Submission to the Joint Standing Committee on Treaties Inquiry on Australia's Accession to the Hague Convention on Choice of Court Agreements

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On 15 March 2016, the Federal Parliament tabled a National Interest Analysis[1] ('NIA') proposing that Australia[2] accede to the Convention on Choice of Court Agreements (The Hague, 30 June 2005) ('Convention').[3] We strongly support Australia's accession to the Convention in principle. The government proposes to implement the Convention by way of a new International Civil Law Act.[4] It also proposes to give effect to the Hague Choice of Law Principles on International Commercial Contracts in the same piece of legislation ('Principles').[5] The government intends to introduce the draft legislation during the winter sittings of 2016.[6]

This submission relates only to the proposal to implement the Convention and does not consider the implementation of the Principles.[7] It will focus on the following aspects of the NIA: 'Scope of the Convention',[8] 'Implementation',[9] and 'Future treaty action'.[10] In section A, we provide an overview of our conclusions and key recommendations regarding Australia's accession to and implementation of the Convention. Section B critically analyses the NIA's proposal for the Conven-

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[1] National Interest Analysis [2016] ATNIA 7, Australia's Accession to the Convention on Choice of Court Agreements [2016] ATNIF 23 (tabled 15 March 2016).
[2] See Mary Keyes, 'Jurisdiction under the Hague Choice of Courts Convention: Its Likely Impact on Australian Practice' (2009) 5 *Journal of Private International Law* 181; Reid Mortensen, 'The Hague and the Ditch: The Trans-Tasman Judicial Area and the Choice of Court Convention' (2009) 5 *Journal of Private International Law* 213.
[3] Convention of 30 June 2005 on Choice of Court Agreements, art 27(4). The Convention entered into force on 1 October 2015 following its ratification by the European Union.
[4] NIA, para 2.
[5] NIA, para 21.
[6] Department of Prime Minister and Cabinet, Legislation Proposed for Introduction in the 2016 Winter Sittings' <https://www.dpmc.gov.**au**/sites/default/.../2016-winter-public-list.doc> (accessed 18 April 2014).
[7] See Brooke Adele Marshall, 'Reconsidering the Proper Law of the Contract' (2012) 13 *Melbourne Journal of International Law* 505.
[8] NIA, paras 12-14.
[9] NIA, paras 21-28.
[10] NIA, paras 31-32.

tion's implementation, recommending several refinements, and considers the Convention's broader impact on Australian law. The submission concludes with several remarks in section C regarding the possibility of extending the Convention following accession.

A. Conclusions and recommendations

The common law currently governs the effect of almost all international choice of court agreements in Australia. Accession to the Convention will standardize the treatment of all *exclusive* jurisdiction agreements designating Australian courts as well as the courts of the countries which have ratified the Convention ('Contracting States'), which at the time of writing this submission were Mexico and 28 Member States of the European Union.[11] The Trans-Tasman Proceedings Act 2010 (Cth) already provides for very similar treatment of exclusive jurisdiction clauses in favour of the courts of New Zealand. Subject to the following comments about the way in which the Convention is implemented in Australian law, we strongly support Australia's accession to the Convention.

I. Limited impact of accession on exclusive and non-exclusive jurisdiction agreements nominating Australian courts

Accession to the Convention would not significantly change the effect of exclusive jurisdiction clauses nominating Australian courts from the perspective of litigation in Australia: Australian courts already almost invariably enforce these agreements.[12] The Convention obliges a chosen court to exercise its jurisdiction unless the jurisdiction agreement is null and void,[13] or the country of the chosen court has made a declaration under Article 19.[14] The Convention does not permit the chosen court to decline jurisdiction on the basis that a foreign court should determine the dispute.[15] This aspect of the Convention would change the common law which does not impose an obligation on the chosen court to hear the case, and allows the chosen court to decline jurisdiction. However, the Convention would not substantive-

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[11] (ie all Member States of the European Union excluding Denmark). Singapore has signed the Convention and on 4 April 2016 tabled the Choice of Court Agreements Bill (No 14/2016) signalling a step towards ratification. The United States of America and Ukraine have also signed but not ratified the Convention. The Hague Conference on Private International Law states that Denmark, China, Macedonia, Serbia, Costa Rica and Argentina are considering the Convention: Permanent Bureau, 'Ongoing Work in the Area of Judgments' (Prel Doc No 7B of January 2016), paras 5-7.

