THE ENFORCEMENT OF JURISDICTION CLAUSES IN AUSTRALIA

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I. INTRODUCTION

As trade and commerce become increasingly international, it can be expected that parties will wish to inject some certainty into their dealings. The danger of being exposed to an unfamiliar legal system, as well as the costs and inconvenience of having to litigate at great distance from home, make the inclusion of jurisdiction clauses in agreements highly desirable.

A jurisdiction clause is typically a provision in a contract whereby parties agree to submit any disputes between them to a designated court. Such a clause may be relied upon by a party in three main ways. Firstly, a jurisdiction clause may be pleaded as a submission to the jurisdiction of the courts of the forum. Secondly, the clause may be pleaded as a basis for staying proceedings in the forum where the clause confers jurisdiction on a foreign court. Thirdly, the clause may be pleaded as a basis for restraining the conduct of proceedings in a foreign jurisdiction where the clause confers jurisdiction on the forum.

Jurisdiction clauses (also known as jurisdiction agreements, forum selection or choice of forum clauses) have a long history, particularly in the area of contracts for the carriage of goods by sea. They are also commonly included in insurance contracts, crossborder distributorships, loan contracts and guarantees

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and international commercial agreements generally. As well as giving parties a measure of certainty and predictability in their commercial relationships, the use of jurisdiction clauses should, theorectically, lessen the scope for dispute over which court should hear an action and thereby reduce the delay and expense of litigation.[1]

In a number of cases, Australian courts have drawn a distinction between exclusive and non-exclusive jurisdiction clauses for the purposes of enforcement. It will be argued that the use of this distinction has reduced the effectiveness of the jurisdiction clause, since in few cases has a stay of proceedings been granted in reliance on a non-exclusive clause. In this regard, reference will be made to developments in English and European law, where there has been an increasing tendency to enforce jurisdiction clauses generally, regardless of whether they are expressed in exclusive form.

Even in the context of exclusive clauses, Australian courts have (until very recently) displayed inconsistency and reticence in enforcement, with the possible consequence of harm to commercial expectations. This reticence can perhaps be explained by the fact that courts have shown an excessive concern to protect local residents from litigation abroad, even though this may have been what was agreed between the contracting parties.

Another question to be explored is whether Australian courts treat (or should treat) differently, jurisdiction clauses contained in international contracts (agreements having a connection outside Australia either in terms of the identity of the parties or the forum selected) and intranational contracts (involving parties from different states or territories within Australia). Jurisdiction clauses in international agreements will be considered first.

II. THE ENFORCEMENT OF JURISDICTION CLAUSES IN INTERNATIONAL CONTRACTS

A. Jurisdiction Clauses as a Basis for Establishing Forum Jurisdiction

It is accepted law that a defendant will be amenable to the jurisdiction of an Australian court where that defendant voluntarily submits to the jurisdiction. Submission may be established by the existence of a clause in a contract to which the defendant is a party, conferring jurisdiction on the forum.[2] In the case of a defendant located outside Australia, the majority of Australian state and federal rules of court recognise submission to the jurisdiction as a basis for service on a foreign defendant outside the forum.[3]

A question to consider is whether, even though jurisdiction has been established in the forum by a choice of jurisdiction clause, it is still possible for a defendant to obtain a stay of local proceedings in order that the matter be heard

1 G Born, *International Civil Litigation in US Courts* (3rd ed, 1996), p 372.

2 P Nygh, *Conflict of Laws in Australia* (6th ed, 1995), p 64.

3 See Fed Ct O8 r1(f); NSW: Pt10 r1A(1)(h); NT: O7.01(1)(h); Qld: O11 r1(2) and (r); SA: R18.02(k); Vic: O7.01(1)(h).

in a foreign court. The answer seems to be that a stay will rarely, if ever, be granted in such circumstances.

In *Woolworths v D S McMillan*, a New South Wales court refused a defendant's application for a stay of proceedings in favour of trial in England where that party had agreed to "submit to jurisdiction of any competent court in the Commonwealth of Australia" and resolve any dispute "in accordance with the law and practice applicable in such court".[4] According to the court, while this clause was only a submission agreement and did not vest the local courts with exclusive jurisdiction over any disputes that may arise between the parties,[5] it should be enforced since it was part of a freely negotiated commercial bargain. The court would therefore be frustrating the parties' intentions by not giving effect to the clause. Additionally, a trial in England offered no overwhelming factors of convenience which would offset the presumption in favour of New South Wales jurisdiction established by the clause.

It seems then that it will be difficult for a defendant to obtain a stay of proceedings commenced in the forum where it entered a contract containing a clause submitting to that court's jurisdiction, even where such a clause was not exclusive. This conclusion is consistent with recent English authority.[6] The question may be raised as to whether the court's approach in *Woolworths*, in not distinguishing between exclusive and non-exclusive clauses for the purposes of enforcement, is one which could be applied more generally.

B. Foreign Jurisdiction Clauses as a Basis for Stay of Local Proceedings

The most common situation in which jurisdiction clauses in international contracts have been considered by Australian courts is where a party brings an action in a forum and the defendant to such an action seeks to stay the proceedings on the ground that the parties had agreed to submit their disputes to a foreign court.

(i) The Distinction Between Exclusive and Non-Exclusive Jurisdiction Clauses

In considering applications to stay proceedings based on a foreign jurisdiction clause, Australian courts have, in a number of cases, recognised a distinction between exclusive and non-exclusive jurisdiction clauses. If a clause in a contract provides for exclusive jurisdiction, then it not only confers jurisdiction on a particular court, but precludes a party from suing in any other forum. By contrast, if a clause is non-exclusive, it only amounts to a submission to the jurisdiction of the specified court, but does not prevent litigation elsewhere.[7] Courts have traditionally been more willing to grant a stay of proceedings in a case involving an exclusive jurisdiction clause. This is because if a court were to allow a party to bring an action in the forum in breach of such a clause, it

4 Unreported, SC NSW, Rogers J, 29 February 1988. (Hereafter referred to as *Woolworths*).

5 An exclusive jurisdiction clause does not merely confer jurisdiction on a particular court but also precludes the parties from suing elsewhere. See, for a fuller discussion, notes 14-31 *infra* and accompanying text.

6 *The Hida Maru* [1981] 2 Lloyd's Rep 510; *British Aerospace v Dee Howard* [1993] 1 Lloyd's Rep 368.

7 See further, notes 14-31 *infra* and accompanying text.

would be effectively sanctioning a breach of contract by that party. Nevertheless, the drawing of this distinction has had the effect of reducing the scope for enforcement of jurisdiction clauses since, as will be discussed, in no case involving a foreign non-exclusive clause has a stay been granted.[8]

Before considering the distinction between exclusive and non-exclusive jurisdiction clauses, it is worth noting as a preliminary point, that for a defendant to obtain a stay of the plaintiff's claims, they must be found to fall within the scope of the clause as a matter of construction. For example, suppose parties had agreed to submit all disputes arising under the agreement to the jurisdiction of court X, but the plaintiff nevertheless brought proceedings in court Y for both breach of contract and for breach of a Y statute. The issue is: Do the terms of the jurisdiction clause extend to cover both claims?

Surprisingly, this issue has rarely been raised in the Australian decisions on jurisdiction clauses,[9] both because plaintiffs have usually conceded the point and Australian courts have tended to take a liberal construction of parties' agreements as to forum. Courts have been mindful of the serious inconvenience to which parties would be subjected by having to litigate in two different fora over the same subject matter, which would be the result of a finding that certain claims fell within the scope of the clause and others did not.[10] So, provided that the parties' clause is sufficiently widely drawn to cover all possible claims which may arise, there will be little opportunity for dispute over the scope of the jurisdiction clause.[11]

When have Australian courts found a clause to be exclusive and when non-exclusive? While courts have approached the issue as a matter of construction, they have not always been consistent in their interpretation of similar wording. Part of the reason for this may be that, as a matter of choice of law theory, questions concerning the construction of jurisdiction clauses are supposed to be referred to the proper law of the agreement,[12] which would obviously vary with each clause. However, in practice, Australian courts have rarely applied the proper law and instead opted for the *lex fori* to resolve the question,[13] so the inconsistency must have another explanation.

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8 By way of contrast, it is interesting to note that in the area of international arbitration agreements, the trend has been towards greater enforcement, with legislation having been enacted to require Australian courts to stay proceedings brought in breach of such agreements. See s 7 of the *International Arbitration Act* 1974 (Cth) and Article 8 of the UNCITRAL Model Law enacted in Schedule 2 to the 1974 Act. For a fuller discussion of the effect of these provisions, see R Garnett, "Enforcing International Arbitration Agreements in Australia" (1995) 2 *Commercial Dispute Resolution Journal* 88.

