal for British Columbia in *Old North State Brewing Company Inc v Newland Services Inc* [1999] 4 WWR 573, 36 held that '[w]hen both parties articulate their commitment to a forum, absent the express intention to render that forum one of exclusive jurisdiction, such a clause will be interpreted as necessarily conferring concurrent [i.e. non-exclusive] jurisdiction'. Cf *BC Rail Partnership v Standard Car Truck Co*, (2003) BCCA 597; *B.A. Blacktop Ltd v Gencor Industries Inc,* (2008) BCSC 231.

[44] Unlike some jurisdictions that deem all choice of court clauses to be exclusive in nature, an Australian court will treat a jurisdiction agreement between parties differently. The Brussels I Regulation similarly distinguishes between the two types of jurisdiction clauses by providing in Article 23 that a choice of court agreement 'shall be exclusive unless the parties have agreed otherwise'.

to treat jurisdiction clauses as exclusive.[45] As discussed earlier, an Australian court requires 'strong causes' before it refuses to enforce an exclusive jurisdiction clause.[46] A stay of proceedings based on a Non-EJC on the other hand will be considered on the basis of whether the court seized is clearly inappropriate.

However, matters are further complicated when Australian courts conflate the 'strong causes' test applied to EJCs (which requires a higher threshold) and the balance of convenience assessment undertaken for non-EJCs. Significantly, Brennan J in *Oceanic Sunline Shipping* noted that:

> A case where the plaintiff seeks the exercise of discretion to refuse to give effect to a contractual stipulation that a nominated court should have exclusive jurisdiction requires justification of a different order from that required in a case where the plaintiff has simply chosen to sue in one forum rather than another, both being available to him.[47]

As such it is important to observe the difference between an application for a stay of proceedings to enforce an EJC and one 'on which a stay is sought on the principle of *forum non conveniens*'.[48] Nevertheless, Australian courts have applied the standard for Non-EJCs in a number of cases concerning EJCs.[49] In *Clough Engineering Ltd v Oil and Natural Gas Corporation Ltd*, when determining whether an EJC should be enforced (the matter was heard in the Courts of India) Gilmour J considered various factors which he held 'on balance, favour[ed] a view arguably that this Court is not a *clearly inappropriate forum*' (emphasis in original).[50] The court in this instance appears to have applied the *forum non conveniens* test.

This approach is misguided as the 'strong causes' test requires compelling or countervailing reasons to preclude the application of an EJC. In contrast, the clearly inappropriate test reduces a choice of court agreement to one consideration among many others in the balance of convenience assessment. While it may appear that there is in fact little practical difference and thus no real basis for maintaining the distinction in the tests applied to EJCs and Non-EJCs,[51] the High Court's decision in *Akai* makes it clear that the distinction is still a live issue.[52] More recently, the case of *Dance With Mr D Limited v Dirty Dancing Investments Pty Ltd* appears to confirm the prevailing view that where a plaintiff commences proceedings in breach of an EJC 'such an application is not to be assimilated to cases where a stay is sought on the principle of forum non conveniens, nor is it a matter of

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[45] In the European Union, Article 23 of the Brussels I Regulation provides that the jurisdiction of a court selected in a choice of court agreement 'shall be exclusive unless the parties have agreed otherwise'.

[46] See discussion above n 23.

[47] *Oceanic Sun Line Shipping* (1988) 165 CLR 197 22, 230-231. Affirmed in *Akai* (1996) 188 CLR 418, 428 (Dawson and McHugh JJ).

[48] *Akai* (1996) 188 CLR 418, 428.

[49] *Lep International v Atlanttrafic Express Service* [1987] 10 NSWLR 614; *Clough Engineering Ltd v Oil & Natural Gas Corporation Ltd* [2007] FCA 881.

[50] Ibid 40.

[51] With regards to an EJC, the court looks to the factors set out by Brandon LJ in *The Eleftheria* [1970] 94, 99-100. This is similar to the factors for Non-EJCs set out by Lord Goff in *Spiliada* [1987] 1 AC 460, 477-8, 482-4 and adopted in *Voth* (1990) 171 CLR 538. They both look to connecting factors such as: (i) the convenience and expense of conducting a trial; (ii) what country either party is connected to and how closely; (iii) the governing law; and (iv) whether there would be a loss of legitimate juridical advantage to the plaintiff if the FJC is enforced. See *Gem Plastics Pty Ltd v Satrex Maritime t/a South African Express Line* (Unreported, NSW Supreme Court, Rolfe J, 9 June 1995) which suggests that the principles in *The Eleftheria* have been subsumed by the *Voth* test.

[52] *Akai* (1996) 188 CLR 418, 445. Discussed in Garnett, above n 34, 50, 63.

mere convenience'.[53] The inconsistent and confusing approach demonstrated by Australian courts undermines predictability and certainty in international litigation.