[12] Cf *Armacel Pty Ltd v Smurfit Stone Container Corp* (2008) 248 ALR 573.

[13] Art 5(1); Trevor Hartley and Masato Dogauchi, Explanatory Report on the Convention of 30 June 2005 on Choice of Court Agreements (Hague Conference on Private International Law 2005), 21, paras 42-43.

[14] Article 19 permits a State to 'declare that its courts may refuse to determine disputes to which an exclusive choice of court agreement applies if, except for the location of the chosen court, there is no connection between that State and the parties or the dispute."

[15] Art 5(2).

ly change the outcome in terms of the effect that Australian courts give to exclusive choices of Australian courts, and for this reason we do not discuss that aspect of the Convention any further.

In terms of its effect on non-exclusive choices of Australian courts, which preserve the jurisdiction of other competent courts and the right of parties to bring proceedings in those courts, accession to the Convention is likely to lead to more jurisdiction agreements being characterized as exclusive because it presumes that jurisdiction agreements are exclusive. The Convention does not apply to non-exclusive agreements, so it will have no impact on the effect that is given to those agreements. The effect of Australian non-exclusive jurisdiction agreements in Australian litigation will continue to be regulated by the common law.

II. Extensive impact of accession exclusive jurisdiction agreements nominating foreign courts and shortcomings of the International Civil Law Act

The major impact of the Convention, which will modify Australian law in a positive way, will be on the treatment by Australian courts of exclusive jurisdiction clauses that nominate the courts of foreign Contracting States. Australian courts' treatment of exclusive jurisdiction agreements nominating foreign courts is much in need of reform.[16] The Convention's strict approach to the enforcement of exclusive agreements is likely to lead to improvement.

Accession to the Convention will regularize Australian courts' treatment of many but certainly not all exclusive jurisdiction agreements. If the International Civil Law Act proceeds as proposed, improvement will be limited to the treatment of exclusive jurisdiction clauses designating foreign Contracting States. Exclusive agreements designating non-Contracting States, other than New Zealand, will continue to be dealt with by common law principles and be subject to current court practices. The decision to confine the International Civil Law Act to the regulation of exclusive jurisdiction agreements nominating Contracting States should therefore be carefully considered. Expansion of the Act to exclusive jurisdiction agreements nominating the courts of any legal system, including non-Contracting states, should in our view be explored.[17]

III. Positive effect of accession on non-exclusive jurisdiction agreements designating foreign courts

Accession to the Convention is likely to reduce preliminary litigation as to whether a jurisdiction agreement nominating foreign courts is exclusive or non-exclusive

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[16] Section Chapter 1 – B.I.1.b).
[17] Section Chapter 1 – B.I.

under common law principles. All jurisdiction agreements nominating Contracting States that do not correspond with the Convention's natural and ordinary definition of 'exclusive' will be non-exclusive. The characterization of a jurisdiction agreement as exclusive or non-exclusive[18] determines whether an Australian court should stay proceedings because of the agreement or retain jurisdiction notwithstanding it. The Convention will therefore have a positive indirect effect on the treatment of all choice of court agreements designating Contracting States, even those non-exclusive jurisdiction agreements that are outside its scope.[19]

IV. Limited impact of accession on Australia's treatment of foreign judgments

The Convention will modify the current Australian treatment of judgments given by foreign courts which had jurisdiction solely based on the parties' choice of court.[20] Australian law currently provides specifically for the recognition of judgments given on the basis of the parties' exclusive choice of court only where the agreement nominates New Zealand courts. In relation to the judgments of every other country, Australian law nonetheless requires recognition of a judgment from a court which had exclusive jurisdiction but on the legal basis that the jurisdiction agreement demonstrates submission to the jurisdiction, so in this respect, the Convention will not modify the current law. However, under current principles, judgments might be refused recognition in a broader range of situations than they would under the Convention.

V. Effect of accession on Australia's protection of weaker contracting parties

We suggest that Australia reconsider its intention not to make any declarations on accession to the Convention.[21] We encourage consideration of the possibility of making a declaration with respect to a specific matter, namely the protection of insured parties.

