

AUSTRALIA'S ACCESSION TO THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS

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The Joint Standing Committee on Treaties has recommended that Australia accede to the Hague Convention on Choice of Court Agreements. The Convention seeks to ensure uniform treatment of 'exclusive' jurisdiction agreements internationally, and is in force in the European Union, Singapore and Mexico. This article considers the effect that the Convention will have on Australian courts' treatment of exclusive jurisdiction agreements, which will largely be positive, and analyses Australia's proposal for the Convention's implementation. It also identifies shortcomings of the Convention and the proposal for its implementation, and recommends refinements to that proposal. The article concludes by underscoring the problems in the existing law that accession will not redress, some of which could and should be remedied in the legislation which will implement the Convention.

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I INTRODUCTION

In November 2016, the Joint Standing Committee on Treaties recommended that binding treaty action be taken by Australia to accede to the *Convention on Choice of Court Agreements* ('*Convention*').¹ The *Convention* aims to promote international trade and investment by providing legal certainty through the protection of commercial parties' express choices of court.² It seeks to achieve this aim by regularising the treatment internationally of 'exclusive' choice of court agreements and of judgments given by courts which had jurisdiction based on an exclusive agreement. Exclusive jurisdiction agreements are those which designate the jurisdiction of the courts of a single country to the exclusion of all others. They are a common feature of international contracts. When clearly drafted and regularly enforced, an exclusive jurisdiction agreement eliminates the need for parties to '[I]itigat[e] about where to litigate'.³ The *Convention* entered into force in October 2015,⁴

¹ Joint Standing Committee on Treaties, Parliament of Australia, *Implementation Procedures for Airworthiness — USA; Convention on Choice of Courts — Accession; GATT Schedule of Concessions — Amendment; Radio Regulations — Practical Revision* (Report No 166, November 2016) 23 [3.21]; *Convention on Choice of Court Agreements*, opened for signature 30 June 2005, 44 ILM 1294 (entered into force 1 October 2015) art 27(4). The *Convention* entered into force following its approval by the EU.

² *Convention* (n 1) Preamble.

³ Adrian Briggs, *The Conflict of Laws* (Oxford University Press, 3rd ed, 2013) 117.

⁴ See *Convention* (n 1) art 31(1).

following approval by the EU,⁵ on behalf of 27 of its member states,⁶ and is also in force in Mexico and in Singapore.⁷ The Australian government proposes to implement the *Convention* in a new International Civil Law Act.⁸

This article relates to the proposal to implement the *Convention* in Australia. It contributes to the literature⁹ by appraising the central provisions of the *Convention* and considering how they will affect the treatment of choice of court agreements under Australian law. We contextualise this discussion by reference to important recent developments in Australian law,¹⁰ as well as the *Convention*-inspired provisions in regional instruments, including

⁵ *Council Decision of 4 December 2014 on the Approval, on Behalf of the European Union, of the Hague Convention of 30 June 2005 on Choice of Court Agreements* [2014] OJ L 353/5. Mexico was the first state to accede to the *Convention* in 2007: HCCH, '2005 Choice of Court Convention to Enter into Force on 1 October 2015 Following the Approval by the European Union' (Media Release, 25 June 2015) <www.hcch.net/en/news-archive/details/?varevent=412>, archived at <<https://perma.cc/L2W9-W9KX>>.

⁶ *Ie all current member states of the EU excluding Denmark. The status of the EU's approval of the Convention on behalf of the United Kingdom of Great Britain and Northern Ireland, once the United Kingdom leaves the EU, is at this stage uncertain. It is expected that the United Kingdom will choose either to remain a party to the Convention or to ratify it independently if that course is required: see nn 125–7 and accompanying text.*

⁷ *The Convention was put into effect in Singapore by the Choice of Court Agreements Act 2016 (Singapore). The United States of America and Ukraine have also signed but not ratified the Convention, while Denmark, China, Macedonia, Serbia, Costa Rica and Argentina are reportedly considering the Convention: Permanent Bureau of the Hague Conference on Private International Law, 'Ongoing Work in the Area of Judgments' (Preliminary Document No 7B, January 2016) 2 [3]–[7]; HCCH, 'Ukraine Signs the 2005 Choice of Court Convention and the 2007 Hague Protocol' (Media Release, 21 March 2016) <www.hcch.net/en/news-archive/details/?varevent=478>, archived at <<https://perma.cc/ZHH2-EEBF>>.*

⁸ *National Interest Analysis: Australia's Accession to the Convention on Choice of Court Agreements* [2016] ATNIA 7, [21]. The government proposes that the International Civil Law Act will also give effect to the *Hague Choice of Law Principles on International Commercial Contracts*: at [21]. See generally Brooke Adele Marshall, 'The Hague Choice of Law Principles, CISG and PICC: A Hard Look at a Choice of Soft Law' (2018) 66 *American Journal of Comparative Law* (forthcoming).

⁹ See Reid Mortensen, 'The Hague and the Ditch: The Trans-Tasman Judicial Area and the Choice of Court Convention' (2009) 5 *Journal of Private International Law* 213; Mary Keyes, 'Jurisdiction under the Hague Choice of Courts Convention: Its Likely Impact on Australian Practice' (2009) 5 *Journal of Private International Law* 181; Richard Garnett, 'The Hague Choice of Court Convention: Magnum Opus or Much Ado about Nothing?' (2009) 5 *Journal of Private International Law* 161, 162–9.

¹⁰ Particularly with respect to the specific protection of franchisees and small businesses in standard form contracts for financial products or services. See nn 109–15 and accompanying text.

the arrangements between Australia and New Zealand¹¹ and the EU's *Brussels I Recast Regulation*.¹² The impact of the *Convention* in Australia may foreshadow changes to the law of other common law countries that ratify the *Convention*.

Subject to the following comments about the way in which the *Convention* is implemented in Australian law, we support Australia's accession to the *Convention*. Part II critically analyses Australia's proposal for the *Convention's* implementation and notes the mostly positive impact the *Convention* will have on Australian law and practice. Part III considers several shortcomings of the *Convention* and the proposal for its implementation in Australia — recommending refinements — and scrutinises the *Convention's* broader impact on Australian law. Part IV is a conclusion.

II IMPACT OF ACCESSION TO THE CONVENTION ON AUSTRALIAN LAW AND PRACTICE

With the exception of choice of court agreements in trans-Tasman cases¹³ and in intra-Australian cases,¹⁴ the common law currently governs the effect of all

¹¹ Pursuant to the *Agreement between the Government of Australia and the Government of New Zealand on Trans-Tasman Proceedings and Regulatory Enforcement*, signed 24 July 2008 [2013] ATS 32 (entered into force 11 October 2013), which is given effect by the *Trans-Tasman Proceedings Act 2010* (Cth) and the *Trans-Tasman Proceedings Act 2010* (NZ) (in force from October 2013). See generally Reid Mortensen, 'Together Alone: Integrating the Tasman World' in Andrew Dickinson, Mary Keyes and Thomas John (eds), *Australian Private International Law for the 21st Century: Facing Outwards* (Hart Publishing, 2014) 113, 113–14, 120, 131–4.

¹² *Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast)* [2012] OJ L 351/1 ('*Brussels I Recast Regulation*').

¹³ Choice of court agreements in cases involving proceedings in Australian and New Zealand courts are currently regulated under the *Trans-Tasman Proceedings Act 2010* (Cth) s 20, which is similar to the *Convention*, although it contains an important difference in that the presumption that a choice of court agreement is intended to be exclusive is not currently incorporated in the Act. See nn 33–5 and accompanying text.

¹⁴ The effect of choice of court agreements in intra-Australian litigation is determined under the cross-vesting scheme, in the case of litigation in the superior courts (the Federal Court of Australia, and the state and territory supreme courts), and under the *Service and Execution of Process Act 1992* (Cth) (in the case of litigation in intermediate and inferior courts). See *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth) s 5, and *Service and Execution of Process Act 1992* (Cth) s 20(4)(d). Under these schemes, choice of court agreements, including exclusive agreements, are treated as merely one factor in the court's determination as to whether to transfer or stay proceedings. For discussion and criticism of the treatment of choice of court agreements under these schemes, see Mary Keyes, 'Improving Australian Private Internation-

choice of court agreements in Australia. Australia's accession to the *Convention* will change the treatment of *exclusive* jurisdiction agreements designating the courts of contracting states to the *Convention*, including Australian courts. In section A of this part, we consider the positive effect that accession will have on the characterisation of a jurisdiction agreement as exclusive or non-exclusive under Australian law. Section B considers the impact that the *Convention* will have on the discretionary treatment by Australian courts of exclusive jurisdiction clauses nominating Australian courts. Section C analyses the major improvement the *Convention* will make to Australian law, which is the improvement in the enforcement of exclusive jurisdiction agreements nominating foreign courts. Section D is an assessment of how a uniform approach to interpretation of the *Convention* is likely to impact Australian judicial practice. Section E closes with the effect of the *Convention* on the treatment by Australian courts of judgments given by a foreign court, the jurisdiction of which derives from an exclusive choice of court agreement.

A Defining 'Exclusive' Jurisdiction Agreements

One of the important changes that the *Convention* will make to Australian law is through its definition of an exclusive jurisdiction agreement. The characterisation of a jurisdiction agreement as exclusive or non-exclusive determines what effect will be given to that agreement: particularly, whether a court will stay proceedings given the existence of the agreement.¹⁵ At common law, exclusive agreements require parties to litigate, if at all, in and to submit to the jurisdiction of the nominated court to the exclusion of all other competent courts.¹⁶ Such an agreement may be enforced by staying proceedings brought in breach of the agreement, by an anti-suit injunction to prevent proceedings being commenced or continued in breach of the agreement, and by the award of damages for breach of the agreement. Non-exclusive jurisdiction agreements indicate the parties' submission to the jurisdiction of the nominated court, but also preserve their rights to bring proceedings in any competent

al Law' in Andrew Dickinson, Mary Keyes and Thomas John (eds), *Australian Private International Law for the 21st Century: Facing Outwards* (Hart Publishing, 2014) 15, 22–4.

¹⁵ See *Convention* (n 1) arts 3, 6.

¹⁶ *Austrian Lloyd Steamship Co v Gresham Life Assurance Society* [1903] 1 KB 249, 252 (Romer LJ), 252 (Mathew LJ). See Richard Garnett, 'Jurisdiction Clauses since Akai' (2013) 87 *Australian Law Journal* 134, 135.

courts.¹⁷ The effect of a jurisdiction agreement also depends on which court is considering the agreement. In the case of an agreement which nominates the forum court, the issue is whether the court should retain jurisdiction because of the agreement or stay proceedings notwithstanding it. In the case of an agreement which nominates a foreign court, the question is whether the forum court should stay proceedings because of the agreement or retain jurisdiction notwithstanding the agreement.

The Australian test for whether a jurisdiction agreement is exclusive, rather than non-exclusive, is whether it obliges the parties to litigate in the nominated courts,¹⁸ which is a question of interpretation.¹⁹ There is usually no evidence as to the parties' subjective intentions, and therefore the agreement must be interpreted by reference to objective factors which are assumed to indicate the intentions of reasonable contracting parties.²⁰ These include whether the parties explicitly designated the jurisdiction of the nominated court as 'exclusive' or 'non-exclusive',²¹ the use of mandatory language such as 'shall' and 'must', and whether the clause refers to 'all' or 'any' disputes.²² Whether the nominated court would have been competent according to its own rules without the parties' choice of court is treated as a factor indicating exclusivity, because the agreement would otherwise be redundant.²³ A further

¹⁷ See Andrew S Bell, *Forum Shopping and Venue in Transnational Litigation* (Oxford University Press, 2003) 305–6 [5.54]–[5.55].