3. Enforceability of an Exclusive and Non-Exclusive Jurisdiction Clause

It is not only the distinction between the two types of clauses that affects its enforceability but also the court deciding it. Even common law courts, sharing a similar legal tradition, reach opposing outcomes on the same clause. In *Armacel v Smurfit,*[54] a license agreement between Armacel and Smurfit provided in Clause 21.3.1 that the Agreement was to be read and construed 'according to the laws of the State of New South Wales, Australia and the parties submit to the jurisdiction of that State'. It further provided that in the event of any dispute arising out of the Agreement, 'the parties will attempt to mediate the dispute in Sydney, Australia'. However, one month before the plaintiff filed its application in the Federal Court of Australia (FCA) claiming breach of contract and damages under Section 82 of the *Trade Practices Act 1974* (Cth), the Defendant had filed proceedings in the United States District Court seeking negative declaratory relief. Despite bringing a motion in the US courts to dismiss proceedings on the basis it lacked jurisdiction, the District court rejected Armacel's contention and held that the jurisdiction clause was non-exclusive in nature.[55] Even though Jacobson J noted that he would have considered the jurisdiction clause as exclusive, Armacel was barred from challenging the issue in Australian courts by issue estoppel.[56] Accordingly, the FCA would not grant an anti-suit injunction against Smurfit as it would be 'invidious and the reverse of comity'.[57] Thus, in the absence of a harmonised approach to the enforcement of choice of court agreements, it appears that a jurisdiction clause is only as exclusive as the court interpreting it.

4. Practical Implementation of Foreign Jurisdiction Clauses

Although Australian courts are inclined to interpret ambiguous FJCs as exclusive, this has not necessarily enhanced the effectiveness of choice of court agreements. According to empirical studies Australian courts have in recent times become less inclined to enforce jurisdictional agreements than their previous records show.[58] It is highlighted that between 1991 and 2001 foreign jurisdiction agreements were enforced in 11 out of 19 cases.[59] However in the period between 2001 and 2008, the courts only enforced the choice of court agreements in one out of the 9 cases of litigation.[60] It is therefore a matter of concern that choice of court agreements have not been as strictly enforced as they used to be.

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[53] *Dance with Mr D Limited v Dirty Dancing Investments Pty Ltd* [2009] NSWSC 332, 89 (Hammerschlag J).

[54] Above n 37.

[55] Ibid 5-7.

[56] Ibid 66-8. In finding that Clause 21.3.1 was exclusive, Jacobson J held that it must be understood in the context that 'this was a contract made between business people negotiating at arms' length who must be presumed to have intended some certainty as to where their disputes would be litigated. It is therefore difficult to see why they would not have intended that all their disputes be resolved in New South Wales' (at 88).

[57] Ibid, 88-90, 125-6.

[58] M Keyes, *Jurisdiction in International Litigation* (Federation Press, 2005) 149.

[59] Ibid168.

[60] M Keyes, 'Jurisdiction under the Hague Choice of Courts Convention: its Likely Impact on Australian Practice' *University of Southern Queensland Colloquium on the Choice of Courts Convention Conference Papers* (October 2008).

E. The Need for a New Regime

The difficulties faced in applying and enforcing jurisdiction clauses in Australia, canvassed above, suggests a real need to review the current law on enforcing jurisdiction agreements. The following Part explores the role the *Hague Convention* can play in trying to ameliorate the jurisdictional quandary in Australia.

3. The Hague Convention as an Alternative Regime

The ambiguity in Australian jurisdictional principles, as discussed in Part 2, suggests the need to review the current law. The *Hague Convention* provides clear and predictable rules in the resolution of civil and commercial disputes and the following discussion considers whether it can indeed improve the current practices in Australian law and the possible ways forward. [61]

The International Chamber of Commerce for one has urged national governments to ratify the Hague Convention as 'it go[es] a long way to reduce the workload of courts and the expense to businesses of long court battles over essentially procedural points'.62 Such a regime clarifies the uncertainty involved in registering foreign judgments which arises from the unfamiliarity with foreign legal process. In addition, it would also reduce transactional costs involved.

A. Jurisdictional Rules under the Hague Convention

Choice of court agreements are given their fullest effect when there is effective enforcement. This can be achieved by a renewed recognition of party autonomy as well as a clear comprehensive framework that will assist courts in their interpretation and application of a jurisdiction agreement.

