Choice of law, jurisdiction and ADR clauses

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Abstract

Choice of law is different to the choice of jurisdiction, and the contract may expressly select different law and jurisdiction, or a different jurisdiction may be determined by statute or international convention. The selection of choice of law and choice of jurisdiction clauses is more important than an after-thought, pro forma usage, or cut and paste, as the subject matter of commercial contracts regularly expands beyond domestic intra-state activities and into inter-state and international trade and commerce. The selection of law and jurisdiction affects the governing law, forum, practice and procedural rules, operation of Alternative Dispute Resolution (ADR) clauses and most importantly, enforcement. This paper discusses these clauses, the influence of Admiralty, Equity and the civil law on the common law of contract, current trends and future developments.

Introduction

Until the 20th Century, common law doctrine dominated construction of agreements in Australia, but the harshness of common law outcomes have been ameliorated by Equity and statutory intervention in Australian intra-state and inter-state commercial activities, and the operation of Admiralty, Equity, international convention and the civil law in international trade and commerce. Current trends and future developments in domestic intra-state and inter-state contracts are influenced by the experience in international trade and transport.

Admiralty provides remedies in the international carriage of goods by sea, and Equity has long supervised the commercial conduct of parties and their performance of contractual obligations in intra-state, inter-state and international trade.

Statutes and international convention have intervened in the choice of law and the choice of jurisdiction in international trade and transport. Some examples include: Bills of Exchange Act 1909 (Cth); Sea-Carriage of Goods Act 1924 (Cth) which adopted the Hague Rules Convention into the law of Australia, and by s9 made void any provision ousting the jurisdiction of Australian courts, later replaced by the Carriage of Goods by Sea Act 1991 (Cth) s11 which also preserved Australian arbitrations; Civil Aviation (Carriers Liability) Act 1959 (Cth) adopted the Warsaw Convention and various amending conventions and protocols, and by Art 28 provides four choices of jurisdiction (carrier's resident, principal place of business, place contract made, destination) and applies the law of the court seized with jurisdiction; the International Arbitration Act 1974 (Cth) adopts the New York Convention 1958, the Uncitral Model Law and the ICSID Convention into Australian Law; the Sale of Goods (Vienna Convention) Act 1986 (NSW) and other States adopting the UN Convention on the International Sale of Goods.

The future involves 'free trade agreements' and economic globalisation, with consideration of conflict of laws in choice of law, choice of jurisdiction and ADR clauses between parties with an eye to the commercial advantages and disadvantages of competing domestic laws, conflict between jurisdictions, operation of international conventions, and most importantly, the international enforcement of arbitration awards and court judgments.

Application to contracts and other things

The operation of these clauses has to be considered beyond common law contract and to non-contractual arrangements and understandings, bailment and tort.

Contracts, arrangements and understandings

Contractual clauses dealing with these elements provide certainty in wholly intra-state contracts and for intra-state enforcement, but there is less certainty in interstate and international contracts which raise conflict of law and jurisdiction issues, practice and procedure, forum non-conveniens, stay application, anti-suit injunction, and problems for enforcement. In addition, statutory intervention may over-ride the contractual choice.

The common law rule of privity does not always apply in international trade and commerce, and is not always a pre-requisite for remedy, for example, a consignee of goods carried by sea is not always party to the original carriage contract, but is entitled to sue inter alia as the holder of the bill of lading or the (subsequent) owner.[2]

There are arrangements and understandings incorporated into international commodity agreements in short form, for example, UCP600 concerned with uniform practice for documentary credits and Incoterms 2000 such as FOB, CIF and CFR which involve important issues such as the passing of property, and the passing of risk;[3] and are understood by the parties to set out their respective obligations for arranging carriage contracts, export and import formalities and marine insurance.

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[2] Sea-Carriage Documents Act 1997 (NSW) ss8-11 and equivalent in other States; Carriage of Goods by Sea Act 1991 (Cth) adopting the Hague Visby Rules, Art 3 r8 which concerns exclusion of liability in contract, tort and default.

[3] For a detailed analysis of these issues see J Levingston, Understanding International Trade – A Straight Line Solution, http://admiralty.net.au/Ajit/Understanding%20International%20Trade%2006-02-06-2.doc viewed 22/1/8

Bailment (on terms)

Although bailment involves a duty to safely keep and redeliver, it is neither contract nor tort, but is amenable to choice of law and jurisdiction where it is a bailment on terms.[4]

Tort

In tort, the rule is that the place of the tort is the governing law, [5] and it is not actionable in the jurisdiction if it is not actionable in the jurisdiction where it occurred.[6] This seems to eliminate any unfairness that might otherwise arise from choice of law and jurisdiction. However, choice of law and jurisdiction can still be important for tort, for example, application of the double actionability rule. [7] Further, this tort rule may be displaced by statute, for example, where the tortious act is governed by statute or international convention such as the negligent loading, carriage or discharge of cargo carried by air or sea.

Elements to be considered

Drafting involves consideration of the following elements:

- Choice of governing law, including operation of:
    - Admiralty
    - common law
    - Equity
    - Civil law
    - Statute and international convention
- Choice of jurisdiction

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[4] See Palmer On Bailment, 2nd ed, Law Book Co, 1991.

[5] Regie National des Usines Renault SA v Zhang [2002] HCA 10, (2002) 76 ALJR 551 at [75] considering the Supreme Court Rules 1970 (NSW) P10 r1A(e) which provided for the service of an originating process outside Australia, and P10 r6A which allowed the Court to make an order that the Court was an inappropriate forum for the trial of the proceedings; and P11 r8 allowed the Court to exercise its discretion and decline to exercise its jurisdiction. See John Pfeiffer Pty Ltd v Rogerson (2000) 203 CLR 503, the law governing all questions of substance in Australian torts involving an interstate element is the lex loci delicti (place of the wrong, more fully stated as lex loci delecti commissi – law of the place where a tort is committed). This decision disapproved the earlier statements in Koop v Bebb (1951) 84 CLR 629 which identified two conditions and Anderson v Eric Anderson Radio & TV Pty Ltd (1965) 114 CLR 20; and did not follow McKain v RW Miller & Co (1991) 174 CLR 1 (later reversed by legislation) or Stevens v Head (1992) 176 CLR 433, and considered Breavington v Godleman (1988) 169 CLR 41.

[6] Amaca Oty Ltd v Frost [2006] NSWCA 173; (2006) 67 NSWLR 635. In this case the plaintiff was injured in NZ but sought compensation in NSW as a common law award in NSW would be greater than in NZ. The Court held that the cause of action arose in NZ and the place of the tort was NZ, and NZ law applied: Voth v Manildra Flour Mills Pty Ltd (1990) 171 CLR 538 at 567. NZ law restricted the plaintiff's rights to bring proceedings in tort. This decision identifies and applies the Australian authorities.

[7] The double actionability rule no longer applies in Australia: Regie National des Usines Renault SA v Zhang [2002] HCA 10, (2002) 76 ALJR 551 at [60].

    - Statute and international convention
    - practice and procedural rules
    - forum non-conveniens
    - stay application
    - anti-suit injunction
- Exclusion or limitation of liability
    - Common law
    - Statute and international convention
- Dispute Resolution processes
    - Alternative dispute resolution (ADR). negotiation, mediation and arbitration - private
    - Courts - public
- Enforcement
    - Australia
    - Outside Australia

1 Choice of governing law

There are important reasons for drafting a clear choice of law clause to create certainty for the parties, and involves consideration of the following:

- Law is unlikely to be the same, or similar
    - Operation of mandatory law (eg Trade Practices Act 1974 (Cth)
- Jurisdictional issues
    - Specialist commercial judges and commercial jurisdiction
    - Practice and procedure
    - Court power to order non-consenting parties to mediation
    - Evidentiary rules
    - Oral evidence or an exchange of witness statements or affidavits prior to hearing

Choice of law can determine the validity and enforceability of the contract [8] and its terms[9] and the extent of the rights and obligations which are not expressly set out.[10] Further, the contract is unenforceable if it is illegal under the proper law or if it is illegal under the law of the forum.[11]

[8] Saxby v Fulton [1909] 2 KB 208.
[9] Re Missouri Steamship Co (1889) 42 Ch D 321 (CA).
[10] The 'August' [1891] P 328.
[11] Boissevain v Weil [1950] AC 327.

The traditional tripartite classification for choice of law is: express, inferred and objective[12] though in Australia, the rule has been stated in slightly different terms.[13] However, this classification is also deficient as it fails to include the role of statute and international convention in international trade and commerce. The relevant classification in international trade and commerce is:

- Any relevant statute or international convention[14]
- express choice of law in the contract[15]
- implied intention[16]

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[12] See US Surgical Corp v Hospital Products [1983] 2 NSWLR 157 (CA) at 187 – 192; has been criticised both by academic writers and the High Court of Australia: see Akai Pty Ltd v People's Ins Co Ltd (1996) 188 CLR at 440 - 442 and fn (51) – (60).