9 By contrast, the issue has arisen occasionally in enforcement of arbitration agreements, see Garnett, *ibid* at 94-6. One case where the issue of the scope of the jurisdiction clause was (unsuccessfully) pleaded as a defence to an application for a stay was *Hanessian v Lloyd Triestino* (1951) 68 WN (NSW) 98.

10 An English judge has referred to the "practical advantages of one-stop adjudication": *Harbour Assurance Co v Kansa General International Insurance Co* [1993] QB 701 at 724 per Lord Hoffmann.

11 See, in the arbitration context, *Francis Travel Marketing v Virgin Atlantic Airways* (1996) 39 NSWLR 160. (Hereafter referred to as *Francis Travel*).

12 E Sykes and M Pryles, *Australian Private International Law* (3rd ed, 1991), p 77.

13 Perhaps the explanation for this lies in the presumption in Australian conflict of laws principles that, in the absence of proof of foreign law, it is to be assumed to be the same as the law of the forum. See *ibid*, p 276.

The distinction between exclusive and non-exclusive jurisdiction clauses was explained in *Contractors Ltd v MTE Control Gear Ltd.*[14] That case involved an application for a stay of South Australian proceedings on the basis of a clause in a contract which provided that:

> ... this agreement shall be construed according to the laws of England ... and shall be deemed to constitute a submission to the High Court of Justice therein for the determination of any dispute or difference arising thereunder.[15]

The court first had to consider whether the clause provided for exclusive jurisdiction. It noted that, in construing the clause, the 'governing law' part had to be considered separately from the 'submission to jurisdiction' part. There was nothing inconsistent for parties to an agreement to choose English law, but to allow also the jurisdiction of the South Australian court to be exercised.

Once the choice of law element of the clause was ignored, the court took the view that the second part of the provision did not amount to an exclusive jurisdiction clause. It did not require any party, of necessity, to refrain from proceeding in a court other than the English High Court of Justice. The use of the words 'submission to the jurisdiction' meant that neither party could object to the jurisdiction of the English court if any proceedings were taken there. However, if no action were brought in England, either party was free to commence proceedings in another court, such as the Supreme Court of South Australia. The clause was therefore only a 'submission to jurisdiction' (or non-exclusive clause) and not a forum selection agreement (exclusive clause). The action in South Australia could therefore proceed.[16]

The reasoning in the *MTE Control* case has been applied in three other Australian cases involving non-exclusive jurisdiction clauses, two of which nominated the courts of England[17] and one New Zealand,[18] with the plaintiff held entitled to continue the suit in the Australian forum in each case. In two of the cases,[19] the parties had also made a contractual choice of the law of the country stipulated in the jurisdiction clause. The court in both cases disregarded the choice of law for the purposes of construing the jurisdiction clause. In all three cases, it was clear that the characterisation of the clause as non-exclusive virtually ensured that a stay would not be granted, which reflects the significance of the characterisation inquiry in the overall context of enforcement of jurisdiction clauses. In fact, by introducing this distinction, courts have limited the scope for enforcement.

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14 [1964] SASR 47. (Hereafter referred to as the *MTE Control* case).

15 *Ibid.*

16 The court also pointed out that, even if, in the context of non-exclusive clauses, a discretion to stay proceedings did still exist, such an order would not be granted in this case because the claim was more closely connected with the forum, South Australia: The agreement upon which the claim was based was made and breached in South Australia, where the plaintiff was resident.

17 *Green v Australian Industrial Investment Corporation* (1989) 90 ALR 500; *Armitage Brick Ltd v Thiess Contractors* (unreported, Qld CA, 25 August 1992); *Enzacor Technology v Ko* (unreported, SC Vic, Smith J, 22 March 1993).

18 *Sheldon Pallet Manufacturing Co v New Zealand Forest Products Ltd* [1975] 1 NSWLR 141.

19 *Green v Australian Industrial Investment Corporation*, note 17 *supra* and *Sheldon Pallet Manufacturing Co v New Zealand Forest Products Ltd, ibid.*

More recently, in the case of *TNT Shipping and Development v QBE Insurance*, the court took a narrow view of what constitutes an exclusive jurisdiction clause.[20] The court held a clause in an insurance policy to be non-exclusive where it provided that "this insurance is subject to English jurisdiction".[21] According to the court, for a provision to be exclusive, "it must impose a contractual obligation on one or more parties to litigate in the chosen jurisdiction".[22] In this case, it could not be said that the clause *required* the plaintiff to sue in England. All that the clause did was to provide a statement to him or her that the rights that he or she had under the policy were capable of enforcement in the English courts. As such, it was only a submission to English jurisdiction and so did not preclude an action in New South Wales. Therefore, the plaintiff's claim was entitled to proceed.

However, the court's approach to interpretation of the jurisdiction clause has been criticised as too restrictive in two subsequent cases, dealing with similarly worded clauses. Certainly, the effect of the court's interpretation was to make it easier for the plaintiff to maintain suit in the local forum and so evade the jurisdiction clause.

In *Gem Plastics v Satrex Maritime*,[23] a New South Wales court had to consider a clause which provided that "this insurance is subject to South African jurisdiction". It held the clause to be exclusive for two main reasons. First, it stated that for a jurisdiction clause to be exclusive, it was not in fact necessary for the word 'exclusive' to be actually used. Secondly, the court relied on a principle stated in a number of English decisions that where a court would have had jurisdiction over a claim, then any reference to such a court in a jurisdiction clause must be taken as granting something more, that is, that the court was to have exclusive jurisdiction.[24] This conclusion is particularly compelling where the jurisdiction clause is accompanied by a choice of law clause specifying that country's law.[25] In *Gem Plastics* itself, the fact that the defendant insurer was a South African company meant that the usual place in which it would be sued would be in its home jurisdiction. So, to prevent the reference in the clause to South African courts being redundant, it must have been intended by the parties that its courts were to have exclusive jurisdiction.[26]

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20 Unreported, SC NSW, Hunter J, 7 November 1994.

21 *Ibid* at 2.

22 This definition comes from the English case *S & W Berisford v New Hampshire Insurance* Co [1990] 2 QB 631 at 636, where an identical clause was considered. Interestingly, this statement was recently approved by two members of the High Court in *Akai v The People's Insurance Co* (1996) 188 CLR 418 at 425 per Dawson and McHugh JJ (dissenting on other grounds). (Hereafter referred to as *Akai*).

23 Unreported, SC NSW, Rolfe J, 9 June 1995. (Hereafter referred to as *Gem Plastics*).

24 See *Sohio Supply Co v Gatoil (USA) Inc* [1989] 1 Lloyds Rep 588 at 591-2; *British Aerospace*, note 6 *supra* at 374.

25 Compare this approach with that taken in the *MTE Control* case, note 14 *supra*, where the court gave no weight to the parties' contractual choice of law in determining whether a clause provided for exclusive jurisdiction.

26 Interestingly, the parties had, in this case, made a choice of English rather than South African law; this did not upset the court's conclusion that the clause was exclusive.

The principles in the *Gem Plastics* case were applied by the same court in *FAI Insurance Co v Ocean Marine Mutual Protection and Indemnity Association,*[27] where an almost identically worded clause stipulating English courts was found to be exclusive. Here, there had also been a choice of English law. As well as relying upon the criteria mentioned above in *Gem Plastics* to reach this conclusion, the court in *FAI* also referred to two other points. First, it noted the principle expressed in recent English authority that the use of the expression "the parties submit themselves" to the jurisdiction is less likely to be construed as an exclusive clause than where 'disputes' or certain subject matter are referred.[28] Here, the parties used the words "this reinsurance is subject to English jurisdiction" which "express an intention that all disputes under the contracts shall be submitted to the jurisdiction of English courts, something different to a personal submission to jurisdiction by each of [the parties]".[29] Secondly, the nature of the wider agreement between the parties was cited as a relevant factor in the clause's characterisation. This case involved a contract of reinsurance between international insurers and so it was likely that there had been an intention to choose "one, certain jurisdiction".[30]

There seems a recent movement, at least in the area of international insurance contracts, towards presuming that the parties, in including a choice of jurisdiction clause, were intending the nominated court to have sole or exclusive jurisdiction. This trend is to be applauded in that it should result in increased enforcement of jurisdiction clauses on the basis that, up until now, Australian courts have more readily stayed proceedings when presented with an exclusive agreement. Interestingly, this prediction that the adoption of a liberal approach as to what amounts to exclusive will facilitate enforcement of jurisdiction clauses generally is not strictly borne out by the *Gem Plastics* case: the court refused a stay, both in the original proceeding[31] and the rehearing.[32] Fortunately, in the subsequent proceeding in the *FAI* case,[33] the court was persuaded to grant a stay, largely on the basis of the presence of the exclusive clause.

