

JURISDICTION CLAUSES IN NEW ZEALAND LAW

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The Trans-Tasman Proceedings Acts 2010, mirror legislation in New Zealand and Australia, regulate the allocation of jurisdiction in trans-Tasman civil proceedings. The legislation includes provisions dealing with the effects of jurisdiction clauses. This article considers the treatment of jurisdiction clauses under the statutory regime and the common law regime which provides for the effect of jurisdiction clauses that are outside the scope of the legislation, how these regimes differ, and their relative strengths and weaknesses.

I INTRODUCTION

Jurisdiction clauses are contractual provisions which nominate the courts in which the parties agree to litigate in the event of a dispute arising. With the growth in cross-border trade and commerce, and the use of technology to facilitate the use of standard forms, jurisdiction clauses have become commonplace in commercial and non-commercial contracts alike.¹ The law in relation to their effect has accordingly become increasingly important in practical terms.

While the New Zealand law on the effect of jurisdiction clauses was historically, and to some extent continues to be, strongly influenced by English case law,² it has also developed somewhat distinctive characteristics. This is mainly as a result of the Agreement between the Government of

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1 The effect of jurisdiction clauses in non-commercial contracts raises interesting issues which, for reasons of space, are not considered in this article.

2 English private international law has in recent decades been heavily influenced by European Union legislation. In the context of jurisdiction, the European Union's Brussels I Recast Regulation applies in many cases before the English courts. This Regulation is not comprehensive, and therefore residual national law retains a role in all member states. Whereas the New Zealand law has in general not been influenced by the European Union law that is required to be applied in many English cases, English cases applying the residual national English law continue to be cited in New Zealand decisions: see for example *Heli Holdings Ltd v Chopper Worx Pty Ltd* [2018] NZHC 3276 at [50], citing *Deutsche Bank AG v Highland Crusader Offshore Partners LP* [2009] EWCA 725, [2010] 1 WLR 1023 (see further below nn 119 and 124 and associated text). At the time of writing, the consequences of the United Kingdom's withdrawal from the European Union for English private international law are unclear.

New Zealand and the Government of Australia on Trans-Tasman Court Proceedings and Regulatory Enforcement,³ entered into between New Zealand and Australia in 2008, and given effect to by legislation in each country called the Trans-Tasman Proceedings Act 2010,⁴ which entered into force in 2013. This legislation creates, amongst other things,⁵ a regime regulating the allocation of jurisdiction in trans-Tasman civil litigation, including where the parties have made agreements about jurisdiction. This regime differs in important respects from the common law regime, which determines the effect of jurisdiction clauses outside the scope of the Trans-Tasman Proceedings Act. This article considers and compares the operation of these two regimes, demonstrating that while exclusive jurisdiction clauses are better protected under the Trans-Tasman Proceedings Act than under the common law, the common law is arguably superior in terms of dealing with the complexities of international commercial litigation.

It is conventional to distinguish the positive from the negative effects of jurisdiction clauses. This distinction depends on whether the jurisdiction clause nominates the courts of the forum (here, of New Zealand), or of a foreign country. The positive effect of a jurisdiction clause refers to whether, according to the law of the forum, the jurisdiction clause nominating the forum court is effective to establish the jurisdictional competency of that court. This relates to the primary issue as to whether a court has the authority to hear and determine a dispute, notwithstanding the international character of the dispute. The negative effect of a jurisdiction clause refers to whether, according to the law of the forum, the forum court will decline to exercise jurisdiction because of the jurisdiction clause, notwithstanding that the forum is otherwise competent. Most of the law and commentary on jurisdiction clauses is concerned with their negative effects (which are addressed in Part III), but it is necessary first to consider the positive effect of jurisdiction clauses which nominate New Zealand courts (addressed in Part II).

3 The Agreement between the Government of New Zealand and the Government of Australia on Trans-Tasman Court Proceedings and Regulatory Enforcement [2008] NZTS 6 (signed 24 July 2008, entered into force 11 October 2013) is sch 1 to the Trans-Tasman Proceedings Act 2010.

4 In both countries, the legislation has the same name. The focus of this article is on the New Zealand legislation; the Australian legislation contains mirror provisions (albeit differently numbered).

5 The Trans-Tasman Proceedings Acts comprehensively deal with a range of matters, including "regulatory enforcement" as well as "court proceedings". Its provisions in relation to court proceedings are not limited to civil proceedings; the relevant provisions of the legislation, for the purposes of the discussion in this article, are those relating to the allocation of jurisdiction in trans-Tasman litigation. This article is primarily focused on the regulation of agreements about jurisdiction, but the legislation also addresses the allocation of jurisdiction where there is no agreement on jurisdiction. That question is beyond the scope of this article: see further Reid Mortensen "A Trans-Tasman Judicial Area: Civil Jurisdiction and Judgments in the Single Economic Market" (2010) 16 *Canta LR* 61 at 70–80; and Reid Mortensen "Together Alone: Integrating the Tasman World" in Andrew Dickinson, Mary Keyes and Thomas John (eds) *Australian Private International Law for the 21st Century: Looking Outwards* (Hart Publishing, Oxford, 2014) 113 at 125–131.

II THE POSITIVE EFFECTS OF JURISDICTION CLAUSES

In New Zealand, as in other common law systems, the court's jurisdictional competence in an international case depends principally on whether it has personal jurisdiction over the defendant.⁶ In common law systems, personal jurisdiction is defined by the defendant's amenability to service of the court's initiating process. Amenability to service depends on whether the defendant is present in the jurisdiction at the time of service.⁷ If not, the court lacks jurisdiction even if the defendant has contractually submitted to the jurisdiction.⁸ This strict territorial limit has been overcome by legislation which enables service of process outside the jurisdiction in a wide range of circumstances, depending on whether the litigation is within the scope of the Trans-Tasman Proceedings Act, or not.

In the context of establishing the court's jurisdiction over foreign defendants, trans-Tasman litigation is regulated very differently to international litigation outside the trans-Tasman context. The Trans-Tasman Proceedings Act enables service of the initiating process of a New Zealand court in Australia⁹ without requiring either the leave of the court or any nexus to New Zealand.¹⁰ The existence of a jurisdiction clause in which the parties agree to litigate in, or to submit to the jurisdiction of, the New Zealand courts neither creates nor enhances those courts' competence under this regime; instead, it is material to the question of whether the court will exercise its jurisdiction, which is considered in Part III.

Where the defendant is in a foreign country other than Australia, service of process outside New Zealand is largely regulated by rules of court.¹¹ This regime differs from the trans-Tasman regime in that the assertion of jurisdiction over a foreign defendant requires a connection to New Zealand, of either the defendant or some aspect of the dispute. The rules of court in New Zealand enable service out of the jurisdiction without leave in a wide range of such circumstances. Relevant to the discussion in this article, the rules enable service out of the jurisdiction without the prior leave of the court "when

6 The court must also have subject-matter jurisdiction to deal with the issues in dispute; this is rarely contested, but see further below nn 15–16 and associated text.

7 *Von Wyl v Engeler* [1998] 3 NZLR 416 (CA) at 421.

8 *British Wagon Co v Gray* [1896] 1 QB 35 (CA). In common law systems, including New Zealand, the defendant's failure to challenge the court's jurisdiction, if they are entitled to do so (for example, if they were not present at the time of service), is regarded as a submission to the jurisdiction, which is also a sufficient basis of jurisdiction at common law: see for example *Von Wyl v Engeler*, above n 7, at 421. This type of unilateral submission (evidenced by an omission to object to the jurisdiction) operates quite differently to an ex ante bilateral contractual agreement to jurisdiction, and is therefore outside the scope of this article.

9 Section 13(1).

10 Section 13(3)(b).

11 Several other statutes facilitate service outside the jurisdiction: see for example the Employment Court Regulations 2000, reg 31A.

the person to be served has submitted to the jurisdiction of the court".¹² A jurisdiction clause which nominates the courts of New Zealand as a venue for litigation (whether exclusively or not) is regarded as a submission to the jurisdiction; therefore such a clause facilitates service out of the jurisdiction on a foreign defendant even if there is no other connection between the litigation and New Zealand. The rules authorise service outside the jurisdiction in a range of other circumstances,¹³ so that the New Zealand courts may assert jurisdiction over foreign defendants even though the parties have contractually agreed to litigate in a foreign court or courts. The effect of any such agreement is relevant to whether the New Zealand court will stay or dismiss the proceedings, or grant some other relief, which is addressed in detail in Part III.