1. Exclusive Jurisdiction – Article 3

The first aspect of the Convention is that choice of court agreements are exclusive unless the parties 'have expressly provided otherwise'.[63] Even if a jurisdiction clause fails to expressly mention that it is exclusive in nature, it will be treated as such where there are no words to the contrary.[64] Therefore, a jurisdiction clause must not leave doubt to its nature to be considered non-exclusive in nature. For instance:

- The courts of State X shall have non-exclusive jurisdiction to hear proceedings under this contract;

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[61] It should be noted that the *Hague Convention* only applies where the case is, pursuant to Article 1(2) of the Convention, international in nature. Therefore, internal rules of private international law that govern the Australian federal system will not be affected. In Australia, the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth) applies at a Commonwealth level while relevant state legislation also provides a mechanism to transfer matters between States. R. Garnett, 'The Internationalisation of Australian Jurisdiction and Judgments Law' (2004) 25 *Australian Bar Review* 205, 213-4.

[62] 'ICC Urges Governments to Ratify Hague Choice of Court Convention', *ICC's Commission on Commercial Law and Practice,* Paris (18 October 2007) accessed online at <http://www.iccwbo.org/policy/law/icccafdg/index.html>.

[63] *Hague Convention*, art 3(b).

[64] See discussion in TC Hartley and M Dogauchi, 'Explanatory Report to the Convention of 30 June 2005 on Choice of Court Agreements' [108].

- Proceedings under this contract may be brought before the courts of State X, but this shall not preclude proceedings before the courts of any other State, having jurisdiction under its law;
- Proceedings under this contract may be brought before court A in State X or court B in State Y, to the exclusion n of all other courts; and
- Proceedings against A may be bought exclusively at A's residence in State A; proceedings against B may be brought exclusively at B's residence in State B.[65]

While not exhaustive, these examples establish a common standard when determining the nature of jurisdiction clauses. This prevents inconsistencies between courts which may exercise their discretion differently; in *Armacel*, where despite having similar legal traditions, the US and Australian courts reached different conclusions on the nature of the same jurisdiction agreement.[66] However it should be noted that the scope of application of the Convention does not, in principle, extend to Non-EJC.[67] Thus, a court of a Contracting State which has been seized but not chosen will not be limited by Article 6 of the Convention and consequently may adjudicate the dispute. Nonetheless, states may make reciprocal declarations under Article 22 of the Convention for the recognition and enforcement of judgments given by a court designated in a non-exclusive choice of court agreements.[68]

2. Obligations of a Court – Articles 5 and 6

The *Hague Convention* also establishes that the court selected by parties must hear the case if the choice of court is valid according to the standards established by the Convention (Article 5).[69] On the other hand, any court seized but not chosen must dismiss the case unless one of the exceptions established by the Convention applies (Article 6). Under these rules, a court selected by parties remains exclusive and has priority in determining jurisdiction even when another court has been first seized. A jurisdiction agreement is thus effectively enforced and perhaps more importantly, a party will not be faced with dilatory risks of a system based on mechanical chronological preference.

This means that if an Australian court has been seized but not chosen, it must refuse jurisdiction pursuant to its obligations under Article 6 of the Convention. Although such a court may retain jurisdiction under some circumstances prescribed under the Convention[70], common law courts cannot exercise their discretion as they are bound by imperative obligations. In fact, Article 5(2) precludes the application of a *forum non conveniens* doctrine and

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[65] Ibid.

[66] See above n 37. The approach under the *Hague Convention* not only ensures certainty and predictability but will also broaden the scope of application of the Convention because it will not only apply to those jurisdiction clauses that are expressly exclusive but also those that are ambiguous.

[67] *Hague Convention*, art 1(1).

[68] Article 22 allows Contracting States to make reciprocal declarations for the recognition and enforcement of judgments given by a court designated in a non-exclusive choice of court agreements.

[69] The obligation placed on courts of Contracting States to accept jurisdiction when they have been designated as the selected forum by parties (Article 5) is not absolute. Article 19 provides that such a State may enter into a declaration that its court may refuse jurisdiction if there is no connection between that State and the parties or the dispute. This provision ensures that a State is not compelled to hear a case that has no connection to it just because parties have selected the court in their agreement.

[70] The obligation of a court not chosen to suspend or dismiss proceedings (Article 6) will also not be enforced if the exceptions in Article 6(a)-(e) applies.

this prevents unpredictable outcomes by courts exercising discretion to hear and determine cases which may be peculiar to their legal system.

While these obligations may vary the existing jurisdictional rules in Australia, a unified and harmonised approach will be beneficial for several reasons. First, ratification of the Convention by a common law country like Australia means a codification of the laws on jurisdictional issues, and on recognition and enforcement of resulting judgments. Secondly, apart from facilitating access and interpretation of the law for both practitioners and international litigants, the succinct and cogent provisions provide the necessary legal rules to be applied by courts of Contracting States. For instance, there are clear rules to apply when the formal and substantive validity of a choice of court clause is assessed.[71] These rules ensure that jurisdictional issues in courts of Contracting States will be treated with the same deference. Thirdly, the Convention also prevents any confusion that might arise from applying the strong cause and clearly inappropriate test, which in itself have often been conflated, when determining whether or not a court should grant a stay of proceedings.