As a final point on the distinction between exclusive and non-exclusive clauses, it is worth recalling the remarks of Rogers J in the *Woolworths* case,[34] to the effect that jurisdiction clauses of whatever type should generally be enforced on the basis that they reflect the intention of the parties as to choice of forum. However, no Australian court has yet applied this reasoning to enforce a foreign non-exclusive jurisdiction clause. Nevertheless, there have been developments under English and European law which suggest that courts may be moving to a position where jurisdiction clauses generally are enforced without regard to whether they are characterised as exclusive or not. Obviously the advantage of

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27 (1996) 41 NSWLR 117. (Hereafter referred to as *FAI*).

28 *British Aerospace v Dee Howard,* note 6 *supra* at 375; *Continental Bank v Aeakos Compania Naviera* [1994] 1 WLR 588 at 592-4. (Hereafter the *Continental Bank* case).

29 *FAI*, note 27 *supra* at 127.

30 *Ibid.*

31 See note 23 *supra.*

32 (1995) 8 *ANZ InsCas* [61-283].

33 (1997) 41 NSWLR 559.

34 See note 4 *supra.*

such an approach, which hopefully will commend itself to Australian courts, is that it should result in increased enforcement of jurisdiction clauses.

Under English law, the status of jurisdiction clauses is now complicated by the impact of European law principles. The United Kingdom is a party to the Brussels Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters of 1968 and the Lugano Convention on Jurisdiction and the Enforcement of Judgements of 1988 which aim to create a substantially uniform system of civil jurisdiction throughout the European Union (EU) and the European Free Trade Area (EFTA).[35]

Article 17 of both conventions is the key provision dealing with jurisdiction clauses. It provides, so far as material, that where "the parties ... have agreed that a court ... of a contracting state [is] to have jurisdiction ... that court shall have exclusive jurisdiction". The first point to note about this provision is that it only applies to clauses which stipulate the jurisdiction of a "Contracting State"; in effect, a member state of the EU or EFTA. Where an English court encounters a clause choosing a forum outside these two bodies, English common law principles continue to apply. Reference will be made to these in a moment. However, assuming that a clause does specify the jurisdiction of a Contracting State, to what types of jurisdiction clause does Article 17 apply?

In a groundbreaking English decision,[36] which has been followed in later cases,[37] it was held that, despite the reference in Article 17 to exclusive jurisdiction, the provision in fact applies to all jurisdiction clauses, whether exclusive or not, on the basis that it was the intention of the drafters of the convention to realise, wherever possible, the intentions of the parties to submit their disputes to a particular forum. So, where a plaintiff commences an action before a domestic court of an EU or EFTA country, and there exists a non-exclusive jurisdiction clause stipulating the jurisdiction of another member state, the court must stay the action. In one stroke, the distinction between exclusive and non-exclusive has been discarded in favour of a general approach to enforce all jurisdiction clauses, on the basis that this better corresponds with the parties' intentions. Commentators have largely welcomed this development.[38]

There is also evidence of a similar trend to enforcing non-exclusive jurisdiction clauses under English common law principles. As noted above, the common law rules continue to apply where the parties have made a contractual choice of a forum outside the EU and the EFTA. The traditional approach in English law was, similar to the Australian decisions discussed earlier, to distinguish between non-exclusive and exclusive foreign jurisdiction clauses, with a plaintiff finding it significantly easier to overcome a non-exclusive clause.[39] However, more recently in *The Rothnie,*[40] an action brought in England

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35 The Brussels and Lugano Conventions have been enacted in the UK by the *Civil Jurisdiction and Judgments Act* 1982 and the *Civil Jurisdiction and Judgments Act* 1991, respectively.

36 *Kurz v Stella Musical Veranstaltungs GmbH* [1991] 3 WLR 1046.

37 For example, *Gamlestaden v Casa de Suecia* [1994] 1 Lloyd's Rep 433.

38 See, for example, R Thomas, "Non-exclusive Jurisdiction Clauses and Submission By Appearance" [1992] *Lloyd's Mar & Com LQ* 292.

39 *Evans Marshall & Co v Bertola* [1973] 1 WLR 349.

was stayed on the basis of a Gibraltan non-exclusive clause. In the court's view, the fact of the clause, together with the parties' contractual choice of Gibraltan law created:

> ... a strong prima facie case that that jurisdiction is an appropriate one. Accordingly the burden shifts to the plaintiff to show that there are special circumstances by reason of which justice requires that trial should nevertheless take place in England.[41]

In the judge's view then, there was no significance in the fact that the foreign jurisdiction clause was only non-exclusive: It still gave rise to a strong presumption that the plaintiff's action in the forum should be stayed. It is suggested that this approach is worthy of adoption in Australia.

(ii) The Enforcement of Exclusive Jurisdiction Clauses

Where a foreign jurisdiction clause was found to be exclusive, as a matter of construction, English common law principles required that a stay of proceedings commenced in the forum be granted unless exceptional circumstances were present.[42] A residual discretion to allow proceedings to continue in the forum, however, did exist on the basis that parties could not oust the jurisdiction of the court by their agreement. Theoretically, Australian courts have also adopted this approach in the case of exclusive jurisdiction clauses designating overseas courts.[43]

What should be noted, however, about the Australian decisions concerning exclusive jurisdiction clauses, is that although the courts have repeatedly reaffirmed the general principle that a stay will be refused only in rare cases, they have at times been rather more generous in allowing claims to proceed in breach of the clause. In particular, when compared to the Australian courts' more rigorous enforcement of international arbitration agreements, there appears to be a more relaxed approach. At least part of the reason for this more lenient treatment of exclusive jurisdiction clauses is the very wide discretion with which courts have invested themselves in deciding whether or not to enforce such agreements.[44] For example, the High Court has said that, "the court's discretion has not been restricted by any exclusive definition of the circumstances which will warrant refusal of a stay".[45] More recently, an English court set out a long list of factors which may guide the court's discretion but even then emphasised that such a list was not exhaustive:

> In exercising its discretion, the court should take into account all the circumstances of the particular case. In particular ... the following matters, where they arise, may

40 [1996] 2 Lloyd's Rep 206.

41 *Ibid* at 211.

42 *Law v Garrett* (1878) 8 Ch D 26; *The Cap Blanco* [1913] P 130.

43 See, for an early example, *Hanessian v Lloyd Triestino*, note 9 *supra*.

44 A Bell, "Jurisdiction and Arbitration Agreements In Transnational Contracts" (1996) 10 *Jnl Contract L* 53 at 61. Note also that under s 7 of the *International Arbitration Act* 1974 (Cth), an Australian court is mandatorily required to stay proceedings brought in breach of an arbitration agreement to which the Act applies.

45 *Huddart Parker v The Ship the Mill Hill* (1950) 81 CLR 502 at 509. (Hereafter referred to as *Huddart Parker*).

properly be regarded: (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and the foreign courts. (b) Whether the law of the foreign court applies and if so, whether it differs from English law in any material respects. (c) With what country either party is connected, and how closely. (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages. (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign forum because they would: (i) be deprived of security for their claim (ii) be unable to enforce any judgment obtained (iii) be faced with a time bar not applicable in England or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.[46]

Two main reasons have been put forward by Australian courts for not enforcing foreign exclusive jurisdiction agreements: (i) that the balance of convenience favours trial in Australia rather than the designated forum and (ii) that the plaintiff (usually an Australian resident) would be deprived of a legitimate juridical advantage by being forced to sue in the foreign court. At times, it is suggested, Australian courts have been too willing to accede to these arguments at the expense of the interests of commercial certainty and protection of contractual expectations which would be enhanced by enforcement of the jurisdiction clause.

(iii) Defences to Enforcement I: The Balance of Convenience Favours Trial in the Forum

In a number of cases it has been successfully argued that a foreign exclusive jurisdiction clause should not be enforced because the balance of convenience favours trial in the Australian court. It will be suggested that, on occasion, this reasoning has been something of a mask to disguise a desire to protect local residents from being sued or forced to sue overseas.

Huddart Parker v The Ship Mill Hill[47] concerned an application for a stay of proceedings, arising from an accident to a ship off the coast of Australia, based on an English exclusive jurisdiction clause. The court stated that it must begin with a strong bias in favour of maintaining the parties' special bargain but then refused to grant a stay on the basis that all the evidence relating to the claim was in Australia and so this country would provide the more convenient forum for trial.[48] Given that there was *no* relevant evidence located outside Australia in this case, it is suggested that the result here is defensible, given that the cost and logistical implications of litigating in the stipulated forum would have been unreasonable.

In *Lewis Construction v Tichauer*,[49] an exclusive jurisdiction clause was not enforced on the basis of the balance of convenience but, it is suggested, with less justification. There, the Supreme Court of Victoria had to consider an action by a Victorian company against a French company for breach of contract in relation to the supply of a defective crane. The crane had been manufactured in France

46 *The Eleftheria* [1970] p 94 at 100.