In addition to personal jurisdiction, the court must have subject-matter jurisdiction: that is, it must be competent to deal with the claims and defences.¹⁴ Subject-matter jurisdiction is not often in issue but it has become more relevant given the growth in importance of statutory claims and defences.¹⁵ This might be relevant if a party relies on peculiar foreign legislation, in which case, the New Zealand court might find that it lacks subject-matter jurisdiction to deal with some aspects of the dispute. Subject-matter jurisdiction is not contractible; the parties' agreement to litigate in New Zealand courts cannot confer subject-matter jurisdiction on a New Zealand court.¹⁶

The fact of the New Zealand courts' jurisdictional competence is not the end of the matter. In international cases, jurisdiction is frequently challenged, and may be challenged on a number of different bases. This article is concerned with challenges to the jurisdiction which are based on the parties' agreements about jurisdiction, which is the focus of Part III.

III THE NEGATIVE EFFECTS OF JURISDICTION CLAUSES

The negative effect of a jurisdiction clause refers to its effect on the court's decision whether to exercise jurisdiction, which arises if the defendant challenges the jurisdiction.¹⁷ In this context, the effect of a jurisdiction clause depends on whether it is characterised as exclusive or non-exclusive.

12 High Court Rules 2016, r 6.27(2)(k); and the District Court Rules 2014, r 6.23(2)(k).

13 High Court Rules, r 6.27(2); and the District Court Rules, r 6.23(2).

14 The issue whether the foreign court lacks subject-matter jurisdiction is relevant to whether the forum court should stay or dismiss proceedings.

15 A detailed discussion of subject-matter jurisdiction is beyond the scope of this article. For an excellent account, see Maria Hook "The 'statutist trap' and subject-matter jurisdiction" (2017) 13 J Priv Int L 435.

16 Likewise, the parties cannot by agreement deprive courts, whether of New Zealand or otherwise, of subject-matter jurisdiction which is exclusively theirs.

17 See High Court Rules, r 5.49; and the District Court Rules, r 5.51. It may also arise if the plaintiff must seek the leave of the court to serve process out of the jurisdiction (which is necessary if none of the gateways to jurisdiction under the rules of court is satisfied): r 6.28 of the High Court Rules; and r 6.24 of the District Court Rules. The same considerations arise in cases such as when the defendant challenges the jurisdiction.

A The Distinction Between Exclusive and Non-exclusive Jurisdiction Clauses

A fundamental distinction is drawn in New Zealand, as in other legal systems, between exclusive and non-exclusive jurisdiction clauses. While that distinction has been cogently criticised,¹⁸ the distinction remains basic to the law.¹⁹ As explained in detail below, exclusive and non-exclusive jurisdiction clauses have different effects in terms of whether a court will exercise its jurisdiction and therefore distinguishing whether a particular jurisdiction clause is exclusive or not is crucial in practice.

1 Exclusive choice of court agreements under the Trans-Tasman Proceedings Act 2010

The trans-Tasman regime is different to that applied in other cases, not only because the Trans-Tasman Proceedings Act uses the term "exclusive choice of court agreement" rather than "jurisdiction clause". This reflects the terminology used in the Convention of 30 June 2005 on Choice of Court Agreements (the Hague Choice of Court Convention),²⁰ on which s 25 of the Trans-Tasman Proceedings Act is based. The use of this term in the Act has not affected the terminology used to describe these clauses which are still generally referred to as jurisdiction clauses.

As already noted, the Trans-Tasman Proceedings Act gives effect to a treaty between New Zealand and Australia.²¹ While the treaty itself does not explicitly address the effect of jurisdiction clauses, the legislation giving effect to it does. The provisions dealing with certain exclusive "choice of court agreements"²² were based on aspects of the Hague Choice of Court Convention and were

18 Adrian Briggs *Agreements on Jurisdiction and Choice of Law* (Oxford University Press, Oxford, 2008) at 118; Adrian Briggs "The Subtle Variety of Jurisdiction Agreements" [2012] LMCLQ 364; and Michelle Ong "Rethinking Jurisdiction Clauses in New Zealand: The Hague Convention and Beyond" (2013) 19 Auckland U L Rev 219.

19 This is true both under the Trans-Tasman Proceedings Act, which contains provisions applicable only to "exclusive choice of court agreements", and at common law, which continues to differentiate exclusive from non-exclusive jurisdiction clauses.

20 Convention of 30 June 2005 on Choice of Court Agreements (signed 30 June 2005, entered into force 1 October 2015) [Hague Choice of Court Convention].

21 See above n 3.

22 This is the term which is used in the Hague Choice of Court Convention, above n 20, as well as in the Trans-Tasman Proceedings Act, s 25. In this section, the same terminology is used.

introduced in order to ensure that, if New Zealand and Australia adopted that Convention,²³ the Trans-Tasman Proceedings Act would be consistent with that.²⁴

The Trans-Tasman Proceedings Act defines an "exclusive choice of court agreement" to mean a written agreement that "designates the courts, or a specified court or courts, of a specified country, to the exclusion of any other courts, as the court or courts to determine disputes".²⁵ Consumer and employment contracts are specifically excluded from the definition of exclusive choice of court agreements.²⁶ The definition in the Act resembles, but is not identical to, the definition of exclusive choice of court agreement in the Hague Choice of Court Convention.²⁷ In particular, the Convention deems a choice of court agreement to be exclusive "unless the parties have expressly provided otherwise",²⁸ whereas the Act contains no such presumption. Also, the Convention has a range of exclusions from its scope which are not expressly mentioned in the Trans-Tasman Proceedings Act.²⁹ The New Zealand courts have not yet been called upon to apply the statutory definition of exclusivity. However, it has been suggested that the statutory definition is "functionally similar" to the common law definition.³⁰

2 *The test of exclusivity at common law*

For cases outside the trans-Tasman regime, determining whether a jurisdiction clause is exclusive or non-exclusive is treated as a question of interpretation. This should be done according to the governing law of the jurisdiction agreement,³¹ which is presumed to be the same as the governing law of the contract as a whole. If the governing law is the law of New Zealand, the question is whether

23 In 2016 (after the Trans-Tasman Proceedings Acts came into effect), the Joint Standing Committee on Treaties of the Australian Parliament recommended that Australia should accede to the Convention and that legislation entitled the International Civil Law Act should be drafted to bring it into effect: Joint Standing Committee on Treaties *Report 166: Implementation Procedures for Airworthiness-USA; Convention on Choice of Court Agreements-accession; GATT Schedule of Concessions-amendment; Radio Regulations-partial revision* (November 2016) at 23. At the time of writing, legislation had not been introduced into the Australian Parliament.

24 Trans-Tasman Proceedings Bill 2010 (105-1) (explanatory note) at 4.

25 Section 25(4)(a).

26 Section 25(4)(b) (consumer agreements) and (c) (employment agreements).

27 Compare Hague Choice of Court Convention, above n 20, art 3(a).

28 Article 3(b).

29 Article 2(2).

30 Brooke Adele Marshall and Mary Keyes "Australia's Accession to the *Hague Convention on Choice of Court Agreements*" (2017) 41 MULR 246 at 252.

31 It is not uncommon for courts to simply apply the law of the forum to this question without addressing the choice of law question at all. This is what was done in *Universal Specialties Ltd v Advanced Cardiovascular Systems Inc* HC Auckland CP162/95, 2 May 1996 [*Universal Specialties Ltd (HC)*] per Tompkins J.

"on its true construction the clause obliges the parties to resort to [the nominated] jurisdiction", irrespective of whether the clause describes the nominated court's jurisdiction as being "exclusive".³² There is limited consideration of the distinction between exclusive and non-exclusive jurisdiction in the New Zealand case law. In *Universal Specialties Ltd v Advanced Cardiovascular Systems Inc*, Tompkins J took into account the fact that the jurisdiction clause gave the defendant, but not the plaintiff, an option to bring proceedings in another court, in holding that the jurisdiction of the Californian courts was exclusive so far as the plaintiff was concerned.³³ In *Eight Mile Style LLC v New Zealand National Party*, Dobson J held that a clause which provided that "[t]his agreement ... shall be construed in accordance with the laws and exclusive jurisdiction of the State of California of the USA"³⁴ was not an exclusive jurisdiction clause, applying United States authorities that require exclusive jurisdiction clauses "to be stipulated in express terms".³⁵ His Honour held that the clause was unclear because it did not specifically refer to the Californian courts,³⁶ and also noted that the clause neither identified, nor enabled the inference of, its intended subject-matter scope.³⁷

B The Effect of Exclusive Jurisdiction Clauses

One of the most significant differences between the Trans-Tasman Proceedings Act and the common law jurisdictional regime is in relation to the effect of exclusive jurisdiction clauses on a court's decision whether to stay or dismiss proceedings.

