National Interest Analysis [2016] ATNIA 7

with attachment on consultation

Australia's Accession to the Convention on Choice of Court Agreements

(The Hague, 30 June 2005)

[2016] ATNIF 23

NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY

SUMMARY PAGE

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Nature and timing of proposed treaty action

1. This National Interest Analysis proposes that Australia accede to the *Convention on Choice of Court Agreements* (the Convention) as soon as possible after the necessary domestic reforms giving effect to the Convention have been implemented.

2. The Convention was negotiated under the auspices of the *Hague Conference on Private International Law* concluded in The Hague on 30 June 2005. The Convention entered into force generally on 1 October 2015, following the deposit of the instrument of approval by the European Union on 11 June 2015. Currently, all EU Member States (except Denmark) and Mexico (which deposited its instrument of accession on 26 September 2007) are Parties to the Convention.

3. **Article 27** of the Convention states that the Convention is open for ratification, acceptance, approval or accession by all States. Australia proposes to accede to the Convention in accordance with **Article 27**(3). In accordance with **Article 31**(2)(a), the Convention will enter into force for Australia on the first day of the month following the expiration of three months after the deposit of its instrument of accession.

Overview and national interest summary

4. The objective of the Convention is to support party autonomy in international business, by providing uniform rules on jurisdiction and on recognition and enforcement of foreign judgments in civil and commercial matters. This ensures that contractual choices of parties to litigation regarding the jurisdiction in which they wish to resolve their disputes are upheld by courts in all States that are Parties to the Convention. The Convention furthermore enhances judicial cooperation and provides certainty and effectiveness for the recognition and enforcement of foreign judgments given by courts designated in exclusive choice of court agreements. These improvements in turn promote international trade and investment.

5. The Convention applies in international cases to exclusive choice of court agreements concluded in civil or commercial matters. The Convention imposes three key obligations (subject to certain exceptions) on all Contracting States, namely: that the court of a Contracting State designated in a choice of court agreement is obliged to exercise jurisdiction; all other courts are obliged to decline jurisdiction; and the judgments given

by the chosen court must be recognised and enforced by other Contracting States. The Convention provides for certain narrow exceptions and qualifications to these three key obligations, to address situations where the desirability of giving effect to a choice of court agreement might be overridden by other policy considerations.

6. Accession to the Convention is in Australia's national interest. Implementing the Convention will provide greater clarity and certainty for Australian businesses in the resolution of disputes arising from international transactions. Furthermore, accession to the Convention by Australia will facilitate party autonomy in civil and commercial contracts, making the process of determining jurisdiction more transparent and predictable.

Reasons for Australia to take the proposed treaty action

7. There are significant reasons for Australia to become a Party to the Convention. Australia's accession to the Convention will ensure that courts in Australia and other Contracting States will exercise jurisdiction in accordance with any choice of court agreement that exists between the parties to a dispute. This will create certainty for Australian and foreign litigants in the conduct of international transactions, and reduce the risk of unnecessary costs occasioned by parallel proceedings in different jurisdictions.

8. Implementation of the Convention will also ensure that more foreign judgments arising from valid choice of court agreements will be capable of recognition and enforcement in Australia; and more Australian judgments will be capable of recognition and enforcement in other Contracting States. These developments are desirable because they will support the choice of parties to litigate in a particular forum, and to subsequently have judgments recognised and enforced internationally, wherever the judgment debtor's assets may be located.

9. Apart from the immediate benefits for businesses engaging in cross-border transactions, the broader circulation of commercial judgments will also raise the profile of cross-border commercial litigation as an alternative to arbitration. This will ensure stronger competition amongst these mechanisms, which may result in lower costs for litigants.

10. Australia has already adopted certain elements of the Convention through the *Trans-Tasman Proceedings Act 2010* (Cth). This legislation requires the enforcement of exclusive choice of court agreements with very limited exceptions, and therefore gives choice of court agreements in trans-Tasman litigation greater effect than is currently afforded to such agreements in other international cases.

Obligations

11. The Convention will impose three key obligations on Australia as a Party to the Convention (subject to limited exceptions and qualifications):

(i) an Australian court designated in a choice of court agreement is obliged to exercise jurisdiction to decide a dispute to which the agreement applies (**Article 5**);

(ii) an Australian court not designated in a choice of court agreement is obliged to decline jurisdiction and suspend or dismiss proceedings to which the agreement applies (**Article 6**); and

(iii) judgments given by a foreign court pursuant to a choice of court agreement made by the parties must be recognised and enforced by an Australian court (**Article 8**).

Details of the key features of the Convention are outlined below.

Scope of the Convention

12. The scope of the Convention is limited to exclusive choice of court agreements arising in civil and commercial disputes, where the case has an international element (**Article 1**). Existing laws relating to the treatment of choice of court agreements and the recognition and enforcement of foreign judgments will continue to apply in disputes that are outside the scope of the Convention.