47 Note 45 *supra*.

48 The Court said that the oral testimony of the crew of the ship was most important and this was located in Australia.

49 [1966] VR 341. (Hereafter referred to as *Lewis Construction*).

and then shipped to Melbourne where, after its installation, it fell, causing injuries to persons and property. The defendant applied for a stay of proceedings on the basis of what the court found was an exclusive jurisdiction clause in the parties' contract. The parties had also made a choice of French law. However, the Victorian court refused to grant a stay because, in its view, the majority of evidence which would be relevant at the trial was located in Victoria rather than France, and so trial would be much more convenient in the local forum. The plaintiff would be subjected to a "positive injustice" if forced to litigate overseas.[50]

However, not only was there significant evidence in France, relating to the design and manufacture of the crane, but there were also other factors which pointed in favour of a stay. If trial were to proceed in Victoria: (i) the Victorian court would likely have to apply French law to resolve the claim and (ii) the defendant would be unable to join as a third party another person against whom it had a right of action arising from the same facts. However, the court felt that these disadvantages were outweighed by the fact that the greater part of the evidence was located in Victoria rather than France.[51]

It is submitted that this decision gives inadequate weight to the jurisdiction clause, particularly since it was exclusive. The fact that important evidence did also lie in France and that the defendant would be deprived of a significant juridical advantage in not being able to join its supplier in the Victorian proceedings should have also been more influential. The likelihood that the Victorian court would have to apply French law to resolve the merits of the dispute should also have been accorded greater significance by the court. French law, being foreign law from outside the common law tradition, would have to be proven by expert evidence before the Victorian court, at some cost and inconvenience to the parties and with the possibility of error by the court.[52] This case seems to confirm the earlier suggestion that Australian courts have, at times, excessively sought to protect their residents from having to litigate overseas.

50 The Court considered that the following oral evidence would be found in Victoria: (i) as to the condition of the cranes on arrival; (ii) the conduct of the plaintiff in assembling the crane; and (iii) the circumstances of the accident. This evidence was thought to be more significant than that in France, which related to the design and manufacture of the crane.

51 *Lewis Construction*, note 49 *supra* at 349.

52 It is also noteworthy that, to support its refusal of a stay, the court relied upon a dictum of Denning LJ in *The Fehmarn* [1958] WLR 159 at 162, which was to the effect that the existing test for a stay, based on an exclusive jurisdiction clause, was too weighted in favour of the grant of a stay. Instead of starting with a presumption in favour of enforcing the clause, the proper question to ask is: "with which country is the dispute most closely concerned?". Applying this principle to the facts of *Lewis Construction*, the Supreme Court found the dispute to be more closely concerned with Victoria than with France; see *ibid*. Interestingly, although this dictum of Denning LJ never 'officially' replaced the 'strong bias' principle as the test for the enforcement of exclusive jurisdiction clauses in both England and Australia, there are signs that an approach close to his was in fact applied in a number of cases, *Lewis Construction* being a good example. More recently, Rolfe J of the Supreme Court of New South Wales in *Gem Plastics*, note 23 *supra*, suggested a test for stay of proceedings based on an exclusive jurisdiction clause which was in very similar terms to that laid down by Lord Denning. This approach is considered in greater detail at notes 54-60 *infra* and accompanying text.

By contrast, in another Victorian case decided in the same year, it was held that where matters of convenience were evenly balanced (for example, in terms of the location of evidence) there is no reason for the presumption in favour of a stay, based on a foreign exclusive jurisdiction clause, to be displaced: *Blackman & Co v Oliver Davey Glass Co.*[53] The court in *Blackman*, in ordering a stay in favour of trial in Belgium, also relied upon two factors which had been downplayed in *Lewis Construction*: (i) the parties had made a choice of Belgian law and a Belgian court would be better qualified to apply its own law than a Victorian court, and (ii) were the case to proceed in Victoria, the Belgian defendant would be unable to join its supplier as a defendant, despite evidence having been led that such a claim would have good prospects of success. These criteria were said to reinforce the presumption in favour of a stay created by the exclusive jurisdiction clause. It is suggested that the court in this case showed a greater recognition of the importance of jurisdiction clauses as mechanisms for bringing commercial certainty to international dispute resolution.

Unfortunately, inconsistency in enforcement has continued to characterise later Australian decisions dealing with exclusive jurisdiction clauses. In *Lep International v Atlanttrafic Express Service*,[54] a United States company sought a stay of New South Wales proceedings, arising from damage to goods on a voyage from New York to Sydney, on the basis of a New York exclusive jurisdiction clause. The court refused to order a stay on the basis that evidence concerning the damage was available in New South Wales and other proceedings were already on foot in that state's courts between the plaintiff and a third party.

The court's decision is not easy to justify. In particular, it seems hard to see why the defendant's concern to protect itself from foreign litigation by entering into the clause in the first place should be undone by the bringing of proceedings by *another entity* against the plaintiff. Such proceedings would not have been in the contemplation of the defendant at the time of contracting nor should they have been. This decision resonates with a desire to protect local plaintiffs.

A similar, although more explicit, overriding of an exclusive jurisdiction clause on the basis of convenience occurred in the *Gem Plastics* case.[55] It will be recalled that this case involved an application for a stay of New South Wales proceedings based on an English exclusive jurisdiction clause. Arising out of the same facts, the plaintiff had already instituted proceedings in New South Wales against two other defendants. Notwithstanding the clause, the court refused to grant a stay.

In the first hearing of the matter, the court stated that, in determining whether to grant a stay, the court was to apply the test laid down by the High Court in *Voth v Manildra Flour Mills*, that is, that to obtain a stay, the *defendant* must show that the local court in which the plaintiff has instituted proceedings is "clearly inappropriate".[56] As to the weight to be given to the exclusive jurisdiction clause, this was a matter to be taken into account in determining how

53 [1966] VR 570.
54 (1987) 10 NSWLR 614.
55 See note 23 *supra*.
56 (1990) 171 CLR 538 at 557. (Hereafter referred to as *Voth*).

the discretion should be exercised. It is suggested that the reference by the court to the *Voth* test is misplaced as it had been originally formulated in a context where no jurisdiction clause, exclusive or otherwise, was present. In addition, such a test effectively consigns exclusive clauses to being merely one factor among many to consider in the overall balance of convenience, which does not truly reflect their significance as mechanisms for introducing predictability into international litigation. In practice, under this formulation, actions brought in breach of jurisdiction clauses will rarely be stayed because of the weighty burden of proof resting on the defendant to show that the local forum is clearly inappropriate. It will be a rare case when a matter will not have some connection with the forum sufficient to satisfy this test, as experience has shown, in stay applications not involving jurisdiction clauses.[57] This approach is in striking contrast to the 'strong cause' test which requires the *plaintiff* to show exceptional reasons why a stay should *not* be ordered where a claim is brought in the forum in breach of an exclusive jurisdiction clause.

It is interesting to note that in England, a similar tendency has emerged in some recent cases to dispense with the separate strong cause test for stay of proceedings where an exclusive jurisdiction clause is present and simply treat such cases under the rubric of the general test for stay of proceedings.[58] While some commentators have viewed this development with hostility for its undermining of contractual expectations,[59] others have welcomed it as a simplification and harmonisation of the law.[60]

Not surprisingly then, on the facts of *Gem Plastics*, the court rejected a stay, noting some connections between the action and the forum, in particular, that the goods were transhipped into New South Wales and were believed to have been damaged there.

However, the court, in reaching its decision, also relied upon the fact that the plaintiff had brought claims against other persons in New South Wales arising out of the same facts. In its view, this made it "manifestly more convenient ... [for] all the actions ... [to be] heard in one court in one set of proceedings".[61] It is suggested that this point is misconceived. By allowing a plaintiff to overcome a foreign exclusive jurisdiction clause by the simple expedient of bringing proceedings against another person in the forum, the court appears to have seriously underrated the importance of jurisdiction clauses.[62]

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57 Professor Nygh has commented that "in almost all cases decided since *Voth* a stay of proceedings has been refused"; Nygh, note 2 *supra*, p 107.

58 See, for example, *The Nile Rhapsody* [1992] 2 Lloyd's Rep 399. In England, the general test for stay of proceedings involves an inquiry into which court is the more appropriate forum. See *The Spiliada* [1987] 1 AC 460.

59 A Briggs, "Jurisdiction Clauses and Judicial Attitudes" (1993) 109 *Law Qty Rev* 382; J Hill, *The Law Relating to International Commercial Disputes* (1994), p 197.

60 A Barma and D Elvin, "Forum Non Conveniens: Where Do We Go From Here?" (1985) 101 *Law Qty Rev* 48 at 65-6.

61 Note 23 *supra*.

62 Such a situation may particularly arise in the context of an action by an insured against an insurer arising out of a marine cargo claim where the insured will likely sue the sea carrier as well; see M Davies, "Australian Maritime Law Decisions 1995" [1996] *Lloyds Mar & Com LQ* 379 at 390.

