

**‘CONTRACTING OUT’: FORUM STATUTES, PUBLIC POLICY AND THE
EFFECTIVENESS OF FOREIGN EXCLUSIVE JURISDICTION CLAUSES**

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ABSTRACT

It is increasingly common to see references to ‘policy’, ‘public policy’, or the ‘policy of the law’ as something distinct that can be discerned from the scope and purpose of a forum statute and invoked as a strong reason not to give effect to a foreign exclusive jurisdiction clause. Yet the legal significance of such policy, and how the task of identifying and applying it might be any different from interpreting and applying the statute, has not been clearly articulated by any English or Australian court. This thesis seeks to provide a coherent account of how a forum statute might limit the effectiveness of a foreign exclusive jurisdiction clause, with a view to better understanding the precise interaction between a forum statute and such an agreement. The thesis first proposes a typology of express statutory rules specifying when and how a foreign exclusive jurisdiction clause will be ineffective: ‘no contracting out’ rules, ‘no choice of court’ rules, qualitative rules and choice of law rules. The thesis then examines whether statutory policy might have an independent bearing on the exercise of the court’s remedial discretion. Following a review of cases where such policy has been invoked, it will be shown that almost all cases involved or ought to have involved the direct application of the forum statute. It will be contended there is limited scope for the court to have regard to the policy of a forum statute when exercising its remedial discretion, as such discretion only survives in the absence of express or implied legislative intent about the effectiveness of the foreign exclusive jurisdiction clause. It is therefore incumbent on courts to exercise caution when deploying the content of a forum statute or its underlying policy, and to be precise about when and how the forum statute is being used.

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1 INTRODUCTION AND OVERVIEW

It is increasingly common to see references to ‘policy’, ‘public policy’ or the ‘policy of the law’ as something distinct that can be discerned from the scope and purpose of a forum statute invoked as a strong reason not to give effect to a foreign exclusive jurisdiction clause.¹ Yet the legal significance of such policy, and how the task of identifying and applying it might be any different from interpreting and applying the statute—in the sense of determining and giving effect to legislative intent about the effectiveness of a foreign exclusive jurisdiction clause—has not been clearly articulated by any English or Australian court. The aim of this thesis is to provide a coherent account of how a forum statute might limit the effectiveness of a foreign exclusive jurisdiction clause, with a view to better understanding the precise interaction between a forum statute and such an agreement. The account has implications for a court exercising its remedial discretion, as there is a significant difference between a policy factor that might weigh in favour of not giving effect to a foreign exclusive jurisdiction clause, and a statutory provision that removes the discretion altogether.

This thesis seeks to provide a framework for understanding the interaction between forum statutes and foreign exclusive jurisdiction clauses by undertaking a doctrinal and comparative analysis of English and Australian statute and case law. Specifically, the thesis is based on a review of statutory provisions that have been found to impact the effectiveness of a

¹ For the purpose of this thesis, the expression ‘give effect’ to an exclusive jurisdiction clause will be used as shorthand for ‘give effect by specific remedy’. It is acknowledged that even where a court does not stay its own proceedings or issue an anti-suit injunction, the exclusive jurisdiction clause may still be recognised as effective and form a basis for damages: see Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (OUP 2008) para 6.02.

foreign exclusive jurisdiction clause or have the potential to do so, and cases where a forum statute has been invoked as a public policy reason to not give effect to a foreign exclusive jurisdiction clause. The thesis is structured as follows. Chapter 1 introduces the work, its parameters and methodology. It also provides an overview of the role of exclusive jurisdiction clauses in international disputes and seeks to explain the close relationship between choice of forum and the substantive law that will be applied to the dispute, before briefly outlining the limits to party autonomy that have developed in modern contract law in other settings. The chapter will then provide an overview of the various ways that a forum statute has been found to interact with a foreign exclusive jurisdiction clause by reference to the landmark decision of the High Court of Australia in *Akai Pty Ltd v People's Insurance Co Ltd*.²

Chapter 2 will examine the circumstances in which a foreign exclusive jurisdiction clause may be rendered void or ineffective by direct application of an express statutory rule in a forum statute. This chapter will propose a typology of relevant statutory provisions: ‘no contracting out’ rules, ‘no choice of court’ rules, and qualitative rules. Each rule is directed towards the effectiveness of contractual arrangements and has been applied directly to limit the effectiveness of a foreign exclusive jurisdiction clause in an international dispute. The chapter will also propose a fourth type of express statutory rule—choice of law rules—which it will be submitted are also capable of applying directly to limit the effectiveness of a foreign exclusive jurisdiction clause.

² [1996] HCA 39, (1996) 188 CLR 418.

Chapter 3 will critically examine 17 cases in the UK and Australia where the existence of a forum statute or its policy has been identified as a strong reason not to give effect to a foreign exclusive jurisdiction clause. It will be contended that almost all of these cases should have been dealt with by direct application of the forum statute, either in the sense of applying an express statutory rule of the type described in Chapter 2, or because the court relies on legislative intent about the scope of ‘overriding’ or ‘mandatory’ substantive rules to impliedly determine that a foreign exclusive jurisdiction clause in favour of a court where those rules would not be applied is ineffective.

In all of these instances, the interpretation of the forum statute (in the sense of determining when it applies) might be assisted by an understanding of the policy underlying the statute and relevant explanatory material. This is consistent with contemporary principles of purposive statutory interpretation in the UK and Australia.³ Yet none of these cases provides a convincing foundation for the ‘policy of the law’ as something distinct discerned from the scope and purpose of a forum statute that is capable of bearing independently on the exercise of the court’s remedial discretion to give effect to the choice of court agreement. While a court may have regard to a forum statute as a point of reference when identifying the content of forum public policy or other matters relevant to the exercise of the court’s remedial discretion, such discretion will not survive in the face of express or implied legislative intent about the effectiveness of the foreign exclusive jurisdiction clause. It is therefore incumbent on courts to

³ See section 2.1.

exercise caution when deploying the content of a forum statute or its underlying policy, and to be precise about when and how the forum statute is being used.

1.1 The role of exclusive jurisdiction clauses in international disputes

In order to understand how and why a forum statute might regulate the effectiveness of a foreign exclusive jurisdiction clause, it is necessary to first consider what these agreements do. Exclusive jurisdiction clauses are a widely accepted means of determining the allocation of jurisdiction in international disputes. The potential benefits of such agreements include convenience, avoidance of duplicative and costly litigation in multiple forums, and certainty. Certainty in this instance refers not only to certainty about the forum in which disputes covered by an exclusive jurisdiction clause will be litigated but also to increased certainty about the protection and enforcement of substantive rights and obligations arising from the contractual relationship.⁴ The forum in which an international dispute is heard has implications for what law is applied to govern the substantive issues in dispute.⁵ This is especially true where the law governing the contract under ordinary common law choice of law rules is the law of the nominated forum, where the agreement may reflect an expectation that the parties will be subject to the law of that place and not any other. The exclusive jurisdiction clause is therefore a means of controlling—or seeking to indirectly control—the law that will be applied to future disputes between the parties.

⁴ For an overview of the nature of the benefits to parties conferred by exclusive jurisdiction clauses, see *AMT Futures Limited v Marzillier, Dr Meir & Dr Guntner Rechtsanwaltsgesellschaft mBH* [2014] EWHC 1085 (Comm) [40]–[44].

⁵ *AMT Futures* (n 4) [40]–[44]. See also Peter Nygh, *Autonomy in International Contracts* (OUP 1999) 15.

Where a proceeding is commenced in breach of a valid exclusive jurisdiction clause, the common law position is that the choice of court agreement must be given effect unless there are strong reasons to the contrary.⁶ In the case of a foreign exclusive jurisdiction clause, being an agreement in favour of a court other than where the proceeding in question has been commenced, this means the court will ordinarily exercise its remedial discretion to stay the local proceeding, and decline to grant injunctive relief to restrain the foreign proceeding (often referred to as an ‘anti-suit injunction’). This rule reflects the significance afforded to party autonomy in private international law,⁷ where the authors of *Dicey, Morris and Collins on the Conflict of Laws* consider the main justification for the law to be that it ‘implements the reasonable and legitimate expectations of the parties to a transaction or an occurrence’.⁸ And while policy is generally only openly discussed in private international law as a narrow exception to the recognition of an act that would ordinarily be recognised under common law rules or the statutes that have codified them,⁹ the strong reasons rule evidently embodies a policy bias in favour of party autonomy.

⁶ *Donohue v Armco Inc* [2001] UKHL 64, [2002] 11 All ER 749 [24]; *Akai* (n 2) 445, 447.

⁷ See *OT Africa Line v Magic Sportswear Corp* [2005] EWCA Civ 710 [32] (Longmore LJ).

⁸ Lord Collins and Jonathan Harris (eds), *Dicey, Morris and Collins on the Conflict of Laws*, vol 1 (16th edn, Sweet & Maxwell 2022) para 1.006. See also Institut de Droit International, *The Autonomy of the Parties in International Contracts Between Private Persons or Entities* <<https://www.idi-iil.org/en/publications/ii-lautonomie-de-la-volonte-des-parties-dans-les-contrats-internationaux-entre-personnes-privees/>> accessed 2 June 2023.

⁹ eg a foreign law or judgment or even a private contractual arrangement, often referred to as the ‘public policy exception’ in private international law. For general discussion of the role of policy issues in private international law, see Maria Hook, ‘The Conflict of Laws as a Shared Language for the Cross-Border Application of Statutes’ in Michael Douglas, Vivienne Bath, Mary Keyes and Andrew Dickinson (eds) *Commercial Issues in Private International Law: A Common Law Perspective* (Bloomsbury Publishing 2019) 186.

Yet just like other instances where legislators have made incursions into freedom of contract outside of private international law, the extent to which a foreign exclusive jurisdiction clause is effective to prevent proceedings continuing in a court other than the chosen court will depend on whether the legislature of that forum has seen fit to interfere with the parties' choice. In a domestic setting in the UK and Australia, it is clear that the primacy of party autonomy has been significantly eroded by statute—or, perhaps more accurately, eroded by the countervailing policies expressed in and given effect to by statute. In the UK and Australia, legislatures have intervened in contractual bargains to address concerns about inequality of bargaining power and freedom of negotiation, resulting in new forms of relationships with additional layers of rights and obligations superimposed by legislation, usually to protect the weaker party from terms that are procedurally or substantively unfair.¹⁰ Where they form part of the applicable law, such statutes will be applied to determine the rights and obligations of parties to an international dispute. In addition, and relevantly for the purpose of this thesis, those statutes might also contain express rules which have the direct effect of limiting the effectiveness of foreign exclusive jurisdiction clauses in respect of such disputes (Chapter 2), or the force of the substantive forum rules might be such that a foreign exclusive jurisdiction

¹⁰ See Patrick Atiyah, *The Rise and Fall of Freedom of Contract* (OUP 1979) 635–86; Law Commission and Scottish Law Commission, *Unfair Terms in Contracts* (Law Com CP No 166, Scot Law Com CP No 119, 2002) para 2.1. For an overview of unfair contract terms legislation in the UK and Australia, see Jeannie Paterson 'The Australian Unfair Contract Terms Law: The Rise of Substantive Unfairness as a Ground for Review of Standard Form Consumer Contracts' MULR 934. In respect of employment relationships, see generally, eg, Employers Liability Act 1880 (UK); Equal Pay Act 1970 (UK); Employment Rights Act 1996 (UK); Fair Work Act 2009 (Cth). In respect of other types of commercial relationships: see, eg, Insurance Act 2015 (UK); Insurance Contracts Act 1984 (Cth); Housing Grants, Construction and Regeneration Act 1996 (UK).

clause in favour of a contractual forum where those substantive rules would not be applied will be impliedly ineffective (Chapter 3).

1.2 Akai: a case study

The role that a forum statute might play in altering the substantive rights and obligations of parties to an international dispute, and regulating the effectiveness of a foreign exclusive jurisdiction clause, can be illustrated by reference to the decision of the High Court of Australia in *Akai*.¹¹ In *Akai*, the High Court considered whether to give effect to an English exclusive jurisdiction clause contained in a contract of insurance between a company incorporated in New South Wales and a Singapore insurer. The Court was asked to rule on a stay of proceedings under the Insurance Contracts Act 1984 (Cth) commenced in New South Wales in alleged breach of the clause. The parties' dispute related to rights and obligations under the insurance contract, which also contained an English choice of law clause.

The Insurance Contracts Act 1984 (Cth) was introduced in Australia in recognition that it was 'unsatisfactory' for rights to be 'determined by the form in which the contract is drafted rather than by reference to the harm caused',¹² and with the aim to ensure that 'a more equitable result is achieved between the insurer and the insured'.¹³ The legislation effected 'long needed

¹¹ (n 2).

¹² Explanatory Memorandum to the Insurance Contracts Bill 1984 para 182 citing Australian Law Reform Commission, *Insurance Contracts* (Report No 20, 1982) paras 228–30, 241–42.

¹³ Explanatory Memorandum to the Insurance Contracts Bill 1984 para 182 citing Australian Law Reform Commission (n 12) paras 228–30, 241–42.

reforms to the law of insurance contracts’,¹⁴ including limiting the ability of an insurer to terminate the insurance contract and refuse to pay a claim.¹⁵

Section 8 of the Act, which exemplifies the category of statutory choice of law rules in the typology proposed in Chapter 2,¹⁶ expressly provides for the statute to apply to insurance contracts where ‘but for an express provision to the contrary’ the proper law of the contract would be the law of an Australian State or Territory’.¹⁷ As a justification for the rule, the explanatory material to the bill noted it ‘would not be proper’ if the effect of ‘long needed reforms’ could be ‘avoided simply by selecting a foreign law or the law of a Territory in which the Act does not apply.’¹⁸

Section 52 of the Act, which exemplifies the category of ‘no contracting out’ rules in the typology proposed in Chapter 2,¹⁹ expressly provides a contractual term that ‘purports to exclude, restrict or modify, or would, but for this subsection, have the effect of excluding, restricting or modifying, to the prejudice of a person other than the insurer, the operation of this Act...is void.’ As a justification for the rule, the explanatory material to the bill notes that

¹⁴ Explanatory Memorandum to the Insurance Contracts Bill 1984 para 23 citing Australian Law Reform Commission (n 12) para 15.

¹⁵ Insurance Contracts Act 1984 (Cth), s 54. See also Explanatory Memorandum to the Insurance Contracts Bill 1984 paras 178–82.

¹⁶ See section 2.6.

¹⁷ Insurance Contracts Act 1984 (Cth), s 8.

¹⁸ Explanatory Memorandum to the Insurance Contracts Bill 1984 para 23 citing Australian Law Reform Commission (n 12) para 15.

¹⁹ See section 2.3.

the ‘balance achieved by the [draft legislation] would be upset if the insurer could “contract out” [of the reforms] either directly or indirectly’.²⁰

The Act does not contain any express provision that states when an agreement that purports to confer jurisdiction on a foreign court, or limit the jurisdiction of the local court, will be void or of no effect, which are referred to as ‘no choice of court’ rules in the typology proposed in Chapter 2.²¹

By reference to the close connection between the contract and the jurisdiction of New South Wales, the High Court applied section 8 to determine that the Act applied to the contract notwithstanding the existence of the English choice of law clause,²² effectively recognising that the statute was of ‘overriding’ or ‘mandatory’ in the sense of applying notwithstanding what would otherwise be the law governing the agreement.²³

The next question was how to deal with the foreign exclusive jurisdiction clause. In circumstances where substantive forum rules—specifically, the provision in section 54 of the Act restricting the circumstances in which an insurer could pay a claim²⁴—would not be

²⁰ Explanatory Memorandum to the Insurance Contracts Bill 1984 para 173. See also paras 171–72.

²¹ See section 2.4.

²² See *Akai* (n 2) 433.

²³ See generally, *Dicey, Morris and Collins on the Conflict of Laws* (n 8) paras 1.054–65.

²⁴ Insurance Contracts Act 1984 (Cth), s 54.

applied by the English courts,²⁵ the majority found section 52 was sufficiently wide to apply to the English jurisdiction clause. This demonstrated a willingness to look past the form of choice of court agreement and characterise the foreign exclusive jurisdiction clause by reference to its indirect effect, in the sense of purporting to fix the substantive rules that would be applied to determine the parties' rights and obligations arising under the contract.

Having directly applied section 52 to determine the choice of court agreement was void,²⁶ the majority nonetheless continued, opining that a stay of proceedings would be inconsistent with 'the policy of the Act'.²⁷ That is, even in the absence of an express statutory provision applying directly to the choice of court agreement, its effectiveness could be dealt with as a matter of policy 'discerned from a consideration of the scope and purpose of the particular statute'.²⁸ The majority identified a policy 'against the use of private engagements to circumvent [the Act's] remedial provisions',²⁹ which was said to arise from the choice of law rule in section 8 of the Act. The majority elsewhere indicated that section 8 ought to be read with section 52, finding that together:

²⁵ *Akai* (n 2) 446–48 (Toohey, Gaudron and Gummow JJ). The English Commercial Court did not apply Australian law and determined to grant an anti-suit injunction restraining the proceedings brought in breach of agreement in Australia, see *Akai Pty Ltd v People's Insurance Co Ltd* [1998] 1 Lloyd's Rep 90 (Com Ct) 100.

²⁶ *Akai* (n 2) 448 (Toohey, Gaudron and Gummow JJ).

²⁷ *Akai* (n 2) 447 (Toohey, Gaudron and Gummow JJ).

²⁸ *Akai* (n 2) 447 (Toohey, Gaudron and Gummow JJ).

²⁹ *Akai* (n 2) 447 (Toohey, Gaudron and Gummow JJ). For an overview of principles of statutory interpretation in Australia for 'remedial legislation', in the sense of statutes enacted to remedy a defect in a prior law, see *Sydney Seaplanes Pty Ltd v Page* [2021] NSWCA 204, (2021) 106 NSWLR [85], [134] (Leeming JA).

[the provisions] manifest a legislative intent not only that there should be no power to contract out of the provisions of the Act, but also that the regime established by the Act should be respected as regards contracts the proper law of which is, or but for selection of another law would be, that of a State or Territory.³⁰

The majority subsequently observed:

...considerations of public policy present in an Australian court may flow from, even if not expressly mandated by the terms of, the Constitution or statute in force in the Australian forum. Thus, the courts may disregard or refuse effect to contractual obligations which, whilst not directly contrary to any express or implied statutory prohibition, nevertheless contravene ‘the policy of the law’ as discerned from a consideration of the scope and purpose of the particular statute.³¹

It follows that, by reference to the same statutory provisions that were applied to render the foreign exclusive jurisdiction clause ineffective (ie sections 8 and 52), as well as legislative intent about the scope of the substantive rules, the majority discerned from the statute a policy capable of forming a strong reason to deny effect to the clause.³² Moreover, this was an example of a policy said to apply in circumstances where the statute itself (through any ‘express or implied statutory prohibition’³³) did not.

The decision, and subsequent Australian cases attempting to grapple with its meaning, raises fundamental questions about the role that a forum statute might play when a court is determining whether to give effect to a foreign exclusive jurisdiction clause. It is the purpose of this work to seek to answer those questions, which have also arisen in the UK (albeit to a

³⁰ *Akai* (n 2) 433.

³¹ *Akai* (n 2) 447 citing *Nelson v Nelson* [1995] HCA 25; (1995) 184 CLR 538, 552, 611 (Deane and Gummow JJ) (emphasis added). For discussion of the significance of this citation, see section 3.2.

³² Insurance Contracts Act 1984 (Cth), s 54. See *Akai* (n 2) 447.

³³ *Akai* (n 2) 447.

more limited extent), and to provide a framework to better understand the precise ways in which a forum statute might limit the effectiveness of such an agreement.