3. Validity of a Choice of Court Clause

Article 3(c) of the Convention sets out in clear terms the formal requirements for a valid choice of court agreement. Meanwhile, Articles 5(1) and 6(a) provide that the validity of an exclusive jurisdiction clause is to be determined by the law of the state of the chosen court.[72] A reference to the law of the state of the chosen court is favourable because, in conjunction with Articles 5(1) and 6(a) of the Convention, it prevents the possibility of vexatious litigants who may intentionally institute proceedings in a forum whose law may be less inclined to find a jurisdiction clause valid. While the application of the law governing the contract may appear at first glance to be the best solution, it is complicated by the preliminary assessment required to be undertaken in order to determine the validity of the putative law chosen, especially in the absence of a choice of law by the parties. Accordingly, it appears that the law of the court chosen is better suited to determine whether a jurisdiction agreement is valid.

The Convention also provides, under Article 3(d), severability of the jurisdiction clause from the main agreement. Thus, it is considered a legally separate and independent agreement and hence will not be found invalid. Even where the main contract is found null and void whether on grounds of mistake, duress, fraud or through the operation of a mandatory rule of the forum, the dispute can still be adjudicated in the designated forum.[73]

These rules on validity are similar to those in Australia which applies the proper law of the agreement to determine issues of validity[74] while also recognising separability of a jurisdiction clause from a main contract found to be voidable.[75] The signature and ratification of the *Hague Convention* therefore not only enhances effectiveness of choice of court agreements but is consistent with and compatible to the existing regime.

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[71] Further discussed in the following paragraph.

[72] The European Union in contrast only provides formal rules on validity under Article 23 of the Brussels I Regulation to determine validity of a clause.

[73] Discussed in Richard Garnett, 'The Internationalisation of Australian Jurisdiction and Judgments Law' (2004) 25 *Australian Bar Review* 205, 207.

[74] *Mackender v Feldia AG* [1967] 2 QB 590; *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1992] 1 Lloyd's Rep 81, 91. See also R. Mortensen, *Private International Law in Australia*, (LexisNexis Butterworths, 2006) 101.

[75] *FAI General Insurance Co Ltd v Ocean Marine Mutual Protection and Indemnity Association and Another* (1997) 41 NSWLR 559, 568.

4. Intellectual Property Rights (IPRs), Consumer, Employment Contracts

Article 2 provides a list of subject matters which are excluded from the Convention, including matters such as family law, wills, insolvency, anti-trust and rights in immovable property[76] as well as arbitration and related proceedings.[77] Hence, for the most part, a ratification of the *Hague Convention* is unlikely to make significant changes in areas that a State traditionally has protective jurisdiction over. For instance, Article 2(1) of the *Hague Convention* excludes consumer[78] and employment[79] contracts from its scope of application as they are the types of contracts that are usually deemed to be susceptible to an imbalance of bargaining power. Three particular issues deserve attention from an Australian perspective.

First, while consumer contracts have been excluded under Article 2(1)(a) of the Convention, small businesses and individuals acting in the course of a business[80] do not fall under this exception.[81] Thus, this group of individuals will still be bound by a jurisdiction agreement even if they may acquire goods and services and enter into the consequent contract without proper contemplation (whether due to time or practical constraints).[82] While Australian courts may be eager to extend protective jurisdiction over such vulnerable parties, it must be noted that the discussions between states on which parties were deemed to be weaker and therefore excluded from the scope of application were extremely protracted and difficult.[83] The exceptions outlined in Article 2 therefore represent a consensus reached after thorough discussions and should be adhered to as the common standard, even if certain groups of individuals are excluded. Further the statistics indicate that, in Australia, 83.33 per cent of the plaintiffs and 95.83 per cent of the defendants involved in foreign jurisdiction clauses were corporations.[84] Any concern Australia may have for certain weaker parties must hence be tempered by the fact that due consideration has been given to the matter and that parties involved in international commercial litigation are usually corporations.

Secondly, it must be noted that Article 17 extends the scope of the Convention to insurance and re-insurance contracts. Although other legal instruments may exclude insurance contracts from its rules on jurisdiction,[85] 'proceedings under a contract of insurance or reinsurance are not excluded' from the scope of application of the *Hague*

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[76] *Hague Convention*, art 2(a)-(p).

[77] Ibid, art 2(4).

[78] Ibid, art 2(1)(a).

[79] Ibid, art 2(1)(b).

[80] The Explanatory Report above n 64, [50] notes that commercial agreements where one party is an individual acting in the course of his business does not fall under the consumer contract exception under Article 2(1)(a) of the *Hague Convention*.

[81] JJ Spigelman, 'The Hague Choice of Court Convention and International Commercial Litigation' (2009) 83 *Australian Law Journal* 386, 391. See also Spigelman, 'Transaction Costs and International Litigation' (2006) 80 *Australian Law Journal* 438, 451.