B. Analysis

Part I of this section will examine the implications of confining the International Civil Law Act to exclusive jurisdiction agreements within the scope of the Convention. Part II considers the positive, indirect effect that accession will have on the treatment of jurisdiction agreements designating Contracting States that are outside the Convention because they are non-exclusive. In Part III, the welcome refine-

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[18] Chapter 1 – B.I.1.a).
[19] Section Chapter 1 – B.II.
[20] Chapter 1 – B.III.
[21] Chapter 1 – B.IV.

ment that the Convention will bring to the treatment by Australian courts of judgments given by a foreign court, the jurisdiction of which derives from an exclusive choice of court agreement, is discussed. In Part IV, we make several critical remarks in relation to the proposal not to make any declarations to the Convention.

I. The scope of the proposed International Civil Law Act

The NIA states that the 'treatment of choice of court agreements and the recognition and enforcement of foreign judgments' that are outside the scope of the Convention will be governed by existing laws.[22] It is somewhat unclear whether the International Civil Law Act will, like the Convention, govern only choice of court agreements within the scope of the Convention or whether it will also apply to other agreements outside the Convention's scope.[23]

Assuming it mirrors the scope of the Convention, the impact of the proposed International Civil Law Act on the common law in relation to choices of foreign courts would be narrower than the NIA claims. Unless the International Civil Law Act makes provisions for exclusive jurisdiction agreements nominating non-Contracting States and non-exclusive choice of court agreements, it will not 'codify the common law relating to choice of court agreements' as the NIA suggests.[24] It will create a more complex regime than currently exists for jurisdiction agreements in civil and commercial matters:[25] the treatment of exclusive jurisdiction agreements nominating Contracting States will be governed by the Convention; the treatment of exclusive jurisdiction agreements nominating non-Contracting States will be governed by common law principles; the treatment of exclusive jurisdiction agreements for cases involving an Australian and New Zealand element[26] will be governed by the Trans-Tasman Proceedings Act 2010 (Cth); and the treatment of all non-exclusive choice of court agreements designating foreign courts will continue to be governed by common law principles, although their characterization as non-exclusive will be dictated by the Convention or the Trans-Tasman Proceedings Act or the common law, depending on which court is chosen. The Convention and the Trans-Tasman Proceedings Act conceptualize exclusivity in identical terms,[27] which is different from the common law. Establishing such a complex regime will undermine the achievement of the Convention's objective to create

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[22] NIA, para 12.
[23] NIA, paras 21-23, 25 cf para 24.
[24] NIA, para 24.
[25] Consumer and employment contracts are excluded from both the Convention (art 2(1)) and the Trans-Tasman Proceedings Act 2010 (Cth) (s 20(3)(a), (b)).
[26] Trans-Tasman Proceedings Act 2010 (Cth), s 3.
[27] Trans-Tasman Proceedings Act 2010 (Cth) ss 4, 20(3)(a); Convention, art 3(a).

'greater clarity and certainty'.[28] Therefore, in our view there is much to be gained from considering the extension of the Convention scheme to apply to all choice of court agreements, including those which select the courts of non-Contracting States.

1. Extension of Convention principles to exclusive jurisdiction agreements designating non-Contracting States via the International Civil Law Act

The proposal to limit the International Civil Law Act to the regulation of exclusive jurisdiction agreements which designate Contracting States should be carefully considered. This limitation would result in a split regime for the characterization and treatment of exclusive jurisdiction agreements under Australian law, unless or until all countries ratify the Convention. In the following sections, we will show why this approach is sub-optimal.

a) *Improvement of characterization of jurisdiction agreements as exclusive or non-exclusive*

Making no provision in the International Civil Law Act for exclusive jurisdiction agreements designating non-Contracting States would be a missed opportunity to refine the principles concerning the distinction between exclusive and non-exclusive agreements, with reference to the Convention's approach. The Convention deems a jurisdiction agreement to be exclusive, unless the parties 'expressly provided otherwise'.[29] The Australian law presently contains no such presumption, though Australian commentators observe that this would improve the law.[30] The presumption also features in several regional instruments governing choice of court.[31]

If jurisdiction agreements designating non-Contracting states are excluded from the International Civil Law Act, the determination of whether such agreements are classified as exclusive would be governed by existing, unsatisfactory common law principles. The question of whether an agreement is exclusive or non-exclusive is, under current principles, a question of interpretation undertaken by reference to a disparate body of principles.[32] These principles reflect the approach