13. In light of the commercial focus of the Convention, employment and consumer contracts are excluded from its scope (**Article 2**(1)). Some subject matters are also excluded where the matter is not commercial in nature, falls within the scope of other specialist Conventions, or is more appropriately dealt with by particular courts with exclusive jurisdiction given public policy considerations and the interests of third parties (**Article 2**(2)-(5)).

14. The Convention is limited in its coverage to 'exclusive' choice of court agreements that meet certain requirements as defined (**Article 3**). The Convention presumes choice of court agreements to be exclusive unless the parties have expressly provided otherwise (**Article 3**(b)).

Jurisdiction

15. The Convention creates an obligation on the chosen court to hear matters arising from an international civil or commercial contract where that court has been designated as the chosen court for dispute resolution in an exclusive choice of court agreement (**Article 5**). The only basis for Australian courts not to accept jurisdiction is where the choice of court agreement is null and void under Australian law. The term 'null and void' is intended to refer to generally recognised legal grounds like fraud, mistake, misrepresentation, duress and lack of capacity.

16. There is, furthermore, an obligation on courts, subject to certain exceptions, to suspend or dismiss proceedings if the court of another Contracting State is the court chosen in an

exclusive choice of court agreement (**Article 6**). Grounds for refusing to stay proceedings where the Australian court is not the chosen court are limited to circumstances where:

(a) the choice of court agreement is null and void under the law of the State of the chosen court;

(b) a party lacked the capacity to conclude the agreement;

(c) giving effect to the agreement would lead to manifest injustice or would be manifestly contrary to Australian public policy;

(d) for exceptional reasons the agreement cannot reasonably be performed; or

(e) the chosen court has decided not to hear the case.

If one of the above stated exceptions to this rule applies, the prohibition against hearing the case is lifted, and an Australian court may exercise such jurisdiction as it would have under its own law.

Recognition and Enforcement of Judgments

17. A judgment given by a court of a Contracting State designated in an exclusive choice of court agreement must be recognised and enforced in other Contracting States (**Article 8**). Recognition or enforcement may be refused only on the grounds specified in the Convention, that is: the agreement was null and void under the law of the State of the chosen court; a party lacked the capacity to conclude the agreement; the defendant was not properly notified of the proceedings; the judgment was obtained by fraud in connection with a matter of procedure; recognition or enforcement of a judgment would be manifestly incompatible with the public policy of the requested State; or there is inconsistency with a prior judgment (**Article 9**).

Damages

18. The Convention allows a court to refuse the recognition or enforcement of a judgment to the extent it awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered (**Article 11**). Furthermore, the Convention provides for the recognition and enforcement of a severable part of a judgment where this is applied for, or where only part of the judgment is capable of being recognised or enforced under the Convention (**Article 15**).

19. The **Explanatory Report** to the Convention clarifies that it is not intended that the Convention will affect the procedural law of Contracting States, except where specifically provided (Paragraph 88). Accordingly, implementation of the Convention will not require Australian courts to enforce relief awarded in a foreign judgment where such relief is not available under Australian law.

Procedural Matters

20. The Convention also sets out the documents that must be produced by a party seeking recognition and enforcement of a foreign judgment (**Article 13**). It furthermore preserves the operation of domestic law with respect to the procedure for recognition and enforcement of judgments, unless the Convention provides otherwise (**Article 14**).

Implementation

21. It is proposed that the Convention will be implemented domestically through a new *International Civil Law Act*. This Act will also implement the *Hague Principles on Choice of Law in International Commercial Contracts* approved by the Hague Conference on Private International Law on 19 March 2015 ('Principles'). The Principles consist of 12 articles designed to clarify the operation of contracts with cross-border elements in international commercial law. They establish the basic rule that international commercial contracts are to be governed by the law chosen by the parties, subject to certain limitations. The Principles are a guide to best practice with respect to the recognition of party autonomy in choice of law in international commercial contracts. They are neither binding at international law, nor a model law, but are designed to be incorporated into State law in the manner most appropriate to each State, so as to develop and harmonise State laws.

22. The Convention and the Principles are well suited to implementation via a single Act, which will provide clear, consistent and accessible Australian private international law rules and principles to litigants in Australia and abroad.

23. For international proceedings, the treatment of exclusive choice of court agreements is currently governed by the common law, and the Trans-Tasman Proceedings Act for Trans-Tasman litigation. Exclusive choice of court agreements are generally regarded as enforceable in Australia, subject to certain limitations relating to the validity of the agreement and public policy considerations.

24. The proposed International Civil Law Act will codify the common law relating to choice of court agreements, clarify areas of uncertainty, and broaden the range of situations in which choice of court agreements will be given effect by Australian courts, consistent with Convention obligations. It will also set out the circumstances in which the recognition and enforcement of foreign judgments can occur in Australia. In accordance with the provisions of the Convention, the new Act will limit the possible grounds for refusing to give effect to an exclusive choice of court agreement.