The defendant appealed the decision to refuse the stay to the New South Wales Court of Appeal which held that the trial judge erred by not applying the test from *Huddart Parker*[63] and *The Eleftheria*,[64] that is, that a stay would only be granted in the case of an exclusive jurisdiction clause where the plaintiff could show strong cause. The case was then remitted to Rolfe J for reconsideration of the facts in light of the different test.[65] Unrepentant, Rolfe J stated that, in his view, the High Court in *Voth* had intended its 'clearly inappropriate' test to apply to all situations where a stay was sought, regardless of whether the parties had entered into an exclusive jurisdiction clause.[66]

Nevertheless, Rolfe J said, even if the strong cause test were to be applied, placing the onus of proving the grounds for a stay on the defendant, there were still factors of convenience present which justified the proceedings in New South Wales being allowed to continue. These factors were those mentioned above in the first decision in the case.[67]

However, criticism can be made of the court's application of the strong cause test. Firstly, the comment made earlier about the inappropriateness of taking into account the plaintiff's actions against other defendants in the forum applies with the same force here. Secondly, the factors of convenience relied upon by the court to overcome the exclusive jurisdiction clause are not, it is suggested, adequate as they do not amount to an overwhelming connection between the forum and the action as was present, for example, in the *Huddart Parker* case.[68] Hence, the *Gem Plastics* case does not leave the position of exclusive jurisdiction clauses very secure.

What the above mentioned cases all have in common is that they involved actions between commercial parties who had entered into freely bargained agreements as to the jurisdiction of dispute settlement. However, where the dispute is between an Australian resident individual and a foreign corporation, with the suggestion of a discrepancy in bargaining power, Australian courts have shown an even stronger willingness to avoid foreign exclusive jurisdiction clauses, although here perhaps with more justification.

Hopkins v Difrex Societe Anonyme[69] involved an employee suing his former employer for breach of contract by wrongful dismissal. The employer was a

63 See note 45 *supra*.

64 See note 46 *supra*.

65 The decision from these proceedings is reported at note 32 *supra* [61 - 283].

66 *Ibid* at [76-130]. It is doubtful whether this view is correct, particularly after the recent High Court decision in *Akai*, where all five judges appeared to endorse the strong cause test from *Huddart Parker*; see *Akai*, note 22 *supra* at 445 per Toohey, Gaudron and Gummow JJ and at 427 per Dawson and McHugh JJ (dissenting on other grounds). Justices Dawson and McHugh went further at 428, noting that "where there is an application for a stay to enforce an exclusive jurisdiction clause ... the case [should not] be assimilated to a case in which a stay is sought on the principle of forum non conveniens". It is fair to say, though, that the High Court has not yet made a definitive statement on the issue.

67 Namely, the desirability of hearing all the plaintiff's claims in the one forum and the connections between the action and New South Wales. The court also noted that, since the governing law of the contract was English, an Australian court would be in as good a position to apply such principles as a South African tribunal.

68 See note 45 *supra*.

69 [1966] 1 NSWR 797. (Hereafter referred to as the *Hopkins* case).

French company which had a subsidiary in New South Wales with which the plaintiff had been employed. Upon the plaintiff bringing suit in New South Wales the French company sought a stay of proceedings based on a French exclusive jurisdiction clause in the employment contract. Another clause in the contract (Article 7) provided that, in the event of "serious default" on the part of the employee, the company could terminate the agreement without paying damages. This clause also stated that as regards the interpretation of serious default, Australian workers' legislation would apply.

In this case the court decided not to grant a stay. The first reason given was that, as a matter of evidence, the action was overwhelmingly connected with New South Wales as opposed to France.[70] Furthermore, the court found that, although it was likely that the proper law of the contract was French (owing to the exclusive jurisdiction clause), this was negated by the presence of Article 7 of the agreement which made Australian law applicable to the dispute. Therefore, overall, the strong connection with New South Wales, both in terms of the location of evidence and the fact that Australian law would likely be applied, meant that a stay would be refused. The court may have also been influenced by the fact that the plaintiff was a local individual suing a large international company, with the court considering that it would be more onerous to require that the former employee sue overseas. Given the relative status of the parties, this is a perhaps a more defensible decision than *Lewis Construction.*[71]

Finally, in four recent decisions on exclusive jurisdiction clauses, it appears that Australian courts may have finally decided that the strong cause test should be applied as it was originally envisaged: that only in exceptional circumstances would such a clause not be enforced. Evidence suggesting that another forum would merely be more convenient than that stipulated in the jurisdiction clause would be inadequate.

In *CSP Computer Security Products v Security Dynamics Technologies Inc*,[72] a United States company successfully sought a stay of proceedings brought in New South Wales[73] by its Australian distributor on the basis of a Massachusetts exclusive jurisdiction clause. The court did not consider the balance of the convenience between the parties but simply said that it saw "no reason" why the plaintiff should not be held to its contractual promise. In addition, the court said that it was a reasonable inference in the context of a distribution agreement between a foreign manufacturer and local distributor that the foreign company may not have entered the agreement without the protection of an exclusive jurisdiction clause. The clause, the court suggested, may have been part of the price the local company had to pay to be appointed distributor. This reasoning is to be welcomed because it shows none of the earlier parochial signs of wishing to extricate a local resident from its promise to litigate abroad. The court also

70 It was the employee's place of residence, the contract of employment had been entered into there, the appointment was to a local company (a subsidiary of the defendant) and the employee's duties were carried out exclusively there.

71 See note 49 *supra*.

72 Unreported, Fed Ct, Heerey J, 12 April 1996.

73 In the Federal Court of Australia, New South Wales District Registry.

reveals an appreciation of the value and role of jurisdiction clauses in contractual negotiations. They are not provisions to be lightly dismissed.

To the same effect is *Apscore International v Grand Canyon Technologies.*[74] In that case, an English defendant successfully applied to stay an action in the Federal Court on the basis of an English exclusive jurisdiction clause. The court, after noting that the balance of convenience was equal with evidence located in both countries, found there was nothing in the case "sufficient to displace the prima facie rule" that an exclusive jurisdiction clause should be enforced.

The same approach was taken in the *FAI* case,[75] where a stay was granted on the basis of an exclusive jurisdiction clause, again where significant connections existed with the local forum. Furthermore, the court suggested that, even if a claim had little connection with the forum stipulated in the exclusive agreement, the clause should still be enforced because "an exclusive jurisdiction provision may choose a forum having no connection with the parties and that is often done to provide a neutral forum".[76] In other words, parties may have deliberately chosen a forum at the time of contracting which bore no relation to what was 'convenient' in terms of closeness with the transaction and that this choice should be respected. This approach would seem to leave little room for arguments as to convenience. The court also rejected the argument that a stay should be refused because litigation in the overseas forum would be more expensive to the plaintiff noting that such a result was "a corollary of agreeing to exclusive jurisdiction" of the foreign courts.[77]

Finally, in *Stern v National Australia Bank,*[78] an Australian court enforced a Californian exclusive jurisdiction clause but in a slightly different way. In that case, the court refused to issue an 'antisuit injunction' to restrain a plaintiff from continuing legal proceedings in California because exclusive clauses should be honoured "except where there is a strong and clear case to the contrary".[79] The court also noted that the Californian proceedings were well advanced, to the point of judgment, and the majority of the claim's connections were with that jurisdiction. In sum, the Australian court did not consider this an appropriate case to interfere, in effect, with the jurisdiction of the foreign court.[80]

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74 Unreported, Fed Ct, Lehane J, 12 December 1996. (Hereafter referred to as *Apscore*).

75 See note 33 *supra.*

76 *Ibid* at 569-70.

77 *Ibid* at 570.

78 (1996) 34 IPR 565.

79 *Ibid* at 574.

80 However, it is also possible that an antisuit injunction could be issued to enforce an exclusive jurisdiction clause. For example, where a plaintiff brings proceedings in a foreign forum in breach of a clause requiring suits to be brought in New South Wales, a New South Wales court could issue an injunction to restrain the plaintiff from pursuing such proceedings. The High Court has recently, in obiter, acknowledged this use of antisuit injunctions; see *CSR v Cigna Insurance Australia* (1997) 146 ALR 402 at 434. (Hereafter referred to as *CSR*). In the *Continental Bank* case, note 28 *supra*, the English Court of Appeal granted an antisuit injunction to restrain a party from bringing proceedings in Greece in breach of an English exclusive jurisdiction clause. This decision was cited with approval by the High Court in *CSR*, see *ibid* at 434, fn 62.

(iv) Defences to Enforcement II: Plaintiff's Loss of a 'Legitimate Juridical Advantage'

Another basis which has been relied upon by Australian courts in avoiding the enforcement of an exclusive jurisdiction clause is where a plaintiff will lose a juridical advantage by not being able to sue in the Australian forum. Juridical advantage, in this context, means that the plaintiff will not be able to bring a claim or claims in the foreign court stipulated in the jurisdiction clause and so a stay should not be granted in the interests of justice.