[13] Bonython v Commonwealth of Australia [1951] AC 201 at 209, (1950) 81 CLR 486 (PC) at 498: *It has been urged that, if London is chosen as the place of payment, then English law as the lex loci solutionis governs the contract and determines the measure of the obligation. But this contention cannot be accepted. The mode of performance of the obligation may, and probably will, be determined by English law; the substance of the obligation must be determined by the proper law of the contract, ie, the system of law by reference to which the contract was made or that with which the transaction has its closest and most real connection. In consideration of the latter question, what is the proper law of the contract, and therefore what is the substance of the obligation created by it, it is a factor and sometimes a decisive one that a particular place is chosen for performance.* This approved the decision of the High Court of Australia in Bonython v Commonwealth of Australia (1948) 75 CLR 589, see Latham CJ at 601-2 and Dixon J at 624-5.

[14] A statute or international convention can also determine the proper law of the contract, and override an express choice of law in the contract. There are a number of statutes concerning international transactions which determine the proper law of the contract: Bills of Exchange Act (Cth), s77 identifies Australian law as the relevant law: Carriage of Goods by Sea Act 1991 (Cth) s11; see Compagnie des Messageries Maritimes v Wilson (1954) 94 CLR 577 per Fullagar J at 584-5; and an Australian Court has jurisdiction to apply the foreign law: Toshiba Corp v Mitsui OSK Lines Ltd The 'Nichigoh Maru' (Unreported: NSWSC 1991, Carruthers J); and Australian law applies to shipments from Australian ports: Kim Mellor Imports Pty Ltd v Eurolevant SpA (1986) 7 NSWLR 269, and where a charterparty incorporated Cogsa: Furness Withy (Aust) Pty Ltd v Metal Distributors (UK) Ltd The 'Amazonia' [1990] 1 Lloyd's Rep 236; The Carriage of Goods by Sea Regulations 1998 (Cth) applies to 'The Amended Hague Rules' Art 10(2) for carriage of goods from ports outside Australia to ports in Australia; The Civil Aviation (Carriers' Liability) Act 1959 (Cth), applies the Warsaw Convention 1929, Art 28.

[15] There are some restrictions to an express choice of governing law: statutory provisions see Carriage of Goods by Sea Act 1991 (Cth), s11(1); and Sch 1A Art 1(b) makes ineffective an ouster of jurisdiction clause in relation to a 'sea carriage document', including such document issued under a charter party, but, this does not apply to charter parties themselves: see Incitec Ltd v Alkimos Shipping Corporation [2004] FCA 698; (2004) 138 FCR 496.

[16] The question of the intention of the parties can be determined by a number of indicators: Bonython v Commonwealth of Australia (1948) 75 CLR 589 per Dixon J at 624, 5: *The 'interpretation' of the transaction must be worked out from its character, from the elements which are contained within it. The nature and circumstances of the transaction must supply the grounds from which the so-called 'intention' must be deduced as a reasoned consequence. It may be called an implication. Lord Watson in a well-known passage in Dahl v Nelson (1881) 6 App Cas 38 at 59, explained how a problem of the same general kind is dealt with when it arises under commercial contracts such as a charter party. His Lordship said: 'I have always understood that, when the parties to a mercantile contract such as that of affreightment, have not expressed their intentions in a particular event, but have left these to implication, a Court of Law, in order to ascertain the implied meaning of the contract, must assume that the parties intended to stipulate for that which is fair and reasonable, having regard to their mutual interests and to the main objects of the contract. In some cases that assumption is the only test by which the meaning of the contract can be ascertained. There may be many possibilities within the contemplation of the contract of charterparty which were not actually present to the minds of the parties at the time of making it, and, when one or other of these possibilities becomes a fact, the meaning of the contract must be taken to be, not what the parties did intend (for they had neither thought nor intention regarding it), but that which the parties, as fair and reasonable men, would presumably have agreed upon if, having such possibility in view, they had made express provision as to their several rights and liabilities in the event of its occurrence.'*

- closest and most real connection[17]

A typical law selection clause might appear as: *This agreement is governed by the law of New South Wales;* in both domestic and international agreements, and there is little doubt about what it means. But that is only the start, and the question is: whether that is a valid choice of law clause for the particular contract.

Statute

The parties can expressly state that their contract is governed by a nominated law, or that different performance obligations are governed by different laws,[18] though this is not determinative as statute may invalidate the choice.

Importantly, a foreign law selection clause may limit or restrict broader rights that might otherwise exist, such as the law at the place of shipment which applies to the international carriage of goods by sea under a Bill of Lading.[19] Similarly: Bills of Exchange[20] and letters of Credit.[21]

Express choice

The general rule is that the governing law of a contract is the law which the parties have chosen,[22] but a

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[17] There are some further restrictions as a choice of law clause which is expressly chosen to avoid the consequences of the law with which the transaction is most closely and really connected will be disregarded: Mynott v Barnard (1939) 62 CLR 68 per Latham CJ at 80: *Parties cannot by agreeing that their contract should be governed by the law of a foreign country exclude the operation of a 'pre-emptory rule' otherwise applicable to their transaction.* And see Kay's Leasing Corp Pty Ltd v Fletcher [1966-67] 116 CLR 124 per Kitto J at 143: *In the Vita Food Case the proposition was laid down that the parties to a contract may conclusively determine for themselves what the proper law of the contract shall be, provided that their expressed intention is 'bona fide or legal', and provided there is no reason for avoiding their choice on the ground of public policy.* There must be no public policy reason to avoid the choice: Vita Food Products Inc v Unus Shipping Co Ltd [1939] AC 277 at 290. Also, the issue of the forum arising from the locus contractus may over-ride a contractual term nominating the forum. This was considered by the High Court in the context of a foreign jurisdiction clause in Oceanic Sun Line Special Shipping Co Inc v Fay (1988) 62 ALJR 389 where the clause appeared only in the passenger's ticket and was held not to be a term of the contract as the carrier had not taken adequate steps to bring it to the attention of the passenger. On forum non-conveniens, the Court held that the Supreme Court of NSW could not be regarded as a clearly inappropriate forum, and as the court of the locus contractus it was the most appropriate forum. The case considered developments in the English and US courts of the doctrine of forum non-conveniens, and the question of vexatious and oppressive conduct in relation to forum choice. See the discussion concerning an exclusive foreign jurisdiction clause by Brennan J at 400 and concerning forum non conveniens at 403.

[18] Hamlyn & Co v Talisker Distillery [1894] AC 202.

[19] Carriage of Goods by Sea Act 1991 (Cth) s11 which makes void an ouster of Australian jurisdiction, applies the Hague Visby Rules and the amended Hague Visby Rules, to imports where the country of shipment has not adopted one of these international conventions.

[20] Bills of Exchange Act 1909 (Cth), s77 applying Australian law.

[21] Though less of a problem if the contract incorporates the International Chamber of Commerce Uniform Customary Practice for documentary credits (UCP 600).

[22] The Eleftheria [1970] P 94 per Brandon J at 99: (1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown. (3) The burden of

conflict may arise where the rules of the forum determine the proper law (discussed below).

Implied choice of law

Absent an express choice, the question is whether there is an implied choice of law, for which the intention of the parties is to be ascertained[23] by looking at other indicators of choice of law and choice of jurisdiction. [24] The proper law is the system of law with which the contract is most closely connected.[25]

Law of the forum, place of the contract or performance

The putative proper law is the law which would be the proper law assuming the contract was validly formed.[26] This can be either the place the contract is made or the place of performance. And the rules of the forum apply to determine the proper law. [27] This can be important in international trade and commerce, for example, rights might be recognized in one jurisdiction but not in another.[28]

In international trade, the majority of disputes arise in relation to the delivery or acceptance of the goods, claims for loss or damage at the place of delivery, and non-payment. As a general rule it is preferable to select the applicable law at the place of performance. But this may not always be suitable to a buyer, for example, where delivery takes place when the goods are delivered to the first carrier,[29] the goods are sold Incoterms 2000 EXW, or when the goods pass the ship's rail at the port of loading.

Conflict of laws and jurisdiction

Where there is a conflict of law, the principle is that matters of procedure are governed by the law of the

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proving such strong cause is on the plaintiffs. (4) In exercising the discretion the court should take into account all the circumstances of the particular case. This is the law in Australia: Akai Pty Ltd v People's Insurance Co Ltd (1996) 188 CLR 418 at 427-428, 444-445; FAI General Insurance Co Ltd v Ocean Mutual Protection and Indemnity Association (1997) 41 NSWLR 559 at 569; Leigh-Mardon Pty Ltd v PRC Inc (1993) 44 FCR 88 at 95-99; Huddardt Parker Ltd v The Ship Mill Hill (1950) 81 CLR 502 at 508-509; Oceanic Sun Line Special Shipping Co Inc v Fay (1988) 165 CLR 197 at 229, 259; Incitec v Alkimos Shipping [2004] FCA 698; (2004) 138 FCR 496 per Allsop J at 505.

[23] See fn 17.

[24] Compagnie D'Armament Maritime SA v Compagnie Tunisienne de Navigation SA [1971] AC 572.

[25] Compagnie D'Armament Maritime SA v Compagnie Tunisienne de Navigation SA [1971] AC 572, and see Re United Railways of Havanna [1961] AC 1007.

