

WILL AUSTRALIA ACCEDE TO THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS?

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Choice of court agreements are a standard and important component of modern contracts. Recent events suggest that Australian principles of private international law in respect of choice of court agreements are about to change. In November 2016, Parliament's Joint Standing Committee on Treaties recommended accession to the Convention on Choice of Court Agreements through an 'International Civil Law Act'. The Convention applies in international cases to exclusive choice of court agreements concluded in civil or commercial matters. It contains three basic rules, each subject to exclusions and exceptions. First, where a court is designated in an exclusive choice of court agreement, that court is essentially obliged to exercise jurisdiction. Second, if a court is faced with an exclusive choice of court agreement in favour of another court, the court is obliged to decline to exercise its jurisdiction. Third, judgments made in proceedings giving effect to exclusive choice of court agreements must be recognised and enforced. This note briefly considers whether Australia will accede to the Convention and how accession could impact how Australian courts address exclusive choice of court agreements.

I INTRODUCTION

Parties litigate about where to litigate¹ because 'venue matters':² the identity of the forum in which a dispute is determined can have a substantive impact on the outcome of that dispute. Parties to a commercial transaction can take account of this risk by incorporating a choice of forum into their agreement. These 'choice of court agreements' are now a standard and important component of modern contracts.

Recent events suggest that Australian principles of private international law in respect of choice of court agreements are about to change. In November 2016, Parliament's Joint Standing Committee on Treaties recommended accession to the *Convention on Choice of Court Agreements* ('*Convention*').³ The *Convention* would be implemented through an 'International Civil Law Act'.⁴ This note briefly considers whether Australia will accede to the *Convention* and how accession could impact how Australian courts address exclusive choice of court agreements.⁵

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¹ *Spiliada Maritime Corp v Cansulex Ltd* [1987] 1 AC 460, 464 (Lord Templeman).

² Andrew Bell, 'Transnational Commercial Litigation and the Current State of Australian Law', in K Lindgren (ed), *International Commercial Litigation and Dispute Resolution* (Sydney University Press, 2010) 44–63; see also Andrew Bell, *Forum Shopping and Transnational Litigation* (Oxford University Press, 2003).

³ *Convention on Choice of Court Agreements*, opened for signature 30 June 2015, 44 ILM 1294 (entered into force 1 October 2015) ('*Convention*').

⁴ Joint Standing Committee on Treaties, Parliament of Australia, *Report 166 - Australia's Accession to the Convention on Choice of Court Agreements* (2016) ('*Report 166*').

⁵ Although the *Convention* came into force in 2015, it has been more than a decade since it was concluded. Other scholars have also considered how the *Convention* could impact Australian law; see, eg, Richard Garnett, 'The Internationalisation of Australian Jurisdiction and Judgments Law' (2004) 25 *Australian Bar Review* 205;

II THE CONVENTION

The *Convention* is a product of negotiations at the Hague Conference on Private International Law — an organisation dedicated to the international harmonisation of principles of private international law. It is a piecemeal solution directed to the broader problem of the overlapping jurisdiction of courts in respect of matters with a foreign element. The more ambitious ‘judgments project’, which continues to seek harmonisation of domestic principles on the exercise of jurisdiction and recognition and enforcement of foreign judgments, has had less success at the Hague Conference. The subject matter of the *Convention* is a sub-set of the judgments project on which members could agree. Broadly speaking, it was agreed that courts ought to respect exclusive choice of court agreements.

The *Convention* applies in international cases to exclusive choice of court agreements concluded in civil or commercial matters. It contains three basic rules. First, where a court is designated in an exclusive choice of court agreement, that court is essentially obliged to exercise jurisdiction.⁶ Second, if a court is faced with an exclusive choice of court agreement in favour of another court, the court is obliged to decline to exercise its jurisdiction.⁷ Third, judgments made in proceedings giving effect to exclusive choice of court agreements must be recognised and enforced.⁸

However, these basic rules are not absolute. For one thing, the *Convention* only applies to exclusive choice of court agreements selecting courts of contracting States. Currently, contracting States include the members of the European Union (but for Denmark, and subject to the Brexit-caveat for the United Kingdom), Mexico, and Singapore.⁹ From Australia’s perspective, the value of the *Convention* is undermined by the fact that our major trading relationships are with nations in the Asia-Pacific region, which are not contracting States. In its Report, the Joint Standing Committee noted that Singapore is the only Asian party, and that Asia is underrepresented at the Hague Conference.¹⁰ It should also be noted that the *Trans-Tasman Proceedings Act 2010* (Cth) already implements aspects of the *Convention* in relation to New Zealand.

