

THE HAGUE CHOICE OF COURT CONVENTION AND CROSS-BORDER COMMERCIAL DISPUTE RESOLUTION IN AUSTRALIA AND THE ASIA-PACIFIC

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I INTRODUCTION

This year (2017), Australia is very likely to accede to an international treaty commonly known as the *Hague Convention*¹ — the treaty has been laid before Parliament, the Joint Standing Committee on Treaties has recommended accession,² and work is already underway on the implementing legislation.³ The *Hague Convention* was negotiated under the auspices of the Hague Conference on Private International Law (‘Hague Conference’), the principal international organisation responsible for global efforts to harmonise rules of private international law. It has potentially very important implications for international commercial dispute resolution in Australia, in the Asia-Pacific region and indeed internationally.

The *Hague Convention* concerns jurisdiction agreements, also known as choice of court clauses — those clauses we have all seen in contracts which deal with the forum in which disputes must be resolved. They may be complex constructions of several paragraphs, or at their simplest may be only two words (‘Jurisdiction: Victoria’), but most commonly state something like: ‘Any dispute arising under this contract must be heard exclusively in the courts of Victoria’. These clauses are commonplace and they may seem banal — certainly, few of us read through such fine print in the many contracts we make on a daily basis and the location in which potential disputes may be resolved is rarely at the forefront

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¹ *Convention on Choice of Court Agreements*, opened for signature 30 June 2005, 44 ILM 1294 (entered into force 1 October 2015) (‘*Hague Convention*’). See also Trevor Hartley and Masato Dogauchi, ‘Explanatory Report on the 2005 *Hague Choice of Court Agreements Convention*’ (Explanatory Report, Hague Conference on Private International Law, 2013) <<https://www.hcch.net/upload/exp137final.pdf>> archived at <<https://perma.cc/G7NU-BSR9>>.

² See Joint Standing Committee on Treaties, Parliament of Australia, *Report 166* (2016).

³ Attorney-General’s Department, *Annual Report 2015–16* (2016) 29. It is proposed that the implementing legislation will in addition adopt the *Hague Principles on Choice of Law in International Commercial Contracts* (‘*Hague Principles*’), a soft law instrument also developed at the Hague Conference on Private International Law and finalised in 2015: Hague Conference on Private International Law, *Principles on Choice of Law in International Commercial Contracts*, The Hague Conference on Private International Law Permanent Bureau, 2015 <http://www.hcch.net/index_en.php?act=conventions.text&cid=135> archived at <<https://perma.cc/G7NU-BSR9>>. See Joint Standing Committee on Treaties, Parliament of Australia, *Report 166* (2016) [3.6]. The *Hague Principles* will not be discussed in this paper, except to note that they permit parties to agree that a contract may be governed by non-state law, which would be rather innovative if adopted in Australian law.

of the minds of contracting parties. Jurisdiction agreements can, however, be extremely important, because the venue for dispute resolution is often very significant for practical or strategic reasons and for some disputes can even be outcome determinative. This is particularly because the choice of forum may affect the governing law, as different forums may apply different choice of law rules or mandatory statutes. The *Hague Convention* is focused particularly on exclusive jurisdiction agreements — those agreements which seek to confer jurisdiction on the nominated court to the exclusion of any other court.

This paper addresses four points. First, it examines the effects of exclusive jurisdiction agreements under current Australian law. Secondly, the key provisions of the *Hague Convention* are outlined and explained. Thirdly, the potential impact of the *Hague Convention* on Australian law is examined. Fourthly and finally, some of the key regional and international implications of the *Hague Convention* are analysed, in light of Singapore's accession to the *Hague Convention* in 2016, which potentially has particularly significant implications for dispute resolution in the Asia-Pacific region, as well as Australia's proposed accession.

II EXCLUSIVE JURISDICTION AGREEMENTS UNDER CURRENT AUSTRALIAN LAW

An analysis of the effects of exclusive jurisdiction agreements must consider their impact both on the chosen court as well as on courts which are not chosen. It must also consider their effects on questions of jurisdiction as well as more indirectly in the context of the recognition and enforcement of foreign judgments. This gives us a table of four different contexts in which exclusive jurisdiction agreements may affect Australian law, in which five distinct effects may be identified.

Table 1

	Jurisdiction	Judgments
<i>Impact in chosen court</i>	1. Prorogation 2. Anti-suit injunction and damages for breach	5. Non-recognition of judgment from non-chosen court
<i>Impact in non-chosen court</i>	3. Derogation	4. Recognition and enforcement of judgment from chosen court

Each of these five effects will now be considered in turn.