[26] Oceanic Sun Line Special Shipping Co Inc v Fay (1988) 165 CLR 197 where the Court applied the law of the forum to determine when and where the contract was made, even though it was clear that the putative proper law was the law of Greece, per Brennan J at 225 and Gaudron J at 261 following Mackender v Feldia AG [1967] 2 QB 590 per Diplock LJ dictum at 602-3. A more recent decision on the same issue is Compania Naviera Micro SA v Shipley International Inc The 'Parouth' [1982] 2 Lloyd's Rep 351.

[27] Male v Roberts (1800) 170 ER 574. For example see the Warsaw Convention Art 28(2), and Cogsa 1991 (Cth) s11(1).

[28] In US Admiralty law a wider category of maritime lien is recognized than under Anglo-English law.

[29] For example, see Sale of Goods Act (NSW) s35 and Sale of Goods (Vienna Convention) Act 1986 (NSW) Schedule 1 Art 31.

forum. [30]

A conflict of laws should be avoided by an express choice of law clause, with an express choice of forum, for example:

> *This contract is governed by the law of New South Wales and the Parties submit to the exclusive jurisdiction of the courts in Sydney.*

Conflict of law problems do not arise to the same extent where there is an international convention adopted into domestic law, as its interpretation is governed by the following principles:

1 When the convention is declared to have the 'force of law' by statute it becomes a statutory enactment;[31]

2 A national court, in the interests of international comity, consistency in interpretation and certainty in international law should avoid parochial constructions. [32] The desirability of adopting uniform construction in the interpretation of international Conventions is well established; [33]

3 Rules are to be construed in a normal manner appropriate for the interpretation of an international convention, unrestrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptance; [34]

4 In constructing such provisions the terms used are not drafted by Parliamentary counsel[35] but are the result of negotiations and often compromise between delegations representing the contracting states with various legal systems, methods and styles of legislative drafting, and the applicable rules of interpretation are those recognised by customary international law, as codified by the Vienna Convention on the Law of Treaties;[36]

5 The relevant articles of the Vienna Convention for rules on interpretation require a combination of literal and purposive construction;[37]

6 Travaux preparatories may be examined in interpreting a convention to confirm a meaning which

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[30] The Laws of Australia, Civil Procedures Limitation of Action 5.10.
[31] The Hollandia (1982) 1 QB 872 at 885 per Sir Sebag Shaw at 885.
[32] SS Pharmaceutical v Qantas [1991] Lloyds Rep 288 per Kirby P at 294.
[33] Scruttons v Midland Silicones Ltd [1961] 2 Lloyd's Rep 365 per Viscount Simonds at 373; and see Foscolo, Mango & Co Ltd v Stage Line Ltd (1932) AC 328 at 350, (1931) 41 Ll L Rep 165 per Lord Atkin at 171; and Corocraft Ltd v Pan American Airways Inc [1969] 1 QB 616 at 655, [1968] 2 Lloyd's Rep 459 per Lord Denning MR at 467: *Even if I disagreed, I would follow them in a matter which is of international concern. The Courts of all the countries should interpret this Convention in the same way*. He then goes on to overcome two conflicting decisions of the Courts of Malaysia by adopting a 'liberal interpretation', and noting that the claim could have been brought in either London or New York, and that the result should be the same in either cases. See also Fothergill v Monarch Airlines Ltd [1981] AC 251 at 276.
[34] See James Buchanan & Co Limited v Babco Forwarding & Shipping (UK) Ltd (1978) AC 141 per Lord Wilberforce at 152, quoted in Shipping Corporation of India Ltd v Gamlen Chemical Co A/Asia Pty Limited (1980) 147 CLR 142 per 159 by Mason and Wilson JJ at 159 and Aickin J at 168.
[35] Fothergill v Monarch Airlines [1981] AC 251 per Lord Diplock at 279;
[36] Minister for Foreign Affairs v Magno (1992) 37 FCR 298 (FC) per Gummow J at 305;
[37] The rules on interpretation are Arts 31 and 32. See Bennion, Statutory Interpretation 2nd edn at 463-5.

emerges from the convention itself [38] but only as an aid, [39] and there is no occasion to refer to the travaux preparatoires if the text of the convention is sufficiently clear in itself. [40]

International Approach by Australian Courts and application of foreign law

The potential disadvantage for a party caused by conflict of laws and jurisdiction is ameliorated by the international approach adopted by Australian courts in international trade and commerce, despite the common law rule that Australian courts know no foreign law.[41]

However, Australian courts have no difficulty accepting evidence [42] and proof [43] of foreign law, and applying it. [44] This is usually done as an expert opinion based on specialized knowledge [45] set out in an affidavit from a practitioner qualified in the jurisdiction.[46] Though questions of foreign law are to be decided by the judge. [47]

A typical foreign law clause in international trade is: *This agreement is governed by the law of England;* which frequently appears in international agreements concerning export commodities, charter parties and other shipping documents, international payments and marine insurance. English law is assumed to be the same as Australian law (and in some areas it is, eg bills of exchange and marine insurance) unless there is evidence to the contrary. In some Australian export trades, an English governing law clause appears for no reason other than it has been used in those trades for over 100 years.

Further, Australian courts are prepared to consider and apply decisions[48] beyond the traditional common law venue of the English courts. This is particularly evident in Admiralty and Equity where Australian courts have recognised the need to adopt an international approach in the interpretation of Conventions consistent with foreign courts dealing with the same issue. [49] This approach is reinforced

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[38] Commonwealth v Tasmania (1983) 158 CLR 1 at 94 per Gibbs CJ at 94 and Brennan J at 223 and 465.
[39] Fothergill v Monarch Airlines Limited (1981) AC 251 per Lord Scarman at 294 referring to the use of travaux preparatoires, la jurisprudence and la doctrine
[40] SS Pharmaceutical Co Ltd v Qantas Airways Ltd [1991] 1 Lloyd's Rep 288 per Kirby J at 298 – 9.
[41] Neilson v Overseas Projects Corporation of Victoria Ltd [2005] HCA 54; (2005) 79 ALJR 1736 per Kirby J at [205].
[42] Evidence Act 1995 (Cth) and (NSW), s174; and s175 provides for evidence of law reports of foreign countries.
[43] Evidence Act 1995 (Cth) and (NSW), s79.
[44] Neilson v Overseas Projects Corporation of Victoria Ltd [2005] HCA 54; (2005) 79 ALJR 1736 per Gummow and Hayne JJ at [115].
[45] Makita v Sprowles (2001) 52 NSWLR 705 per Heydon J at [59], [64] and [85].
[46] See the Evidence Act 1995 (Cth) and (NSW) ss48(1), 49, 79, 174 – 176, and the Foreign Evidence Act 1994 (Cth).
[47] Evidence Act 1995 (Cth) and (NSW) s176.
[48] At least since 1986 with the abolition of appeals to the English Privy Council and establishment of the High Court of Australia as the final appeal court
[49] Brown Boveri (Australia) Pty Ltd v Baltic Shipping Co [1989] 1 Lloyd's Rep 518 per Kirby P at 521, in the NSW Court of Appeal (carriage by sea) 518 the NSW Court of Appeal applied a decision of a Bangladesh court on the Hague Rules 1924; SS Pharmaceutical Co Ltd v Qantas Airways Ltd [1991] 1 Lloyd's Rep 288 per Kirby J at 294 –

by forum non-conveniens, stay applications and anti-suit injunctions.

2 Choice of jurisdiction

Jurisdiction is concerned with the competence of a court to determine a dispute, regardless of the choice of law, and involves the exercise of judicial discretion to exercise jurisdiction regardless of the chosen jurisdiction.

The general rule

The common law general rule is that exercise of jurisdiction depends on service of originating court process,[50] as service can only be effected on those actually present in the jurisdiction, [51] or those who submitted voluntarily or by contract to the jurisdiction. [52] Historically, there was no power to permit service outside the jurisdiction,[53] and a judgment in a personal action was not recognised outside the jurisdiction.[54] The use of a privative clause depriving a party of the right to judicial review[55] may not be conclusive as the Court has authority to decide whether a dispute is within its jurisdiction.[56]

5, 298 (carriage by air).

[50] John Russell and Co Ltd v Cayzer, Irvine & Co Ltd [1916] 2 AC 298 at 302.

[51] Berkley v Thompson (1884) 10 App Cas 45 at 49. And note Admiralty jurisdiction by which the presence of the ship within jurisdiction gives the Admiralty Court jurisdiction to determine claims against the ship: Admiralty Act 1988 (Cth).

[52] Emmanuel v Simon [1908] 1 KB 302 at 308.

[53] Re Anglo-African Steamship Co (1886) 32 Ch 348 at 350; Laurie v Carroll (1985) 98 CLR 310. Note that an Admiralty Writ In Rem can not be served outside the jurisdiction.

[54] Sirdar Gurdyal Singh v Rajah of Faridkote (1894) AC 670 at 684; City Finance Co Ltd v Matthew Harvey & Co Ltd (1915) 21 CLR 55 at 60.

[55] Darling Casino Ltd v New South Wales Casino Control Authority (1997) 143 ALR 55 per Gaudron and Gummow JJ at 73-76.