¹⁸ *Akai Pty Ltd v The People's Insurance Co Ltd* (1996) 188 CLR 418, 425 (Dawson and McHugh JJ).

¹⁹ See *ibid*; *FAI General Insurance Co Ltd v Ocean Marine Mutual Protection and Indemnity Association* (1997) 41 NSWLR 117, 126. Interpretation of a jurisdiction agreement is at common law governed by the proper law of the contract: Richard Garnett, 'The Internationalisation of Australian Jurisdiction and Judgments Law' (2004) 25 *Australian Bar Review* 205, 214.

²⁰ The leading Australian authority is *FAI General Insurance* (n 19). In that case, Giles CJ Comm D relied particularly on *Sohio Supply Co v Gatoil (USA) Inc* [1989] 1 Lloyd's Rep 588; *S & W Berisford plc v New Hampshire Insurance Co* [1990] 2 QB 631; *British Aerospace plc v Dee Howard Co* [1993] 1 Lloyd's Rep 368; *Continental Bank NA v Aeakos Compania Naviera* [1994] 1 WLR 588.

²¹ *Continental Bank* (n 20) 593–4 (Steyn LJ); *ACE Insurance v Moose Enterprise Ltd* [2009] NSWSC 724, [33]; *Re Douglas Webber Events Pty Ltd* (2014) 291 FLR 173, 175–6 [6], 179 [27]–[28]. See *FAI General Insurance* (n 19) 126.

²² *ACE Insurance* (n 21) [33]. See James Fawcett, 'Non-Exclusive Jurisdiction Agreements in Private International Law' [2001] *Lloyd's Maritime and Commercial Law Quarterly* 234, 237.

²³ *British Aerospace* (n 20) 374 (Waller J); *FAI General Insurance* (n 19) 127; *ACE Insurance* (n 21) [33], [37]; *Compania Sud Americana de Vapores SA v Hin-Pro International Logistics Ltd* [2016] 1 All ER (Comm) 417, 436 [64] (Christopher Clarke LJ); Louise Merrett, 'The

factor to consider is whether the agreement is intransitive or transitive: whether the parties have agreed only to submit themselves or also to submit their disputes to the nominated court.²⁴ By submitting themselves, parties are agreeing to defend in the nominated court if sued there, with the implication that they are free to initiate proceedings elsewhere, which suggests that the clause is non-exclusive. By submitting their disputes, parties are agreeing to initiate and defend eventual proceedings in the nominated court which suggests that the clause is exclusive.

These factors often do not indicate with certainty whether the clause will be interpreted as exclusive or not.²⁵ The lack of certainty in the process of interpretation is prone to be exploited: given that there is usually no evidence of the parties' actual intentions at the time of making the contract, each party is likely to adduce factors in support of an interpretation most favourable to them at the time a dispute arises.²⁶ This lack of certainty impedes settlement and makes litigation on this preliminary point likely. In finely balanced cases, courts may be inclined to find agreements nominating the forum court to be exclusive and agreements nominating foreign courts to be non-exclusive, which may encourage forum shopping.

The *Convention's* definition of an exclusive choice of court agreement is functionally similar to that which applies at common law. Under the *Convention*, an exclusive choice of court agreement is one which 'designates ... the courts of one Contracting State ... to the exclusion of the jurisdiction of any other courts.'²⁷ The *Convention* differs from the common law by deeming a jurisdiction agreement to be exclusive, unless the parties 'expressly provided otherwise',²⁸ in which case it will be non-exclusive and outside the scope of the *Convention*.²⁹ The presumption of exclusivity also features in several regional

Enforcement of Jurisdiction Agreements within the Brussels Regime' (2006) 55 *International and Comparative Law Quarterly* 315, 316 n 5.

²⁴ *Faxtech Pty Ltd v ITL Optronics Ltd* [2011] FCA 1320, [12]–[14].

²⁵ *ACE Insurance* (n 21) [33]. See also Martin Davies, Andrew Bell and Paul Le Gay Brereton, *Nygh's Conflict of Laws in Australia* (LexisNexis Butterworths, 9th ed, 2014) 173 [7.67], who note that on application of these principles, 'it is not unusual for judges to take different interpretations of the same clause', in different cases or even within the same case.

²⁶ See Bell (n 17) 305–6 [5.54]–[5.55]; Mary Keyes and Brooke Adele Marshall, 'Jurisdiction Agreements: Exclusive, Optional and Asymmetrical' (2015) 11 *Journal of Private International Law* 345, 361.

²⁷ *Convention* (n 1) art 3(a), which is subject to the formalities requirements of art 3(c).

²⁸ *Ibid* art 3(b).

²⁹ See nn 164–72 and accompanying text.

European instruments governing choice of court.³⁰ In contrast, the common law does not presume exclusivity; indeed, the parties' failure to explicitly characterise jurisdiction as 'exclusive' is at common law relevant to whether the agreement is interpreted as exclusive. It has been suggested that a presumption of exclusivity would improve the Australian law by simplifying the law and encouraging more explicit drafting.³¹ This would reduce the scope for parties to exploit uncertainties in the jurisdiction agreement when a dispute arises,³² which should, in turn, facilitate settlement and reduce the costs of litigation if settlement is unsuccessful.

The *Trans-Tasman Proceedings Act 2010* (Cth) applies to international disputes involving Australian and New Zealand courts.³³ Its provisions dealing with exclusive choice of court agreements were intended to be consistent with the *Convention*. The Act uses the *Convention's* definition of exclusivity. An exclusive choice of court agreement is defined to mean 'a written agreement ... that designates the courts, or a specified court or courts, of a specified country, to the exclusion of any other courts, as the court or courts to determine disputes between ... [the] parties.'³⁴ But unlike the *Convention*, the Act does not presume that a choice of court agreement is exclusive. If Australia accedes to the *Convention*, it would be desirable to amend the Act to incorporate the presumption of exclusivity.³⁵

³⁰ *Brussels I Recast Regulation* (n 12) art 25(1). See also *Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters* [2007] OJ L 339/3, art 23(1), which applies to civil and commercial matters involving the EU and three of the four current member states of the European Free Trade Association.

³¹ Mary Keyes, *Jurisdiction in International Litigation* (Federation Press, 2005) 97. See Richard Garnett, 'The Enforcement of Jurisdiction Clauses in Australia' (1998) 21 *University of New South Wales Law Journal* 1, 7–9.

³² See Keyes and Marshall, 'Jurisdiction Agreements' (n 26) 361.

³³ The legislation entered into effect in October 2013 and has not yet been applied in many cases. In *Z487 Ltd v Skelton* [2014] QSC 309, the validity of an exclusive choice of Australian courts was unsuccessfully challenged. In *Re Douglas Webber Events* (n 21) Brereton J of the Supreme Court of New South Wales held that none of the exclusive jurisdiction agreements in question was applicable to both the parties and the subject matter of the Australian litigation: at 178 [19]–[20], 179 [25]–[28], 183 [43]–[44].

³⁴ *Trans-Tasman Proceedings Act 2010* (Cth) s 20(3)(a). The same definition is used in the New Zealand legislation: *Trans-Tasman Proceedings Act 2010* (NZ) s 25(4)(a).

³⁵ If New Zealand were also to accede to the *Convention*, the same consequential change in its equivalent legislation would be desirable.

B Jurisdiction Agreements Designating Australian Courts

As mentioned in the introduction to this part, accession to the *Convention* will change the Australian courts' treatment of exclusive jurisdiction clauses nominating Australian courts. The *Convention* obliges a chosen court to exercise its jurisdiction unless the jurisdiction agreement is null and void under the law of the chosen court,³⁶ including its choice of law rules,³⁷ or unless the country of the chosen court has made a declaration under art 19.³⁸ This aspect of the *Convention* is identical to the *Trans-Tasman Proceedings Act 2010* (Cth), which states that an Australian court must not stay proceedings in favour of a more appropriate New Zealand court if the parties agreed to the exclusive jurisdiction of an Australian court,³⁹ unless the agreement is null and void under Australian law.⁴⁰ The obligation under the *Convention* on a chosen court to exercise jurisdiction is not inconsistent with the current position under the rules of court of all the Australian superior courts, which is that a court has jurisdiction over a defendant who has submitted to the jurisdiction,⁴¹ but it is very different from the common law, which does not impose any obligation on the chosen court to hear the case.

The *Convention* does not permit the chosen court to decline jurisdiction on the basis that a foreign court should determine the dispute.⁴² If Australia accedes to the *Convention*, this will significantly modify the common law, which allows the chosen court, in the exercise of its discretion, to decline jurisdiction if there are strong reasons for doing so. It is very unusual for a court to decline jurisdiction if the parties have agreed that it has exclusive jurisdiction, but this might be warranted if there are related proceedings on foot in another jurisdiction involving either third parties to the choice of court agreement or issues which are beyond the subject matter scope of the choice of court agreement.⁴³ It might also be necessary if a foreign court had

³⁶ *Convention* (n 1) art 5(1); Trevor Hartley and Masato Dogauchi, *Convention of 30 June 2005 on Choice of Court Agreements* (Explanatory Report, Hague Conference on Private International Law, 2005) [125]–[126].

³⁷ Hartley and Dogauchi (n 36) [125].

³⁸ Article 19 permits a state to 'declare that its courts may refuse to determine disputes to which an exclusive choice of court agreement applies if, except for the location of the chosen court, there is no connection between that State and the parties or the dispute'.

³⁹ *Trans-Tasman Proceedings Act 2010* (Cth) s 20(1)(b).

⁴⁰ *Ibid* s 20(2A).

⁴¹ See, eg, *Federal Court Rules 2011* (Cth) r 10.42 item 19.

⁴² *Convention* (n 1) art 5(2).

⁴³ *Donohue v Armco Inc* [2002] 1 All ER 749, 759 [24], 760 [27] (Lord Bingham).

decided that the choice of court agreement was non-exclusive or otherwise not enforceable and, on that basis, had not stayed its proceedings.⁴⁴ In such situations, the chosen court might take the view that the interests of efficiency and avoiding the risk of incompatible judgments outweigh the private interests of one party in having the choice of court agreement enforced, and on that basis not enforce the agreement.⁴⁵ This is because at common law jurisdiction is ultimately a procedural question which is not contractible, even though decisive weight is usually given to parties' exclusive jurisdiction agreements.⁴⁶ In this respect, the common law reflects a different conception of jurisdiction to that which informs the *Convention*.

In practice, the outcome of many decided cases in Australia, on the effect given to exclusive choices of Australian courts, would not be different if they were to be decided by an Australian court in accordance with the *Convention* obligation to hear proceedings. There would be no substantive change, because Australian courts almost invariably enforce, albeit in their discretion, prorogation agreements.⁴⁷ But removing courts' discretion to decline jurisdiction would deprive courts of their ability to address certain entirely foreseeable events, including the bringing of proceedings in a foreign court — which either applies a different test of exclusivity to that under the *Convention*,⁴⁸ applies it differently to the wording of the particular clause, or takes a different view as to the subject matter scope of the choice of court agreement — or the bringing of proceedings involving third parties to the choice of court agreement. In our view, the removal of this discretion is not clearly an improvement on the current law; while the *Convention* should achieve its aim of greater certainty, it does so at the expense of the flexibility of the current common law, which is valuable in some situations.

⁴⁴ See, eg, *Armcel Pty Ltd v Smurfit Stone Container Corp* (2008) 248 ALR 573, 575 [6] (Jacobson J).

⁴⁵ *Donohue* (n 43) 760–4 [27]–[34] (Lord Bingham).

