

THE HAGUE AND THE DITCH: THE TRANS-TASMAN JUDICIAL AREA AND THE CHOICE OF COURT CONVENTION

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A. INTRODUCTION

Having been finalised in 2005, the Hague Convention on Choice of Court Agreements¹ is the most recent attempt to improve the transnational enforcement of judgments by a “double convention”.² Recognising that States are often concerned only to allow the enforcement of a foreign judgment if the court that gave the judgment was exercising a credible jurisdiction, double conventions tie liberal rules for the enforcement of judgments between the participating states to proportionate rules of jurisdiction that all of those states have agreed to. However, the Choice of Court Convention only establishes agreed rules for one traditional head of jurisdiction – a contractual agreement to submit litigation to the courts of a nominated country. It is nevertheless a worthwhile reform. As the Convention was negotiated and concluded at The Hague Conference on Private International Law, it promises the broadest international adoption that a double convention has yet secured and, for that reason, its ratification and implementation is something that should be encouraged.³ But the high regard it has for the

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¹ Convention on Choice of Court Agreements 2005 (done at The Hague on 30 June 2005) (“Choice of Court Convention”).

² Cf P Beaumont, “Hague Choice of Court Agreements Convention 2005: Background, Negotiations, Analysis and Current Status” (2009) 5 *Journal of Private International Law* 125, 134, where the Convention is regarded as a classical mixed convention with one positive (Art 5) and one negative (Art 6) rule of jurisdiction (both features of a double convention). This could also be understood as a double convention limited to one ground of jurisdiction: party choice.

³ R Garnett, “The Internationalisation of Australian Jurisdiction and Judgments Law” (2004) 25 *Australian Bar Review* 205, 226 (“Internationalisation”); R Garnett, “The Hague Choice of Court Convention: Magnum Opus or Much Ado about Nothing?” (2009) 5 *Journal of Private International Law* 161, 180 (“Magnum Opus”); S Fairley and J Archibald, “After the Hague: Some Thoughts on the Impact on Canadian Law of the Convention on Choice of Courts Agreements” (2006) 12 *ILSA Journal of International and Comparative Law* 417, 431; VP Nanda, “The Landmark 2005 Hague Convention on Choice of Court Agreements” (2007) 42 *Texas International Law Journal* 773, 787–8; Note, “Recent International Agreement” (2006) 119 *Harvard Law Review* 931, 938; W Woodward, “Saving the Hague Choice of Court Convention” (2008) 29 *University of Pennsylvania Journal of International Law* 657, 718.

promises that businesses have made about where they will litigate⁴ is a more important reason why, in common law countries that have not been so supportive of enforcing those promises, the Convention should be implemented.

Many states that were involved in the negotiations for the Choice of Court Convention have already had long experience of double conventions. At the time the Convention was concluded, it was contemplated that there would be questions of its relationship with more comprehensive double conventions to which Hague Conference participants were already party.⁵ Foremost among these were the European Union's Brussels Convention⁶ and Regulation,⁷ and the European Community/European Free Trade Association's Lugano Convention.⁸ A number of features of the Choice of Court Convention are plainly there to accommodate European arrangements.⁹

Australia and New Zealand both actively negotiated towards the Choice of Court Convention, and were involved in the drafting of its text.¹⁰ Australia, at the least, is currently considering whether or not to implement the Convention.¹¹ However, as part of the economic and legal integration of the two countries within the Closer Economic Relations (CER) market area, in 2008 both countries also entered a bilateral treaty on civil court proceedings and the enforcement of judgments.¹² The Agreement on Trans-Tasman Court Proceedings and Regulatory Enforcement ("the Trans-Tasman Treaty") largely gives effect to the recommendations of a Working Group that reported in 2006 and which aimed

⁴ For the Convention's emphasis on party autonomy, see Beaumont, *supra* n 2, 130; LE Teitz, "The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration" (2005) 53 *American Journal of Comparative Law* 543, 546–7, 556–7.

⁵ T Hartley and M Dogauchi, *Convention of 30 June 2005 on Choice of Court Agreements – Explanatory Report* (Hague Conference on Private International Law, The Hague, 2005), 69–70 ("Explanatory Report").

⁶ Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968, OJ 1998 C 27 (done at Brussels, 27 September 1968).

⁷ Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, OJ 2001 L 12 (22 December 2000). See Beaumont, *supra* n 2, 156–7.

⁸ Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968, OJ 1988 L 319 (done at Lugano, 16 September 1988).

⁹ Especially those relating to Regional Economic Integration Organisations: see Arts 26(6), 29 Choice of Court Convention. On 5 September 2008, the European Union advised it would sign the Choice of Court Convention: Proposal for a Council Decision on the signing by the European Community of the Convention on Choice of Courts Agreements of 2005 (COM (2008) 538). The European Community signed the Convention in April 2009.

¹⁰ Explanatory Report, *supra* n 5, 16.

¹¹ Letter, Australian Government (Attorney-General's Department – Civil Justice Division) to author, 21 August 2008; Beaumont, *supra* n 2, 158. US ratification of the Convention places an even greater obligation on Australia to ratify it as well, under Art 14(7) United States–Australia Free Trade Agreement (done at Washington, 18 May 2004): Teitz, *supra* n 4, 557.

¹² Agreement between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement (done at Christchurch, 24 July 2008) ("Trans-Tasman Treaty").

to give better effect to the unusually close legal relations that the two countries have always enjoyed, and which have deepened under CER.¹³ The treaty will see New Zealand incorporated, with a few adjustments, into the civil jurisdiction and judgments scheme that sorts litigation between federal and state courts in the Australian federation. Legislation to implement the treaty has not yet appeared, and there may be some refinement of the scheme in the course of its drafting.¹⁴

It is therefore quite possible that Australia and New Zealand will soon ratify and implement another double convention – the Choice of Court Convention – which provides for somewhat different means of dealing with jurisdiction and judgments. As the Trans-Tasman regime will deal comprehensively with the allocation of general civil jurisdiction and the enforcement of judgments in the CER market area, it will certainly include litigation of the kind that is to be captured by the Choice of Court Convention. This raises the two issues that I discuss in this article. First, there are profound differences between the two models – differences in the approach to the exercise of jurisdiction and in the ease by which judgments would be enforced transnationally. Indeed, these differences are more deeply seated than any between the Choice of Court Convention and the Brussels Regulation and Lugano Convention. The particular features of the Trans-Tasman regime for jurisdiction and judgments are therefore identified and developed. A comparison between the different approaches of the Choice of Court Convention and the Trans-Tasman regime is then drawn. Secondly, the Choice of Court Convention deals explicitly with its relationship with other international instruments on jurisdiction and judgments. How these provisions – especially Article 26 – would affect the simultaneous operation of the Convention and the Trans-Tasman regime will be briefly discussed. This leads to some reflections on whether the Convention requires some rethinking of the arrangements made under the Trans-Tasman Treaty.

¹³ Australia (Attorney-General's Department) and New Zealand (Ministry of Justice), *Trans-Tasman Court Proceedings and Regulatory Enforcement – A Report by the Trans-Tasman Working Group* (Commonwealth of Australia, Canberra, 2006) ("Working Group Report"). See also Australia (Attorney-General's Department) and New Zealand (Ministry of Justice), *Trans-Tasman Court Proceedings and Regulatory Enforcement – A Public Discussion Paper by the Trans-Tasman Working Group* (Commonwealth of Australia, Canberra, 2006) ("Discussion Paper").

¹⁴ New Zealand Minister for Justice Simon Power and Australian Attorney-General Robert McClelland, "Ministers Make Trans-Tasman Law Reform a Priority", Joint Media Statement, 14 January 2009. Although both governments have declared that the introduction of legislation to give effect to the treaty is a priority, at the time of writing it appeared that there was still consultation with Australian state governments and some significant drafting to take place: email, Australian Attorney-General's Department to author, 9 February 2009.

B. THE TRANS-TASMAN MODEL FOR JURISDICTION AND JUDGMENTS

1. Trans-Tasman Judgments Enforcement

Australia and New Zealand have a shared history stemming from the European settlements of the countries as British colonies (and in the case of Australia, six of them) through the late 18th and 19th centuries. This shared history saw occasional co-operation between them, and efforts at improving the enforcement of judgments across “The Ditch”¹⁵ – the colloquial term for the Tasman Sea which separates the Australian continent and the islands of New Zealand. From the mid-1930s, the Australian states and New Zealand adopted legislation based on the United Kingdom’s Foreign Judgments (Reciprocal Enforcement) Act 1933 which, despite its name, was principally a means for improving the reciprocal enforcement of judgments made by superior courts in the British Empire and Commonwealth.¹⁶ The imperial scheme is one of “indirect jurisdiction”, allowing judgment debtors, at the point of registration in the country where enforcement is sought, to challenge the jurisdiction of the original court to make the judgment. However, the present arrangements between Australia and New Zealand sit inside the trading, co-operative and legal rubric of the CER Trade Agreement.¹⁷ The CER Treaty has created perhaps the world’s most open free trade area and, reinforced by the free movement of people across the Tasman, has brought unparalleled economic, social and legal integration to the two countries.

In 1988, during a review of the CER, attention was given to the place that closer legal relations should have in assisting the integration of the Trans-Tasman market area. A subsequent Memorandum of Understanding on Harmonisation of Business Laws signed at Darwin that year promised the “further recognition and reciprocal enforcement of court decisions in each country, including enforcement of injunctions, orders for specific performance and revenue judgments”.¹⁸ The result was disappointing, and inexplicable. In Australia, it secured a federal takeover of the law relating to the enforcement of foreign judgments by registration, which before then had been carried by the states and territories.¹⁹ It added little else to the existing ability to enforce New Zealand judgments in Australia, apart from enabling judgments of the New Zealand District Court (an inferior court) to be registered in all parts of the country. However, the legislation in both countries retained the basic structure of

¹⁵ See R Mortensen, “Judgments Extension under CER” [1999] *New Zealand Law Review* 237, 246.

¹⁶ *Ibid.*, 242.

¹⁷ Australia New Zealand Closer Economic Relations Trade Agreement (done at Canberra, 1 January 1983).

¹⁸ Art 5(h) Memorandum of Understanding between the Governments of Australia and New Zealand (concluded at Darwin, 1 July 1988).

