

**THE LIMITS ON THE REMEDY OF
DAMAGES FOR BREACH OF JURISDICTION
AGREEMENTS: THE LAW OF CONTRACT
MEETS PRIVATE INTERNATIONAL LAW**

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The availability of damages for breach of jurisdiction agreements raises issues at the intersection of the law of contract and private international law. While the availability of such a remedy is firmly entrenched in England, it has received little attention in Australia. This article suggests that Australian law should embrace such a remedy, and that the real question is what the proper limits of such a remedy should be. Even though a jurisdiction agreement is, like any other contractual term, capable of being breached, careful consideration must be given to the limits on the availability of damages. In particular, an award of damages for breach of a jurisdiction agreement should not be made where to do so would contradict a judgment of a foreign court which is entitled to recognition in Australia.

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I INTRODUCTION

In 1964, Professor Zelman Cowen and Dr Derek Mendes Da Costa wrote an article published in the *American Journal of Comparative Law* entitled ‘The Contractual Forum: Situation in England and the British Commonwealth’.¹

The theme of that article has much current appeal. Therein, the learned authors referred to the judgment of Fullagar J in *Compagnie des Messageries Maritimes v Wilson*.² In that case, his Honour had said:

When parties to a contract say:— ‘All disputes between us shall be determined by such and such a tribunal,’ they are saying that, if a dispute arises between them, the claimant will seek a determination of it by the designated tribunal, and that the other party will not object to the jurisdiction of that tribunal. But they are also saying that, as between them, no other tribunal shall have jurisdiction to determine disputes. And what the English courts ... were really saying was that they would recognize such a clause as binding and give effect to it *except* so far as it purported to oust a jurisdiction which they otherwise possessed. Thus, if one party proceeded before a tribunal other than the designated tribunal, they would entertain an action for damages at the suit of the other party ...³

Fullagar J’s words, written more than 60 years ago, have not spawned cases for damages for breach of jurisdiction agreements in Australia, but the availability of that remedy in England is now firmly established.⁴

Jurisdiction agreements should be invaluable tools for parties who are involved in international trade and commerce. They may enable parties to agree, *in advance*, to one of the preliminary stages in any litigation; namely, the court in which disputes between the parties will be heard. Their content is familiar to lawyers and to those involved in international commerce. For example, they may say ‘The parties agree that any disputes under this contract will be determined by the courts of Victoria’, or ‘The parties agree to submit themselves to the exclusive jurisdiction of the courts of New South Wales’. As such, their inclusion in international commercial contracts has the potential

¹ Zelman Cowen and Derek Mendes Da Costa, ‘The Contractual Forum: Situation in England and the British Commonwealth’ (1964) 13 *American Journal of Comparative Law* 179.

² (1954) 94 CLR 577, cited in Cowen and Mendes Da Costa, above n 1, 181–2.

³ *Ibid* 587 (emphasis in original).

⁴ See, eg, *Union Discount Co Ltd v Zoller* [2002] 1 WLR 1517; *A/S D/S Svendborg v Akar* [2003] EWHC 797 (Comm) (15 April 2003); *National Westminster Bank plc v Rabobank Nederland* [No 3] [2008] 1 All ER (Comm) 266; *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG* [2014] 2 Lloyd’s Rep 544 (‘*Starlight Shipping*’).

to bring certainty to the parties' relationship, and save them, as well as the courts, significant time, inconvenience and expense should a dispute arise.

Despite these benefits, without clear and settled mechanisms for their enforcement their effectiveness is significantly decreased. As a result, contracting parties and their legal advisers will also be affected; they will be unable to provide advice on such agreements with any guarantee as to their efficacy. The consequences can be critical — the resolution of the forum for a dispute may often be determinative of the parties' respective prospects of success on the merits.

The Australian courts, which Professor Cowen and his co-author described in their article as those of the 'British Commonwealth', have not yet embraced the remedy of damages for breach of a jurisdiction agreement.⁵ But it is likely that little will stand in the way of the common law in Australia being so developed. The real question, and that which is the subject of this article, is what the proper limits of such a remedy should be.

As such, at the heart of this article lies an assessment of the extent to which jurisdiction agreements should be given effect by the courts as exercises in party autonomy. That is, is a jurisdiction agreement a normal contractual term the breach of which sounds in damages? One might start with this very simple proposition: a jurisdiction agreement is a promise by the parties to each other — a mutual promise — that they agree to sue each other, if the need arises, in the chosen court, *and no other*.⁶ The words of Scrutton LJ, on that occasion in

⁵ The availability of the remedy of damages for breach of an exclusive jurisdiction agreement was held, without discussion, to be sufficiently arguable to warrant the grant of leave to serve a claim alleging such breach by Mandie J in *Commonwealth Bank of Australia v White [No 2]* [2004] VSC 268 (6 August 2004). In *Pipeline Services WA Pty Ltd v Atco Gas Australia Pty Ltd* [2014] WASC 10 (7 May 2014) [8]–[25], Martin CJ accepted that indemnity costs should be ordered for the costs of an application to stay proceedings on the basis of a breach of an arbitration clause. In so doing, the Chief Justice relied on English authority to the effect that breach of an arbitration agreement or jurisdiction agreement, which causes the innocent party to incur costs in applying for a stay, should normally sound in an order for indemnity costs. That is so because such an order reflects that those costs were the direct consequence of the breach of the parties' agreement and would therefore be recoverable as damages for breach of contract in accordance with ordinary principle. Cf *Ansett Australia Ltd v Malaysian Airline System Berhad [No 2]* [2008] VSC 156 (9 May 2008) [22] (Hollingworth J); *Mio Art Pty Ltd v Mango Boulevard Pty Ltd [No 3]* [2013] QSC 95 (12 April 2013) [12]–[13] (Philip McMurdo J).