1 Exclusive choice of court agreements under the Trans-Tasman Proceedings Act

The Trans-Tasman Proceedings Act, reflecting the Hague Choice of Court Convention, requires exclusive choice of court agreements to be strictly enforced with very limited exceptions. It deals separately with exclusive choice of court agreements in favour of New Zealand and Australian courts.

32 *Universal Specialties Ltd* (HC), above n 31, at 7 per Tompkins J, citing Lawrence Collins (ed) *Dicey and Morris on the Conflict of Laws* (12th ed, Sweet & Maxwell, London, 1993) at 421. Dicey and Morris' formula was also approved and applied by the English Court of Appeal in *Sohio Supply v Gatoil (USA)* [1989] 1 Lloyd's Rep 588 (CA) at 591; and *Continental Bank NA v Aeakos Cia Naviera SA* [1994] 1 WLR 588 (CA) at 593–594.

33 *Universal Specialties Ltd* (HC), above n 31, at 7–8 per Tompkins J.

34 *Eight Mile Style LLC v New Zealand National Party* [2015] NZHC 2409 at [36].

35 At [38]. The reason for applying United States authorities is that United States law was the governing law of the jurisdiction clause.

36 At [40].

37 At [41].

Where the exclusive choice of court agreement nominates New Zealand courts, the Act provides that the New Zealand court "must not" stay its proceedings,³⁸ unless the agreement is "null and void" under New Zealand law, including its rules of private international law.³⁹ This is a significant change from the common law position, according to which the court usually enforces exclusive jurisdiction clauses, but always retains a discretion not to do so. Article 5(1) of the Hague Choice of Court Convention, on which this provision is based, is intended "to refer primarily to generally recognised grounds like fraud, mistake, misrepresentation, duress and lack of capacity".⁴⁰ In the only New Zealand case to have considered this provision,⁴¹ it was not contended that the choice of New Zealand courts was null and void, so the exception is yet to be judicially considered. It is likely that the courts will construe the exception narrowly, consistent with the strict approach that New Zealand courts take to the exceptions to enforcement of arbitration agreements.⁴²

The Act also requires strong protection of exclusive choice of court agreements in favour of Australian courts. Where the exclusive choice of court agreement nominates an Australian court, the Trans-Tasman Proceedings Act provides that the New Zealand court "must" stay the proceeding,⁴³ with five limited exceptions, which are derived from the exceptions in the Hague Choice of Court Convention.⁴⁴ These exceptions are:⁴⁵

- (a) where the agreement is null and void under Australian law, including Australian "rules of private international law";⁴⁶

38 Trans-Tasman Proceedings Act, s 25(1)(b).

39 Trans-Tasman Proceedings Act, s 25(3). The reference to rules of private international law means New Zealand choice of law rules; in other words, the issue as to whether a choice of court agreement is null and void must be determined according to the governing law of the choice of court agreement (presumed to be the same as the governing law of the contract as a whole), which is identified by the New Zealand contract choice of law rules.

40 Trevor Hartley and Masato Dogauchi *Convention of 30 June 2005 on Choice of Court Agreements: Explanatory Report* (Hague Conference on Private International Law, 2013) at [126].

41 *Skelton v Z487 Ltd* [2014] NZHC 707.

42 See *Zurich Australian Insurance Ltd (t/a Zurich New Zealand) v Cognition Education Ltd* [2014] NZSC 188.

43 Trans-Tasman Proceedings Act, s 25(1)(a).

44 Hague Choice of Court Convention, above n 20, art 6. In turn, the exceptions in the Hague Choice of Court Convention are modelled on the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 330 UNTS 3 (signed 10 June 1958, entered into force 7 June 1959) [the New York Convention]: see Hartley and Dogauchi, above n 40, at [147].

45 Trans-Tasman Proceedings Act, s 25(2).

46 This refers to Australian choice of law rules – in other words, this question is determined according to the governing law of the choice of court agreement, identified by reference to the Australian contract choice of law rules.

- (b) where a party lacked capacity, under New Zealand law, to enter into the agreement;
- (c) where giving effect to the agreement "would lead to a manifest injustice or would be manifestly contrary to New Zealand public policy";
- (d) where the agreement cannot reasonably be performed, for reasons beyond the parties' control; and
- (e) where the nominated court has decided not to determine matters within the scope of the agreement.

At the time of writing, these exceptions have only been considered in one New Zealand case.⁴⁷ In *Skelton v Z487 Ltd*, Lang J stated that "[i]t is likely ... that the meaning to be attributed to the phrase ['lead to a manifest injustice' in s 25] will be informed by the background against which the Act came to be passed",⁴⁸ namely, that the provision was modelled on the Hague Choice of Court Convention, and that "[a]uthorities relating to the manner in which those articles have been interpreted are therefore likely to be relevant to the manner in which s 25(2) should be interpreted."⁴⁹ At the time of writing, the Convention was in effect in Mexico, the member states of the European Union, Singapore and Montenegro.⁵⁰ Authorities from these jurisdictions interpreting the exceptions under the Convention will be of assistance in interpreting the exceptions in s 25. However, the Convention only came into effect in 2015. Given that the exceptions to the enforcement of exclusive choice of court agreements are based on the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), until the jurisprudence on the meaning of the Convention's exceptions develops, cases dealing with arbitration agreements will be instructive in the interpretation of these provisions.

The first exception is when the choice of court agreement is null and void under Australian law, including the relevant Australian choice of law rule. By analogy to the narrow interpretation applied to the exceptions to enforcement of arbitration agreements by both Australian and New Zealand courts, this exception is likely to be strictly construed. Assuming that the governing law of the choice of court agreement was Australian law, the exception would be applicable when Australian legislation precluded contracting out, such as under the Insurance Contracts Act 1984 (Cth),⁵¹ as well as where the choice of court agreement was procured by mistake, misrepresentation, fraud or duress. In an Australian case dealing with the mirror provision of the Australian Trans-Tasman Proceedings Act,

47 *Skelton v Z487 Ltd*, above n 41.

48 At [30].

49 At [30], n 3.

50 See the Status Table for the Convention: HCCH "Status Table: 37: Convention of 30 June 2005 on Choice of Court Agreements" <www.hcch.net/en/instruments>.

51 Section 52 renders void a contractual provision purporting to "exclude, restrict or modify" the operation of the Act to the prejudice of a person other than the insurer.

Atkinson J of the Supreme Court of Queensland treated arguments that the choice of court agreement was vitiated by fraudulent misrepresentation or mistake as being relevant to whether the clause was null and void.⁵²

The second and fourth of the five exceptions, concerning the parties' capacity to enter into, and the frustration of, a choice of court agreement, seem very unlikely to arise in practice. There are no New Zealand or Australian cases in which these issues have arisen or been considered.⁵³ Consequently these two exceptions are not discussed any further here.⁵⁴

The third exception has two limbs, justifying non-enforcement where giving effect to the exclusive choice of court agreement would either "lead to a manifest injustice", or be "manifestly" incompatible with New Zealand public policy. In relation to the first limb, in *Skelton v Z487 Ltd*, the New Zealand plaintiff asserted that the enforcement of a choice of court agreement in favour of Australian courts would lead to a manifest injustice, because he suffered from significant health issues and claimed that he would therefore be unable to travel to Queensland to participate in a trial there. Justice Lang found that "the evidence does not establish that Mr Skelton could not travel to Queensland if that was necessary", and therefore he did not need to decide how the first limb should be interpreted.⁵⁵

In relation to the second limb, the public policy exception, the New Zealand courts already take an internationalist and restrictive approach to the application of New Zealand public policy generally, including in jurisdictional disputes involving foreign jurisdiction clauses.⁵⁶ The inclusion of the qualifier "manifestly" in the Hague Choice of Court Convention is intended to establish a high threshold.⁵⁷ As already noted, consumer and employment contracts – which entail obvious public policy concerns that might otherwise enliven this exception – are explicitly excluded from the definition of exclusive choice of court agreements in the Trans-Tasman Proceedings Act.⁵⁸ The public

52 *Z487 Ltd v Skelton* [2014] QSC 309 at [72] and [75].

53 See Marshall and Keyes, above n 30, at 261–262.

54 For detailed discussion of all five exceptions, see Hartley and Dogauchi, above n 40, at [146]–[159]; and Marshall and Keyes, above n 30, at 258–268.

55 *Skelton v Z487*, above n 41, at [30].

56 See further below nn 85–86 and associated text. Similarly, the New Zealand courts apply a very high standard in relation to the public policy defence to the enforcement of foreign judgments. In *Reeves v OneWorld Challenge LLC*, the Court of Appeal said that the issue is whether enforcement would "'shock the conscience' of a reasonable New Zealander, or be contrary to New Zealand's view of basic morality or a violation of essential principles of justice or moral interests in New Zealand": *Reeves v OneWorld Challenge LLC* [2006] 2 NZLR 184 (CA) at [67].