[56] R v Judges of the Federal Court of Australia; Ex parte Western Australian National Football League (1979) 143 CLR 190; Bray v F Hoffman-La Roche Ltd [2003] FCAFC 153; (2003) 130 FCR 317 which considered whether the jurisdiction of the Court was dependent on satisfaction of facts prescribed by s5(1) of the Trade Practices Act 1974 (Cth). The Federal Court Rules require the originating process in the form of an Application, which must state the basis of the Court's jurisdiction: see Order 4 r1 and Form 5 Application which states: (State briefly the nature of the subject of the application or cross-claim and the legislative basis of the court's jurisdiction to hear and grant the relief sought. The required statement is not taken to be part of the pleading.) The Court has power in relation to matters within its jurisdiction to make orders and to issue writs as it thinks appropriate, s23: Jackson v Sterling Industries Ltd (1987) 162 CLR 612 per Deane J at 622; Keith Hercules & Sons v Steedman (1987) 17 FCR 290 at 299, 300, including interlocutory orders (see Form 5): Denpro Pty Ltd v Centrepoint Freeholds Pty Ltd (1983) 72 FLR 156 at 161, 48 ALR 39 at 42, ATPR 40-363. Federal Court Rules 1988. Order 8 r1 – 16 concerns service of court process outside Australia and provides a broad range of cases where this can be done, including matters relevant to international transactions: r1; Tycoon Holdings Ltd v Trencor Jetco Inc (1992) 34 FCR 31 per Wilcox J at 34-36; Merpro Montassa Ltd v Conoco Specialty Products Inc (1991) 28 FCR 387 per Heerey J at 390. The range of cases includes: Where the cause of action arises in the Commonwealth, r1(a); Enforcement of a contract, damages, rr1(aa, ab, ae); Arbitration, r1(ah); Tort, r1(ac, ad); Contribution or indemnity, r1(d); Submission to jurisdiction, r1(f); Service on a person properly joined, r1(g). The Rules provide for service in a Convention Country rr6 – 12 and a Non-Convention Country rr 13 – 16, including provision in the latter case for substituted service, r16. Convention and Non-Convention Country are defined in r1A. The rules of the Federal Magistrates Court are not considered here.

The common law has a long history of controversy in its intervention in commercial law[57] and its claim of supremacy.[58] There is a current debate about whether common law should adopt a textual or contextual construction of contracts, so the choice of jurisdiction can be crucial to interpretation [59] and to the outcome from different forms of dispute resolution process. [60]

Another issue is the jurisdiction of the court, and whether it is exercising inherent or statutory jurisdiction. The Federal Court of Australia was created by statute and its original jurisdiction arises from laws made by the Commonwealth Parliament.[61] By contrast, the Supreme Court of NSW has all the jurisdiction which may be necessary for the administration of justice in NSW, so that theoretically the Court is a court of unlimited jurisdiction[62] but because Australia is a federal system, the Supreme Court's jurisdiction is limited by its constitutional competence[63] though it also has power to exercise federal jurisdiction, subject to some limitations.[64]

Another consideration is whether the court can exercise jurisdiction ex juris by service[65] of its process outside the jurisdiction in which it sits. This raises important questions of foreign sovereignty which a national court should not offend.[66]

A qualification

The use of a choice of jurisdiction clause may be but might not be determinative, dependent on the form of drafting and other matters, for example, whether the clause will be applied or disregarded by operation of statute, practice and procedure, mandatory application of domestic law.[67]

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[57] Bailment is a legacy of Roman Law in England, and has been claimed by common law even though it is neither contract nor tort.

[58] TFT Plucknett, *A Concise History of the Common Law,* 5th edn, 1956, Chapter 5, p662 . In 1606 Coke CJ asserted that *…the law merchant is part of the law of this realm…*

[59] Hon JJ Spigelman AC, From text to context: Contemporary contractual interpretation, (2007) 81 ALJ 322.

[60] Court proceedings, direct negotiation, mediation or arbitration, and enforcement.

[61] Federal Court of Australia Act 1976 (Cth) ss19 – 23 and 32 (jurisdiction in associated matters); and the Judiciary Act 1903 (Cth) s39B.

[62] Supreme Court Act 1971 (NSW) s23.

[63] Stack v Coast Securities (No 9) Pty Ltd (1983) 46 ALR 451 at 460.

[64] Judiciary Act 1903 (Cth) s39.

[65] The NSW Uniform Civil Practice (UCP) r11.2 allows for service of Supreme Court process (but not other NSW courts) outside Australia in the circumstances referred to in UCP Schedule 6. Leave is not required for service outside Australia, though the process may have to be undertaken through the Attorney-General's Department for certain convention countries, see Schedule 6. Jurisdiction prim facie exists in the circumstances in which service of process outside Australia is permissible: see rr 11.1 – 11.8.

[66] There are rules for effective service of process (r11.9 – 11.12) which is effected in accordance with the Attorney General's arrangements, particularly in countries which are signatory to international conventions governing service.

[67] Megens & Bonnell, The Bakun dispute: Mandatory national laws in international arbitration (2007) 81 ALJ 259 discussing the freedom of parties to select governing law, and the tension between the law chosen and mandatory national law which intervenes and binds one of the parties. See Transfield v Pacidic Hydro Ltd [2006] VSC 175.

A typical clause is: *The parties agree to submit to the non-exclusive jurisdiction of the courts of NSW* which is not determinative, as it is non-exclusive, and does not close the door on the jurisdictional avenue upon which a party intent on forum shopping will stroll crying 'forum non-conveniens'. Consider closing the door firmly by the following clause: *The parties agree to submit to the exclusive jurisdiction of the courts at Sydney* which does the same work as the following English jurisdiction clause: *The parties agree to submit all disputes to the High Court in London.*

The clear advantage of the last two examples are that they definitively name the jurisdiction and also the place where the courts are located. This clarity enables a party to seek a stay of proceedings commenced contrary to the clause,[68] or an anti-suit injunction. It also assists preventing a conflict between two jurisdictions with the potential for conflicting outcomes. [69]

Exceptions and conflict - Admiralty and Equity

As with every general rules, there are exceptions. The choice of jurisdiction may be irrelevant. In Admiralty, the wide breadth of claims[70] may be *in personam*, or *in rem*. The Admiralty Court's in rem jurisdiction is obtained by the presence of the res (ship or other property) within the jurisdiction. In personam jurisdiction is obtained by service of court process on the defendant who appears in the jurisdiction (usually to defend the in rem claim against the res). So, in Admiralty, contractual law and jurisdiction clauses will be overridden by the presence of the res, except for some arbitration clauses: usually London arbitration on the charter party which will prevail; but not a foreign arbitration clause concerning claims for loss or damage to goods carried by sea under a bill of lading.[71]

In Equity (which is the jurisdiction for international and domestic commercial disputes), although contractual terms will nominate the governing law and jurisdiction, there are some matters where statute over-rides those terms, for example, bills of exchange;[72] or service may be made outside the jurisdiction under rules of court which then raises issues of forum, stay and anti-suit injunction. Another consideration is whether the jurisdiction of the court is statutory [73] or inherent.[74]

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[68] The stay is mandatory if the contract includes a reference to international commercial arbitration governed by the International Arbitration Act 1974 (Cth) s7(2).

[69] See Peoples Ins Co of China & Anor v Vysanthi Shipping Co Ltd (The 'Joanna V') where the London arbitration gave an award to the ship-owner and Chinese Court gave its judgment for the cargo interests.

[70] See the Admiralty Act 1988 (Cth) s4.

[71] Admiralty Act 1988 (Cth), s11(3).

[72] Bills of Exchange Act 1909 (Cth) s77 which sets out the rules where there is a conflict of law, for determining the rights, duties, and liabilities of the parties where a bill drawn in one country is negotiated, accepted, or payable in another.

[73] Eg, the Federal Court of Australia (Admiralty in rem and in personam jurisdiction) and the Federal Magistrates Court (in personam Admiralty jurisdiction only) are statutory courts (Chapter III Courts under the Constitution). Their jurisdiction is vested by the laws of the Commonwealth Parliament: s19; and see the Constitution ss75(v), 77(i); Judiciary Act 1903, S39B(1A). Statutory courts do not have inherent power beyond that which arises from

Conflict of law issues also arise, consider the tension arising where an international commercial contract is executed by a corporation in China with a China arbitration clause, and a Chinese law clause so that the Chinese Contract law[75] applies, but nominating execution to be in accordance with the law of Australia.[76] Consider also the conflict between the Admiralty Court's power to sell the res and distribute the sale fund pursuant to Admiralty priorities which are different to the priorities in Equity under a corporate insolvency, or Bankruptcy where a personal insolvency.

Forum non-conveniens

Forum non conveniens is the private international law doctrine that courts have a discretionary power to decline jurisdiction when the convenience of the parties and justice would be better achieved by resolving the dispute in another forum.[77] Forum non-conveniens issues arise in the interpretation and construction of a choice of jurisdiction clause.[78] A clause should be drafted and negotiated with the knowledge that courts of different jurisdictions have adopted different tests.[79]

Australia

An Australian Court cannot be an inappropriate forum merely by virtue of the circumstance that the choice of law rules that apply in the forum require its courts to apply a foreign lex causae.[80] The High

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the relevant statute: see Jackson v Sterling Industries Ltd (1986) 12 FCR 267 per Bowen CJ at 272.