⁴⁶ See generally Adrian Briggs, 'The Nature or Natures of Agreements Relating to Jurisdiction and to Governing Law' (Paper Prepared for Webinar, American Society of International Law, 2 March 2016) 7 [29]. Briggs describes a jurisdiction agreement as 'an important element of the data' which a court uses in answering jurisdictional questions.

⁴⁷ Garnett, 'The Hague Choice of Court Convention' (n 9) 165; Garnett, 'Jurisdiction Clauses since Akai' (n 16) 136.

⁴⁸ See nn 27–9 and accompanying text.

C Jurisdiction Agreements Designating Foreign Courts

The major impact of the *Convention* will be on the treatment by Australian courts of exclusive jurisdiction clauses that nominate the courts of foreign contracting states. Although the Australian principle is the same in form as that applied in other common law countries — requiring the courts to enforce exclusive foreign choice of court agreements absent strong reasons for non-enforcement⁴⁹ — the Australian courts have been comparatively willing to find strong reasons,⁵⁰ which has led to criticism and calls for reform.⁵¹

The *Convention's* stricter approach to the enforcement of exclusive agreements is based upon, and analogous to, the treatment of international arbitration agreements under the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958* ('*New York Convention*'),⁵² which now operates well in practice in Australia. There is a level of conceptual similarity between jurisdiction and arbitration agreements accepted notably, but not exclusively,⁵³ in common law jurisdictions.⁵⁴ The exceptions to enforcement in the *Convention* are similar to those in the *New York Convention*, which in practice have been shown to provide appropriate and sufficient protections.

The *Convention* will change the Australian law, by limiting the Australian courts' ability to retain jurisdiction to the circumstances described in five exceptions.⁵⁵ Several of these exceptions, including that relating to capacity, are not currently conceptualised in Australian law as limiting the enforceability of jurisdiction clauses, although they can be understood as having that effect. The scope of the *Convention's* exceptions is narrower than the circumstances in which an Australian court, in the exercise of its discretion, might currently refuse to enforce a foreign exclusive jurisdiction agreement.⁵⁶ This

⁴⁹ *Akai* (n 18) 428–9 (Dawson and McHugh JJ), 445 (Toohey, Gaudron and Gummow JJ).

⁵⁰ Although there has been an improvement in the enforcement of jurisdiction agreements since 1997: Garnett, 'Jurisdiction Clauses since *Akai*' (n 16) 149.

⁵¹ Garnett, 'The Enforcement of Jurisdiction Clauses' (n 31) 19; Keyes (n 9) 199–201.

⁵² *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959).

⁵³ See Nathalie Coipel-Cordonnier, *Les Conventions d'arbitrage et d'élection de for en droit international privé* (LGDJ, 1999) 6.

⁵⁴ *Global Partners Fund Ltd v Babcock & Brown Ltd (in liq)* (2010) 79 ACSR 383, 398 [60] (Spigelman CJ); Otto Kahn-Freund, 'Jurisdiction Agreements: Some Reflections' (1977) 26 *International and Comparative Law Quarterly* 825, 833.

⁵⁵ *Convention* (n 1) art 6.

⁵⁶ See Garnett, 'Jurisdiction Clauses since *Akai*' (n 16) 140–7.

is only permitted if there are strong reasons for non-enforcement of that agreement.⁵⁷

There are two types of strong reasons in Australia, the first being 'where the foreign jurisdiction clause offends the public policy of the forum whether evinced by statute or declared by judicial decision.'⁵⁸ This includes where Australian statutes explicitly provide that foreign jurisdiction clauses, which would undermine the operation of the substantive provisions of the relevant statute, are unenforceable.⁵⁹ In those cases, Australian courts are constitutionally obliged to retain jurisdiction. Public policy also precludes the enforcement of foreign exclusive jurisdiction agreements where applicable Australian legislation prohibits 'contracting out' of the substantive provisions of that legislation.⁶⁰ This is regarded as invalidating foreign jurisdiction agreements unless the defendant can show that the foreign court would enforce the substantive provisions of the Australian legislation. Australian legislation which does not explicitly state that foreign jurisdiction clauses are unenforceable may also be interpreted to have that effect if such clauses 'contravene "the policy of the law" as discerned from a consideration of the scope and purpose of the particular statute.'⁶¹ Related to the first type of strong reason, some Australian courts refuse to enforce foreign jurisdiction agreements if the dispute involves a claim under Australian legislation and the court takes the view that foreign courts would lack jurisdiction to hear and determine that statutory claim.⁶²

⁵⁷ *The Mill Hill* (1950) 81 CLR 502, 508–9 (Dixon J); *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197, 259 (Gaudron J); *Akai* (n 18) 427–9 (Dawson and McHugh JJ), 445 (Toohey, Gaudron and Gummow JJ).

⁵⁸ *Akai* (n 18) 445 (Toohey, Gaudron and Gummow JJ).

⁵⁹ *Carriage of Goods by Sea Act 1991* (Cth) s 11(2); *Competition and Consumer (Industry Codes — Franchising) Regulation 2014* (Cth) sch 1 cls 21(2)(a)(ii), 21(3). For the purposes of this discussion, sch 1 to this Act is referred to as the *Franchising Code* while the regulation in which it is contained is referred to as the *Industry Codes Regulation*. The *Industry Codes Regulation* is subordinate legislation to the *Competition and Consumer Act 2010* (Cth) ('CCA'). Pursuant to CCA ss 51AE(a) and 51AE(b), the *Industry Codes Regulation* in s 4 prescribes the *Franchising Code* as mandatory. See nn 188–93 and accompanying text.

⁶⁰ See, eg, *Insurance Contracts Act 1984* (Cth) s 52(1), applied in *Akai* (n 18) 447–8 (Toohey, Gaudron and Gummow JJ).

⁶¹ *Akai* (n 18) 447 (Toohey, Gaudron and Gummow JJ).

⁶² *Commonwealth Bank of Australia v White* [1999] 2 VR 681, 704–5; *Faxtech* (n 24) [18]. For criticism, see Andrew Dickinson, 'What, if Anything, Can Australia Learn from the EU Experience?' in Andrew Dickinson, Mary Keyes and Thomas John (eds), *Australian Private International Law for the 21st Century: Facing Outwards* (Hart Publishing, 2014) 157, 176 n 122.

The second type of strong reason justifying non-enforcement is where related proceedings are on foot in the forum involving issues beyond the scope of, or third parties to, the jurisdiction agreement. In such a case a foreign exclusive jurisdiction agreement might not be enforced because of

the desire of courts to avoid disruption and multiplicity of litigation, in particular a desire to avoid parallel proceedings and the risk of inconsistent findings, and to avoid the causing of inconvenience to third parties.⁶³

By comparison, the *Convention* stipulates that the non-chosen court may only retain jurisdiction in five situations, namely where:⁶⁴

- 1 the agreement is null and void according to the law of the state of the chosen court;⁶⁵
- 2 one party lacked contractual capacity under the law of the court seised;⁶⁶
- 3 ‘giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy’ of the law of the forum;⁶⁷
- 4 ‘for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed’;⁶⁸ or
- 5 ‘the chosen court has decided not to hear the case’.⁶⁹

On the whole, these exceptions appear to allow non-enforcement of exclusive jurisdiction agreements in a narrower range of cases than under the current Australian law. We address each of the exceptions in turn, focusing on how they compare to the current Australian law.

1 *Null and Void*

The first exception, allowing non-enforcement if the choice of court agreement is null and void, states that this issue must be determined by the law of

⁶³ *Incitec Ltd v Alkimos Shipping Corporation* (2004) 138 FCR 496, 506 [47].

⁶⁴ *Convention* (n 1) art 6. The *Trans-Tasman Proceedings Act 2010* (Cth) s 20(2) contains almost identical exceptions to enforcement of an exclusive choice of court agreement in favour of the New Zealand courts.

⁶⁵ *Convention* (n 1) art 6(a).

⁶⁶ *Ibid* art 6(b).

⁶⁷ *Ibid* art 6(c).

⁶⁸ *Ibid* art 6(d).

⁶⁹ *Ibid* art 6(e).

the chosen court,⁷⁰ which includes its rules of private international law.⁷¹ The principal European instrument on jurisdiction, the *Brussels I Recast Regulation*, which regulates the effect of choice of court agreements in litigation in the courts of EU member states, also adopts this approach, but for all issues relevant to the substantive validity of choice of court agreements.⁷² The application of the law of the chosen court to this issue will change the Australian law, under which the validity of a choice of court agreement is determined according to Australian law as the law of the forum.⁷³ The *Convention's* reference to the rules of private international law of the chosen court, whatever its merit in principle,⁷⁴ creates another layer of complexity, especially where the chosen court is that of an EU member state. There is no uniform EU choice of law rule for the law governing a jurisdiction agreement,⁷⁵ and residual national choice of law rules on contract are in some EU member states unsettled,⁷⁶ and in others non-existent.⁷⁷

⁷⁰ Ibid art 6(a). The same enquiry may arise before the chosen court where it is seised: at art 5(1). It may also arise before a court called upon to enforce a judgment rendered by a court the jurisdiction of which is based on an exclusive jurisdiction agreement unless the chosen court had already ruled on that question: at art 9(a).

⁷¹ Hartley and Doguchi (n 36) [125]. The *Trans-Tasman Proceedings Act 2010* (Cth) s 20(2)(a) contains the same rule but explicitly refers to the rules of private international law of the chosen court.

⁷² *Brussels I Recast Regulation* (n 12) recital 20, art 25(1).

⁷³ *Oceanic Sun Line Special Shipping* (n 57) 260–1 (Gaudron J). Wilson and Toohey JJ applied the law of the forum to determine whether a foreign exclusive jurisdiction clause was contractually effective, without explaining why: at 202. Deane J agreed with Wilson and Toohey JJ on this point: at 256. See also *Venter v Ilona MY Ltd* [2012] NSWSC 1029, [25]–[27]; *Hargood v OHTL Public Co Ltd* [2015] NSWSC 446, [23]. Cf Garnett, 'The Internationalisation of Australian Jurisdiction and Judgments Law' (n 19) 214, stating that the proper law of the contract governs validity.

⁷⁴ Brand is critical, observing that this provision 'begins by treating the choice of court agreement as valid for purposes of determining the law applicable to its own validity': Ronald A Brand, 'The Evolving Private International Law/Substantive Law Overlap in the European Union' in Peter Mankowski and Wolfgang Wurmnest (eds), *Festschrift für Ulrich Magnus zum 70. Geburtstag* (Sellier European Law Publishers, 2014) 371, 377.

⁷⁵ *Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I)* [2008] OJ L 177/6, arts 1(1), (2)(e).

⁷⁶ Eg in France: Hélène Gaudemet-Tallon, *Compétence et exécution des jugements en Europe* (LGDJ), 5th ed, (2015) 165–6; Jérôme Barbet and Peter Rosher, 'Les clauses de résolution de litiges optionnelles' [2010] 1 *Revue de l'arbitrage* 45, 58–61.

⁷⁷ Germany abolished its private international law rules applicable to contract on entry into force of the *Rome I Regulation*: Ulrich Magnus, 'Article 25' in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law ECPII: Brussels Ibis Regulation* (Otto Schmidt, 2016) vol 1, 629 n 287.

