Rethinking Jurisdiction Clauses in New Zealand: The Hague Convention and Beyond

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When a dispute arises out of cross-border transactions, two pressing questions also arise: what is the most favourable choice of law; and what is the most favourable choice of forum? This article focuses on the latter consideration in examining jurisdiction clauses in common law systems, particularly from a New Zealand perspective. As befits their name, jurisdiction clauses have a procedural (and associated substantive) impact on both the existence and exercise of jurisdiction. Yet an analysis of the current treatment of jurisdiction clauses reveals that the actual impact of the jurisdiction clause is troublingly inconsistent and falls short of its theoretical value. This paper seeks to restore the value of such clauses by reframing them according to contractual rights; revising the discretionary tests used in respect of such clauses; and extending the commendable trans-Tasman scheme through the Hague Convention on Choice of Court Agreements to implement these reforms and more. Ultimately, the reforms advanced in this article should restore a valuable cost and risk-allocating clause to the disposal of businesses and individuals in New Zealand and beyond.

I INTRODUCTION

Justice Scalia once observed that "[v]enue is often a vitally important matter, as is shown by the frequency with which parties contractually provide for and litigate the issue."[1] The truth of this observation drives the force of the arguments in this article. In negotiating for the forum to decide their disputes, contracting parties are often effectively negotiating the outcome of their future transnational litigation. Yet the integrity of the parties' bargain is often severely undermined by the courts themselves. This article focuses on choice of court clauses — hereafter referred to as jurisdiction clauses — in common law systems, particularly in the New Zealand legal landscape. Part II presents the case for routine enforcement of jurisdiction clauses and grounds the rest of the article in a contractual perspective. Part III rejects categorising jurisdiction clauses according

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1 *Stewart Organisation Inc v Ricoh Corp* 487 US 22 (1988) at 39.

to overbroad labels and, instead, reframes the clauses according to their precise effect on the composite nature of jurisdiction. Part IV then goes on to question the actual value of the jurisdiction clause by examining the predictability of its enforcement in New Zealand courts. With the answer disappointingly unsatisfactory, new tests for both non-exclusive and exclusive jurisdiction clauses are proposed. This leads to Part V, which considers recent attempts at reform in the area of jurisdiction clauses, such as the Trans-Tasman Treaty and the Hague Convention. Given that the jurisdiction clause has been hailed as "an indispensable element in international trade, commerce, and contracting",[2] it is hoped that the following discussion will provoke a rethink of jurisdiction clauses and herald a quest for a more progressive approach in New Zealand.

II THE THEORETICAL VALUE OF JURISDICTION CLAUSES

Before considering the case for routine enforcement of jurisdiction clauses, it is first necessary to review the concerns against such enforcement.

Clause for Concern?

Jurisdiction clauses serve the same purpose as the widely-enforced arbitration clause: they designate the forum in which the dispute is to be adjudicated. This leads one to expect courts to routinely respect the parties' choice of court as a matter of contract law. However, three concerns differentiate jurisdiction clauses from the rest of the contractual pack.

First, since jurisdiction clauses are essentially ex ante forum shopping, they suffer by association from the unsavoury reputation of forum shopping as an "unethical and inefficient" act that "abus[es] the adversary system and squander[s] judicial resources."[3]

Secondly, the distinction between jurisdiction and arbitration clauses is critical, in that the former's designated forums are public. Civil law systems characterise jurisdiction clauses as concerning a matter of public policy for which there is only marginal scope for freedom of contract.[4] While common law courts do not go as far, the doctrine of ouster historically allowed a court to hold an arbitration clause as unenforceable if it purported to lessen or exclude a court's jurisdiction.[5] Even today, jurisdiction clauses may be regarded as a part of procedural or public law, since whether a court has jurisdiction is always a matter of public law lying beyond the parties' direct control.[6]

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2 *The Bremen v Zapata Off-Shore Co* 407 US 1 (1972) at 13–14 [*The Chaparral*].

3 "Notes: Forum Shopping Reconsidered" (1990) 103 Harv L Rev 1677 at 1677.

4 Mario Giuliano and Paul Lagarde "Report on the Convention on the law applicable to contractual obligations" [1980] OJ C282 at 10.

5 Giora Shapira and Ronen Lazarovitch "Exclusive Jurisdiction Clauses — A New Zealand Perspective on the Hague Convention on Choice of Court Agreements" (2008) 23 NZULR 215 at 215–216.