57 Hartley and Dogauchi, above n 40, at [153].

58 See above n 26 and associated text.

policy exception might be invoked in disputes arising from other contracts characterised by disparities in bargaining position, such as franchise and insurance contracts. The public policy exception would also be made out if New Zealand legislation either explicitly or implicitly invalidated a foreign choice of court agreement.⁵⁹

The final exception is where the Australian court, nominated in the exclusive choice of court agreement, has decided not to determine matters within the agreement's scope. This provision is misconceived. As explained above, in the Trans-Tasman Proceedings Act, the court nominated in an exclusive choice of court agreement is obliged to determine matters within the agreement's scope, unless the agreement is null and void under the law of the chosen court.⁶⁰ That sole exception is already fully reflected in the first exception under s 25(2).⁶¹ There is no other basis on which a chosen court is expressly allowed, under the Act, to "decide not to" exercise its jurisdiction. This exception was adverted to in the only published New Zealand case⁶² dealing with the effect of exclusive choice of court agreements under the Trans-Tasman Proceedings Act: *Skelton v Z487 Ltd*.⁶³

Skelton v Z487 Ltd concerned disputes that arose from two agreements between the parties who were engaged in a long-term commercial relationship.⁶⁴ The first agreement, concluded in 2008, contained an exclusive choice of New Zealand courts; the second agreement, concluded in 2010, contained an exclusive choice of Australian courts. The Australian party, Z487 Ltd, commenced proceedings in the Supreme Court of Queensland, seeking relief only under the 2008 agreement.⁶⁵ A month later, the New Zealand party, Mr Skelton, brought proceedings in the High Court of New Zealand, seeking relief under both the 2008 and 2010 agreements.⁶⁶ The defendant to each proceeding (the plaintiff in the proceedings in the other country) sought a stay under the relevant Trans-Tasman Proceedings Act, in each case relying on the exclusive choice of court agreement in favour of its preferred forum.

59 For an example of an explicit invalidation, see the Maritime Transport Act 1994, s 210. A provision prohibiting contracting out might be interpreted to impliedly invalidate an exclusive choice of foreign court, for example s 5C(1) of the Fair Trading Act 1986.

60 See above n 39 and associated text.

61 See above nn 51–52 and associated text.

62 Three Australian cases have considered the identical provisions in the Australian legislation: *Z487 Ltd v Skelton*, above n 52; *Australian Gourmet Pastes Pty Ltd v IAG New Zealand Ltd* [2017] VSCA 155, (2017) 321 FLR 345; and *Re Douglas Webber Events Pty Ltd* [2014] NSWSC 1544, (2014) 291 FLR 173.

63 *Skelton v Z487 Ltd*, above n 41.

64 *Skelton v Z487 Ltd*, above n 41.

65 *Z487 Ltd v Skelton*, above n 52.

66 *Skelton v Z487 Ltd*, above n 41.

The application to stay the New Zealand proceedings was heard first. In that case, Lang J observed that the Trans-Tasman Proceedings Act required the New Zealand court to stay the proceedings relating to the 2008 agreement, and prohibited the New Zealand court from staying the proceedings in relation to the 2010 agreement.⁶⁷ He noted that the Australian court would be required not to stay its proceedings in relation to the 2008 agreement, with the result that "the dispute will necessarily be determined in a piecemeal way in both Australia and New Zealand".⁶⁸

Justice Lang went on to suggest that it was "open ... to the courts in Queensland to elect not to determine the issues raised in the Queensland proceeding".⁶⁹ His Honour seems to have drawn this conclusion from s 25(2)(e) of the Trans-Tasman Proceedings Act, which states that the New Zealand court is not required to stay proceedings in favour of an exclusive choice of court which designates Australian courts if the designated court has "decided not to determine" the matters in dispute within the scope of the agreement.⁷⁰ As noted above, this provision is directly inconsistent with the Trans-Tasman Proceedings Acts' requirement that a court designated in an exclusive choice of court agreement must not stay proceedings brought in accordance with the agreement unless the agreement is null and void. In other words, notwithstanding s 25(2)(e), it was not open to the Australian court to decide not to determine the matters in dispute beyond the scope of the agreement. Just as the Trans-Tasman Proceedings Act insisted that the New Zealand courts "must not" stay proceedings in relation to the 2010 agreement, the Australian legislation required that the Queensland courts must not stay proceedings in relation to the 2008 agreement, unless the choice of court agreement was null and void under Australian law.⁷¹

Clearly, the circumstance that arose in *Skelton v Z487 Ltd* – that the commercial relationship between the parties involved more than one contract, containing inconsistent exclusive choice of court agreements – had not occurred to those responsible for drafting the Trans-Tasman Proceedings Acts. They might be forgiven the omission in that it is not addressed in the Hague Choice of Court Convention either. In *Skelton v Z487 Ltd*, Lang J, assuming that the Queensland Court, which was yet to consider the jurisdictional challenge, might "elect not to determine the issues raised in the Queensland proceedings", decided that litigation should continue in New Zealand because the Australian court was not "the more appropriate court",⁷² by reference to the provision applicable when

67 At [31].

68 At [31].

69 At [32].

70 This provision is discussed above nn 60–63 and associated text.

71 Trans-Tasman Proceedings Act 2010 (Cth), s 20(1)(b). Atkinson J rejected an argument that the choice of Australian courts in the 2008 agreement was null and void: *Z487 Ltd v Skelton*, above n 52.

72 *Skelton v Z487 Ltd*, above n 41, at [32], referring to s 24 of the Trans-Tasman Proceedings Act.

there is no effective exclusive choice of court agreement.⁷³ This course is simply not available under the Act, which neither contemplates nor provides for the possibility of multiple inconsistent exclusive choice of court agreements in related contracts between the same parties. While Lang J's attempt to craft a solution consistent with the purpose of the legislation in simplifying and expediting litigation on the preliminary jurisdictional issue is laudable, it is inconsistent with the rigid scheme of the legislation strictly to enforce exclusive choice of court agreements. This highlights the most important difference between the common law, which always preserves the court's discretion not to enforce exclusive choice of court agreements⁷⁴ – a discretion which is highly desirable, if not essential, in dealing with complex international commercial disputes involving multiple parties, multiple inconsistent agreements, or both – and the Hague Choice of Court Convention, which denies the court any such discretion.

In the application to stay the Queensland proceedings in *Z487 Ltd v Skelton*, Atkinson J held that the 2008 agreement was separate from the 2010 agreement, and the exclusive choice of court in the 2008 agreement, nominating the Australian courts, had to be enforced under the Australian Trans-Tasman Proceedings Act.⁷⁵ Subsequent procedural decisions of the New Zealand High Court indicate that proceedings continued in New Zealand, but do not reveal how the jurisdictional stalemate was resolved.⁷⁶

2 *Exclusive jurisdiction clauses outside the scope of the trans-Tasman regime*

The effect of jurisdiction clauses outside the scope of the Trans-Tasman Proceedings Act requires consideration both of the relevant rules of court, as well as of the case law. Under the rules of court, a defendant can challenge the jurisdiction of the New Zealand court; in determining whether the challenge is made out, the court must consider whether "New Zealand is the appropriate forum for the trial".⁷⁷ The New Zealand courts refer to the residual common law in determining that issue, which requires that exclusive jurisdiction clauses should be enforced "unless there is strong cause or the

73 Trans-Tasman Proceedings Act, s 24, discussed below nn 106–107 and associated text.

74 See in particular *Donohue v Armco Inc* [2001] UKHL 64, [2002] 1 All ER 749, discussed below n 88 and associated text.

75 *Z487 Ltd v Skelton*, above n 52, at [81], applying s 20(1)(b) of the Trans-Tasman Proceedings Act (Cth).

76 *Skelton v Z487 Ltd* [2015] NZHC 1338; and *Skelton v Z487 Ltd* [2015] NZHC 1450.

77 High Court Rules, r 6.28(5)(c), which requires the plaintiff to show, inter alia, that New Zealand is the appropriate forum for the trial. This is relevant for cases where initiating process was served outside New Zealand: High Court Rules, r 5.49, which refers to r 6.29. Rule 6.29(1)(a)(ii) in turn requires reference to be made to r 6.28(5)(b)–(d).

existence of exceptional circumstances" justifying non-enforcement.⁷⁸ In *Society of Lloyd's and Oxford Members' Agency Ltd v Hyslop*, Richardson J stated that:⁷⁹

The existence of an exclusive jurisdiction clause places a heavy burden on the party seeking to oppose the clause. While the Court has a discretion, a stay should be granted unless strong cause for not doing so is shown by the plaintiff.