It is suggested that, at times, Australian courts have been too willing to accept this argument and to allow the parties' contractual obligations to be overridden. Moreover, the juridical advantage argument itself is rather dubious, because commercial parties should be expected to investigate, in advance, their rights and obligations under the law of the jurisdiction which is the subject of the clause. If the law appears unfavourable, then the jurisdiction clause should be reconsidered prior to conclusion of the contract. Obviously, this argument has less force where the parties are commercially unequal and there is no scope for bargaining as to terms.[81]

In *Ramcorp v DFC Financial Services,*[82] it was held that a stay of proceedings should be refused because of the plaintiff's inability to obtain particular relief in the forum designated by the jurisdiction clause. This case involved an action in New South Wales by New South Wales borrowers to restrain a New Zealand bank from demanding repayment and enforcing securities under certain loan agreements. The bank applied for a stay of proceedings on the basis of an exclusive jurisdiction clause in favour of the courts of New Zealand. New Zealand law also governed the agreements. The plaintiff's main argument against the enforcement of the clause was that it would be denied a legitimate juridical advantage by being forced to sue in New Zealand because New Zealand legislation had taken away its right to injunctive relief against the defendant.[83] The court accepted the argument and refused to order a stay.

It is suggested that the peculiarity of the facts in *Ramcorp* justifies the court's decision to override the jurisdiction clause. Here, the very species of relief sought by the plaintiff, an injunction, had been available at the time of entry into the loan agreement containing the jurisdiction clause. However, the plaintiff's loss of its rights to relief occurred due to unforeseen events occurring *after* the parties had entered the agreement, namely the defendant being placed in statutory management. This case, therefore, was not an example of where a plaintiff had failed, prior to entry into the contract, to investigate adequately its rights under the law of the jurisdiction clause, but rather of its rights under that law changing in the time between conclusion of the agreement and the dispute between the parties arising.

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81 Such as in the *Hopkins* case, note 69 *supra*.

82 Unreported, SC NSW, Waddell CJ in Eq, 30 April 1990. (Hereafter referred to as *Ramcorp*).

83 Section 122(1) of the *New Zealand Reserve Bank Act* 1989 (NZ) stated that no action could be brought against any registered bank where such entity was subject to statutory management, as was the defendant.

There have also been a number of cases where a plaintiff has sought to overcome an exclusive jurisdiction clause by arguing that a claim under s 52 of the *Trade Practices Act* 1974 (Cth) would not be available in the foreign court and so the plaintiff would be deprived of a legitimate and juridical advantage.

A case where such an argument appears to have been successful, although admittedly involving only a non-exclusive jurisdiction clause, was *Green v Australian Industrial Investment Corporation.*[84] That case involved an application made in Western Australia, to stay proceedings for breach of contract and s 52, on the basis of an English non-exclusive jurisdiction and choice of law clause.

The court stated that where a plaintiff had brought a claim under s 52, suggesting that misleading or deceptive conduct had induced entry into a contract containing a jurisdiction clause, then less weight should be given to the clause. The reason given by the court was that "such a claim calls into question the basis upon which the contract was formed and, in any event invokes a statutory jurisdiction and remedies from which there is no contractual escape".[85]

It is difficult to understand exactly what the judge meant by this last statement and what relevance it has to the idea of juridical advantage. If his Honour was saying that it is not possible for parties to contract out of s 52 by simply choosing the law or courts of a foreign country, then he is probably correct.[86] However, this conclusion would not necessarily preclude the foreign court from hearing the s 52 claim and so leave the plaintiff subject to no juridical disadvantage.[87] In fact, at no point does the court actually say that an English tribunal would *not* admit the trade practices claim. So, while commentators have cited the case as authority for the proposition that a stay will be refused where the foreign court is unable to grant the relief requested by the plaintiff,[88] it does not, in fact, support this proposition.[89] It is therefore suggested that this was a case where the jurisdiction clause should have been enforced.[90]

In two other cases (this time involving exclusive jurisdiction clauses) courts rejected the argument that a stay should be refused because of the possibility that

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84 Note 17 *supra.*

85 *Ibid* at 512.

86 See the discussion by the New South Wales Court of Appeal in *Francis Travel*, note 11 *supra* at 164.

87 Whether or not the foreign court would hear the s 52 claim would be a matter for the conflict of laws rules of the country in question, see *Francis Travel, ibid* at 167. However, it is likely that, at least where the proper law of the contract was the law of a foreign country, that country's courts would not apply s 52.

88 Sykes and Pryles, note 12 *supra*, p 78.

89 Alternatively, the judge may have been suggesting, in the above passage, that s 52 operated as an implied mandatory rule, invalidating foreign jurisdiction agreements contained in contracts said to be entered into on the basis of misleading and deceptive conduct. This reasoning, however, is also doubtful since it is now accepted in Australian law that a jurisdiction clause, where included as a provision in a larger contract, is itself a contract separable from the main agreement. The effect of this view is that if the principal contract is found to be void due to misrepresentation, fraud or breach of s 52 of the *Trade Practices Act*, the jurisdiction clause remains valid. See *Mackender v Feldia AG* [1967] 2 QB 590 as applied in *Woolworths*, note 4 *supra* and *FAI*, note 33 *supra.*

90 It is interesting to note that the High Court in *Voth*, note 56 *supra* at 565-6, suggested that the Court in *Green* placed too much weight on the notion that the plaintiff had a prima facie right to insist upon the exercise of jurisdiction in his or her chosen forum of suit.

its claim under s 52 may not be admitted by the foreign court. *Williams v The Society of Lloyds*[91] involved an application to stay Victorian actions for deceit, negligent misrepresentation and breach of s 52 on the basis of an English exclusive jurisdiction clause. The relevant agreements also contained an English choice of law clause. The plaintiff's main argument was that a stay should not be granted because to do so would deprive it of its claim under s 52 on the basis that an English court would not grant such relief because of the English choice of law clause.

The court acknowledged that, if a plaintiff showed the existence of a juridical advantage which would be lost upon a stay being granted, this could be a basis for not enforcing an exclusive jurisdiction clause. However, the juridical disadvantage must be "more theoretical than real".[92] Where, for example, a claim may not be available before a foreign court, but there exists an alternative claim which could be pleaded before that court which is, in substance, the same as the unavailable claim, both in terms of cause of action and remedy, then the plaintiff cannot claim to have suffered any juridical disadvantage. So in *Williams*, even assuming that the s 52 claim would not be admitted in England (which the court did not in fact decide), what had to be noted was that the plaintiff also had a claim for rescission of contract based on misrepresentation, an action which formed part of English law and one which, in substance, was little different from the s 52 plea. The plaintiff could therefore not claim to have been deprived of any juridical advantage by a stay being granted.[93]

A similar approach was taken in *Leigh Mardon v PRC*,[94] where the Federal Court held that a plaintiff would suffer no disadvantage by being able to plead its s 52 claim before an American court because it had made an alternative claim, for estoppel, which was conceded by both parties to be available under the likely applicable American law and to cover the same ground as the s 52 plea. Again, the court did not actually decide that the s 52 claim was unavailable in the foreign proceedings, but it did prevent the plaintiff from using the mere pleading of the claim as an excuse to avoid a stay of proceedings.

The view taken in both *Williams* and *Leigh Mardon* as to juridical advantage is to be applauded. Unless the plaintiff can show that, in substance, it will be denied a specific right of action if forced to litigate abroad or where possibly it has suffered a loss of rights since the agreement was concluded,[95] there is no reason why the jurisdiction clause should not be enforced. The adoption of such an approach would certainly lead to greater enforcement of jurisdiction clauses in the future.[96]

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91 [1994] 1 VR 274. (Hereafter referred to as *Williams*).

92 *Ibid* at 321.

93 In ordering a stay of both proceedings, the court also emphasised the presumption in favour of a stay which arose from an exclusive jurisdiction clause and the fact that, in this case, in any event, the dispute had a closer connection with England than Victoria: The contracts were performed in England and most of the evidence and witnesses were located there. See *Williams*, *ibid*.

94 (1993) 44 FCR 88. (Hereafter referred to as *Leigh Mardon*).

95 As in the *Ramcorp* case, note 82 *supra*.

96 Unfortunately, such an approach was not taken in *Astra AB v Delta West* (unreported, SC Vic, Ashley J, 5 December 1994). In that case, the court accepted the plaintiff's argument that a Swiss exclusive

The concept of juridical advantage arose in a different way in *Oceanic Sun Line Special Shipping Co v Fay.*[97] This case involved an application to stay New South Wales proceedings based upon a Greek exclusive jurisdiction clause. For the High Court, the main question for determination was whether the exclusive jurisdiction clause formed part of the parties' agreement (which the court found it did not). However, Brennan J, in *obiter*, addressed the issue of whether a stay would have been granted had the jurisdiction clause applied.