It is not clear if the ‘null and void’ exception is intended to comprehensively address the ongoing effect of a choice of court agreement, including dealing with questions such as unilateral waiver of the right to rely on, and repudiation of, a choice of court agreement.⁷⁸ Neither a waiver nor repudiation of a choice of court agreement would render the agreement null and void at common law, in which case it appears that the choice of court agreement would be regarded as enforceable under the *Convention*. This is consistent with the difference in wording between the *Convention* and the related provision of the *New York Convention*, which also applies to ‘inoperative’ arbitration agreements.⁷⁹

Whether the *Convention* subsumes all issues relevant to the existence and validity of a jurisdiction agreement is uncertain. Three different interpretations have been expressed. The first is that the issue of whether an agreement between the parties ‘exists’ is not a separate enquiry, but is to be resolved fully and exclusively by the *Convention*’s formal and substantive validity provisions.⁸⁰ Under that interpretation, an agreement is formally valid if it is in writing or in a subsequently accessible form.⁸¹ It will be given effect to unless, on application of the *Convention*’s exceptions, the law of the state of the chosen court renders it null and void,⁸² one party lacked contractual capacity under the law of the court seised,⁸³ or giving effect to the agreement would ‘lead to a manifest injustice or would be manifestly contrary to the public policy’ of the law of the forum.⁸⁴ If this interpretation is correct, this will change the Australian law which does not contain any such limitations to the requirement of consent. The second view is that the existence of an ‘agreement’ is a precondition to the application of the *Convention*: ‘the basic factual requirements of consent’ to an agreement must exist by reference to ‘any normal standards.’⁸⁵ Provided that this minimum factual threshold is satisfied, issues relevant to the parties’ consent to the agreement are determined by the

⁷⁸ See nn 155–63 and accompanying text.

⁷⁹ *New York Convention* (n 52) art II(3).

⁸⁰ Paul Beaumont, ‘Hague Choice of Court Agreements Convention 2005: Background, Negotiations, Analysis and Current Status’ (2009) 5 *Journal of Private International Law* 125, 137–40.

⁸¹ *Convention* (n 1) art 3(c).

⁸² *Ibid* art 6(a).

⁸³ *Ibid* art 6(b).

⁸⁴ *Ibid* art 6(c); Beaumont, ‘Hague Choice of Court Agreements Convention 2005’ (n 80) 140.

⁸⁵ Hartley and Dogauchi (n 36) [94]–[96].

null and void exception.⁸⁶ This also differs from the Australian law, according to which the existence of the agreement is determined under Australian law as the law of the forum. A third view is that for the *Convention* to apply, there must be an agreement which in fact exists, to which the parties actually consented as determined by forum law,⁸⁷ including its choice of law rules.⁸⁸ On this view, 'existence' is distinct from the requirement that the agreement be formally and substantively valid.⁸⁹ the *Convention's* formal requirements apply to, and its exceptions operate on only what is in fact, an actual agreement.⁹⁰ Any one of these interpretations would modify the current Australian law in various ways, although the third is the closest to the current Australian law. The first approach is likely to provide the best protection for the operation of the *Convention*, by encouraging all contracting states to address the question of whether a formally and substantively valid jurisdiction agreement exists in the same way.

2 Capacity

The second exception under the *Convention* is where a party lacked capacity to enter into the agreement under the law of the state of the court seised, again, including its choice of law rules. The capacity of the parties is rarely contested in international commercial disputes,⁹¹ and there is no Australian authority dealing with this issue in the context of choice of court agreements.⁹² Under Australian common law, the law of the forum governs whether a choice of court agreement has been incorporated into the contract.⁹³ If capacity is considered to be an issue relating to the existence of a

⁸⁶ Ibid [94] n 124.

⁸⁷ William J Woodward, Jr, 'Saving the Hague Choice of Court Convention' (2008) 29 *University of Pennsylvania Journal of International Law* 657, 674.

⁸⁸ Ronald A Brand and Paul Herrup, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents* (Cambridge University Press, 2008) 79.

⁸⁹ Cf ibid 79–80. Brand and Herrup acknowledge that existence and formal validity may be related: if the *Convention's* requirements as to form were more stringent, there would be less scope for a serious disagreement about whether an agreement exists.

⁹⁰ Ibid 40–1, 41 n 1, 79; Brand (n 74) 377.

⁹¹ Peter Gillies, 'Enforcement of International Arbitration Awards: The New York Convention' (2005) 9 *International Trade and Business Review* 19, 30.

⁹² The issue of capacity to enter into a contract should as a matter of principle be determined by the governing law of the contract, but that question is not necessarily analogous to the issue of capacity to enter into a choice of court agreement.

⁹³ *Oceanic Sun Line Special Shipping* (n 57) 225 (Brennan J), 260–1 (Gaudron J). Wilson and Toohey JJ applied, without explaining why, the law of the forum to the issue of whether a

choice of court agreement,⁹⁴ this exception is partially consistent with Australian law. However, the application of the law of the forum under Australian law is not taken to include reference to choice of law rules, so in its reference to the choice of law rules of the court seised, this exception will modify the current law. This modification is unlikely to have much practical significance.

3 *Manifest Injustice and Manifestly Contrary to Public Policy*

It is difficult to envisage a situation in which enforcing an international commercial choice of court agreement could 'lead to a manifest injustice.' In *The Eleftheria*, Brandon J suggested that one factor that should be taken into account in the exercise of discretion whether to enforce a choice of court agreement was whether the plaintiff 'would be prejudiced by having to sue in the foreign court because they would ... for political, racial, religious or other reasons be unlikely to get a fair trial.'⁹⁵ This has never been suggested in litigation in the Australian courts, but recognising such an exception to enforcement is not inconsistent with the current law. Garnett suggested that Australian courts might apply this part of the exception to the situation where a plaintiff would be unable to rely on Australian statutory rights in litigation in the chosen forum.⁹⁶

The public policy exception in the *Convention* is designed to be used restrictively,⁹⁷ as is evident from the qualifying term 'manifestly'. This exception resembles the current Australian law, according to which a foreign exclusive choice of court agreement may not be enforced if to do so would be inconsistent with Australian public policy,⁹⁸ on the basis that this is a strong reason for non-enforcement. It is unclear, however, which, if any, internationally mandatory provisions of Australian legislation which Australian courts currently treat as evincing public policy ought – consistently with the *Convention* – to be covered by this exception.⁹⁹ The drafting history of the public policy exception and the Explanatory Report do little to illuminate this

contract of carriage (of which the jurisdiction agreement was a term) had come into existence: at 202, 205. Deane J agreed with Wilson and Toohey JJ on this point: at 256.

⁹⁴ In the context of contract choice of law, issues of capacity should be determined according to the governing law of the contract: Davies, Bell and Brereton (n 25) 460–1 [19.50].

⁹⁵ [1970] P 94, 100 (Brandon J).

⁹⁶ Garnett, 'The Hague Choice of Court Convention' (n 9) 167.

⁹⁷ Hartley and Dogauchi (n 36) [153].

⁹⁸ See nn 58–61 and accompanying text.

⁹⁹ See Garnett, 'The Hague Choice of Court Convention' (n 9) 166–7.

issue.¹⁰⁰ Both refer to 'mandatory rules' as not being covered by the exception,¹⁰¹ but the context in which this term is used suggests that they are concerned with simple mandatory rules, rather than internationally mandatory rules, not being covered by the exception.¹⁰²

Assuming that internationally mandatory rules are, in principle, covered by the public policy exception, two types of situation involving them must be distinguished.¹⁰³ The first relates to foreign jurisdiction agreements which, if enforced by an Australian court, are likely to result in the non-application of Australian international mandatory rules by the foreign nominated court. Some Australian courts would be likely to apply the public policy exception in this type of situation, although it is uncertain whether or not they ought to under the *Convention*.¹⁰⁴ The second situation relates to jurisdiction agreements which themselves contravene Australia's international mandatory rules. In this situation, Australian courts ought to apply the exception because enforcing the agreement would infringe the courts' constitutional obligation to apply Australian mandatory laws.¹⁰⁵

¹⁰⁰ On the origins of the exception, see Jürgen Basedow, 'Exclusive Choice-of-Court Agreements as a Derogation from Imperative Norms' in Patrik Lindskoug et al (eds), *Essays in Honour of Michael Bogdan* (Juristförlaget, 2013) 15, 24–5. See also Garnett, 'The Hague Choice of Court Convention' (n 9) 166 on the Explanatory Report.

¹⁰¹ See Hague Conference on Private International Law, *Proceedings of the Twentieth Session: Choice of Court* (Intersentia, 2010) vol 3, 461, in which the delegation of the United States of America explained that the exceptions in the now art 6(c) 'should be reserved only for the most important cases and mandatory rules should not be imported under that Article'. See also Hartley and Dogauchi (n 36) [153].

¹⁰² Hartley and Dogauchi (n 36) [153] state that the exception does not allow for the non-enforcement of jurisdiction agreements solely on the basis that they 'would not be binding under domestic law'. Cf Hague Conference on Private International Law, *Proceedings of the Twentieth Session* (n 101) vol 3, 468–9, which leaves open the possibility that the public policy exception may also encompass not only international public policy (*ordre public international*) but also domestic public policy, which in some jurisdictions may be evinced by simple mandatory norms.

¹⁰³ Brooke Adele Marshall, 'Imbalanced Jurisdiction Clauses under the Lugano Convention' (2016) 24 *Zeitschrift für Europäisches Privatrecht* 515, 523–4.

¹⁰⁴ Basedow argues that the exception 'is exactly on the point' provided three tests are satisfied: the internationally mandatory rule is part of the forum's public policy; derogation of the forum court's jurisdiction is, in the circumstances, contrary to its public policy; and 'that contrariness [is] "manifest": Basedow (n 100) 24–5. Cf Garnett, 'The Hague Choice of Court Convention' (n 9) 166. Garnett argues that 'the tendency of Australian courts' to refuse to enforce foreign jurisdiction agreements where enforcement would result in the non-application of Australia's internationally mandatory rules 'undermines and undervalues foreign choice-of-court agreements'.

¹⁰⁵ See *Compagnie des Messageries Maritimes v Wilson* (1954) 94 CLR 577.

In relation to the first of these situations — jurisdiction agreements which, if enforced, are likely to result in the non-application of Australia's international mandatory rules — some Australian courts may regard the potential non-application of substantive Australian legislative provisions by a foreign court as manifestly contrary to Australian public policy,¹⁰⁶ although not all will do so.¹⁰⁷ The most prominent example of such provisions is the statutory prohibition against misleading or deceptive conduct,¹⁰⁸ which is commonly invoked in international commercial litigation in Australia. Although, like most Australian substantive legislation, the legislation does not explicitly state whether this prohibition should be given internationally mandatory effect, Australian courts often hold that it does have this effect. Likewise, Australian legislation which contains provisions that will protect small businesses¹⁰⁹ from unfair terms in standard form contracts for financial products or the supply of financial services,¹¹⁰ or for the supply of goods and services,¹¹¹ does not explicitly state whether these provisions are intended to have internationally mandatory effect. It is unclear whether Australian courts will consider the non-application by a foreign court of these provisions as manifestly contrary to Australian public policy, although it seems likely that some courts would be inclined to do so.¹¹² Determining the intended scope of Australian legislation

¹⁰⁶ See, eg, *Commonwealth Bank of Australia v White* (n 62) 704 [89]; *The Society of Lloyd's v White* [2004] VSCA 101, [19] (Buchanan JA); *Hume Computers Pty Ltd v Exact International BV* [2006] FCA 1440, [21]–[24]; *Clough Engineering Ltd v Oil & Natural Gas Corporation Ltd* (2007) ATPR ¶42-166, 47616 [41]–[42]; *Australian Competition and Consumer Commission v Valve Corporation [No 3]* (2016) 337 ALR 647, 669–73 [107]–[124] (Edelman J).

¹⁰⁷ *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45, 107–8 [240] (Allsop J).

¹⁰⁸ CCA (n 59) sch 2 s 18, which replaced s 52 of the *Trade Practices Act 1974* (Cth), with effect from 1 January 2011. The fact that s 18 is contained in an instrument entitled the 'Australian Consumer Law' is a misnomer — s 18 also applies in business-to-business relationships and is often invoked in international commercial litigation in Australia.