A Prorogation

The most obvious effect of an exclusive jurisdiction agreement is on the jurisdiction of the chosen court. Under the laws of the various Australian state and federal courts (referred to in this paper as 'Australian courts' for convenience), exclusive jurisdiction agreements provide a basis for jurisdiction even if the dispute or the parties have no other connection with Australia.⁴ It is important to note, however, that if the defendant does not accept the jurisdiction

⁴ See, eg, *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 7.02(b)(iv).

of the chosen court once proceedings have been commenced, there remains a discretion for the court not to exercise its jurisdiction (at least in theory), under the doctrines of *forum conveniens* or *forum non conveniens*.⁵ The qualification ‘at least in theory’ is necessary, because there are few if any cases in which Australian courts have actually exercised this discretion, as an exclusive jurisdiction agreement is considered a very powerful reason to exercise jurisdiction.⁶ However, there are exceptional cases (discussed below) in which English courts in equivalent circumstances have declined to exercise jurisdiction even where there was an exclusive jurisdiction agreement in their favour. It is true that the test for *forum non conveniens* is defined more strictly in Australia than it is in England,⁷ meaning that Australian courts are less likely in general to stay proceedings validly commenced, but the English practice may nevertheless illustrate circumstances in which an Australian court might refuse to hear a case despite the existence of an exclusive jurisdiction agreement in its favour.

The most likely context in which this might occur is where the dispute covered by the exclusive jurisdiction agreement is part of a larger dispute, involving either other parties or other issues which are not covered by the jurisdiction agreement and which are not otherwise subject to the jurisdiction of the Australian courts. The position would be at its strongest if those other parties or issues are already being litigated before a foreign court in proceedings which are well advanced and where the parties or issues covered by the Australian exclusive choice of court agreement could be litigated as part of those foreign proceedings. In such circumstances, giving effect to the jurisdiction agreement would fragment the proceedings, decreasing the efficient resolution of the overall dispute, and increasing the risk of conflicting judgments between different courts. The English courts at least have determined that these negative consequences may in exceptional cases justify refusing to give effect to the agreement between the parties,⁸ and it is certainly possible that Australian courts would be influenced by the same considerations should such a case arise. In essence, the efficient resolution of complex disputes and the avoidance of the risk of conflicting judgments may, at least conceivably, be considered to outweigh the interests of giving effect to the agreement of the parties.

B *Anti-Suit Injunction and Damages for Breach*

Exclusive jurisdiction agreements in favour of an Australian court may have a range of further effects in the chosen court. These effects follow from the fact that a jurisdiction agreement is understood in the common law as a contractual

⁵ See generally *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538; *Regie Nationale Des Usines Renault SA v Zhang* (2002) 210 CLR 491.

⁶ See, eg, Richard Garnett, ‘Jurisdiction Clauses Since *Akai*’ (2013) 87 *Australian Law Journal* 134, 147–8 (‘Jurisdiction Clauses’).

⁷ The leading English authority remains: *Spiliada Maritime Corp v Cansulex Ltd* (1987) AC 460. But its approach was expressly rejected by the High Court of Australia in: *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538; *Regie Nationale Des Usines Renault SA v Zhang* (2002) 210 CLR 491.

⁸ See, eg, *Donohue v Armco Inc* [2001] UKHL 64 (13 December 2001). This approach is, however, no longer possible because the effect of any exclusive jurisdiction agreement in favour of the English courts is now governed by the *Brussels I Regulation* rather than the common law.

obligation. If one party commences proceedings in a court other than that selected in the agreement, they are in breach of contract. A common remedy for such a breach, whether it has occurred or is merely threatened, is an order for specific performance of the jurisdiction agreement. This takes the form of an injunction restraining a party from commencing or continuing foreign proceedings brought in breach of an Australian choice of court agreement, which is of course a species of anti-suit injunction.⁹ While such an injunction may readily be granted on the basis of an exclusive jurisdiction agreement,¹⁰ it must be remembered that it is an equitable remedy and as such discretionary and the courts will take into account all the circumstances of any case. In recent years, it has also increasingly been recognised that breach of an exclusive jurisdiction agreement may alternatively or in addition sound in damages.¹¹

One notable further consequence of the fact that litigating in breach of an exclusive jurisdiction agreement is considered to be a breach of contract is that a claim might be made in tort where a third party has induced the breach. Such a claim was at the heart of the *AMT Futures v Marzillier* litigation before the Supreme Court in the United Kingdom earlier this year — a German law firm was sued for inducing breach of an English exclusive jurisdiction agreement by advising clients to sue in Germany.¹² Although ultimately the Supreme Court held that the English courts did not have jurisdiction over the claim (as any tort had occurred in Germany), the case remains a high profile reminder (in particular, for legal practitioners) of the possibility of such claims.