It was argued by the plaintiff that the exclusive clause should not be enforced because it violated the provisions of a New South Wales statute, the *Contracts Review Act* 1980,[98] and that, if a stay was granted, the Greek court would apply its own law as the proper law of the contract and not recognise the claim based on the New South Wales statute. The plaintiff would therefore be denied a juridical advantage by a stay. The plaintiff's argument, in effect, was that the provisions of the Act amounted to a mandatory legislative rule from which no 'contracting out' was permitted,[99] similar to sections in other Australian statutes which prohibit jurisdiction clauses, such as s 11(2) of the *Carriage of Goods By Sea Act* 1991 (Cth).[100] The question for Brennan J was whether s 17(3) of the *Contracts Review Act* had this effect.

Section 17(3) made the Act's provisions applicable to "contracts of which the law of New South Wales is the proper law or which would have been that of New South Wales but for the selection of the law of another country". While Brennan J agreed with the plaintiff that Greek law would likely have been the proper law of the contract, he thought that, as a result, the contract would not have come within the terms of s 17(3), and so the provisions of the *Contracts Review Act* could not have been invoked, even before a New South Wales court. The plaintiff would therefore have lost no juridical advantage by a stay having been ordered.

A more recent case in which it has been argued that a plaintiff would be denied a juridical advantage through a foreign court's likely failure to apply an Australian statute is *Akai.*[101] This case involved a New South Wales insured

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jurisdiction clause should be circumvented because it would not be able to bring a s 52 claim in Switzerland. The court reached this conclusion despite the defendant having led evidence to show that similar relief was available under Swiss law. By contrast, in *Apscore*, note 74 *supra*, where the plaintiff argued that its claim under the *Fair Trading Act* 1987 (NSW) would be unavailable if the matter were heard in England, the court felt that this plea was "highly unlikely to add anything of substance to the relief to which the [plaintiff] (if successful) may be entitled". Strong echoes of the approach taken in *Williams* and *Leigh Mardon* are evident here.

97 (1988) 165 CLR 197.

98 Section 7(1) of the Act allows a court to refuse to enforce any provision in a contract which it finds to be "unjust".

99 A majority of the New South Wales Court of Appeal accepted this argument, see (1987) 2 NSWLR 242 at 268 per McHugh JA (with whom Glass JA agreed).

100 Section 11(2) provides: "an agreement has no effect so far as it purports to ... preclude or limit the jurisdiction of a court of the Commonwealth ... in respect of a bill of lading or other document of title relating to the carriage of goods from any place outside Australia to any place in Australia". The predecessor to this provision, which was in similar form, was held to render invalid a French exclusive jurisdiction clause in *Compagnie des Messageries Maritimes v Wilson* (1954) 94 CLR 577.

101 See note 22 *supra*.

making a claim for an indemnity under a policy entered into with a Singaporean insurer. The insurer sought a stay of proceedings on the basis of an English exclusive jurisdiction clause in the policy, which also contained an English choice of law clause. The plaintiff argued that if the court were to enforce the jurisdiction clause, it would be denied a juridical advantage because the English court would apply its own law and not give effect to the *Insurance Contracts Act* 1984 (Cth) which contained provisions beneficial to the plaintiff.[102] Moreover, it was argued that the jurisdiction clause was invalid because it conflicted with the terms of ss 8[103] and 52[104] of the *Insurance Contracts Act.*

The court, by a majority of 3-2, refused a stay on the basis that the jurisdiction clause violated the policy of the Act, as expressed in ss 8 and 52, which was to prohibit, in an insurance contract having a significant connection with Australia, evasion of the statute by an express or implied[105] choice of a foreign law.

As the minority judges noted, the conclusion that an exclusive jurisdiction clause may be unenforceable, even in the absence of express words, where it "offends the public policy of the forum whether evinced by statute or declared by judicial decision"[106] is a far reaching one. Given the breadth and uncertainty in the concept of public policy, this approach has the potential to limit the operation of jurisdiction clauses significantly. A forum's domestic public policy is also something which is difficult for parties' advisers to identify at the stage of contractual drafting, unlike the express terms of a statute. The minority judges recognised these concerns[107] and felt that, given the importance of exclusive jurisdiction clauses in international commerce, express legislative words should be required to render them invalid.[108]

102 In particular, s 54 of the Act, which a majority of the court described as "designed to restrict the circumstances in which the insurer may refuse to pay a claim"; *ibid* at 431 per Justices Toohey, Gaudron and Gummow. The objective of the Act, as a whole, was said to be "the protection of insured persons or businesses in ... dealings with insurers having a relevant connection with Australia"; see the New South Wales Court of Appeal decision in *Akai* at (1995) ANZ InsCas [61-254], [75-841] per Kirby P (dissenting).

103 Section 8 provides that: "(1) ... the application of this Act extends to contracts of insurance ... the proper law of which is ... the law of a State ... in which this Act applies" and "(2) [f]or the purposes of (1), where the proper law of a contract would, but for an express provision to the contrary included ... in a contract ... be the law of a State ... in which this Act applies ... then, notwithstanding that provision, the proper law of the contract is the law of that State".

104 Section 52 provides that "where a provision of a contract of insurance ... purports to exclude, restrict or modify ... to the prejudice of a person other than an insurer, the operation of this Act, the provision is void".

105 The inclusion of an exclusive jurisdiction clause in a contract "may be taken as an indication of the intention of the parties that the law of that country is to be the proper law of the contract"; *Akai*, note 22 *supra* at 442.

106 *Ibid* at 445.

107 "It would be a serious and far-reaching interference with the freedom of the parties to such contracts to prevent them from making provision to that effect", namely, to include an exclusive jurisdiction clause; *ibid* at 426 per Justices Dawson and McHugh.

108 The view that mandatory provisions of the forum should, in the absence of express words, have only limited operation has some academic support, see F Mann, "Statutes and the Conflict of Laws" (1972-73) 46 *Brit Y B Int'l L* 117.

It is suggested that the view of the minority is to be preferred, especially since, in this case, there was no evidence of any inequality in bargaining power between the parties which may have justified legislative intervention.

III. THE ENFORCEMENT OF JURISDICTION CLAUSES IN INTRANATIONAL CONTRACTS

Having considered the enforcement of jurisdiction clauses in international contracts by Australian courts and noted that there has been an inconsistency in approach, with (at times) too great a willingness to allow plaintiffs to circumvent their contractual bargains, it is necessary to consider whether this attitude is also apparent in the case of jurisdiction clauses in intranational contracts within Australia. Typically, such clauses have been included in agreements involving parties from different states or territories. An important question which arises is whether a distinction should be drawn for the purposes of enforcement between a jurisdiction clause in a contract between only Australian parties, choosing an Australian forum and cases with an international element, such as a clause involving the choice of a foreign jurisdiction. There may be some argument that given the relative legal homogeneity within the Australian federation, in that all states inherited the same body of common law principles and a common ultimate appellate court, less weight should be placed on those principles of private international law used for resolving interjurisdictional conflicts with the result that jurisdiction clauses would have no special significance. However, it is suggested that the arguments of commercial certainty, respect for party autonomy and discouragement of forum shopping to justify the use of jurisdictional agreements in the international context, retain strong resonance in intranational disputes. Unfortunately, courts have not yet taken a clear view on which approach they intend to follow.

Some early cases on exclusive jurisdiction clauses reflect a difference in approach. *Aldred v Australian Building Industries Ltd*[109] involved an application to stay proceedings in the Northern Territory in reliance upon a Queensland exclusive jurisdiction clause. The court noted that in cases involving exclusive clauses in international contracts, there was a "strong bias in favour of enforcement".[110] However, the bias did not apply with such strong force in the case of jurisdictional conflicts within Australia. Therefore, in this case, the court found that a stay should not be granted because the preponderance of evidence was located in the Territory, and the plaintiffs would suffer greater inconvenience and cost than the defendants if trial were to take place in Queensland.

By contrast, in *Sykes v Povey Corporation,*[111] the Victorian Supreme Court granted a stay of an action on the basis of a Western Australian exclusive

109 (1987) 48 NTR 59. (Hereafter referred to as *Aldred*).

110 *Ibid* at 64.

111 Unreported, SC Vic, Tadgell J, 8 April 1988. (Hereafter referred to as *Sykes*).

jurisdiction clause, even though significant evidence existed in Victoria. The court applied the test from *Huddart Parker*[112] that the plaintiff must show strong reasons why an exclusive clause should not be enforced. Proof that one jurisdiction was more convenient than the agreed forum was inadequate.