25. In accordance with **Article 6**(c) of the Convention, in circumstances where the agreement between the parties is inconsistent with an Australian law that expressly prohibits parties from contracting out of the forum or its laws, the International Civil Law Act will create an exception to the general obligation to give effect to an exclusive choice of court

agreement between the parties.[1] However, in order to improve clarity and certainty in international commercial transactions, Australian parties to an international contract will not be able to rely on the loss of other domestic protections under Australian law to override otherwise valid choice of court agreements to refer the dispute to a foreign court. This approach will promote the core objective of the Convention to enhance party autonomy and protect contractual expectations, while maintaining protection of fundamental public policy interests. It is important to note, in this context, that the Convention does not apply to consumers or contracts of employment (**Article 2**(1)).

26. The recognition and enforcement of foreign judgments in Australia is based in part on statute (the *Foreign Judgments Act 1991* (Cth) and the Trans-Tasman Proceedings Act for New Zealand judgments), and in part on common law rules. The Convention provides a broader definition of 'judgment' than the Foreign Judgments Act or common law, which are limited to the recognition of money judgments. Australia's domestic implementation of the Convention will ensure that more foreign judgments arising from valid choice of court agreements will be capable of recognition and enforcement in Australia. Similarly, it is expected that Australia's accession to the Convention will ensure that a greater number of Australian judgments will be capable of recognition and enforcement abroad.

27. The Convention does not affect the application of a different treaty for the purposes of recognition and enforcement of a foreign judgment, provided that the judgment is not recognised or enforced to a lesser extent than it would be under the Convention (Article 26). Given that the Trans-Tasman Proceedings Act gives effect to a treaty between Australia and New Zealand and establishes more favourable grounds for the registration and enforcement of New Zealand judgments in Australia than the Convention, it is intended that this Act will prevail for such judgments.

28. In respect of all other foreign judgments that fall within the scope of the Convention, it is intended that the proposed International Civil Law Act will have primacy over the Foreign Judgments Act and common law mechanisms for the recognition and enforcement of judgments. Foreign judgments that do not fall within the scope of the International Civil Law Act will continue to be eligible for enforcement under these alternative regimes.

Costs

29. It is not anticipated that becoming a Party to the Convention will have any cost implications for Australia.

30. The Office of Best Practice Regulation has been consulted and confirms that a Regulation Impact Statement is not required (ID 18992).

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[1] For example, ss8 and 52 of the *Insurance Contracts Act 1984* (Cth) demonstrate a legislative intent to prohibit the parties to a contract of insurance from contracting out of the operation of the Act.

Future treaty action

31. The Convention makes specific provisions for Contracting States to make declarations, including with respect to non-unified legal systems (**Article 28**). Australia does not intend to make any declarations or reservations to the Convention when lodging its Instrument of Accession.

32. The Hague Conference on Private International Law ('Conference') will consider at regular intervals whether it is desirable to make any amendments to the Convention (**Article 24**). Although the Convention does not provide a specific amendment procedure, it may be amended by agreement between the Parties in accordance with **Article 39** of the *Vienna Convention on the Law of Treaties* [1974] ATS 2 and as advised by the consideration of the Conference. Any decision to become a party to a future amendment will be subject to Australia's domestic treaty-making requirements.

Withdrawal or denunciation

33. **Article 33** provides that the Convention may be denounced by notification in writing to the depositary. Any denunciation by a Contracting State to the Convention takes effect on the first day of the month following the expiration of twelve months after the date on which the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of the specified period after the date on which the notification is received by the depositary. A decision by Australia to withdraw from the Convention would be subject to Australia's domestic treaty-making requirements.

Contact details

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ATTACHMENT ON CONSULTATION

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CONSULTATION

34. The States and Territories were notified of Australia's intention to become a Party to the *Convention on Choice of Court Agreements* in the Commonwealth-States Standing Committee on Treaties (SCOT) in June 2015.

35. There were, furthermore, two sets of consultations which provided feedback on the desirability of Australia acceding to the Convention. The first consultation was conducted in 2008/09 and focussed exclusively on Australia's accession to and implementation of the Convention. The second time stakeholders could comment on the Convention was as part of the 2012 Private International Law Consultation. Both consultations highlighted stakeholder support for Australia becoming a Party to the Convention.

2008 Consultation

36. The responses received in 2008/09 indicated that most respondents supported Australia acceding to the Convention. There was a general consensus that it would improve certainty in commercial transactions and remove jurisdiction as a matter in issue. This consultation captured government bodies, State and Territory law departments, the courts and other key external stakeholders.

2012 Consultation

37. The 2012 consultation was wide-ranging and was open to any individual, academic, business, organisation or public authority with an interest in relevant areas. Two papers were released online, with relevant announcements made through social media platforms, including LinkedIn and Twitter. The papers were also sent in hard-copy to over 400 stakeholders, including members of the judiciary at federal, state and territory level, ASX 100 companies, academics, large and medium-sized law firms and peak bodies, such as the Law Council of Australia, all Law Societies and Bar Associations and the Australian Chamber of Commerce and Industry.

38. The Commonwealth received submissions from leading private international law experts, businesses and peak interest groups. Several submissions stressed the importance of choice of court clauses being respected (save for certain exceptions) so as to enhance certainty in international transactions and dispute resolution.