⁶ Jurisdiction agreements may also be non-exclusive: that is, such agreements enable a person to sue in one court (and the other party agrees not to contest its jurisdiction) but they can sue in other courts. This article does not consider such agreements. For an example of such an agreement, and the mechanisms for its enforcement, see *Sabah Shipyard (Pakistan) Ltd v Pakistan* [2003] 2 Lloyd's Rep 571.

the context of an arbitration agreement, are also apposite for jurisdiction agreements, namely that 'a guiding principle ... and a very natural and proper one, is that parties who have made a contract should keep it'.⁷

No one would be surprised by an assertion that if someone has promised something, he or she should make good on that promise. But private international law must consider interests other than simply those of the contracting parties. The extent to which this 'guiding principle' can inform the law on jurisdiction agreements therefore necessitates consideration of wider issues of public interest.

II THE ARGUMENT FROM GENERAL PRINCIPLE

Courts acknowledge the importance of respecting the contractual autonomy of parties, as expressed in their agreements, particularly jurisdiction agreements. But, as will be explained, the effect that these agreements have on important private international law issues cannot be ignored.

This is a matter that has extensive practical ramifications. If jurisdiction agreements are found to share normal contractual characteristics, certain consequences will flow, particularly when considering the remedies that are available to secure their enforcement. On the other hand, if, upon analysis, it is found that they do not share some, or all, of these contractual characteristics, some other remedies, particularly those commonly found in the corpus of private international law, will shoulder the load of securing their enforcement.

To say that a court has jurisdiction to hear a dispute means that it has the power to hear and decide the proceedings brought before it. It is a precondition to an Australian court adjudicating a dispute that, first, it has personal jurisdiction over the parties to the litigation and that, secondly, it has jurisdiction over the subject matter of the proceedings. If either of these requirements is not established, the Australian court will not be able to hear the matter. Furthermore, at common law, Australian courts also have a discretion to refuse to hear a case if the Australian court is a clearly inappropriate forum.⁸ In such cases, the plaintiff is generally left to pursue the desired remedies in the courts of a foreign state.

⁷ *Metropolitan Tunnel and Public Works Ltd v London Electric Railway Co* [1926] 1 Ch 371, 389.

⁸ See generally *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538. Cf *Spiliada Maritime Corporation v Cansulex Ltd* [1987] 1 AC 460.

Australian and English law recognise that parties are generally entitled to choose in advance a court or courts which will have jurisdiction over any disputes arising between them.⁹ There are some constraints upon this freedom to choose, notably, for example, that the parties cannot choose an Australian court as the forum to decide a dispute the subject matter of which is real property located outside Australia.¹⁰ Furthermore, some jurisdictions have mandatory rules which prevent the choice of a foreign court to resolve certain disputes. Generally, however, the courts respect the parties' autonomy in relation to choice of jurisdiction.

III REVERSING THE EFFECT OF A BREACH OF A JURISDICTION AGREEMENT BY THE REMEDY OF DAMAGES

Say a person promised to sue another, if the need arose, in a particular court. Rather than institute proceedings in that (chosen) court, the person has sued in another court. He or she has breached that promise. If any loss flows from this breach, the aggrieved party should be compensated. Such an approach merely recites the standard application of contractual principles in response to a breach of contract. A contract lawyer would not be surprised. But these principles are not so easily applied to jurisdiction agreements.

Some commentators have drawn on the dicta in English case law and argued that this remedy, until recently largely unknown and undeveloped in the English common law, should assume more importance in the context of jurisdiction agreements.¹¹ This discussion, and the embrace of the remedy in

⁹ See, eg, *Akai Pty Ltd v The People's Insurance Co Ltd* (1996) 188 CLR 418, 428–9 (Toohey, Gaudron and Gummow JJ); *Donohue v Armco Inc* [2002] 1 All ER 749, 759 [24] (Lordingham). See generally Richard Garnett, 'Jurisdiction Clauses since *Akai*' (2013) 87 *Australian Law Journal* 134. This approach is exemplified, within the members of the European Union, by the priority given to jurisdiction agreements in art 25 of *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 Regulation Recast*'), which superseded, from 10 January 2015, the *Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters* [2000] OJ L 12/1 ('*Brussels I Regulation*').