[74] The Supreme Court of NSW has inherent power which does not dependent on statute. Inherent power is distinguishable from the incidental power of the Court to control its own process, though the distinction is not always observed: Logwon Pty Ltd v Warringah Shire Council (1993) 33 NSWLR 13 at 16, 17. The incidental power gives the Court power to do whatever is necessary to act effectively within its jurisdiction and control its process and proceedings.

[75] Contract law of the People's Republic of China 15 March 1999 Art 35 states that the place of a written contract is where it is executed.

[76] Corporations Act 2001 (Cth) s127.

[77] Australian Legal Dictionary, Butterworths Sydney 1997. See Voth v Manildra Flour Mills (1990) 171 CLR 538.

[78] Oceanic Sun Line Special Shipping Co Inc v Fay (1988) 165 CLR at 241, cited by the majority in Voth [1990] 171 CLR at 550. The High Court of Australia declined to follow and apply the principles governing forum non conveniens determined by the English House of Lords in Spiliada Maritime Corp v Cansulex Ltd [1987] AC 460; Voth v Manildra Flour Mills Pty Ltd [1990] 171 CLR 538, on appeal from the Supreme Court of NSW (1989) 15 NSWLR 513, reversed; Goliath Portland Cement Co Ltd v Bengtell (1994) 33 NSWLR 414 per Gleeson CJ at 420; Huddart Parker Limited v The Ship "Mill Hill" (1950) 81 CLR 502 at 508-9; Compagnie des Messageries Maritimes v Wilson (1954) 94 CLR 577 at 582, 585 and 589-591.

[79] This paper will identify the different approaches in Australia, England and the US.

[80] Regie National des Usines Renault SA v Zhang [2002] HCA 10, (2002) 76 ALJR 551 at [81]. And see In Neilson v Overseas Project Corporation of Victoria Ltd [2005] HCA 54; (2005) 79 ALJR 1736 the High Court considered a choice of law provision contained in the whole of the law of China, including the General Principles of the Civil Law of the People's Republic of China Art 146, which provided a one year limitation period for compensation for bodily harm, and Art 137 which allowed an extension of time for 'special circumstances'. The plaintiff had commenced proceeding in WA almost six years after slipping and falling down stairs in an apartment provided by her husband's employer. The principle issue was whether the law of Australia or China was to be applied to decide the limitation period. The majority (Gleeson CJ; Gummow and Hayne JJ) held that the lex loci delecti included the choice of law provisions, being the law of China. The Court also considered the operation of Chinese law; the doctrine of renvoi (which did not apply in this case); and 'flexible exception and infinite regression'.

Court of Australia has adopted the '**clearly inappropriate forum**' test which is a different test to that applied in England which has adopted the 'clearly more appropriate forum' test.[81] Matters for consideration include convenience to the parties, relative ease of international travel, use of written statements and availability of video conference technology for cross examination.[82]

Australian jurisdiction will not be a clearly inappropriate forum only because the dispute is governed by a foreign law, [83] as a plaintiff regularly invoking the jurisdiction of the court prima facie has the right to insist on its exercise.[84] However the choice of jurisdiction is not determinative, though it raises a strong inference.[85]

England

The English courts have adopted the **'clearly more appropriate forum'** test.[86]

United States

The principle is that the forum clause should control absent a strong showing that it should be set aside.[87]

Stay proceedings – forum non-conveniens

The rationale for the exercise of power to stay a proceeding on the ground of forum non-conveniens is to avoid injustice in the sense that it would be oppressive or vexatious to allow the Australian proceeding to continue.[88] Similarly, a stay will be granted where there is a suit pending elsewhere.[89]

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[81] Voth v Manildra Flour Mills Pty Ltd (1990) 171 CLR 538. And see the CLR headnote reporting the arguments put by opposing counsel. For a comparison between the 'clearly inappropriate forum' and the 'clearly more appropriate forum' see p557 - 561 (per Mason CJ, Deane, Dawson and Gaudron JJ). See also Oceanic Sun Line Special Shipping Co Inc v Fay (1988) 165 CLR 197 at 247, 8; James Hardie Industries Pty Ltd v Grigor (1998) 45 NSWLR 20.

[82] CE Heath Underwriting & Ins (Aust) Pty Ltd v Barden (Unreported: NSWSC 50132/93, Rolfe J, 19/10/94, BC9403144); the apparent strength or weakness of the plaintiff's case: Agar v Hyde (2000) 201 CLR 552 at [51], [56] – [61]. See Incitec v Alkimos Shipping [2004] FCA 698; (2004) 138 FCR 496 per Allsop J at 506-508.

[83] Regie National des Usines Renault SA v Zhang [2002] HCA 10, (2002) 76 ALJR 551 at [81].

[84] Amwano & Anor v Parbery & Ors [2005] FCA 1804; (2005) 148 FCR 126 per Finklestein J at [17] citing Adeange v Nauru Phosphate Royalties Trust (Unreported, SC Victoria, Hayne J, 8/7/92).

[85] Akai Pty Ltd v People's Insurance Co Ltd (1995) 126 FLR 204 per Sheller J at 224, 225. see: Reid Mortensen, Duty Free Forum Shopping: Disputing Venue in the Pacific [2001] VUWL Rev 22.

[86] Spiliada Maritime Corp v Cansulex Ltd [1987] AC 460 per Lord Goff at 476: *The basic principle is that a stay will only be granted on the ground of forum non-conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the matter, ie, in which the case may be tried more suitably for the interests of all the parties and the ends of justice.*

[87] The Bremen v Zapata Offshore Co 407 US 1 (1972) per Burger CJ at p15.

[88] Amwano & Anor v Parbery & Ors [2005] FCA 1804; (2005) 148 FCR 126 per Finklestein J at [17] citing Voth v Manildra Flour Mills Pty Ltd (1990) 171 CLR 538 at 555-556;

[89] Lis alibi pendens, (often referred to as lis pendens) Australian Legal Dictionary, Butterworths Sydney 1997: *If a dispute between a plaintiff and defendant regarding a specific issue is lis alibi pendens, the defendant may invoke*

An important consideration for a defendant is whether there may be grounds to seek a stay of the proceedings commenced in another jurisdiction. In Australia, where the Court is a clearly inappropriate forum, it will grant a stay of the proceedings before it, but this is to be distinguished from anti-suit proceedings (discussed below) where the Court grants an injunction to restrain a party from commencing or pursuing other proceedings.[90] In granting a stay, the decisive matter for the Court is whether the appellants can show that the jurisdiction is a 'clearly inappropriate forum' in the sense that a trial in the forum would be productive of injustice, because it would be oppressive in the sense of being seriously and unfairly burdensome, prejudicial or damaging, or vexatious in the sense of being productive of serious and unjustifiable trouble and harassment.[91]

Even where the contract contains a foreign jurisdiction clause, a stay of proceedings will not be granted if the effect of the stay will be to deprive a plaintiff of a legitimate advantage such as the benefit of a statutory right, for example, under the Insurance Contracts Act 1984, [92] or where the plaintiff is unable to litigate the infringement of an Australian patent outside Australia.[93]

Stay proceedings – express choice of jurisdiction

Proceedings commenced contrary to a choice of jurisdiction clause are subject to an application to stay those proceedings.[94] This also applies to international arbitration, as an agreement to submit to international arbitration will, in the absence of countervailing reasons,[95] expressly stay proceedings in the Court, as there is no discretion concerning whether a stay may be granted.[96]

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this fact as a ground to prevent the plaintiff from instituting the same suit in another court against the defendant.

[90] Societe Nationale Industrielle Aerospatiale v Lee Kui Jak [1987] AC 871.

[91] Voth v Manildra Flour Mills Pty Ltd (1989) 15 NSWLR 513: Regie National des Usines Renault SA v Zhang [2002] HCA 10, (2002) 76 ALJR 551 at [78, 79, 82].

[92] Akai Pty Ltd v People's Insurance Co Ltd (1996) 188 CLR 418.

[93] Best Australia Ltd v Aquagas Marketing Pty Ltd (1988) 83 ALR 217 at 223 – 34.

[94] See Henry v Geoprosco International Ltd [1976] QB 726 which sets out the common law rule. See also Airbus Industrie GIE v Patel [1999] 1 AC 119 per Lord Goff identifying four principles for the grant of an anti-suit injunction.

[95] Compagnie des Messageries Maritimes v Wilson (1954) 94 CLR 577 at 582, 585 and 589-591 where it was held that agreement to submit to arbitration will, in the absence of countervailing reasons, stay proceedings in the Court.