C Derogation

Exclusive jurisdiction agreements may equally have jurisdictional effects in courts other than the chosen court — indeed, one of their central purposes is to preclude the jurisdiction of a court which is not chosen. In Australian courts, a foreign exclusive jurisdiction agreement is considered to be a very powerful reason why the court should not exercise any jurisdiction which it may have, either through a refusal to commence proceedings under the doctrine of *forum conveniens* or a stay of proceedings pursuant to the doctrine of *forum non conveniens*.¹³ As noted above, however, these doctrines are discretionary, and there is thus the possibility that Australian courts might hear a case despite the existence of a foreign exclusive jurisdiction agreement. In this context, the discretion to exercise jurisdiction despite such an agreement has indeed been exercised in a number of cases (although perhaps decreasingly).¹⁴ Two main circumstances in which this is likely may be identified.

First, similarly to the analysis above, the discretion not to give effect to a foreign exclusive jurisdiction agreement might be exercised where the dispute

⁹ See generally *CSR v Cigna* (1997) 189 CLR 345.

¹⁰ *Aggeliki Charis Compania Maritima SA v Pagnan SpA* [1995] 1 Lloyd's Rep 87 ('*The Angelic Grace*').

¹¹ See, eg, Louise Merrett, 'The Enforcement of Jurisdiction Agreements within the Brussels Regime' (2006) 55 *International and Comparative Law Quarterly* 315; *The Alexandros T* [2013] UKSC 70.

¹² *AMT Futures Ltd v Marzillier mbH* [2017] 2 WLR 853.

¹³ See generally *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538; *Regie Nationale Des Usines Renault SA v Zhang* (2002) 210 CLR 491.

¹⁴ See generally Garnett, 'Jurisdiction Clauses', above n 6, 140–6.

involved multiple parties or issues and other issues or parties were being litigated (or would be best litigated) in Australian courts. The court may refuse to give effect to the jurisdiction agreement to ensure that the whole dispute is heard in a single forum, for the sake of efficiency and avoiding the risk of conflicting judgments.

Secondly, more distinctively, Australian courts have refused to stay proceedings despite a foreign exclusive jurisdiction agreement in some cases in which it is established that the foreign court would not recognise rights under Australian law — such as where the cause of action is based on an Australian statute which would not be applied by the foreign court.¹⁵ Australian practice on this point has been viewed critically by some commentators.¹⁶

D *Recognition and Enforcement*

Further effects of exclusive jurisdiction agreements may be identified in the rules on the recognition and enforcement of foreign judgments. In Australia, these rules are generally found under either the common law or in the *Foreign Judgments Act 1991* (Cth). In both contexts, a judgment from a foreign court based on a valid and applicable exclusive jurisdiction agreement in its favour will be generally enforceable in Australia,¹⁷ subject to various defences such as a breach of procedural fairness or public policy.

E *Non-Recognition*

The converse principle also applies where there is an exclusive jurisdiction agreement in favour of the court in which recognition or enforcement is sought. Foreign judgments obtained in breach of an exclusive jurisdiction agreement in favour of Australian (or indeed other foreign) courts are not enforceable — the only exceptions are where the agreement is invalid or inapplicable, such as where the defendant has waived their rights by submitting to the foreign court.¹⁸

III INTRODUCING THE *HAGUE CONVENTION*

This section explains the general scope and purposes of the *Hague Convention*, before the following section outlines its key provisions.

A *Scope*

A number of important preliminary points may be noted concerning the scope of the *Hague Convention*.

First, it is limited to international cases, and the choice of a foreign court does not supply the international element.¹⁹ An exclusive choice of court agreement in favour of the courts of Singapore between New South Wales and Victorian

¹⁵ See, eg, *Hume Computers Pty Ltd v Exact International BV* [2006] FCA 1439; *Reinsurance Australia Corporation Ltd v HIH Casualty & General Insurance Ltd (in liq)* [2003] FCA 56.

¹⁶ See, eg, Richard Garnett, 'The Hague Choice of Court Convention: Magnum Opus or Much Ado About Nothing?' (2009) 5 *Journal of Private International Law* 161, 166 ('The Hague Choice of Court Convention').

¹⁷ *Foreign Judgments Act 1991* (Cth) s 7(3)(a)(iii).

¹⁸ *Ibid* s 7(4)(b).

¹⁹ *Hague Convention* art 1(1)–(2).

parties covering a contract to be performed in Australia would not be covered by the *Hague Convention*.

Secondly, the *Hague Convention* is concerned with business-to-business contracts — consumer and employment contracts are specifically excluded from its scope.²⁰ There is, however, no exclusion for insurance or franchise contracts, two further contexts in which national legal systems (including Australia)²¹ frequently place restrictions on the power of parties to choose their own court. Under art 21 of the *Hague Convention*, a contracting state may exclude certain subject matters from its scope at the time of accession and it is possible that Australia may consider making such a declaration in respect of insurance and/or franchise contracts.