¹⁰ *Dagi v Broken Hill Proprietary Company Ltd [No 2]* [1997] 1 VR 428; *Schmidt v Won* [1998] 3 VR 435; *British South Africa Co v Companhia de Moçambique* [1893] AC 602. See also *Brussels I Regulation Recast* [2012] OJ L 351/1, art 24(1).

¹¹ See, most prominently, Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford University Press, 2008) ch 8. See also Adrian Briggs 'Decisions of British Courts during 2001 Involving Questions of Public or Private International Law — B: Private International Law' (2001) 72 *British Year Book of International Law* 437, 446–52; Daniel Tan, 'Damages for

English law,¹² comes against the background of legal development in England. Specifically, in *Turner v Grovit*,¹³ the European Court of Justice ruled that an anti-suit injunction is no longer available where the *Brussels I Regulation* applied because of the concept of mutual trust fundamental to the question of jurisdiction of, and as between, courts in Europe.¹⁴

As Tham has stated, it is somewhat surprising that no English court had, until 2000, considered a claim for damages for a breach of a jurisdiction clause where, in breach of the agreement to sue in England, a party brought proceedings in a foreign jurisdiction.¹⁵ As already noted, no Australian court has yet substantively grappled with this issue.¹⁶

The previous obscurity of this remedy was attributable to the view that an anti-suit injunction was the *only* appropriate remedy, and that damages would be an ineffective, useless remedy. In *Continental Bank NA v Aeakos Compania Naviera SA*, Steyn LJ (delivering the judgment of the Court of Appeal) said that '[a]n injunction is the *only* effective remedy for the defendants' breach of contract'.¹⁷ Any award of damages for breach of a jurisdiction agreement has been described as an 'ineffective remedy'.¹⁸

Union Discount Co Ltd v Zoller ('*Union Discount*'),¹⁹ decided by the English Court of Appeal in 2001, was, therefore, a trailblazing case. It has been

Breach of Jurisdiction Clauses' (2002) 14 *Singapore Academy of Law Journal* 342; Daniel Tan and Nik Yeo, 'Breaking Promises to Litigate in a Particular Forum: Are Damages an Appropriate Remedy?' [2003] *Lloyd's Maritime and Commercial Law Quarterly* 435; Nik Yeo and Daniel Tan, 'Damages for Breach of Exclusive Jurisdiction Clauses' in Sarah Worthington (ed), *Commercial Law and Commercial Practice* (Hart Publishing, 2003) 403.

¹² See above n 4 and accompanying text.

¹³ [2005] 1 AC 101.

¹⁴ In *Starlight Shipping* [2014] 2 Lloyd's Rep 544, 547 [15] (Longmore LJ), the Court of Appeal held that there was no incompatibility between a claim for damages for breach of a jurisdiction agreement and the fact that an anti-suit injunction is not available to enjoin such breach under the *Brussels I Regulation*. But the question is likely to excite further consideration by the European Court of Justice in due course, where the answer may be different. The advent of the *Brussels I Regulation Recast*, and its recognition of the problems caused by proceedings commenced first in a non-chosen court (as to which, see *Brussels I Regulation Recast* recital 22, arts 31(2), 31(3)), raises a further layer of complexity. Those issues are beyond the scope of this article.

¹⁵ Chee Ho Tham, 'Damages for Breach of English Jurisdiction Clauses: More than Meets the Eye' [2004] *Lloyd's Maritime and Commercial Law Quarterly* 46, 50.

¹⁶ Cf above n 5.

¹⁷ [1994] 1 WLR 588, 598 (emphasis added).

¹⁸ *Doleman & Sons v Ossett Corporation* [1912] 3 KB 257, 268 (Fletcher Moulton LJ).

¹⁹ [2002] 1 WLR 1517. The judgment was handed down by Schiemann LJ on behalf of the Court of Appeal, which was comprised of Lord Phillips MR, Schiemann and May LJ.

cited as authority for the proposition that damages can be awarded for a breach of a jurisdiction agreement.²⁰ It is, however, as the academic commentators have emphasised, significantly more complex than this. Indeed, the purpose of this article is to show that there must be limits on such a sweeping proposition.

In *Union Discount*, proceedings were brought by the defendant in New York in breach of a jurisdiction agreement in favour of the English courts. On application by the party that became the English plaintiff, the New York proceedings were struck out on the basis that it was the English courts that had exclusive jurisdiction over the dispute. That party then brought English proceedings in order to claim the damages for the costs incurred in applying to strike out the improperly initiated New York proceedings.

The judgment expressly concerns itself with the correctness of a claim in *Halsbury's Laws of England* that costs incurred in foreign proceedings cannot be recovered in English proceedings between the same parties.²¹ In rejecting this proposition, and allowing the case to go to trial for the costs incurred, the Court of Appeal was careful to emphasise that the following features were present in the case:

- (i) The costs which the claimant seeks to recover in the English proceedings were incurred by him when he was a defendant in foreign proceedings brought by the defendant in the English proceedings.
- (ii) The claimant in the foreign proceedings brought those proceedings in breach of an express term, the exclusive jurisdiction clause, which, it is assumed for present purposes, has the effect of entitling the English claimant to damages for its breach.
- (iii) The rules of the foreign forum only permitted recovery of costs in exceptional circumstances.
- (iv) The foreign court made no adjudication as to costs.²²

It is clear that the judgment of the Court of Appeal is quite restricted and is not to be read as an authoritative statement of the availability of damages in *all* cases of a breach of a jurisdiction agreement, and to the full extent of any loss suffered. Indeed, the judgment only assumes that the breach has the effect of entitling the English plaintiff to damages for breach. Later cases have, however, made clear the correctness of this assumption.²³

²⁰ See, eg, Yeo and Tan, above n 11, 406.