It has been argued that the International Civil Law Act should be framed so that the core aspects of the *Convention* would apply to non-contracting States.¹¹ For example, Australian courts would be obliged to suspend or dismiss proceedings in light of an exclusive choice of a court in Hong Kong.¹² However, other things being equal, there would be no guarantee that a Hong Kong court would do the same in respect of an exclusive choice of an Australian court; this would depend on the private international law principles applicable in that place. Arguably,

Mary Keyes, ‘Jurisdiction under the Hague Choice of Courts Convention: Its Likely Impact on Australian Practice’ (2009) 5(2) *Journal of Private International Law* 181.

⁶ *Convention* art 5.

⁷ *Ibid* art 6.

⁸ *Ibid* arts 8, 9.

⁹ Hague Conference on Private International Law, *Status Table - 37: Convention of 30 June 2005 on Choice of Court Agreements* (21 January 2016) <<https://www.hcch.net/en/instruments/conventions/status-table/?cid=98>>.

¹⁰ *Report 166*, above n 4, 19 [3.4].

¹¹ Brooke Adele Marshall and Mary Keyes, Submission No 1 to Joint Standing Committee on Treaties, *Inquiry on Australia's Accession to the Hague Convention on Choice of Court Agreements*, 26 April 2016, 5; *Report 166*, above n 4, 22 [3.16].

¹² *Convention* art 6.

Australian parties to transnational contracts would suffer detriments under such an Act — being deprived of a potential juridical home advantage — without a reciprocal benefit.¹³

Another limitation on the *Convention*'s scope is that it only applies to *exclusive* choice of court agreements.¹⁴ Non-exclusive choice of court agreements are not captured, although this might not be as disappointing as has been suggested.¹⁵ This is because Article 3(b) provides that a choice of court agreement 'shall be deemed to be exclusive unless the parties have expressly provided otherwise'. The enactment of this presumption of exclusivity would provide welcomed clarity to Australian private international law, which currently relies on common law principles of contractual construction for the characterisation of exclusivity. Courts have implied exclusivity into choice of court agreements lacking express language to that effect.¹⁶ If this principle is communicated to parties at the negotiation stage of a deal, it could facilitate a more transparent allocation of risk in their contract.

Even when a choice of court agreement comes within the scope of the *Convention*,¹⁷ there is potential for a court of a contracting State to avoid application of the basic rules through the application of a number of exceptions. For example, there is no obligation to respect choice of court agreements that are null and void according to the law of the State of the chosen court.¹⁸ For courts that are not chosen, an important exception is in Article 6(c): the obligation to stay or dismiss proceedings does not apply if 'giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised'. This exception may prove to be critical to the *Convention*'s future within Australian law.

III WILL AUSTRALIA IMPLEMENT THE CONVENTION?

At the time of writing, it appears that an International Civil Law Act will come into existence in 2017. There seems to be strong support for accession within the Commonwealth Attorney-General's Department and from the Assistant Secretary, Andrew Walter.¹⁹ So far, the Department's recommendations have been well-received by the Government.²⁰ At the time of writing, the Department of Prime Minister and Cabinet identifies an 'International Civil Law Bill' which would implement the *Convention* as legislation proposed for introduction in the 2017 Winter Sittings.²¹

The *Convention* provides opportunity for contracting States to make various declarations, which have the potential to alter the scope of the core obligations.²² There are several areas in which Australia could make such a declaration, although it is not clear whether this will occur. Insurance contracts could justifiably be excluded from the scope of the International Civil Law

¹³ See also Michael Douglas, 'Choice of Court Agreements under an International Civil Law Act' (2017) *Journal of Contract Law* (forthcoming).

¹⁴ See *Convention* art 3.

¹⁵ Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford University Press, 2008) 529.

¹⁶ See, eg, *Ace Insurance Ltd v Moose Enterprise Pty Ltd* [2009] NSWSC 724 (31 July 2009).

¹⁷ Cf *Convention* art 2, which provides a long list of specific exclusions from the scope of the Convention.

¹⁸ *Convention* arts 5(1), 6(a).

¹⁹ See *National Interest Analysis: Australia's Accession to the Convention on Choice of Court Agreements* [2016] ATNIA 7.

²⁰ See Evidence to Joint Standing Committee on Treaties, Parliament of Australia, Canberra, 10 October 2016; *Report 166*, above n 4.

²¹ Department of Prime Minister and Cabinet, *Legislation Proposed for Introduction in the 2017 Winter Sittings* (2017) 2 <<https://www.pmc.gov.au/sites/default/files/publications/2017-winter-public-list.doc>>.

²² *Convention* arts 19–22.

