

**Jurisdiction clauses**  
**under**  
**Australian Law**  
**by**  
**Alexander W Street SC**

**A. Introduction**

An exclusive jurisdiction clause is not only of moment to the immediate contracting parties to the bareboat charter, time charter, contract of carriage, contract of affreightment, marine insurance policy, marine insurance treaty, mutual indemnity agreement, stevedoring contract, ship management contract, freight forwarding agreement, ship building contract, or other maritime contract. There needs to be taken into account the third parties that may be able to claim the benefit of the exclusive jurisdiction clause through a *Himalaya* clause<sup>1</sup>, agency clause, trust agreement, third party statutory enforcement<sup>2</sup> and/or an obligation for the benefit of a third party enforceable by law<sup>3</sup>. Indeed the third parties may obtain a benefit under such a clause that the contracting parties are by statute prevented from enforcing<sup>4</sup>.

Clearly, there are an endless variety of jurisdictional clauses some facilitating choice of multiple forums consistent with a balancing of the competing interests of the parties to the contract or an exclusive jurisdiction contract tied or untied with other dispute resolution or choice of law clauses.

It is not intended to address in this paper the question as to incorporation of the exclusive jurisdiction clause<sup>5</sup> or the operation of such a provision in consumer transactions<sup>6</sup>. The focus is upon provisions in maritime commercial contracts outside the sphere of consumer transactions or deemed consumer transactions. The issue of

---

<sup>1</sup> *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Aust) Pty Ltd* (1977) 139 CLR 231

<sup>2</sup> For example s.52 Property Law Act 1969 (WA)

<sup>3</sup> *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107

<sup>4</sup> *Kim Mellor Imports Pty Ltd v Uurolevant SPA* (1986) 7 NSWLR 269; cf *BHP Trading Asia Limited (Second Plaintiff), BHP Materials Trading Proprietary Limited T/A BHP Steel International Group (Third Plaintiff) and John Lysaght (Australia) Limited (Fourth Plaintiff) v Oceaname Shipping Limited and Scottish Ship Management (Australia) Pty Ltd* [1996] FCA 1415

<sup>5</sup> Such as where inadequate notice was given to incorporate a jurisdiction clause, *Oceanic Sun Line Special Shipping Inc v Fay* (1988) 165 CLR 197

<sup>6</sup> See for example s. 64 of the Australian Consumer Law and s.87 of the Competition and Consumer Law Act 2010

enforcement of jurisdiction clauses by anti-suit injunction is also a topic outside this paper<sup>7</sup>.

## **B. Australian law**

Absent the areas of statutory intervention, Australian Courts give effect to the contractual intention of the parties<sup>8</sup> objectively determined<sup>9</sup> from the construction of the contract as a whole, unless there is a recognised legal principle by reason of which the provision should not be enforced. The qualification as to enforcement of the parties' objective intention may arise from circumstances creating a competing equitable right, fraud, illegality or other recognised dominant public policy.

Further, the jurisdiction clause may have a potential impact on other issues such as the jurisdiction of the particular court for a service out of the State or Australia and/or an impact in the absence of an express term as to the governing law or work done by a dispute resolution clause.

In *Akai Pty Ltd v The People's Insurance Co Ltd*<sup>10</sup> the High Court of Australia dealt with a credit insurance policy which provided

*Clause 9*

*Governing Law*

*This policy shall be governed by the laws of England. Any dispute arising from this policy shall be referred to the Courts of England.*

This form of wording reflected a variation from the standard form of the policy in which the second sentence was to the effect “*any dispute arising from the policy shall be referred to the Courts of Singapore*”.

In that case, by majority it was held that there was a statutory provision under the *Insurance Contracts Act 1984 (Cth)* that rendered the second sentence of clause 9 void. In that case the majority in the High Court of Australia, Toohey J, Gaudron J, and Gummow J expanded upon the significance of public policy in an Australian court being taken into consideration in determining whether to give effect to a contractual obligation even if not expressly mandated by the terms of the constitution

<sup>7</sup> *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345

<sup>8</sup> *Huddart Parker Limited v The Ship "Mill Hill"* (1950) 81 CLR 502 at 509

<sup>9</sup> *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 45; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165; *International Air Transport Association v Ansett Australia Holdings Limited* (2008) 234 CLR 151

<sup>10</sup> (1996) 188 CLR 418

or a statute in force in the Australian forum. It was relevant in that case that the rights of the parties if a stay was granted would not be determined by reference to the Australian *Insurance Contracts Act* and the majority said:

*“To grant a stay in the present case would be to prefer the private engagement to the binding effect upon the State court of the law of the Parliament. This indicates a strong reason against the exercise of the discretion in favour of a stay. The policy of the law and of the Constitution militates against a stay.”*

In addition to the discretionary considerations referred to by the Court in the passage quoted the majority held that s52 of the *Insurance Contracts Act* was a provision that forbids contracting out and was effective to render the second sentence of Clause 9 void.

The enforcement of an exclusive jurisdiction clause, which is not contrary to the applicable law, will prima facie be granted unless there are strong reasons to the contrary<sup>11</sup>. This is a more onerous test than applicable to the question of stay based on forum grounds under Australian law which depends upon the party seeking the stay demonstrating that the Australian Court is a clearly inappropriate forum<sup>12</sup>. The Australian court will however lean against multiple proceedings<sup>13</sup> in determining whether to give effect to an exclusive jurisdiction clause.