6 Adrian Briggs *Agreements on Jurisdiction and Choice of Law* (Oxford University Press, Oxford, 2008) at 10.

Finally, ancillary to the public nature of jurisdiction clauses, such clauses may generate social costs when substantive law is misapplied, so that the true plaintiff loses or the defendant is condemned.[7] Judicial reluctance to enforce forum clauses may be justified if one accepts that the state should have control over errors of adjudication and that the natural forum's theoretical advantage in adjudicative accuracy overcomes the parties' choice.[8]

At first glance, these concerns appear to justify a looser enforcement of jurisdiction clauses. A closer consideration of the nature of jurisdiction clauses suggests otherwise. While a detailed debate of the pros and cons of forum shopping is beyond the scope of this article, ex ante forum *selection* should be distinguished from ex post forum *shopping*. The offence of forum selection appears to be largely grounded in the "one proper forum" or "manipulable justice" myth: forum selection is offensive because justice should not be susceptible to strategy and manipulation.[9] In reality, there is often more than one legitimate option available. Legislators and courts have set increasingly liberal rules of jurisdiction. Such an approach indirectly authorises the potential for different outcomes and supports a party's selection of one forum over another.[10] Ex ante selection is not "cheating" by unethical ambush, but an agreed bargain between parties. Indeed, the more extensive the enforcement of jurisdiction clauses, the less scope there is for costly reverse shopping.

Moreover, while courts undoubtedly retain public power to decide jurisdiction, this should not overshadow the promissory bargain inherent in a jurisdiction clause. Jurisdiction clauses may not be binding on the court, but they are binding on the *parties* who have promised each other not to commence proceedings in a non-chosen court or object to the discretionary exercise of a chosen court's jurisdiction.[11] To ignore the parties' bargain would be to assist in breach of contract. This contractual perspective is supported by the modern irrelevance of the doctrine of ouster, which has been reduced to a "vestigial legal fiction" ever since it was recognised that the court's jurisdiction is not ousted when the court simply refrains from exercising jurisdiction in a particular way.[12] Interestingly, the New Zealand legislature appears to take a contractual perspective by allowing foreign money judgments made in breach of jurisdiction clauses to be set aside.[13] Hence, at least in a common law system such as New Zealand, jurisdiction clauses should be predominantly viewed through a contractual

7 Tan Yock Lin "Choice of Court Agreement: From a Viewpoint of Anglo-Commonwealth Law" in *Evolution of Party Autonomy in International Civil Disputes* (LexisNexis, Singapore, 2005) 41 at 42.

8 At 42.

9 Debra Lyn Bassett "The Forum Game" (2006) 84 NCL Rev 333 at 384–389.

10 At 384–389.

11 Daniel Tan and Nik Yeo "Breaking Promises to Litigate in a Particular Forum: Are Damages an Appropriate Remedy?" [2003] LMCLQ 435 at 437.

12 *The Chaparral*, above n 2, at 12.

13 Reciprocal Enforcement of Judgments Act 1934, s 6(4)(b).

lens, tempered by a judicial discretion to determine the exercise of the court's own jurisdiction.

With this in mind, the assertion that jurisdiction clauses result in social costs is questionable from a freedom of contract perspective. A fundamental principle underpinning civil and international law is *pacta sunt servanda* (agreements must be kept), which derives much of its economic and normative force from the credible assumption that "parties know best". In fact, since parties are better equipped than courts to choose the forum best suited for their contract, jurisdiction clauses reduce the costs of judicial errors and lead to wealth maximisation.[14] Accordingly, the law should only intrude on or override private agreements to the extent necessary to serve broader public interests.[15] Judicial reluctance to enforce jurisdiction clauses should be reserved for exceptional instances where the public interest calls for intervention.

The Case for Routine Enforcement

With the objections to routine enforcement of jurisdiction clauses largely defused, orthodox justifications for enforcing contractual clauses may apply equally to jurisdiction clauses. The doctrine of party autonomy supports using consent as a convenient and relatively precise test of jurisdiction.[16] An approach based on respecting personal autonomy and freedom of contract (and thus, the democratic values of individualism and equality) seems preferable to judicial manipulation in dealing with the problem of parallel litigation.[17]

Arguments of economic fairness and efficiency further support enforcing jurisdiction clauses. Transnational contracts are vulnerable to the uncertainty of disparate laws and jurisdictional overlap.[18] Jurisdiction clauses reduce the jurisdictional battle into a negotiated contractual form. The party who principally benefits would have often paid a premium for the certainty of litigating disputes in the selected forum *and* the forum's associated impact on his procedural and substantive rights.[19] This impact should not be underestimated. Jurisdiction clauses are more than just a choice of venue — they are the parties' choice of procedural law. The chosen court's lex fori governs procedural matters, such as the nature and scope of discovery, as well as the recovery of costs and availability

14 See Michael Whincop and Mary Keyes "Putting the 'Private' Back into Private International Law: Default Rules and the Proper Law of the Contract" (1997) 21 MULR 515 at 531–534 on the costs of *ex ante* contracting for choice of law.