In a majority of cases,⁸⁰ New Zealand courts have found that the plaintiff has not shown strong cause and have therefore enforced the foreign exclusive jurisdiction clause.⁸¹ In determining whether there is strong cause justifying non-enforcement, the New Zealand courts take into account factors identified by Brandon J in the influential English case *Owners of Cargo lately laden on board ship or vessel Eleftheria v Owners of ship or vessel Eleftheria (The Eleftheria)*, as follows:⁸²

(a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the [forum] and foreign courts; (b) Whether the law of the foreign court applies and, if so, whether it differs from [forum] law in any material respects; (c) With what country either party is connected, and how closely; (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages; (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would: (i) be deprived of security for their claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time-bar not applicable in [the forum]; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.

These are the same kinds of factors that are relevant in deciding jurisdiction challenges when there is no exclusive jurisdiction clause under the principle of *forum non conveniens* – namely, the factual and legal connections between the parties and the dispute to the forum and relevant foreign legal system.⁸³ Although a higher standard is imposed when there is an exclusive jurisdiction clause, it is

78 *Advanced Cardiovascular Systems Inc v Universal Specialties Ltd* [1997] 1 NZLR 186 (CA) [*Universal Specialties Ltd* (CA)] at 190.

79 *Society of Lloyd's and Oxford Members' Agency Ltd v Hyslop* [1993] 3 NZLR 135 (CA) at 142 per Richardson J. Cooke P agreed with Richardson J at 138.

80 In 2013, Ong stated that foreign exclusive jurisdiction clauses were enforced by New Zealand courts in nine out of 15 reported cases decided since 1990: Ong, above n 18, at 236, n 101.

81 See for example *Universal Specialties Ltd* (CA), above n 78; *Kidd v van Heeren* [1998] 1 NZLR 324 (HC); and *Seed Enhancements Ltd v Agrisource 2000 Ltd* HC Auckland CIV 2010-404-004243, 18 November 2011. Compare *Apple Computer Inc v Apple Corp SA* [1990] 2 NZLR 598 (HC).

82 *Owners of Cargo lately laden on board ship or vessel Eleftheria v Owners of ship or vessel Eleftheria* [1970] P 94 [*The Eleftheria*] at 100, adopted and applied by the Court of Appeal in *Society of Lloyd's and Oxford Members' Agency Ltd v Hyslop*, above n 79, at 143.

83 See *Schumacher v Summergrove Estates Ltd* [2014] NZCA 412, [2014] 3 NZLR 599 at [29]–[30]; and *Exporttrade Corporation v Irie Blue New Zealand Ltd* [2013] NZCA 675 at [38]–[39].

unfortunate that the same test is applied whether there is an exclusive jurisdiction clause or not, and that ultimately the jurisdictional dispute is resolved by weighing various connections. This makes it difficult accurately to predict the outcome of a jurisdictional dispute, and might not appropriately protect exclusive jurisdiction clauses.⁸⁴ It is in marked contrast to the treatment of exclusive choice of court agreements under the Trans-Tasman Proceedings Act.

New Zealand courts, as already noted, have generally taken a cosmopolitan approach to the effect of New Zealand public policy in the jurisdictional context. The potential non-application of forum public policy has been held to be not in itself a strong cause for non-enforcement of a foreign exclusive jurisdiction clause. In *Society of Lloyd's and Oxford Members' Agency Ltd v Hyslop*, in which the defendant challenged the jurisdiction of the New Zealand courts on the basis of an exclusive jurisdiction clause in favour of English courts, Richardson J, with whom Cooke P agreed, observed that:⁸⁵

... the Securities Act 1978 is designed to offer protection to New Zealand investors. Accordingly it may be said that it is for New Zealand Courts to determine whether foreigners who have come to New Zealand canvassing for capital have breached its provisions.

However, his Honour went on to hold that this "in itself is not sufficient to counter the overwhelming weight of all the other considerations supporting England".⁸⁶ If New Zealand legislation explicitly or implicitly invalidates a foreign jurisdiction clause,⁸⁷ the clause will not be enforced.

The common law recognises that an exclusive jurisdiction clause might and sometimes should yield to other considerations. In *Donohue v Armco Inc*, the House of Lords held that the English court might not enforce an exclusive jurisdiction clause:⁸⁸

... where the interests of parties other than the parties bound by the exclusive jurisdiction clause are involved or grounds of claim not the subject of the clause are part of the relevant dispute so that there is a risk of parallel proceedings and inconsistent decisions.

84 See similarly Ong, above n 18.

85 *Society of Lloyd's and Oxford Members' Agency Ltd v Hyslop*, above n 79, at 143.

86 At 143. Compare *Apple Computer Inc*, above n 81, in which it was held that if the proceedings concern New Zealand legislation and the court takes the view that foreign courts lack jurisdiction to apply that legislation, the court might refuse to enforce the foreign exclusive jurisdiction clause.

87 See for example the Maritime Transport Act, s 210.

88 *Donohue v Armco Inc*, above n 74, at [27]. See also *General Equity Building Society v Squant Communications Private Ltd* [2017] NZHC 1436 at [14].

Eight Mile Style LLC v New Zealand National Party concerned a chain of contracts involving multiple parties.⁸⁹ The fourth party objected to the jurisdiction of the New Zealand courts on the basis that its contract with the fifth third party contained an exclusive choice of United States courts. Dobson J found that the jurisdiction clause in question was not exclusive,⁹⁰ but that even if it were, he would not have enforced it because "the importance of resolving all aspects of the substantive claim of breach of copyright does give sufficiently strong cause for the Court to exercise its jurisdiction not to stay the New Zealand proceeding".⁹¹ Likewise, if the New Zealand litigation involved a range of claims, only some of which were within the subject-matter scope of the foreign exclusive jurisdiction clause, the court might refuse to enforce the clause.

Most New Zealand cases concern exclusive jurisdiction clauses in favour of foreign courts, but as a matter of principle, exclusive jurisdiction clauses in favour of New Zealand courts should be determined in the same way: that is, enforced unless there is strong cause for non-enforcement.⁹² While the courts would be unlikely to stay proceedings if the parties agreed to litigate exclusively in the forum, they might find that there was strong cause justifying doing so if the litigation in another country involved third parties who were not bound by the jurisdiction clause, or matters beyond the subject-matter scope of the jurisdiction clause, because the public interest in preventing multiplicity of litigation may outweigh the parties' private interests in having jurisdictional agreements enforced.

The English courts have had to deal with jurisdictional disputes involving multiple contracts containing inconsistent exclusive jurisdiction clauses. *UBS AG v HSH Nordbank AG* involved a series of related contracts, containing different "exclusive" jurisdiction clauses. Lord Collins held that the prevailing clause was that contained in "the agreements which are at the commercial centre of the transaction" and suggested that this would be consistent with the parties' intentions.⁹³ A related issue arises in the context of inconsistent arbitration and jurisdiction clauses. Garnett's suggestion to resolve conflicting dispute resolution clauses is that the tribunal which was "more appropriate to resolve the dispute" should prevail, taking into account the tribunal that was seised first.⁹⁴ That suggestion resembles the solution proposed by Lang J in *Skelton v Z487 Ltd*, discussed above.⁹⁵

89 *Eight Mile Style LLC v New Zealand National Party*, above n 34.

90 This aspect of the case is discussed above nn 34–37 and associated text.

91 *Eight Mile Style LLC v New Zealand National Party*, above n 34, at [68].

92 *Heli Holdings Ltd v Chopper Worx Pty Ltd*, above n 2, at [53].

93 *UBS AG v HSH Nordbank AG* [2009] EWCA Civ 585, [2009] 2 Lloyd's Rep 272 at [95].

94 Richard Garnett "Coexisting and conflicting jurisdiction and arbitration clauses" (2013) 9 J Priv Int L 361 at 370.

95 See nn 72–73 and associated text.

3 *Protection of exclusive jurisdiction clauses*

The principal protection given to exclusive jurisdiction clauses is in the principles relating to staying or dismissing proceedings, as already discussed. The court might also protect an exclusive jurisdiction clause in two other ways: first, by awarding an anti-suit injunction to prevent the commencement or continuation of proceedings in a foreign forum other than that nominated in an exclusive jurisdiction clause; and second, by awarding damages for breach of an exclusive jurisdiction clause.