Thirdly, it is almost entirely concerned with exclusive jurisdiction agreements.²² Non-exclusive jurisdiction agreements (in which the agreement seeks prorogation but not derogation) are generally excluded, although art 22 of the *Hague Convention* does provide an optional rule under which states may agree to recognise and enforce judgments based on such agreements on a reciprocal basis. Asymmetrical agreements, in which the agreement is exclusive for one party and non-exclusive for the other, or in which a different court is chosen exclusively for each party, are not considered exclusive for the purposes of the *Hague Convention*.²³ The *Hague Convention* notably includes a rule that a jurisdiction agreement is to be presumed exclusive unless expressly provided otherwise,²⁴ which is discussed further below.

Fourthly, there are limits on the temporal and geographical scope of the *Hague Convention*. Only jurisdiction agreements entered into in favour of contracting states are covered,²⁵ and only agreements entered into in favour of the courts of a contracting state after it has become party to the *Hague Convention* are covered — the *Hague Convention* has no effect on pre-existing jurisdiction agreements.²⁶

B Purpose

The purpose of the *Hague Convention* has been described as an attempt to replicate for jurisdiction agreements the effects of the highly successful *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* ('*New York Convention*') in relation to arbitration agreements and arbitral awards.²⁷ This begs the question — why should this attempt be made? International commercial parties often prefer arbitration to litigation, in part because of the widespread effectiveness of arbitration agreements and enforceability of arbitral awards. However, arbitration also has its disadvantages,

²⁰ Ibid art 2(1).

²¹ See, eg, *Akai v The People's Insurance Co* (1996) 188 CLR 418; *Competition and Consumer (Industry Codes – Franchising) Regulations 2014* (Cth) sch 1, s 21.

²² *Hague Convention* art 1(1).

²³ Hartley and Dogauchi, above n 1, 811 [104]–[106], 845 [249]–[250]. On such agreements, see, eg, Mary Keyes and Brooke Adele Marshall, 'Jurisdiction Agreements: Exclusive, Optional and Asymmetrical' (2015) 11 *Journal of Private International Law* 345.

²⁴ *Hague Convention* art 3(b).

²⁵ Ibid art 3(a).

²⁶ Ibid art 16(1).

²⁷ See, eg, Hartley and Dogauchi, above n 1, 791 [1].

both for the parties and more broadly. It is, for example, not possible for an arbitral tribunal to join third party defendants who are not subject to the same arbitration agreement, or to take coercive measures without the assistance of a court. The confidentiality of arbitral proceedings and frequently also of arbitral awards may be an advantage to some parties but can be a disadvantage to others. Recently, concerns have also been raised that the popularity of arbitration may have harmful effects on the development of commercial law, as the confidentiality of the awards as well as their lack of precedential value means that they are frequently unable to contribute to the progressive public development of the law.²⁸

For these reasons among others, the *Hague Convention* aims to promote the choice of national courts alongside arbitration, not to replace it but to create a more level playing field. It seeks to do this through creating greater international standardisation in the treatment of exclusive jurisdiction agreements, giving greater effectiveness to exclusive jurisdiction agreements and increasing the enforceability of judgments based on exclusive jurisdiction agreements. These effects are each examined in further detail below.

C Status

At present the *Hague Convention* has 29 states party and the European Union is also a party as a 'Regional Economic Integration Organisation'.²⁹ Mexico acceded to the *Hague Convention* in 2007 and it came into force in 2015 when the EU joined both in its own right and on behalf of all of its member states except Denmark. Should the UK leave the EU, as expected in light of the Brexit vote, it will cease to be a party to the *Hague Convention*. There is, however, strong support for accession in this case as it may be necessary to ensure that English judgments based on an exclusive jurisdiction agreement remain readily enforceable across the EU.³⁰ The most recent accession was that of Singapore in 2016, which is potentially very significant for Australia, as discussed further below. The number of states party is thus significant if not yet comparable to the

²⁸ See, eg, Robert French, 'Transnational Dispute Resolution' (Speech delivered at the Supreme and Federal Court Judges' Conference, Brisbane, 25 January 2016) <<http://www.hcourt.gov.au/assets/publications/speeches/currentjustices/frenchcj/frenchcj25Jan2016.pdf>> archived at <<https://perma.cc/C6YN-BHDW>>; Lord Thomas of Cwmgiedd, 'Developing Commercial Law through the Courts: Rebalancing the Relationship between the Courts and Arbitration' (Speech delivered at The Bailii Lecture, London, 9 March 2016), <<https://www.judiciary.gov.uk/wpcontent/uploads/2016/03/lcjspeechbaillilecture20160309.pdf>> archived at <<https://perma.cc/3TNB-VF2A>>.