[96] The International Arbitration Act 1974 (Cth) s7 which grants a stay if the New York Convention or the Uncitral model law apply: see Tanning Research Laboratories Inc v O'Brien (1990) 64 ALJR 211; Huddart Parker Limited v The Ship "Mill Hill" (1950) 81 CLR 502 at 508-9 where an arbitration agreement concerning salvage services was made between owners of the 'Mill Hill' and owners of the salvage tug, was held to be binding on the master and crew of the tug as to the character and amount of salvage reward, but not binding as to the forum which nominated an arbitrator in London leading to the possibility of two arbitrations – one in London and one in Australia; Compagnie des Messageries Maritimes v Wilson (1954) 94 CLR 577.

Anti-suit injunctions

An Australian Court has power to grant an anti-suit injunction to restrain curial proceedings commenced in a foreign forum, although not governed by the same principles. The injunction will be granted where the foreign proceedings will interfere with the conduct of the domestic proceedings or would be unduly oppressive.[97] The power is based on a general discretion which is not confined to closed categories of cases.[98]

The principles[99] governing grant of interlocutory anti-suit injunctions restraining proceedings in foreign courts include: the nature and sources of jurisdiction to grant anti-suit injunctions; whether proceedings instituted in foreign court were vexatious or oppressive according to principles of equity; whether prior application for stay or dismissal of foreign proceedings were necessary; the relationship between interlocutory anti-suit injunctions and stay of proceedings on forum non conveniens grounds; whether necessary to consider first whether to grant a stay of local proceedings on forum non conveniens grounds, whether the principles governing grant of interlocutory injunctions are applicable to interlocutory anti-suit injunctions; stay of proceedings on forum non conveniens grounds; relevant considerations when proceedings are pending in Australia and abroad; the nature of the test when issues in local and foreign proceedings are not the same; local proceedings brought for dominant purpose of preventing other party from pursuing remedies available only in foreign proceedings; whether, having regard to the controversy as a whole, the local proceedings are vexatious or oppressive.

These principles are equally applicable to arbitration proceedings, such as where an application is made to restrain a proceeding pending resolution under an arbitration agreement for determination by a foreign forum.[100]

3 Alternative Dispute Resolution (ADR)

Alternative dispute resolution provides parties with a private and confidential means of resolving

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[97] CSR Ltd v Cigna Insurance Australia Ltd [1997] HCA 33, (1997) 189 CLR 345 at 396 - 397; CSR Ltd v New Zealand Ins Co Ltd (1994) 36 NSWLR 138; Incitec Ltd v Alkimos Shipping Corporation [2004] FCA 698; (2004) 138 FCR 496.

[98] McHenry v Lewis (1882) 22 Ch D 397 at 407 – 8; National Mutual Holdings Pty Ltd v Sentry Corp (1989) 22 FCR 209; and see NSW Supreme Court Rules P15 r26. Other examples include an abuse of process or where the proceedings are unjust or oppressive, or where the party has a legal or equitable right not to be sued in a foreign court such as arising under an exclusive jurisdiction clause: British Airways Board v Laker Airways Ltd [1985] AC 58.

[99] CSR Ltd v Cigna Insurance Australia Ltd [1997] HCA 33, (1997) 189 CLR 345.

[100] Hopkins v Diffrex Societe Anonyme (1966) 84 WN (Pt 1) (NSW) 297, [1966] 1 NSWR 797. As a practical matter, a plaintiff against whom an application is made should seek a conditional stay rather than a final order dismissing the claim, to protect his position in the event that the matter does not proceed in the other forum for any reason.

disputes away from the glare of public hearings. Arbitration clauses have been an important part of international trade and commerce for a long time, as they have enabled the parties to largely decide the place and rules for resolving their disputes, and provides guidance for domestic dispute resolution.

Law and jurisdiction clauses must be considered in the context of ADR and whether the subject matter is concerned with a domestic[101] or international contract.[102] Though this may also be subject to the rules of court in the selected jurisdiction[103] and statutory intervention in international transactions.[104]

Historically, arbitration clauses have nominated arbitration in London, but there has been a trend in more recent time for either arbitration in Australia, or a dual locality clause providing for the arbitration to take place where the events giving rise to the dispute occur, either at the shippers or the buyers end.[105] Importantly for arbitration clauses in international trade and commerce with the US, foreign arbitration clauses have been enforceable in the US since 1995.[106]

Since 1980 there has been an increased interest in international commercial arbitration,[107] particularly in the Asia-Pacific, [108] beyond the traditional areas of shipping, insurance and commodity trades [109] and involving changes in attitude, even in the US since 1995.[110]

International Disputes

It is important in international transactions to use arbitration procedures which provide an award which can be enforced outside the jurisdiction. The drafter must consider the operation of the International Arbitration Act 1974 (Cth) Schedule 2 Uncitral Model Law[111] when drawing an ADR clause.[112]

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[101]Commercial Arbitration Act 1984 (NSW) and equivalent in other jurisdictions.

[102]International Arbitration Act 1974 (Cth) which applies the Convention on the Recognition and Enforcement of Foreign Arbitral Awards New York 10 June 1958 (New York Convention 1958); Uncitral Model Law on International Commercial Arbitration; Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention)

[103] See the Federal Court of Australia Act 1976 (Cth), ss4, 53A to 54 and Federal Court Rules 1988, Order 72; and in NSW see the Civil Procedure Act 2005 (NSW) Part 5 – Arbitration of proceedings, ss35 – 41 and the Uniform Civil Procedure Rules 2005 (NSW), Part 20 Division 2 rr20.8 – 20.12

[104] Carriage of Goods by Sea Act 1991 (Cth), s11; Civil Aviation (Carriers' Liability) Act 1959 (Cth), Warsaw Convention Art 32.

[105] This is the approach typically adopted in Chinese contracts.

[106] Fn 118.

[107] The Hon Sir Laurence Street AC, KCMG, formerly Chief Justice of New South Wales, in his Foreword to Jacobs, International Commercial Arbitration, p7 noting an increase of 80% recorded by the ICC International Court of Arbitration between 1981 and 1990.

[108] Ibid, 230% between 1981 and 1990.

[109] Jacobs, International Commercial Arbitration, p8.

[110] See Vimar Seguros Y Reaseguros SSA v MV Sky Reefer 1995 WL 360200 (US) in which the US Supreme Court held that foreign arbitration clauses are enforceable, and there should be no bar to foreign arbitration involving a US party.

[111] The Uncitral Model Law has the force of law in Australia, International Arbitration Act 1974 (Cth) s16(1).

[112] Note the statutory definition of an international commercial arbitration in the Act, and of an international

Particularly the adverse effects[113] caused by opting out either expressly or by mistake.[114]

Australia has adopted the Uncitral Model Law, but because it is not compulsorily applicable, if the parties opt out and use some other rules, such as the ICC Rules, there are serious and probably unintended consequences for parties in international disputes.[115]

In international transactions, the courts interpret arbitration clauses widely and flexibly,[116] though it is usual to draft in a broad way so as to capture the dispute by the usual two element form of words: [117]

…any dispute arising out of or in relation to this contract or breach thereof…

Importantly, In 1995 the US Supreme Court upheld the enforcement of a foreign arbitration clause[118] which represented a significant policy shift[119] away from consideration and weighing of 'private interest

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arbitration in Art 1 of the Model Law, as an inappropriate clause may is lost (p1,2).

[113] Adverse effects include loss of: procedure for appointment of arbitrator's where parties cannot agree Art 11(3);Tribunal's power to rule on jurisdiction Art 16; interim measures of protection Art 17; assistance for taking evidence Art 27; procedures for recourse against an award Art 34; statutory enforcement procedure Arts 35 & 36.

[114] The author encountered such a mistake in an international agreement involving Australian and Swedish parties which adopted the Commercial Arbitration Act 1984 (Tas) rather than the International Arbitration Act 1974 (Cth). The award would have been unenforceable in Sweden.

[115] Marcus Jacobs QC International Commercial Arbitration, p1.

[116] Ashville Investments Ltd v Elmer Contractors Ltd [1989] QB 488; Dowell Australia Ltd v Triden Contractors Pty Ltd [1982] 1 NSWLR 508 at 515; Roose Industries Ltd v Ready Mix Concrete Ltd [1974] 2 NZLR 246; Wealands v CLC Contractors Ltd [1999] 2 Lloyd's Rep 739; Societe Commerciale de Reassurance v Eras International Ltd [1992] 1 Lloyd's Rep 570; Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd (1996) 39 NSWLR 160 at 165-166.

[117] See: IBM Australia Ltd v National Distribution Services Pty Ltd (1991) 22 NSWLR 466 (CA) per Kirby P at 472, Clarke JA at 477B and 483, and Handley J at 487; Paper Products Pty Ltd v Tomlinsons (Rochdale) Ltd (1993) 43 FCR 439 per French J at 448; Ethiopian Oilseeds v Rio del Mar Foods Inc [1990] 1 Lloyd's Rep 86 per Hirst J at 90ff and 95-96 (arising out of includes actions in tort). In Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (No 5) (1998) 90 FCR 1 the narrower words 'arising from' were considered.