(a) Anti-suit injunctions

It is necessary to consider trans-Tasman proceedings separately from proceedings outside that regime. Whether New Zealand (and Australian) courts can award anti-suit injunctions to protect exclusive choice of court agreements within the scope of the Trans-Tasman legislation is an interesting question which has not yet been considered by the courts in either country. The Trans-Tasman Proceedings Act provides that:⁹⁶

A New Zealand court must not restrain a person from commencing a civil proceeding in an Australian court *on the grounds that the Australian court is not the appropriate forum for the proceeding.*

This provision might have been intended to apply in all cases, including where there is an exclusive choice of court agreement in favour of the New Zealand courts. But on its clear wording, it does not apply in such a case because the ground on which the injunction would be sought is not that the Australian court is inappropriate, but rather that the exclusive choice of court agreement should be enforced; the appropriateness of the Australian forum is not explicitly relevant to that question under the Act. It would be consistent with the strong protection of exclusive choice of court agreements under the Act, with the express words of s 28(1), and with relevant Australian authority,⁹⁷ for the remedy of an anti-suit injunction to be available to enjoin a party from commencing or continuing Australian proceedings brought in breach of an exclusive choice of court agreement in favour of the New Zealand courts.

Outside the scope of the trans-Tasman regime, New Zealand courts certainly have jurisdiction to grant anti-suit injunctions, and although there appear to be no cases in which an anti-suit injunction has been granted to prevent the commencement or continuation of foreign proceedings brought in breach of an exclusive jurisdiction clause in favour of the New Zealand courts, the courts could certainly grant an anti-suit injunction in such circumstances.

⁹⁶ Trans-Tasman Proceedings Act, s 28(1) (emphasis added).

⁹⁷ See *Great Southern Loans v Locator Group* [2005] NSWSC 438 at [75]–[77], discussing s 21 of the Service and Execution of Process Act 1992 (Cth) which applies to the context of intra-Australian litigation and is in very similar terms to s 28(1) of the Trans-Tasman Proceedings Act. See also Mortensen, above n 5, at 85.

(b) Damages for breach of an exclusive jurisdiction clause?

The issue as to the availability of damages for breach of an exclusive jurisdiction clause has not yet arisen in New Zealand. The Trans-Tasman Proceedings Act makes no reference to any such remedy; its silence on this point could be argued both to support and not to support the availability of damages. By not explicitly prohibiting the remedy, the Act could be said implicitly to permit it. On the other hand, by not explicitly making the remedy available, the Act could be said implicitly to deny its availability. It is suggested that it would be consistent with the Act's explicit description of jurisdiction clauses as choice of court agreements to allow a contractual remedy for breach.⁹⁸

For exclusive jurisdiction clauses outside the scope of that legislation, the question as to whether damages are available for breach of an exclusive jurisdiction clause has not arisen directly in New Zealand. In England and Australia, at least in principle, damages may be awarded for breach of an exclusive jurisdiction clause.⁹⁹ In *Vero Liability Insurance Ltd v Heartland Bank Ltd*, the New Zealand Court of Appeal implied that, as an exception to the general rule that damages cannot be awarded for the costs of pursuing a claim,¹⁰⁰ damages might be available if a party had successfully applied for a stay of local proceedings in support of an arbitration agreement.¹⁰¹ The same reasoning applies to exclusive jurisdiction agreements.¹⁰² If the exclusive jurisdiction clause nominated a foreign court, and the New Zealand court ordered a stay of proceedings brought in New Zealand in breach of that clause, awarding damages for breach is relatively straightforward. But if the exclusive jurisdiction clause nominated New Zealand courts and was breached by a party bringing proceedings in a foreign court which interpreted the clause differently to the New Zealand court, the foreign court's decision in relation to the effect of the jurisdiction clause may give rise to an issue estoppel¹⁰³ which would prevent the award of damages by a New Zealand court.

98 See Mukarrum Ahmed and Paul Beaumont "Exclusive choice of court agreements: some issues on the Hague Convention on choice of court agreements and its relationship with the Brussels I recast especially anti-suit injunctions, concurrent proceedings and the implications of BREXIT" (2017) 13 J Priv Int L 386 (referring to the Hague Choice of Court Convention, above n 20, on which the Act is based).

99 *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG* [2013] UKSC 70, [2014] 1 All ER 590; *Compagnie des Messageries Maritimes v Wilson* (1954) 94 CLR 577 at 587; *Commonwealth Bank of Australia v White (No 2)* [2004] VSC 268; and *Pipeline Services WA Pty Ltd v Atco Gas Australia Pty Ltd* [2014] WASC 10 at [8]–[25]. See also Albert Dinelli "The Limits on the Remedy of Damages for Breach of Jurisdiction Agreements: The Law of Contract Meets Private International Law" (2015) 38 MULR 1023.

100 The Court cited *Berry v British Transport Commission* [1962] 1 QB 306 (CA) at 316–317, 319 and 320–321; *Herbison v Papakura Video Ltd (No 2)* [1987] 2 NZLR 720 (HC) at 735; *Simpson v Walker* [2012] NZCA 191, (2012) 28 FRNZ 815; and *Boswell v Millar* [2014] NZCA 314, [2014] 3 NZLR 332 at [50].

101 *Vero Liability Insurance Ltd v Heartland Bank Ltd (Formerly Marac Finance Ltd)* [2015] NZCA 288 at [111].

102 *A v B (No 2)* [2007] EWHC 54 (Comm) at [10]–[11].

103 See Dinelli, above n 99, at 1039.

C *Non-exclusive Jurisdiction Clauses*

Non-exclusive jurisdiction clauses are usually defined as mere submissions to the jurisdiction of the nominated court.¹⁰⁴ In general,¹⁰⁵ they should have different legal effects to exclusive jurisdiction clauses because they are not taken to imply that the parties agree not to litigate in courts other than those nominated in the clause. The treatment of non-exclusive jurisdiction clauses under the Trans-Tasman Proceedings Act and at common law is similar. Under both regimes, it makes no difference, at least in principle, whether the non-exclusive jurisdiction clause is in favour of the forum or of foreign courts.

1 *Non-exclusive choice of court agreements under the Trans-Tasman Proceedings Act*

Jurisdiction clauses which fall outside the definition of "exclusive choice of court agreements" in the Trans-Tasman Proceedings Act, including non-exclusive jurisdiction clauses,¹⁰⁶ have a very different effect. They are merely one of eight listed factors¹⁰⁷ that the New Zealand courts must take into account in determining whether they should stay proceedings on the basis that an Australian court is "the more appropriate court for the proceeding". The legislation does not indicate the weight to be given to such agreements. The legislation came into effect in October 2013; as at the time of writing, there were no published New Zealand or Australian cases discussing this particular factor in detail. It seems likely that the cases dealing with the effect of non-exclusive jurisdiction clauses at common law will be influential in cases decided under the Act, because, as explained below, the common law has traditionally treated non-exclusive jurisdiction clauses in a similar way – as a factor which is relevant to determining whether New Zealand is the appropriate forum to hear and determine the dispute.

2 *Non-exclusive jurisdiction clauses at common law*

For cases outside the scope of the Trans-Tasman Proceedings Act, there are two different approaches manifest in the New Zealand cases. The first is the same as in the Act: a non-exclusive jurisdiction clause is merely one of several factors relevant to the court's determination as to whether it should exercise its jurisdiction. The negative effect of a non-exclusive jurisdiction clause will arise

104 JJ Fawcett "Non-exclusive Jurisdiction Clauses in Private International Law" [2001] LMCLQ 234 at 235. See similarly *Sensation Yachts Ltd v Darby Maritime Ltd* HC Auckland M1146-sw02, 25 October 2002 at [32].

105 There are English cases in which some non-exclusive jurisdiction clauses in favour of English courts have been given similar protection to exclusive jurisdiction clauses in favour of the English courts, in that the courts have issued anti-suit injunctions to prevent the commencement or continuation of proceedings brought in a foreign court. See further below nn 117–120 and 124 and associated text.

106 As well as all jurisdiction clauses in consumer and employment contracts, which are excluded from the definition of "exclusive choice of court agreements": Trans-Tasman Proceedings Act, s 25(4)(b) and (c).