¹⁹ Foreign Judgments Act 1992 (Cth).

the imperial scheme of 1933,²⁰ and as a result added nothing more to improve the enforcement of judgments in trading and commercial relationships. It retained the imperial scheme's permission to test indirectly, at the point of registration, the jurisdiction of the original court to give judgment in the first place. The registration of non-money judgments, despite the aspirations of the Darwin Understanding, was unrealised, and remains unrealised.²¹ And as the two countries have taken care to maintain the CER as an economic arrangement and studiously avoid any suggestion of political integration, it is strange that the only substantial improvement in the efficiency of the enforcement of judgments across the Tasman that came as a result of the Darwin Understanding was that each country could extend its political sovereignty into the other.²² Express provision was made for the registration of revenue judgments and competition judgments, and in both cases (and only in those two cases) any right to challenge to the rendering court's jurisdiction to make the judgment was denied.²³ There is little wonder that in 2006 the Trans-Tasman Working Group recommended "further reform to create a coherent legal framework for resolving civil disputes with a Trans-Tasman element", and opted to do this by the double convention model that "was designed to remove many similar problems between the Australian States and Territories".²⁴

2. The Australian Model

In one sense, it is misleading to describe the Australian arrangements for the allocation of jurisdiction between courts in the federation and for the enforcement of judgments across state borders as a "model". This might suggest that it was consciously designed. In truth, the simple lines of the Australian federal scheme owe as much to accident, good fortune and judicial reinterpretation (long after its central legislative structures were introduced) as they do to careful planning. However, with the unparalleled importance they give to the principles of the House of Lords' decision in *Spiliada Maritime Corporation v Cansulex Ltd*,²⁵ they probably represent the purest presentation of a common law model for a double convention that is presently available.

In short, the Australian model provides for the absolutely free circulation of any judgment made in any federal, state or territory court or tribunal anywhere in the Australian federation. It is a "double convention" because there are, with one important hitch, common principles of jurisdiction that help to sort litiga-

²⁰ Foreign Judgments Act 1992 (Cth); Pt I Reciprocal Enforcement of Judgments Act 1934 (NZ).

²¹ Judgments Extension, *supra* n 15, 242–7.

²² *Ibid.*, 268–9.

²³ *Ibid.*, 248–51; ss 7(2)(a)(iv), 7(3)(a)(iv) Foreign Judgments Act 1992 (Cth); Pt IIIA, Div 5 Federal Court of Australia Act 1976 (Cth); s 6(1)(b), Pt IA Reciprocal Enforcement of Judgments Act 1934 (NZ).

²⁴ Working Group Report, *supra* n 13, 7.

²⁵ [1987] 1 AC 460.

tion between courts across the federation. Proceedings will be heard in the *forum conveniens*, as determined by the exercise of judicial discretion. The hitch is for the federal courts, which can only hear matters within federal jurisdiction and which therefore, unlike state and territory courts, have a jurisdiction delimited by rules as well as by the principles of *forum conveniens*.²⁶

In Australia, the interstate enforcement of state court judgments is governed by the Service and Execution of Process Act 1992 (Cth). This perpetuates arrangements that have been in place since 1902,²⁷ by which interstate judgments are localised by registration in the state where enforcement is sought.²⁸ There is no restriction on the kind of judgment that can be enforced interstate: the Australian model allows enforcement of money judgments and non-money judgments of any kind.²⁹ It also denies any place to traditional common law defences to the enforcement of foreign judgments when securing interstate registration and enforcement³⁰ (although this is also thought to be an implication of the Australian Constitution's requirement that states give full faith and credit to judgments made in sister-states).³¹ It makes no provision for the treatment of incompatible judgments. The Act of 1992 eases enforcement further by allowing registration to take place by faxing a copy of the judgment to the appropriate court registry in the state where enforcement is sought.³² This scheme effectively gives all state and territory courts an inexpensive, efficient and unchallengeable jurisdiction to enforce their judgments anywhere in the federation.

The principles of jurisdiction are more complicated. The Australian scheme originally based the long-arm jurisdiction of state courts within the federation on the rule-based model of the English Supreme Court Rules,³³ and required some defined nexus between the subject-matter of the claim and the state to be established if a defendant was to be served interstate.³⁴ However, the innovation of the Act of 1992 was completely to abandon rule-based jurisdictions within Australia, and enable the unfettered circulation of the civil process of state and

²⁶ R Mortensen, *Private International Law in Australia* (LexisNexis, Sydney, 2006), 127.

²⁷ Service and Execution of Process Act 1902 (Cth). This statute was itself directly descended from the Australasian Judgments Act 1886 of the Federal Council of Australasia – a precursor to Federation in Australia.

²⁸ Ss 20–21 Service and Execution of Process Act 1902 (Cth); s 105 Service and Execution of Process Act 1992 (Cth).

²⁹ S 3 Service and Execution of Process Act 1902 (Cth); s 3 Service and Execution of Process Act 1992 (Cth).

³⁰ S 109 Service and Execution of Process Act 1992 (Cth); see *R v White and Noonan; Ex parte TA Field Pty Ltd* (1975) 133 CLR 113, 117.

³¹ S 118 Constitution (Cth); Mortensen, *supra* n 26, 159–61.

³² S 105 Service and Execution of Process Act 1992 (Cth).

³³ S 11 Service and Execution of Process Act 1902 (Cth). The more immediate predecessor of these common rules of jurisdiction was the Federal Council of Australasia's Australasian Civil Process Act 1886.

³⁴ R Mortensen, "Autochthonous Essential: State Courts and a Cooperative National Scheme of Civil Jurisdiction" (2003) 22 *University of Tasmania Law Review* 109, 113–14; *id, supra* n 26, 42–3.

territory courts throughout the nation. A writ from any state or territory court can be served anywhere in the federation, and establishes the court's jurisdiction as of right.³⁵ That court, though, is only to exercise the jurisdiction if it is the *forum conveniens*. If it concludes that it is not the *forum conveniens*, it has discretion to decline jurisdiction in favour of the Australian court that is the *forum conveniens*.

Significantly, for allocating jurisdiction between different Australian courts, the *forum conveniens* is identified by the principles set out by the House of Lords in *Spiliada*.³⁶ It is the court "which prima facie is clearly more appropriate for the trial of the action".³⁷ This is despite the fact that, in international litigation, the High Court of Australia has consistently rejected the use of *Spiliada*.³⁸ In *Voth v Manildra Flour Mills Pty Ltd*,³⁹ the High Court concluded that proceedings could only be stayed or dismissed if it appeared to the court that it was itself "a clearly inappropriate forum" for dealing with the dispute.⁴⁰ The *Voth* standard has given Australian courts the most forum-centric approach to international jurisdiction in the common law world.⁴¹ It is possible to conclude that, in the foreign country, there may be a clearly more appropriate court that could deal with the litigation without making the Australian court "a clearly inappropriate forum".⁴² The recognition that this raises the possibility of parallel litigation also makes the approach conceptually unsuitable as a means of sorting jurisdiction in a way that identifies the best placed court to deal with the litigation. As is discussed later, its application to choice-of-court agreements remains unresolved.⁴³ Australian courts have only occasionally assumed that the *Voth* enquiry directly absorbs the question of how to deal with choice-of-court agreements,⁴⁴ but even when they do not use *Voth* in decisions about choice-of-court agreements, it is evident that Australian courts still approach them with a *Voth*-induced preference for keeping international litigation to themselves.

³⁵ Ss 12, 15 Service and Execution of Process Act 1992 (Cth).

³⁶ [1987] 1 AC 460.

³⁷ *Ibid.*, 478.

³⁸ *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197; *Regie National des Usines Renault SA v Zhang* (2002) 210 CLR 491; *Dow Jones & Company Inc v Gutnick* (2002) 210 CLR 575. The High Court refused to reopen *Voth* in the context of a Trans-Tasman case in *Puttick v Tenon Limited (formerly called Fletcher Challenge Forests Limited)* [2008] HCA 54, [38]-[42].

³⁹ (1990) 171 CLR 538.

⁴⁰ *Ibid.*, 558.

⁴¹ See RA Brand and SR Jablonski, *Forum Non Conveniens: History, Global Practice, and Future Under the Hague Convention on Choice of Court Agreements* (New York, Oxford University Press, 2007), 100.

⁴² *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538, 558.

⁴³ Cf R Garnett, "The Enforcement of Exclusive Jurisdiction Clauses in Australia" (1998) 21 *University of New South Wales Law Journal* 1, 12-3.

⁴⁴ Eg *Gem Plastics v Satrix Marine* (1995) 8 ANZ Ins Cas 61-283. See R Garnett, "Stay of Proceedings in Australia: A Clearly Inappropriate Test" (1999) 23 *Melbourne University Law Review* 30, 62-3. The usual approach is to assume that *Akai v The People's Insurance Company* (1996) 188 CLR 418 governs choice-of-court agreements that derogate from Australian jurisdiction; see text at *infra* n 130. Australian courts certainly use *Voth* when the agreement is a prorogation of an Australian forum for the litigation: M Keyes, "Jurisdiction under the Hague Choice of Court Convention: Its Likely Impact on Australian Practice", Colloquium Paper, 18.

For superior courts in Australia – the State and Territory Supreme Courts, the Federal Court, the Family Court of Australia and the Family Court of Western Australia – the question of *forum conveniens* arises in considering whether the proceedings should be transferred to another superior court. Momentarily putting the “hitch” with federal courts to one side, in 1987 uniform federal, state and territory legislation invested the subject-matter jurisdiction of each of these courts in all of the others. With minor qualifications,⁴⁵ this gave each superior court the power to deal with any matter that any other superior court could.⁴⁶ Any proceeding could begin in any of these courts, and if a transfer was made to another superior court, that court would have an undoubted subject-matter jurisdiction to deal with it.

It is sufficient for a transfer to be ordered that it is in the “interests of justice” to do so.⁴⁷ From an early point, some courts understood this as enacting the *Spiliada* formula of declining jurisdiction, so that a transfer would be made to the superior court which was the clearly more appropriate forum for dealing with the litigation. The High Court confirmed that reading of the legislation in *BHP Billiton Ltd v Schultz*,⁴⁸ elevating the *Spiliada* approach to the point where, within the Australian federation, but unlike its position in England,⁴⁹ it is the sole determinant of the proper exercise of jurisdiction.

A similar situation arises for the inferior courts – the local, magistrates, district and county courts in each state and territory. Unlike the superior courts, they cannot directly transfer proceedings to another court. Under the Service and Execution of Process Act, inferior courts can nevertheless grant a stay of the proceedings before them,⁵⁰ and grant that stay on condition that the action be pursued in another court.⁵¹ The Act expressly provides that the stay may be granted if a court in another state or territory “is the appropriate court to determine” the proceedings.⁵² Inferior courts have been granting stays of this kind by reference to the *Spiliada* formula that the interstate court is “the more appropriate court”.⁵³

⁴⁵ Mortensen, *supra* n 34, 123–5; *id, supra* n 26, 42–3.