[82] Ibid. Spigelman refers to both online purchase agreements where consumers are faced with a 'yes' or 'I agree' button as well as 'shrink-wrap licenses' that are contained on or inside a software box capable of being read only after purchase.-

[83] See *Hague Conference of Private International Law*, '*Hague Convention* of 30 June 2005 on Choice of Court Agreements', Preliminary Document No 7 of April 1997, No 13 of April 2001, No 14, No 15 of May 2001, No 20 of November 22, No 22 of June 23 & No 24 of December 2003, accessed online at <http://www.hcch.net/index_en.php?act=conventions.publications&dtid=35&cid=98>.

[84] See above n 58, 157.

[85] Section 3 of the Brussels I Regulation provides specific rules to determine jurisdiction of a court in an insurance contract.

Convention.[86] It is unlikely however that the perceived weaker party (i.e. the policyholder) will—under the Convention—be forced into a jurisdiction agreement which is disadvantageous to them.[87] This is because those vulnerable policyholders are likely to also fall within the consumer exception under Article 2(1)(a) of the Convention and hence within the protective jurisdiction of each Contracting State.[88] As such, an Australian court can be assured that the rights of those insured[89] will be preserved despite the application of Article 17 of the Convention.

The third issue to be considered is the benefit from the increase in the recognition and enforcement of judgments of certain IPRs. While the Convention excludes IPRs from its scope of application (to prevent its rules from being applied to determine the validity of registrable IPRs such as patents, trademarks and designs), it does not exclude questions of validity of copyright and related rights as well as infringement of such rights.[90] As such the recognition of IPRs by Australian courts will be enhanced as the number of jurisdiction agreements dealing with copyright and related rights which stand to be enforced under Australian law increases.[91]

If however Australia continues to have 'a strong interest in not applying this Convention to [the] specific matter[s]' discussed above, it can make a declaration under Article 21(1) with regards to either copyright and related rights in Article 2(2)(n) or insurance contracts in Article 17 of the Convention.[92] Upon making such a declaration, the *Hague Convention* will not apply between Australia and any other Contracting State where the specific subject matter is concerned.[93]

5. Mandatory Rules

The ratification of the *Hague Convention* is also likely to have an impact on the enforcement of mandatory rules. Traditionally under Australian law, an Australian court may refuse the

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[86] *Hague Convention*, art 17(1).

[87] The 'Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters', COM(2009) 174 Final, Brussels 21.4.2009 ('EC Impact Assessment Report') suggests that this forms the basis for the protective nature of jurisdictional rules on insurance contracts under the Brussels I Regulation.

[88] Although Article 17(1) of the Convention provides that contracts of insurance or reinsurance will not be excluded just because it may relate to a matter to which the Convention does not apply, this provision refers to situations where the subject matter is itself outside the scope of the Convention. In this case, a policy holder subject to unilateral or oppressive terms of the insurance contract is not the subject matter of the contract but a contracting party. Such a policy holder is arguably a consumer within the meaning of Article 2(1)(a) as a consumer and thus the jurisdiction agreement will not apply. This is to be distinguished from an instance where an insurance contract insures against the risk involved in the carriage of goods. In this example, the jurisdiction agreement contained therein will still apply despite Article 2(2)(f) of the Convention according to Article 17(1).

[89] See *Insurance Contracts Act 1984* (Cth).

[90] *Hague Convention*, art 2(2)(n)-(o).

[91] R Garnett, 'The Hague Choice of Court Convention: Magnum Opus or Much Ado About Nothing?' (April 2009) *Journal of Private International Law* 161, 163-4; R. Garnett, above n 73, 210.

[92] Small businesses and individuals in the course of business is not a discrete area of the law capable of being excluded under the Convention. This is because it does not fall within a specified subject matter and as a result will be too broad and is not sufficiently clear or defined. See Explanatory Report above n 64, 234.

[93] Anthony Aust, '*Modern Treaty Law and Practice*' (Cambridge University Press, 2nd ed, 2007) 143. According to empirical studies conducted by M. Keyes (above n 58, 156) the most commonly invoked local substantive legislation in cases involving the exercise of jurisdiction was the *Trade Practices Act*, referred to in 30.3 per cent of cases.

enforcement of a choice of court agreement where its enforcement will, more likely than not, result in the loss of a legitimate juridical advantage of one of the parties.[94] For instance, a party may argue that hearing the matter in the designated court outside Australia denies him the protection conferred under section 52 of the *Trade Practices Act 1974* (Cth).[95] Similarly, Article 11 of the *Carriage of Goods by Sea Act 1991* (Cth) prohibits parties from using 'an agreement (whether made in Australia or elsewhere) [to] preclude or limit the jurisdiction' of Australian courts.