²¹ Butterworths, *Halsbury's Laws of England*, vol 12(1) (4th ed reissue, 1998) [828].

²² *Union Discount* [2002] 1 WLR 1517, 1524 [18] (Schiemann LJ for Lord Phillips MR, Schiemann and May LJ).

²³ See, eg, *National Westminster Bank plc v Rabobank Nederland* [No 3] [2008] 1 All ER (Comm) 266; *Starlight Shipping* [2014] 2 Lloyd's Rep 544.

As can be seen, the Court of Appeal also limited the award of damages to those circumstances where the foreign court did not itself deal with the question of costs. It has been argued by some academic commentators that such restrictions are not necessary and damages can still be awarded even if the adjudicating court has the ability to award, or has actually awarded, costs.²⁴

It should be said that there is nothing that a contract lawyer would argue with in the judgment of the Court of Appeal in *Union Discount*. But how far can the principle be taken?

The defendant in *Union Discount* submitted that public policy considerations of comity prevented the recovery of costs in a foreign jurisdiction as damages for a breach of contract. This argument was rejected on the basis that comity is an elastic concept and, if the situation were reversed, and an English court had granted only minimal costs in proceedings and more had been ordered by a foreign court, this would not constitute a matter of concern in England.²⁵

The defendant argued that the plaintiff should have mitigated its damages by seeking an anti-suit injunction in England rather than applying for a strike out of the New York proceedings. Although not deciding the issue, the Court of Appeal stated that this was a matter which went to quantum and not to the principle of whether damages were available for the breach of a jurisdiction agreement.²⁶ Such a finding is consistent with contractual principles which consider the mitigation of loss.

Even though these arguments were rejected on the facts of this case, they may yet justify the refusal of an award of damages in circumstances where what is claimed is more than *merely* the costs incurred in a foreign jurisdiction in seeking a strike out of a claim brought in breach of a jurisdiction agreement. Given the narrow ratio of the decision in *Union Discount*, it is not possible, as a result of that decision alone, to decipher any general right to damages for a breach of a jurisdiction agreement.

But let me now posit a question that would, no doubt, have excited the conflicts lawyer in Sir Zelman. Assume that the New York court had accepted jurisdiction and awarded substantial damages. Would that, too, be capable of being claimed in the action for damages in the English court? *Union Discount*

²⁴ Yeo and Tan, above n 11, 406.

²⁵ *Union Discount* [2002] 1 WLR 1517, 1524–5 [22]–[23] (Schiemann LJ for Lord Phillips MR, Schiemann and May LJ).

²⁶ *Ibid* 1526 [33].

is unable, of itself, to withstand the burden of general principles capable of answering this question, and other similarly difficult questions.

Soon after the decision of the Court of Appeal in *Union Discount*, the House of Lords made some obiter statements in *Donohue v Armco Inc* about the availability of damages for breach of a jurisdiction agreement.²⁷

Lord Bingham, with whom Lords Mackay and Nicholls agreed, noted, but did not discuss, the respondent's acceptance that his client's decision to sue elsewhere than in the chosen court could found a claim for damages.²⁸ Lord Hobhouse was also prepared to accept that if Mr Donohue could demonstrate that he had suffered loss as a result of the breach of the jurisdiction clause, the ordinary remedy of damages for breach of contract would be open to him.²⁹ This does not, unlike *Union Discount*, appear to be limited to costs incurred. In fact, in referring to the submission made to the House, his Lordship appeared to accept that the breaches could lead to damages for loss suffered in the form of increased liability:

if this leads to Mr Donohue *incurring a greater liability* or being put to a greater expense (eg, for unrecovered costs) in New York than would have been the case in London, Mr Donohue may have a claim in damages against the defendants for breach of contract — breach of the exclusive jurisdiction clause.³⁰

While this statement appears to give support to a wide concept of damages, available not only for costs incurred in the foreign proceedings but also any additional liability, Lord Hobhouse is careful to state that the issue is complex.³¹ In contrast, Lord Scott appears to support only a claim for damages for breach of a jurisdiction agreement to the extent that damages are constituted by costs incurred in successfully defending a claim in the non-chosen court.³²

Other cases in England have followed the approach in *Union Discount*.³³ But, in Australia, *Union Discount* has only received two fleeting, and irrele-

²⁷ [2002] 1 All ER 749.

²⁸ *Ibid* 765 [36].

²⁹ *Ibid* 769 [48].

³⁰ *Ibid* (emphasis added).

³¹ *Ibid*.

³² *Ibid* 774–5 [75].