⁴⁶ Under s 4 Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth); and s 4 Jurisdiction of Courts (Cross-vesting) Act 1987 (NSW) and identical legislation in all other States and Territories.

⁴⁷ Eg s 5 Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth); s 5 Jurisdiction of Courts (Cross-vesting) Act 1987 (NSW); Mortensen, *supra* n 34, 125–30; *id, supra* n 26, 109–14.

⁴⁸ (2004) 211 ALR 573.

⁴⁹ In England, when it is applicable, *Spiliada* still remains conditioned by the rule-based jurisdictions of para 3.1, Practice Direction 6B, Civil Procedure Rule.

⁵⁰ S 20(3) Service and Execution of Process Act 1992 (Cth); Mortensen, *supra* n 34, 131; *supra* n 26, 116.

⁵¹ S 20(5) Service and Execution of Process Act 1992 (Cth).

⁵² S 20(3) Service and Execution of Process Act 1992 (Cth); Mortensen, *supra* n 34, 131; *id, supra* n 26, 116.

⁵³ *Valkama v Jamieson* (1994) 11 SR (WA) 246, 249; *Workcover Corporation v Pross Chiyoda Pty Limited* [1999] SAWCT 86; *Programmed Maintenance Services Limited v Shell Company of Australia Ltd* [2000] QDC 249; *Fertico v Murray River Corn* [2002] SADC 89, [20].

The exception to this simple approach to the allocation of jurisdiction comes with the federal courts. This is a matter of some significance for the Trans-Tasman arrangements, as the Federal Court of Australia aspires to be a centre for commercial and corporate litigation in the Asia-Pacific,⁵⁴ but, of all of the Australasian superior courts, it has the most limited jurisdiction in general contract and tort claims. The Federal Court's capacity to deal with commercial litigation expanded considerably when it was a full participant in the scheme that saw all superior court jurisdictions pooled, and which therefore purported to allow it to exercise the state and territory Supreme Courts' jurisdiction in general commercial, contract and tort claims. However, in *Re Wakim; Ex parte McNally*⁵⁵ in 1999 it was held to be unconstitutional for the federal courts to exercise state or territory jurisdictions granted by state or territory legislation. As a result, the Federal Court may only hear claims in contract and tort that "accrue" to some other action based on a federal statute – normally the Trade Practices Act 1974 (Cth). Federal courts can therefore only exercise a federal jurisdiction (including an "accrued jurisdiction"), while, in contrast, the state courts can exercise both state and federal jurisdictions. So, the jurisdiction of the Victorian Supreme Court in an intra-Australian matter (and whether a federal or state question) is determined purely by *Spiliada* principles of *forum conveniens*. But for the Federal Court to hear any matter, first, the question must be within the rules that define the limits of the court's federal jurisdiction, and, second, the Federal Court must be the most appropriate Australian court to deal with it. Although the rules defining federal accrued jurisdiction are both vague and uncertain, they are nevertheless taken to be rules, and compromise the otherwise complete reliance on discretionary principles to allocate jurisdiction within Australia.⁵⁶ The Federal Court's limited commercial jurisdiction was not considered in the negotiations and reports leading to the Trans-Tasman Treaty, but it could have implications for the effectiveness of some of the treaty's legal machinery.

3. The Proposed Trans-Tasman Regime

Reporting in late 2006, the Trans-Tasman Working Group recommended that a treaty on jurisdiction and judgments should extend the present Australian model to New Zealand.⁵⁷ In doing so it rejected a rule-based approach to establishing agreed civil jurisdictions along the lines of the Brussels Regulation.⁵⁸ The Austra-

⁵⁴ Australian Law Reform Commission, *Review of the Federal Civil Justice System – Report No 89* (Australian Government Publishing Service, Canberra, 2000), para 1.105.

⁵⁵ (1999) 198 CLR 511.

⁵⁶ *Wakim* led to a revival of litigation over the Federal Court's jurisdiction: B Opeskin, "Cross-vesting of Jurisdiction", in B Opeskin and F Wheeler (eds), *The Australian Federal Judicial System* (Melbourne University Press, 2000), 308.

⁵⁷ The Working Group also made recommendations about the issuing of subpoenas in civil and criminal matters, giving evidence by video-link, and enforcing fines and civil penalties: Working Group Report, *supra* n 13, 17–24. These are not discussed in this article.

⁵⁸ Discussion Paper, *supra* n 13, 11–3.

lian model, which I suggest is the archetypal common law double convention, was thought to more suitable for countries “which share a common law heritage and very similar justice systems”.⁵⁹ Furthermore,

“because of the confidence that both countries have in each other’s judicial and regulatory institutions, many of the safeguards required for interaction with more distant, dissimilar countries are unnecessary.”⁶⁰

As a consequence, the Trans-Tasman Treaty that followed will create a genuine Trans-Tasman Judicial Area – resting on an underlying “uniform writ stretching from the Cocos (Keeling) Islands to the Chathams”.⁶¹ This is also arguably the world’s most liberal scheme for the transnational enforcement of judgments, tied to agreed principles of jurisdiction that centre on the court that is, in the CER market area, the *forum conveniens*. The Australian model is therefore to be extended to include New Zealand with only the smallest qualifications. Initiating process in any personal action that is issued by any Australian court – whether a federal, state or territory court – will be able to be served (without leave) in New Zealand, and the civil process of any New Zealand court will be able to be served (without leave) anywhere in Australia.⁶² The same will also be possible for the process of some tribunals.⁶³ Any Australian or New Zealand court would therefore have the right to hear any matter (within the existing subject-matter and financial restrictions on its jurisdiction) in which a defendant could be served in either country. From that point, the court will decline jurisdiction by granting a stay of proceedings if there is another court in the other country that is the more appropriate to deal with the case.⁶⁴ A choice-of-court agreement is treated as one consideration to take into account when deciding which court is the *forum conveniens*.⁶⁵ This represents a larger change for Australian courts which, at

⁵⁹ Working Group Report, *supra* n 13, 6.

⁶⁰ *Ibid.*

⁶¹ W Pengilly, “On Trans-Tasman Banter and ‘Things’ CER” [1990] *New Zealand Law Journal* 199, 200.

⁶² Art 4(1) Trans-Tasman Treaty.

⁶³ Art 6 Trans-Tasman Treaty.

⁶⁴ Arts 4(4), 8(1)–(3) Trans-Tasman Treaty. Under Art 8(4), the treaty also expressly preserves common law powers to stay or dismiss proceedings on the ground of *forum non conveniens*, and so, even in the exercise of Trans-Tasman jurisdiction, a court could stay proceedings in favour of a court in a third country that was considered better placed to deal with the litigation. If this was considered in an Australian court, it would naturally be the principles of *Voth* that would determine whether or not there was a stay or dismissal of proceedings. In a New Zealand court, however, where *Splilada* is used, it would be expected that the claims of a third country to host the litigation would be treated much the same as if it were an Australian court that was the alternative forum. The Trans-Tasman regime is therefore not likely to affect the treatment of parties from third countries, or the claims of third country courts to deal with disputes, as has happened under the Brussels Regulation: cf *Owusu v Jackson (t/a Villa Holidays Bal Inn Villas)*, Case C–281/02, [2005] ECR I–1383, [2005] QB 801; J Harris, “Understanding the English Response to the Europeanisation of Private International Law” (2008) 4 *Journal of Private International Law* 347, 371, 373–4, 381–3.

⁶⁵ Art 8(2) Trans-Tasman Treaty.

present, must use the more myopic *Voth* principles of jurisdiction when New Zealand courts might have some claim on the same proceedings.⁶⁶ New Zealand courts already use the *Spiliada* approach when assessing whether they or Australian courts are to deal with the litigation.⁶⁷ There would be no means other than deciding whether to stay proceedings on the ground of *forum conveniens* for placing them in the most appropriate court within the Trans-Tasman area. Anti-suit injunctions between Australian and New Zealand courts are to be banned.⁶⁸

The agreement on common principles of jurisdiction centring on the *forum conveniens* will allow the enforcement of any civil judgment made in Australia or New Zealand by registration in a comparable court in the other country, and registration will give it the same effect as a judgment of the registering court.⁶⁹ This will extend to non-money judgments;⁷⁰ injunctions and orders for specific performance are expressly mentioned in the Working Group's report.⁷¹ The judgment debtor could raise only one defence to registration: that enforcement would be contrary to public policy.⁷² Any other issue traditionally raised in proceedings for resisting the enforcement of foreign judgments, such as fraud or a denial of natural justice, cannot be used to challenge enforcement, and will have to be raised with the court that rendered the original judgment.⁷³

The Trans-Tasman Treaty does not provide for a regime that replicates the existing Australian model in precisely all details. The regime therefore loses some of the efficiency of the Australian model and, from the perspective of Australian courts, brings some imbalance into the model.⁷⁴ Furthermore, the proposed Trans-Tasman regime also replicates a weakness of the Australian model – its silence on the treatment of incompatible judgments.

First, the allocation of jurisdiction between the superior Australian courts uses the mechanism of a transfer of proceedings to the more appropriate court. In part, this is made possible by the legislative pooling of much of these courts'

⁶⁶ *James Rolfe Transport (Vic) Pty Ltd v Livdon Engineering Ltd*, Unreported, Supreme Court of Victoria, McDonald J, 4 March 1991; *In the Marriage of Gilmour* (1993) 16 Fam LR 285; *Century Insurance Ltd (In liq) v New Zealand Guardian Trust Ltd*, Unreported, Federal Court of Australia, Gray J, 7 April 1993; *James Hardie Industries Pty Ltd v Grigor*, Unreported, New South Wales Court of Appeal, Spigelman CJ, Mason P and Beazley JA, 18 June 1998; *Puttick v Tenon Limited (formerly called Fletcher Challenge Forests Pty Ltd)* [2008] HCA 54.

⁶⁷ *Oilseed Products (NZ) Ltd v HE Burton Ltd* (1987) 1 PRNZ 313; *Club Mediteranee NZ v Wendell* [1989] NZLR 216; *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1990] 3 WLR 297; *Kidd v Van Heeren* [1998] 1 NZLR 324; *Jackson v Henning & Associates* [2006] NZHC 639, [12]; *Kidd v Van Heeren* [2006] NZCA 42; *Dale v Jeffrey* [2008] NZHC 147, [21].