In relation to particular types of contracts of carriage, the *Carriage of Goods by Sea Act 1991 (Cth)* gives effect to the amended *Hague-Visby Rules* and s11 renders of no effect a jurisdiction clause that precludes or limits the jurisdiction of a court of the Commonwealth or a State in respect of the particular type of contracts of carriage addressed by that provision.

Where the jurisdiction of the Australian court has been properly invoked between the parties to the contract or having the benefit of a contractual provision that reflects an exclusive jurisdiction clause, the Australian court will permit evidence to be adduced if the contract is governed by a foreign law as to efficacy of that exclusive jurisdiction clause under that foreign law. If, as a matter of proved evidence of fact as to that foreign law, the jurisdiction clause is of no effect or invalid under that foreign law, an Australian court would give effect to that finding of fact as to foreign law and decline

---

<sup>11</sup> *Global Partners Fund Ltd v Babcock & Brown Ltd* (2010) NSWCA 196; *Incitec Ltd v Alkimos Shipping Corporation* (2004) 138 FCR 496 at [43]; *FAI General Insurance Co Ltd v Ocean Marine Mutual Protection and Indemnity Association* (1997) 41 NSWLR 559 at 569

<sup>12</sup> *Voith v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538

<sup>13</sup> *Hume Computers Pty Ltd v Exact International BV* [2006] FCA 1440 at [25]-[26]; *Faxtech Pty Ltd v ITL Optronics Ltd* [2011] FCA 1320 at [19], [27]

to enforce the jurisdiction clause. Equally, if the application of that foreign law, governing the contract, as established by the evidence would then be defeated by the application of the exclusive jurisdiction clause, an Australian court would be likely to take into account those findings of fact in determining whether to enforce an exclusive jurisdiction clause.

For example, if the foreign law governing the contract gave effect to the *Hague-Visby Rules* then an Australian court would apply the provisions of Article III rule 8 of the *Hague-Visby Rules* to an exclusive jurisdiction clause and would decline to enforce the clause and treat the same as “*null and void and of no effect*”.

Similarly, where the *Hamburg Rules* are in force under the governing law Article 21 and Article 23 an Australian court will give effect to those Articles over the operation of an inconsistent exclusive jurisdiction clause.

If the exclusive jurisdiction clause reflected a choice of forum unconnected with the parties in which international enforcement of the determination of that exclusive jurisdiction forum would be ineffective, an Australian court would be likely to decline to enforce the foreign jurisdiction clause.

Interesting questions concerning exclusive jurisdiction clauses may also arise under Article 17 of the *Brussels Convention* particularly taking into account maritime disputes that arise under the broader scope of international admiralty jurisdiction exercised by Admiralty Courts and also the impact of the *1952 and 1999 Convention on Arrest of Ships*. This wider international Admiralty jurisdiction has not been adequately addressed by the *Brussels Convention* or the principles in common law countries of international jurisdiction and enforcement of Admiralty Court judgments.

Where one party has tried to escape the application of the exclusive jurisdiction clause by bringing a non-contractual cause of action the Australian courts are likely to adopt a liberal construction to the clause so as to hold the parties to the contract to their bargain, unless there are strong reasons to the contrary. If the foreign forum will not give effect to Australian law that properly governs the contract the subject to dispute that will be a powerful ground to decline to enforce a foreign jurisdiction clause.

### C. Multiple and inconsistent contractual jurisdiction clauses

There may be a combination of construction issues where there are multiple charter parties and questions of inconsistency, uncertainty or incorporation arise. A liberal and flexible interpretation will be given between commercial parties to a jurisdictional clause<sup>14</sup>. Australian courts will also take into account the interest of uniformity in the construction of standard clauses and will as a matter of international comity have regard to relevant decisions of foreign courts. It is likely that the Australian court will be influenced in the objective construction by consideration of the most appropriate jurisdictional provision in relation to regulation of the legal relationship between the respective contracting parties. This may mean that an inconsistent arbitration clause may prevail<sup>15</sup>, but the proper meaning of the contractual provision will remain a question of objective contractual construction and any exclusive jurisdiction clause applicable to the dispute will give rise to a discretion as to enforcement. In certain circumstances for example, the rights of multiple parties may well involve enforcement of different exclusive jurisdiction clauses up the line under a time charter, voyage charter or bareboat charter, but not in relation to parties the subject of the contract of carriage evidenced by the bill of lading.

### D. Conclusion

The Australian courts will not treat the private engagement of the parties as to the forum to determine a matter, which is within the Australian Court's jurisdiction, as determinative of the question of enforcement. Enforcement of any contractual provision requires an exercise of the court's jurisdiction and wherever the court is exercising its jurisdiction, it is applying the judicial power either of the State or of the Commonwealth, and, neither parties to a dispute, nor the legislature, can mandate or dictate the exercise of that judicial power. In other words, Australian courts will not treat an exclusive jurisdiction clause as if a rubber stamp that should be automatically enforced, but rather will evaluate the question of enforcement, consistent with ordinary principles reflecting the independence of courts and the exercise of judicial power by applying legal principle. The fundamental doctrines of independence of

---

<sup>14</sup> *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160 at 165; *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 at [164]-[165]

<sup>15</sup> Particularly, if falling within the *International Arbitration Act 1974 (Cth)* which gives effect to the *New York Convention* and the *UNCITRAL Model Law*

Australian courts and the Australian judiciary, as well as the supremacy of the rule of law are entrenched by Chapter III of the Australian Constitution. The legal principles to be applied for the purpose of enforcement of a jurisdiction clause by an Australian court require consideration of the matters referred to above and an exclusive jurisdiction clause will not itself oust the jurisdiction of an Australian court.

**A W Street SC**