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[28] NIA, para 6.
[29] Art 3(b).
[30] Richard Garnett, 'The Enforcement of Jurisdiction Clauses' (1998) 21(2) *University of New South Wales Law Journal* 1, 5-9; Mary Keyes, *Jurisdiction in International Litigation* (Federation Press 2005), 97.
[31] Brussels I Recast Regulation, art 25(1); Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 21 December 2007 [2009] OJ L 147/5, art 23(1).
[32] Although in principle, interpretation of a jurisdiction agreement ought to be governed by the proper law of the contract, in several cases Australian courts have held that the *lex fori* is applicable to this question: *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197, 225, 255; *Venter v Ilona MY Ltd* [2012] NSWSC 1029; *Hargood v OHTL Public Company* [2015] NSWSC 446.

taken by other common law courts. The refinement of these principles is '[s]till on the to do list',[33] despite persistent criticism.[34]

Where characterization is a question of interpretation, carried out by reference to inconsistent principles, it is prone to be exploited: whatever the parties' intentions at the time of making the contract, each party is likely to argue in favour of an interpretation most favourable to them at the time a dispute arises. The requirement that parties must make their intentions express if they do not wish to agree that the nominated court should have exclusive jurisdiction is likely to encourage clearer drafting. Clearer drafting will reduce the scope for parties to exploit uncertainties in the jurisdiction agreement when a dispute arises.[35]

b) *Improvement of Australian courts' treatment of all exclusive jurisdiction agreements designating foreign courts*

In our view, the Convention's treatment of exclusive jurisdiction agreements in commercial cases is generally principled and suitable for exclusive jurisdiction agreements in general, whether they designate the courts of a Contracting State or not. It is analogous to the treatment of international arbitration agreements under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ('New York Convention'), which operates well in practice. The exceptions to enforcement in the Convention are very similar to those in the New York Convention, which in practice provide appropriate and sufficient protections. In this section, we explain how the Convention would improve current principles with a view to showing why the International Civil Law Act should extend the Convention's principles to all exclusive agreements designating foreign courts.

The Convention will deprive Australian courts of their discretion to retain jurisdiction, if the criteria of application are satisfied and none of the exceptions apply.[36] Australian courts actively assert their authority to determine whether jurisdiction should be retained even though there is an exclusive choice of foreign courts. They have a greater tendency than the courts of other countries to retain jurisdiction, despite an otherwise effective foreign exclusive agreement, although as Gar-

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[33] Adrian Briggs, 'The Subtle Variety of Jurisdiction Agreements' [2012] LMCLQ 364, 375.

[34] See *BNP Paribas SA v Anchorage Capital Europe LLP* [2013] EWHC 3073 (Com Ct) [87] (Males J); Adrian Briggs, *Civil Jurisdiction and Judgments*, (6th edn, Informa Law 2015), para 4.50.See also M Davies, A S Bell, P L G Brereton who note that on application of these principles, 'it is not unusual for judges to take different interpretations of the same clause', in different cases or even within the same case: *Nygh's Conflict of Laws in Australia* (9th edn, LexisNexis 2014), para 7.67.

[35] Mary Keyes and Brooke Adele Marshall, 'Jurisdiction Agreements: Exclusive, Optional and Asymmetrical' (2015) 11 *Journal of Private International Law* 345, 361.

[36] Art 6.

nett shows, there has been a marked improvement in the enforcement of jurisdiction agreements since 2010.[37]

The Convention allows the non-chosen court to retain jurisdiction only in five situations.[38] These are where:

- the agreement is null and void according to the law of the state of the chosen court;[39]
- one party lacked contractual capacity under its law;[40]
- giving effect to the agreement would 'lead to a manifest injustice or would be manifestly contrary to the public policy' of its law;[41]
- for 'exceptional reasons beyond the control of the parties', the agreement 'cannot reasonably be performed';[42] or
- the chosen court has decided not to hear the case.[43]

Constraining the Australian courts' ability not to enforce a jurisdiction agreement designating foreign courts to these very limited circumstances would substantially change the Australian law. Accordingly, there is a risk that the parties will be more likely directly to challenge the effectiveness of jurisdictional agreements.[44]

The exceptions to non-enforcement fall into two categories.[45] The first relates to the protection of the parties' rights to a fair hearing, by protecting the parties from any 'manifest injustice' that might result from the enforcement of their agreement, and by ensuring the parties are not deprived of a forum if the chosen court declines to hear the case. The exceptions in the second category, although based on the exceptions under the New York Convention, are even more constrained. A non-chosen court is not obliged to enforce a choice of court agreement if it is null and void; if the agreement's enforcement would be 'manifestly contrary' to the forum's public policy; and if performance of the choice of court agreement is impossible. The first category relates to fairly uncontroversial exceptions which seldom arise in practice and for this reason we do not discuss these any further.[46]

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37 Richard Garnett, 'Jurisdiction Clauses Since *Akai*' (2013) 87 *Australian Law Journal* 134.
38 Art 6.
39 Art 6(a).
40 Art 6(b).
41 Art 6(c).
42 Art 6(d).
43 Art 6(e).
44 Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (OUP 2008), 530.
45 Keyes, above n 2, 207.
46 For analysis of these exceptions, see Keyes, above n 2, 208.