Act, which would align Australia to the position of the European Union; this position was argued by Marshall and Keyes in their submission to the Joint Standing Committee's inquiry.²³ Protection of the vulnerable parties to insurance contracts is already a conspicuous feature of Australian private international law, in light of the High Court's judgment in *Akai Pty Ltd v Peoples Insurance Co Limited*,²⁴ which held that the *Insurance Contracts Act 1984* (Cth) ousted a choice of English court and English law. On the other hand, if no declaration is made in this area, Australian courts could potentially continue the *Akai* orthodoxy, even in the context of exclusive choice of court agreements within the scope of the *Convention*, by invoking the public policy exception in Article 6(c).

IV LOOKING FORWARD

What impact will the *Convention* have on Australian law? In the author's view, the most significant impact will be from the presumption of exclusivity. Exclusivity matters because it can have a material impact on how a court deals with an interlocutory piece of 'litigation about where to litigate'. Under common law principles, exclusive choice of court agreements in favour of foreign states, which are sometimes called 'derogation agreements', will ordinarily result in a stay of Australian proceedings in the absence of strong reasons.²⁵ This is because Australian courts are inclined to respect contracting parties' autonomy to determine their mode of dispute resolution. Accordingly, agreements which lack that quality of exclusivity are less likely to justify a stay. Conversely, in the case of an exclusive choice of an Australian court, ie, a 'prorogation agreement', an Australian forum might exercise its auxiliary jurisdiction in equity to aid the legal rights under the parties' agreement by restraining the commencement or continuation of foreign proceedings — deploying a so-called 'anti-suit injunction'.²⁶ The statutory presumption will therefore discourage costly litigation over contractual construction, and remove the courts' discretion to stay proceedings.

A question mark hangs over the manifest injustice/public policy exception in Article 6(c). In proceedings before the Joint Standing Committee, Andrew Walter adverted to the exception in the following passage:

The convention provides for certain narrow exceptions and qualifications to these three key obligations to address situations where the desirability of giving effect to a choice of court agreement might be overridden by other important considerations — for example, the convention contains safeguards to prevent the recognition of contractual clauses or the enforcement of foreign judgements that would be contrary to, or incompatible with, public policy in Australia. This approach strikes an appropriate balance between the core objective of the convention to enhance the circulation of civil and commercial judgements, and the need for contracting states to protect their fundamental sovereign rights.²⁷

It is not clear what forum policy would engage the exception. If Mr Walter's view is correct, then the exception would align the International Civil Law Act to the common law expressed in *Akai*, where the High Court held that a choice of court agreement would not be enforced if it is contrary to the 'policy of the law'.²⁸ In contrast, an Explanatory Note to the *Convention* provides that the exception 'does not permit the court seised to hear the case simply because

²³ Marshall and Keyes, above n 11, 12.

²⁴ (1996) 188 CLR 418.

²⁵ *Huddart Parker Ltd v The Ship "Mill Hill"* (1950) 81 CLR 502, 508–9 (Dixon J).

²⁶ *FAI General Insurance Co Ltd v Ocean Marine Mutual* (1997) 41 NSWLR 559.

²⁷ Evidence to Joint Standing Committee on Treaties, Parliament of Australia, Canberra, 10 October 2016, 4 (Andrew Walter, Assistant Secretary, Attorney-General's Department).

²⁸ *Akai Pty Ltd v Peoples Insurance Co Limited* (1996) 188 CLR 418, 447 (Toohey, Gaudron and Gummow JJ).

the chosen court might violate, in some technical way, a mandatory rule of the State of the court seised'.²⁹ It might be that European contributors to the *Convention* text share a different understanding of the role of forum policy in this context. Thus, the meaning of Article 6(c) could be a flashpoint for future litigation over the International Civil Law Act.³⁰

If Australia accedes to the *Convention* through an International Civil Law Act, the significance of that event will depend on whether our major trading partners also accede. In an October 2016 hearing of the Joint Standing Committee on the issue of accession, the Chair of the Committee, Hon Stuart Robert MP, commented on the rate of uptake as follows: 'It seems like it is moving at the speed of an asthmatic ant with a heavy load of shopping'.³¹ Mr Walter explained that this is not unusual for the Hague Conference. Even if we see an Act in 2017, it may be some time before Australia realises the full potential of the *Convention*.

²⁹ Trevor Hartley and Masato Dogauchi, *Explanatory Report on the Convention of 30 June 2005 on Choice of Court Agreements* (2013) 821 [153] <<https://www.hcch.net/en/publications-and-studies/details4/?pid=3959>>.

³⁰ See also Michael Douglas, 'Choice of Court Agreements under an International Civil Law Act' (2017) *Journal of Contract Law* (forthcoming).

³¹ Evidence to Joint Standing Committee on Treaties, Parliament of Australia, Canberra, 10 October 2016, 6 (Hon Stuart Robert MP).