⁶⁸ Art 8(5) Trans-Tasman Treaty.

⁶⁹ Art 5(1), (2) and (9) Trans-Tasman Treaty.

⁷⁰ Art 3(4) Trans-Tasman Treaty. Under Art 3(5) the countries may make arrangements to exclude some non-money judgments from the scheme.

⁷¹ Working Group Report, *supra* n 13, 12–3.

⁷² Art 5 (6) Trans-Tasman Treaty.

⁷³ Art 9(4) and(5) Trans-Tasman Treaty.

⁷⁴ However, it must be recognised that some of the Working Group's recommendations for divergence from the Australian scheme might be rejected as the final details of the treaty are settled.

subject-matter jurisdictions among themselves.⁷⁵ The transfer procedure enables proceedings to be picked up in “the transferee court” at the point they reached in the “transferor” court, and so litigants do not have to retrace any of the pre-trial procedural steps they took before the transfer was ordered. The treaty does not provide for a pooling of the subject-matter jurisdictions of Australian and New Zealand courts,⁷⁶ and without this a transfer between the two countries’ courts is problematic. A stay of proceedings must be used. Accordingly, if the Supreme Court of New South Wales (NSW) considered the New Zealand High Court to be the more appropriate for hearing litigation, it would be required to stay the proceedings (although probably only on condition that they be conducted in New Zealand) and they would have to recommence, from scratch, in New Zealand. In similar proceedings in NSW that favoured the Supreme Court of Tasmania as the more appropriate court for the hearing, the NSW court would (as at present) transfer the proceedings to Tasmania without any loss of pre-trial effort or expense on the part of the litigants. Secondly, the Australian federal scheme incorporates all Australian courts and tribunals. The treaty does not provide for this, but rather that subordinate legislation in each country is allowed to add tribunals to the Trans-Tasman arrangements on an *ad hoc* basis.⁷⁷ Thirdly, the Australian federal scheme includes orders made in proceedings *in rem*,⁷⁸ whereas proceedings *in rem* have been excluded from the Trans-Tasman regime.⁷⁹

Fourthly, in Australia it is still technically possible for superior courts to issue anti-suit injunctions against each other,⁸⁰ but Article 8(5) of the Treaty bans the issue of anti-suit injunctions against proceedings across the Tasman. In this respect, the treaty reflects the arrangements under the Brussels Regulation more than it does the Australian model.⁸¹ This could nevertheless lead to difficulties that themselves suggest it is preferable to retain the availability of anti-suit injunctions in Trans-Tasman cases – although these difficulties should not be exaggerated.⁸² The anti-suit injunction is the natural corollary to the mechanism

⁷⁵ See *supra* n 46.

⁷⁶ As it is unconstitutional for an Australian federal court to receive the subject-matter jurisdiction of an Australian State court, it is probably also unconstitutional for an Australian federal court to receive the jurisdiction of a foreign court: see Mortensen, *supra* n 34, 137.

⁷⁷ Art 6 Trans-Tasman Treaty; Working Group Report, *supra* n 13, 14–5.

⁷⁸ In Australia, most maritime claims are heard in the Federal Court, which can enforce its orders across the country. Orders *in rem* do not therefore usually require the interstate enforcement of the judgment by registration.

⁷⁹ Art 5(8)(b) Trans-Tasman Treaty.

⁸⁰ Inferior courts, if exercising interstate jurisdiction under the Service and Execution of Process Act 1992 (Cth), are prohibited from issuing anti-suit injunctions: s 21. The ban prohibits very little, as most inferior courts do not have any power to order injunctions of any kind: cf s 69(2) District Court of Queensland Act 1967 (Qld).

⁸¹ Ie, because anti-suit injunctions are not permitted to restrain proceedings that fall within the terms of the Brussels Regulation: *Turner v Grovit*, Case C-159/02, [2005] ECR I-3565, [2005] 1 AC 101.

⁸² The Trans-Tasman Working Group also did not address the possibility that it could be constitutionally difficult in Australia to restrict the armoury available to federal courts for protecting the

of stays in favour of the *forum conveniens*, on which the exercise of Trans-Tasman jurisdiction is to depend exclusively. With other precautionary constraints, it formally allows proceedings brought in another court that is a *forum non conveniens* to be restrained. Despite being, with the stay and transfer of proceedings, one legal mechanism by which proceedings can be confined to the *forum conveniens*, the Working Group recommended that the anti-suit injunction be banned for litigation that had claims on both Australian and New Zealand courts so that it not be “used to circumvent the proposed trans-Tasman regime, including the provisions on staying the proceedings on the ground that another court is the more appropriate forum”.⁸³

It is not entirely clear how, if properly used, an anti-suit injunction would circumvent the principle of *forum conveniens* at the centre of Trans-Tasman jurisdiction. Indeed, exclusive reliance on one discretionary mechanism, like a stay of proceedings, to place litigation in the *forum conveniens* risks both *lis pendens* and the possibility that incompatible judgments could arise within the market area. This suggests that a second, more aggressive measure, like the anti-suit injunction, might be needed to end any stalemate between Australian and New Zealand courts. It would nevertheless do so without any conceptual compromise of the coordinating principle of *forum conveniens* for the exercise of Trans-Tasman jurisdiction. The analysis that follows assumes, however, that the court issuing an anti-suit injunction has first concluded that it is the *forum conveniens* by reference to the *Spiliada* standard and not, as in Australia at present, when merely concluding that is not a clearly inappropriate forum.⁸⁴

There are two considerations that suggest the need for the anti-suit injunction to assist the stay of proceedings so as to deal effectively with the potential for *lis pendens* in the Trans-Tasman regime. The first are the vague limitations on the subject-matter jurisdiction of the Federal Court of Australia. From the time that Australian courts gained the power to transfer proceedings between them up until *Wakim*, an anti-suit injunction was issued only once: the Federal Court enjoining litigants not to pursue parallel proceedings in the South Australian Supreme Court.⁸⁵ A consequence of *Wakim* was the reactivation of jurisdictional contests between federal and state courts – contests that are addressed by anti-suit injunctions. In “accrued jurisdiction”, which is the principal means by which the Federal Court can hear many, if not most, of the commercial disputes that come before it, there is ample opportunity for litigants to disagree on the court’s right to hear the proceedings. As a result, there is an enhanced role for anti-suit injunctions from state courts that target commercial litigation which sits

exercise of federal jurisdiction, and that legislation implementing the Trans-Tasman regime may not therefore be able validly to prevent the Federal Court from issuing anti-suit injunctions.

⁸³ Working Group Report, *supra* n 13, 18.

⁸⁴ *CSR Ltd v Cigna Insurance Ltd* (1997) 189 CLR 345, 395–401.

⁸⁵ *Pegasus Leasing Limited v Cadoroll* (1996) 59 FCR 152.

toward the extremities of the Federal Court's jurisdiction. There is also a role for Federal Court injunctions that protect its aspiration to deal with commercial disputes which centre on federal law.⁸⁶ There is every reason to suggest that this problem will also dog Trans-Tasman disputes. Without an anti-suit injunction to deal with it there remains a risk that the New Zealand High Court, in particular, and the Federal Court could each consider itself the *forum conveniens*, and be left without any means of terminating parallel proceedings before they came to judgment. This is a position the superior Australian courts do *not* suffer under the intra-Australian model, but that is only because they can use the anti-suit injunction.

The second consideration why, at present, the ban on anti-suit injunctions could present difficulties for the Trans-Tasman regime relates to the treatment of choice-of-court agreements. This would be less significant if the jurisdictional rules of the Choice of Court Convention were brought into the Trans-Tasman regime – an issue discussed below⁸⁷ – but there is no suggestion of this possibility under the Trans-Tasman Treaty. As it stands, forum selection under the regime treats a choice-of-court agreement as only one consideration to take into account in the search for the *forum conveniens*. Anti-suit injunctions have been important means of enforcing exclusive choice-of-court agreements when, in breach of contract, a party to the agreement litigates in a different court that does not itself decline jurisdiction.⁸⁸ On the face of the Trans-Tasman Treaty, the risk that its principles of jurisdiction will trump any party autonomy expressed in a choice-of-court agreement is less than is the case under the Brussels Regulation, where a court first seised of jurisdiction on some ground other than a choice-of-court agreement will be given priority.⁸⁹ But Australian courts, at present, are more likely to hold jurisdiction against the terms of an agreement choosing a foreign court than they are to enforce it.⁹⁰ It may be that the Trans-Tasman regime itself compels Australian courts to change this approach to choice-of-court agreements – or at least to agreements that select New Zealand courts. In general, Australian courts are much more inclined to enforce

⁸⁶ Mortensen, *supra* n 34, 138–9.

⁸⁷ See text at *infra* nn 108–49.

⁸⁸ A Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford University Press, 2008), 277–9; Mortensen, *supra* n 26, 122–3.

⁸⁹ The following analysis is suggested by reactions to the European Court of Justice's decisions in two cases: *Erich Gasser GmbH v MISAT Srl*, Case C-116/02, [2003] ECR I-14693, where the ECJ held that an Italian court's jurisdiction under the Brussels Regulation had to be settled by that court itself, even though the parties had agreed to litigate in Austria; and *Turner v Grovit*, Case C-159/02, [2005] ECR I-3565, [2005] 1 AC 101, where the ECJ held that anti-suit injunctions were prohibited in cases captured by the Brussels Regulation. Together, these decisions have worried English scholars who have expressed concern that the regulation's rules of jurisdiction are being used tactically to delay proceedings, and to protect claimants against the jurisdiction of the court that the parties had agreed should be dealing with disputes: see Harris, *supra* n 64, 368–72.

⁹⁰ See text at *infra* nn 134–5.

a derogating choice-of-court agreement in interstate litigation than they are in international cases,⁹¹ and, as the purpose of the Trans-Tasman regime is effectively to bring New Zealand into the intra-Australian scheme of jurisdiction and judgments, that practice might well be extended to Trans-Tasman litigation. However, the treaty gives no assurance that the present Australian practice will change, and without that it seems that the anti-suit injunction could be needed to place litigation in the contractually chosen court. But, so far as the treatment of choice-of-court agreements is concerned, the adoption of the jurisdictional rules of the Choice of Court Convention in Trans-Tasman cases would be a more effective solution.