³³ See, eg, *A/S D/S Svendborg v Akar* [2003] EWHC 797 (Comm) (15 April 2003); *National Westminster Bank plc v Rabobank Nederland [No 3]* [2008] 1 All ER (Comm) 266; *Starlight Shipping* [2014] 2 Lloyd's Rep 544.

vant, references in litigation in Queensland and in a case in Western Australia.³⁴

So, insofar as English law is concerned, damages will be awarded *at least* for a breach of a jurisdiction agreement to the extent that costs have been incurred in successfully defending the proceedings in the non-chosen court. But is this not a fertile area for legal development?

The 'most compelling argument' for allowing damages for breach of a jurisdiction agreement is the general domestic law right to damages for breach of a contract.³⁵ As already noted, where the parties have provided binding mutual promises and one party is in breach, the normal remedy is to award damages against the defaulting party.

It is on this basis that the English courts have granted anti-suit injunctions and stays of proceedings brought in breach of a jurisdiction agreement. The fact that the courts clearly see the basis of an anti-suit injunction as breach of contract is exemplified in *Continental Bank NA v Aeakos Compania Naviera SA*: 'in our view the decisive matter is that the bank applied for the injunction to restrain the defendants' clear breach of contract'.³⁶

Given that the courts have identified that the invocation of the jurisdiction of a non-chosen court is a breach of contract, there is no reason why, policy reasons aside, the breach cannot give rise to a claim for damages. At common law, all breaches of contract give rise to a claim for damages, and so it should also be for jurisdiction agreements. If jurisdiction agreements are contractual terms, it should follow naturally that damages are a legal right flowing from breach.

The *Chancery Amendment Act 1858* ('*Lord Cairns' Act*')³⁷ and its successors in the Australian legal system,³⁸ accept the availability of equitable damages in lieu of an injunction. *Lord Cairns' Act* confers a discretionary jurisdiction upon a court to award equitable damages in addition to, or in substitution for, an injunction or specific performance. They may also be awarded for future loss and can be awarded where damages have not actually

³⁴ *Hawkins v Permarig Pty Ltd* [2003] QSC 342 (17 September 2003) 6 (Helman J); *Hawkins v Permarig Pty Ltd* [2004] 2 Qd R 388, 394 [13] (McMurdo P); *Pipeline Services WA Pty Ltd v Atco Gas Australia Pty Ltd* [2014] WASC 10 (7 May 2014) [8] (Martin CJ).

³⁵ Yeo and Tan, above n 11, 406. See also Tan and Yeo, above n 11, 437.

³⁶ [1994] 1 WLR 588, 598 (Steyn LJ for Sir Stephen Brown P, Steyn and Kennedy LJJ).

³⁷ 21 & 22 Vict, c 27, now enshrined in the *Senior Courts Act 1981* (UK) c 54, s 50.

³⁸ *Supreme Court Act 1933* (ACT) ss 20, 26; *Supreme Court Act 1970* (NSW) s 68; *Supreme Court Act 1979* (NT) s 62; *Civil Proceedings Act 2011* (Qld) s 8; *Supreme Court Act 1935* (SA) s 30; *Supreme Court Civil Procedure Act 1932* (Tas) s 11(13); *Supreme Court Act 1986* (Vic) s 38; *Supreme Court Act 1935* (WA) s 25(10).

been claimed. Where, as would be the case here, the equitable damages awarded in lieu of an injunction would be the same as that which would be given at common law, their measure would be the same.³⁹

A further argument in favour of the availability of damages is the existence of a commercial necessity which demands that a person who suffers loss from a breach of contract should be entitled to full compensation if a jurisdiction agreement, bargained for as part of a wider agreement, is not respected. Yeo and Tan argue:

Allied with an anti-suit injunction, which is essentially pre-emptive, an award of damages of this nature amounts to robust enforcement of [jurisdiction agreements]. Because of its far-reaching consequences, it also has a prophylactic effect in discouraging [parties] from attempting to breach [jurisdiction agreements] in the future.⁴⁰

There is much to be said about the effectiveness of a monetary award to discourage forum shopping. If a party is aware of a financial detriment that will be caused by proceeding in a non-chosen court, there is less likelihood that such a course of action will be taken.

Along these lines, Peel discusses the way in which a right to damages can enable a court to balance the private interest in a particular jurisdiction agreement with the wider public interest in ensuring that justice is properly administered.⁴¹ In the context of the approach to be taken by the courts to awarding a stay of proceedings, Peel argues:

allowing the defendant to sue for damages for breach of the foreign jurisdiction agreement may be seen to provide a compromise between the private interest and the public interest. The private interest will usually prevail in the form of an order to stay proceedings. Where other factors, the 'public interest', outweigh the private interest, no stay will be ordered, but the private interest will continue to be protected in the shape of an action for damages.⁴²

On the other hand, the availability of damages for breach of a jurisdiction agreement is opposed on a number of grounds, predominantly policy-based. The largest obstacle to a claim for damages for breach of a jurisdiction agreement is the challenge that this presents to the concept of comity. While

³⁹ See, eg, *Johnson v Agnew* [1980] AC 367.