2 APPLYING EXPRESS STATUTORY RULES TO DETERMINE THE EFFECTIVENESS OF A FOREIGN EXCLUSIVE JURISDICTION CLAUSE

This chapter will examine the circumstances in which a foreign exclusive jurisdiction clause may be rendered ineffective by direct application of express statutory rules in a forum statute. The principal focus of the chapter will be on statutory interpretation. That is, the task of determining and giving effect to the intention of Parliament as disclosed by the language used in the statute.³⁴ Even though the chapter is concerned with circumstances where the statute expressly governs the effectiveness of the foreign exclusive jurisdiction clause, policy is still relevant. Any statutory provision that may be applied directly to limit the effectiveness of a foreign exclusive jurisdiction clause effects legislative intent about when party autonomy must cede to other countervailing policies of the forum. And when construing a statute for the purpose of determining whether it applies directly to render a foreign exclusive jurisdiction clause ineffective, the heart of the court's task is to identify Parliament's intention as to the appropriate balance between party autonomy and other policy which might weigh against giving effect to such clauses. The chapter will begin with a brief overview of relevant principles of statutory interpretation and the framework of jurisdiction in the UK and Australia, before considering three types of statutory provisions which may give effect to such intention: 'no contracting out' rules, 'no choice of court' rules, and qualitative rules. Each rule is directed

³⁴ Perry Herzfeld, Thomas Prince and Stephen Tully, *Interpretation and Use of Legal Sources: The Laws of Australia* (Thomson Reuters 2013) 79–80.

towards the effectiveness of contractual arrangements and has been applied to limit the effectiveness of a foreign exclusive jurisdiction clause in an international dispute. The chapter will also propose a fourth type of statutory rule—unilateral choice of law rules—which it is submitted are also capable of being applied directly to limit the effectiveness of a foreign exclusive jurisdiction clause.

2.1 Principles of statutory interpretation

In both the UK and Australia, judges take a contextual and purposive approach to statutory interpretation: the task of the court is to identify the purpose of the statute and give effect to the language of the statute in light of that purpose and surrounding circumstances,³⁵ sometimes referred to as giving effect to the ‘intention of Parliament’.³⁶ In both jurisdictions, the ‘intention of Parliament’ is an objective concept—the intention which the court reasonably imputes to Parliament on the basis of language of the statute read in context.³⁷ On a strict approach, the ‘intention of Parliament’ (properly understood as relating to the meaning of the statute) is distinct from the ‘purpose’ or ‘object’ of the statute (properly understood as relating to the

³⁵ In respect of the UK, *IRC v McGuckian* [1997] 3 All ER 817, [1997] 1 WLR 991, 999. See also A Burrows, *Thinking About Statutes* (CUP 2018) 5. In respect of Australia, *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28, 194 CLR 355 [78]. This approach is also required by Commonwealth legislation: Acts Interpretation Act 1901 (Cth), s 15AA; and equivalent State legislation eg Interpretation of Legislation Act 1984 (Vic), s 35(a); Interpretation Act 1987 (NSW), s 33; Acts Interpretation Act 1915 (SA), s 22.

³⁶ See, eg, *R v Secretary of State for the Environment, Transport and the Regions ex p Spath Holme Ltd* [2001] 2 AC 349 (HL) 388.

³⁷ In respect of the UK, see *R v Spath Holme* (n 36) 396. In respect of Australia, see Herzfeld, Prince and Tully (n 34) 79–80.

mischief to which the statute is directed).³⁸ This is again distinct from ‘policy’, which is sometimes used in connection with ‘purpose’,³⁹ but may also refer to fundamental principles of justice or convictions of the forum.⁴⁰ In seeking to give effect to the intention of Parliament, courts will have regard to applicable common law and statutory rules of interpretation,⁴¹ as well as extrinsic material where it assists in ascertaining the meaning of a statutory provision in light of the purpose and object of the statute.⁴²

2.2 Jurisdiction framework

In both the UK and Australia, the question of whether the court has jurisdiction is in principle separate from the question of whether to exercise it. In respect of the former question, in order to establish jurisdictional competence, the court must have personal jurisdiction over the parties. In international disputes this is generally established by service out of the jurisdiction under local court rules,⁴³ which have substantially expanded the circumstances in which

³⁸ Oliver Jones and Francis Bennion, *Bennion on Statutory Interpretation: A Code* (LexisNexis 2010) paras 483–86; see also Herzfeld, Prince and Tully (n 34) para 25.1.710.

³⁹ See, eg, Burrows (n 35) 19–20: ‘[w]hen we talk of “purpose”, we are looking for the policy behind the statute or statutory provision’.

⁴⁰ See Diggory Bailey and Luke Norbury, *Bennion, Bailey and Norbury on Statutory Interpretation* (8th ed, LexisNexis 2020) 822–23.

⁴¹ Herzfeld, Prince and Tully (n 34) para 25.1.690 cf Burrows (n 35) 7–8.

⁴² Bailey and Norbury (n 40) 708–711; Acts Interpretation Act 1901 (Cth), s 15AB; and equivalent State legislation eg Interpretation of Legislation Act 1984 (Vic), s 35(b); Interpretation Act 1987 (NSW), s 34.

⁴³ See, eg, Federal Court Rules 2011 (Cth), div 10.2; Civil Procedure Rules 2006 (ACT), div 6.8.9; Supreme Court Rules 2000 (Tas), div 10; Supreme Court Civil Rules 2006 (SA), pt 4 div 2; Supreme Court (General Civil Proceedings) Rules 2015 (Vic), O 7 pt 1; Uniform Civil Procedure Rules 1999 (Qld), pt 7 div 1; Uniform Civil Procedure Rules 2005 (NSW), pt 11 sch 6; Civil Procedure Rules 1998 (UK), pt 6 s IV, 6B PD IV.

English and Australian courts will be competent to exercise jurisdiction.⁴⁴ In the UK, service out of jurisdiction will ordinarily be subject to the grant of permission by the court,⁴⁵ with two principal exceptions. The first is where jurisdiction has been conferred on the English court under sections 15A to 15E of the Civil Jurisdiction and Judgments Act 1982, which contains a modified version of the regime governing certain consumer and employment disputes in the recast Brussels I Regulation and its predecessor the Brussels I Regulation.⁴⁶ Where a claim is brought relying on those particular rules of jurisdiction, the defendant may be served out of jurisdiction without permission.⁴⁷ The second exception is where an English jurisdiction agreement applies to the dispute,⁴⁸ which covers both English exclusive jurisdiction clauses in accordance with the Hague Convention on Choice of Court Agreements 2005,⁴⁹ as well as non-

⁴⁴ See Mary Keyes, 'Improving Australian Private International Law' in Andrew Dickinson, John Thomas and Mary Keyes (eds) *Australian Private International Law for the 21st Century: Facing Outwards* (Hart Publishing 2014) 14, 17.

⁴⁵ Civil Procedure Rules 1998 (UK), r 6.36. For the requirements to obtain leave, which include that England and Wales must be the proper place to bring the claim, see r 6.37. For more detailed discussion of how to fulfil these requirements, see *Dicey, Morris and Collins on the Conflict of Laws* (n 8) paras 11.009, 11.104–107.

⁴⁶ Regulation (EU) 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/ 1 ('recast Brussels I Regulation'); Regulation (EU) of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L012/1 ('Brussels I Regulation'). For more detailed discussion of the policy underlying the regime, see section 2.4.1.

⁴⁷ Civil Procedure Rules 1998, r 6.33(2) as amended by the Civil Procedure Rules 1998 (Amendment) (EU Exit) Regulations 2019 SI 2019/479. This is subject to requirements that the defendant is not a consumer and that no proceedings between the parties concerning the same claim are pending in the courts of any other part of the UK: r 6.33(2)(a),(b)(i). For further discussion of the significance of the service out rules see Louise Merrett, 'International Employment Cases Post-Brexit: Choice of Law, Territorial Scope, Jurisdiction and Enforcement' (2021) 50 *ILJ* 343, 361–62.

⁴⁸ Civil Procedure Rules 1998, r 6.33(2B) inserted with effect from 6 April 2021 by the Civil Procedure (Amendment) Rules 2021 SI 2017/117.

⁴⁹ (30 June 2005) given effect in the UK under Civil Jurisdiction and Judgments Act 1982, s3D, sch 3F. The Hague Convention on Choice of Courts 2005, contains specific rules regarding the enforcement of certain exclusive

exclusive jurisdiction clauses and other agreements that fall outside the scope of the Convention.⁵⁰

In Australia, aside from Western Australia and the Northern Territory,⁵¹ a defendant may be served outside of jurisdiction without leave of the court on a number of grounds.⁵² This includes, for instance, where the proceeding is for relief in respect of breach of contract where the contract or the breach has a connection to Australia,⁵³ or where a ‘proceeding arises under a law of the Commonwealth, a State or a Territory’ and ‘the law expressly or by implication confers jurisdiction on the Court over persons outside Australia’.⁵⁴ In all Australian jurisdictions, leave is not required for service in New Zealand of claims under the Trans-Tasman Proceedings Act 2010 (Cth),⁵⁵ which also contains specific rules about the enforcement of exclusive jurisdiction clauses,⁵⁶ and gives effect to the Agreement between the Government

jurisdiction clauses, including English exclusive jurisdiction clauses: see art 5(1); Civil Procedure Rules 1998, r 6.33(2B)(a). For further discussion of the Convention see text to nn 63–64, 71–75, 77.

⁵⁰ Civil Procedure Rules 1998, r 6.33(2B)(b).

⁵¹ Rules of the Supreme Court 1971 (WA), O 10; Supreme Court Rules 1987 (NT), r 7.02.

⁵² Federal Court Rules 2011 (Cth), div 10.2 as amended with effect from 13 January 2023 by the Federal Court Legislation Amendment Rules 2022 (Cth); Civil Procedure Rules 2006 (ACT), div 6.8.9; Supreme Court Rules 2000 (Tas), div 10; Supreme Court Civil Rules 2006 (SA), pt 4 div 2; Supreme Court (General Civil Proceedings) Rules 2015 (Vic), O 7 pt 1; Uniform Civil Procedure Rules 1999 (Qld), pt 7 div 1; Uniform Civil Procedure Rules 2005 (NSW), pt 11, sch 6.

⁵³ Federal Court Rules 2011 (Cth) r 10.42(b)–(c). There are similarly worded jurisdictional gateways in equivalent rules for the State courts.

⁵⁴ Federal Court Rules 2011 (Cth), r 10.42(j)(iv).

⁵⁵ See Trans-Tasman Proceedings Act 2010 (Cth), s 9. See also, eg, Rules of the Supreme Court 1971 (WA), O 10 r 1A(2)–(3A); Federal Court Rules 2011 (Cth), r 10.41.

⁵⁶ For further discussion of the statutory regime see text to nn 71–77.

of New Zealand and the Government of Australia on Trans-Tasman Court Proceedings and Regulatory Enforcement ('TTPA').⁵⁷

Once it has been determined that the English or Australian court has jurisdiction, the next issue is whether that jurisdiction is to be exercised. This is ordinarily determined by the application of non-statutory rules in common law or equity. In both Australia and the UK, this means giving effect to an exclusive jurisdiction clause by staying local proceedings (for a foreign exclusive jurisdiction clause) or exercising jurisdiction (for a local exclusive jurisdiction clause) unless there are strong reasons not to do so.⁵⁸ The discretion to grant injunctive relief to restrain foreign proceedings (for a local exclusive jurisdiction clause) is similarly weighted in favour of giving effect to the choice of court agreement.⁵⁹ And in the absence of an exclusive jurisdiction clause, or where such a clause is rendered ineffective by statute, an English court must be satisfied that the English court is an appropriate forum;⁶⁰ and

⁵⁷ (adopted 24 July 2008, entered into force 11 October 2013), [2013] ATS 32 ('TTPA').

⁵⁸ *Donohue v Armco* (n 6) [24]; *Akai* (n 2) 445, 447.

⁵⁹ *Donohue v Armco* (n 6) [24]. For detailed consideration of jurisdiction to grant such injunctive relief in the UK and Australia, see Andrew Dickinson, 'Taming Anti-Suit Injunctions' in Dickinson and Edwin Peel (eds) *A Conflict of Laws Companion* (OUP 2021); Michael Douglas, 'Anti-Suit Injunctions in Australia' (2017) 41 MULR 66.

⁶⁰ See *Dicey, Morris and Collins on the Conflict of Laws* (n 8) r 41(2) regarding the formulation of the test for a stay of proceedings commenced as of right, and r 41(3) in respect of the forum conveniens requirement for assuming jurisdiction of a proceeding involving a claim served out of the jurisdiction with permission of the court: citing *Spiliada v Cansulex* [1987] 1 AC 460, 475–78 and 478–82 respectively.

the Australian court must determine that it is not a clearly inappropriate forum to hear the claim.⁶¹

In a few rare instances, the exercise of jurisdiction is governed by statutory rules mandating the exercise or non-exercise of jurisdiction by the court. These rules have so far only arisen where jurisdiction is mandated by statute giving effect to an international agreement.⁶² In the UK, the Hague Convention on Choice of Court Agreements 2005, as given effect in the 1982 Act, provides for the exercise of jurisdiction by the court nominated in an exclusive jurisdiction clause,⁶³ and the mandatory non-exercise of jurisdiction by a court of any other contracting state.⁶⁴ In Australia, the jurisdiction regime implemented by the Trans-Tasman Proceedings Act 2010 (Cth), designed to be consistent with 2005 Convention in case either Australia or New Zealand ever became a party,⁶⁵ also provides for the exercise of jurisdiction by the court nominated in an exclusive jurisdiction clause,⁶⁶ and the mandatory non-exercise

⁶¹ *Oceanic Sunline Special Shipping Co Inc v Fay* [1988] HCA 32, (1998) 165 CLR 197, 247–48 appd *Voth v Manildra Flour Mills Pty Ltd* [1990] HCA 55, (1990) 171 CLR 538, 558–59. See also Richard Garnett ‘Stay of Proceedings in Australia: A “Clearly Inappropriate” Test?’ (1999) 23 MULR 30.

⁶² Adrian Briggs, *Civil Jurisdiction and Judgments* (6th ed, Routledge 2015) 349.

⁶³ Hague Convention on Choice of Court Agreements 2005, art 5. See also art 3, definition of ‘exclusive choice of court agreement’.

⁶⁴ Hague Convention on Choice of Court Agreements 2005, art 6.

⁶⁵ Explanatory Memorandum to the Trans-Tasman Proceedings Bill 2009, para 40. See also Trans-Tasman Working Group, *Trans-Tasman Court Proceedings and Regulatory Enforcement: Final Report* (2006) 20 <<https://www.ag.gov.au/international-relations/publications/trans-tasman-working-group-court-proceedings-and-regulatory-enforcement-report-2006>> accessed 17 July 2023.

⁶⁶ Trans-Tasman Proceedings Act 2010 (Cth), s 20(1)(b). See also s 21(1).

of jurisdiction by any other court.⁶⁷ In both instances, the jurisdiction rules increase (rather than limit) the effectiveness of foreign exclusive jurisdiction clauses in the UK and Australia.

While sections 15A to 15E of the 1982 Act contain rules about jurisdiction, the regime in these provisions is not mandatory in the same ways as the rules in the 2005 Convention and the TTPA. Prior to UK withdrawal from the EU, the jurisdiction conferred by the Brussels regime was ‘mandatory’ in the sense that a court with allocated jurisdiction was required to exercise it,⁶⁸ albeit with some ambiguity in relation to the court’s power to stay proceedings on the basis of an exclusive jurisdiction clause in favour of a non-Member State.⁶⁹ However, under the modified regime in the 1982 Act, the statute expressly preserves the power of the court to stay its own proceedings ‘on the ground of forum non conveniens or otherwise’.⁷⁰ It follows that sections 15A to 15E are best understood as statutory rules that confer jurisdiction but do not mandate the exercise of it. The additional role that these rules in the 1982 Act (particularly section 15D(1)) play in determining the effectiveness of foreign exclusive jurisdiction clauses will be considered in section 2.4.

⁶⁷ Trans-Tasman Proceedings Act 2010 (Cth), s 20(1)(a).

⁶⁸ Case C-281/02 *Owusu v Jackson* EU:C:2005:120 [2005] ECR I-01383 [37], [45]. See also *Brownlie v FS Cairo (Nile Plaza) LLC* [2021] UKSC 45, [2022] 3 All ER 207 [55].

⁶⁹ See *Ferrexpo v Gilson Investments* [2012] EWHC 721 (Comm), 1 Lloyd’s Rep 588 [122]–[133] and academic commentary cited therein cf *Gulf International Bank BSC v Aldwood* [2019] EWHC 1666 (QB).

⁷⁰ Civil Jurisdiction and Judgments Act 1982, s 49 cf *Dicey, Morris and Collins on the Conflict of Laws* (n 8) para 12.012.

Both the 2005 Convention and the TTPA, implemented through domestic legislation in the UK and Australia,⁷¹ signal entrenched recognition of party autonomy. The regimes have been designed to promote international trade and investment and increase certainty,⁷² and ‘[increase] the clarity and certainty available to cross-border litigants’.⁷³ Yet both regimes also contain extensive carve-outs and exceptions.⁷⁴ The subject matter excluded from the 2005 Hague Convention is varied and includes, for example, competition and insolvency matters.⁷⁵ The TTPA is wider in scope,⁷⁶ yet also contains carve-outs for exclusive jurisdiction clauses involving consumers or employees.⁷⁷ Both regimes also contain an exception to the enforcement of an exclusive jurisdiction clause where giving effect to the clause would be ‘manifestly contrary to... public policy’.⁷⁸ These carve-outs and exceptions are the product of negotiation and compromise, and also reflect widespread recognition of a need to balance party autonomy with other substantive forum policies that may favour limiting the effectiveness of

⁷¹ Civil Jurisdiction and Judgments Act 1982, s 3D(1), sch 3F; Trans-Tasman Proceedings Act 2010 (Cth), s 3.

⁷² Hague Convention on Choice of Court Agreements 2005, preamble.

⁷³ Trans-Tasman Working Group (n 65) 7.

⁷⁴ In respect of the Hague Convention on Choice of Court Agreements 2005, see art 2, art 6(a)–(e), art 7; and the declaration made by the UK under art 21 in respect of the application of the Convention to insurance contracts: Civil Jurisdiction and Judgments Act 1982, sch 3FA. In respect of the TTPA, see Trans-Tasman Proceedings Act 2010 (Cth) s 8(2), s 20(2)(a)–(e), (2A), (3)(b)–(c).

⁷⁵ Hague Convention on Choice of Court Agreements 2005, art 2(2)(e), (h).

⁷⁶ See Trans-Tasman Proceedings Act 2010 (Cth), s 8(2) read with definition of ‘excluded matter’ in s 4.

⁷⁷ Hague Convention on Choice of Court Agreements 2005, art 2(1); Trans-Tasman Proceedings Act 2010 (Cth), s 20(3)(b)–(c).

⁷⁸ Hague Convention on Choice of Court Agreements 2005, art 6(c); Trans-Tasman Proceedings Act 2010 (Cth), s 20(2)(c).

foreign exclusive jurisdiction clauses. The remainder of this work will consider the forum statutes which give effect to such countervailing policies.

2.3 ‘No contracting out’ rules

A ‘no contracting out’ rule expressly provides when an agreement to exclude or modify substantive rules in a forum statute is ineffective. For instance, article III(8) of the Hague-Visby Rules,⁷⁹ implemented through domestic legislation in the UK and Australia,⁸⁰ provides that a clause ‘lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect’. In Australia, as outlined above,⁸¹ section 52(1) of the Insurance Contracts Act 1984 (Cth) states that a provision that ‘purports to exclude, restrict or modify, or would, but for this subsection, have the effect of excluding, restricting or modifying, to the prejudice of a person other than the insurer, the operation of this Act...is void.’⁸² Both of these rules have been applied to limit the effectiveness of foreign exclusive jurisdiction clauses in international disputes.⁸³

⁷⁹ International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1924, as amended by the Visby Protocol of 1968 (‘Hague-Visby Rules’).

⁸⁰ Carriage of Goods by Sea Act 1971 (UK), s 1(2), sch; Carriage of Goods by Sea Act 1991 (Cth), s 8, sch 1.

⁸¹ See section 1.2.

⁸² For examples of similarly worded statutory provisions see, in the UK: Employment Rights Act 1996, s 203(1)(a); Equality Act 2010, s 144(1); Trade Union and Labour Relations (Consolidation) Act 1992, s 288(1); Insurance Act 2015, ss 15(1), 16(1); Consumer Insurance (Disclosure and Representations) Act 2010 s 10(1); Misrepresentation Act 1967 s 3(1); Carriage by Air Act 1961, schs 1–1B arts 23(1), 32; Carriage of Goods by Road Act 1965, sch art 41. In Australia, see Civil Aviation (Carriers’ Liability) Act 1959 (Cth), s 32, sch 1A arts 26, 47, 49; sch 1 art 32; sch 2 arts 23(1), 32; sch 3 art IX; sch 5 art 32; Contracts Review Act 1980 (NSW), s 17.