15 Briggs, above n 6, at 12.

16 Arthur T von Mehren and Donald T Trautman "Jurisdiction to Adjudicate: A Suggested Analysis" (1966) 79 Harv L Rev 1121 at 1138.

17 Peter Nygh *Autonomy in International Contracts* (Oxford University Press, Oxford, 1999) at 2–3.

18 Friedrich K Juenger *Choice of Law and Multistate Justice* (Martinus Nijhoff Publishers, Netherlands, 1993) at 214.

19 Andrew Bell *Forum Shopping and Venue in Transnational Litigation* (Oxford University Press, Oxford, 2003) at 276.

of certain remedies.[20] This further affects litigation expenses, which are dependent upon these variables, and the parties' familiarity with the institution.[21] These factors alone are "often the decisive determinants in a case overriding considerations of fact and substantive law".[22]

Yet jurisdiction clauses are not constrained to procedural impact, for all procedural rules have the potential to affect substantive rights. Different jurisdictions apply different choice of law rules, resulting in different substantive rights.[23] Even courts with the same choice of law rules may take different approaches to characterisation, which again result in different substantive rights.[24] Foreign law may be applied with "local sensibilities",[25] and the forum may apply its mandatory law that would not have otherwise been applied in other forums. Most crucially, "[s]uit might well not be pursued, or might not be as successful, in a significantly less convenient forum."[26] A 13-year American study of three million federal cases provides empirical support for this claim. The study revealed that the plaintiff's rate of winning was nearly 60 per cent in the forum where the case was originally filed, but halved when the case was transferred to a different forum.[27] By stipulating venue, jurisdiction clauses potentially go to the substantive heart of litigation: whether the claim is won or pursued at all.

The implications of non-enforcement are therefore fourfold: non-enforcement encourages litigation about venue, resulting in greater uncertainty and increased transaction costs; disregards economic fairness and efficiency; potentially undermines the value of the contract; and may indirectly decide the suit in favour of the breaching party in a situation where damages for breach of the jurisdiction clause, if available at all, are often considered an inadequate remedy. Combined with the principle of party autonomy, the above analysis lends force to Brandon J's assertion that it is "essential that the court should give full weight to the prima facie desirability of holding the plaintiffs to their agreement".[28]

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20 At 24.

21 Arthur T von Mehren *Adjudicatory Authority in Private International Law: A Comparative Study* (Martinus Nijhoff Publishers, Netherlands, 2007) at 264.

22 Simon Pearl "Forum Shopping in the EEC" (1987) 15 IBL 391 at 393.

23 von Mehren, above n 21, at 264.

24 For example, characterisation of a time bar as procedural affects the plaintiff's substantive right to action.

25 Alex Wilson Albright "In Personam Jurisdiction: A Confused and Inappropriate Substitute for Forum Non Conveniens" (1992) 71 Tex L Rev 351 at 354, n 14.

26 *Ricoh Corp*, above n 1, at 39–40.

27 Kevin M Clermont and Theodore Eisenberg "Exorcising the Evil of Forum-Shopping" (1995) 80 Cornell L Rev 1507 at 1511–1512.

28 *Owners of Cargo Lately Laden on Board the Ship or Vessel Elefitheria v The Elefitheria (Owners)* [1970] P 94 at 103 [*The Elefitheria*].

III TYPES OF JURISDICTION CLAUSES

The Effect of Jurisdiction Clauses

This logically leads to the question: what, exactly, did the parties agree to? To answer this question, one must appreciate the effect of jurisdiction clauses on the composite nature of jurisdiction.

Jurisdiction clauses may have a prorogation or derogation effect or both. The former effect provides legal justification for the chosen court to hear the case; the latter provides reasons for not having the case decided in a non-chosen court.[29] Since all jurisdiction clauses purport to prorogate jurisdiction, the defining characteristic of an exclusive jurisdiction clause is its derogation effect.[30]

Consequently, a jurisdiction clause's impact on jurisdiction depends on its purported effect. A jurisdiction clause with prorogation effect seeks to establish the *existence* of jurisdiction by giving parties a right to commence proceedings in the nominated court.[31] Conversely, to affect a court's discretion in *exercising* jurisdiction, a jurisdiction clause must generally have a derogation effect. That is, the clause founds a contractual right to have proceedings heard in a certain court.[32] It is only by understanding the effect of jurisdiction clauses on the existence and exercise of jurisdiction that one can clearly delineate the parties' bargain.