⁴⁰ Yeo and Tan, above n 11, 416.

⁴¹ Edwin Peel, 'Exclusive Jurisdiction Agreements: Purity and Pragmatism in the Conflict of Laws' [1998] *Lloyd's Maritime and Commercial Law Quarterly* 182, 225–6.

⁴² *Ibid* 225.

sometimes a vague concept, comity imposes restraints on the English courts trespassing into matters which are properly left for the decision of a foreign court. Many of the rules of the conflict of laws are directed at ensuring that the English courts do not impinge on this concept.⁴³

In *Union Discount*, counsel for the defendant unsuccessfully argued that comity prevented a claim being made for damages for breach of a jurisdiction agreement. The English Court's answer to this was that it was merely compensating the plaintiff for the costs and expenses of being brought before a foreign court in breach of an agreement.⁴⁴ This is so where there is no provision for an award of costs in the jurisdiction where the proceedings were improperly brought. But, for these reasons, *Union Discount* was an easy case.

Where issues of comity become more difficult is where a claim for loss includes awarding the plaintiff any amount ordered to be paid in *substantive* proceedings before a foreign court. The reconciliation of that concept with the general right to damages is the issue to which I now turn.

IV APPROPRIATE LIMITS ON THE RIGHT TO DAMAGES

There are a number of ways in which the sometimes disparate concepts of the natural, and normal, consequence of a breach of contract (namely, an award of damages) and comity can be reconciled.

First, one could simply state that in no circumstances can an Australian court award damages by reference to what another court has awarded. This would be a blunt rule, but one that would mean that there is no breach of international comity.

Secondly, the threat to international comity could be put to one side, positing, as courts have in relation to an anti-suit injunction,⁴⁵ that no other court will take offence with an Australian court awarding damages for breach of contract.

Thirdly, whether or not the loss could be compensated could be made dependent on whether the judgment is capable of recognition in the Australian courts. If the foreign judgment is capable of recognition in Australia, it

⁴³ For example, the requirement of there being a sufficient interest in, or connection with, the matter to justify the indirect interference with the jurisdiction of a foreign court occasioned by an anti-suit injunction.

⁴⁴ *Union Discount* [2002] 1 WLR 1517, 1524–5 [22]–[23] (Schiemann LJ for Lord Phillips MR, Schiemann and May LJ).

⁴⁵ See, eg, *Aggeliki Charis Compania Maritima SA v Pagnan SpA; The Angelic Grace* [1995] 1 Lloyd's Rep 87, 95 (Leggatt LJ).

cannot be said that the plaintiff has a separate entitlement to the amount awarded in the foreign proceedings. To do so would be to counteract the obligation to recognise a foreign judgment that is capable of recognition in Australia. If, however, the judgment is not recognised in Australia, there is no reason in principle why damages cannot be measured by reference to the loss suffered if payment has been made in satisfaction of that judgment. The Australian court has not recognised that foreign judgment so it should not stand in the way of an award of damages made by reference to the loss suffered. The loss would be measured by reference to the amount of money that the plaintiff has lost because the proceedings were brought in breach of an agreement. If the judgment has been enforced in the foreign state, the amount of the loss is equivalent to that expended in satisfying the judgment. The plaintiff should be entitled to make a claim for this loss in proceedings brought in Australia. It is this latter alternative which is here advocated, as it provides a balance between the competing interests in upholding parties' bargains and according respect to the judgments of foreign courts.

The first option can be rejected, because while it has been argued that no right to damages arises from a breach of a jurisdiction agreement on the basis that such agreements do not create an independently enforceable obligation in court,⁴⁶ that argument has been rightly rejected by the English courts in the cases cited above. It is not correct merely to characterise a jurisdiction agreement as being a statement of consent to the jurisdiction of the selected court which the selected court may then choose to exercise or choose to decline. Jurisdiction agreements operate as mutual promises between the parties as to the manner in which disputes are to be brought under the contract. The action that gives rise to the breach is not the court's acceptance of jurisdiction despite a jurisdiction agreement, but the action of the party who initiates proceedings in the non-chosen court.⁴⁷ That is, the breach occurs at this point in time, irrespective of whether the non-chosen court then chooses to decline jurisdiction. (If a foreign court refuses jurisdiction, as was the case in *Union Discount*, it means, perhaps fortunately for the party in breach, that the damages are limited to the amount expended in challenging the non-chosen court's jurisdiction.)

⁴⁶ Look Chan Ho, 'Anti-Suit Injunctions in Cross-Border Insolvency: A Restatement' (2003) 52 *International and Comparative Law Quarterly* 697, 707.

⁴⁷ *Starlight Shipping* [2014] 2 Lloyd's Rep 544, 548 [20] (Longmore LJ).

As to the second option, much of the academic commentary cited above⁴⁸ is premised on the ‘fundamental principle of English contract law’ that any unexcused breach of a contractual term gives rise to an action in damages.⁴⁹ But even therein, there is wariness about extending the scope of that which is compensable.