However, it is unclear whether these mandatory rules fall within the exception under Article 6(c) of the Convention which allows for a court not chosen to accept proceedings, despite a jurisdiction agreement to the contrary.[96] The effect of enforcing the choice of court agreement must be such that it leads to a 'manifest injustice' or would be 'manifestly contrary to the public policy of the State'. Significantly, the Explanatory Report has highlighted that:

> [t]he concept of public policy refers to... the interests of the public at large- rather than the interest of any particular individual... The standard is intended to be high: the provision does not permit a court to disregard a choice of court agreement simply because it would not be binding under domestic law. [97]

The examples alluded to in the Explanatory report refer to instances of bias or corruption and fraud. While it is not clear whether a party's loss to a right under a local statute is sufficiently grave to be manifestly contrary to public policy,[98] it is reasonable to conclude that the non-application of section 52 of the *Trade Practices Act* would deprive a plaintiff legitimate juridical advantage and therefore, at the very least, lead to manifest injustice.

B. Preliminary Conclusion

It appears that the *Hague Convention* does indeed clarify the uncertainties that arise in international jurisdictional disputes, especially where Australian courts attempt to determine the nature and apply jurisdiction clauses. It establishes a common standard and promotes predictability by circumscribing the discretion that courts can exercise. This enhances the effectiveness of jurisdiction agreements.

The value in ensuring that jurisdiction clauses are effective is adduced by a survey conducted by the International Chamber of Commerce (ICC).[99] Of the companies surveyed, 41 per cent indicated that uncertainty regarding which court would resolve the dispute and the law that would apply to the contract has affected a significant business decision of their

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[94] Australian courts have demonstrated a tendency to refuse the application of a choice of court agreement to preserve the rights conferred onto a party under section 52 *Trade Practices Act*. See *Akai* (1996) 188 CLR 418; *Commonwealth Bank of Australia v White* [1999] 2 VR 861, 704-05; *Clough Engineering* [2007] FCA 881.

[95] It provides that '[a] corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.'

[96] Under Article 6(c), a court of a Contracting State other than that of the chosen court will not have to suspend or dismiss proceedings to which an exclusive choice of agreement applies where giving effect to the agreement would lead to manifest injustice or would be manifestly contrary to the public policy of the State of the court seized.

[97] *Explanatory Report*, above n 64 [151].

[98] If section 52 of the *Trade Practices Act* were to constitute public policy, this means that any decision made by the court of a Contracting State which may have views contrary to Australia's regarding 'misleading and deceptive conduct' can be refused recognition and enforcement. While the rule certainly cannot be derogated from by contract (i.e. a mandatory rule), it is unlikely to constitute public policy within the meaning given to it under the *Hague Convention*.

[99] 'ICC Survey regarding business practices on jurisdictional issues' (2003). Copy available with author.

company. To this end, it becomes apparent that enhancing enforcement of choice of court agreements not only underscores the practical relevance in international commerce but will also encourage the recognition and enforcements of judgments not only to a particular region but globally.

It appears therefore that the Convention will prove to be a valuable instrument in providing a more comprehensive regime to determining jurisdictional issues in Australia in the face of foreign jurisdiction agreements.

4. Recognition and Enforcement in Australia

The provisions of the *Hague Convention* which seek to replicate the recognition and enforcement mechanism of the *New York Convention* is arguably one of the greatest advantages in ratifying the *Hague Convention*. An international framework to recognise and enforce judgments not only expedites proceedings but additionally reduces the transactional costs and delays normally associated with international litigation. Admittedly, the practical application of the Convention only extends to judgments resulting from exclusive jurisdiction clauses but a study by the American Bar Association (ABA) has found that 98 per cent of economic operators surveyed found that such a Convention would be useful for their economic practice. Hence while the practical effect of harmonisation of rules regarding recognition and enforcement of foreign judgments may not extend to all types of decision, their potential utility should not be underestimated.[100]

A. The Australian Regime

The enforcement of foreign civil judgments in Australia is governed by the *Foreign Judgments Act 1991* (Cth). It ensures that where arrangements for mutual recognition have been made, 'substantial reciprocity of treatment will be assured' in the recognition and enforcement of foreign judgments from both superior and inferior courts.[101] The common law rules also provide for the enforcement of money judgments as a debt action.[102] The enforcement of a money judgment under the common law, as also set out under the *Foreign Judgments Act*,[103] can be resisted by establishing the relevant defences. They include instances where the judgment was obtained by fraud,[104] a denial of natural justice[105] or that recognition or

[100] 'Survey conducted by the ABA Section of International Law' (ABA Working Group on the *Hague Convention* on Choice-of-Court Agreements) in October/ November 2003.

[101] *Foreign Judgments Act 1991* (Cth) ss 5(1), (3), (6).

[102] For a money judgment to be recognised under the common law and enforced against the judgment debtor, four requirements must be met: (i) the foreign court must have 'international jurisdiction'; (ii) the foreign judgment must be final and conclusive; (iii) the judgment must be for a fixed or readily calculable sum and (iv) the parties to the foreign court and the parties in the enforcements proceedings are identical. R. Mortensen, above n 74.