[118] Vimir Seguros Y Reaseguros SA v M\V Sky Reefer (1995 AMC 1817:115 S.Ct 2322). See also In Kanematsu Corp v M\V Kretan W (1995 AMC 2957:897 F.Supp 1314); Lucky Metals v M\V Ave (1996 AMC 265). The arbitration agreement was up-held on the basis that the consignees were bound to arbitrate where the clause required "any dispute" to be arbitrated. In answer to an argument that the English arbitrators might wrongly apply English rule rather than American law, the Court said: *...whatever the correct outcome of the choice-of-law issue may be, it is the arbitrators, rather than this court, who should decide the choice of law issue in the first instance.*

[119] The previous leading case for invalidation of a foreign forum selection clause was the US Court of Appeals for the Second Circuit in Indussa Corp v SS Ranborg 377 F 2d 200 (1967) (en banc). The basis of the previous policy was to avoid the possibility that arbitrations conducted outside the US would disadvantage a US party, may be less well done by a foreign arbitrator, may not take US law into account (if US law applies, and there may be some debate about that) or may result in a less fair outcome for a US party. This was a parochial view and inconsistent with the policy of comity in international commercial law. See also Trafigura Beheer B.V. v. M/T Probo Elk US Court of Appeals 5th Circuit No 06-20576 <http://www.ca5.uscourts.gov/opinions/pub/06/06-30655-CV0.wpd.pdf> which determined that a charter party forum clause: *The High Court in London shall have exclusive jurisdiction over any dispute which may arise out of this charter* was binding and prevailed over a later letter of undertaking (LoU) agreeing to appear in a Texas Court, but which did not expressly supersede the charter party, and expressly reserved all defences. The Court noted: W*e review the enforcement of a forum selection clause de novo. Hellenic Inv Fund Inc v Det Norske Veritas, 464 F.3d 514, 517 (5th Cir 2006). Forum selection clauses are presumptively enforceable under federal law in the 'interests of international comity and out of deference to the integrity and proficiency of foreign courts. Haynesworth v The Corporation 121 F.3d 956, 962 (5th Cir 1997) (quoting Mitsui & Co (USA) Inc v MIRA M/V 111 F.3d 33, 35 (5th Cir 1997).* and also noted that although Haynesworth was not an

factors' and 'public interest factors' in applying forum non-conveniens. Forum selection clauses for international arbitration are to be enforced unless the clause is fundamentally unfair and therefore unreasonable.[120]

Arbitration

By drafting an appropriate clause, the parties can exclude or limit the jurisdiction of the courts by giving jurisdiction to the arbitrator. Direct negotiations and mediation do not raise issues of jurisdiction as they involve consensual processes which are not in dispute and do not require determination. As an initial issue it is important to distinguish between domestic and international arbitrations and restrict the use of a domestic arbitration clause to a domestic dispute as domestic arbitration procedures do not have the benefit of international enforcement.[121]

Mediation

ADR is not limited to arbitration as mediation is now a well accepted process used successfully in Australia, commonly written into commercial contracts, and in some areas of commerce mediation is voluntary,[122] though in franchising mediation is compulsory.[123]

Mediation involves bringing the parties to the dispute together and to reach agreement (if possible). Mediation is not supported by international convention, and it does not need to be, as the outcome is consensual, and if a dispute is resolved by mediation, it should be recorded by writing in a deed or agreement, for enforcement of performance by the parties to it.

Mediation procedures are regarded by Australian Courts as an important ADR procedure which have

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Admiralty case, it had relied extensively on Admiralty cases such as The Bremen v Zapata Off-Shore C0 407 US 1(1972) and Mitsui and held that the rules of these cases apply not only to Admiralty, but also outside Admiralty. Figura argued that enforcement of the London forum clause was unjust and unreasonable, but the Court of Appeal dismissed that argument, [119] noting: *London was otherwise a reasonable forum… Trifigua has an office there, so it was not inconvenient. Further, British courts have a long history of fair and impartial admiralty jurisprudence. The Bremen 407 US at 17. In sum, it was fair and reasonable for the court to enforce the forum selection clause.*

[120] Vimir Seguros Y Reaseguros SA v M\V Sky Reefer (1995 AMC 1817:115 S.Ct 2322) setting out four bases for unreasonable (pp12 – 13): *(1) the incorporation of the forum selection clause into the agreement was the product of fraud or overreaching; (2) the party seeking to escape enforcement 'will for all practical purposes be deprived of his day in court' because of the grave inconvenience or unfairness of the selected forum; (3) the fundamental unfairness of the chosen law will deprive the plaintiff of a remedy; (4) enforcement of the forum selection clause would contravene a strong public policy of the forum state.* See Haynsworth v Corporation 121 F.3d 956, 963 (5th Cir 1997) citing Carnival Cruise Lines v Shute 499 US 585, 595 (1991); Carnival Cruise Lines v Shute 499 US 585, 595 (1991) involving a lack of bargaining power; Piper Aircraft v Reyno 454 US 235 at 241; 1982 AMC 214 (1981) at 217.

[121] The Commercial Arbitration Act 1984 (NSW), ss33, 53 is for domestic and not international arbitrations.

[122] See the Oil Code.

[123] Trade Practices (Industry Codes – Franchising) Regulations 1998, r3 which applies Trade Practices Act 1974 (Cth) s51AE and makes the Code of Conduct in the Schedule prescribed and mandatory.

rules of court concerning the reference and conduct of mediation. [124] Including the power to direct the parties to mediation or arbitration regardless of the consent of the parties,[125] and the process is protected by confidentiality.[126] In NSW, the Court no longer has a supervisory role over arbitrations,[127] and the Court may make orders for the enforcement of that agreement as a precondition to the commencement of proceedings in relation to the dispute.[128] In domestic arbitrations, NSW courts have power to appoint a Referee. [129]

Drafting an ADR clause

A typical ADR clause establishes an escalating regime through sequential procedures, often with time limits for each step:

- Direct negotiations between nominated or senior officers who are not directly or personally involved in the subject matter of the dispute;
- Mediation, with a qualified mediator appointed by a neutral professional body;
- Arbitration, with one or more (usually three) qualified arbitrator(s) appointed by a neutral professional body.

A clause in an international commercial agreement should contain a clear statement of:

- Governing law;
- Jurisdiction;
- Which body is to appoint the mediator and arbitrator;

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[124] See Federal Court of Australia Act 1976 (Cth), ss4 53A to 54 and Statutory Rules, 1979 No 140, O 72. Supreme Court Act 1970 (NSW) ss23 and 76A. S23 provides for jurisdiction generally, and s76A provides for directions for the speedy determination of real questions in proceedings. Mediation and arbitration are the subject of the court rules: Civil Procedure Act 2005 (NSW) Part 4 - Mediation of proceedings ss 25 -34; Uniform Civil Procedure Rules 2005 (NSW): Part 20 – Resolution of proceedings without hearing, Division 1 – Mediation rr 20.1 – 20.7; see Practice Note SC Gen 6, see Ritchie Vol 2 [150,225]. CPA: Part 5 – Arbitration of proceedings ss 35 – 55; UCP Part 20 - . Resolution of proceedings without hearing, Division 2 – Arbitration rr 20.8 – 20.12; Practice Note – Standard Directions, Hearings and Arbitrations, Ritchie Vol 2 [160,000].

[125] Ibid s53A, Kilthistle No 6 Pty Ltd v Austwide Homes Pty Ltd [1977] FCA 1383 ; ACCC v Lux Pty Ltd [2001] FCA 600; Lone Star Steakhouse & Saloon Inc v Zurcas [2000] FCA 29.

[126] Ibid s53B: Abriel v Australian Guarantee Corp [1999] FCA 50 per Branson J at [22]

[127] CPA and UCP have had the effect of curtailing the Court's supervisory powers over arbitrations, and the Court's role is now seen as supportive and auxiliary, being principally limited to Appeals on questions of Law: see Commercial Arbitration Act 1984 (NSW), s38; remission of matters where it is necessary to correct some injustice: s43; and removal of an arbitrator for misconduct: s42, and see Imperial Leatherware Co Pty Ltd v Macrif Marcelliano Pty Ltd (1991) 22 NSWLR 653.

[128] Hooper Bailie Associated Limited v Natcom Group Pty Ltd (1992) 28 NSWLR 194; Consolidated Press Holdings Ltd v Wheeler (1992) 84 NTR 42.

[129] UCP Part 20, Division 3 – References to Referees rr20.13 to 20.24 provides for Reference by the Court to a Referee. This Part was introduced following the introduction of the Commercial Arbitration Act 1984 (NSW) which allows the Court a general discretion to appoint referees and refer to them either the whole of the proceedings or any questions to which those questions give rise. The Discretion is exercisable whenever the interests of justice make it appropriate, and in making orders, the Court has regard to the nature of the matters proposed for reference out and the desirability of the "just, quick and cheap disposal of the proceedings".

- Which international rules apply to ADR;
- How many arbitrators are to be appointed, and their roles whether to act as advocates for each party appointing them, or to act independently;
- Where the arbitration is to be held;
- What language is to be used for the procedure, evidence and award of the arbitration, including oral statements, written submissions, documents in evidence (including translations where necessary).

4 Enforcement

Enforcement concerns a number of issues:

- Enforcement of the choice of law and jurisdiction
- Enforcement of the arbitration award or court judgment

A reason for careful consideration of the choice of law and the jurisdiction is enforcement of the court judgment or arbitration award. It is obvious that an unenforceable order or award is of little value.