²⁹ A status table is available at Hague Conference on Private International Law, 37: *Convention of 30 June 2005 on Choice of Court Agreements* (2 June 2016) <<https://www.hcch.net/en/instruments/conventions/status-table/?cid=98>> archived at <<https://perma.cc/3WKN-VPET>>.

³⁰ See, eg, Justice Committee, *Implications of Brexit for the Justice System*, House of Commons Paper No 9, Session 2016–17 (2017).

New York Convention,³¹ although it has been reported by the Hague Conference that numerous other states are considering accession to the *Hague Convention*.³²

IV KEY PROVISIONS OF THE *HAGUE CONVENTION*

A *Prorogation*

Under art 5 of the *Hague Convention*, the state courts which are chosen in a valid and effective exclusive jurisdiction agreement must exercise that jurisdiction. As under existing Australian law, there is no requirement for any objective connection between the parties or their dispute and the court chosen.³³ While state parties may impose such a requirement on accession to the *Hague Convention* under art 19, there is no reason to expect Australia will do so. Although the *Hague Convention* does not set this out expressly, it can be presumed that a court may refuse to exercise jurisdiction where the jurisdiction agreement is invalid for any reason. The question of damages for breach of a jurisdiction agreement is not addressed by the *Hague Convention*, although an award of such damages would arguably be a judgment based on the jurisdiction agreement and thus entitled to recognition and enforcement under the streamlined rules in the *Hague Convention*.³⁴

B *Derogation*

Under art 6 of the *Hague Convention*, where the parties have entered into an exclusive choice of court agreement in favour of the courts of one Convention state, the courts of any other Convention state generally must not exercise jurisdiction. This is subject to certain exceptions, also set out in art 6. Perhaps most obviously, there is no obligation to enforce an invalid agreement — but importantly (as discussed further below), the *Hague Convention* requires this to be assessed based on the law of the state of the chosen court, including its choice of law rules.³⁵ Similarly, an agreement need not be enforced where the parties lacked capacity to make it.³⁶ A general public policy safety net is included,³⁷ permitting a state to refuse to enforce certain foreign exclusive jurisdiction agreements — there is little guidance on when this should be applicable, but it ought to be interpreted restrictively if it is not to undermine the purposes of the *Hague Convention*. Two final exceptions are where the agreement ‘cannot

³¹ Currently 157 parties. See UNCITRAL, *Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)* <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html> archived at <<https://perma.cc/5CXS-J4ZQ>>.

³² See Council on General Affairs and Policy of the Conference, ‘Suggested Further Work in Support of Forum and Law Selection in International Commercial Contracts’ (Preliminary Document No 5, Hague Conference on Private International Law Permanent Bureau, January 2017) <<https://assets.hcch.net/docs/a357a94b-5bac-44c5-9fa3-4f1a079b2411.pdf>> archived at <<https://perma.cc/J8AN-WVHS>>.

³³ See, eg, *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 7.02(b)(iv).

³⁴ If the foreign court rejects the validity of the jurisdiction agreement, however, it will also reject the application of the *Hague Convention* to such a damages award.

³⁵ *Hague Convention* art 6(a).

³⁶ *Ibid* art 6(b).

³⁷ *Ibid* art 6(c).

reasonably be performed' and where the chosen court has declined jurisdiction.³⁸ In both cases, a court may exceptionally hear the case in breach of a foreign exclusive jurisdiction agreement to ensure that the claimant is able to obtain access to justice, a value which is evidently adjudged to outweigh party autonomy in these circumstances.

It is also important to note in this context that the *Hague Convention* adopts the principle of severability, also known as separability. The validity of a choice of court agreement must be evaluated separately from the rest of the agreement between the parties. Under art 6, evidently the courts of a non-chosen state may have to decide on the validity of the choice of court clause. However, if issues arise concerning the general validity of the contract between the parties, these should generally be heard by the court chosen in the jurisdiction agreement, unless the invalidity would also specifically affect that agreement.

C *Interim Protective Measures*

Article 7 of the *Hague Convention* provides that interim protective measures, such as the availability of an asset freezing order in support of prospective proceedings, are left for national law. It is unclear whether this article encompasses anti-suit injunctions — on one view these are more like a final order to enforce the exclusive jurisdiction agreement rather than a protective measure, although they may also be issued on a provisional basis. The point is ultimately not significant, as in either case it is clear that the *Hague Convention* leaves the availability of anti-suit injunctions to national law.

D *Recognition and Enforcement*

The final key provisions to note are arts 8 and 9, which essentially provide that a judgment obtained from the courts of one Convention state on the basis of an exclusive jurisdiction agreement must generally be recognised in the courts of other Convention states, subject to various defences, set out in art 9, such as a breach of procedural fairness or public policy.