107 Trans-Tasman Proceedings Act, s 24(2).

if the foreign defendant protests the jurisdiction,¹⁰⁸ in which case the plaintiff must establish, among other things, that New Zealand is "the appropriate forum for the trial".¹⁰⁹ This requires consideration of which of the competing fora has "the most real and substantial connection" to the dispute.¹¹⁰ The existence of a non-exclusive jurisdiction clause is relevant to that question,¹¹¹ in addition to "factors affecting convenience or expense (such as availability of witnesses), the law governing the relevant transaction and the places where the parties respectively reside or carry on business".¹¹² Although Ong suggested in 2013 that New Zealand courts give "little weight to non-exclusive jurisdiction clauses",¹¹³ cases since show that this is changing. In *Haines v Herd*, Associate Judge Bell stated that the foreign non-exclusive jurisdiction clause placed "a higher burden" on the applicant for a stay to show that New Zealand was more appropriate than the foreign court nominated in the clause than would apply if there were no jurisdiction clause.¹¹⁴ Nonetheless, ultimately that clause "only reinforce[d]" the conclusion that Vanuatu was the natural forum.¹¹⁵ Similarly, in *Tiah Ltd v Koninklijke Ten Cate NV*, Edwards J said it was "significant" that the parties had chosen New Zealand law and included a non-exclusive choice of New Zealand courts.¹¹⁶

The second approach has only recently begun to emerge in New Zealand. It resembles the approach taken in some English cases which do not determine the effect of non-exclusive jurisdiction clauses by reference to the *forum non conveniens* principle.¹¹⁷ In these cases, a similar standard is applied to non-exclusive as to exclusive jurisdiction clauses; that is, these decisions required that non-exclusive jurisdiction clauses should be protected, often by anti-suit injunction, unless the party

108 High Court Rules, r 5.49.

109 Rules 6.28(5)(c) and 6.29(1)(a)(ii).

110 *Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd* [2010] NZCA 502, [2011] 1 NZLR 754 at [45]–[46].

111 At [46].

112 *Exporttrade Corporation v Irie Blue New Zealand Ltd* [2013] NZCA 675 at [39(c)]; and *Schumacher v Summergrove Estates Ltd* [2014] NZCA 412, [2014] 3 NZLR 599 at [29].

113 Ong, above n 18, at 228.

114 *Haines v Herd* [2015] NZHC 3365 at [83].

115 At [95].

116 *Tiah Ltd v Koninklijke Ten Cate NV* [2016] NZHC 237 at [50].

117 Gloster J summarised this approach in *Antec International Ltd v Biosafety USA Inc* [2006] EWHC 47 (Comm) at [7]. The same approach has recently been endorsed and applied by the Singapore Court of Appeal: see *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] SGCA 11, and is also applied in Hong Kong: see *Noble Power Investments Ltd v Nissei Stomach Tokyo Co Ltd* [2008] 5 HKLRD 631.

resisting enforcement demonstrated strong reasons¹¹⁸ why the court nominated in the clause – usually, the forum court – was not an appropriate jurisdiction.¹¹⁹ Factors that were foreseeable at the time the agreement was concluded cannot be taken into account.¹²⁰ A number of these English cases were cited by Associate Judge Bell with apparent approval in *Haines v Herd*,¹²¹ although in that case the non-exclusive jurisdiction clause was still treated as relevant to the *forum non conveniens* enquiry.

In two cases decided in 2018, Associate Judge Smith held that non-exclusive jurisdiction clauses in favour of New Zealand courts are significant in determining jurisdictional challenges. In the first, *Vector Ltd v Sunverge Energy Inc*, his Honour stated that the parties' express submission to the non-exclusive jurisdiction of the New Zealand courts was a "powerful consideration ... on the appropriate forum issue".¹²² In *Heli Holdings Ltd v Chopper Worx Pty Ltd*,¹²³ in obiter, Associate Judge Smith quoted a passage from *Deutsche Bank AG v Highland Crusader Offshore Partners LP*, a decision of the English Court of Appeal, in which Toulson LJ stated that:¹²⁴

... by agreeing to submit to the non-exclusive jurisdiction of state X the parties implicitly agree that X is an appropriate jurisdiction, and therefore either party should have to show a strong reason for later arguing that it is not an appropriate jurisdiction.

Without explicitly adopting that position, Associate Judge Smith suggested that his own statement in *Vector Ltd v Sunverge Energy Inc*, that a non-exclusive jurisdiction clause was a "powerful

118 In some cases, even stronger language is used: in *Antec International Ltd*, above n 117, at [7(ii)], Gloster J held that "overwhelming, or at least very strong, reasons" had to be shown by the party challenging their obligation to submit to the English courts (emphasis added).

119 *Deutsche Bank AG v Highland Crusader Offshore Partners LP*, above n 2, at [64], cited in *Heli Holdings Ltd v Chopper Worx Pty Ltd*, above n 2, at [50]. This is a slightly different inquiry to that which pertains to exclusive jurisdiction clauses. In the case of the non-exclusive clause, the test is whether the party resisting the clause can demonstrate strong reasons why the nominated court is not an appropriate jurisdiction. For exclusive clauses, the question is whether the party challenging the clause can demonstrate strong reasons why the clause should not be enforced. For a detailed discussion of this issue see Louise Merrett and Janeen Carruthers "United Kingdom: Giving Effect to Optional Choice of Court Agreements – Interpretation, Operation and Enforcement" in Mary Keyes (ed) *Optional Choice of Court Agreements in Private International Law* (Springer, Cham (Switzerland), 2020) 443.

120 *Antec International Ltd*, above n 117, at [7].

121 *Haines v Herd*, above n 114, at [80]–[81].

122 *Vector Ltd v Sunverge Energy Inc* [2018] NZHC 1936 at [95]. His Honour used the same phrase ("a powerful consideration ... on the appropriate forum issue") in his decision in the later case *Heli Holdings Ltd v Chopper Worx Pty Ltd*, above n 2, at [50].

123 *Heli Holdings Ltd v Chopper Worx Pty Ltd*, above n 2, at [32].

124 *Deutsche Bank AG v Highland Crusader Offshore Partners LP*, above n 2, at [64].

consideration ... on the appropriate forum issue"¹²⁵ was "[t]o similar effect".¹²⁶ However, his Honour also recognised that:¹²⁷

While it is clear that even an exclusive jurisdiction clause can be overridden if exceptional circumstances exist which would justify denying the contractual provision its operative effect, the bar is set lower where the jurisdiction clause is non-exclusive.

The status of non-exclusive jurisdiction clauses in New Zealand law has, therefore, become somewhat unclear. There is a clear trend to give non-exclusive clauses greater weight than in earlier decisions – which is a positive development – and several cases have referred approvingly to English authorities that give non-exclusive clauses a similar status to exclusive clauses. Whether the New Zealand courts will take the next step, following English, Singaporean and Hong Kong authority, in more strictly protecting non-exclusive jurisdiction clauses, particularly by means of anti-suit injunction, remains to be seen. Whether that would be a desirable development is not certain.¹²⁸

3 *Protection of non-exclusive jurisdiction clauses*

As already explained, non-exclusive jurisdiction clauses are relevant to a court's decision whether to stay proceedings, both under the Trans-Tasman Proceedings Act and otherwise. In *Deutsche Bank AG v Highland Crusader Offshore Partners LP*, Toulson LJ noted that "a jurisdiction clause which is not fully exclusive may nevertheless be drafted in such a way as to have the effect of barring parallel proceedings in certain circumstances".¹²⁹ In that case, an anti-suit injunction might be awarded to prevent the commencement or continuation of foreign proceedings, where the parties had nominated the forum court in a non-exclusive jurisdiction clause. This would not be possible under the Trans-Tasman Proceedings Act; the effect of any choice of court agreement which is not exclusive under the Act is relevant to whether the Australian court is the (more) appropriate forum,¹³⁰ and the Act prohibits a New Zealand court from granting an anti-suit injunction in those circumstances.¹³¹

It may well be otherwise in cases outside the trans-Tasman regime. In particular, it would be consistent with the two cases referred to above, in which Associate Judge Smith cited the English

¹²⁵ *Vector Ltd v Sunverge Energy Inc*, above n 122, at [95].

¹²⁶ *Heli Holdings Ltd v Chopper Worx Pty Ltd*, above n 2, at [50].

¹²⁷ At [53].

¹²⁸ This second approach has been criticised for discriminating in favour of jurisdiction clauses that nominate forum courts, and for blurring the distinction between exclusive and non-exclusive jurisdiction clauses: see *UBS AG v Telesto Investments Ltd* [2011] 4 SLR 503 at [120]; and *BP plc v AON* [2005] EWHC 2554 (Comm) at [23].

¹²⁹ *Deutsche Bank AG v Highland Crusader Offshore Partners LP*, above n 2, at [105].

¹³⁰ Section 24(2)(d).

¹³¹ Section 28.