Even before *Wakim*, it was evident that the power to stay or transfer proceedings in Australia was insufficient to prevent parallel proceedings from arising in different courts.⁹² It still remains preferable to align intra-Australian and Trans-Tasman arrangements so that the ban on anti-suit injunctions is lifted, at the least, for the superior courts of both countries. This would only preserve the existing powers of the New Zealand High Court to restrain proceedings in Australia, and of Australian superior courts to restrain proceedings in New Zealand. Again, a high degree of co-operation between courts on either side of the Tasman can be expected, and the issue of an anti-suit injunction is likely to be rare. It should be even rarer if Australian practice in relation to choice-of-court agreements would show more respect for party autonomy. However, a problem that is harder to solve (because it requires constitutional change in Australia) is the contestable commercial jurisdiction of the Federal Court. Australian experience has been that this has revived the importance of the anti-suit injunction as a means of avoiding *lis pendens*, and it is hard to see why that, too, should not be available in Trans-Tasman litigation.

Fifthly, under the Australian scheme, there are no grounds to refuse registration of an interstate judgment.⁹³ It is the settled position in Australia that states are constitutionally prohibited from refusing to apply the law or judgment of another state on public policy grounds;⁹⁴ one reason why the circulation of judgments across the Australian federation is “absolutely free”. In the Trans-Tasman regime, public policy is available as the sole ground for challenging the registration of a judgment from the other country.⁹⁵ This gives rise to two further issues. The first is why no express provision is made for the treatment of incompatible

⁹¹ See text at *infra* nn 136–8.

⁹² In the *Pegasus Leasing* litigation, both the Federal Court and the South Australian Supreme Court held on to proceedings despite each being aware of the parallel action in the other court. A Federal Court anti-suit injunction restraining the Supreme Court proceedings was the only means by which the delivery of two different judgments in the dispute was avoided: cf *Pegasus Leasing Limited v Balescope Ltd* (1994) 63 SASR 51; *Pegasus Leasing Limited v Cadoroll* (1996) 59 FCR 152.

⁹³ S 109 Service and Execution of Process Act 1992 (Cth).

⁹⁴ This is taken to be a requirement of s 118 Constitution (Cth) – “the full faith and credit clause”.

⁹⁵ Art 5(6) Trans-Tasman Treaty.

judgments of courts in the CER market area. The Australian scheme is silent on the point and, as the Service and Execution of Process Act is a code for the interstate enforcement of judgments, Australian courts have no statutory guidance as to how they should deal with an incompatible judgment from another state. The common law rule is that the court (with a recognised international jurisdiction) that rendered judgment first is the court that makes the issues in dispute *res judicata*, and subsequent judgments should give way to its judgment.⁹⁶ Unfortunately, the codification of interstate enforcement in Australia does not allow reference to the common law rule. When recommending the present scheme for the interstate enforcement of judgments, the Australian Law Reform Commission also thought that priority would be given to the judgment made first.⁹⁷ It remains unclear why, even if the likelihood of incompatible judgments is a small one, the commission then refused to recommend a statutory rule to that effect. That is the position that has been carried into the Trans-Tasman regime. The Working Group took the view that, as different courts coming to different judgments is a scenario that is most unlikely to happen, there is no need to legislate for incompatible judgments.⁹⁸ However, for any scheme that sorts litigation between courts exclusively by the exercise of their own discretion, and leaves them without anti-suit injunctions to restrain parallel proceedings brought to their attention, a simple statutory direction for the treatment of incompatible judgments would seem a worthwhile precaution.

The second further consideration returns us to the public policy ground for refusing recognition of a judgment made in the other country. It might be thought that this is only a formal, theoretical defence, and one that is practically unusable. Australian and New Zealand courts have never been reported as applying public policy as a ground for refusing to enforce a foreign civil judgment.⁹⁹ Indeed, in *Bolton v Marine Services Ltd*¹⁰⁰ Thomas J in the New Zealand High Court intimated that there was a public policy of deterring absconding debtors that gave competing reasons to prefer the recognition of foreign judgments.¹⁰¹ The one role that the public policy ground for refusing to enforce a Trans-Tasman judgment might legitimately have is that it could allow the courts a backdoor means of introducing a rule for dealing with incompatible judgments – and probably the common law rule at that.¹⁰² In more general and principled terms, however, the public policy defence appears to be one of those “safeguards required for interaction with more distant, dissimilar countries” that the Working

⁹⁶ *Showlag v Mansour* [1995] 1 AC 431.

⁹⁷ Australian Law Reform Commission, *Service and Execution of Process – Report No 40* (Australian Government Publishing Service, Canberra, 1987), 257; see also Mortensen, *supra* n 15, 267.

⁹⁸ Working Group Report, *supra* n 13, 18.

⁹⁹ For recent observations, see *Jenton Overseas Investment Pte Ltd v Townsing* [2008] VSC 470, [20].

¹⁰⁰ [1996] 2 NZLR 15.

¹⁰¹ *Ibid*, 18–9.

¹⁰² See text at *supra* nn 97–8.

Group thought unnecessary within Trans-Tasman arrangements.¹⁰³ It is arguably incompatible with the Trans-Tasman Treaty's recital of the two countries' "close historic, political and economic relationship", and each country's "confidence in the judicial and regulatory institutions of the other".¹⁰⁴ Furthermore, given the high degree of intergovernmental co-operation between Australia and New Zealand, it is extremely unlikely that judgments made in one country would be so contrary to the other's basic notions of justice as to offend its public policy. The two countries have already disallowed the public policy defence to the enforcement of each other's revenue judgments,¹⁰⁵ and it would be preferable that it be denied even more generally.¹⁰⁶

C. THE CONVENTION AND THE TRANS-TASMAN REGIME: A COMPARISON

Even though the legislation implementing the Trans-Tasman Treaty has yet to be finalised,¹⁰⁷ there is enough in the treaty to suggest that the basic institutions of the Trans-Tasman regime for jurisdiction and judgments will differ profoundly from those of the Choice of Court Convention.

1. Jurisdiction

The Choice of Court Convention regulates the jurisdiction of courts when businesses agree to the exclusive jurisdiction of the courts of a given country and, in its approach to jurisdiction, inherits the rule-based approach taken in the Preliminary draft Convention on Jurisdiction and Foreign Judgments, and the Brussels

¹⁰³ Working Group Report, *supra* n 13, 10, 13.

¹⁰⁴ Preamble, Trans-Tasman Treaty.

¹⁰⁵ S 7(2)(a)(ix) Foreign Judgments Act 1992 (Cth); s 6(1)(e) Reciprocal Enforcement of Judgments Act 1934 (NZ). See also Art 5(7) Trans-Tasman Treaty.

¹⁰⁶ The example given in the Discussion Paper is of an Australian court awarding damages for personal injuries against a New Zealander for an accident that occurred in New Zealand. The Working Group suggests that, if this were to be enforced by registration in New Zealand, it could be contrary to that country's public policy as it would be incompatible with the no-fault accident compensation scheme of the *Accident Rehabilitation and Compensation Insurance Act 1992* (NZ): Discussion Paper, *supra* n 13, 16. This scenario is probably inspired by *Stevens v Head* (1993) 176 CLR 433, but today is extremely unlikely. First, if proceedings are brought relating to an accident in the other country, the *Spiliada* principles of *forum conveniens* that will govern the question of declining jurisdiction in both countries are most likely to see the litigation referred to a court in the place of the accident. Secondly, as they currently stand, Australian choice-of-law rules will not see the relevant Australian law relating to personal injuries apply to an accident that occurs in New Zealand: *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491. New Zealand law would be applied. Thirdly, even if this improbable legal situation did arise, there remains the question whether the incompatibility of an Australian award of damages for personal injuries (against a New Zealand defendant or insurer) with the compensation available under the New Zealand no-fault scheme is so offensive to New Zealand's ideas of basic justice as to fall within the public policy exception for the enforcement of a foreign judgment.

¹⁰⁷ *Supra* n 14.

and Lugano Conventions on which the Preliminary draft drew.¹⁰⁸ The difference with the discretionary, common law approach of the proposed Trans-Tasman regime is therefore in the foundational assumptions of the Convention, and is likely to give rise to other differences in the conceptualising of exclusive choice-of-court agreements and the effect to be given to them.

According to Article 3 of the Convention, a choice-of-court agreement is “exclusive” if, for deciding how disputes between the businesses will be determined, it designates the courts of a contracting state “to the exclusion of the jurisdiction of any other courts”.¹⁰⁹ However, it deems the agreement to be exclusive “unless the parties have expressly provided otherwise”.¹¹⁰ In short, so long as the reference in a choice-of-court clause in a contract is to one contracting state and one only, it is an exclusive choice. While the language of a “presumption” of exclusiveness was carefully avoided in the Convention,¹¹¹ the result is in effect a presumed position. It is an exclusive choice unless evidence to the contrary can be mustered. Furthermore, and somewhat artificially, as the contracting states are often federal or multi-jurisdictional nations, an agreement to have disputes dealt with in the courts of, say, a named federal nation state (where no other nation state is mentioned) will itself be deemed exclusive.¹¹²

The Convention therefore defines an exclusive choice-of-court agreement much more broadly than tends to be the case at common law. The common law draws a distinction between exclusive and non-exclusive choice-of-court agreements, although commentators suggest that the distinction is more marked and of greater legal significance in Australia.¹¹³ The choice of court must be understood as excluding the right of the parties to sue in any court except the one named in the agreement.¹¹⁴ An exclusive choice-of-court agreement proceeds on the assumption that, if parties did choose to have disputes heard only in a given court (or the courts of a given country), it is a breach of contract to bring proceedings somewhere else. Accordingly, a contextual judgment is made of the language of the clause to assess whether the parties intended that, if one of them did sue somewhere else, this would amount to a breach of contract.¹¹⁵ Different approaches to the identification of choice-of-court agreements as exclusive or

¹⁰⁸ See WE O’Brian, “The Hague Convention on Jurisdiction and Judgments: The Way Forward” (2003) 66 *Modern Law Review* 491, 493, 598. I am not considering the implications of Art 22, which allows a contracting state also to declare that it will recognise and enforce judgments made in other Convention countries where jurisdiction was exercised on the basis of a non-exclusive agreement as to jurisdiction.

¹⁰⁹ Art 3(a) Choice of Court Convention.

¹¹⁰ Art 3(b) Choice of Court Convention.

¹¹¹ RA Brand and PM Herrup, *The 2005 Hague Convention on Choice of Courts Agreements – Commentary and Documents* (Cambridge University Press, 2008), 42–3.

¹¹² Art 25(1)(c) Choice of Court Convention.