¹⁰⁹ A small business is defined as one which employs fewer than 20 persons on a regular and systematic basis: see *Australian Securities and Investments Commission Act 2001* (Cth) ss 12BF(4)(a), (5) ('ASIC Act'); CCA (n 59) sch 2 ss 23(4)(b), (5).

¹¹⁰ ASIC Act (n 109) ss 12BF(4)(a), (5). These provisions apply to contracts concluded on or after 12 November 2016: at s 301; *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015* (Cth) s 2.

¹¹¹ CCA (n 59) sch 2 ss 23(4)(b), (5).

¹¹² These protections for small businesses extend those provided to consumers by pre-existing legislation and are similarly motivated by a concern to protect vulnerable counterparties in contracting. Reform was justified by reference to the potential for exploitation of small businesses by large businesses: Explanatory Memorandum, *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015* (Cth) 7–8 [1.2]–[1.7]. Cf ASIC Act

in international cases is a common problem because legislation is often silent as to this important factor. There is an unfortunate lack of consistency in the Australian case law on this issue, which is not directly resolved by the *Convention*.

With respect to the second situation — jurisdiction agreements which themselves are contrary to international mandatory rules — Australian courts will be highly likely to invoke the public policy exception in applying provisions such as cl 21(2) of sch 1 to the *Competition and Consumer (Industry Codes — Franchising) Regulation 2014* (Cth) (sch 1 hereinafter the '*Franchising Code*')¹¹³ and s 52 of the *Insurance Contracts Act 1984* (Cth). Clause 21 of the *Franchising Code* renders foreign jurisdiction agreements in franchising contracts of no effect against Australian franchisees. Similarly, s 52 of the *Insurance Contracts Act 1984* (Cth) prevents contracting out of the Act, which has the effect that a foreign jurisdiction agreement will not be enforced if the Act is applicable.¹¹⁴ Equally, Australian courts may invoke the public policy exception in refusing to enforce the foreign jurisdiction agreement on the basis of s 12BF of the *Australian Securities and Investments Commission Act 2001* (Cth) if that provision is treated as being internationally mandatory in nature. As explained above, s 12BF will protect small businesses from unfair terms in standard form financial contracts; a 'term that limits, or has the effect of limiting, one party's right to sue another party' is an example of an unfair term.¹¹⁵ A foreign jurisdiction agreement which requires a small business to litigate abroad may have the effect of limiting its right to sue the other party.

The Australian government considers that mandatory rules of both types undoubtedly fall within the public policy exception and proposes to make an express carve out for them in the International Civil Law Act. As we discuss below,¹¹⁶ dealing with international mandatory rules in the second type of situation via the public policy exception is a sub-optimal approach.

(n 109) s 12EA, which substitutes the parties' choice of law in a consumer contract for the supply of financial services with Australian law, if the proper law of the contract would otherwise be Australian law, making it clear that the parallel provisions which protect consumers are intended to have internationally mandatory effect.

¹¹³ Clause 21(2) of the *Franchising Code* (n 59) applies to franchise agreements made on or after 1 January 2015 and has not yet been tested before an Australian court. See nn 188–90 and accompanying text.

¹¹⁴ *Akai* (n 18) 447–8 (Toohey, Gaudron and Gummow JJ). See nn 191–3 and accompanying text.

¹¹⁵ *ASIC Act* (n 109) s 12BH(1)(k).

¹¹⁶ See nn 200–11 and accompanying text.

4 *Agreement Cannot Reasonably Be Performed*

The exception in relation to the difficulty in performing the choice of court agreement only permits non-enforcement if the agreement cannot be performed because of 'exceptional reasons beyond the control of the parties'.¹¹⁷ This deliberately narrows the equivalent exception in the *New York Convention*, which allows the non-enforcement of arbitration agreements if they are 'incapable of being performed'.¹¹⁸ The *Convention* exception is intended to apply only in truly unusual cases, such as where the jurisdiction agreement itself has been frustrated.¹¹⁹ This is unlikely to arise or to be established in many cases and there is no Australian authority on such a situation. As a matter of principle, if a jurisdiction agreement had been frustrated according to Australian law (which, as the law of the forum, governs the question of the existence of a jurisdiction agreement), it would not currently be enforced, so this exception will not change the current law. The *Convention* does not indicate what law should apply to determine whether the agreement cannot reasonably be performed.

5 *Chosen Court Has Decided Not to Hear the Case*

Given that the *Convention* obliges the chosen court to hear the case unless the agreement is null and void, this exception presumably relates to the situation where the chosen court did not hear the case because it lacks subject matter jurisdiction. This situation would be regarded as a strong reason for non-enforcement of a foreign exclusive jurisdiction clause under current Australian law, although there is no authority directly on point.

The previous analysis has illustrated that the two exceptions which are most likely to arise in practice – the 'null and void' exception and the public policy exception – are both somewhat unclear. It is likely to take some interpretation to determine their scope and hence their effect on the Australian law. In particular, the lack of consensus among commentators about whether the *Convention* exhaustively deals with issues of the existence of the choice of court agreement, and the scope of the public policy exception, can be expected to lead to litigation in the short term. Unless Australian courts interpret these two exceptions restrictively, the impact of the *Convention* on Australian law will be relatively limited.

¹¹⁷ *Convention* (n 1) art 6(d).

¹¹⁸ *New York Convention* (n 52) art II(3).

¹¹⁹ Hartley and Dogauchi (n 36) [154].

D Uniform Interpretation of the Convention and Australian Judicial Practice

These concerns should be addressed by the *Convention's* requirement that courts interpreting its provisions must have regard to 'its international character and to the need to promote uniformity in its application.'¹²⁰ Accordingly, Australian courts will be obliged to have regard to the jurisprudence of other contracting states in interpreting *Convention* principles. A degree of convergence is likely to develop in the interpretation of the *Convention*, piloted by the Court of Justice of the European Union ('CJEU'). The CJEU, which has competence to interpret the *Convention*,¹²¹ is likely to be particularly influential in shaping *Convention* jurisprudence, given the number of member states of the EU, the volume of international litigation in those countries and the number of languages in which its judgments exist.¹²² Even when the *Convention* is not in issue, it is likely to influence the way in which the CJEU interprets the *Brussels I Recast Regulation*. This will, in turn, influence the way in which the CJEU interprets the *Convention*.¹²³ Having regard to CJEU jurisprudence will be a novel but ultimately uncomplicated task for Australian courts. Australian courts are used to drawing on the judgments of other common law courts as persuasive authority and language will be no obstacle: although the working language of the Court is French, all CJEU judgments have an official English version.¹²⁴ The *Convention* jurispru-

¹²⁰ *Convention* (n 1) art 23.

¹²¹ Given that the *Convention* deals with a matter within EU competence, it is an instrument of the Union: Pippa Rogerson, 'Relationship with Other EU Instruments (Art 67)' in Andrew Dickinson and Eva Lein (eds), *The Brussels I Regulation Recast* (Oxford University Press, 2015) 564, 564 [17.05].

¹²² See *Protocol (No 3) on the Statute of the Court of Justice of the European Union* [2010] OJ C 83/210, art 64; *Rules of Procedure of the Court of Justice* [2012], OJ L 265/1, art 40 ('CJEU Rules of Procedure'); *Council Regulation (EC) No 920/2005 of 13 June 2005 Amending Regulation No 1 of 15 April 1958 Determining the Language to Be Used by the European Economic Community and Regulation No 1 of 15 April 1958 Determining the Language to Be Used by the European Atomic Energy Community and Introducing Temporary Derogation Measures from Those Regulations* [2005] OJ L 156/3, art 1.

¹²³ See generally the opinion of Advocate General Szpunar in *Höszig kft v Alstom Power Thermal Services* (Opinion of Advocate General Szpunar, Court of Justice of the European Union, C-222/15, 7 April 2016) [50], where he referred to the 'interest in maximum alignment of the convention and the system established by the Union in [the *Brussels I Recast Regulation* and its predecessor]':

¹²⁴ Although only the judgment in the language in which proceedings have been conducted (the language of the case) is authoritative: *CJEU Rules of Procedure* (n 122) art 41. For criticism of this principle, see Mattias Derlén, 'A Single Text or a Single Meaning: Multilingual Interpretation of EU Legislation and CJEU Case Law in National Courts' in Susan Šarčević (ed), *Language and Culture in EU Law: Multidisciplinary Perspectives* (Ashgate, 2015) 53, 58. In pre-

dence of the Singaporean courts and, possibly, English courts is also likely to have particular influence on Australian courts. The frequency with which English courts will be seised of cases concerning choice of court agreements governed by the *Convention* may be affected by the terms of the exit treaty between the United Kingdom and the European Union. On the United Kingdom's withdrawal, it is likely that the EU's *Brussels I Recast Regulation* and the *Convention* will no longer have force of law in the United Kingdom.¹²⁵ It is likely that the United Kingdom will itself ratify the *Convention*,¹²⁶ with the result that it will govern all exclusive jurisdiction agreements within its scope which nominate English courts.¹²⁷

E Recognition of Judgments from Courts with Jurisdiction under an Exclusive Agreement

The *Convention* will modify Australian courts' treatment of judgments given by foreign courts which had jurisdiction solely based on the parties' exclusive choice of court. The *Convention* explicitly provides for the recognition of such judgments and contains rules about non-enforcement that are tailored to such judgments. The main difference in the treatment of such judgments under the *Convention* is that the exceptions to enforcement are somewhat narrower than under the current law.

The recognition of foreign judgments in Australia is currently regulated by three different schemes: the *Trans-Tasman Proceedings Act 2010* (Cth) deals with the judgments of New Zealand courts; the *Foreign Judgments Act 1991* (Cth) regulates judgments of courts of the countries listed in the schedule to the *Foreign Judgments Regulation 1992* (Cth);¹²⁸ and the common law rules on recognition and enforcement apply to the judgments of the courts of all other

liminary ruling proceedings, the language of the case must be the language of the referring court: *CJEU Rules of Procedure* (n 122) art 37(3).

¹²⁵ Assuming the Parliament of the United Kingdom repeals the *European Communities Act 1972* (UK): Andrew Dickinson, 'Back to the Future: The UK's EU Exit and the Conflict of Laws' (2016) 12 *Journal of Private International Law* 195, 197–8.

¹²⁶ See Mukarrum Ahmed and Paul Beaumont, 'Exclusive Choice of Court Agreements: Some Issues on the Hague Convention on Choice of Court Agreements and Its Relationship with the Brussels I Recast Especially Anti-Suit Injunctions, Concurrent Proceedings and the Implications of Brexit' (2017) 13 *Journal of Private International Law* 386, 409–10.

¹²⁷ *Convention* (n 1) arts 1(1), 3(a).

¹²⁸ This includes only six of the current contracting states to the *Convention* (France, Germany, Italy, Poland, Singapore and the United Kingdom). See *Foreign Judgments Regulations 1992* (Cth) sch items 9, 10, 15, 19A, 24, 27.

countries. Each of these three schemes requires recognition of a judgment given by a court which had jurisdiction because the parties had nominated that court as having exclusive jurisdiction, although none specifically refers to this situation. Under the *Trans-Tasman Proceedings Act 2010* (Cth), an Australian court must register a 'registrable NZ judgment' given by New Zealand courts on the application of the judgment creditor.¹²⁹ A registered New Zealand judgment can only be set aside in very limited circumstances.¹³⁰ This applies to almost all judgments given by a New Zealand court, including when the jurisdiction of the New Zealand court was based on an exclusive choice of that court.