Court of Appeal's reasoning in *Deutsche Bank AG v Highland Crusader Offshore Partners LP* with approval,¹³² for a New Zealand court to grant an anti-suit injunction to protect a non-exclusive jurisdiction clause in favour of New Zealand courts, if it found that the clause was "drafted in such a way as to have the effect of barring parallel proceedings".¹³³

D Asymmetric Jurisdiction Clauses

The discussion in this article has so far proceeded on the basis that jurisdiction clauses are symmetric in their effect on the parties: that is, that they apply to the parties equally. It is not uncommon to find jurisdiction clauses which purport to affect the parties differently. Such asymmetric jurisdiction clauses may bind only one party (these are sometimes called "unilateral" jurisdiction clauses), or combine exclusive and non-exclusive components (these are also called "one-sided" jurisdiction clauses). For example, the jurisdiction clause at issue in *Advanced Cardiovascular Systems Inc v Universal Specialties Ltd* provided that:¹³⁴

In case of any litigation arising out of any dispute between the parties concerning the interpretation or the compliance with this Agreement, the parties hereby expressly declare to accept the jurisdiction of the California Courts. However, ACS [the defendant] shall be entitled at its discretion to seek relief in a court of competent jurisdiction in the district in which DISTRIBUTOR [the plaintiff] is domiciled.

The latter type of clause is quite common. Generally such clauses purport to limit the jurisdictional options of one party, usually requiring that party to litigate exclusively at the home courts of the counter party, while preserving more jurisdictional options for the counter party, often enabling the counter party to litigate wherever the first party (or its assets) can be located at the time that proceedings are commenced.¹³⁵ There is a lively and extensive debate about the legitimacy and effect of asymmetric jurisdiction clauses, particularly in Europe. Whereas the English courts routinely enforce asymmetric jurisdiction clauses and regard them as an entirely unexceptional exercise of party autonomy, the French Cour de Cassation has refused to enforce them in some cases, including in the controversial decision of *Madame X v Société Banque Privé Edmond de Rothschild*.¹³⁶

132 *Vector Ltd v Sunverge Energy Inc*, above n 122; and *Heli Holdings Ltd v Chopper Worx Pty Ltd*, above n 2.

133 *Deutsche Bank AG v Highland Crusader Offshore Partners LP*, above n 2, at [105].

134 *Universal Specialties Ltd* (CA), above n 78, at 188.

135 See in general Mary Keyes and Brooke Adele Marshall "Jurisdiction agreements: exclusive, optional and asymmetrical" (2015) 11 J Priv Int L 345.

136 *Madame X v Société Banque Privé Edmond de Rothschild* Cass civ, 1ère, 26 September 2012. This case and a number of subsequent – not entirely consistent – decisions of the French Cour de Cassation are discussed in detail by François Mailhé "France: A Game of Asymmetries, Optional and Asymmetrical Choice of Court Agreements under French Case Law" in Mary Keyes (ed) *Optional Choice of Court Agreements in Private International Law* (Springer, Cham (Switzerland), 2020) 197. See also Keyes and Marshall "Jurisdiction

The legitimacy of asymmetric jurisdiction clauses has not been directly raised in New Zealand, although there are cases involving such clauses. In these cases, the New Zealand courts have addressed only the relevant component of the clause (which has usually been the exclusive aspect), treated them as enforceable and have not expressly commented on the asymmetric nature of the clause.¹³⁷ For example, the jurisdiction clause in *Heli Holdings Ltd v Chopper Worx Pty Ltd* provided that:¹³⁸

Lessor and Lessee hereby expressly submit to the non-exclusive jurisdiction of the New Zealand Courts situated in the courts of New Zealand [sic]. Lessee further agrees that any legal action or proceeding against it or in any of its assets [sic] may be brought in New Zealand or in any jurisdiction where Lessee or any of its assets may be found.

Associate Judge Smith interpreted the second sentence of this clause to create exclusive jurisdiction only for claims brought by the lessor. He did not remark on the asymmetric nature of this clause.¹³⁹ In the related context of unilateral arbitration clauses, there is New Zealand authority that such clauses are enforceable.¹⁴⁰ It seems likely that if the issue directly arose, the New Zealand courts would likewise hold asymmetric jurisdiction clauses to be effective, although this may not be appropriate under the Trans-Tasman Proceedings Act. This is because of the view expressed in the Explanatory Report to the Hague Choice of Court Convention that the Convention does not apply to asymmetric choice of court agreements.¹⁴¹ Given the influence of that Convention on the Trans-Tasman Proceedings Act, it might follow that the exclusive components of asymmetric agreements are outside the scope of that legislation. This question has not yet been considered by either the New Zealand or Australian courts.

agreements: exclusive, optional and asymmetrical", above n 135; and Merrett and Carruthers, above n 119, at 481–496.

¹³⁷ However, in *Universal Specialties Ltd* (HC), above n 31, at 7–8, Tompkins J took into account the fact that the clause gave the defendant, but not the plaintiff, the option to litigate in another court in determining that the main part of the clause was exclusive so far as the plaintiff was concerned.

¹³⁸ *Heli Holdings Ltd v Chopper Worx Pty Ltd*, above n 2, at [25].

¹³⁹ In *Universal Specialties Ltd* (HC), above n 31, at 8, Tompkins J noted without criticism that the clause reflected the parties' intention that it bind only the plaintiff and not the defendant. On appeal, the Court of Appeal did not remark on this aspect of the clause: see *Universal Specialties Ltd* (CA), above n 78.

¹⁴⁰ *Kawakawa Station Ltd v New Zealand Walking Access Commission* [2019] NZHC 791 at [35].

¹⁴¹ Hartley and Dogauchi, above n 40, at [106]. See also Keyes and Marshall "Jurisdiction agreements: exclusive, optional and asymmetrical", above n 135, at 366; and Adeline Chong "Singapore: A Mix of Traditional and New Rules" in Keyes (ed) *Optional Choice of Court Agreements in Private International Law* (Springer, Cham (Switzerland), 2020) 325. Compare *Commerzbank AG v Liquimar Tankers Management Inc* [2017] EWHC 161 (Comm), 1 WLR 3497 at [74]; and Merrett and Carruthers, above n 119, at 493–494.

IV CONCLUSION

It is often asserted that jurisdiction clauses create certainty about how jurisdictional disputes will be resolved and therefore reduce the scope for and intensity of preliminary jurisdictional skirmishes in international cases.¹⁴² This is in both the public and the parties' interests. However, the benefits of jurisdiction clauses will be undermined if the principles concerning their effect are unclear, or courts are too ready not to enforce them.

Some commentators have suggested that the New Zealand cases have insufficiently protected jurisdiction clauses, particularly exclusive jurisdiction clauses.¹⁴³ Under the common law, New Zealand courts treat exclusive and non-exclusive clauses in a similar way, applying similar principles to those that are used to resolve jurisdictional challenges in the absence of any agreement. This may undermine the effect of jurisdictional clauses and may create an incentive to parties to challenge jurisdictional agreements. The New Zealand courts have expressed divergent views about the weight to be given to non-exclusive clauses, making it difficult to anticipate with certainty how a jurisdictional challenge will be resolved.

The Trans-Tasman Proceedings Act is a welcome, although partial, improvement on the common law in its much stronger and clearer protection of exclusive choice of court agreements. However, this comes at the price of removing the court's discretion not to enforce exclusive jurisdiction clauses in exceptional cases, which is especially important in complex litigation. In terms of non-exclusive jurisdiction clauses, the Act mirrors the common law: non-exclusive jurisdiction clauses are one of several factors relevant to deciding whether the court should stay or dismiss proceedings because it is not the appropriate court to hear the dispute. Like the common law, the Act does not indicate the weight non-exclusive clauses are to be given. This is not an improvement on the common law.

It remains to be seen whether the Trans-Tasman Proceedings Act will, over time, influence the common law, whether at the level of nomenclature (will we begin to use the term "choice of court agreement" instead of jurisdiction clause?), or at the more important level of principle (will exclusive jurisdiction clauses be given stronger protection?). The early indication, from the one New Zealand case that has dealt with choice of court agreements under the Act, is that the influence might be in the opposite direction,¹⁴⁴ or at least that change might be a while coming. *Skelton v Z487 Ltd* suggests

142 *Perpetual Trustee Company Ltd v Downey* HC Auckland CIV-2001-404-4096, 25 October 2011 at [28].

143 Ong, above n 18, at 229–230; and Giora Shapira and Ronen Lazarovitch "Exclusive Jurisdiction Clauses – A New Zealand Perspective on the Hague Convention on Choice of Court Agreements" (2008) 23 NZULR 216 at 220.

144 This is so both in terms of form and substance. In *Skelton v Z487 Ltd*, above n 41, Lang J referred to the relevant terms as "jurisdiction clauses" eight times. The term "choice of court agreements" also appears in the judgment eight times, but all but one of those occurs in quotes from ss 24 and 25 of the Trans-Tasman Proceedings Act. His Honour also resolved the clash between inconsistent exclusive choice of court

that the courts may be likely to remain convinced of the relative superiority of the flexible common law regime and perhaps inclined to favour it over the rigidity of the legislative scheme.

agreements by reference to the common law method of identifying the country which was the more appropriate forum.