[103] Above n 101, s 7.

[104] Some common law courts have allowed for the defence of fraud to relate to substantive matters such as perjury or the falsification of documents even where the matter had already been adjudicated by a foreign court, i.e. it essentially allows the merits of the case to be argued. English cases such as *Abouloff v Oppenheimer* (1882) 10 QBD 295; *Vadala v Laws* (1890) 25 QBD 310; *Jet Holdings Inc v Patel* [1990] QB 335 demonstrate that the defence of fraud is not limited to matters that arise in evidence only after the foreign judgment is rendered. The courts in New Zealand adopt this same approach (*Svirkis v Gibson* [1977] 2 NZLR 4, 10) although Canadian courts restrict the defence of fraud to only on extrinsic evidence/procedural matters (*Jacobs v Beaver* (1908) 17 Ont LR 496, 506; *McDougall v Occidental Syndicate Ltd* (1912) 4 DLR 727; *Manolopoulos v Pnaiffe* [1920] 2 DLR 169).

[105] *Barclays Bank Ltd v Piacus* [1984] 2 Qd R 476.

enforcement of the foreign judgment would be manifestly contrary to the public policy of the court.[106]

Generally, if a foreign money judgment originates from a country whose superior courts have been proclaimed under the *Foreign Judgments Act*, there will be substantial reciprocity and an application can be made to have the judgment recognised and enforced. If however the foreign judgment does not come from a court proclaimed under the *Foreign Judgments Act*, then the common law principles will apply.[107]

B. Scope of the Convention

The application of the Convention is however limited to foreign judgments made by courts designated under the jurisdiction agreement. Therefore, courts of Contracting States are not compelled to recognise those judgments which do not involve a choice of court agreement or where there has been refusal to enforce the jurisdiction agreement.

The Convention further extends its scope to non-monetary judgments such as injunctions.[108] This is because a 'judgment' is defined under Article 4(1) of the Convention to not only include a decision on the merits but additionally 'a decree or order... provided that the determination relates to a decision on the merits'.[109] Thus, as long as a judgment is not an interim measure of protection, it must be recognised and enforced between Contracting States of the Convention.

C. Recognition and Enforcement under the Hague Convention

The *Hague Convention* obliges a Contracting State to recognise and enforce any judgment by the court of another Contracting State designated by a choice of court agreement (Article 8). This duty for mutual recognition of judgments can only be derogated from if the grounds for refusal are established (Article 9). These grounds include the situation where the jurisdiction agreement was found to be null and void under the law of the chosen court, if a party lacked the capacity to enter into the agreement, if a judgment was obtained by fraud or where considerations of public policy apply. The procedural defence under section 7(2)(v) of the *Foreign Judgments Act*, which assures the right of a judgment debtor to receive notice of proceedings in sufficient time to enable sufficient time to arrange for a defence, is also reflected under Article 9(c) of the Convention.

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[106] A foreign judgment on a tax matter has been seen to be against public policy. See for e.g. *Government of India v Taylor* [1955] AC 491.

[107] It should be noted however that 'judgment' as defined under section 3(1) of the *Foreign Judgments Act* encompasses a broader meaning than at common law as it includes 'a final or interlocutory judgment or order given or made by a court in civil proceedings'.

[108] It should be noted that if an injunction falls within Article 7 of the Convention as an 'interim measure of protection', a court of a Contracting State will not be required to be recognise and enforce such an order as it is not a 'judgment' within the meaning of Article 4(1) of the Convention. Although such injunctions may protect the position of one of the parties or are granted to facilitate enforcement of a judgment, there is no obligation to comply with Article 8 of the Convention if they are not permanent in nature, The *Explanatory Report*, above n 64, identifies (at para 160) temporary measures that fall outside the scope of the Convention and they include, *mareva* injunctions (freezing asset orders), interim injunctions prohibiting a defendant from acts which would infringe on the plaintiff's rights and an order for the production of evidence for use in proceedings before another court.

[109] See discussion in R. Garnett, above n 73, 224.