If the Convention were to be implemented in Australia, the narrow scope of the second group of exceptions should lead to more regular enforcement of choice of court agreements. The first of these exceptions, allowing non-enforcement if the choice of court agreement is null and void, states that this issue must be determined by the law of the chosen court.[47] The Brussels I Recast Regulation, applicable to choice of court agreements in the European Union, also adopts this approach.[48] This would improve the current Australian position, under which the validity of choice of court agreements is determined under Australian law as the law of the forum.[49]

The public policy exception is designed to be used restrictively.[50] It is unclear whether particular provisions of Australian legislation which Australian courts treat as having internationally mandatory effect should be covered by this exception.[51] The Australian government considers that these provisions undoubtedly fall within the public policy exception and proposes to make an express carve out for them in the International Civil Law Act.[52] Recent cases are consistent with this view[53] suggesting that Australian courts would probably regard the potential non-application of provisions such as section 18 of the Australian Consumer Law[54] by a foreign court as manifestly contrary to Australian public policy, although this issue is likely to be hotly contested.[55]

The exception in relation to the difficulty in performing the choice of court agreement only permits non-enforcement if the agreement cannot be performed because of 'exceptional reasons beyond the control of the parties'.[56] This is intend-

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[47] Art 6(a).

[48] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2012] OJ L 351/1 (Brussels I Recast Regulation), Art 25(1).

[49] *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197, 225 (Brennan J), 260-1 (Gaudron J). Wilson and Toohey JJ applied the law of the forum to this issue without explaining why (at 202) and Deane J agreed with Wilson and Toohey JJ on this point (at 256). See also *Venter v Ilona MY Ltd* [2012] NSWSC 1029; *Hargood v OHTL Public Company* [2015] NSWSC 446. Cf Richard Garnett, 'The Internationalisation of Australian Jurisdiction and Judgments Law' (2004) 25 *Australian Bar Review* 205, 214 (stating that the proper law of the contract governs validity).

[50] Hartley and Dogauchi, above n 13, 48.

[51] See Garnett, 'The Hague Choice of Court Convention: Magnum Opus or Much Ado about Nothing?' (2009) 5 *Journal of Private International Law* 161, 166-7.

[52] Text to n 84.

[53] *Akai Pty Ltd v The People's Insurance Co Ltd* (1996) 188 CLR 418; *Clough Engineering Ltd v Oil and Natural Gas Corporation Ltd* [2007] FCA 881; *Hume Computers Pty Ltd v Exact International BV* [2006] FCA 1440; *Commonwealth Bank of Australia v White* [1999] 2 VR 681; *The Society of Lloyd's v White* [2004] VSCA 101.

[54] Which replaced s 52 of the Trade Practices Act 1974 (Cth), with effect from 1 January 2011

[55] Text to n 84.

[56] cf the New York Convention which allows for the non-enforcement of arbitration agreements if they are 'incapable of being performed'.

ed to apply only in truly exceptional cases, such as where the jurisdiction agreement has been frustrated.[57] This is unlikely to be established in many cases.

c) *Impact of extension on the desired policy*

From a policy perspective, it might be argued that leaving agreements designating non-Contracting States to be determined according to existing chaotic principles relevant to characterization and not affording them the treatment that they would receive under the Convention will encourage other states to accede to the Convention.[58] The merits of this approach rest on the assumption that the Convention will attract the same worldwide following as the New York Convention. Unless and until the Convention fulfils this ideal,[59] the approach of Australian courts to exclusive jurisdiction agreements would be disparate.