Foreign judgments from countries other than New Zealand can currently be recognised on the legal basis that any exclusive jurisdiction agreement demonstrates submission to the jurisdiction.¹³¹ The law does not differentiate between submission arising from exclusive jurisdiction agreements and submission arising in other ways.¹³² Accession to the *Convention* will therefore not substantively change the law in relation to recognition of foreign judgments, but it will make it clearer that a judgment given in such a case would be enforceable in Australia, which will create certainty for foreign parties contracting with Australian parties.

Both the *Foreign Judgments Act 1991* (Cth) and the common law allow non-enforcement of judgments in a similar, although somewhat broader, range of situations to the *Convention*. The Act stipulates the circumstances in which a registered foreign judgment must be set aside on the application of the judgment debtor.¹³³ These are generally similar to, although somewhat more specific than, the circumstances in which the common law permits a court not to enforce a recognised foreign judgment. Relevantly to the discus-

¹²⁹ *Trans-Tasman Proceedings Act 2010* (Cth) ss 4 (definition of 'entitled person'), 66, 67, 68(1).

¹³⁰ *Ibid* ss 72(1), (3) only permit a registered judgment to be set aside if enforcement of the judgment would be contrary to Australian public policy, or if the judgment was registered in contravention of the Act, or the subject matter of the original proceedings was certain property not located in New Zealand.

¹³¹ *Foreign Judgments Act 1991* (Cth) ss 7(2)(a)(iv), (3)(a)(iii); *Telesto Investments Ltd v UBS AG* (2013) 94 ACSR 29, 79–81 [266]–[272] (Sackar J).

¹³² Except in a confined range of cases, a foreign court is not taken to have jurisdiction simply because 'the bringing of the proceedings in the country of the original court was contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of the country of that court': *Foreign Judgments Act 1991* (Cth) s 7(4)(b). Submission to jurisdiction may be effected by means other than agreement: at s 7(3).

¹³³ *Ibid* s 7.

sion in this article, these include that the judgment debtor did not have sufficient notice of foreign proceedings in order to be able to participate in those proceedings,¹³⁴ that the judgment was obtained by fraud,¹³⁵ that the judgment is contrary to public policy,¹³⁶ and that the matter in dispute had already been determined by a competent court.¹³⁷

The *Convention* limits the circumstances in which a court can refuse recognition or enforcement of judgments. Reflecting some of the *Convention's* exceptions to enforcement of choice of court agreements, a court may refuse to recognise or enforce a judgment if the agreement was null and void under the law of the chosen court, unless the chosen court determined that the agreement was valid,¹³⁸ if a party lacked capacity to conclude the agreement under the law of the requested state,¹³⁹ and if recognition or enforcement would be 'manifestly incompatible with the public policy of the requested State'.¹⁴⁰ Some exceptions to recognition and enforcement of judgments may be applied more restrictively than the equivalent exceptions to enforcement of choice of court agreements.¹⁴¹ A judgment may also be refused recognition or enforcement under the *Convention* if it was obtained by fraud 'in connection with a matter of procedure',¹⁴² and if the judgment is inconsistent with an earlier judgment of the requested state or another state.¹⁴³ In summary, most of the bases for non-recognition and non-enforcement under the *Convention* are not dissimilar to the grounds on which a registered judgment can be set aside under the *Foreign Judgments Act 1991* (Cth) or not enforced at common law, although most of the bases under the *Convention* are somewhat narrower than the current law.

¹³⁴ *Ibid* s 7(2)(a)(v).

¹³⁵ *Ibid* s 7(2)(a)(vi).

¹³⁶ *Ibid* s 7(2)(a)(xi).

¹³⁷ *Ibid* s 7(2)(b).

¹³⁸ *Convention* (n 1) art 9(a).

¹³⁹ *Ibid* art 9(b).

¹⁴⁰ *Ibid* art 9(e).

¹⁴¹ See generally Jan Oster, 'Public Policy and Human Rights' (2015) 11 *Journal of Private International Law* 542, 551.

¹⁴² *Convention* (n 1) art 9(d).

¹⁴³ *Ibid* arts 9(f)–(g).

III MATTERS UNRESOLVED BY THE CONVENTION AND IMPLICATIONS FOR AUSTRALIA'S ACCESSION

Given Australia's constitutional structure, and the limits on the Commonwealth government's legislative authority, implementing the *Convention* in Australia raises some challenges. Section A of this part examines the implications of the scope of the *Convention*, and section B analyses various matters not dealt with by the *Convention's* exceptions. Section C considers the effect of the *Convention* on non-exclusive jurisdiction agreements which, although outside the *Convention's* scope, are affected by it. Section D considers the status of jurisdiction agreements which nominate multiple courts of one or more contracting states. In section E, we make several critical remarks in relation to the *Convention's* approach to the protection of weaker parties and how the *Convention* will impact Australia's existing protections of such parties.

A *The Scope of the Convention*

The government's *National Interest Analysis: Australia's Accession to the Convention on Choice of Court Agreements* is ambiguous as to whether the proposed International Civil Law Act will govern only choice of court agreements within the *Convention's* scope or whether it is intended also to apply to other agreements outside the *Convention's* scope.¹⁴⁴ It asserts both that the 'treatment of choice of court agreements and the recognition and enforcement of foreign judgments' that are outside the scope of the *Convention* will be governed by existing laws,¹⁴⁵ and that the International Civil Law Act will 'codify the common law relating to choice of court agreements.'¹⁴⁶

Assuming that it mirrors the scope of the *Convention*, the proposed International Civil Law Act would not 'codify' the common law in relation to choices of foreign courts. Until the *Convention* is ratified by every country (which is obviously unlikely), incorporating it into Australian law will create an even more complex regime for the characterisation and treatment of

¹⁴⁴ *National Interest Analysis* (n 8) [21]–[25].

¹⁴⁵ *Ibid* [12].

¹⁴⁶ *Ibid* [24]. This statement is potentially confusing because the Act would not in any sense 'codify' the common law; it would replace the common law principles both in form and, as already explained, in substance in respect of exclusive jurisdiction agreements nominating contracting states.

exclusive jurisdiction agreements than already exists.¹⁴⁷ Following accession, exclusive jurisdiction agreements nominating contracting states will be governed by the *Convention*, exclusive jurisdiction agreements nominating New Zealand courts will be governed by the *Trans-Tasman Proceedings Act 2010* (Cth) unless New Zealand accedes to the *Convention*, and exclusive jurisdiction agreements nominating the courts of non-contracting states other than New Zealand will be governed by common law principles. All non-exclusive choice of court agreements will continue to be governed by common law principles, although their characterisation as non-exclusive will be determined according to different principles, depending on which court is chosen — by the *Convention*, the *Trans-Tasman Proceedings Act 2010* (Cth), or the common law. The *Convention*,¹⁴⁸ the Act,¹⁴⁹ and the common law¹⁵⁰ each uses a different test of exclusivity, which further complicates the system. Such a complex regime is hardly likely to achieve the *Convention's* objective of creating 'greater clarity and certainty'.¹⁵¹ In principle, it would be desirable to extend the *Convention* scheme to all choice of court agreements, including those which select the courts of non-contracting states. Whether the Commonwealth has the constitutional power to do so is an entirely different question, which the *National Interest Analysis* does not address.

Given Australia's constitutional structure and the limitations on the Commonwealth government's legislative competence, the means of comprehensively and effectively extending the scope of application of the *Convention's* scheme will require cooperation between the Commonwealth and the states and territories. The Commonwealth certainly has authority to legislate with respect to federal jurisdiction, including jurisdictional rules applicable to the federal courts as well as to state and territory courts exercising federal jurisdiction, so the extension of the *Convention* scheme to all exclusive choice of court agreements in courts exercising federal jurisdiction could be done in the proposed International Civil Law Act. The Commonwealth's competence to extend the operation of the *Convention* scheme to the state and territory courts not exercising federal jurisdiction is less clear. This could be overcome either by the states referring relevant powers to the Commonwealth, or by the

¹⁴⁷ Notably, consumer and employment contracts are excluded from the *Convention*: *Convention* (n 1) art 2(1). These contracts also fall outside the scope of the *Trans-Tasman Proceedings Act*: *Trans-Tasman Proceedings Act 2010* (Cth) ss 20(3)(b), (c).

¹⁴⁸ *Convention* (n 1) art 3.

¹⁴⁹ *Trans-Tasman Proceedings Act 2010* (Cth) s 20(3)(a).

¹⁵⁰ *ACE Insurance* (n 21) [15]–[40].

¹⁵¹ *National Interest Analysis* (n 8) [6]. See *Convention* (n 1) Preamble.

Commonwealth, states and territories enacting uniform rules. Enactment of uniform rules appears to be the most likely course.¹⁵²

B *Matters Not Resolved by the Convention's Exceptions to Enforcement*

The *Convention's* exceptions differ from those in the *New York Convention* in two important respects. First, the *New York Convention* explicitly permits a court to order a stay of only the part of the proceeding to which the arbitration agreement applies,¹⁵³ whereas the *Convention* does not contain such an explicit provision and apparently requires the court to stay the entire proceeding.¹⁵⁴ While it might be argued that art 6 of the *Convention* should be narrowly interpreted to require a stay to be granted only if all aspects of the proceedings are within the scope of the choice of court agreement, we suggest that it ought to be construed so as to permit a stay to be granted only of the part of the proceeding to which the choice of court agreement applies.

Second, unlike the *New York Convention*, the *Convention* does not regulate the non-enforcement of 'inoperative' agreements. Where parties have mutually or unilaterally waived their rights under the arbitration agreement, that agreement will be inoperative for the purposes of the *New York Convention*.¹⁵⁵ Waiver implied from conduct can also occur in the context of a choice of court, yet the *Convention* contains no exception which applies to this situation.¹⁵⁶ Australian authority establishes that where a defendant counterclaims in proceedings initiated by its counterparty in a court other than that exclusively nominated, the defendant makes an election between its rights under the exclusive jurisdiction agreement and its rights in the proceedings the

¹⁵² The former Chief Justice of the High Court of Australia, Robert French, stated extra-curially that the Harmonisation Committee of the Council of Chief Justices of Australia and New Zealand is assisting the Commonwealth Attorney-General 'in developing Model Rules of Court to give effect to the *Convention*': Chief Justice Robert French, 'The State of the Australian Judicature' (2016) 90 *Australian Law Journal* 400, 404.

¹⁵³ *New York Convention* (n 52) art V(1)(c).

¹⁵⁴ See *Convention* (n 1) art 6.

¹⁵⁵ *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896, [53]; *Comandate Marine* (n 107) 62 [53]–[55] (Allsop J); *Zhang v Shanghai Wool and Jute Textile Co Ltd* (2006) 201 FLR 178, 184–5 [13] (Chernov JA).

¹⁵⁶ This is distinct from a later jurisdiction agreement which satisfies the *Convention* requirements and which varies the parties' earlier agreement designating the exclusive jurisdiction of the chosen court. If such a variation is established, the consequence would be that the original exclusive choice of court agreement would no longer exist and the exceptions to enforcement would therefore no longer apply to it, although they might apply to the later agreement.

subject of the counterclaim, and waives its rights under the exclusive jurisdiction agreement.¹⁵⁷ European authority similarly recognises the overriding effect of post-seisin conduct but conceptualises it very differently. A defendant is deemed to have submitted to the jurisdiction of a non-nominated court before which the plaintiff has initiated proceedings if it objects to jurisdiction after having made what is under the national, procedural law of the court seized its first submissions in defence as to substance.¹⁵⁸ The plaintiff's and defendant's conduct taken together is conceptualised as a tacit jurisdiction agreement,¹⁵⁹ and will override the effect of a prior exclusive agreement as to jurisdiction.¹⁶⁰ The *Convention* makes no specific provision for post-seisin conduct. Proposals for a specific rule on post-seisin agreements, including one requiring the written acceptance of the defendant,¹⁶¹ were included in earlier drafts¹⁶² but ultimately not taken up. One of the *Convention* rapporteurs suggests unofficially that the *Convention* sees this as a procedural matter left to national law.¹⁶³

¹⁵⁷ *Bogart Lingerie Ltd v Steadmark Pty Ltd* [2013] VSC 212, [36], [50]; *Steadmark Pty Ltd v Bogart Lingerie Ltd* [2013] VSC 402, [36], [45].