⁸³ See *The Hollandia* [1983] 1 AC 565 (HL); *Akai* (n 2).

2.3.1 Legislative background and underlying policy

The legislation containing these ‘no contracting out’ rules—the Hague-Visby Rules and the Insurance Contracts Act 1984 (Cth)—give effect to substantive forum policy in respect of certain types of contractual relationships. Both statutes impose substantive rights and obligations to protect a class of weaker party to a contractual bargain.

The Hague-Visby Rules are the successor to, and an amended version of, the Hague Rules.⁸⁴ The Hague Rules, which were also implemented through domestic legislation in the UK and Australia,⁸⁵ introduced uniform rules for contracting states relating to bills of lading with a view that ‘all international carriage of goods should be subject to the same terms and conditions’.⁸⁶ These reforms went directly to the balance between party autonomy and other substantive policy concerns, with the first question put to the Maritime Law Committee of the International Law Association on Bills of Lading in 1921 being ‘[w]hether the freedom of contract on the part of the shipowner with regard to carriage of goods by sea should be absolute or should be limited by legislation?’⁸⁷ In response to this question, the majority of the Committee were in favour of ‘a uniform system of law among maritime States whereby liability for losses caused by defect of ship or default in the handling and custody of goods should be

⁸⁴ International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1924 (‘Hague Rules’).

⁸⁵ Carriage of Goods by Sea Act 1924 (UK) sch; Sea-Carriage of Goods Act 1924 (Cth) s 4, Sch 1.

⁸⁶ *The Hollandia* [1982] 1 All ER 1076, [1982] QB 872 (CA) 882 (Lord Denning MR).

⁸⁷ International Law Association, *Report of the Conference of the Maritime Law Committee* (London, 17–20 May 1921) in Comité Maritime International, *The Travaux Préparatoires of the Hague Rules and of the Hague-Visby Rules* (CMI Headquarters 1997) 24.

obligatory on the shipowner'.⁸⁸ This desire for uniformity arose in response to the practice of ship owners issuing bills of lading containing clauses exempting themselves from liability on a non-negotiable basis,⁸⁹ described as 'historic tendency to exploit...inequality [of bargaining power] whenever possible',⁹⁰ and thus the Hague Rules were agreed to limit the effectiveness of such terms. However, after 44 years these rules were considered deficient in certain respects. The amended Hague-Visby Rules were introduced with a new provision aimed 'to give as wide a scope to the Rules as is possible',⁹¹ and to increase the upper monetary limit imposed on claims made against ship owners.⁹² The latter amendment was considered to be, at least by the UK and Australia, an 'equitable and efficient'⁹³ means of '[shifting] the balance of liability as between the cargo owner and the ship owner'.⁹⁴ Similarly, as stated in section 1.2, the Insurance Contracts Act 1984 (Cth) introduced provisions aimed to protect insured parties from claims

⁸⁸ International Law Association (n 87) 24.

⁸⁹ *Vimar Seguros y Reaseguros, SA v M/v Sky Reefer* 515 US 528, 543-544 (1995) (Stevens J, dissenting). See also *The Hollandia (CA)* (n 86) 881-82 (Lord Denning MR); HL Deb 25 March 1971, vol 316, col 1029.

⁹⁰ *Sky Reefer* (n 89) 550 (Stevens J, dissenting).

⁹¹ HL Deb, 25 March 1971, vol 316, col 1033 (Lord Diplock).

⁹² See Hague-Visby Rules, art IV(5). This amendment was the subject of considerable debate with the UK delegation seeking an adjournment of the Seventh Plenary Session on 22 May 1967 for the stated purpose of avoiding the 'the disaster of having half the maritime countries of the world subscribing to the old Hague Rules, with that particular method of limitation, and the other half of them subscribing to the Visby Rules with a different method of limitation' (Lord Diplock): see International Law Association (n 87) 71.

⁹³ Commonwealth, Parliamentary Debates, House of Representatives, 15 October 1991, 1925 (Robert Brown).

⁹⁴ HL Deb, 25 March 1971, vol 316, col 1035 (Lord Kennet).

being refused in certain circumstances, and was designed to ensure that ‘a more equitable result is achieved between the insured and insurer’.⁹⁵

2.3.2 Applying ‘no contracting out’ rules to foreign exclusive jurisdiction clauses

This section will consider how ‘no contracting out’ rules have been interpreted and applied to foreign exclusive jurisdiction clauses by English and Australian courts. It will be contended that, in circumstances where a ‘no contracting out’ rule prevents a party from excluding or modifying the substantive rules in a statute, and those substantive rules would apply to the dispute before the local court, a statutory provision containing a ‘no contracting out’ rule may be readily interpreted as excluding a choice of foreign court if it is demonstrated to a sufficient standard that the foreign court would not apply those substantive rules. In the UK, the most prominent example of a court applying a ‘no contracting out’ rule to a foreign exclusive jurisdiction clause is *The Hollandia*. This case concerned a bill of lading containing a Dutch exclusive jurisdiction clause and choice of law clause. It was common ground that if the proceeding continued only in the contractual forum there would be a lower monetary limit imposed on the ship owner’s liability, as the Hague-Visby Rules had not yet been implemented in the Netherlands. By reference to this fact, the Court of Appeal found the foreign exclusive jurisdiction clause amounted to a clause ‘lessening such liability otherwise than as provided in these Rules’ and as such by operation of article III(8) it was rendered ‘null and void and of no effect’.⁹⁶ In reaching this conclusion, Lord Denning MR and Sir Sebag Shaw each rejected an

⁹⁵ Explanatory Memorandum to the Insurance Contracts Bill 1984 para 182 citing Australian Law Reform Commission (n 12) paras 228–30, 241–42.

⁹⁶ Carriage of Goods by Sea Act 1971 sch art III(8); *The Hollandia (CA)* (n 86) 884.

argument that public policy in favour of freedom of contract justified a narrower construction of the Carriage of Goods by Sea Act 1971 implementing the Hague-Visby Rules.⁹⁷ While the existence of public policy in favour of freedom of contract was acknowledged,⁹⁸ Lord Denning MR found it yielded to a ‘higher’ policy given effect to by the statute:

The public policy which demands that, in international trade, all goods carried by sea should be subject to uniform rules governing the rights and liabilities—and the limitation of liability—of the parties... Parties should not by any device, directly or indirectly, be able to contract out of the Rules. This public policy applies not only to contracts of carriage of goods by sea, but also to carriage by air, where again there is a statute which overrides other stipulations... In short, it applies to all international transport.⁹⁹

In the House of Lords,¹⁰⁰ Lord Diplock gave the lead speech. Lord Diplock had introduced the Carriage of Goods by Sea Bill as a private member’s bill in 1971 and even led the UK delegation for the Brussels deliberations of the Hague-Visby Rules in 1967.¹⁰¹ Upholding the decision of the Court of Appeal, he too characterised the exclusive jurisdiction clause by reference to the likely outcome in the contractual forum.¹⁰² Any construction of article III(8) which distinguished between contractual terms containing substantive rights and obligations and a foreign exclusive jurisdiction clause ‘which only prescribes the procedure by which disputes...are to be resolved’ was rejected as ‘narrow’, ‘literalistic’ and focused on form over

⁹⁷ *The Hollandia (CA)* (n 86) 884, 886.

⁹⁸ *The Hollandia (CA)* (n 86) 884.

⁹⁹ *The Hollandia (CA)* (n 86) 884 (citations omitted). See also 886.

¹⁰⁰ *The Hollandia (HL)* (n 83).

¹⁰¹ See HL Deb 25 March 1971, vol 316, col 1029; International Law Association (n 87) 71.

¹⁰² *The Hollandia (HL)* (n 83), 572–74.

substance.¹⁰³ Lord Diplock indicated article III(8) ought to be given a ‘purposive’ construction, particularly ‘wherever...a literalistic construction would enable the stated purpose of the international convention...to be evaded by the use of colourable devices that, not being expressly referred to in the Rules, are not specifically prohibited.’¹⁰⁴ He found:

The only sensible meaning to be given to the description of provisions in contracts of carriage which are rendered ‘null and void and of no effect’ by this rule is one which would embrace every provision in a contract of carriage which, if it were applied, would have the effect of lessening the carrier’s liability otherwise than as provided in the Rules. To ascribe to it the narrow meaning for which counsel contended would leave it open to any shipowner to evade the provisions of article III, paragraph 8 by the simple device of inserting in his bills of lading issued in, or for carriage from a port in, any contracting state a clause in standard form providing as the exclusive forum for resolution of disputes what might aptly be described as a court of convenience, viz., one situated in a country which did not apply the Hague-Visby Rules or, for that matter, a country whose law recognised an unfettered right in a shipowner by the terms of the bill of lading to relieve himself from all liability for loss or damage to the goods caused by his own negligence, fault or breach of contract.¹⁰⁵

Lord Diplock subsequently acknowledged that a foreign exclusive jurisdiction clause might only have the effect of leading to a lessening of liability in particular circumstances—being where a dispute arises involving the parties’ rights and obligations under the specified substantive provisions, and where the nominated forum would not apply those substantive provisions—which may never arise.¹⁰⁶ But in light of the purpose of the Carriage of Goods by Sea Act 1971 and with emphasis on the nature of the legislation as implementing an

¹⁰³ *The Hollandia (HL)* (n 83), 572, 574.

¹⁰⁴ *The Hollandia (HL)* (n 83) 572–73. In respect of specific prohibitions of the use of foreign exclusive jurisdiction clauses, see discussion of ‘no choice of court’ rules in section 2.4.

¹⁰⁵ *The Hollandia (HL)* (n 83) 574.

¹⁰⁶ *The Hollandia (HL)* (n 83) 574–75.

international convention,¹⁰⁷ he concluded the relevant point in time to ascertain the effect of a foreign exclusive jurisdiction clause was when the carrier sought to rely on it.¹⁰⁸ Article III(8) therefore operated to deprive a foreign exclusive jurisdiction clause of effect to the extent certain liability provisions in the Hague-Visby Rules would not be applied in the contractual forum. As the Dutch court would not apply the relevant substantive rules, the House of Lords was bound to treat the bill of lading as if it did not contain the relevant clause.¹⁰⁹

In Australia, the same approach was adopted by the majority of the High Court in *Akai* when interpreting the Insurance Contracts Act 1984 (Cth) as outlined in section 1.2. Notably, in *Akai*, there was no connection between the 1984 Act and any international convention. Even in the absence of an international convention, the majority of the High Court was prepared to look at the substance and indirect effect of the foreign exclusive jurisdiction clause to determine that it offended the express statutory rule in section 52 of the Act.

It follows that, where it can be proven to the relevant civil standard that local substantive rules will be effectively excluded or modified by only proceeding in the contractual forum, then a ‘no contracting out’ rule in a forum statute may be applied to limit the effectiveness of a foreign exclusive jurisdiction clause. This approach is consistent with the underlying policy of the legislation considered in this section: to intervene in commercial relationships to address concerns about inequality of bargaining power and freedom of negotiation, and protect the

¹⁰⁷ *The Hollandia (HL)* (n 83) 575.

¹⁰⁸ *The Hollandia (HL)* (n 83) 575.

¹⁰⁹ *The Hollandia (HL)* (n 83) 576–77.

weaker party from terms that are procedurally or substantively unfair. If a party were permitted to ‘contract out’ of such reforms by simply nominating a contractual forum where those substantive rules would not be recognised or given effect, then the policy of the forum statute would be defeated.

There are other ‘no contracting out’ rules in forum statutes that have not yet been applied to limit the effectiveness of foreign exclusive jurisdiction clauses by English or Australian courts. For instance, insurance legislation in the UK contains such rules applying to terms that put the insured ‘in a worse position’ in respect of substantive rules in a forum statute and rendering such terms ‘to that extent of no effect’.¹¹⁰ By parity of reasoning, these ‘no contracting out’ rules (which also have a qualitative aspect: see section 2.5 below) should be capable of applying to a foreign exclusive jurisdiction clause, at least to the extent the contractual forum would apply a different law putting the insured in a worse position than under the relevant UK insurance legislation. The position is the same in respect of other similarly worded statutory provisions in the UK and Australia.¹¹¹ Subject to choice of law issues and other statutory criteria, discussed in the following section, it is submitted that any of these provisions could be applied to prevent a party from relying on a foreign exclusive jurisdiction clause.

¹¹⁰ See, in respect of consumer insurance: Consumer Insurance (Disclosure and Representations) Act 2010, s 10(1); Insurance Act 2015, s 15(1). In respect of non-consumer insurance, see Insurance Act 2015 s 16(1) but see also ss 16(2), 17.

¹¹¹ See n 82.

2.3.3 *Choice of law issues*

The application of a ‘no contracting out’ rule to a foreign exclusive jurisdiction clause effects legislative intent to ensure substantive rules are available to parties in the forum and not circumvented by private agreement. As recognised by Lord Diplock in *The Hollandia (HL)*,¹¹² not all agreements to litigate exclusively in a foreign court will offend a ‘no contracting out’ rule. In order for a clause to offend a ‘no contracting out’ rule, it is submitted that each of the following elements must be established:

- 1) In the absence of the foreign exclusive jurisdiction clause, the proceeding would continue in the local forum.
- 2) If the proceeding continued in the local forum, the relevant local substantive rules contained in the forum statute would be applied to the parties’ dispute.
- 3) If the proceeding instead continued in the contractual (foreign) forum, the relevant local statutory rules would not be applied to the parties’ dispute.

The first and third points are relatively straightforward. The first did not arise for consideration in either *The Hollandia* or *Akai*, as both involved disputes with a close connection to relevant local forum, but the requirement is obvious—it would be illogical to find a foreign exclusive jurisdiction clause leads to the exclusion of local substantive rules if the local forum would not even exercise jurisdiction over the dispute in the absence of the clause, such as where it was an inappropriate or clearly inappropriate forum.¹¹³ The third has already been covered in the

¹¹² *The Hollandia (HL)* (n 83) 574–75.

¹¹³ See nn 60–61 and text.

analysis of *The Hollandia* and *Akai* in section 2.3.2 regarding the indirect effect of a foreign exclusive jurisdiction clause. It is noted that these cases did not consider the prospect of similar or equivalent rules being applied in the contractual forum. However, it is suggested that this would not have been sufficient to satisfy the mandate of the forum statute. In interpreting and applying a ‘no contracting out’ rule, the relevant legislative intent goes to the scope of the specific substantive rules in the forum statute, rather than whether the policy effected in those rules can be achieved by some other means.

The second point is more complicated, raising choice of law issues in respect of the substantive rules that would be applied to the parties’ dispute. In order to satisfy this element, the substantive rules that are connected to the ‘no contracting out’ rule (usually contained in the same forum statute) must either form part of the law governing the dispute or be ‘overriding’ in the sense that they apply notwithstanding what law would otherwise govern the parties’ relationship. In *Akai*, as outlined above,¹¹⁴ the High Court had determined that the Insurance Contracts Act 1984 (Cth) applied to the insurance contract notwithstanding the existence of an English choice of law clause by applying section 8 of the Act.¹¹⁵ The overriding nature of the Hague-Visby Rules also arose for consideration in *The Hollandia*. In the Court of Appeal, Lord Denning MR relied on section 1(2) of the Carriage of Goods by Sea Act 1971 which gave the Hague-Visby Rules the ‘force of law’,¹¹⁶ as well as article X which provided for the Hague-

¹¹⁴ See section 1.2.

¹¹⁵ See *Akai* (n 2) 433.

¹¹⁶ *The Hollandia (CA)* (n 86) 883.

Visby Rules to apply ‘whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person’,¹¹⁷ to apply the Rules notwithstanding that the parties’ contractual relationship would otherwise be governed by Dutch law. In doing so, he considered the words in the international convention and statute evinced the intent for the Rules to apply ‘whatever be the proper law of the contract’.¹¹⁸ This finding was upheld in the House of Lords, where a contrary argument was rejected for reasons including that it failed to draw any distinction between the 1971 Act and predecessor legislation containing no equivalent to article X of the Rules.¹¹⁹

Having determined that the local substantive rules would be applied to the parties’ dispute if the proceeding continued in the local forum, and if the other two elements for applying the ‘no contracting out’ rule to the foreign exclusive jurisdiction clause are also satisfied, this leaves a related but distinct choice of law question as to whether the ‘no contracting out’ rule itself applies to the choice of court agreement. This was the main subject of inquiry in *The Hollandia*,¹²⁰ where the question was resolved by determining that the entirety of the Hague-Visby Rules (including both article III(8) and the substantive rules) applied to the bill of lading. It is submitted that this question must be answered by reference to the substantive

¹¹⁷ Carriage of Goods by Sea Act 1971 (UK) s 1(2), sch art X.

¹¹⁸ *The Hollandia (CA)* (n 86) 883.

¹¹⁹ *The Hollandia (HL)* (n 83) 577. The contrary argument adopted the reasoning of F A Mann in an article contending that both s 1(2) of the 1971 Act and art X of the Hague-Visby Rules only apply if English law governs the agreement: see 569 in respect of reliance by the carriers’ legal representatives on the article: ‘Statutes and the Conflict of Laws’ 46 BYIL 117, 121–26.

¹²⁰ See *The Hollandia (CA)* (n 86) 882–84; *The Hollandia (HL)* (n 83) 573.

rules being protected by the ‘no contracting out’ rule: if the substantive rules in the forum statute apply to the underlying dispute, the statute must also apply to the choice of court agreement.

2.3.4 Conclusion

The manner in which these ‘no contracting out’ rules have been interpreted and applied by English and Australian courts shows a readiness to regulate foreign exclusive jurisdiction clauses by reference to their substance and indirect effect. By reference to what substantive rules would be applied in the contractual forum, it is clear that ‘no contracting out’ rules in forum statutes may serve as a tool to ensure the application of certain substantive rules and limit the effectiveness of foreign exclusive jurisdiction clauses in international disputes.

2.4 ‘No choice of court’ rules

A ‘no choice of court’ rule expressly provides when an agreement that purports to confer jurisdiction on a foreign court or limit the jurisdiction of the local court will be void or of no effect. For instance, section 15D(1) of the Civil Jurisdiction and Judgments Act 1982 (UK) provides certain ‘[a]greements or provisions of a trust instrument conferring jurisdiction shall have no legal force’ in relation to disputes arising under a consumer contract or an individual contract of employment.¹²¹ In Australia, section 11(2) of the Carriage of Goods by Sea Act 1991 (Cth), which implement the Hague-Visby Rules,¹²² provides ‘an agreement...has no

¹²¹ The section provides, by reference to s 15B(6), that jurisdiction rules for disputes relating to consumer contracts in may only be departed from by way of a specific type of jurisdiction agreement, and does the same, by reference to s 15C(6), in respect of disputes relating to individual contracts of employment.

¹²² Carriage of Goods by Sea Act 1991 (Cth), s 8, sch 1.

effect so far as it purports to... preclude or limit' the jurisdiction of an Australian court in respect of a dispute related to a bill of lading or other specified document.¹²³ Both of these rules have been applied to limit the effectiveness of foreign exclusive jurisdiction clauses in international disputes.¹²⁴

2.4.1 *Legislative background and underlying policy*

The legislation containing these 'no choice of court' rules gives effect to substantive forum policy in respect of certain types of contractual relationships in the same way as outlined in sections 1.1 **Error! Reference source not found.**and 2.3.1 above. As already observed in section 2.1, the Civil Jurisdiction and Judgments Act 1982 (UK) contains a modified version of the Brussels regime. In carrying across this part of the Brussels regime following withdrawal from the EU,¹²⁵ it was considered desirable that 'in relation to...consumer and employment contracts, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules',¹²⁶ allowing 'limited autonomy [for parties to those contracts]

¹²³ Carriage of Goods by Sea Act 1991 (Cth), s 11(2)(b)–(c).

¹²⁴ See, eg, *Bitar v Banque Libano-Francaise SAL* [2021] EWHC 2787 (QB), [2022] 2 All ER; *Compagnie Des Messageries Maritimes v Wilson* (1954) 94 CLR 577. For examples of similarly worded statutory provisions, see for the UK: Employment Rights Act 1996, s 203(1)(b); Carriage by Air Act 1961, schs 1–1B art 32. For Australia, see Competition and Consumer (Industry Codes—Franchising) Regulation 2014, sch 1 cl 21(2); Civil Aviation (Carriers' Liability) Act 1959 (Cth), sch 1A art 49, schs 1–2, 5 art 32.