It may be noted that the *Hague Convention* does not address the question of non-recognition — the obligation not to recognise a foreign judgment which has been obtained in breach of an exclusive jurisdiction agreement. The reason for this exclusion is probably that it would broaden the scope of the *Hague Convention*, because it relates to the non-enforcement of a judgment not based on a jurisdiction agreement. It may be presumed that this rule is nevertheless likely to be applied under the national law of Convention states.

V THE IMPACT OF THE *HAGUE CONVENTION* ON AUSTRALIAN LAW³⁹

A *Prorogation*

Should Australia accede to the *Hague Convention*, the most obvious effect would be in the context of prorogation. Accession to the *Hague Convention*

³⁸ Ibid art 6(d) and (e).

³⁹ See generally Mary Keyes, 'Jurisdiction under the *Hague Choice of Courts Convention*: Its Likely Impact on Australian Practice' (2009) 5 *Journal of Private International Law* 181; Garnett, 'The *Hague Choice of Court Convention*', above n 16.

would mean that Australian courts would be obliged to exercise jurisdiction based on a valid exclusive jurisdiction agreement. Although, as noted above, they are already extremely likely to do this, the *Hague Convention* would remove the element of discretion and thus a degree of uncertainty. Another important effect would be that jurisdiction agreements in favour of Convention states would be presumed exclusive unless expressly non-exclusive. The current position under Australian law on the point is somewhat unclear — there is probably a presumption in favour of jurisdiction agreements being found to be exclusive, but a weaker one than that under the *Hague Convention*.⁴⁰ This change might thus also be viewed as adding greater certainty, decreasing litigation over whether particular agreements are exclusive or non-exclusive, although there is an evident risk that a presumption might impute an intention which was not held by the parties to a particular agreement.

The flipside of an increase in certainty is always a decrease in flexibility. In this context, the change would mean that Australian courts would be forced to hear a dispute covered by an exclusive jurisdiction agreement, even though it is part of a complex multi-party or multi-issue dispute largely being heard in a foreign court. Under the *Hague Convention*, the obligation to give effect to the agreement between the parties may thus risk decreasing the efficient resolution of some complex disputes, and may in some cases increase the risk of conflicting judgments. This raises the question of whether Australian state or federal legislatures should consider adopting broader rules of incidental jurisdiction — permitting the addition of related parties or related claims — an approach adopted in some Australian states,⁴¹ and recently broadened under English law.⁴² This would facilitate the possibility that in some cases a complex dispute may be consolidated in the Australian courts rather than fragmented as a result of the *Hague Convention*.

B Derogation

The *Hague Convention* would have closely equivalent effects in the context of derogation. Australian courts would be obliged not to exercise jurisdiction where the claim is covered by a valid foreign exclusive jurisdiction agreement in favour of the courts of a Convention state, although as noted above they are already very likely not to do so. This greater certainty again means reduced flexibility — an inability to hear a dispute covered by a foreign exclusive jurisdiction clause which is part of a complex multi-party or multi-issue dispute largely being heard in an Australian court, however expansively the Australian court's rules on incidental jurisdiction are drafted. The *Hague Convention* is also likely to mean that Australian courts cannot refuse to give effect to a foreign exclusive jurisdiction agreement on the sole basis that the foreign court would not recognise rights arising under Australian law (such as under statutory causes of

⁴⁰ See, eg, *Armacel Pty Limited v Smurfit Stone Container Corporation* (2008) 248 ALR 573 [88]; Garnett, 'The *Hague Choice of Court Convention*', above n 16, 164.

⁴¹ See, eg, *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 7.02(h)(i). Rule 7.02(s) suggests that a recognised basis of jurisdiction must be found for each claim against a single defendant, but this is supplemented by r 7.03 under which a broader approach may be taken with the permission of the court.

⁴² *Civil Procedure Rules (England and Wales) 1998* (UK) SI 1998/3132 Practice Direction 6B, para 3.1(4)–(4A).

action). In some circumstances these cases may continue to be covered by the public policy exception, but as noted above that exception should probably be interpreted restrictively. The position of insurance or franchise contracts would also be somewhat uncertain under the *Hague Convention*, unless Australia excluded them from its scope under art 21.

As noted above, the *Hague Convention* requires the validity of a choice of court agreement to be assessed under the law of the chosen court, including its choice of law rules. The present position under Australian law on this point is somewhat uncertain, and there is authority for the view that the law of the forum should be applied instead.⁴³ This would therefore be potentially a significant change in Australian law, and one which should increase international consistency in determining the validity of exclusive jurisdiction agreements, reducing the risk of conflicting judgments arising between the courts of Convention states.