¹¹³ Jurisdiction Clauses, *supra* n 43, 2; Jurisdiction under the Convention, *supra* n 44, 1.

¹¹⁴ Garnett, *supra* n 43, 5. See *Contractors Ltd v MTE Control Gear Ltd* [1964] SASR 47.

¹¹⁵ Briggs, *supra* n 88, 111–12.

non-exclusive have been taken by courts, including the making of a presumption in favour of exclusiveness.¹¹⁶ However, Adrian Briggs has made a powerful argument that reasons can be given for presuming for and against both exclusiveness and non-exclusiveness, and so “attempts to short-circuit the analysis of what the parties actually agreed with presumptions about what they must rationally have wanted . . . are insecure and unreliable”.¹¹⁷ No presumption has replaced the basic common law position that it is ultimately a matter of construing the contract according to its particular terms,¹¹⁸ and therefore of giving effect to the parties’ proved intentions.

The different approaches of the Convention and the common law will inevitably lead to different characterisations of choice-of-court agreements.¹¹⁹ For instance, in *Atwood Oceanics Australia Pty Ltd v BHP Petroleum Pty Ltd*¹²⁰ the agreement stated that “the parties agree to submit to the jurisdiction of the courts of Victoria”. It mentioned nothing else about the jurisdiction of courts. Article 3 of the Convention would require a clause like this to be construed as an exclusive choice-of-court agreement, because there is nothing in the parties’ agreement that provides otherwise.¹²¹ Using common law principles, the Supreme Court of Western Australia nevertheless found that it was a non-exclusive choice-of-court agreement and that, as result, proceedings could be brought in Western Australia without being in breach of contract.¹²² That would be a possible construction of the agreement for any Australian or New Zealand court to take at common law and, almost certainly, under the Trans-Tasman regime. But it would still be incompatible with the approach demanded under the Choice of Court Convention.

If the agreement stated only that the parties agree to “submit to the jurisdiction of any competent court in the Commonwealth of Australia”, the Convention would also treat this as “exclusive” for its purposes.¹²³ Under normal common law principles, again, courts would have little choice but to construe this as non-exclusive,¹²⁴ as (not counting Australia’s external territories) the parties effectively agreed to submit to the jurisdiction of courts in eight states and territories that apply eight different systems of contract law.

¹¹⁶ *Ibid*, 113.

¹¹⁷ *Ibid*, 115.

¹¹⁸ Garnett, *supra* n 43, 4.

¹¹⁹ Fairley and Archibald, *supra* n 3, 428–9; J Hogan-Doran, “Choice of Forum and the Hague Choice of Courts Convention – A Forum Shopper’s Lament?” Colloquium Paper, 3–10; Nanda, *supra* n 3, 779.

¹²⁰ Unreported, Supreme Court of Western Australia, Master Seaman, 6 August 1987.

¹²¹ Explanatory Report, *supra* n 5, 23; Brand and Herrup, *supra* n 111, 43.

¹²² *Atwood Oceanics Australia Pty Ltd v BHP Petroleum Pty Ltd*, Unreported, Supreme Court of Western Australia, Master Seaman, 6 August 1987, [3].

¹²³ Art 25(1)(c) Choice of Court Convention; Brand and Herrup, *supra* n 111, 43.

¹²⁴ *Woolworths v DS McMillan*, Unreported, Supreme Court of New South Wales, Rogers J, 29 February 1988.

The second difference lies in the effect given to an exclusive choice-of-court agreement. This is the centrepiece of the Convention. Article 5 gives the chosen courts, if in a Convention country, the right to exercise jurisdiction.¹²⁵ They cannot exercise a discretion, on the ground of *forum non conveniens* or otherwise, not to deal with the case.¹²⁶ Article 6 requires courts in any other Convention country *not* to exercise jurisdiction. In fact, other Convention country courts must suspend or dismiss proceedings brought in breach of an exclusive choice-of-court agreement (as defined in the Convention).¹²⁷

This is the key point of distinction with the Trans-Tasman Treaty. The Convention embodies an unqualified insistence that, if businesses have promised to litigate only in a given place, they will be expected to honour that promise.¹²⁸ Particularly in Australia, the common law is nowhere near as exacting about the keeping of these promises.

The case-law reinforces that common law courts will potentially endorse a breach of contract by holding on to litigation brought before them in breach of an exclusive choice-of-court agreement. This is more likely to be found in Australian decisions in international contractual disputes, as an Australian court remains at least influenced by the *Voth* obligation to refuse to stay or dismiss proceedings if it considers itself “not clearly inappropriate”.¹²⁹ In *Akai Pty Ltd v Pty Ltd v People’s Insurance Co Ltd*,¹³⁰ Toohey, Gaudron and Gummow JJ in the High Court of Australia reiterated that the NSW Supreme Court was not precluded from hearing proceedings brought in breach of an exclusive choice-of-court agreement, although the breach might be a consideration that the court would take into account to decline the exercise of jurisdiction.¹³¹ However, the *Akai* majority thought that, unless there were strong reasons not to enforce the choice-of-court agreement, the proceedings should normally be stayed or dismissed.¹³² This brought some slippage from the earlier practice in Australia, when only strong evidence would have allowed proceedings to be brought contrary to an exclusive choice.¹³³ In a series of studies, Mary Keyes has established that Australian courts have progressively become more prepared to hold proceedings brought in breach of an exclusive choice-of-court agreement.

¹²⁵ Art 5(1) Choice of Court Convention. Keyes notes that the Convention does not unambiguously require the chosen court to exercise jurisdiction: Keyes, *supra* n 44, 26.

¹²⁶ Art 5(2) Choice of Court Convention.

¹²⁷ Art 6 Choice of Court Convention.

¹²⁸ RA Brand, “The Hague Convention on Choice of Court Agreements (2005): Introductory Note” (2005) 44 *International Legal Materials* 1291, 1292.

¹²⁹ M Keyes, *Jurisdiction in International Litigation* (Sydney, Federation Press, 2005), 92–4.

¹³⁰ (1996) 188 CLR 418.

¹³¹ *Ibid.*, 444.

¹³² *Ibid.*, 445, 447.

¹³³ Keyes, *supra* n 129, 92. See *Huddart Parker Ltd v The Ship “Mill Hill”* (1950) 81 CLR 502, 508; *Compagnie des Messageries Maritimes v Wilson* (1954) 94 CLR 577, 582, 585, 589; *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197, 224, 231, 259.

In the first study, Dr Keyes noted that from 1991 to 2001 an Australian court held jurisdiction against the terms of a choice-of-court agreement in 46 per cent of all cases.¹³⁴ More recently, she has also found that since 2001 the court has held jurisdiction against the terms of an exclusive choice-of-court agreement in 89 per cent of cases.¹³⁵ *Akai*, decided mid-way through the first period, may well have accentuated the parochial leanings of *Voth*. The samples are relatively small, but in whatever way these surveys are read they reinforce that Australian courts would be forced to make a large change in attitude to international litigation if the Choice of Court Convention were implemented.

From a purely doctrinal perspective, the *Spiliada* principles give a better prospect of courts requiring the performance of choice-of-court agreements. Australian courts using the *Spiliada* principles in interstate litigation have recognised the possibility that the proceedings can be held by the court against the terms of a choice-of-court agreement, but more consistently than in international litigation have required the parties to be kept to their bargain.¹³⁶ In *World Firefighters Games Brisbane v World Firefighters Games Western Australia Inc*,¹³⁷ the parties agreed to arrange the staging of “The World Firefighters Games” in Queensland, but also to submit to the exclusive jurisdiction of the Western Australian courts for any disputes under the contract. Proceedings under the contract were brought in the Supreme Court of Queensland, but a transfer to the Supreme Court of Western Australia was sought. Almost all connections of any significance in the case were with Queensland, which was actually, without more, the most appropriate forum for dealing with the dispute. However, the exclusive choice-of-court agreement was decisive in leading Philippides J to transfer the proceedings to Western Australia. The fact that the parties, while conscious of all of the connections that their arrangements had with Queensland, had nevertheless agreed to the exclusive jurisdiction of the Western Australian courts made the agreement an even weightier factor in the decision to transfer.¹³⁸

As noted earlier, New Zealand courts already use the *Spiliada* principles in international litigation. There, choice-of-court agreements seem to be subsumed under the larger question of *forum non conveniens*.¹³⁹ The small number of reported cases involving the treatment of choice-of-court agreements in New Zealand cannot give reliable evidence of any trend. In recent years, New Zealand courts have stayed proceedings and so enforced an exclusive choice of the South African courts for dealing with them,¹⁴⁰ but have also retained jurisdiction

¹³⁴ Keyes, *supra* n 129, 162–75.

¹³⁵ Keyes, *supra* n 44, 23.

¹³⁶ See S Miller and O Nicholls, “Cross-Vesting Civil Proceedings – A Practical Analysis of the Interests of Justice in the Determination of Cross-Vesting Applications” (2004) 30 *Monash University Law Review* 95, 105–8.

¹³⁷ (2001) 161 FLR 355.

¹³⁸ *Ibid*, 369.

¹³⁹ *Supra* n 67.

¹⁴⁰ *Kidd v Van Heeren* [1998] 1 NZLR 324; *Kidd v Van Heeren* [2006] NZCA 42.

against a choice of the Spanish courts.¹⁴¹ In no country has the application of *Spiliada* principles to choice-of-court agreements seen courts abandon the enforcement of contractual promises to anywhere near the extent to which this has happened in Australia.

Although it has been argued that the granting and refusing of stays in Australia on the ground of choice-of-court agreements are not conditioned by principles of *forum non conveniens*,¹⁴² the Trans-Tasman Treaty clearly has the effect of subordinating choice-of-court agreements to the broader search for the more appropriate court.¹⁴³ It is therefore more compatible with the present approach in New Zealand. A stay is to be granted in, say, an Australian court on the ground that a New Zealand court “is the more appropriate court to determine the proceedings”.¹⁴⁴ Article 8(2) of the Treaty then provides that “the more appropriate court” is to be determined “having regard to . . . whether there is agreement between the parties to the proceeding about the court or place where proceedings should be heard”. Accordingly, the effect is to bring the decision to enforce choice-of-court agreements under a *Spiliada*-like discretion to hold on to the proceedings or to let them go. Despite being more deferent to choice-of-court agreements than the Australian approach, the New Zealand approach still recognises that courts are allowed to dishonour them.¹⁴⁵

A decade ago, Richard Garnett argued that Australian courts had “been slow to recognise the importance” of choice-of-court agreements, and in allowing proceedings to be held against the terms of a choice-of-court agreement had undermined certainty in commercial contractual relations and had harmed commercial expectations.¹⁴⁶ The evidence suggests that, since then, they have become even slower, and have now reached a point of disregard for certainty of contract that is unknown in other developed countries.¹⁴⁷ The insistence in the Choice of Court Convention on the performance of exclusive choice-of-court agreements would be an important and valuable correction to this. The Trans-Tasman Working Group made recommendations that suggested – albeit vaguely – that where choice-of-court agreements figure in Trans-Tasman litiga-

¹⁴¹ *Dale v Jeffrey* [2008] NZHC 147, although note (at [66]) the conclusion that the contractual choice did not extend to the issue in dispute. Although the common law of England does not distinguish exclusive and non-exclusive choice-of-courts agreements as emphatically as Australian courts, it is still possible in England for the court to keep proceedings that are in breach of the agreement. It is, however, most unlikely that the court will do that: Briggs, *supra* n 88, 169 regards the prospects of success as “modest”.