In the case of non-exclusive jurisdiction clauses in intranational agreements, it seems that they may be treated similarly to such clauses in international contracts, if the *Atwood Oceanics Australia v BHP Petroleum* case is any guide. This case involved an action in Western Australia which the defendant sought to stay on the basis of a clause which provided that "the parties agree to submit to the jurisdiction of the courts of Victoria". The court applied the *MTE Control Gear* case[113] to hold that the clause only conferred non-exclusive jurisdiction on the courts of Victoria and so:

> ... does no more than provide that if the plaintiff were sued in the Victorian courts it would accept their jurisdiction. It is not ... an agreement that disputes shall be determined in that jurisdiction and therefore not a case in which the bargain of the parties is to be given weight.[114]

The application for a stay was therefore dismissed.

In 1987, legislation was drafted by the Commonwealth, State and Territory Parliaments with the aim of overcoming the problems of jurisdictional conflict between Australian courts.[115] This legislation collectively is known as the "cross vesting scheme" and introduced, in s 5(2), a special procedure for transfer of proceedings from one court (state, territory or federal) to another.

Section 5(2)(iii) of the Commonwealth and State Acts provides that a transfer of a proceeding will be ordered where it is "in the interests of justice that the relevant proceeding be determined by the Supreme Court of another State or Territory". There is currently some disagreement as to whether this subsection is to be interpreted according to the principles of private international law applying to stay of proceedings or introduces a new test based simply on which court is the more convenient.[116] Seemingly, if the rules of private international law were to be retained, then the common law principles dealing with jurisdiction clauses would be applied (possibly including the strong cause test in the case of exclusive clauses), whereas if a test of pure convenience is adopted, then jurisdiction clauses would merely be one factor to consider among many with no special weight. Again, unfortunately, the caselaw on intranational jurisdiction clauses under the cross vesting scheme is not entirely consistent, although the courts have recently shown a tendency to give some preference to exclusive clauses in determining the question of appropriate forum.

In the context of non-exclusive clauses, a number of cases have dealt with applications for transfers of actions commenced in the forum stipulated by the

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112 See note 45 *supra*.

113 See note 14 *supra*.

114 Unreported, SC WA, Master Seaman, 6 August 1987.

115 See, for example, *Jurisdiction of Courts (Cross-Vesting) Act* 1987 (Cth). Identical legislation was drafted by the states.

116 See the discussion of the New South Wales Court of Appeal in *Bankinvest v Seabrook* (1988) 14 NSWLR 711 where the latter view was taken. Contrast the view of the Supreme Court of the ACT in *Waterhouse v Australian Broadcasting Corporation* (1989) 97 FLR 1.

jurisdiction clause. In these cases, courts appear to have taken the view that s 5(2) constitutes a statutory command to stay proceedings whenever the preponderance of evidence lies in another jurisdiction, regardless of the jurisdiction clause. So in *Nilsen Electric (WA) v Jovista*, an action commenced in Victoria (the jurisdiction stipulated by a non-exclusive clause) was transferred to Western Australia, where the bulk of evidence was located. The court noted that, apart from the clause being non-exclusive, "the considerations applicable to the effect of parties' decision to submit to the law of a truly foreign jurisdiction are not comparable to those applicable to the like decision to submit to another jurisdiction in a federation such as ours". [117] To like effect was *Power and Water Authority v McMahon Contractors.*[118] In that case, the court transferred an action from the Northern Territory to Queensland, notwithstanding the existence of a Territory non-exclusive jurisdiction clause. Again, the major reason was that the majority of evidence lay in Queensland and the defendants would be more greatly inconvenienced if trial were not to be held there. However, the court also made reference to the context of the Australian federation, stating that the substantive law of both the Territory and Queensland was virtually identical and so there could be no question of a denial of juridical advantage by the transfer being ordered. By contrast, where matters of cost and convenience were equally balanced as between the competing fora, an action brought in the forum designated by a non-exclusive clause would not be stayed; see *Divinyls Holdings P/L v Billboard*[119]and *Queensland Tourist and Travel Corporation v Western Australian Tourist Commission.*[120]

It seems that, in deciding whether to transfer a proceeding under the cross vesting legislation, Australian courts will disregard a non-exclusive jurisdiction clause, where trial would be more convenient in another Australian forum.

However, it appears that despite the comments in *Aldred*[121] to the effect that exclusive jurisdiction clauses should have less weight in interjurisdictional conflicts within Australia, courts in recent decisions under the cross vesting legislation have shown a preference for upholding exclusive agreements, even where the balance of convenience points to trial in another forum. In this respect, they have tended to follow the *Sykes*[122]approach of not differentiating between the international and intranational contexts.

So, in *Manietta v National Mutual Life Association of Australasia*[123] where parties had entered into an exclusive jurisdiction agreement and the plaintiff sued in the stipulated forum (Victoria), the fact that the majority of evidence lay in another jurisdiction (New South Wales) did not persuade the court to transfer the matter. A similar result was reached in *Bond Brewing Holdings v National*

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117 Unreported, SC Vic, Byrne J, 8 March 1995.

118 Unreported, SC NT, Angel J, 21 September 1995. See also, more recently, *Motor Trades Warranty Investments P/L v Fortron Automotive Treatments P/L* (unreported, Fed Ct, Beaumont J, 19 November 1997).

119 Unreported, SC NSW, Young J, 17 October 1995.

120 Unreported, SC Qld, Ryan J, 1 November 1992.

121 See note 109 *supra*.

122 Note 111 *supra*.

123 Unreported, SC Vic, Mc Donald J, 8 September1995.

Australia Bank,[124] where an action brought in Western Australia was transferred to Victoria in reliance upon what the court seemed to consider was a Victorian exclusive jurisdiction clause;[125] and *National Dairies WA v Westfarmers*,[126] where proceedings brought in New South Wales were transferred to Western Australia on the basis of an exclusive clause stipulating the latter. Finally and most recently, in *Air Attention WA v Seeley International*,[127] a Western Australian action was transferred to South Australia where the parties had provided for that State to have exclusive jurisdiction.

The court in the *Air Attention* case also noted, more radically, that even if the clause had only been non-exclusive, it should still be given 'full weight' because "the clause evidences the basic intent of the contracting parties that their obligations were to be determined ... in South Australia".[128] This statement represents the high water mark in Australian judicial attitudes toward jurisdiction clauses, in that the exclusive/non-exclusive distinction is effectively declared redundant for the purposes of enforcement. What is important, according to the court, is that parties have included a clause indicating a place and method of dispute resolution and courts should seek to give effect to this intention and not look for means of circumvention.[129] This sentiment is welcome and recalls the recent developments in English law, particularly the cases interpreting Article 17 of the Brussels Convention.[130]

Finally, reference should be made to the recent decision of the New South Wales Industrial Court in *Mansweto v Midas Australia*.[131] In that case, the court refused to order a stay of proceedings brought by a franchisee to vary the terms of a franchise agreement, notwithstanding the presence of a Victorian exclusive jurisdiction clause in the contract and the fact that a slight majority of the evidence was in Victoria. The court's reason was that the plaintiff would be denied a juridical advantage if the matter were stayed because the claim to vary the franchise agreement derived from s 275 of the *Industrial Relations Act* (NSW), an enactment of which there was no equivalent in Victoria. It is possible that the court, in not enforcing the exclusive jurisdiction clause, was influenced by a perceived inequality of bargaining power between franchisor and franchisee, similar to the *Hopkins* case[132] and, if so, this may provide a basis for accepting the decision. Otherwise, it is hard to see why the court did not hold the parties to their bargain.

124 Unreported, SC WA, Wallwork J, 16 February 1990.

125 It is not entirely clear that the clause was exclusive in its terms.

126 Unreported, Fed Ct, Tamberlin J, 22 July 1996.

127 Unreported, SC WA, Walsh J, 3 September 1996. (Hereafter referred to as the *Air Attention* case).

128 *Ibid.*

129 See also, to the same effect, *West's Process Engineering v Westralian* (unreported, SC NSW, Rolfe J, 6 August 1997) where a court had to consider a clause in which the parties had agreed to "submit to and accept the jurisdiction" of the court of Western Australia. The court found the clause to be exclusive and then ordered a stay of New South Wales proceedings. While the court's conclusion that the clause was exclusive is open to question (see *FAI*, note 27 *supra*) the decision is nevertheless consistent with a trend towards enforcing jurisdiction clauses generally, regardless of their characterisation.

130 See notes 35-41 *supra* and accompanying text.

131 (1996) 65 IR 182.

132 See note 69 *supra*.

IV. CONCLUSION

It has been contended that the use of jurisdiction clauses in contracts should be encouraged; both as a means of creating certainty for private parties in their dealings, and also as a means of reducing the amount of litigation conducted on preliminary, jurisdictional questions. Unfortunately, Australian courts have been slow to recognise the importance of jurisdiction clauses and too often have allowed plaintiffs to escape their contractual obligations on less than compelling grounds, for example, because the chosen forum is non-exclusive or inconvenient.

Recent developments, however, point in a new direction: Where the intentions of the parties as to their place and mode of dispute resolution are given complete effect and courts see their role as facilitating this objective.