C Recognition and Enforcement

In the context of recognition and enforcement of judgments, the effects of the *Hague Convention* would be less dramatic — foreign judgments based on exclusive jurisdiction agreements are already generally enforceable under Australian law and the defences under the *Hague Convention* are similar to those under common law or statute in Australia, although perhaps more narrowly defined. Under art 9(c), for example, concerns of procedural fairness are limited to notice of the commencement of proceedings, whereas under common law they might also encompass the conduct of proceedings.⁴⁴ Under art 9(d), the defence of ‘fraud’ is limited to ‘a matter of procedure’, whereas under the common law it has not been limited in that way.⁴⁵ In both contexts, however, it is possible that the general defence of public policy may cover any cases not caught by the specific defence.⁴⁶ One significant change, however, is that the *Hague Convention* provides for the enforceability of non-monetary judgments, such as an order for specific performance. This would be a positive development of an outmoded common law rule, already more broadly rejected by the Canadian Supreme Court.⁴⁷ It should be noted of course that Australia’s accession to the *Hague Convention* would also mean that judgments from Australian courts would equally gain the benefit of greater recognition and enforcement in other Convention states.

VI THE REGIONAL IMPACT OF SINGAPORE’S ACCESSION TO THE *HAGUE CONVENTION*

As noted above, Singapore became a party to the *Hague Convention* in 2016, and has implemented it through the *Choice of Court Agreements Act 2016* (Singapore). It is no secret that Singapore has recently been pushing to establish itself as a dispute resolution centre, certainly for the Asia-Pacific region, and to

⁴³ See, eg, *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197, 202, 225, 256, 260.

⁴⁴ See, eg, *Adams v Cape Industries* [1990] 1 Ch 433.

⁴⁵ See, eg, *Jet Holdings Inc v Patel* [1990] 1 QB 335.

⁴⁶ *Hague Convention* art 9(e).

⁴⁷ See, eg, *Pro Swing v Elta Golf* [2006] 2 SCR 612.

some extent also for the world. In 2015, Singapore established a new International Commercial Court ('SICC'), which has a number of innovative features which are designed to attract international disputes, including more flexible rules of evidence, the possibility of having foreign lawyers and international judges, and simpler procedures for proving the content of foreign law. Singapore's accession to the *Hague Convention* in 2016 also means that judgments from the Singapore courts which are based on an exclusive choice of court clause are more readily recognised and enforced in member states of the EU.

These developments present risks and opportunities for the Australian legal services industry. Australian lawyers now have the opportunity to act before the SICC based on their Australian qualifications. Australian lawyers advising clients engaged in cross-border activity should already be considering the benefits of the SICC as an alternative to choosing other national courts or arbitration. There is, however, also a risk for the Australian legal services industry that parties doing business in Asia, or Asian parties doing business in Australia, may end up preferring the SICC to Australian courts, in part because its judgments are more readily enforceable under the *Hague Convention*. If Australia also accedes to the *Hague Convention*, as proposed, this relative advantage will be removed because Australian judgments will be equally enforceable — Australian courts would be able to compete more readily with the SICC. However, this would also mean that judgments from the SICC would benefit from the *Hague Convention* enforcement rules in Australia. A side effect of Australia becoming a party to the *Hague Convention* would thus be to increase the attractiveness of the SICC for contracts involving Australian parties, as discussed further below.

VII BROADER INTERNATIONAL EFFECTS OF THE *HAGUE CONVENTION*

As discussed above one of the purposes of the *Hague Convention* is to promote the use of national courts, to level the playing field between litigation and arbitration, through providing greater certainty and uniformity in the rules governing the direct and indirect effects of exclusive jurisdiction agreements. Given the limited number of parties at present, the *Hague Convention* evidently has a long way to go to achieve the harmonisation effects of the *New York Convention*, but in the long run there is no obvious reason why this would not be possible. It is worth pausing, however, to ask whether this would necessarily be desirable. There are different views on whether encouraging national litigation over arbitration would actually be a positive development. One of the reasons why states often promote arbitration through favourable national laws (and accession to the *New York Convention*) is that arbitration privatises the cost of commercial dispute resolution, allowing disputes to be resolved without imposing a burden on the courts. This attitude is reflected in other contexts — in the United States, for example, there has at least traditionally been hostility to the idea that the parties could impose the burden of resolving their disputes on a particular forum, unless that forum itself had an interest in the litigation. Certainly, under US law the question of forum allocation is commonly not just a

matter for the parties but also a question of public interest.⁴⁸ On the other hand, the view has long been taken in London that commercial litigation is not a burden but a business opportunity, one which London has developed into an important and world-leading industry — a perspective which is much more likely to welcome the effects of the *Hague Convention*. The greater certainty and uniformity around the effectiveness of choice of court agreements should also, at least in theory, promote cross-border economic activity between Convention states. By simplifying, strengthening and harmonising the rules around exclusive jurisdiction agreements, litigation risk should be reduced, providing a modest boost to cross-border business.