¹²⁵ Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 SI 2019/479 regs 4, 26. For an overview of the legislative changes following withdrawal from the EU see *Dicey, Morris and Collins on the Conflict of Laws* (n 8) paras 11.026–27.

¹²⁶ Recast Brussels I Regulation, recital 18; Brussels I Regulation, recital 13. See also Explanatory Memorandum to the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 para 2.6.

to determine the courts having jurisdiction'.¹²⁷ The explanatory material to the regulations amending the 1982 Act sets out the following rationale for retaining the Brussels regime:

The instrument has adopted and restated the approach to jurisdiction in consumer and employment matters taken by the Brussels Ia Regulation. The rules continue the particular protections offered to consumers and employees domiciled in the UK by the Brussels Ia Regulation, including a right to be sued in relation to a consumer, or employment, dispute only in the part of the UK in which they are domiciled (regardless of the domicile of the other party), and a right to sue the other party in such a dispute in parts of the UK with relevant connections – all of which largely obviates the need for the consumer, or employee, to sue abroad in such cases (with the attendant expense and difficulty for this category of economically weaker parties which having to sue outside their own forum brings).¹²⁸

Unlike other statutes that have been discussed in this chapter, the regime in sections 15A to 15E of the 1982 Act is specifically about jurisdiction and the forum statute does not seek to modify the parties' substantive rights or obligations.

In respect of the Australian carriage of goods by sea legislation, the policy underlying the Hague Rules and the Hague-Visby Rules has been outlined in section 2.2.1. The first iteration of carriage of goods by sea liability legislation in Australia arrived prior to the Hague Rules in the form of the Sea-Carriage of Goods Act 1904 (Cth), modelled on US law and introduced as a response to 'successful lobbying efforts of disgruntled Australian fruit exporters',¹²⁹ aiming to 'prevent ship-owners from escaping liability for their own

¹²⁷ Recast Brussels I Regulation, recital 19; Brussels I Regulation, recital 14.

¹²⁸ Explanatory Memorandum to The Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019, para 2.6.

¹²⁹ Simon Allison, 'Choice of Law and Forum Clauses in Shipping Documents – Revising Section 11 of the Carriage of Goods by Sea Act 1991 (Cth)' (2014) 40 Mon LR 639, 640. The legislation was modelled on the Harter Act 49 USC § 190 (1893): see Commonwealth, Parliamentary Debates, Senate, 23 November 1904, 7288 (Sir Josiah Symon).

negligence’.¹³⁰ In his Senate second reading speech introducing the legislation, the Attorney-General shared an anecdote involving damage to a consignment where, after making a complaint to the company, ‘the shippers were politely invited to proceed with their suit in the Courts of Germany.’¹³¹ After some debate,¹³² it was considered necessary to include a ‘no choice of court’ rule in the draft legislation ‘to prevent that which is simply an evasion of what we all desire should be fair conditions under which this export trade should be continued.’¹³³ This background helps explain why the second and third iterations of carriage of goods by sea liability legislation in Australia—the Sea-Carriage of Goods Act 1924 (Cth) which implemented the Hague Rules, and the Carriage of Goods by Sea Act 1991 (Cth) which implemented the Hague-Visby Rules—also contain ‘no choice of court’ rules in addition to the ‘no contracting out’ rules discussed above, even though the former rules were not part of the international convention or adopted by other states.¹³⁴

2.4.2 *Applying ‘no choice of court’ rules to foreign exclusive jurisdiction clauses*

This section will consider how ‘no choice of court’ rules have been interpreted and applied to foreign exclusive jurisdiction clauses by English and Australian courts. In the UK, where the

¹³⁰ Commonwealth, Parliamentary Debates, Senate, 23 November 1904, 7286–87 (Sir Josiah Symon).

¹³¹ Commonwealth, Parliamentary Debates, Senate, 23 November 1904, 7287 (Sir Josiah Symon).

¹³² For an overview of this debate, see Allison (n 129) 640–41.

¹³³ Commonwealth, Parliamentary Debates, Senate, 23 November 1904, 7287 (Sir Josiah Symon). See Sea-Carriage of Goods Act 1904 (Cth), s 6.

¹³⁴ Sea-Carriage of Goods Act 1924 (Cth), s 9(2); Carriage of Goods by Sea Act 1991 (Cth), s 11(2). But see Merchant Shipping Act 57 of 1951 (South Africa), s 310 (6); Carriage of Goods by Sea Act No 1 of 1986 (South Africa), s 3.

relevant provisions in the Civil Jurisdiction and Judgments Act only took effect for proceedings commenced from 1 January 2021, in determining whether to exercise jurisdiction in a consumer dispute, Mr Michael Kent KC recently found ‘[s]ections 15A to 15E inclusive...override any exclusive jurisdiction clause in a contract’.¹³⁵ This is consistent with previous decisions where the jurisdiction rules (including ‘no choice of court’ rules¹³⁶) in the recast Brussels I Regulation and its predecessor have been recognised as rendering ineffective exclusive jurisdiction clauses contrary to rules about the use of such agreements in relation to disputes arising under consumer contracts or individual contracts of employment.¹³⁷ Significantly, the European Court of Justice has held that the provisions of the Brussels regimes are to be interpreted ‘with account being taken of the concern to ensure proper protection for...the weaker of the contracting parties,’¹³⁸ which has informed the Court’s approach to interpreting the scope of a ‘no choice of court’ rule and its application to jurisdiction agreements.¹³⁹

¹³⁵ *Bitar v Banque Libano-Francaise SAL* (n 124) [4].

¹³⁶ Recast Brussels I Regulation art 25(4); Brussels I Regulation art 23(5). See also recast Brussels I Regulation, arts 17–19 in respect of consumer disputes, arts 20–23 in respect of employment disputes; Brussels I Regulation, arts 15–17 and arts 18–21.

¹³⁷ See, eg, *Yukos International UK BV v Merinson* [2018] EWHC 335 (Comm) [28] affd *Yukos International UK BV v Merinson* [2019] EWCA Civ 830, [2020] QB 336; Case C-208/18 *Jana Petruchová v FIBO Group Holdings Limited* EU:C:2019:825 [29].

¹³⁸ Case C-154/11 *Ahmed Mahamdia v People’s Democratic Republic of Algeria* EU:C:2012:491, [2012] I Pr 779 [46]. See also [60], appd in *Petter v EMC Europe Ltd* [2015] EWCA Civ 828, [2015] All ER (D) 313 (Jul) [17] (Moore-Bick LJ) when determining the meaning of ‘employee’ and ‘employer’ in section 5 of the Brussels I Regulation.

¹³⁹ See *Mahamdia* (n 138) [64]–[65] regarding the interpretation of Brussels I Regulation arts 21(2), 23(5) in respect of choice of court agreements which allow an employee to bring proceedings in other courts.

The ‘no choice of court’ rules in Australian carriage of goods by sea liability legislation have also been recognised by Australian courts as applicable to foreign exclusive jurisdiction clauses. In *Compagnie Des Messageries Maritimes v Wilson*,¹⁴⁰ the High Court applied section 9(2) of the Sea-Carriage of Goods Act 1924 (Cth) to strike down a French exclusive jurisdiction clause contained in a bill of lading relating to carriage from Dunkirk to Sydney. In doing so, Dixon CJ observed:

it can hardly be doubted that [the object of the provision] was to insure that Australian consignees of goods imported might enforce in Australian courts the contracts of sea-carriage evidenced by the bills of lading which they held. Section 9(2) is expressed in the strongest words and makes a stipulation or agreement falling within its terms illegal, null, void and of no effect.¹⁴¹

The provision has subsequently been described by a differently constituted High Court as ‘express statutory rejection of a foreign exclusive jurisdiction clause’.¹⁴² In even stronger terms, when considering the application of the provision to an arbitration agreement almost 50 years later in *The Krasnogorsk*,¹⁴³ Kirby P said ‘Parliament has...left no doubt as to its objective, emphatically expressed’ and referred to the duty of courts to ‘obey, and faithfully implement, such strongly worded legislative instruction.’¹⁴⁴ He continued:

¹⁴⁰ (n 124).

¹⁴¹ *Wilson* (n 124) 583.

¹⁴² *Akai* (n 2) 446 (Toohey, Gaudron and Gummow JJ).

¹⁴³ *Bulk Chartering & Consultants Australia Pty Ltd v T & T Metal Trading Pty Ltd (The Krasnogorsk)* (1993) 31 NSWLR 18.

¹⁴⁴ *The Krasnogorsk* (n 143) 23. The majority held the application of s 9(1) was irrelevant as it did not apply to the award itself which was valid: 28 (Handley JA), 42–43 (Sheller JA).

From the beginning of the Australian Federation, at least until the 1924 Act was repealed in 1991 (and even, arguably, now by s 11(2) of the 1991 Act) the Federal Parliament of this country, with the requisite constitutional power, has asserted an extremely strong legislative purpose to safeguard to Australian courts, Federal and State, the determination of disputes concerned with (putting it broadly) the sea-carriage of goods in and out of Australia. The strength of the language used by Parliament is reinforced by its three-fold repetition in statutes enacted in 1904, 1924 and 1991... There are few statutory provisions of any legislature in Australia which are more emphatic in their expression of policy than s 9 of the 1924 Act.¹⁴⁵

A similar approach has been taken by other Australian courts applying section 11(2) of the Carriage of Goods by Sea Act 1991 (Cth).¹⁴⁶ As an illustration of the strength of the rule, albeit in the context of a foreign arbitration clause, the Full Court in *Hi-Fert Pty Ltd v Kiukian Maritime Carriers Inc (No 5)* rejected an argument that section 11(2) only rendered the arbitration clause ineffective in requiring the parties to arbitrate, but continued to operate as acceptance of the nominated seat as an appropriate forum.¹⁴⁷ Instead, Emmett J found '[an] express obligation to refer a dispute to a non-judicial forum and the promise not to refer the dispute to a judicial forum are simply different aspects of a single stipulation',¹⁴⁸ and that '[b]oth aspects have the same consequence, namely that access to the jurisdiction of a court is

¹⁴⁵ *The Krasnogrosk* (n 143) 25.

¹⁴⁶ See, albeit in the context of a foreign arbitration clause, *Hi-Fert Pty Ltd v United Shipping Adriatic Inc* (1998) 89 FCR 166, 181 (Emmett J); *Hi-Fert Pty Ltd v Kiukian Maritime Carriers Inc (No 5)* (1998) 90 FCR 1. See also Mary Keyes, *Jurisdiction in International Litigation* (Federation Press 2005) 125.

¹⁴⁷ *Hi-Fert (No 5)* (n 146) 24–26.

¹⁴⁸ *Hi-Fert (No 5)* (n 146) 25 (Emmett J, others agreeing).

precluded or limited.’¹⁴⁹ Section 11(2) was therefore applied to render the arbitration clause of no effect whatsoever.¹⁵⁰

There are other ‘no choice of court’ rules in forum statutes that do not appear to have been the subject of consideration by English or Australian courts in determining the effectiveness of foreign exclusive jurisdiction clauses in international disputes. For instance, Australian franchising industry regulations provide that ‘a franchise agreement must not contain a clause that...requires a party to the agreement to bring an action or proceedings in relation to a dispute under the agreement... in any jurisdiction outside Australia’.¹⁵¹ In the UK, section 203(1)(b) of the Employment Rights Act 1996 provides that ‘[a]ny provision in an agreement...is void in so far as it purports...to preclude a person from bringing any proceeding under this Act before an employment tribunal’.¹⁵² Subject to satisfying other statutory criteria, it is submitted any of these provisions could also be applied to prevent a party from relying on a foreign exclusive jurisdiction clause in an international dispute.

¹⁴⁹ *Hi-Fert (No 5)* (n 146) 25 (Emmett J, others agreeing).

¹⁵⁰ *Hi-Fert (No 5)* (n 146) 24–26 citing *Wilson* (n 124).

¹⁵¹ Competition and Consumer (Industry Codes—Franchising) Regulation 2014, sch 1 cl 21(2). See cl 5 for definition of ‘franchise agreement’. But see *Joshan v Pizza Pan Group Pty Ltd* [2021] NSWCA 219, (2021) 106 NSWLR 104 where this provision was applied to a domestic non-exclusive jurisdiction clause in favour of the courts of New South Wales.

¹⁵² This provision may have limited work to do in circumstances where s 15D(1) of the Civil Jurisdiction and Judgments Act 1982 is available. See, in respect of the and the previous regime under the recast Brussels I Regulation and Brussels I Regulation, eg, *Kuznetsov v ING Bank NV* 3213256/2020 [50].

2.4.3 Choice of law issues

In the UK, recent decisions involving the application of section 15D(1) of the 1982 Act—and academic commentary in respect of this provision¹⁵³—proceed on the basis that the provision may apply to render a foreign exclusive jurisdiction clause ineffective even where there the clause is contained in a contract otherwise governed by foreign law.¹⁵⁴ This approach finds support in the context of the jurisdiction regime in which the rule is contained, and the purpose of that regime, being to retain the protection for consumers and employers that was available under the previous Brussels regimes.¹⁵⁵ It is further reinforced by the mandatory nature of these jurisdiction rules prior to the UK withdrawal from the European Union.¹⁵⁶

In Australia, each iteration of carriage of goods by sea liability legislation containing a ‘no choice of court’ rule also contains an express choice of law rule indicating legislative intent for the statute to apply notwithstanding what law would otherwise govern the parties’ relationship.¹⁵⁷ The position is the same for the Employment Rights Act in the UK,¹⁵⁸ and the

¹⁵³ See generally *Dicey, Morris and Collins on the Conflict of Laws* (n 8) chs 11 and 12 where, in respect of disputes relating to consumers and employment contracts, the authors proceed on the basis that s 15D(1) of the Civil Jurisdiction and Judgments Act 1982 would apply to any exclusive jurisdiction clause invoked before an English court.

¹⁵⁴ *Bitar v Banque Libano-Francaise SAL* (n 124) [3]–[4]. See also *Soleymani v Nifty Gateway LLC* [2022] EWHC 773 (Comm) [51], [60].

¹⁵⁵ See discussion in section 2.2 and 2.4.1.

¹⁵⁶ See section 2.2.

¹⁵⁷ Sea-Carriage of Goods Act 1904 (Cth), s 6; Sea-Carriage of Goods Act 1924 (Cth), s 9(1); Carriage of Goods by Sea Act 1991 (Cth), s 11(1).

¹⁵⁸ Employment Rights Act 1996, s 204(1).

franchising regulations in Australia which have force as a prescribed mandatory industry code.¹⁵⁹

2.4.4 Conclusion

‘No choice of court’ rules have been consistently applied to foreign exclusive jurisdiction clauses by English and Australian courts in a manner which recognises legislative intent to ensure parties, usually the weaker contractual party, can access local jurisdiction for certain types of disputes. By reference to the subject matter of the dispute and identity of the parties involved, it is clear that ‘no choice of court’ rules in forum statutes may limit the effectiveness of foreign exclusive jurisdiction clauses in international disputes.

2.5 Qualitative rules

A qualitative rule expressly provides when a term of an agreement is void or of no effect by reference to qualitative standards, such as fairness or reasonableness. For instance, section 62(1) of the Consumer Rights Act 2015 (UK) provides that an ‘unfair term of a consumer contract’—being a term ‘contrary to the requirement of good faith’ that ‘causes a significant imbalance in the parties’ rights and obligations under the contract to the detriment of the consumer’¹⁶⁰— is not binding on the consumer. The assessment of whether a term is unfair is to be undertaken ‘by reference to all the circumstances existing when the term was

¹⁵⁹ Competition and Consumer (Industry Codes—Franchising) Regulation 2014 reg 4 specifies that the code is a mandatory industry code prescribed under the Competition and Consumer Act 2010 (Cth), s 51AE(1).

¹⁶⁰ Consumer Rights Act 2015, s 62(4).

agreed’,¹⁶¹ and a specified example of an unfair term is one with ‘the object or effect of excluding or hindering the consumer’s right to take legal action or exercise any other legal remedy’.¹⁶²

There are similar provisions in Australia. Section 23(1) of the Australian Consumer Law, which applies to terms in standard form consumer or small business contracts, also defines an unfair term as one that causes a ‘significant imbalance’ in the parties’ rights and obligations arising under the contract.¹⁶³ There is a corresponding provision in section 12BF(1) of the Australian Securities and Investments Commission Act 2001 (Cth) in respect of unfair consumer or small business contract terms in financial products or contracts for the supply of financial services.¹⁶⁴ Both statutes specify an example of an unfair term as one ‘that limits, or has the effect of limiting, one party’s right to sue another party’,¹⁶⁵ and provide that such terms will be void.¹⁶⁶

¹⁶¹ Consumer Rights Act 2015, s 62(5).

¹⁶² Consumer Rights Act 2015, sch 2 pt 1, s 20. In the UK, there are qualitative rules in other statutes: see, eg, Unfair Contract Terms Act 1977, ss 3 and 6; Consumer Insurance (Disclosure and Representations) Act 2010 s 10(1); Insurance Act 2015 ss 15(1); 16(1)–(2), 17.

¹⁶³ Competition and Consumer Act 2010 sch 2 (‘Australian Consumer Law’), s 24(1). See also (2)–(3).

¹⁶⁴ Australian Securities and Investments Commission 2001 (Cth), s 12BF(1). See also ss 12BG–12BH. With effect from 9 November 2023, these provisions have been amended by Treasury Laws Amendment (More Competition, Better Prices) Act 2022 (Cth), sch 3 pt 1, ss 1–2.

¹⁶⁵ Australian Consumer Law, s 25(k); Australian Securities and Investments Commission 2001 (Cth), s 12BH(1)(k).

¹⁶⁶ Australian Consumer Law, s 23(1); Australian Securities and Investments Commission 2001 (Cth), s 12BF(1). From 9 November 2023, the inclusion of unfair terms in a contract in Australia may result in a contravention of the relevant statute carrying civil penalties and other remedial consequences: Treasury Laws Amendment (More Competition, Better Prices) Act 2022 (Cth), s 2, sch 3 pt 1.

2.5.1 *Legislative background and underlying policy*

The prohibition on unfair contract terms in section 62(1) of the Consumer Rights Act 2015 continues the protections for consumers introduced in the UK under the Consumer Contracts Regulations 1999,¹⁶⁷ which implemented the 1993 Council Directive on unfair terms in consumer contracts.¹⁶⁸ The Directive introduced a ‘system of protection...based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge’.¹⁶⁹ The specific prohibition on unfair contract terms is ‘a mandatory provision which, taking into account the weaker position of one of the parties to the contract, aims to replace the formal balance which the latter establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them.’¹⁷⁰

In Australia, the unfair contracts regime was modelled on the 1999 Regulations, which had already been adopted in Victoria.¹⁷¹ The Commonwealth regime was introduced in

¹⁶⁷ See Explanatory Notes to the Consumer Rights Act 2015, paras 287, 301.

¹⁶⁸ Council Directive (EC) 93/13 of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29 (‘Unfair Terms Directive 1993’).

¹⁶⁹ Case C-240/98–C-244/98 *Océano Grupo Editorial SA v Quintero* EU:C:2000:346 [2000] ECR I-494 [25]; Case C-137/08 *VB Penzugyi Lizing Zrt v Ferenc Schneider* EU:C:2010:401 [2010] ECR I-10847 [46].

¹⁷⁰ Case C-168/05 *Mostaza Claro v Centro Movil Milenium SL* EU:C:2006:675 [2006] ECR I-10421 [36]. See also Paula Giliker, ‘The Consumer Rights Act 2015—A Bastion of European Consumer Rights?’ (2017) 37 LS 78, 94.