It has been argued, by Yeo and Tan, that one way of dealing with the concern identified as to the reach of contractual damages is to restrict recovery to the reliance measure of damages.⁵⁰ According to this approach, the measure of damages is limited to those losses incurred in reliance on the contract. Yeo and Tan suggest that it would include the following losses:

costs and expenses Y incurs in pursuing pre-emptive remedies (stays or anti-suit injunctions) to try to avoid having to contest the action brought by X in the non-contractual forum; and Y’s costs and expenses incurred before X even begins proceedings (but at a time when the parties realised proceedings were likely) in preparing for what Y assumed would be an action brought against him in the chosen forum (such as costs of legal advice in that chosen forum about whether Y should make an early offer of settlement; costs of making evidence available in that chosen forum).⁵¹

The advantage with this approach is that it eliminates the possibility that the plaintiff will be able to also claim for any damages awarded in the foreign substantive proceedings, thereby preventing the threat to comity that this would entail. Such losses would fall outside the definition of those that were incurred in reliance on the contract. It is difficult to assert, on the one hand, that a breach of a jurisdiction agreement should result in a remedy of damages on the basis that all breaches of contract should result in a remedy of damages, but to then advocate treating breaches of jurisdiction agreements differently from the standard approach to contractual damages. There is a flaw in the internal logic of their argument.

Yeo and Tan are not alone in advocating damages for breach of a jurisdiction clause. Peel comes to the same conclusion.⁵² He argues that in balancing the private interests of the parties and the wider public interest in the resolu-

⁴⁸ See especially Briggs, *Agreements on Jurisdiction and Choice of Law*, above n 11, 304–5 [8.09]; Yeo and Tan, above n 11. See also Tan, above n 11.

⁴⁹ Tan and Yeo, above n 11, 435.

⁵⁰ Yeo and Tan, above n 11, 420–2.

⁵¹ *Ibid* 421. In this hypothetical, X has brought the proceedings in the foreign court in breach of a jurisdiction agreement and Y is the plaintiff who is seeking a remedy in the local court.

⁵² Peel, above n 41, 224–6.

tion of disputes without subjecting them to international fragmentation, there may be circumstances where the courts can take into account the extent to which it is possible to maintain the private interest by allowing a claim for damages.⁵³ In such a case, the court will still be able to refuse to stay proceedings or grant an anti-suit injunction, thereby ‘condoning’ a breach of the jurisdiction agreement in the public interest, but will be able to compensate the party aggrieved by this breach.

In the context of whether such damages would be available where the English court refused a stay of proceedings and heard the matter in breach of a jurisdiction agreement, Briggs has said ‘it is unclear what, if anything, prevents the defendant counterclaiming for damages for any proven loss flowing from the breach of contract’.⁵⁴ He argues that it would denature the fact that a right has been bought and paid for to deny it the usual remedy in damages.

The same views are expressed by Briggs and Rees who, before entertaining the arguments for and against such a claim, state simply: ‘There has been a breach of contract, or an unlawful interference with contractual rights, and loss has occurred. No more is needed to make out a claim for compensation’.⁵⁵ Once again in the context of awarding damages where a stay has been refused, they explain, however, that there are two strong arguments that may be made against the availability of a remedy in this case: (i) it is contradictory for the court to order damages for doing what it has sanctioned; and (ii) a contract to oust the jurisdiction of the English courts is, as a matter of English law, illegal.⁵⁶

Briggs and Rees go on to provide responses to these two arguments. First, it is pointed out that where a court declines to order an injunction to restrain a breach of contract, it does not condone the breach. It merely leaves the plaintiff to his or her remedy in damages. Secondly, the plaintiff’s breach of contract is effected by the plaintiff asking the court seised to adjudicate *at this stage*. That is, Briggs and Rees reason that the contractual term requires the parties to litigate elsewhere, but the successful party is always free to return to a non-chosen court to enforce the foreign judgment. Therefore, the non-chosen court’s jurisdiction is not ousted completely, but the plaintiff is in

⁵³ Ibid 226.

⁵⁴ Adrian Briggs, *The Conflict of Laws* (Oxford University Press, 3rd ed, 2013) 121.

⁵⁵ Adrian Briggs and Peter Rees, *Civil Jurisdiction and Judgments* (Informa, 5th ed, 2009) 484 [4.50].

⁵⁶ Ibid 484–5 [4.50].

breach of the contractual agreement by invoking its jurisdiction at the (premature) time when he or she did.⁵⁷

Males⁵⁸ has also given support to a claim for contractual damages for a breach of a jurisdiction clause:

If it is a breach of contract for the foreign proceedings to be pursued, there is in principle no reason why the unsuccessful applicant for an injunction should not claim damages for that breach, which will involve the English court or arbitrators sitting in judgment on the proceedings in the foreign court.⁵⁹

Males cites a number of cases in which the availability of damages has been accepted, highlighting that the undesirability of making an award of damages has been seen as a factor supporting the grant of an injunction instead.⁶⁰ This is seen in the description of damages as a 'relatively ineffective remedy' in *Continental Bank NA v Aeakos Compania Naviera SA*.⁶¹ Notwithstanding his support of this remedy, no direction is given as to what limits are to be placed on its application in practice.