¹⁴² Garnett, *supra* n 43, 12–3.

¹⁴³ Cf *The Nile Rhapsody* [1992] 2 Lloyd’s Rep 399.

¹⁴⁴ Art 8(1) Trans-Tasman Treaty.

¹⁴⁵ See *Dale v Jeffrey* [2008] NZHC 147; Briggs, *supra* n 88, 230–1.

¹⁴⁶ Garnett, *supra* n 43, 1–2, 26.

¹⁴⁷ Eg, Woodward, *supra* n 3, 691–2 concludes that American courts enforce choice-of-court agreements without difficulty. See also Briggs, *supra* n 88, 169; AE Kerns, “The Hague Convention and Exclusive Choice of Court Agreements: An Imperfect Match” (2006) 20 *Temple International and Comparative Law Journal* 509, 515–9; Nanda, *supra* n 3, 774–5; Note, *supra* 3, 935–6.

tion, “a court would be required to decline jurisdiction in favour of the chosen court”.¹⁴⁸ The Working Group then claimed that the “approach is consistent with the 2005 *Hague Convention on Choice of Courts Agreements*”,¹⁴⁹ but was silent on the point as to whether the terms of the Convention were to be a legislated qualification to the general *forum conveniens* principle of its suggested Trans-Tasman regime. As it turned out, no attempt was made to incorporate the jurisdictional rules of the Convention into the Trans-Tasman Treaty. They remain at odds.

2. Judgments

A double convention is oriented towards litigants concentrating the contest between them in the court that first deals with the case, and reducing – or eliminating – the possibility of litigation in other places where the judgment is to be enforced. The judgment debtor’s greater exposure to the judgment in countries where enforcement is sought therefore adds to incentives for it to engage properly in the initial proceedings. Consequently, successful double conventions (like the Brussels Regulation and the intra-Australian scheme) are typified by extensive litigation on jurisdictional questions and little, if any, on cross-border enforcement. In the case of the Australian model – which has clear, simple and unqualified rules for cross-border enforcement – there is not a single reported case on the question under the Act of 1992.¹⁵⁰

Under the Choice of Court Convention, the judgment can be refused recognition if the choice-of-court agreement is null and void in the place chosen for the litigation, or if one of the parties lacks capacity to make contracts in that place.¹⁵¹ Convention country courts may also refuse recognition of judgments awarding punitive or exemplary damages.¹⁵² From that point, the Choice of Court Convention departs from the usual structure of double conventions. It allows a Convention country to refuse recognition or enforcement of a judgment if there was a denial of procedural justice in the original court,¹⁵³ if the judgment was obtained by fraud,¹⁵⁴ if recognition or enforcement would be contrary to public policy,¹⁵⁵ or if the judgment is incompatible with a local judgment or an earlier foreign judgment that is also recognised in the place of enforcement.¹⁵⁶ These latter grounds for contesting enforcement parallel those that allow enforcement of a judgment to be resisted at common law,¹⁵⁷ or that enable regis-

¹⁴⁸ Working Group Report, *supra* n 13, 16.

¹⁴⁹ *Ibid.*, 16.

¹⁵⁰ Mortensen, *supra* n 15, 267–8.

¹⁵¹ Art 9(a) and (b) Choice of Court Convention.

¹⁵² Art 11 Choice of Court Convention.

¹⁵³ Art 9(c) Choice of Court Convention.

¹⁵⁴ Art 9(d) Choice of Court Convention.

¹⁵⁵ Art 9(e) Choice of Court Convention.

¹⁵⁶ Arts 9(f) and (g) Choice of Court Convention.

¹⁵⁷ Mortensen, *supra* n 26, 138–43.

tration of a judgment under the imperial scheme of 1933 to be set aside. The existing legislation in Australia and New Zealand still allows registration of judgments to be set aside on the same grounds.¹⁵⁸

The Convention therefore brings only two possible improvements to the existing law in the Trans-Tasman area for the enforcement of judgments, but suggests a further improvement for the Trans-Tasman regime. First, formally at least, it retains the effect of a double convention by denying the right to challenge the jurisdiction of the court that rendered judgment. However, when compared with the existing law in Australia and New Zealand this is only a cosmetic difference. At common law and under the reciprocal enforcement of judgments legislation, the foreign court is taken to have a jurisdiction that is recognised in Australia and New Zealand if the defendant had submitted to the jurisdiction of the original court.¹⁵⁹ A choice-of-court agreement, whether exclusive or non-exclusive, gives that submission.¹⁶⁰ So in the conditions in which the Convention is to apply, a judgment debtor would not have had an effective defence of lack of international jurisdiction under the existing law. Secondly, the Convention allows any non-money judgment to be enforced. This is not possible at common law; nor under statutes presently in force.

It is only to the extent that the Convention allows enforcement of non-money judgments that it would improve the conditions for enforcing foreign judgments in Australia and New Zealand. It does not therefore promise the improvements in efficiency for the circulation of judgments that the Trans-Tasman regime will, and is therefore not as effective as a double convention. The Trans-Tasman Treaty provides that public policy is to be the only possible defence to enforcement of an Australian or New Zealand judgment in the Trans-Tasman Judicial Area.¹⁶¹ As I have suggested, this defence seems unnecessary unless it can be used as a means of dealing with incompatible judgments that emerge from Trans-Tasman litigation. Even with the public policy defence, however, the Trans-Tasman arrangements significantly elevate the incentives for litigants to participate in the original proceedings, and to avoid duplicating litigation in the place of enforcement. And so far as the possibility of incompatible judgments goes, an express legislative statement of how they should be addressed is preferable to a general public policy defence.¹⁶² Article 9 of the Convention itself provides a suitable model for legislation dealing with incompatible judgments by allowing recognition or enforcement to be refused if:

¹⁵⁸ S 7(2) Foreign Judgments Act 1991 (Cth); s 6(1) Reciprocal Enforcement of Judgments Act 1934 (NZ).

¹⁵⁹ Mortensen, *supra* n 26, 131–3, 152; s 7(3)(a)(i) Foreign Judgments Act 1991 (Cth); s 6(3)(a)(i) Reciprocal Enforcement of Judgments Act 1934 (NZ).

¹⁶⁰ Mortensen, *supra* n 26, 131–2.

¹⁶¹ Working Group Report, *supra* n 13, 10, 13.

¹⁶² See *supra* n 106.

- “f) the judgment is inconsistent with a judgment given in the requested State in a dispute between the same parties; or
- g) the judgment is inconsistent with an earlier judgment given in another State between the same parties on the same cause of action, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested State.”

The Convention therefore provides for the usual position that the first judgment made by a court with a recognised jurisdiction to render judgment has priority – a rule that is itself an incentive for parties to engage actively in litigation commenced properly in a Convention country. A similar rule in Trans-Tasman proceedings would therefore give courts an immediate response to any attempt to register an incompatible judgment in the CER market area. Even more importantly, it would enhance the incentives for parties not to pursue parallel litigation in the first place.

D. THE CONVENTION AND THE TREATY: GIVING-WAY

The failure of the Trans-Tasman Treaty to take up the Working Party’s suggestion of incorporating the Choice of Court Convention’s rules of jurisdiction means that, if the Convention is implemented, the opportunity to secure a seamless approach to choice-of-court agreements in Australian and New Zealand courts could well be lost. Potential conflicts between the Trans-Tasman regime and the Convention must therefore be contemplated. As mentioned,¹⁶³ the Convention was drafted with the recognition that there was potential for incompatibility with other double conventions on jurisdiction and judgments. It has therefore tried to deal with that by incorporating “give-way rules”.¹⁶⁴ These are set out in Article 26, and deal with the Convention’s relationship with treaties between Convention countries,¹⁶⁵ pre-existing treaties between Convention and non-Convention countries,¹⁶⁶ treaties for the enforcement of judgments between Convention countries,¹⁶⁷ treaties made by countries after they implement the Convention,¹⁶⁸ and Regional Economic Integration Organisations.¹⁶⁹ It would be expected that, if either of Australia or New Zealand ratifies and implements the Choice of Court Convention, the other is likely to as well. And the creation of a

¹⁶³ See text at *supra* nn 5–9.

¹⁶⁴ Explanatory Report, *supra* n 5, 72–80; Brand and Herrup, *supra* n 111, 168.

¹⁶⁵ Art 26(2) Choice of Court Convention.

¹⁶⁶ Art 26(3) Choice of Court Convention.

¹⁶⁷ Art 26(4) Choice of Court Convention.

¹⁶⁸ Art 26(5) Choice of Court Convention.

¹⁶⁹ Art 26(6) Choice of Court Convention. A Regional Economic Integration Organisation is not defined, but must comprise sovereign states and have its own competence over matters covered by the Convention: see Art 29; and Brand and Herrup, *supra* n 111, 176. It therefore has some legislative capacity. The European Union is an REIO: Explanatory Report, *supra* n 5, 77.

Trans-Tasman Judicial Area by bilateral treaty potentially gives rise to the application of two of the Convention's give-way rules.

Article 26 begins by providing that the Convention is to be interpreted "so far as possible to be compatible with other treaties in force for Contracting States".¹⁷⁰ What will trigger a give-way rule in the Convention is incompatibility: an application of the two instruments that leads to different results.¹⁷¹ While the situations that could give rise to a conflict with the Trans-Tasman regime cannot be exhaustively predicted in advance, the earlier analysis suggests that three points of conflict loom: a common law characterisation of a choice-of-court agreement as non-exclusive when the Convention has it as an exclusive choice; an Australian or New Zealand court keeping proceedings in breach of an exclusive choice-of-court agreement; and a defence available under the Convention (say, an incompatible judgment) to a judgment debtor for resisting enforcement of a judgment which is not available to that person under the Trans-Tasman Treaty.