II. Non-exclusive jurisdiction agreements designating Contracting States

The Convention applies only to jurisdiction agreements designating the courts of a single Contracting State to the exclusion of all others. Non-exclusive choice of court agreements designating a Contracting State, which preserve the jurisdiction of other competent courts and the right of parties to bring proceedings in those courts, are outside the scope of the Convention. The NIA states that the 'treatment of choice of court agreements' that are outside the scope of the Convention will be governed by existing laws. While this is true with respect to an agreement's effects, accession to the Convention will nonetheless dictate the way all choice-of-court agreements designating Contracting States are characterized at common law.[60]

As discussed in section B.I.1.a) above, the Convention deems a jurisdiction agreement to be exclusive unless the parties have *expressly* agreed otherwise. Many agreements that would, under current principles, be characterized as non-exclusive, would on accession to the Convention be characterized as exclusive.[61] Accession would therefore result in more agreements being characterized as exclusive than is currently the case at common law.

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[57] Hartley and Dogauchi, above n 13, 48.

[58] This approach, adopted by the European Union, has been criticized: see eg Illaria Queirolo 'Choice of Court Agreements in the New Brussels I-Bis Regulation: A Critical Appraisal' (2013–2014) 15 *Yearbook of Private International Law* 113, 136-137.

[59] Hartley and Dogauchi, above n 13, 787.

[60] This is in contrast to the way all choice of court agreements designating non-Contracting States will continue to be characterized if the International Civil Law Act is confined as proposed: Chapter 1 – B.I.1.a).

[61] See Mortensen, above n 2, 231.

III. Recognition of judgments from courts with jurisdiction under an exclusive agreement

The treatment of foreign judgments given by a foreign court the jurisdiction of which derives from an exclusive choice of court agreement would be a welcome refinement to the current law. Recognition of foreign judgments, including those which are given by a foreign court the jurisdiction of which is based on an exclusive choice of court agreement, is currently regulated by the Trans-Tasman Proceedings Act 2010 (Cth) in relation to the judgments of New Zealand courts; by the Foreign Judgments Act 1991 (Cth), in relation to the judgments of courts of the countries listed in the Schedule to the Foreign Judgments Regulation; and by the common law in relation to the judgments of all other countries. The Trans-Tasman Proceedings Act is the only one of these schemes which specifically provides for the enforcement of judgments given on the basis of the parties' exclusive choice of court. Both the Foreign Judgments Act and the common law require recognition of a judgment given in such a case, on the basis that the jurisdiction agreement demonstrates submission to the jurisdiction, but both also allow non-enforcement of a judgment in a broader range of situations than under the Convention. The Convention's approach to enforcement of judgments limits the circumstances in which a judgment debtor can challenge enforcement.

IV. Declaration to the Convention concerning weaker parties on accession

Australia does not intend to make any Convention declarations on accession to the Convention. The Convention allows a Contracting State with a 'strong interest' in not applying the Convention to a particular matter, to make a declaration to that effect.[62] After investigation, Australia may consider it appropriate to make a declaration, as the European Union has done, with a view to protecting insured parties which Australian law recognises as being in need of protection. Australia currently proposes[63] for courts to deal with this issue at the time a dispute arises by refusing enforcement of a jurisdiction agreement designating foreign courts on the basis of the Convention's public policy exception.[64]

The Convention applies only to commercial contracts, excluding certain categories of contract involving weaker parties, namely consumers and employees, from its scope.[65] The Trans-Tasman Proceedings Act 2010 (Cth) contains the same

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[62] Art 21.

[63] NIA, para 25 states that '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'.

[64] Text to nn 50-54.

[65] Art 2(1).

exclusions.[66] These exclusions are justified on the basis that consumers and employees are presumed to have weaker bargaining power. Under Australian and European Union law,[67] insured parties are also considered as deserving of protection with respect to jurisdiction by agreement.

The policy of protecting insured parties is reflected in Australia under the Insurance Contracts Act 1984 (Cth) which prevents parties to contracts of insurance from 'contracting out' of the operation of the Act to the detriment of the insured.[68] While the Act does not expressly address the effect of a choice of a foreign court, the High Court has held that such a choice cannot exclude the application of the Act.[69] We suggest that careful consideration ought to be given to the position that has been taken by the European Union on accession to the Convention, because the EU rules on jurisdiction have a similar protective tendency, so far as insureds are concerned. Those rules are based on the premise that the insured party, whether a consumer or a company, is always weaker than the insurer.[70] The jurisdictional protection of insured parties in the European Union applies to policy holders, insureds and beneficiaries.[71] Insured parties can be sued only in their place of domicile[72] while insurers may be sued in the place of their domicile[73] or deemed domicile,[74] or at the domicile of the insured party.[75] Unless the parties' jurisdiction agreement, concluded before a dispute arises, allows the insured party to sue the insurer in courts additional to those places, or is contained in a contract covering certain enumerated risks,[76] it is unenforceable.[77]