¹⁵⁸ *Elefanten Schuh GmbH v Jacqmain* (C-150/80) [1981] ECR 1671, 1686 [16]–[17].

¹⁵⁹ Alfonso Luis Calvo Caravaca and Javier Carrascosa González, 'Article 26' in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law ECPIL: Brussels Ibis Regulation* (Otto Schmidt, 2016) vol 1, 669, 670 [1].

¹⁶⁰ *Elefanten Schuh* (n 158) 1684–5 [10]–[11]; *Česká podnikatelská pojišťovna as v Bilas* (C-111/09) [2010] ECR I-4547, I-4556–7 [25]–[26].

¹⁶¹ Permanent Bureau and Co-Reporters, Hague Conference on Private International Law, 'Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference 6–20 June 2001' (Interim Text, Commission II — Jurisdiction and Foreign Judgments in Civil and Commercial Matters, 2001) 5 <https://assets.hcch.net/upload/wop/jdgm2001draft_e.pdf>, archived at <<https://perma.cc/LG38-UKQT>>.

¹⁶² Andrea Schulz, 'Report on the Second Meeting of the Informal Working Group on the Informal Judgments Project 6 to 9 January 2003' in Hague Conference on Private International Law, *Proceedings of the Twentieth Session* (n 101) vol 3, 55, 63–5 [38]–[47]; Andrea Schulz, *Report on the Work of the Informal Working Group on the Judgments Project, in Particular on the Preliminary Text Achieved at Its Third Meeting — 25–28 March 2003* (Preliminary Document No 22, Permanent Bureau of the Hague Conference on Private International Law, June 2003) 17.

¹⁶³ Trevor Hartley, *Choice-of-Court Agreements under the European and International Instruments: The Revised Brussels I Regulation and Lugano Convention, and the Hague Convention* (Oxford University Press, 2013) 185 [8.46].

C Non-Exclusive Jurisdiction Agreements

The *Convention* applies only to exclusive jurisdiction agreements designating the courts of a single contracting state. The *Convention* will, nonetheless, have an effect on agreements that are currently characterised as non-exclusive by Australian courts, in two ways. First, the *Convention* will dictate the way all choice of court agreements designating the courts of Contracting States, including Australia, are characterised. As discussed above,¹⁶⁴ the *Convention* deems a jurisdiction agreement to be exclusive unless the parties have expressly agreed otherwise. Some agreements that would, under current principles, be characterised as non-exclusive, will on accession to the *Convention* be characterised as exclusive.¹⁶⁵ Accession will therefore result in more agreements being characterised as exclusive than is currently the case at common law.

Because the *Convention* does not apply to non-exclusive agreements, it will have no impact on the *effect* that is given to agreements which are characterised as non-exclusive. The effect of such agreements in Australian litigation will, for the time being, continue to be regulated by the common law. At common law, a non-exclusive agreement is merely one factor to be taken into account in determining whether the court is *forum non conveniens*. The distinction between exclusive and non-exclusive jurisdiction agreements is more significant in Australia than in other common law countries. That is because the Australian principle of *forum non conveniens* only requires that proceedings be stayed if the court accepts that it is a clearly inappropriate forum, without regard for the relative suitability of litigation in competent foreign fora.¹⁶⁶ Most other common law jurisdictions adopt the English version of *forum non conveniens*, which requires a court to stay proceedings in favour of another more appropriate court.¹⁶⁷ Australian courts are therefore comparatively unlikely to stay proceedings on the basis of a non-exclusive jurisdiction agreement. The distinction between exclusive and non-exclusive agreements lends itself to exploitation by litigants attempting to avoid the effect of a jurisdiction agreement.¹⁶⁸

¹⁶⁴ See nn 27–9 and accompanying text.

¹⁶⁵ See Mortensen, 'The Hague and the Ditch' (n 9) 231.

¹⁶⁶ *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538, 558–60 (Mason CJ, Deane, Dawson and Gaudron JJ), 587 (Toohey J).

¹⁶⁷ See Dan Jerker B Svantesson, 'In Defence of the Doctrine of Forum Non Conveniens' (2005) 35 *Hong Kong Law Journal* 395.

¹⁶⁸ Bell (n 17) 305–6 [5.54]–[5.55].

The effect of non-exclusive jurisdiction agreements may in the future be governed by an instrument of the revived Hague 'Judgments Project'. In June 2016 and February 2017, a Special Commission began to prepare a draft convention on the recognition and enforcement of foreign judgments.¹⁶⁹ If the Judgments Project is later expanded to include the development of an additional instrument on direct rules of jurisdiction,¹⁷⁰ jurisdiction on the basis of non-exclusive agreements would have to be dealt with in that instrument.

The second way in which the *Convention* may affect non-exclusive jurisdiction agreements is at the level of recognition and enforcement of foreign judgments. The *Convention* makes provision for contracting states to extend the *Convention's* rules for the recognition and enforcement of foreign judgments to those rendered by courts with jurisdiction based on non-exclusive jurisdiction agreements. The *Convention* provides a framework for Contracting States to do this by declaration on a reciprocal basis.¹⁷¹ Australia should carefully scrutinise the content and effect of this provision and, naturally, the views of other contracting states before considering a reciprocal declaration.¹⁷² At the time of writing this article, the EU, Mexico and Singapore had not made a reciprocal declaration.¹⁷³

The net result is a rather fragmentary, confusing and potentially inconsistent regime: the *Convention's* definition of exclusivity is applied to determine whether an agreement is exclusive, and the effect of non-exclusive agreements will be governed in Australia by the common law, though this

¹⁶⁹ 'Special Commission', *HCCH (Web Page)* <www.hcch.net/en/projects/legislative-projects/judgments/special-commission1>, archived at <<https://perma.cc/JXP4-L38D>>. The representative governing body of the Hague Conference on Private International Law instructed the Secretary General to convene a third meeting of the Special Commission, which is scheduled to occur in November 2017: Permanent Bureau of the Hague Conference on Private International Law, 'Conclusions and Recommendations Adopted by the Council' (14–16 March 2017) 1 [5].

¹⁷⁰ Once the Special Commission has completed the draft convention, the Experts Group will consider expanding the Judgments Project: Permanent Bureau of the Hague Conference on Private International Law, 'Conclusions and Recommendations Adopted by the Council' (14–16 March 2017) 2 [7].

¹⁷¹ *Convention* (n 1) art 22(1).

¹⁷² See European Commission, 'Proposal for a Council Decision on the Approval, on Behalf of the European Union, of the Hague Convention of 30 June 2005 on Choice of Court Agreements' (Procedure 2014/0021/NLE, 30 January 2014) 5 [3.2.1].

¹⁷³ 'Status Table: 37 — Convention of 30 June 2005 on Choice of Court Agreements', *HCCH (Web Page)*, 2 June 2016 <www.hcch.net/en/instruments/conventions/status-table/?cid=98>, archived at <<https://perma.cc/HUJ4-YRCN>>.

may in the future be governed by a Judgments Project instrument. The parochial nature of the Australian *forum non conveniens* principle which determines the effect of a non-exclusive choice of foreign court agreement is incongruent with the *Convention's* cosmopolitan attitude. This disparity should raise concerns; we hope it will create renewed interest in the reform of the Australian principle of *forum non conveniens*. Finally, foreign judgments rendered by courts with jurisdiction based on non-exclusive jurisdiction agreements may be governed by the *Convention* if both courts involved in parallel proceedings are from contracting states that have made a reciprocal declaration. The inconsistency of having the enforcement of judgments rendered on the basis of non-exclusive agreements governed by the *Convention*, and the effect of non-exclusive jurisdiction agreements themselves potentially being governed by another instrument, is a reason to exercise caution in making a reciprocal declaration.

D Choice of Court Agreements that Nominate Multiple Courts

The *Convention* treats a choice of multiple courts within a *single* contracting state as an 'exclusive' agreement within the terms of the *Convention*. The Explanatory Report states that in such a case the allocation of jurisdiction between multiple courts of that State should be regulated by its national laws.¹⁷⁴ This issue is not readily or simply resolved by Australian law, which does not recognise the possibility that multiple courts can have 'exclusive' jurisdiction and therefore has no specific rules for resolving a dispute as to which of several Australian courts, each of which has 'exclusive' jurisdiction, should hear a case. This would have to be determined under the cross-vesting scheme which requires Australian courts to transfer proceedings if such transfer is 'in the interests of justice.'¹⁷⁵ This has been interpreted to require the court to transfer proceedings to the more appropriate Australian court. It remains to be seen how Australian courts would determine the effect of multiple 'exclusive' jurisdiction agreements in such a case.

The *Convention* does not treat as exclusive those jurisdiction agreements which expressly nominate the courts of *more than one* contracting state. It does not apply to more complex jurisdiction agreements. In particular, non-uniquely exclusive jurisdiction agreements, which nominate the courts of different countries as having 'exclusive' jurisdiction in terms of claims brought

¹⁷⁴ Hartley and Dogauchi (n 36) [103]–[104].

¹⁷⁵ *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth) s 5.

by each party, and asymmetric agreements, which nominate the courts of one country as having ‘exclusive’ jurisdiction in terms of claims brought by one party while purporting to preserve the counterparty’s right to invoke the jurisdiction of other courts, are not exclusive agreements for the purposes of the *Convention*.¹⁷⁶ Whether or not such provisions are enforceable, and the effect that should be given to them, remain issues for national laws and regional instruments.¹⁷⁷

E *Effect of Accession on Australia’s Protection of Weaker Contracting Parties*

The *Convention* applies to commercial and civil contracts, explicitly excluding contracts involving consumers and employees from its scope.¹⁷⁸ These exclusions are justified on the basis that consumers and employees are presumptively weaker than their counterparties. Presumptively weaker parties are those who, despite having legal capacity to contract and not having any inherent weakness of their own, have an ‘institutional’ disadvantage in relation to the other party.¹⁷⁹ This may be because the other party wields greater bargaining power,¹⁸⁰ and is deemed to be economically stronger,¹⁸¹ or because of an information asymmetry between the parties.¹⁸² The provisions of the *Trans-Tasman Proceedings Act 2010* (Cth) dealing with exclusive choice of court agreements contain the same exclusions.¹⁸³ The Act incorporates, with one difference, the *Convention*’s definition of a consumer: ‘a natural person acting primarily for personal, family or household purposes.’¹⁸⁴

¹⁷⁶ Hartley and Dogauchi (n 36) [40], [47]–[48], [104]–[106].

¹⁷⁷ Keyes and Marshall (n 26) 356–7. See Richard Fentiman, *International Commercial Litigation* (Oxford University Press, 2nd ed, 2015) 79–88 [2.123]–[2.158].

¹⁷⁸ *Convention* (n 1) art 2(1).

¹⁷⁹ Adrian Briggs, *Private International Law in English Courts* (Oxford University Press, 2014) 225 [4.146].

¹⁸⁰ Peter Nygh, *Autonomy in International Contracts* (Clarendon Press, 1999) 69.

¹⁸¹ *Group Josi Reinsurance Company SA v Universal General Insurance Company (UGIC)* (C-412/98) [2000] ECR I-5940, I-5959 [65].

¹⁸² Michael J Whincop and Mary Keyes, *Policy and Pragmatism in the Conflict of Laws* (Ashgate Dartmouth, 2001) 35; Giesela Rühl, ‘Consumer Protection in Choice of Law’ (2011) 44 *Cornell International Law Journal* 569, 573–5.