As already noted above, one of the effects of the *Hague Convention* should be to promote choice of the courts of Convention states in exclusive jurisdiction agreements, because judgments based on those agreements will be made more powerful. It is important to note, however, that these effects are symmetrical between Convention states (one state cannot make its own judgments more powerful without also making the judgments of other states more powerful), and also may have counterintuitive asymmetrical effects where one party to a dispute is from a non-Convention state. Two examples are illustrative.

Imagine under existing law you are advising an Australian company negotiating with a German company, and the German company proposes an exclusive choice of court agreement in favour of the Singapore courts as a neutral option. This is potentially quite a good choice from the perspective of the Australian company. If the Australian company successfully sues the German company in Singapore, they get a judgment which is enforceable under the *Hague Convention* in Germany, where the defendant's assets are most likely to be located. On the other hand, if the German company sues the Australian company in Singapore, they get a judgment which can only be enforced under Australian law, not under the *Hague Convention*, which may allow for more defences. Of course there are many other reasons to choose a particular court, but from the perspective of relative enforceability, Singapore would be a particularly good choice for parties who are not from Convention states, contracting with parties from Convention states.

For a second example, imagine that Australia accedes to the *Hague Convention*, and you are advising an Australian company entering into a contract with a Chinese company. The Chinese company proposes an exclusive choice of court agreement in favour of Singapore, as a neutral option. In this context, accepting such an agreement would probably be disadvantageous. If the Chinese company successfully sues the Australian company in Singapore, the judgment will be readily enforceable in Australia, under the *Hague Convention*. But if the Australian company sues the Chinese company in Singapore, the judgment will not be readily enforceable in China, because China is not a party to the *Hague Convention*. Accession to the *Hague Convention* would thus have the curious effect of making exclusive choice of court agreements in favour of other Convention states less desirable for Australian contracting parties.

These examples are not only illustrations of some interesting strategic implications of the *Hague Convention*, but also a reminder that in the course of

⁴⁸ This point is reflected in art 19 of the *Hague Convention*, as discussed in Part IV(A) above.

negotiating any choice of forum agreement (whether in favour of a court or arbitration), it is important to consider not only the features of different courts or tribunals, but the enforceability of any potential judgments, taking into account the location of assets against which a judgment or arbitral award can be enforced.

VIII CONCLUSIONS

Jurisdiction agreements may appear simple, but their effects can be complex. Australia's proposed accession to the *Hague Convention* may have significant costs, including increasing the expense of some complex litigation, and increasing the risks of conflicting judgments arising in some circumstances. Any new law reform, even one aimed at increasing certainty, inevitably also has the effect of decreasing certainty in the short term until a consistent jurisprudence has developed around the interpretation of the rules. The need to rely on foreign authority to ensure consistent interpretation of the *Hague Convention* may add expense to litigation in the short term, as may the addition of a further regime of jurisdictional rules on top of the complexity of the existing rules of Australian federal and state courts. Depending on the terms of accession and on how the rules are interpreted, the *Hague Convention* might also reduce the legal safeguards offered to certain weaker parties such as franchisees or purchasers of insurance, and may reduce the effectiveness of Australian statutes creating private causes of action.

Ultimately, however, accession to the *Hague Convention* is likely to be welcomed by most commercial parties, who will value the overall increased certainty it will bring in the long run. There are potential benefits for all Australian business seeking to conduct their activities internationally, and also for Australia's ability to compete in regional and global markets for the provision of dispute resolution services. In this respect, Singapore's accession in 2016 is particularly significant regionally, along with the development of the SICC, and Australia's proposed accession could also have an important impact. Indeed, it is important to note that the *Hague Convention* already affects the potential benefits and risks of some choice of court agreements — those in favour of Convention states — because it already affects the enforceability of those agreements and of judgments from those states.

On balance, it is also this author's view that accession to the *Hague Convention* would be a positive move for Australia and for the global development of rules on jurisdiction — private international law works best when it is coordinated and international and the development of the *Hague Convention*, while not without some disadvantages, is a step in the right direction as part of a broader ongoing project at the Hague Conference on Private International Law.⁴⁹ Australian lawyers and commercial parties will, however, need to be aware of the complexities the *Hague Convention* creates, not only in terms of its impact on jurisdiction and the recognition and enforcement of judgments in Australia, but also in terms of the strategic questions surrounding their choice of forum for international disputes. Australia's potential accession to

⁴⁹ This project deals more broadly with the recognition and enforcement of judgments, and also potentially jurisdiction. See Hague Conference on Private International Law, *The Judgments Project* <<https://www.hcch.net/en/projects/legislativeprojects/judgments>> archived at <<https://perma.cc/9DCC-HCWF>>.

the *Hague Convention* may thus also serve as an important reminder that choice of forum is not a simple matter for boiler plate clauses, but a strategic issue which requires careful consideration and analysis.