¹⁷¹ See Fair Trading Act 1999 (Vic), pt 2B, repd Fair Trading Amendment (Australian Consumer Law) Act 2010 (Vic), s 17.

response to a perceived ‘deficiency in the current generic framework’,¹⁷² namely that the use of standard form contracts ‘offered on a take-it-or-leave-it basis, with the terms apparently rarely read’ might increase the risk that ‘consumers can be exploited if things go wrong’.¹⁷³ Similar concerns underpinned the extension of the regime in Australia to small business contracts in 2016, where it was recognised that ‘unfair contract terms often allocate contract risks to the party that is less able to manage them’.¹⁷⁴ The Australian Consumer Law protections are now part of legislation which aims to ‘enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection’.¹⁷⁵

2.5.2 *Applying qualitative rules to foreign exclusive jurisdiction clauses*

This section will consider how qualitative rules have been interpreted and applied to foreign exclusive jurisdiction clauses by English and Australian courts. In the UK, it has been accepted that a qualitative rule can limit the effectiveness of a foreign exclusive jurisdiction clause,¹⁷⁶ but this position has not yet been accepted in Australia.¹⁷⁷ From the limited case law available,

¹⁷² Productivity Commission, *Review of Australia’s Consumer Policy Framework* (No 45, Inquiry Report, 30 April 2008) vol 1 34–35. See Explanatory Memorandum to the Trade Practices Amendment (Australian Consumer Law) Bill 2009 paras 480–81 for discussion of the legislative response to this report.

¹⁷³ Productivity Commission (n 172) 34–35

¹⁷⁴ See Explanatory Memorandum to the Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015, paras 1.3–1.5, 2.3–2.5.

¹⁷⁵ Competition and Consumer Act 2010 (Cth), s 2. There is no equivalent objective stated in the Australian Securities and Investments Commission Act 2001 (Cth).

¹⁷⁶ *Standard Bank London Ltd v Apostolakis* [2001] Lloyd’s Rep Bank 240, [2001] EWHC 493 applying Unfair Terms in Consumer Contracts Regulations 1999, reg 8(1) subsequently replaced by Consumer Rights Act 2015, s 62(1).

¹⁷⁷ *Karpik v Carnival plc (The Ruby Princess) (stay application)* [2021] FCA 1082 (‘*The Ruby Princess (First Instance)*’) [137] (Stewart J). This decision was the subject of appeal to the Full Court where this aspect of appeal was abandoned: *Carnival plc v Karpik (The Ruby Princess)* [2022] FCAFC 149, (2022) 294 FCR 524 (‘*The Ruby*

the focus of the court’s inquiry is on the individual circumstances of the parties, such as matters of costs and convenience, rather than the approach of the contractual forum or substantive rules that would be applied there.

In the UK, it has been accepted that a qualitative fairness rule may render a foreign exclusive jurisdiction clause ineffective in certain circumstances. In *Standard Bank London Ltd v Apostolakis*,¹⁷⁸ David Steel J considered an exclusive jurisdiction clause in favour of the English court did not bind consumers who did not speak English and were taken by surprise by the bank’s subsequent reliance on the clause.¹⁷⁹ Applying regulation 8(1) of the 1999 Regulations,¹⁸⁰ he observed ‘the purpose of the regulations is to protect consumers’ before finding that the relevant proceedings demonstrated ‘the potential cost and inconvenience of being bound to this jurisdiction’,¹⁸¹ which led to his conclusion that the clause was contrary to good faith and not binding.¹⁸²

In doing so, David Steel J referred to the European Court of Justice decision in *Océano Grupo Editorial SA v Quintero*,¹⁸³ where it was recognised that a Spanish domestic exclusive

Princess (Full Court)’ [4] (Allsop CJ). Special leave to appeal from the Full Court decision to the High Court was granted on 17 March 2023: S5/2023.

¹⁷⁸ (n 176).

¹⁷⁹ *Apostolakis* (n 176) [51].

¹⁸⁰ This provision was subsequently replaced by s 62(1) of the Consumer Rights Act 2015.

¹⁸¹ *Apostolakis* (n 176) [51].

¹⁸² *Apostolakis* (n 176) [51].

¹⁸³ *Apostolakis* (n 176) [48] citing *Océano Grupo* (n 169).

jurisdiction clause in favour of a place far away from a consumer's place of domicile could be a deterrent for taking action in respect of small claims,¹⁸⁴ while in contrast 'the term enables the seller or supplier to deal with all the litigation relating to his trade, business or profession in the jurisdiction of which he has his principal place of business..[which] makes it easier for the seller or supplier to arrange to enter an appearance and makes it less onerous for him to do so.'¹⁸⁵ A similar approach has been taken to exclusive jurisdiction clauses in other decisions of the European Court of Justice, pointing out the imbalance between the consumer's position and that of the seller or supplier, and recognising an exclusive jurisdiction clause might fall within the category of terms with 'the object or effect of excluding or hindering the consumer's right to take legal action' which has been specified as an example of an unfair term in the Directive.¹⁸⁶

In the UK, it has subsequently been emphasised by the courts that assessment of unfairness is 'a fact specific inquiry',¹⁸⁷ and *Apostolakis* might be distinguished on its specific facts, including the language barriers and complexity of the agreement.¹⁸⁸ In any event, there has been limited recourse to unfair contract terms legislation in respect of exclusive jurisdiction

¹⁸⁴ *Océano Grupo* (n 169) [22]. See also *Penzugyi* (n 169) [54]–[55].

¹⁸⁵ *Océano Grupo* (n 169) [23].

¹⁸⁶ Unfair Terms Directive 1993, art 3(3), annex 1 div 1(q). See *Penzugyi* (n 169) [54]; Case C-519/19 *RyanAir DAC v Delay Fix* EU:C:2020:933 [57]–[59].

¹⁸⁷ *AMT Futures* (n 4) [62] (Poplewell J).

¹⁸⁸ *Chopra v Bank of Singapore Ltd* [2015] EWHC 1549 Ch [139]–[140] although the jurisdiction clause in this case was non-exclusive. See also, in relation to when a term leads to a significance imbalance between the parties and is contrary to good faith, *Cavendish Square Holding BV v Talal El Makdessi*; *ParkingEye Ltd v Beavis* [2015] UKSC 67, [2016] AC 1172 [105], [109].

clauses in the UK, likely due to the historic operation of the Brussels Convention,¹⁸⁹ and the subsequent Brussels I Regulation and recast Brussels I Regulation containing special rules for consumers, which are now given effect through the Civil Jurisdiction and Judgments Act 1982.¹⁹⁰

In Australia, there are no instances where a qualitative rule has been applied to limit the effectiveness of a foreign exclusive jurisdiction clause. In *The Ruby Princess (First Instance)*,¹⁹¹ a judge of the Federal Court found a foreign exclusive jurisdiction clause in a holiday cruise contract was not an unfair term,¹⁹² taking the view the clause did not cause any imbalance between the parties because ‘it does not prevent a passenger’s right to sue...it only seeks to restrict the fora in which a passenger may bring an action’.¹⁹³ While there was no issue regarding the substantive law that could be applied in the US contractual forum,¹⁹⁴ Stewart J observed ‘the forum chosen is not one that is inapt to give effect to the parties’ rights arising under the contract’.¹⁹⁵ In addition, ‘avoidance by an international corporation of litigation in multiple jurisdictions’ was found to be ‘a legitimate interest worthy of

¹⁸⁹ Civil Jurisdiction and Judgments Act 1982, s 2 which gave effect to an amended version of the 1968 Brussels Convention as recorded in the 1978 Accession Convention repd by Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 SI 2019/479.

¹⁹⁰ Civil Jurisdiction and Judgments Act 1982, ss 15A–15E.

¹⁹¹ *Karpik v Carnival plc (The Ruby Princess)* [2021] FCA 1082 (*The Ruby Princess (First Instance)*’).

¹⁹² *The Ruby Princess (First Instance)* (n 192) [137]. The finding was in obiter as Stewart J considered the exclusive jurisdiction clause was not incorporated into the contract: see [134]–[136].

¹⁹³ *The Ruby Princess (First Instance)* (n 192) [135] (Stewart J).

¹⁹⁴ See *The Ruby Princess (First Instance)* (n 192) [298].

¹⁹⁵ *The Ruby Princess (First Instance)* (n 192) [135].

protection'.¹⁹⁶ While an appeal against this finding was abandoned in the Full Court,¹⁹⁷ it is suggested that this reasoning is difficult to reconcile with the statute and its underlying purpose. Even though the representative passenger was domiciled in Calgary, this is still some distance away from the District Court of Los Angeles, being the nominated contractual forum. As recognised in the aforementioned UK and European Court of Justice decisions,¹⁹⁸ the costs and inconvenience of litigating in California might be a deterrent from commencing legal proceedings, and therefore do much more than simply 'restrict the fora in which a passenger may bring an action'.¹⁹⁹ In addition, when an international corporation is conducting business and targeting consumers in multiple jurisdictions, the legitimacy of seeking to avoid the possibility of litigating in those jurisdictions is open to doubt. It is submitted the Australian court should have at least recognised these matters, and this might have led to the qualitative rule being applied to render the foreign exclusive jurisdiction clause ineffective.

There are other examples of qualitative rules that have not yet been applied to foreign exclusive jurisdiction clauses in the UK or Australia. For instance, in the UK, the Unfair Contract Terms Act 1977 prohibits the exclusion or restriction of liability for breach of contract in certain circumstances subject to a requirement of reasonableness,²⁰⁰ which is effectively a

¹⁹⁶ *The Ruby Princess (First Instance)* (n 192) [136] citing *Gonzalez v Agoda Co Pte Ltd* [2017] NSWSC 1133 [126].

¹⁹⁷ *Carnival plc v Karpik (The Ruby Princess)* [2022] FCAFC 149, (2022) 294 FCR 524 ('*The Ruby Princess (Full Court)*') [4].

¹⁹⁸ See text to nn 178–186.

¹⁹⁹ *The Ruby Princess (First Instance)* (n 192) [135].

²⁰⁰ Unfair Contract Terms Act 1977, ss 3 and 6. See s 11 for the 'requirement of reasonableness'.

combination of a ‘no contracting out’ rule and a qualitative rule. There are also provisions in the Insurance Act 2015 and the Consumer Insurance (Disclosure and Representations) Act 2010 to regulate contractual terms that would put a consumer ‘in a worse position’ in respect of certain matters,²⁰¹ or, in the case of a non-consumer, such terms subject where transparency requirements are not satisfied.²⁰² In Australia, there is also State legislation allowing a court to intervene where a contract is ‘unjust in the circumstances relating to the contract at the time it was made’.²⁰³ Subject to other statutory criteria and choice of law issues, discussed in section 2.5.3, it is submitted that any of these provisions might be capable of being applied to prevent a party from relying on a foreign exclusive jurisdiction clause

2.5.3 Choice of law issues

In the UK, the Consumer Rights Act 2015 contains an express choice of law rule which provides that even where a foreign law is chosen by the parties to be applicable to a consumer contract, the unfair contract terms regime will apply ‘despite that choice’ so long as ‘the consumer contract has a close connection with the [UK].’²⁰⁴ It follows that section 62(1) will apply to a foreign exclusive jurisdiction clause contained in a consumer contract that is either governed by local law or where there is a sufficiently close connection between the contract and the UK.

²⁰¹ Consumer Insurance (Disclosure and Representations) Act 2010, s 10; Insurance Act 2015, s 15.

²⁰² Insurance Act 2015, s 16. See also s 17.

²⁰³ Contracts Review Act 1980 (NSW), s 7(1).

²⁰⁴ Consumer Rights Act 2015, s 74(1).

The position is less straightforward in respect of the UK legislation that has not yet been applied to or invoked in relation to a foreign exclusive jurisdiction clause. The Unfair Contract Terms Act 1977 (UK) will apply notwithstanding a foreign choice of law clause only where it appears that choice has been imposed ‘wholly or mainly for the purpose of enabling the party imposing it to evade the operation of this Act’.²⁰⁵ In addition, while the Law Commission report behind the Consumer Insurance (Disclosure and Representations) Act 2010 contemplated that a foreign choice of law clause would be ineffective if it left the insured in ‘a worse position’,²⁰⁶ none of the insurance statutes contain any express statement of legislative intent to apply notwithstanding what would otherwise be the law governing an agreement.

In Australia, it is currently unsettled whether section 23 of the Australian Consumer Law (or its corresponding provision in section 12BF(1) of the Australian Securities and Investments Commission Act 2001 (Cth)) has overriding effect. In *The Ruby Princess (First Instance)*, Stewart J relied on section 5 of the Competition and Consumer Act 2010 (Cth), which extends the application of the Australian Consumer Law to ‘the engaging in conduct outside Australia by...bodies corporate incorporated or carrying on business within Australia’,²⁰⁷ to find that section 23 applied to the foreign exclusive jurisdiction clause.²⁰⁸ In the Full Court, while Allsop CJ indicated it was ‘a valid and open constructional choice’ to find

²⁰⁵ Unfair Contract Terms Act 1977, s 27(2).

²⁰⁶ Law Commission and Scottish Law Commission, *Consumer Insurance Law: Pre-Contract Disclosure and Misrepresentation* (Law Com No 319, Scot Law Com No 219, 2009) para 6.117.

²⁰⁷ Competition and Consumer Act 2010 (Cth) s 5(1)(c),(g); *The Ruby Princess (First Instance)* (n 192) [126]. See also Competition and Consumer Act 2010, s 4(2)(a).

²⁰⁸ *The Ruby Princess (First Instance)* (n 192) [126].

section 5 of the Act extended the scope of section 23,²⁰⁹ this did not resolve the question of whether the provision applied to contracts otherwise governed by foreign law.²¹⁰ The majority of the Full Court (Allsop CJ and Derrington J) delivered divergent reasons on the scope of section 23,²¹¹ which was framed as an issue about the extraterritorial reach of the legislation,²¹² but left the point undecided. The decision is now the subject of appeal to the High Court.²¹³ where it is suggested the intended scope of the regime to apply to ‘the making of, or the giving effect to a provision of’ a contract outside Australia,²¹⁴ and the prospect of it being frustrated by the use of foreign choice of law clauses to ‘contract out’ of the regime, means the stronger argument lies in favour of section 23 being applied to unfair terms in consumer and small business contracts with a close connection to Australia,²¹⁵ even where those terms are otherwise governed by foreign law.

2.5.4 Conclusion

Qualitative rules in forum statutes ensure, with due regard to the circumstances of the contracting parties, that the terms of an agreement meet particular standards of fairness,

²⁰⁹ *The Ruby Princess (Full Court)* (n 197) [22].

²¹⁰ *The Ruby Princess (Full Court)* (n 197) [23] (Allsop CJ). See [274]–[267], [281]–[349] (Derrington J). Rares J did not decide this point.

²¹¹ *The Ruby Princess (Full Court)* (n 197) [20]–[35] (Allsop CJ), [274]–[349] (Derrington J).

²¹² See, eg, *The Ruby Princess (Full Court)* (n 197) [274]–[276] cf *The Soldiers, Sailors, Airmen and Families Association v Allgemeines Krankenhaus Viersen GmbH* [2022] UKSC 29 [36].

²¹³ Case S25/2023.

²¹⁴ See the definition of ‘engaging in conduct’ in Competition and Consumer Act 2010, s 4(2)(a). See also s 5(1)(g).

²¹⁵ By implication, the outcome would also apply to Australian Securities and Investments Commission Act 2001 (Cth), s 12BF(1).

reasonableness or transparency. These rules reflect a different degree of tolerance for party autonomy and choice of forum. The parties are permitted to choose a foreign court for the resolution of disputes subject to standards imposed upon that freedom of choice, requiring the court to undertake a qualitative assessment of the agreement and the circumstances in which it was agreed. While there are few instances of qualitative rules being applied to limit the effectiveness of foreign exclusive jurisdiction clauses, it is clear that such rules can be used as a tool to ensure access to local courts and uphold standards about the circumstances in which such access can be fairly bargained away, which may limit the effectiveness of foreign exclusive jurisdiction clauses.

2.6 A fourth type of express statutory rule? Choice of law rules

There is a potential fourth type of express statutory rule to consider in this chapter. As already indicated,²¹⁶ whether or not a statute is ‘overriding’ or ‘mandatory’ in the sense of applying notwithstanding what law would otherwise govern a dispute is a matter of statutory interpretation. In some instances, the statute will contain an express statutory choice of law rule (either ‘unilateral’ or ‘multilateral’²¹⁷) to indicate legislative intent that the law of the forum, or specific provisions of that law, should be applied. Some of these rules have already been referred to or set out in sections 2.3.3, 2.4.3 and 2.5.3.

²¹⁶ See sections 1.2 and 2.3.3.

²¹⁷ The distinction between a unilateral or a multilateral rule goes to whether the rule is only concerned with the law of the forum or laws of more than one jurisdiction. A unilateral rule will preference the forum. A multilateral choice-of-law rule will specify when the law of the forum (which will include the forum statute) is to be applied, as well as when to apply the law of another jurisdiction.

Some choice of law rules expressly state when an agreement to apply another law (ie a foreign choice of law clause) will be void or ineffective. For instance, section 11(1) of the Carriage of Goods by Sea Act 1991 (Cth) first provides that all parties to certain sea carriage documents and non-negotiable documents ‘are taken to have intended to contract according to the laws in force at the place of shipment’; section 11(2) then provides an agreement ‘has no effect so far as it purports to...preclude or limit the effect of subsection (1) in respect of a bill of lading or a document mentioned in that subsection.’²¹⁸ Others do not. For example, section 8(1) of the Insurance Contracts Act 1984 (Cth) provides that the statute is to be applied to contracts the proper law of which would be the law of an Australian State or territory,²¹⁹ and section 8(2) provides that such contracts will include those with a close connection to such a State or territory notwithstanding an express provision to the contrary.²²⁰ The statutory choice of law rule says nothing expressly about whether such ‘express provision to the contrary’ will be void or ineffective. It is left to be implied, as the High Court did in *Akai*,²²¹ that a foreign choice of law clause is ineffective to displace application of the statute.

The background and underlying policy of the legislation containing these rules has already been set out in sections 2.3.1, 2.4.1 and 2.5.1. The extrinsic material also reveals the specific intent behind some rules: for instance, a Law Commission report underpinning the

²¹⁸ Carriage of Goods by Sea Act 1991 (Cth), s 11(2)(a). See also Sea-Carriage of Goods Act 1904 (Cth), s 6; Sea-Carriage of Goods Act 1924 (Cth), s 9(1).

²¹⁹ Insurance Contracts Act 1984 (Cth), s 8 read with s 52; *Akai* (n 2) 426–27, 433.

²²⁰ Insurance Contracts Act 1984 (Cth), s 8(1)–(2).

²²¹ See section 1.2.

Consumer Rights Act states the choice of law rule was intended to defeat attempts to ‘evade’ the substantive consumer protection provisions in the 2015 Act,²²² recognising that in circumstances where a contract is ‘from the consumer’s perspective, closely connected to the UK because he or she ordered the goods or services there’,²²³ the consumer could ‘justifiably expect their own “home” law to apply’.²²⁴ Similar statements can be found in explanatory material for Australian statutes containing such rules.²²⁵

The reason that these choice of law rules are only proposed as a tentative fourth category is because there are no known instances of such rules being directly applied to independently render a foreign exclusive jurisdiction clause ineffective. However, in principle, there is no apparent reason why this could not be done. A choice of law rule cannot be meaningfully distinguished from a ‘no contracting out’ rule (section 2.3) insofar as both types effect legislative intent about when substantive rules of the forum must be applied and, more broadly, about when party autonomy must yield to countervailing policies of the forum. It follows that, where there is evidence that the contractual forum would not apply substantive rules contained in a forum statute, there is no reason why a choice of law rule that ordinarily ensures those rules apply notwithstanding a choice of foreign law could not also be applied to

²²² Law Commission and Scottish Law Commission, *Unfair Terms in Contracts* (Law Com No 292, Scot Law Com No 199, 2005) para 7.14. See Consumer Rights Act 2015, ss 32(1), 74(1).

²²³ Law Commission and Scottish Law Commission (n 222) paras 7.16–7.18.

²²⁴ Law Commission and Scottish Law Commission (n 222) paras 7.16–7.18. See also Explanatory Memorandum to the Consumer Rights Bill 2015 paras 161–62, 340.