¹⁸³ *Trans-Tasman Proceedings Act 2010* (Cth) ss 20(3)(b)–(c).

¹⁸⁴ *Convention* (n 1) art 2(1)(a). See Mortensen, ‘Together Alone’ (n 11) 132–4. The definition in the *Trans-Tasman Proceedings Act 2010* (Cth) s 20(3)(b) refers to ‘an individual’ rather than to ‘a natural person’. Defining ‘consumer’ differently in the Act and the *Convention* is not ideal. Australian law is already inconsistent in terms of defining a ‘consumer’: compare *CCA* (n 59) sch 2 s 23(3), which defines a ‘consumer contract’ as ‘a contract for (a) a supply of

The exclusions in the *Convention* and Act protect only certain types of presumptively weaker parties. Under Australian and EU law, insured parties are also considered as deserving of protection with respect to jurisdiction agreements. Again, those rules are based on the premise that the insured party, even if it is a company, is usually weaker than the insurer.¹⁸⁵ Australian law also protects franchisees by requiring parties to litigate where the franchised business is based. This requirement intends 'to reduce the barriers and costs to a franchisee in seeking access to justice and resolving disputes'.¹⁸⁶ Litigation in a different Australian court or foreign court is presumed to be more expensive; because a franchisee 'is typically not as well-resourced as a franchisor', it is thought more appropriate that the franchisor should bear this cost.¹⁸⁷

The policy of protecting franchisees and insured parties is reflected in Australia under the recently enacted *Franchising Code*¹⁸⁸ and *Insurance Contracts Act 1984* (Cth) respectively.¹⁸⁹ The *Franchising Code* provides that any jurisdiction agreement, other than one which designates the state or territory in which the franchised business is based, has no effect.¹⁹⁰ The *Insurance Contracts Act 1984* (Cth) is less explicit. It contains a general provision which prevents parties to contracts of insurance from 'contracting out' of the operation of the Act to the detriment of the insured.¹⁹¹ While the Act does not expressly address the effect of a choice of a foreign court,¹⁹² the

goods or services; or (b) a sale or grant of an interest in land to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption', with CCA (n 59) sch 2 ss 3(1)(a)–(b), (3)(a)–(b), under which a small business is a 'consumer' if the price of the goods or services does not exceed \$40,000 or the goods or services were of a kind ordinarily acquired for personal, domestic or household use or consumption.

¹⁸⁵ European Commission, 'Proposal for a Council Decision' (n 172) 6–8 [3.2.2.2]. In EU law, the protection does not apply in relation to insureds or reinsureds party to large risk insurance contracts: *Brussels I Recast Regulation* (n 12) arts 15(5), 16.

¹⁸⁶ Minister for Small Business, 'Explanatory Statement: Competition and Consumer Act 2010' (Select Legislative Instrument No 168, 2014) 33.

¹⁸⁷ *Ibid.*

¹⁸⁸ *Franchising Code* (n 59).

¹⁸⁹ Franchisees are also recognised in some American states as being presumptively weaker: Woodward (n 87) 680–2; Symeon C Symeonides, *Choice of Law* (Oxford University Press, 2016) 459.

¹⁹⁰ *Franchising Code* (n 59) cl 21.

¹⁹¹ *Insurance Contracts Act 1984* (Cth) s 52.

¹⁹² The Act contains provisions relating to choice of law. It stipulates that it applies to insurance contracts the objective proper law of which is that of an Australian state or territory, notwithstanding any agreement as to the governing law: *ibid* s 8.

High Court has held that such a choice has the effect of excluding the application of the Act and therefore is unenforceable.¹⁹³

In the *Brussels I Recast Regulation*, jurisdiction agreements involving certain insured parties, domiciled in a member state,¹⁹⁴ have a limited effect.¹⁹⁵ In litigation against these insured parties, jurisdiction agreements are subverted to the general rule of jurisdiction — that a defendant should be sued in the place of its domicile.¹⁹⁶ In litigation against an insurer, that rule is extended, so that an insured party can sue an insurer in the place of its own domicile as well as in the place of the insurer's domicile or deemed domicile.¹⁹⁷ Unless the parties' jurisdiction agreement, which is concluded before a dispute arises, allows the insured party to sue the insurer in courts additional to those places, or is contained in a contract covering certain enumerated large risks,¹⁹⁸ it is unenforceable.¹⁹⁹

We suggest that careful consideration ought to be given in Australia to the position that has been taken by the EU on accession to the *Convention*, because the EU rules on jurisdiction have a similar protective tendency, at least so far as insureds are concerned. On ratification, the EU made a declaration to the *Convention* preserving,²⁰⁰ at least for the time being,²⁰¹ the jurisdictional protections afforded to insured parties under the *Brussels I Recast Regulation*.²⁰² The *Convention* allows a contracting state with a 'strong interest'

¹⁹³ *Akai* (n 18) 447–8 (Toohey, Gaudron and Gummow JJ).

¹⁹⁴ *Brussels I Recast Regulation* (n 12) art 15(4).

¹⁹⁵ *Ibid* art 25(4).

¹⁹⁶ *Ibid* art 14(1).

¹⁹⁷ *Ibid* arts 11(1)(a)–(b), (2).

¹⁹⁸ *Ibid* arts 15(5), 16.

¹⁹⁹ This does not apply where both parties and the nominated court are domiciled or habitually resident in the same member state: *ibid* art 15(3).

²⁰⁰ On the EU's reasons for the making of a declaration, see European Commission, 'Commission Staff Working Document Accompanying the Proposal for a Council Decision on the Signing by the European Community of the Convention on Choice-of-Court Agreements: Impact Assessment' (Supplement No SEC/2008/2389, 5 September 2008) 46–9.

²⁰¹ The EU also made a unilateral declaration to the effect 'that it may ... reassess the need to maintain its declaration' with respect to insured parties once the *Convention* has been in force for some time: *Council Decision of 4 December 2014 on the Approval, on Behalf of the European Union, of the Hague Convention of 30 June 2005 on Choice of Court Agreements* [2014] OJ L 353/5, annex II.

²⁰² *Ibid* annex I. See generally Stefania Bariatti, 'Jurisdiction in Matters Relating to Insurance' in Andrew Dickinson and Eva Lein (eds), *The Brussels I Regulation Recast* (Oxford University Press, 2015) 197. For a detailed analysis of the EU declaration and its lawfulness see Paul

in not applying the *Convention* to a particular matter, to make a narrow and specific declaration to that effect.²⁰³ The EU's declaration excludes from the scope of the *Convention* any jurisdiction agreement, concluded prior to a dispute arising,²⁰⁴ unless the jurisdiction agreement relates to a contract of reinsurance,²⁰⁵ or a contract of insurance in respect of 'large risks,'²⁰⁶ or nominates a contracting state in which both parties are located.²⁰⁷ The EU also considered making a declaration with respect to copyright and related rights²⁰⁸ but ultimately refrained from doing so.

Australia does not intend to make any *Convention* declarations on accession to the *Convention*. Australia proposes for courts to deal with the effect of exclusive jurisdiction agreements nominating foreign courts of contracting states in insurance contracts at the time a dispute arises by refusing enforcement of a jurisdiction agreement designating foreign courts on the basis of the *Convention's* public policy exception.²⁰⁹ The same approach will apply to franchise contracts. This approach is likely to encourage litigation about whether enforcement of the agreement would satisfy the *Convention* threshold of being 'manifestly contrary' to Australia's public policy,²¹⁰ especially given the uncertainty as to the scope of that exception. If Australia were to make a declaration,²¹¹ this litigation would be avoided and exclusive jurisdiction agreements nominating foreign courts in insurance contracts and franchise contracts litigated before Australian courts would receive uniform treatment, irrespective of whether the nominated court belongs to a contracting state.

Beaumont, 'The Revived Judgments Project in The Hague' (2014) 32 *Nederlands Internationaal Privaatrecht* 532, 532, 534–5, 539.

²⁰³ *Convention* (n 1) art 21.

²⁰⁴ Cf *Brussels I Recast Regulation* (n 12) art 15(1).

²⁰⁵ 'Declaration/Reservation/Notification', *HCCH* (Web Page) para 2(a) <www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=1044&disp=resdn>, archived at <<https://perma.cc/C46W-HWY9>>.

²⁰⁶ *Ibid* para 2(d).

²⁰⁷ *Ibid* para 2(c).

²⁰⁸ European Commission, 'Commission Staff Working Document' (n 200) 17, 35–8, 46–9.

²⁰⁹ *National Interest Analysis* (n 8) [25]. See nn 97–116 and accompanying text.

²¹⁰ *Convention* (n 1) art 6(c).

²¹¹ Woodward suggests that the United States, if it were to ratify the *Convention*, should make an art 21 declaration with respect to franchise contracts: Woodward (n 87) 714–15. Both Garnett and Beaumont have criticised this view: Garnett, 'The Hague Choice of Court Convention' (n 9) 176–80; Beaumont, 'Hague Choice of Court Agreements Convention 2005' (n 80) 135 n 37.

Declarations also have reciprocal effect. The consequence of this is that, if the parties to an insurance or franchising contract within the scope of the declaration have chosen an Australian court, other contracting states will not be obliged to give effect to that choice via the *Convention*. This means, for example, that where an Australian insured sues an insurer in an Australian court nominated in an exclusive choice of court agreement and the insurer subsequently brings proceedings in an EU member state, which has general or special jurisdiction under the *Brussels I Recast Regulation*, the EU member state would not be obliged to stay its proceedings pursuant to the *Convention*. But it would be open to that court to stay its proceedings pursuant to its national law, which would govern the effect of the choice of court agreement nominating the Australian court.²¹² Given that in these circumstances, an EU member state court would be applying its national law, rather than the *Convention* presumption and definition, to the question of whether the jurisdiction agreement is exclusive, parties would be well-advised to draft their jurisdiction agreement in the clearest possible terms and to describe the chosen forum as having 'exclusive' jurisdiction.

IV CONCLUSION

The *Hague Convention on Choice of Court Agreements* should have a largely positive impact on Australian law. The *Convention's* presumption of exclusivity, and its requirements that the courts of contracting states strictly enforce foreign exclusive jurisdiction agreements and judgments given by foreign courts exclusively nominated by the parties, are important improvements to the existing law. The *Convention* should create greater certainty for contracting parties and reduce the likelihood and complexity of disputes about the effect of jurisdiction agreements. The *Convention* does, however, have several shortcomings and leaves several important issues untouched, as we have demonstrated. This emphasises the need for an holistic review of the Australian law relating to the effect of jurisdiction agreements; in drafting the new International Civil Law Act, it is to be hoped that the

²¹² See *Coreck Maritime GmbH v Handelsveem BV* (C-387/98) [2000] ECR I-9362, I-9373 [19]. The *Brussels I Recast Regulation* does not contain a specific provision empowering member state courts to decline jurisdiction where a third-state court has been chosen in an exclusive jurisdiction agreement. Beaumont asserts that this was a deliberate decision to encourage other states to join the *Convention*: Beaumont, 'The Revived Judgments Project in The Hague' (n 202) 535. All the same, the *Brussels I Recast Regulation* does not contain a provision governing third state choice of court agreements, nor does it contain a provision preventing member states from declining jurisdiction under their national laws.

opportunity is taken to simplify and improve the treatment of jurisdiction agreements more broadly. Finally, we have suggested that Australia should reconsider its intention not to make any declarations on accession to the *Convention*. In particular, Australia should consider making a declaration with respect to a specific matter, as the EU has done, with a view to ensuring, at least for the time being, the continued protection of certain categories of parties, namely insured parties and franchisees.