On ratification, the European Union made a declaration to the Convention preserving these protections.[78] The declaration excludes from the scope of the Convention any jurisdiction agreement, concluded prior to a dispute arising,[79] un-

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66 s 20(3)(b), (c).
67 Brussels I Recast Regulation, arts 10-16, 25(4).
68 Insurance Contracts Act 1984 (Cth) s 52.
69 *Akai Pty Ltd v The People's Insurance Co Ltd* (1996) 188 CLR 418, 447-448.
70 European Commission, Proposal for a Council Decision on the approval, on behalf of the European Union, of the Hague Convention of 30 June 2005 on Choice of Court Agreements of 30 January 2014 COM(2014) 46 final, ('European Commission Hague Convention Proposal') para 3.2.2.2.
71 Brussels I Recast Regulation, arts 10-15.
72 Brussels I Recast Regulation, art 14(1).
73 Brussels I Recast Regulation, art 11(1)(a).
74 Brussels I Recast Regulation, art 11(2).
75 Brussels I Recast Regulation, art 11(1)(b).
76 Brussels I Recast Regulation, arts 15(5), 16.
77 Brussels I Recast Regulation, art 15. This does not apply where both parties and the nominated court are domiciled or habitually resident in the same Member State (art 15(3)) or where the insured party is not domiciled in a Member State (art 15(4)).
78 On the European Union's reasons for the making of a declaration, see Commission Staff Working Document Accompanying the Proposal for a Council Decision on the signing by the European Community of the Convention on Choice-of-Court Agreements Impact Assessment COM(2008) 538 final, ('Commission Staff Working Document') 46-49.
79 cf Brussels I Recast Regulation, art 15(1).

less the jurisdiction agreement relates to a contract of reinsurance[80] or a contract of insurance in respect of 'large risks',[81] or nominates a Member State in which both parties are located.[82] The European Union also considered making a declaration with respect to copyright and related rights[83] but ultimately refrained from doing so.

Australia may either make a declaration in respect of jurisdiction agreements in contracts of insurance or leave courts to deal with their effectiveness via the Convention's public policy exception discussed in section B.I.1.b) above. If Australia were to make a declaration, exclusive jurisdiction agreements nominating foreign courts in contracts of insurance litigated before Australian courts would receive uniform treatment, irrespective of whether the nominated court belongs to a Contracting State. If Australia were not to make a declaration, the effect of exclusive jurisdiction agreements nominating foreign courts of Contracting States in contracts of insurance would invariably be dealt with at the time a dispute arises. This approach is likely to encourage litigation about whether enforcement of the agreement would satisfy the Convention threshold of being 'manifestly contrary'[84] to Australia's public policy.

C. Future, post-accession considerations

The Convention only applies to jurisdiction arising out of exclusive jurisdiction agreements and the recognition and enforcement of judgments by courts with jurisdiction based on them. The Convention makes provision for Contracting States to extend the Convention's rules for the recognition and enforcement of foreign judgments rendered by courts with jurisdiction based on non-exclusive jurisdiction agreements. The Convention provides a framework for Contracting States to do this by declaration on a reciprocal basis.[85] Australia should carefully scrutinize the content and effect of this provision and, naturally, the views of other Contracting States[86] before considering a reciprocal declaration. At the time of writing this submission, the European Union and Mexico had not made a reciprocal declaration.[87]

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[80] Ministry of Foreign Affairs of the Kingdom of the Netherlands, The Hague, Convention on Choice of Court Agreements (The Hague, 30 June 2005), Notification pursuant to Article 34 of the Convention, ('EU Article 34 Notification') para 2(a).
[81] EU Article 34 Notification, para 2(d).
[82] EU Article 34 Notification, para 2(c).
[83] Commission Staff Working Document, 16, 35, 46-49.
[84] Art 6(c).
[85] Art 22(1).
[86] European Commission Hague Convention Proposal, para 3.2.1.
[87] Hague Conference on Private International Law, Status Table, Convention of 30 June 2005 on Choice of Court Agreements <https://www.hcch.net/en/instruments/conventions/status-table/?cid=98> (accessed 25 April 2016).

Hamburg and Brisbane, 26 April 2016