In due course, and in an appropriate case, Australian law should embrace the dicta in these English cases and formulate principles upon which damages for breach of a jurisdiction agreement can be awarded. Therefore, a jurisdiction agreement should be seen as a primary obligation, breach of which can give rise to the remedy of damages. A breach occurs when the defaulting party invokes the jurisdiction of the non-chosen court. Whether or not the court actually accepts jurisdiction goes to the extent of loss that will be suffered by the plaintiff. But the reach of the remedy should be limited by careful application of established contractual and private international law principles.

Most fundamentally, as already contended above, the award of damages should be limited to any losses incurred in a foreign judgment that is *not* capable of recognition in Australia. Notwithstanding the limitation placed on

⁵⁷ Ibid 485 [4.50].

⁵⁸ Now Justice Males, a judge of the High Court of England and Wales.

⁵⁹ Stephen Males, 'Comity and Anti-Suit Injunctions' [1998] *Lloyd's Maritime and Commercial Law Quarterly* 543, 550.

⁶⁰ Ibid 550 n 35, citing *Doleman & Sons v Ossett Corporation* [1912] 3 KB 257, 267 (Fletcher Moulton LJ); *Mantovani v Carapelli SpA* [1980] 1 Lloyd's Rep 375; *Continental Bank NA v Aeakos Compania Naviera SA* [1994] 1 WLR 588, 598 (Steyn LJ for Sir Stephen Brown P, Steyn and Kennedy LJJ); *Aggeliki Charis Compania Maritima SA v Pagnan SpA; The Angelic Grace* [1995] 1 Lloyd's Rep 87, 94 (Leggatt LJ); *Schiffahrtsgesellschaft Detlev Von Appen GmbH v Voest Alpine Intertrading GmbH; The Jay Bola* [1997] 2 Lloyd's Rep 279, 285 (Hobhouse LJ).

⁶¹ [1994] 1 WLR 588, 598 (Steyn LJ for Sir Stephen Brown P, Steyn and Kennedy LJJ).

the right, the availability of damages is clear. Accordingly, if the plaintiff can make out a breach of contract, and is not prevented from doing so by a foreign judgment which renders the matter *res judicata*, the claim for damages should be successful. To embrace this approach would be to give effect to the jurisdiction agreement and dissuade parties to act in breach of their agreement. And so, we see the law of contract meeting private international law.

It is here that the most important aspect of the conclusion must be emphasised. If the validity or otherwise of a jurisdiction agreement is *res judicata*, the local court will be prevented by the principles of private international law from deciding for itself whether the agreement is valid. The availability of contractual damages must heed to the principle of private international law that a matter that has already been authoritatively decided by a foreign court cannot be re-litigated again. Such a principle is not, however, unique to jurisdiction agreements. If a claim is brought for damages for breach of a contract in a foreign country, and the defendant there is successful, the plaintiff will not be able to come to an Australian court to re-litigate whether the defendant has acted in breach of contract. The litigation merry-go-round must stop at a certain point, and that point is where the rules of Australian private international law determine that the foreign judgment must be recognised.

This approach recognises one of the strongest arguments against permitting a party to bring proceedings for damages in the local court after a foreign court has decided a matter, namely the concept of *res judicata*. According to this legal principle, the matter has already been litigated and the local court will not entertain the re-litigation of it. The policy underlying *res judicata* is that there must be some finality of litigation.⁶² It prevents a party simply jumping from court to court until one court delivers a favourable judgment by estopping a plaintiff from bringing the action. A defendant to an Australian action is entitled to plead that either the cause of action or an issue is *res judicata*, which serves as a defence to a claim.

One argument put against the availability of a right to damages for a breach of a jurisdiction agreement is the fact that their availability may upset conflict of laws principles in other ways. That is, '[a]n unrestrained right to damages may, in certain circumstances, impinge on the discretion of the English court to take up jurisdiction in the face of a jurisdiction clause in the favour of a foreign court'.⁶³ The same difficulty would exist with respect to a

⁶² *Burrell v The Queen* (2008) 238 CLR 218, 223 [15] (Gummow ACJ, Hayne, Heydon, Crennan and Kiefel JJ).

⁶³ Tan and Yeo, above n 11, 439.

decision whether to award an anti-suit injunction. If the jurisdiction agreement stipulates the local courts but there are strong reasons to deny the plaintiff an anti-suit injunction, would this mean that damages would have to be awarded in lieu? But, here too, the preferred approach offers an answer: no damages would be payable because to do so would contradict the local court's decision to take jurisdiction.

V CONCLUSION

The major conclusion of this article, therefore, is that the Australian courts should embrace the availability of damages for breach of a jurisdiction agreement. But their availability must be constrained by established contractual and private international law principles to prevent the re-litigation of matters which have already been decided by a foreign court and are *res judicatae*.

How the law develops in future will interest not just conflicts lawyers, of whom Sir Zelman was one of Australia's most well-regarded, but also contract lawyers. After all, the limits to the availability of damages for breach of a jurisdiction agreement constitute an area where the law of contract meets private international law.