Court judgments

Historically, judgments of foreign Courts were not recognised and were unenforceable at common law. Aat common law, a foreign judgment will only be recognised where the court exercised personal jurisdiction.[130] Further, the common law rules require the presence in the jurisdiction of the person or company against whom the judgment is to be enforced, or in some circumstances, where the personal consents to appear (in the sense of entering an appearance).[131]

In addition to the common law rules, there are a number of other means of obtaining a judgment and enforcement relevant to international carriage by sea. In Admiralty, a foreign judgment can be enforced against property within the jurisdiction:

- As security for a debt (even where the debt claimed has not yet matured to a judgment) by arrest of a ship (and sometimes a sister or surrogate ship);[132]
- By enforcing a foreign judgment against the ship sale fund held by the Admiralty

[130] As in 'in personam proceedings': see Newcom Holdings Pty Ltd v Funge Systems Inc [2006] SASC 284 where the court declined to enforce an order of the US Bankruptcy Court in related South Australian proceedings.
[131] Emanuel v Symon [1908] 1 KB 302 (CA) at 313-4; Singh v Rajah of Faridkote [1894] AC 670 at 686; or is deemed to have submitted to the jurisdiction: Victorian Phillip Stephan Photo Litho Co v Davies (1890) 11 LR (NSW) 257; De Santis v Russo [2002] 2 Qd R 230.
[132] Admiralty Act 1988 (Cth) s4.

Court;[133]

However, court judgments for claims in international air carriage pursuant to the Warsaw Convention[134] do not have the same international enforceability.

Enforcement of court judgments raises questions of recognition and reciprocity[135] and is not clearly resolved as judgments of a court in one jurisdiction may not be enforceable in another, and some types of judgment may not be enforceable at all.[136]

In Australia, an important example is the absence of provisions giving recognition to US judgments[137] though there has been some limited modification for enforcement of a narrow range of monetary judgments between Australia and the US under AUSFTA, [138] but not in relation to enforceability of court judgments arising out of commercial contracts.[139] However, it remains to be seen how this will develop in the future.

Arbitration awards

Having regard to these problems, the usefulness of a good arbitration clause cannot be overstated, and they are very important in the enforcement of international agreements. To put it simply, an arbitration award is more easily and internationally enforced than a court order.[140]

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[133] Admiralty Rules 1988 (Cth) r73(1).

[134] Eg, in relation to international carriage by air: see the Civil Aviation (Carriers' Liability) Act 1959 (Cth) and schedules setting out the Warsaw Convention, see Art 28 r1 which sets out the forum choices (plaintiff's option, carrier ordinarily resident, principal place of business, establishment by which the contract was made, or place of destination) and Art 30 r3 (consignor has right against first carrier, consignee against the last carrier, and both may claim against carrier when destruction, loss, damage or delay took place). but does not provide the same scope for enforceability by arrest to obtain security as in Admiralty.

[135] See the Foreign Judgments Act 1991 (Cth)) s5 provides for substantial reciprocity of treatment to be assured in relation to the enforcement of money judgements, and s13 provides that money judgements are unenforceable if there is no reciprocity. The question is largely one of either treaty or reciprocity. As a rule of thumb, decisions of Commonwealth countries enjoy reciprocity in Australia, but there may be real difficulties with enforcement in countries such as the United States despite the US Free Trade Agreement Implementation Act 2004 (Cth).

[136] Consider problems with the enforceability of a default judgment or a summary judgment, as these types of judgment may not be recognized nor enforceable in a foreign jurisdiction.

[137] Foreign Judgments Act 1991 (Cth).

[138] See the US Free Trade Agreement Implementation Act 2004 (Cth) Art 14.7 which gave effect to the Australia-United States Free Trade Agreement signed 18 May 2004 (AUSFTA) and entered into force 1 January 2005 [2005] ATS 1: see http://www.dfat.gov.au/trade/negotiations/us_fta/ final-text/index.html: This is limited to civil proceedings conducted by the US FTC, US S&EC, US Future Trading Commission and the ACCC to provide monetary restitution to consumers, investors or customers who suffered economic harm as a result of being deceived, defrauded or misled. Interestingly this does not include consumer compensation for proceedings by ASIC in relation to financial services, being similar consumer protection provisions to the Trade Practices Act in relation to goods and services: see the ASIC Act 2001 (Cth) ss 12AA to 12HD; see J Hogan-Doran, Enforcing Australian judgments in the United States (and vice versa): How the long arm of Australian courts reaches across the Pacific (2006) 80 ALJ 361.

[139] In Newcom Holdings Pty Ltd v Funge Systems Inc [2006] SASC 284 the court declined to enforce an order of the US Bankruptcy Court in related South Australian proceedings.

[140] See the International Arbitration Act 1974 (Cth) Schedule 1 which incorporates into Australian law, the

The International Arbitration Act 1974 (Cth) Schedule 1 sets out the New York Convention 1958, (with some amendments), and the effect is that an arbitration award is more enforceable in more foreign jurisdictions than a Court decision.[141] Agreements to resolve disputes by mediation do not form part of this law, but the current consensus is that they are enforceable as part of general contract law, as they reflect a written agreement between the parties.

Conclusion

The importance of international trade and commerce for the wealth of nations is well established, and that importance has been recognised by the international trade and transport conventions of the 20th century.

The days of commercial contracts applying solely to wholly intra-state commercial transactions are mostly gone, other than for perhaps contracts for the sale of land and some businesses.

Many commercial contracts are now concerned with inter-state and international activities as more commercial men widen their activities into wider markets, and the advent of global markets.

It is this wider scope of commercial activity which challenges lawyers to consider a wider range of issues when drafting a contract with effective choice of law, choice of jurisdiction, ADR and enforcement clauses.

Convention on the Recognition and Enforcement of Foreign Arbitral Awards New York 10 June 1958 (New York Convention 1958). This Convention has been adopted by the majority of nations.

[141] The International Arbitration Act 1974 (Cth); s6 sets out the conditions and procedure for having a foreign judgement registered in an Australian Court; s7 provides for the setting aside of a registered judgement and identifies some 11 matters where a judgement must be set aside, and in s7(b) allows a discretion; s8 provides for a stay of enforcement of a registered judgement, and s9 procedure. This Act adopts a number of international conventions into Australian law: Schedule 1, Convention on the Recognition and Enforcement of Foreign Arbitral Awards New York 10 June 1958 (New York Convention 1958); Schedule 2, Uncitral Model Law on International Commercial Arbitration; Schedule 3, Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention). By contrast, court judgments are enforceable by reciprocal arrangements giving effect to the judgments of certain courts: The Foreign Judgments Act 1973 (NSW) and the Foreign Judgments Act 1991 (Cth) apply and are not as satisfactory as the New York Convention which has been almost universally adopted.

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Schedule - A typical clause

Liability

1 The Parties agree that they will not be liable to each other for any (including consequential) loss or damage where ever and howsoever caused and whether caused by breach of contract, breach of duty in bailment, tort or wilful default. This clause is to be read subject to any compulsorily applicable law which prohibits exclusion of liability but enables a Party to limit liability, in which case the Parties agree that they may thereby limit their liability.

(a) This clause may be extended for the benefit of servants, agents and sub-contractors by an expanded definition of the parties.
(b) Consider also the use of a promise not to sue, consolidated by a circular indemnity.

Dispute Resolution

2 If a dispute arises out of or in relation to this Agreement or its breach, termination, validity or subject matter, a Party must give written notice of the particulars of the dispute to the other Party within 3 business days, and the Parties must use their best endeavours to settle their dispute through discussions between their representatives appointed for that purpose within a further 7 business days.

3 If the dispute is not resolved within those 10 business days, the Parties must then use their best endeavours to settle their dispute by mediation in Sydney conducted by a qualified mediator appointed by the Accord Group, Sydney within a further 28 days.

4 If the dispute has not been settled through mediation within those 28 days (or such other period as agreed between the Parties in writing) the dispute must be submitted to arbitration by Mr John Levingston, Barrister, sitting (a) in the case of a domestic dispute to which the Arbitration Act 1984 (NSW) applies; and (b) in the case of an international dispute to which the International Arbitration Act 1974 (Cth) applies; as a single arbitrator for determination in Sydney or such other place as the parties agree. The arbitrator must not be the same person as the mediator. English is the language of the arbitration and any documents in another language are to be provided with a translation into English by an appropriately accredited translator.

5 The arbitrator may conduct the arbitration on the basis of documents, unsworn witness statements and written submission submitted by the Parties together with a statement of the final negotiated position of each Party. The arbitrator will read the documents submitted by each party and make an award.

6 The determination of the arbitrator will be final, binding on and confidential to the Parties.

7 The Parties will equally pay the cost of the mediator and the arbitrator, and their own costs and disbursements.

8 A Party must not commence Court proceedings before exhausting the dispute resolution procedures in the preceding clauses.

Law and jurisdiction

9 This Agreement is governed by the law of NSW and the Parties submit to the exclusive jurisdiction of the courts in Sydney. A Party will not object to that forum for any reason.