²²⁵ See, eg, Explanatory Memorandum to the Insurance Contracts Bill 1984 para 23 citing Australian Law Reform Commission (n 12) para 15.

render a foreign exclusive jurisdiction clause ineffective. This was contemplated in *Nicola v Ideal Image Development Corporation Inc*,²²⁶ where a stay of proceedings involving claims under the Trade Practices Act 1974 (Cth) and the Independent Contractors Act 2006 (Cth) was resisted on the basis that both statutes were said to contain ‘overriding choice of law rule which meant...the claims under those acts had to be determined by Australian courts’.²²⁷ Perram J accepted the argument in principle,²²⁸ although found there was no relevant choice of law rule in either statute.²²⁹ Interestingly, he found that the decision of the High Court in *Akai* provided support for giving this effect to a statutory choice of law rule:

There can be cases where a statute contains an overriding choice of law clause such that a forum court can proceed on no other basis but than in accordance with its terms. The decision in *Akai Pty Ltd* is an example of one such case.²³⁰

While it might be questioned whether *Akai* does provide support for this position, as the choice of law rule in section 8 of the Insurance Contracts Act 1984 (Cth) was only ever invoked by the majority in relation to the ‘no contracting out’ rule in section 52,²³¹ it is submitted that the reasoning of Perram J is otherwise sound. It follows that, where a statutory choice of law rule

²²⁶ [2009] FCA 1177, (2009) 215 FCR 76.

²²⁷ *Nicola* (n 226) [71]. The proceeding also involved a claim under the Trade Practices (Industry Codes—Franchising) Regulations 1998 sch (Franchising Code of Conduct) repd Competition and Consumer ((Industry Codes—Franchising) Regulations 2014. It was not submitted that the 1998 Regulations contained any express choice of law rule. The 1998 Regulations also did not contain a ‘no choice of court’ rule cf 2014 Regulations, sch 1, cl 21(2); see section 2.4.2.

²²⁸ *Nicola* (n 226) [72].

²²⁹ *Nicola* (n 226) [72]–[73].

²³⁰ *Nicola* (n 226) [72].

²³¹ *Akai* (n 2) 448 as discussed in section 1.2; cf *Keyes* (n 146) 8, 85–86.

expressly states that a contrary agreement will be rendered void or ineffective, it may be applied to a foreign exclusive jurisdiction clause according to its terms. Where there is no statement to this effect, it may provide a basis for impliedly limiting the effectiveness of a foreign exclusive jurisdiction clause where that would preclude the application of the statute.

2.7 Conclusion

This chapter has illustrated how forum statutes might tell us, through express rules about the effectiveness of contractual terms, exactly when and how a foreign exclusive jurisdiction clause will be ineffective. The chapter has identified three types of express rules: ‘no contracting out’ rules, ‘no choice of court’ rules and qualitative rules. Each rule has a distinct interaction with any given foreign exclusive jurisdiction clause: for instance, a ‘no contracting out’ rule directs attention to the substantive rules that will be applied in the contractual forum, whereas a qualitative rule demands a focus on the individual circumstances of the contracting parties at the time of contracting. The rules tell us precisely the types of agreements that they apply to, and the consequences for such agreements when they are applied. The chapter has also suggested a fourth type of express statutory rule—choice of law rules—which it is submitted are capable of applying directly to limit the effectiveness of a foreign exclusive jurisdiction clause. There will, of course, be differences in context and terms of each statute, including between the UK and Australia. But once applied to a foreign exclusive jurisdiction clause, each rule effects intent about when countervailing policy will prevail over party autonomy and leaves no room for the exercise of the court’s remedial discretion to give effect to the parties’ choice of court agreement.

3 POLICY OF THE FORUM STATUTE AS A STRONG REASON NOT TO GIVE EFFECT TO A FOREIGN EXCLUSIVE JURISDICTION CLAUSE

This chapter will consider whether a forum statute that does not regulate jurisdiction, in the sense of directing the court when to exercise it, or regulate the effectiveness of the foreign exclusive jurisdiction clause, in the sense of containing an express rule about the effectiveness of the choice of court agreement, might still provide a strong reason not to give effect to such a clause. This chapter will critically examine 17 cases in the UK and Australia where public policy relating to a forum statute has been identified as a strong reason not to give effect to a foreign exclusive jurisdiction clause.²³² It will be submitted that almost all the cases under review can be understood as involving—or should have been dealt with as involving—the direct application of one or more provisions of the forum statute. That is either in the sense of applying an express statutory rule of the type described in Chapter 2 (section 3.1), or because the substantive rules are of such force that legislative intent about the scope of those rules impliedly renders the foreign exclusive jurisdiction clause ineffective when those rules are engaged (section 3.2). In all of these instances, a purposive interpretation of the forum statute (in the sense of determining when it applies) might be assisted by an understanding of the policy underlying the statute, and relevant extrinsic material. Yet no case provides a convincing foundation for the ‘policy of the law’, or public policy discerned from the scope and purpose of a forum statute, as a matter bearing independently on the exercise of the court’s remedial

²³² This includes 3 English cases identified in a pool of 250 cases involving references to ‘public policy’ and ‘exclusive jurisdiction clause’, and 14 Australian cases in a pool of 65 cases on the same terms. One of the English cases (*Motacus Constructions Ltd v Paolo Castelli SpA* [2021] EWHC 356 (TCC), [2021] Bus LR 717) concerns the application of the statutory public policy exception in article 6 of the 2005 Hague Convention rather than the common law discretionary rule.

discretion to grant specific relief. It is instead apparent that the expression ‘policy of the law’ has been used synonymously with legislative intent about the scope of substantive rules in international disputes, which when applied must result in the court’s discretion being removed altogether.

The chapter will consider how a forum statute might supply information about or reflect the public policy of the forum, or other matters relevant to the court’s discretion such as the degree of public interest in a proceeding (section 3.4.1). This analysis shows there is a real distinction between ascertaining legislative intent as disclosed by the language used in the statute, and using a statute as a fact or point of reference when identifying forum public policy.²³³ In the first scenario, legislative intent must be given effect if it applies to the case at hand, thereby precluding the court’s remedial discretion when the intent relates expressly or impliedly to the effectiveness of the foreign exclusive jurisdiction clause. In the second scenario, the court’s remedial discretion only survives in the absence of legislative intent about the effectiveness of the foreign exclusive jurisdiction clause. It is therefore incumbent on courts to exercise caution when deploying the content of a forum statute or its underlying policy, and to be precise about when and how the forum statute is being used.

²³³ See, for a general discussion of how judge-made law can be informed by and respond to statute: Jack Beatson, ‘Has the Common Law a Future?’ (1997) 56 CLJ 291, 308; Mark Leeming, ‘Theories and Principles Underlying the Development of the Common Law: The Statutory Elephant in the Room’ (2013) 36 UNSWLJ 1002.

3.1 Cases where the court ought to have applied an express statutory rule in the forum statute to determine the effectiveness of the foreign exclusive jurisdiction clause

This section will consider five cases where the policy of a forum statute was identified as a strong reason or potential strong reason not to give effect to a foreign exclusive jurisdiction clause. In each of these instances, it is contended the court ought to have simply applied a ‘no contracting out’, ‘no choice of court’ or choice of law rule of the type described in Chapter 2 to render the foreign exclusive jurisdiction clause ineffective, leaving no room for the exercise of the court’s remedial discretion.

As already outlined above,²³⁴ the majority of the High Court in *Akai* applied the ‘no contracting out’ rule in section 52 of the Insurance Contracts Act 1984 (Cth) to determine the foreign exclusive jurisdiction clause was void.²³⁵ This ought to have been an appropriate place to conclude, as the House of Lords did in *The Hollandia*.²³⁶ Yet the majority continued, finding that a stay of proceedings would also be inconsistent with ‘the policy of the Act’.²³⁷ In support of this conclusion, the majority relied on the express statutory rules about the effectiveness of foreign exclusive jurisdiction clauses in the statute. They explicitly invoked the choice of law rule in section 8 which,²³⁸ for reasons set out above,²³⁹ could have been applied directly to

²³⁴ See sections 1.2 and 2.3.2.

²³⁵ *Akai* (n 2) 448.

²³⁶ See discussion of *The Hollandia (HL)* (n 83) in section 2.3.2.

²³⁷ *Akai* (n 2) 447 (Toohey, Gummow and Gaudron JJ).

²³⁸ *Akai* (n 2) 447.

²³⁹ See section 2.6.

render the English exclusive jurisdiction clause ineffective, and indicated that this provision was to be read alongside the ‘no contracting out’ rule in section 52, which was in fact applied to render the foreign exclusive jurisdiction clause ineffective.²⁴⁰ Given this background, it is unsurprising that the policy identified by the majority—being ‘against the use of private engagements to circumvent [the Act’s] remedial provisions’²⁴¹—is really no more than a description of the effect of these express statutory rules. It is submitted that the High Court’s analysis in *Akai* ought to have ended once the express statutory rule was applied, with no room left for additional consideration of the policy of the statute. As it stands, the majority’s use of the Insurance Contracts Act 1984 (Cth), as a means of illustrating how the policy of a statute might operate where the statute itself does not, gives rise to confusion about the concept of the ‘policy of the law’,²⁴² as well as the difference between the task of statutory interpretation and discerning the policy of a statute. This analysis obscures the operation of the statute, and risks eliding fundamental differences between public policy bearing on the exercise of the court’s discretion, and a statute which removes that discretion altogether.

The potential for confusion is evident in *Quinlan v Safe International Försäkrings AB*.²⁴³ In determining the effectiveness of a Swedish exclusive jurisdiction clause in an insurance contract, Nicholson J only makes a passing reference to section 52 of the Insurance

²⁴⁰ *Akai* (n 2) 433.

²⁴¹ *Akai* (n 2) 447 (Toohey, Gaudron and Gummow JJ).

²⁴² *Akai* (n 2) 447 (Toohey, Gaudron and Gummow JJ).

²⁴³ [2005] FCA 1362, (2006) 14 ANZ Ins Cas 61-693.

Contracts Act 1984 (Cth).²⁴⁴ He also does not contemplate applying section 8 of the Act to the foreign exclusive jurisdiction clause by reference to its indirect effect,²⁴⁵ insisting that '[a] choice of forum clause is different from a choice of law clause'.²⁴⁶ On the assumption that the nominated Swedish court would not apply the Act, Nicholson J exercises his remedial discretion in favour of declining to give effect to the clause, finding 'the protective factor in the Australian statute strongly favours the ability of the applicant to sue in an Australian court'.²⁴⁷ While the approach taken is unlikely to have made a difference to the outcome, it is submitted that, like *Akai*, this is a purported policy case that should have been dealt with by application of an express statutory rule,²⁴⁸ which would have removed the court's remedial discretion altogether.

In the UK, a similar point can be made about *Fern Computer Consultancy v Intergraph Cadworx & Analysis Solutions Inc.*²⁴⁹ Mann J considered the effectiveness of an exclusive Texas jurisdiction clause in a proceeding involving a substantive claim under the Commercial

²⁴⁴ See *Quinlan* (n 243) [36] where Nicholson J notes that section 52 of the Insurance Contracts Act 1984 (Cth) 'prevents contracting out'. No further reference is made to this statutory provision when determining the effectiveness of the foreign exclusive jurisdiction clause.

²⁴⁵ See section 2.6.

²⁴⁶ *Quinlan* (n 243) [344].

²⁴⁷ *Quinlan* (n 243) [50]. See also [49(f)] citing *Commonwealth Bank of Australia v White* [1999] VSC 262, [1999] 2 VR 681, quoting *Society of Lloyd's v White* [2004] VSCA 101 [6].

²⁴⁸ Either s 8 or s 52 of the Insurance Contracts Act 1984 (Cth).

²⁴⁹ [2014] EWHC 2908 (Ch), All ER (D) 160 (Aug).

Agents (Council Directive) Regulations 1993,²⁵⁰ which govern the relationship between commercial agents and their principals including, in regulations 17 and 18, the indemnity or compensation payable to a commercial agent on termination of contract.²⁵¹ Regulation 19, which is an example of the ‘no contracting out’ rules outlined in Chapter 2, provides that parties ‘may not derogate from regulations 17 and 18 to the detriment of the commercial agent before the agency contract expires’. After deciding the Texas court would not apply the relevant substantive rules,²⁵² Mann J referred to two arbitration cases where a court had declined to give effect to an arbitration agreement in favour of a place that would not apply the 1993 Regulations, recognising ‘the primacy of a claim under the Regulations over contractual provisions where to give effect to those provisions would not allow the Regulations to have their full effect’.²⁵³ He also expressly referred to the effect of regulation 19: noting ‘the impermissibility of derogating from the entitlement of the parties to benefit from the Regulations’.²⁵⁴ While it appears that Mann J proceeded on the basis that he was exercising

²⁵⁰ Commercial Agents (Council Directive) Regulations 1993 implementing Council Directive (EC) 86/653 of 18 December 1986 on the co-ordination of the laws of member States relating to self-employed commercial agents [1986] OJ L382/17

²⁵¹ Commercial Agents (Council Directive) Regulations 1993, reg 19.

²⁵² *Fern Computer Consultancy* (n 249) [125]–[126] in the context of determining whether England and Wales was the proper place to bring the claim.

²⁵³ *Fern Computer Consultancy* (n 249) [128] citing *Accentuate Ltd v Asigra Inc* [2009] EWHC 2655 (QB), [2010] 2 All ER (Comm) 738 [88] (Tugendhat J), Case C-381/08 *Ingmar GB Ltd v Eaton Leonard Technologies Inc* EU:C:2000:605 [2000] ECR I-93305.

²⁵⁴ *Fern Computer Consultancy* (n 249) [127].

discretion as to whether to give effect to the Texas jurisdiction clause, it is suggested that regulation 19 ought to have been applied directly to remove his remedial discretion altogether.

Petter v EMC Europe followed the controversial decision of *Samengo-Turner v J&H Marsh & McLennan (Services)*,²⁵⁵ where the Court of Appeal granted an anti-suit injunction to support an employee's right to jurisdiction in an English court under section 5 of the Brussel I Regulation notwithstanding the existence of an exclusive New York jurisdiction clause.²⁵⁶ This section, which is now replicated in sections 15C to 15D of the Civil Jurisdiction and Judgments Act 1982,²⁵⁷ provides an employer may bring proceedings 'only in the courts of the Member State in which the employee is domiciled',²⁵⁸ and that an exclusive jurisdiction clause contrary to the regime 'has no legal force'.²⁵⁹ Faced with similar facts in an application for an interim anti-suit injunction to restrain proceedings brought by an employer in Massachusetts, the Court of Appeal in *Petter* considered itself bound to follow *Samengo-Turner*,²⁶⁰ albeit with different degrees of conviction about the correctness of the earlier decision. Each judge agreed that the

²⁵⁵ *Petter v EMC Europe Ltd* [2015] EWCA Civ 828, [2015] All ER (D) 313 (Jul); *Samengo-Turner v J&H Marsh & McLennan (Services)* [2007] EWCA Civ 723, [2008] ICR 18.

²⁵⁶ *Samengo-Turner* (n 255) [39] (Tuckey LJ). For recent discussion of academic debate around both decisions, see *Gagliardi v Evolution Capital Management LLC* [2023] EWHC 1608 (Comm) [37] (Foxton J) and academic literature cited therein. See also *Khalifeh v BLOM Bank SAL (a Société Anonyme Libanaise incorporated under the Laws of Lebanon)* [2021] EWHC 1502 (QB), [2021] All ER (D) 19 (Jun) in respect of the consumer contract regime under the Civil Jurisdiction and Judgments Act 1982.

²⁵⁷ See discussion of the history of this regime in section 2.2.

²⁵⁸ Brussels I Regulation, art 20(1); recast Brussels I Regulation, art 22(1). This provision has been replicated in Civil Jurisdiction and Judgments Act 1982, s 15C(3).

²⁵⁹ Brussels I Regulation, art 23(5); recast Brussels I Regulation, art 25(4). This provision has been replicated in Civil Jurisdiction and Judgments Act 1982, s 15D(1).

²⁶⁰ *Petter* (n 255) [33] (Moore-Bick LJ), [37] (Vos LJ), [47] (Sales LJ).

exclusive Massachusetts jurisdiction clause had ‘no legal force’ by operation of the ‘no choice of court’ rule in the recast Brussels I Regulation.²⁶¹ However, Vos LJ suggested that the existence of a ‘freely-agreed’ exclusive jurisdiction clause was still relevant to the appropriateness of awarding injunctive relief.²⁶² For Sales LJ, the weight due to the foreign exclusive jurisdiction clause in the exercise of the Court’s remedial discretion was informed by the public policy underlying section 5 of the recast Brussels I Regulation.²⁶³ After outlining different public policy concerns that might be relevant to the exercise of the Court’s discretion,²⁶⁴ he found the policy of the statute supported limited weight to be given to party autonomy. He held:

where the English Court has to consider whether public policy as reflected in English law should be given weight so as to outweigh party autonomy and the principle of *pacta sunt servanda* in respect of a foreign country exclusive jurisdiction clause (as in our case), the effect of the law and its role to protect public policy considerations which are to be recognised in the English domestic jurisdiction are much more direct and the discretion of the English Court to disregard it or give it little weight is much less. The domestic legislator (including for these purposes the EU legislator when enacting directly effective EU law, as in the Regulation) has the primary responsibility for identifying what public policy requires and for enacting law to give effect to that public policy; and its judgment on that question may be very direct and clear, as it is in the provisions in s 5 of the Regulation.²⁶⁵

²⁶¹ *Petter* (n 255) [26] (Moore-Bick LJ), [43] (Vos LJ), [46] (Sales LJ).²⁶¹ Brussels I Regulation, art 23(5); recast Brussels I Regulation, art 25(4).

²⁶² *Petter* (n 255) [44] (Vos LJ). See also [42]–[43].

²⁶³ *Petter* (n 255) [48]–[57] (Sales LJ).

²⁶⁴ *Petter* (n 255) [48]–[50] (Sales LJ).

²⁶⁵ *Petter* (n 255) [53] (Sales LJ).

Sales LJ continued:

I think it is also relevant in assessing how to weigh up domestic public policy concerns reflected in English law against the usual principle of party autonomy to consider whether the relevant English public policy and law are themselves intended to reflect a judgment regarding the force to be accorded to party autonomy...²⁶⁶

And applying that rule to the case at hand:

... the object of [section 5] is to deprive foreign exclusive jurisdiction clauses of effect when the English Court is asked to apply them and to require a person who is an “employer” for the purposes of the Regulation to litigate against the employee in the courts of the employee's place of domicile... The public policy and law are specifically designed to derogate from party autonomy and the *pacta sunt servanda* principle, so that the employee is not to be treated as stuck with what he has contracted for.²⁶⁷

This reasoning demonstrates a willingness to identify and use the public policy of a forum statute to inform the exercise of the court’s discretion to grant relief. It was the policy of the forum statute, in the view of Sales LJ, which told the Court what value to put on party autonomy and the existence of the ‘freely-agreed’ foreign exclusive jurisdiction clause. Significantly, this was treated as a separate exercise to the direct application of the recast Brussels I Regulation to determine the effectiveness of the foreign exclusive jurisdiction clause. It is suggested that the policy considerations identified by Sales LJ, all going to the purpose of the statutory regime and legislative intent about the circumstances in which parties’ choice of forum will be ineffective, might have instead been applied to the construction of article 25(4) of the recast

²⁶⁶ *Petter* (n 255) [56] (Sales LJ).

²⁶⁷ *Petter* (n 255) [57] Sales LJ). See also, for a description of the policy underlying s 5 of the recast Brussels I Regulation for the purpose of informing the approach to determining the meaning of ‘employer’ and ‘employee’ in the statute: [17] (Moore-Bick LJ).

Brussels I Regulation.²⁶⁸ Of course, an application for injunctive relief is different from an application for a stay, and the effectiveness of the exclusive jurisdiction may not be determinative of whether relief should be granted. However, the reasoning of Sales LJ supports a broader reading of ‘no legal force’, words from article 25(4) which might have at least been applied to deprive the Massachusetts exclusive jurisdiction clause entirely of effect in the court’s determination about whether to award injunctive relief, such that it would not have been appropriate for Vos LJ or Sales LJ to have regard to the fact of the agreement in exercising the court’s remedial discretion.

Another case is *Motacus Constructions Ltd v Paolo Castelli SpA*,²⁶⁹ which involved an application to enforce an interim decision pursuant to an adjudication regime in the Housing Grants, Construction and Regeneration Act 1996 (UK).²⁷⁰ While there was an exclusive jurisdiction clause in favour of the courts of Paris, the claimant contended the Hague Convention on Choice of Court Agreements 2005 was not engaged for reasons including that the claim fell within the statutory public policy exception in article 6(c) of the Convention. This argument focused on the policy of the 1996 Act, which regulates the substantive content of construction contracts and provides for compulsory interim adjudication of disputes relating to those contracts.²⁷¹ The claimant’s submissions relied on extracts of debate in the House of

²⁶⁸ This provision has been replicated in Civil Jurisdiction and Judgments Act 1982 (UK), s 15D(1).