Conflicts of these kinds most likely attract the "first give-way rule" of Article 26(2). So long as both parties are resident in a Convention country and the other treaty applies to them, the application of the treaty will be preferred. The assumption is that all countries implicated in the litigation have an "interest" in the treaty if it involves their residents, and none is therefore concerned that the treaty will be given priority over the Convention.¹⁷²

The Trans-Tasman regime applies to proceedings when a party is served in Australia or New Zealand,¹⁷³ again reflecting the common law assumption that jurisdiction is grounded on a person's amenability to the Queen's writ.¹⁷⁴ Especially for corporations,¹⁷⁵ residence and presence within the national borders of the two countries will usually coincide and so, by the Convention's own rules, the Trans-Tasman regime will apply. However, if a foreign corporation, doing business in Australia or New Zealand but formed in a third Convention country, is served with process in Australia or New Zealand, Article 26(2) does not allow the Convention to give-way.¹⁷⁶ In their terms, both the Trans-Tasman Treaty and the

¹⁷⁰ Art 26(1) Choice of Court Convention. The co-reporters for the Convention state that, where the Convention is "reasonably capable of two meanings", the meaning that is compatible with the other treaty is to be preferred. However, the language of the Convention is not to be strained to secure a construction that forces a harmonisation of the instruments: Explanatory Report, *supra* n 5, 72.

¹⁷¹ *Ibid*, 72.

¹⁷² *Ibid*, 72–3.

¹⁷³ Art 4(1) Trans-Tasman Treaty.

¹⁷⁴ *John Russell and Co Ltd v Cayzer, Irvine and Co Ltd* [1916] 2 AC 298, 302; *Laurie v Carroll* (1958) 98 CLR 310; *Colt Industries Inc v Sarlie* [1966] 1 All ER 673; *Maharane of Baroda v Wildenstein* [1972] 2 QB 283; *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1, 23, 36.

¹⁷⁵ A corporation is "resident" where it has its statutory seat, in the place that gave it corporate status, where it has its central administration or where it has its principal place of business: Art 4(2) Choice of Court Convention.

¹⁷⁶ *Brand and Herrup*, *supra* n 111, 176.

Convention apply to this situation, but the Convention is to have priority. This would also be the rule for litigation over a multi-party contract between businesses from Australia, New Zealand and a third Convention state (say, the UK). In proceedings like this, the Convention's rules of jurisdiction would place the litigation in the court chosen by the businesses as set out in the contract made between them. It is really only in the unlikely case of proceedings between the Australian and New Zealand parties being conducted separately from any involving just one of them and the UK business that the different treatment of the one choice-of-court agreement could arise. Even here, courts might understandably be reluctant to characterise the one choice-of-court agreement (under the Convention) as exclusive so far as the proceedings involving the UK business were concerned, but non-exclusive (by common law principle) for the litigation just between the Australasian parties. A different characterisation nevertheless remains likely where the Convention's deeming of a choice as exclusive is patently artificial.¹⁷⁷ For instance, an agreement that stated that the parties submitted "to jurisdiction of any competent courts in the Commonwealth of Australia" – a choice that is not limited to one jurisdiction – is itself powerful evidence at common law for construing the choice of court as non-exclusive, where the Convention requires it to be treated as exclusive.¹⁷⁸ I reiterate that the risk of different characterisations under the Convention and the treaty in a case like this is small, and courts will usually do what they can to consolidate different proceedings brought under the one contract. However, splintered adjudication remains possible, and it is only the failure to take up the Trans-Tasman Working Group's recommendation to thread the Convention's rules of jurisdiction through the Trans-Tasman Treaty¹⁷⁹ that makes it possible.

The other give-way rule that could apply in Trans-Tasman proceedings relates only to the recognition and enforcement of judgments. Here, it could be envisaged that a judgment debtor might have a defence against enforcement of a judgment under the Convention that is not available under the Trans-Tasman regime. In short, if any of the defences available under the Convention other than refusing enforcement on the ground of public policy is arguable, the two regimes are in conflict. Article 26(4) ensures that the Convention gives-way to the treaty in this case, as its only requirement is that "the judgment shall not be recognised or enforced to a lesser extent than under this Convention". The Convention, admirably, sets itself as the floor for the conditions in which judgments will circulate,¹⁸⁰ and is prepared to improve enforcement by deferring to more efficient schemes for extending judgments. The refusal of the Trans-Tasman regime to deal expressly with incompatible judgments is, nevertheless,

¹⁷⁷ See text at *supra* n 112.

¹⁷⁸ See text at *supra* n 123–4.

¹⁷⁹ Working Group Report, *supra* n 13, 16.

¹⁸⁰ Brand and Herrup, *supra* n 111, 170.

one point where a conflict is possible. Under the Convention, the judgment must not be recognised in the place of enforcement if it is incompatible with a judgment made in the place of enforcement or with an earlier judgment made in another Convention country where jurisdiction was properly exercised. Under the Trans-Tasman regime, a literal reading of the treaty has an incompatible judgment entitled to registration and enforcement unless the rendering court concludes that registration would be contrary to public policy. Here, too, it would be better that the Trans-Tasman regime adopt the provisions of the Convention and expressly allow registration to be refused to a judgment that is incompatible with one given in the registering country or state, or with an earlier judgment made by any court in Australia or New Zealand with jurisdiction to do so.

E. CONCLUSION

The Choice of Court Convention is an important statement about the value to transnational trade and businesses of certainty in contractual relations. Its ultimate rationale might be to improve the extraterritorial extension of judgments, but in that respect, apart from introducing non-money judgments into the range of internationally enforceable orders, the Convention adds little to the existing law on the enforcement of judgments in Australia and New Zealand.¹⁸¹ Rather, it is in its aim of removing any issue about jurisdiction in relation to exclusive choice-of-court agreements from efforts at enforcing judgments across borders that it would drastically improve the law in the Trans-Tasman area.

Although New Zealand courts are also prepared to dishonour contracting parties' agreements about where to sue, the willingness of Australian courts to use the jurisdictional discretions they have invented since *Voth* and *Akai* to hollow out established principles of contractual certainty is breathtaking. The only evidence that is now available suggests that foreign interests wishing to invest in or trade with Australian businesses are best to expect that an Australian court will disregard any agreement they have deliberately made to litigate in another country. For Australian commercial law it is a juridically embarrassing and economically naïve position to be in.¹⁸² It is counterproductive to the objectives of establishing certainty in international trading and commercial relationships

¹⁸¹ For similar overall assessments, see Briggs, *supra* n 88, 529; Garnett, "Internationalisation", *supra* n 3, 226; *id.*, "Magnum Opus", *supra* n 3, 180; Keyes, *supra* n 44, 2, 30; Fairley and Archibald, *supra* n 3, 431.

¹⁸² Cf the US Supreme Court in *The Bremen v Zapata Off-Shore Co*, 407 US 1, 9 (1972): "[t]he expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts". See also R Mortensen, "Jurisdiction in International Litigation: Book Review" (2007) 16 *Griffiths Law Review* 276, 280; Nanda, *supra* n 3, 774.

and of respecting business expectations. Legislative correction is now the only practical possibility. The implementation of the Choice of Court Convention and the extension of its jurisdictional rules to the whole Trans-Tasman area are therefore opportunities that Australian and New Zealand Governments should seize.

A principled rationale for the Convention's rules of jurisdiction also suggests that they should be preferred for the more intimate arrangements being introduced for the CER market area, and for the intra-Australian model of jurisdiction as well.¹⁸³ In two respects, the example of the Convention can also correct some weakness brought into the Trans-Tasman regime from the Australian scheme for jurisdiction and judgments – the risk of *lis pendens* and incompatible judgments. At the front end of the regime, the effective deterrence or termination of parallel proceedings in a Trans-Tasman Judicial Area is only likely to be guaranteed if the superior courts of both countries retain the power to issue anti-suit injunctions. The practical need for that will nevertheless be reduced if the Convention's rules of jurisdiction are also adopted in Trans-Tasman and intra-Australian cases. At the back end, the Convention's rules that state when the enforcement of incompatible judgments may be refused would bring worthwhile certainty to the terms on which judgments can circulate across borders in the market area. The alignment of the rules for sorting jurisdiction between all polities in the Trans-Tasman area with the provisions of the Convention is therefore both preferable policy and preferable practice. Some effort therefore needs to be taken to stitch Articles 5 and 6 of the Convention into the Trans-Tasman Treaty, as well as the terms of Article 9(f)–(g).¹⁸⁴ The inclusion of Articles 5 and 6 was the apparent recommendation of the Trans-Tasman Working Group,¹⁸⁵ and since both governments agreed to adopt the Working Group's recommendations it is unfortunate that they overlooked this recommendation when concluding the treaty.¹⁸⁶ Furthermore, a sensible alignment of jurisdictional practice suggests that, for intra-Australian disputes as well, similar efforts need to be taken to include the terms of Articles 5 and 6 and, in part, Article 9 in the statutes that provide for the interstate enforcement of judgments and for transfers of proceedings and stays within the federation on *forum non conveniens* grounds.¹⁸⁷ Indeed, it would seem that a stronger case can be made for

¹⁸³ Cf Nanda, *supra* n 3, 775; Note, *supra* n 3, 936–7, 938. Federal Contracting States are not bound to apply the Convention to questions that involve just the different territorial units of the federation: Art 24(2) Choice of Court Convention.

¹⁸⁴ Cf Briggs, *supra* n 88, 532.

¹⁸⁵ Working Group Report, *supra* n 13, 16.

¹⁸⁶ Australian Attorney General Philip Ruddock and New Zealand Associate Minister of Justice Clayton Cosgrove, "Trans-Tasman Cooperation Set to Improve", Joint Media Statement, 25 May 2007.

¹⁸⁷ S 5 Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth); s 5 Jurisdiction of Courts (Cross-vesting) Act 1987 (NSW); ss 20(3)–(5), 109 Service and Execution of Process Act 1992 (Cth).

a categorical rule that requires proceedings to be dealt with in the contractually chosen court where each country and state undoubtedly enjoys more “confidence in the judicial and regulatory institutions of the other”¹⁸⁸ than is possible for the larger group that is presently ratifying the Choice of Court Convention.

¹⁸⁸ Preamble, Trans-Tasman Treaty.