D. Refusal to Recognise and Enforce a Foreign Judgment

These principles generally do not depart from current Australian rules on allowing a judgment to be recognised and enforced where the requirements have been met.[110] However, as Garnett points out, the Australian standard on refusing to recognise and enforce a judgment obtained by fraud in the connection with a matter of procedure appears to be wider than the scope delineated under the Convention.[111] *Keele v Findley*[112] suggests that only fraud on procedural grounds can be used as a defence against the enforcement of a judgment. In the more recent case of *Yoon v Song,* Dunford J held that:

> I am not satisfied that *Keele v Findley* was correctly decided. Indeed the facts of this case demonstrate in my mind good reason for applying a different test of fraud in respect of foreign judgments to that applied in domestic judgments…[113]

In contrast under the Convention, refusing the enforcement of a judgment affected by fraudulent acts to the substance of the matter rather than to extrinsic evidence alone (e.g. perjured evidence resulting in a wrong result) essentially constitutes a review of the judgment on the merits.[114] This is because the exception against fraud under Article 9(d) of the Convention is limited to those 'in connection with a matter of procedure'. Nonetheless, it is arguable that Article 9(e) of the Convention accommodates for such situations as '[f]raud as to substance could fall under the public policy exception in Article 9*(e)*'.[115] Further, it is reasonable to assume that, as Article 9(d) is restricted to fraud relating to procedural matters, Article 9(e) must contemplate to encompass a wider meaning to include substantive fraud and not just extrinsic evidence. The public policy exception however is of a high standard and must not be invoked easily. It is therefore perhaps premature to make a decision in this matter because it appears to be unsettled in Australian law. Further, there is no indication under the Convention (at least until the law is applied) of how this exception is applied and as such it is difficult to anticipate how the defence of fraud will affect Australian courts in the recognition and enforcement of judgments.

E. Conclusion

The *Foreign Judgments Act* demonstrates the importance of enforcing foreign money judgments where sufficient reciprocity has been established.[116] The *Hague Convention* seeks to extend this regime for mutual recognition of foreign judgments based on a choice of court agreement. The Convention also widens the scope of foreign judgments that can be recognised and enforced to non-money judgments which further ensures that a judgment given to a business party in its favour will have effect in its intended place of enforcement. Article 22 of the

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[110] The equivalent requirements can be found under section 7 of the *Foreign Judgments Act 1991* (Cth).

[111] While the matter has not been fully considered by an appellate court, some cases like *Norman v Norman (No 2)* (1968) 12 FLR 39 and *Yoon v Song* (2000) 158 FLR 295 suggest that the defence of fraud against the enforcement of a foreign judgment in Australian courts is not restricted to extrinsic evidence alone - Discussed in R. Garnett, above n 73, 223. See for instance *Ahmed v Habib Bank* [2008] EWCA Civ 1270 where the English Court of Appeal held that fraud existed in the foreign proceedings even though the Pakistani court in its deliberation found otherwise.

[112] *Keele v Findley* (1990) 21 NSWLR 445.

[113] Ibid 300.

[114] Ibid.

[115] The Explanatory Report, above n 64, 188.

[116] The *Foreign Judgments Act* replaced the previous State and Territory legislation to allow for greater efficiency in the registration of foreign judgments in Australia. See *Yoon v Song* 158 FLR 295, 111, 298. Discussed in C. Hinchen and L. McKernan, 'Australia' in Lawrence Newman (ed), *Enforcement of Money Judgments* (JurisNet LLC, 2006).

Convention further widens the scope of application of the instrument by allowing for Contracting States to enter into declarations to recognise and enforce another Contracting State's judgments even if they are a result of non-exclusive choice of court agreements. The Convention thus not only creates a global framework to enforce judgments but also further extends the current reach of Australian law.

Conclusion

In light of ever increasing cross-border commercial transactions in today's global economy, the lack of consistent enforcement of foreign jurisdiction clauses in Australia can only lead to a greater level of uncertainty and unpredictability in international trade and litigation. The ratification of the *Hague Convention* seeks to clarify these jurisdictional rules by providing for a harmonised and uniform approach to the application and enforcement of choice of court clauses agreed between parties. It is pertinent to note that the very nature of the multi-lateral *Hague Convention* means it has been negotiated with countries globally and hence it is far-reaching in its potential application and recognition by other countries. Its benefits also extend beyond legal certainty but also promote economic efficiency.

As noted by Spigelman J:

> [r]atification of the *Hague Choice of Court Convention* can make a contribution to reducing the transaction costs and uncertainties associated with the enforcement of legal rights and obligations in international trade and investment.[117]

More importantly, if several of the world's largest economies and Australia's trading partners were to be parties to the Convention,[118] and Australia maintains its current position, it may pose as a barrier to international trade and commerce. Indeed, if Australia is not a Contracting State to the Convention, it will not be recognised under Articles 5 and 6, even if it is the designated court selected by parties. Accordingly, any resulting judgment will also have to be registered and enforced in foreign courts instead of obtaining enforcement under Articles 8 and 9. This makes Australia less attractive venue for international litigation.

As such, Australia stands to benefit from the ratification of the *Hague Convention* in an effort to harmonise jurisdictional rules which would promote legal certainty in commercial contracts as well as to secure recognition and enforcement of foreign judgments at a global level. Such measures seem particularly necessary in times of a global recession.

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[117] Above n 81, 388.

[118] To recall, the United States signed the Convention on 19 January 2009 and a subsequent signature from the European Community was received on 1 April 2009.