²⁶⁹ *Motacus Constructions* (n 232).

²⁷⁰ Housing Grants, Construction and Regeneration Act 1996 pt II, s 108.

²⁷¹ Housing Grants, Construction and Regeneration Act 1996 pt II, s 108.

Lords regarding ‘the need for the adjudication process to produce a quick, enforceable, interim decision’ in construction disputes,²⁷² arguing ‘it was hard to imagine that Parliament intended that parties to foreign law contracts should be able to avoid the effective (ie timely) implementation of the 1996 Act by electing for the exclusive jurisdiction of a foreign court.’²⁷³ The claimant’s policy argument also relied on the choice of law provision in section 104(7) of the Act, which provides for the adjudication regime to apply ‘whether or not the law of England and Wales or Scotland is otherwise the applicable law in relation to the contract’.²⁷⁴

Judge Hodge QC ultimately did not accept the policy argument, with emphasis on the absence of evidence about what law would be applied in Paris,²⁷⁵ as well as some reticence about meeting the standard of ‘manifestly’ contrary to public policy set by article 6 of the 2005 Hague Choice of Courts Convention.²⁷⁶ However, there are aspects of the judgment recognising a ‘statutory policy of affording the parties a speedy mechanism for settling disputes in construction contracts on a provisional, and interim, basis’,²⁷⁷ which might have determined the effectiveness of the exclusive jurisdiction clause under the 2005 Hague Choice of Courts

²⁷² *Motacus Constructions* (n 232) [24] quoting HL Deb 22 April 1996, vol 571.

²⁷³ *Motacus Constructions* (n 232) [25]. See also [30] referring to *Babcock Marine (Clyde) Limited v HS Barrier Coatings Ltd* [2019] EWHC 1659 (TCC), [2019] BLR 495 where at [66] an argument of this nature was contemplated, although not determined.

²⁷⁴ *Motacus Constructions* (n 232) [25].

²⁷⁵ In the absence of such evidence, Judge Hodge QC relied on the presumption that foreign law is the same as English law: *Motacus Constructions* (n 232) [38].

²⁷⁶ Hague Convention on Choice of Court Agreements 2005, art 6(c); *Motacus Constructions* (n 232) [54].

²⁷⁷ *Motacus Constructions* (n 232) [55]. See also [27], [54], [58].

Convention regime in different circumstances or outside of it.²⁷⁸ If there had been evidence that the adjudicative regime would not have been applied in Paris, this might be a case where the statutory choice of law rule in section 104(7) of the 1996 Act could be applied to the foreign exclusive jurisdiction clause.²⁷⁹ However, this was not considered by any of the parties or the Court, likely because under the Convention regime there is no exception for a choice of court agreement that is ineffective under the law of the court seised.²⁸⁰

Each of these five cases can be understood as involving—or should have been dealt with as involving—the direct application of the forum statute. In each instance, the forum statute contained an express statutory rule of the type described in Chapter 2, giving effect to specific legislative intent about when and how a foreign exclusive jurisdiction clause will be ineffective. It follows that, while the court might refer to policy as something distinct from the operation of the statute, and purport to be exercising remedial discretion to give effect to the clause with regard to such matters, no case provides a foundation for such policy as a matter that will bear on the exercise of the court’s discretion. Rather, in each instance the court’s remedial discretion was or ought to have been precluded by the forum statute, and the policy of the statute had no further role to play in determining the effectiveness of the foreign exclusive jurisdiction clause.

²⁷⁸ *Motacus Constructions* (n 232) [55].

²⁷⁹ *Motacus Constructions* (n 232) [25].

²⁸⁰ See Hague Convention on Choice of Court Agreements, art 6(a) which contains an exception limited to where ‘the agreement is null and void under the law of the State of the chosen court.’

3.2 Cases where the court ought to have applied legislative intent about scope of substantive rules in the forum statute to determine the effectiveness of the foreign exclusive jurisdiction clause

This section will examine nine cases where, even though the court claims to be applying public policy or the ‘policy of the law’ as something distinct from the operation of the statute as a strong reason not to give effect to a foreign exclusive jurisdiction clause,²⁸¹ and there is no express statutory rule of one of the types discussed in Chapter 2, the court’s reasons focus on legislative intent regarding the scope of specific substantive rules in the forum statute. It will be submitted that it is this intent which conclusively determines the effectiveness of the foreign exclusive jurisdiction clause. If the contractual forum will not apply the relevant substantive rules, and there is legislative intent to ensure the application of those rules of such force that the foreign exclusive jurisdiction clause in favour of such a forum is rendered impliedly ineffective, the court’s remedial discretion is precluded altogether. While the task of ascertaining legislative intent might be assisted by an understanding of policy underlying the statute and relevant extrinsic material, such policy does not amount to something distinct that can bear separately on the exercise of the court’s remedial discretion. This analysis is consistent with the treatment of the effectiveness of choice of law clauses by courts in international disputes, and provides a more principled basis for understanding the interaction between forum statutes and foreign exclusive jurisdiction clauses.

²⁸¹ The section additionally considers 2 cases where the statute did contain an express rule: *Akai* (n 2), *Motacus Constructions* (n 232); and 1 case where the court did not finally determine the effectiveness of the foreign exclusive jurisdiction clause: *The Ruby Princess (Full Court)* (n 197).

The majority of the cases canvassed in this section are lower court decisions involving alleged contraventions of the prohibitions on misleading and deceptive conduct and unconscionable conduct in the Australian Consumer Law,²⁸² or the predecessor legislative provisions in the Trade Practices Act 1974 (Cth) and equivalent State legislation.²⁸³ For instance, in *Commonwealth Bank of Australia v White*,²⁸⁴ a judge of the Supreme Court of Victoria determined an application for service out for claims alleging misleading and deceptive conduct and breaches of Victorian companies legislation. In determining whether to uphold an exclusive jurisdiction clause in favour of the courts of England where the substantive rules would not be applied, Byrne J found it ‘undesirable’ to allow the contractual parties to ‘circumvent a legislative scheme established by Parliament to protect investors purchasing interests or prescribed interests’.²⁸⁵ After pointing out there was no exemption in the statutes for foreign corporations,²⁸⁶ he found ‘the policy behind [the statutes] would not be served if exemption might be achieved by inserting stipulations as to foreign law or forum’,²⁸⁷ and declined to give effect to the foreign exclusive jurisdiction clause. This is a very clear statement

²⁸² Australian Consumer Law, ss 18 and 21. See *Home Ice Cream Pty Ltd v McNabb Technologies LLC* [2018] FCA 1033; *Home Ice Cream Pty Ltd v McNabb Technologies LLC (No 2)* [2018] FCA 1093; *The Ruby Princess (First Instance)* (n 192); *Lew Footwear Holdings v Madden International* [2014] VSC 320; *Epic Games, Inc v Apple Inc* [2021] FCA 338, (2021) 151 ACSR 444; *Urban Moto Imports Pty Ltd v KTM AG* [2021] VSC 616; *Ayers Rock SkyShip Pty Ltd v Lindstrand Technologies Limited* [2022] FCA 1208.

²⁸³ Trade Practices Act 1974 (Cth), ss 51AB and 52; Fair Trading Act 1985 (Vic.) s 11 repd by Fair Trading Act 1999 (Vic). See, eg, *CBA v White* (n 247); *Hume Computers Pty Ltd ACN 003 154 827 v Exact International BV* [2006] FCA 1440; *Clough Engineering Ltd v Oil & Natural Gas Corporation Ltd* [2007] FCA 881, [2007] ATPR 42.

²⁸⁴ (n 247).

²⁸⁵ *CBA v White* (n 247) [89].

²⁸⁶ *CBA v White* (n 247) [89].

²⁸⁷ *CBA v White* (n 247) [89].

about the intended scope of the substantive rules under which claims had been made in the proceeding. Even though this decision is often cited in support of the existence of a strong reason of public policy to not give effect to a foreign exclusive jurisdiction clause in a case involving a consumer law claim,²⁸⁸ it is clear that the effectiveness of the foreign exclusive jurisdiction clause was determined by reference to legislative intent about the circumstances in which the substantive provisions of the Trade Practices Act 1974 and other forum statutes should be applied.

Similarly, in *Clough Engineering Ltd v Oil & Natural Gas Corporation Ltd*,²⁸⁹ when considering an application for service out of jurisdiction of claims under the Trade Practices Act 1974 (Cth) notwithstanding an exclusive jurisdiction clause in favour of the courts of India, Gilmour J indicated that the exclusive jurisdiction clause might not be enforced in an Australian court,²⁹⁰ describing the Act as a ‘public policy statute’.²⁹¹ However, the finding that the prospect of the statutory prohibition on unconscionable conduct not being applied in the contractual forum would be a strong reason not to give effect to the clause relies on Parliament’s

²⁸⁸ See, eg, *Lew Footwear* (n 282) [234]–[235]; *Urban Moto Imports* (n 282) [23], [78]; *The Ruby Princess (First Instance)* (n 192) [256]; *Epic Games (First Instance)* (n 282) [27]. See also *Home Ice Cream* (n 282) [19].

²⁸⁹ (n 283).

²⁹⁰ *Clough* (n 283) [41].

²⁹¹ *Clough* (n 283) [41].

desire ‘to stamp out unfair or improper conduct in trade or commerce’,²⁹² and thus rests squarely on legislative intent behind the substantive rules in the statute.²⁹³

In *Home Ice Cream Pty Ltd v McNabb Technologies LLC*,²⁹⁴ Greenwood ACJ placed emphasis on the remedial entitlements available under the Australian Consumer Law and the protective nature of the statute.²⁹⁵ He found that giving effect to the foreign exclusive jurisdiction clause would result in the legislative protective scheme being ‘defeated’ or ‘avoided’,²⁹⁶ and expressed the view that statutory entitlements under protective legislation could not be ‘contracted away’.²⁹⁷ This formed a basis for injunctive relief restraining the respondent from prosecuting proceedings in the Circuit Court of Cook County, Illinois, notwithstanding the existence of a foreign exclusive jurisdiction clause in favour of that forum,²⁹⁸ and a subsequent ‘antiantisuit injunction’ to further limit the effectiveness of the choice of court agreement.²⁹⁹ Again, this is about the scope of substantive rules.³⁰⁰

²⁹² *Clough* (n 283) [41] quoting *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (No 1)* (1988) 39 FCR 546, 561. See also [42] quoting *Akai* (n 2) 445.

²⁹³ Trade Practices Act 1974 (Cth), s 51AA.

²⁹⁴ (n 282). See also *Home Ice Cream (No 2)* (n 282).

²⁹⁵ *Home Ice Cream* (n 282) [17], [25]. See also *Home Ice Cream (No 2)* (n 282) [17]–[19].

²⁹⁶ *Home Ice Cream* (n 282) [19] citing *CBA v White* (n 247) 704.

²⁹⁷ *Home Ice Cream* (n 282) [17].

²⁹⁸ *Home Ice Cream* (n 282) [28], [35].

²⁹⁹ *Home Ice Cream (No 2)* (n 282) [30].

³⁰⁰ In this instance, the statutory prohibition on misleading and deceptive conduct in the Australian Consumer Law, s 18.

Even in *Akai*, although the forum statute did contain an express rule of the type considered in Chapter 2,³⁰¹ the majority's analysis of the policy of the Insurance Contracts Act 1984 (Cth) was informed by legislative intent, being 'legislative intent not only that there should be no power to contract out of the provisions of the Act, but also that the regime established by the Act should be respected as regards contracts the proper law of which is, or but for selection of another law would be, that of a State or Territory'.³⁰² This finding also relies on the intended scope of specific substantive statutory rules.³⁰³

The issue of legislative intent also arose in *The Ruby Princess (Full Court)*. It was common ground that the US contractual forum would apply Australian law but would not permit the claimants to proceed by way of a class action. Only two judges, Allsop CJ and Rares J, considered whether Pt IVA of the *Federal Court of Australia Act 1976* (Cth),³⁰⁴ being a class action regime with highly regulated opt-out procedures, limited the effectiveness of the foreign exclusive jurisdiction clause. In reaching opposite conclusions, both judges refer variously to the 'policy of the statute',³⁰⁵ 'public policy',³⁰⁶ and the 'policy of the legislature in

³⁰¹ See section 2.3.

³⁰² *Akai* (n 2) 433.

³⁰³ In this instance, Insurance Contracts Act 1984 (Cth) s 54. For an analysis of *Akai* which proceeds on the basis that the majority did perceive themselves bound to apply substantive rules in the Insurance Contracts Act 1984 (Cth) and therefore required to retain jurisdiction without considering any other factor, see Keyes (n 146) 8, 85–86.

³⁰⁴ *The Ruby Princess (Full Court)* (n 197) [11]–[14] (Allsop CJ); [51]–[69], [87]–[95] (Rares J).

³⁰⁵ *The Ruby Princess (Full Court)* (n 197) [11] (Allsop CJ).

³⁰⁶ *The Ruby Princess (Full Court)* (n 197) [51] (Rares J).

enacting a statute'.³⁰⁷ However, the essence of the disagreement is about whether the terms of the statutory regime permit a party to effectively opt out of a class action through a foreign exclusive jurisdiction clause.³⁰⁸ The reasons of Allsop CJ are particularly focused on the terms of the statute: stating that for the clause to be ineffective 'the foregoing of such statutory rights must be contrary to the statute',³⁰⁹ and pointing out that there was no 'policy or purpose of Pt IVA infringed...[or] aspect of the terms of Pt IVA that are offended' by the choice of court agreement.³¹⁰ This reasoning clearly centres around the existence and nature of legislative intent, rather than any policy distinct from the application of the regime.

And in *Motacus Constructions Ltd v Paolo Castelli SpA*,³¹¹ the intention of Parliament was at the centre of the parties' dispute about the content and relevance of any policy arising from the Housing Grants, Construction and Regeneration Act 1996 (UK).³¹² The claimant's argument focused on legislative intent to permit 'contracting out' in the sense of being able to

³⁰⁷ *The Ruby Princess (Full Court)* (n 197) [51] (Rares J).

³⁰⁸ See *The Ruby Princess (Full Court)* (n 197) [91] (Rares J) cf [11]–[14] (Allsop CJ).

³⁰⁹ *The Ruby Princess (Full Court)* (n 197) [11] citing *Price v Spoor* [2021] HCA 20, (2012) 270 CLR 450 [12]–[16], [39], [76]–[78]; *Westfield Management Ltd v AMP Capital Property Nominees Ltd* [2012] HCA 54 [46]–[52]; *Commonwealth v Verwayen* [1990] HCA 39, 170 CLR 394, 404–407.

³¹⁰ *The Ruby Princess (Full Court)* (n 197) [12]–[13].

³¹¹ *Motacus Constructions* (n 232).

³¹² *Motacus Constructions* (n 232) [24]–[25]. See [40] for the defendant's counter-argument in relation to intention expressed in the Hague Convention on Choice of Court Agreements 2005 and the implementing legislation: Civil Jurisdiction and Judgments Act 1982 as amended by the Private International Law (Implementation of Agreements) Act 2020.

‘avoid the effective (ie timely) implementation of the 1996 Act by electing for the exclusive jurisdiction of a foreign court’.³¹³

It is difficult to see how the process of ascertaining legislative intent to allow ‘contracting out’ is anything other than a matter of interpreting specific provisions of the statute that are engaged in the case at hand. It involves looking at the words of the statute. It involves having regard to the terms and purpose of the statute. And the end result involves giving effect to what the legislature is taken to have intended, being to ensure certain substantive rules in a forum statute are applied or at least made available to a person bringing a claim in the forum. All of these steps might be described as hallmarks of a purposive approach to statutory interpretation.³¹⁴ Indeed, the process is almost identical to the approach taken by courts when interpreting a statute to determine whether substantive rules have ‘overriding’ or ‘mandatory’ effect in the sense of applying to a contract notwithstanding what would otherwise be the governing law under common law rules of private international law (including where there is a foreign choice of law clause in favour of another jurisdiction).³¹⁵ In this context, an Australian commentator has observed that the ‘policy of the law’ has been used in a manner that is ‘practically indistinguishable from a purposive approach to statutory interpretation’,³¹⁶ and as

³¹³ *Motacus Constructions* (n 232) [25].

³¹⁴ See section 2.1.

³¹⁵ See generally, in relation to the role of statutory interpretation in choice of law Michael Douglas, ‘Choice of Law in an Age of Statutes: A Defence of Statutory Interpretation after Valve’ in Michael Douglas, Vivienne Bath, Mary Keyes and Andrew Dickinson (eds) *Commercial Issues in Private International Law: A Common Law Perspective* (Bloomsbury Publishing 2019) 201.

³¹⁶ Douglas (n 315) 210 citing *Australian Competition and Consumer Commission v Valve Corporation (No 3)* [2016] FCA 196. See also 221–23.

a means of determining when a statute applies to an international dispute.³¹⁷ It might be argued that the jurisdictional stage of proceedings is distinct from determining what substantive rules ought to be applied to govern the parties' dispute, and substantive rules should not have any bearing on the court's determination about jurisdiction.³¹⁸ Yet such a distinction seems artificial. In determining whether to exercise jurisdiction, the court is effectively deciding (albeit indirectly) the law that will be applied to govern the parties' dispute. In the cases under review, this is a matter that already bears on the court's decision-making, as belied by the focus on substantive rules and legislative intent to permit 'contracting out'.

3.3 A domestic law analogy?

In *Akai*, when the majority of the High Court identified the 'policy of the law' as a matter which might provide a basis for a court to decline to give effect to private contractual arrangements that are 'not directly contrary to any express or implied statutory prohibition',³¹⁹ they did so by citing the case of *Nelson v Nelson*.³²⁰ Given this case has also been relied on in subsequent Australian decisions applying public policy to find that parties cannot 'contract out' of the Australian Consumer Law in a domestic setting,³²¹ and might be a point of distinction between

³¹⁷ Douglas (n 315) 221. See also Keyes (n 146) 91 suggesting the references to public policy in *Akai* (n 2) are a 'justification for application of a mandatory rule of the forum'.

³¹⁸ See, eg, Keyes (n 146) 86.

³¹⁹ *Akai* (n 2) 447 (Toohey, Gaudron and Gummow JJ).

³²⁰ *Akai* (n 2) 447 citing *Nelson* (n 31) 611 (Deane and Gummow JJ).

³²¹ See, eg, *Viterra Malt Pty Ltd v Cargill Australia Ltd* [2023] VSCA 157, [407]. This decision is the subject of an application to the High Court for special leave filed 21 July 2023: M56/2023.

the UK and Australia, it is worth considering here. *Nelson* involved a claim for enforcement of equitable rights under a trust associated with an illegal purpose prohibited by statute. In a joint judgment, Deane and Gummow JJ set out three categories of statutory consequences for a contract or trust.³²² The first two categories involve the direct application of a forum statute, express or implied. The third category was said to be where the statute does not apply directly but a court applies the policy of the law—ascertained by reference to the scope and purpose of the statute³²³—to determine that the contract or trust should not be enforced.³²⁴ In drawing a link between the policy of the law as a means of determining the effectiveness of a foreign exclusive jurisdiction clause and the doctrine of statutory illegality (or “common law illegality”³²⁵) in other private law contexts, the majority implicitly recognised the existence of the same concern to maintain coherence between statutes and the enforcement of private contractual arrangements.³²⁶

While the tripartite approach set out in *Nelson* might provide a useful framework for considering the role of a forum statute in determining the effectiveness of a private agreement, it is submitted that the recognition of the relevance of the policy of the law in this context does

³²² *Nelson* (n 31) 611 citing *Vita Foods, Inc v Unus Shipping Co* (1939) AC 277 (HL) 293 and *Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd* [1978] HCA 42, 139 CLR 410, 429–30, 432–33.

³²³ *Nelson* (n 31) 611.

³²⁴ *Nelson* (n 31) 611.

³²⁵ See A Burrows, ‘A New Dawn for the Law of Illegality’ in Sarah Green and Alan Bogg (eds) *Illegality after Patel v Mirza* (Hart Publishing 2018) 24–25. See also *Gnych v Polish Club Ltd* [2015] HCA 42, (2015) 255 CLR 414 [70] (Gageler J).

³²⁶ *Miller v Miller* [2011] HCA 9, (2011) 242 CLR 446 [15]; ‘the central policy consideration at stake is the coherence of the law’; *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 [23]; *Gnych* (n 325) [72].

not provide a principled basis for applying (or even identifying) the policy of a forum statute on a freestanding basis when the court is exercising its discretion to give effect to a foreign exclusive jurisdiction clause. The majority in *Akai* did not engage with the obvious differences between conduct associated with or in furtherance of an illegal purpose and an agreement to exclusively litigate in a foreign court, nor did they give any express indication as to how an extension of the doctrine was expected to supplement or interact with Australian forum statutes that already regulate the effectiveness of foreign exclusive jurisdiction clauses, including the Insurance Contracts Act 1984 (Cth). It is suggested that these differences are significant, with the result that the utility of the tripartite framework in this context is limited. This conclusion is reinforced by returning to the cases under review in sections 3.1 and 3.2. In these instances, the statute is not being used to provide information about the values of the forum or even to modify the content of forum public policy as something distinct from the operation of the statute. Rather, the courts are only looking to the statute for specific rules that bear upon the effectiveness of a foreign exclusive jurisdiction clause or for information about the scope of substantive rules in the statute. Such legislative intent, once identified, may bear directly on the effectiveness of a foreign exclusive jurisdiction clause. But it has no work to do as a policy factor that might be weighed in the exercise of the court's remedial discretion.

3.4 Is there any other basis for a forum statute to supply a strong reason of public policy to not give effect to a foreign exclusive jurisdiction clause?

This section will test any remaining bases for finding that a forum statute that does not apply directly to a foreign exclusive jurisdiction clause (ie because it does not contain an express statutory rule (section 3.1) and the substantive rules do not render the clause ineffective (section

3.2)) might nonetheless supply a policy factor relevant to the exercise of the court's remedial discretion to give effect to a foreign exclusive jurisdiction clause.

3.4.1 *Epic Games*

In *Epic Games (Full Court)*,³²⁷ the focus of the Full Court's reasons in relation to public policy is in connection with substantive claims made under the restrictive trade practices regime in pt IV of the Competition and Consumer Act 2010 (Cth).³²⁸ While the Full Court expressly referred to *Akai* in determining that to give effect to the foreign exclusive jurisdiction clause would 'offend the public policy of the forum',³²⁹ there are important differences in respect of the public policy identified by the Full Court and the means by which it was identified when compared with the approach of the majority of the High Court in *Akai*. One of these differences is that the Full Court was not concerned with the potential for parties to 'contract out' of the forum statute. The Full Court accepted that the contractual forum might apply Australian law. However, it found there was a 'a legislative policy that claims pursuant to pt IV should be determined in Australia, preferably in the Federal Court',³³⁰ regardless of what substantive law would be applied in the Californian court. This conclusion was also linked to concerns about a

³²⁷ *Epic Games, Inc v Apple Inc* [2021] FCAFC 122, (2021) 286 FCR 105 ('*Epic Games (Full Court)*').

³²⁸ See *Epic Games (Full Court)* (n 327) [13]. The proceeding also involved Australian Consumer Law claims.

³²⁹ *Epic Games (Full Court)* (n 327) [20] (Middleton, Jagot and Moshinsky JJ). See also [21], [87], [122].

³³⁰ *Epic Games (Full Court)* (n 327) [99]. See also [122].

foreign court applying Australian law ‘through the prism of expert evidence’ and the potential for local proceedings to contribute to Australian jurisprudence.³³¹

Another difference is that the Full Court’s reasons rely to a significant extent on the degree of public interest in the proceeding: the economic significance of claims under pt IV,³³² the likely impact on consumers in Australia,³³³ and the availability of statutory ‘platform provisions’ in the Competition and Consumer Act 2010 (Cth) for claims in respect of loss or damage suffered by other persons from the same contravening conduct, such as other app developers,³³⁴ and for the Australian competition regulator to bring an action on behalf of such persons.³³⁵ These provisions were said to ‘reinforce the fact that proceedings under Pt IV of the CCA can involve fundamental public interest issues.’³³⁶

The Full Court also relies on the statutory regime for the distribution of jurisdiction for pt IV claims within Australia, pointing to ‘the relevance of the Federal Court being chosen by the legislature as the court of its choice’.³³⁷ But again, it is the economic significance of pt IV

³³¹ *Epic Games (Full Court)* (n 327) [110].

³³² *Epic Games (Full Court)* (n 327) [99].

³³³ *Epic Games (Full Court)* (n 327) [97], [108], [125].

³³⁴ Competition and Consumer Act 2010 (Cth), ss 83, 87(1A), 137H, 237–40; *Epic Games (Full Court)* (n 327) [66], [108]–[109].

³³⁵ *Epic Games (Full Court)* (n 327) [32] citing Competition and Consumer Act 2010 (Cth), s 87(1A). See also [122].

³³⁶ *Epic Games (Full Court)* (n 327) [60].

³³⁷ *Epic Games (Full Court)* (n 327) [122] citing Competition and Consumer Act 2010 (Cth), s 86.

proceedings which is recognised as the basis for this choice.³³⁸ This is apparent from the following passage:

However, some general comments can be made as to Pt IV of the CCA. As we will explain, there is a legislative policy that claims pursuant to Pt IV should be determined in Australia, preferably in the Federal Court. This public policy reflects the economic significance for Australia of conduct regulated by Pt IV and is reflected in the legislative intention that, with limited and carefully prescribed exceptions, Pt IV contraventions should be heard by this Court.³³⁹

The Full Court's reasons clearly hinge on the degree of public interest in the proceeding: it is acknowledged that 'the alleged contravening conduct has, and is continuing to, adversely affect the state of competition in markets in Australia and very large numbers of Australians',³⁴⁰ and has 'particularly far reaching' effect,³⁴¹ involving 'fundamental public interest issues' in relation to conduct undertaken in Australia.³⁴² In this sense, the reasons look outwards: focusing on the effect of the alleged contravening conduct on consumers generally and other app developers,³⁴³ and wider public interest in pt IV claims;³⁴⁴ rather than being strictly confined to the text of the statute.

It is submitted that *Epic Games (Full Court)* is an outlier relative to the other cases reviewed in this chapter. It is clear that the Full Court is not engaged in the task of searching

³³⁸ See *Epic Games (Full Court)* (n 327) [99].

³³⁹ *Epic Games (Full Court)* (n 327) [99].

³⁴⁰ *Epic Games (Full Court)* (n 327) [97].

³⁴¹ *Epic Games (Full Court)* (n 327) [97] quoting with approval *Epic Games (First Instance)* (n 282) [57], [63].

³⁴² *Epic Games (Full Court)* (n 327) [122].

³⁴³ *Epic Games (Full Court)* (n 327) [97], [108].

³⁴⁴ *Epic Games (Full Court)* (n 327) [102].

for and applying legislative intent. The forum statute is still relevant, but mainly in the sense that its provisions inform the Full Court’s understanding of the degree of public interest in the proceeding, and the implications of giving effect to the foreign exclusive jurisdiction clause, namely other parties affected by the alleged conduct or the competition regulator on behalf of such persons not being able to rely on ‘platform provisions’ in subsequent private enforcement proceedings. The Full Court’s decision, and subsequent cases applying it, should be understood on this basis. Once understood as a public interest case, the decision does not provide a strong foundation for recognition of the scope and purpose of a forum statute as a matter that can bear independently on the exercise of the court’s remedial discretion in determining whether to give effect to a foreign exclusive jurisdiction clause. However, it does demonstrate how certain features of a statute (such as the platform provisions in the Competition and Consumer Act 2010 (Cth) facilitating pt IV claims brought by the regulator and other affected parties³⁴⁵) might reflect forum public policy and be used to inform the court’s understanding of other relevant matters—in this instance, the degree of public interest in a proceeding and its impact on third parties—relevant to the exercise of the court’s discretion.

3.4.2 *Recognising a forum statute as a legitimate juridical advantage?*

For completeness, there are a handful of Australian cases in the pool under review where the bare fact of a substantive claim under a forum statute has been treated as a ‘legitimate juridical advantage’ weighing against giving effect to a foreign exclusive jurisdiction clause.³⁴⁶ In the

³⁴⁵ Competition and Consumer Act 2010 (Cth), ss 83, 87(1A).

³⁴⁶ *Akai* (n 2) 445; *Hume Computers* (n 283) [18], [21]–[26]; *Epic Games (Full Court)* (n 327) [82]; *Ayers Rock SkyShip* (n 282) [47]; *Urban Moto Imports* (n 282) [77], [79].

UK, the existence of a substantive claim is treated as a foreseeable matter that has limited relevance to the court's determination.³⁴⁷ Whereas in Australia, the existence of such a claim has been recognised as a standalone factor relevant to the exercise of the court's discretion.³⁴⁸ Putting aside the correctness of the Australian position (although it is suggested that to recognise the bare fact of a claim under a forum statute as a relevant discretionary factor would completely undermine party autonomy and so the UK position is to be preferred³⁴⁹), the reasoning in these cases relates only to the claim being available in the forum,³⁵⁰ rather than a policy said to be arising from the statute or any other special characteristic of the forum statute. As such, the cases do not provide support for the policy of a forum statute or 'policy of the law' as an independent factor relevant to the exercise of the court's remedial discretion, or for any further role of a forum statute as a relevant factor that might reflect or shape the content of forum public policy.

³⁴⁷ See, eg, *British Aerospace plc v Dee Howard Co* [1993] 1 Lloyd's Rep 369, 376.

³⁴⁸ Outside the policy cases under review in this chapter, see *Leigh-Mardon Pty Ltd v PRC Inc* (1993) 44 FCR 88 [31]–[32]; *Laminex (Australia) Pty Ltd v Coe Manufacturing Company* [1997] NSWSC 665; *Babcock & Brown DIF III Global Co-Investment Fund LP v Babcock & Brown International Pty Ltd* [2016] VSC 623 affd *Royal Bank of Scotland plc v Babcock & Brown DIF III Global Co-Investment Fund LP* [2017] VSCA 138 but see [143] (Whelan J). See also *Oceanic Sunline Special Shipping Co Inc v Fay* (1987) 8 NSWLR 242, 268 (McHugh JA, with whom Glass JA agreed) which was overturned on the ground that the exclusive jurisdiction clause did not apply to the proceeding, but see *Oceanic Sunline (HCA)* (n 61) [28] (Wilson and Toohey JJ), [18], [20] (Brennan J).

³⁴⁹ For recent discussion of recognition of legitimate juridical advantage in Australian case law as a strong reason not to give effect to a foreign exclusive jurisdiction clause, see Brandon Smith, 'Strong Reasons: The Epic Litigation and the Primacy of Public Policy over Exclusive Jurisdiction Clauses' (2022) 49 ABLR 291, 303–306.

³⁵⁰ See *Leigh-Mardon* (n 348) [31]–[32]; *Laminex* (n 348); *Babcock & Brown (First Instance)* (n 348) [108]; *Oceanic Sunline (NSWCA)* (n 348) 268.

3.5 Conclusion

Following a review of 17 cases in the UK and Australia where the existence of a forum statute or its policy was cited as a strong reason not to give effect to a foreign exclusive jurisdiction clause, it is apparent that public policy or the ‘policy of the law’ discerned from the scope and purpose of a forum statute has a very precise and limited role relative to the effectiveness of foreign exclusive jurisdiction clause. Almost all the cases under review can be understood as involving—or should have been dealt with as involving—the direct application of the forum statute. That is either in the sense of applying an express statutory rule of the type described in Chapter 2 (section 3.1), or because the substantive rules within the statute are of such force that legislative intent about the scope of those rules impliedly renders the foreign exclusive jurisdiction clause ineffective (section 3.2). None of the cases under review, including the cases examined in section 3.4, provide a convincing basis to recognise the ‘policy of the law’ as an independent matter that might be weighed in the exercise of the court’s discretion, including against other factors where relevant, to give effect to a foreign exclusive jurisdiction clause.

The chapter also considered how a forum statute might supply information about and reflect the public policy of the forum or other matters relevant to the exercise of the court’s discretion, such as the degree of public interest in a proceeding (section 3.4.1). In this regard, there is an important distinction between ascertaining legislative intent as disclosed by the language in the statute, and using a statute as a fact or point of reference when identifying other matters relevant to the exercise of the court’s discretion. In the former instance, legislative intent must be given effect if it applies to the case at hand, precluding the court’s remedial discretion where such intent relates expressly or impliedly to the effectiveness of the foreign

exclusive jurisdiction clause. In the latter instance, the court's remedial discretion will only have survived in the absence of legislative intent about the effectiveness of the foreign exclusive jurisdiction clause, and so the relevance must lie in some other feature of the forum statute. This distinction underscores the need for courts to exercise caution when deploying the content of a forum statute or its underlying policy, and to be precise about when and how the forum statute is being used.

4 CONCLUSION

This thesis has sought to provide an account of the precise ways in which forum statutes may limit the effectiveness of foreign exclusive jurisdiction clauses. The thesis first sought to demonstrate how forum statutes might expressly tell us when and how a foreign exclusive jurisdiction clause will be ineffective. The proposed typology in Chapter 2, which may be applied to both English and Australian statutes, includes rules that declare such clauses ineffective where they relate to certain types of disputes ('no choice of court' rules), or by reference to the individual circumstances of the parties (qualitative rules), or what substantive rules are to be applied to the parties' relationship ('no contracting out' rules, and choice of law rules).

The thesis then considered the role of policy, or the 'policy of the law' discerned from the scope and purpose of a forum statute, in the exercise of the court's remedial discretion. Following a close examination of cases where such policy has been invoked as a strong reason not to give effect to a foreign exclusive jurisdiction clause, it is submitted that almost all cases involved, or ought to have involved, the direct application of a forum statute to determine the effectiveness of the parties' choice of court agreement. This was either because the statute

contained an express rule that ought to have been applied to negate the foreign exclusive jurisdiction clause, or because the court's reasons centred around legislative intent about the scope and mandatory effect of substantive rules in the forum statute so as to impliedly determine the effectiveness of the clause. In the face of such legislative intent, the court's remedial discretion to give effect to the foreign exclusive jurisdiction clause will not survive, and so the scope and purpose of the forum statute has no further role to play.

In seeking to provide a coherent account of the interaction between forum statutes and foreign exclusive jurisdiction clauses, this work has sought to clarify the state of the law in relation to the effectiveness of such clauses. In specifying the precise ways that a forum statute might be applied to render a foreign exclusive jurisdiction clause ineffective, it is intended to demonstrate that the ways in which a forum statute might limit the effectiveness of a choice of court agreement are more targeted (and in some instances, more absolute) than might have previously been thought.

BIBLIOGRAPHY

Books and journal articles

Allison, S, 'Choice of Law and Forum Clauses in Shipping Documents – Revising Section 11 of the Carriage of Goods by Sea Act 1991 (Cth)' (2014) 40 Mon LR 639

Atiyah, P, *The Rise and Fall of Freedom of Contract* (OUP 1979)

Bailey, D and Luke Norbury, *Bennion, Bailey and Norbury on Statutory Interpretation* (8th ed, LexisNexis 2020)

Beatson, J, 'Has the Common Law a Future?'(1997) 56 CLJ 291

Briggs, A, *Agreements on Jurisdiction and Choice of Law* (OUP 2008)

Briggs, A, *Civil Jurisdiction and Judgments* (6th ed, Routledge 2015)

Burrows, A, 'A New Dawn for the Law of Illegality' in Sarah Green and Alan Bogg (eds) *Illegality after Patel v Mirza* (Hart Publishing 2018)

Burrows, A, *Thinking About Statutes* (CUP 2018)

Collins, Lord, and Jonathan Harris (eds), *Dicey, Morris and Collins on the Conflict of Laws*, vol 1 (16th edn, Sweet & Maxwell 2022)

Dickinson, A, 'Taming Anti-Suit Injunctions' in Andrew Dickinson and Edwin Peel (eds) *A Conflict of Laws Companion* (OUP 2021)

Douglas, M, 'Anti-Suit Injunctions in Australia' (2017) 41 MULR 66

Douglas, M, 'Choice of Law in an Age of Statutes: A Defence of Statutory Interpretation after Valve' in Michael Douglas, Vivienne Bath, Mary Keyes and Andrew Dickinson (eds) *Commercial Issues in Private International Law: A Common Law Perspective* (Bloomsbury Publishing 2019) 201

Garnett, R, 'Stay of Proceedings in Australia: A "Clearly Inappropriate" Test?' (1999) 23 MULR 30

Giliker, P, 'The Consumer Rights Act 2015—A Bastion of European Consumer Rights?' (2017) 37 LS 78

Herzfeld, P, Thomas Prince and Stephen Tully, *Interpretation and Use of Legal Sources: The Laws of Australia* (Thomson Reuters 2013)

Hook, M, 'The Conflict of Laws as a Shared Language for the Cross-Border Application of Statutes' in Michael Douglas, Vivienne Bath, Mary Keyes and Andrew Dickinson (eds) *Commercial Issues in Private International Law: A Common Law Perspective* (Bloomsbury Publishing 2019) 186

Jones, O, and Francis Bennion, *Bennion on Statutory Interpretation: A Code* (LexisNexis 2010)

Keyes, M, 'Improving Australian Private International Law' in Andrew Dickinson, John Thomas and Mary Keyes (eds) *Australian Private International Law for the 21st Century: Facing Outwards* (Hart Publishing 2014) 14

Leeming, M, 'Theories and Principles Underlying the Development of the Common Law: The Statutory Elephant in the Room' (2013) 36 UNSWLJ 1002

Keyes, M, *Jurisdiction in International Litigation* (Federation Press 2005)

Mann, FA, 'Statutes and the Conflict of Laws' 46 BYIL 117

Merrett, L, 'International Employment Cases Post-Brexit: Choice of Law, Territorial Scope, Jurisdiction and Enforcement' (2021) 50 ILJ 343

Nygh, P, *Autonomy in International Contracts* (OUP 1999)

Paterson, J, 'The Australian Unfair Contract Terms Law: The Rise of Substantive Unfairness as a Ground for Review of Standard Form Consumer Contracts' MULR 934

Smith, B, 'Strong Reasons: The Epic Litigation and the Primacy of Public Policy over Exclusive Jurisdiction Clauses' (2022) 49 ABLR 291

Reports and explanatory material

Australia

Australian Law Reform Commission, *Insurance Contracts* (Report No 20, 1982)

Commonwealth, Parliamentary Debates, House of Representatives, 15 October 1991

Commonwealth, Parliamentary Debates, Senate, 23 November 1904

Explanatory Memorandum to the Insurance Contracts Bill 1984

Explanatory Memorandum to the Trade Practices Amendment (Australian Consumer Law) Bill 2009

Explanatory Memorandum to the Trans-Tasman Proceedings Bill 2009

Explanatory Memorandum to the Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015

Productivity Commission, *Review of Australia's Consumer Policy Framework* (No 45, Inquiry Report, 30 April 2008)

Trans-Tasman Working Group, *Trans-Tasman Court Proceedings and Regulatory Enforcement: Final Report* (2006) <<https://www.ag.gov.au/international-relations/publications/trans-tasman-working-group-court-proceedings-and-regulatory-enforcement-report-2006>> accessed 17 July 2023

UK

Explanatory Memorandum to the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019

Explanatory Notes to the Consumer Rights Act 2015

HL Deb 25 March 1971, vol 316

Law Commission and Scottish Law Commission, *Unfair Terms in Contracts* (Law Com CP No 166, Scot Law Com CP No 119, 2002)

Law Commission and Scottish Law Commission, *Unfair Terms in Contracts* (Law Com No 292, Scot Law Com No 199, 2005)

Law Commission and Scottish Law Commission, *Consumer Insurance Law: Pre-Contract Disclosure and Misrepresentation* (Law Com No 319, Scot Law Com No 219, 2009)

Other

Institut de Droit International, *The Autonomy of the Parties in International Contracts Between Private Persons or Entities* <<https://www.idi-iil.org/en/publications/ii-lautonomie-de-la-volonte-des-parties-dans-les-contrats-internationaux-entre-personnes-privees/>> accessed 2 June 2023

International Law Association, *Report of the Conference of the Maritime Law Committee* (London, 17–20 May 1921) in Comité Maritime International, *The Travaux Préparatoires of the Hague Rules and of the Hague-Visby Rules* (CMI Headquarters 1997)