Enforcing the Actual Bargain: A More Nuanced Approach

Unfortunately, courts give little explanation of the exact content of the jurisdiction agreement being enforced. Courts tend to categorise jurisdiction clauses under the broad labels of exclusive, non-exclusive and asymmetric (unilaterally exclusive) without giving much attention to determining their exact effect on the composite nature of jurisdiction. This is not helped by the misleading insinuations of the labels: that parties may submit exclusively or non-exclusively to the chosen court's jurisdiction, but such submission is to the *entire* composite nature of jurisdiction. A review of the prorogation and derogation effect of jurisdiction clauses, rather than under their ostensible label of non-exclusive or exclusive clauses, reveals the far more nuanced reality.

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29 Yeo Tiong Min "The Contractual Basis of the Enforcement of Exclusive and Non-Exclusive Choice of Court Agreements" (2005) 17 SAcLJ 306 at 310–312.

30 At 315.

31 Yeo Tiong Min "Party Autonomy in International Civil Litigation: Singapore Law" in *Evolution of Party Autonomy in International Civil Disputes* (LexisNexis, Singapore, 2005) 1 at 24. Note that since submission to jurisdiction by agreement is characterised as jurisdiction as of right, there can be no protest to the existence of jurisdiction under New Zealand law where established by a jurisdiction clause: see High Court Rules, r 5.49.

32 Yeo, above n 29, at 315.

1 Wide Derogation Effect

Three types of clauses fall under this category. The first is the traditional exclusive jurisdiction clause, which obliges parties to commence proceedings in the nominated court. Such clauses are easily and accurately identified.

The second type is an agreement to waive objection in any court to the exercise of jurisdiction by the chosen court.[33] This would typically be labelled a non-exclusive clause, since the submission to the existence of the chosen court's jurisdiction is non-exclusive. However, though it is not a breach to commence proceedings in another court, the agreement effectively operates as a traditional exclusive jurisdiction clause in its derogation effect by making any objection to exercise of the chosen court's jurisdiction a breach.[34] There is little guidance on whether such agreements must be express or implied. That said, English courts appear to be willing to apply narrower versions of this waiver automatically.[35]

The third type is an agreement of the chosen court as the "most appropriate" forum.[36] Again, this combines a non-exclusive submission to the existence of the chosen court's jurisdiction with an agreement that any objection that the exercise of the chosen court's jurisdiction is "most appropriate" is a breach.[37] No New Zealand court has gone so far as to automatically imply such an agreement in non-exclusive jurisdiction clauses. On the other hand, English courts tend to imply such an agreement in local non-exclusive jurisdiction clauses, though the terminology used is "a strong prima facie case that [the] jurisdiction is an appropriate one".[38] This inference effectively deems all English non-exclusive jurisdiction clauses governed by English law as having a similar or identical derogation effect as the traditional exclusive jurisdiction clause. A clear statement from the English Supreme Court is required to settle the uncertainty rife in this area and guide parties on how to escape such a presumption, if it does apply.

2 Qualified Derogation Effect

Three types of clauses also fall under this category. All three fall short of the absolute label of "exclusive", but have qualified derogation effects that deserve recognition. The first is an agreement to waive objection to the exercise of jurisdiction by the chosen court, except the waiver is only tied

33 At 341.

34 At 342.

35 Yeo, above n 31, at 27.

36 Yeo, above n 29, at 345.

37 At 345.

38 *S & W Berisford plc v New Hampshire Insurance Co* [1990] 2 QB 631 at 646. See also *Mercury Communications Ltd v Communication Telesystems International* [1992] 2 All ER (Comm) 33 (QB); and *Antec International Ltd v Biosafety USA Inc* [2006] EWHC 47 (Comm) for Gloster J's propositions on dealing with local non-exclusive jurisdiction clauses.

to the perspective of the chosen court, not any court.[39] English courts also appear to imply this narrow waiver into every English jurisdiction clause, a questionable approach which draws an unprincipled line between foreign and local courts.[40]

The second type is where there is a right to sue elsewhere that extinguishes upon election of the designated court.[41] This may be characterised as the "dormant" exclusive jurisdiction clause. The derogation effects of such clauses only come into force upon election of the chosen court.

Finally, clauses which reserve the right to sue elsewhere to only one party should be treated as exclusive jurisdiction clauses for the right-holder but as a non-exclusive jurisdiction clauses for the party lacking that right.[42] As mentioned above, courts widely recognise and enforce the unilaterally exclusive nature of asymmetric clauses.[43]

3 Prorogation Effect Only

The true polar opposite of traditional exclusive jurisdiction clauses falls into this category. Non-exclusive jurisdiction clauses only provide parties with a non-exclusive right to commence proceedings in the nominated court.[44] Thus, it is not a breach to protest the court's exercise of jurisdiction. Such clauses logically give rise to the inference that the chosen court is an appropriate forum.[45] Given that New Zealand courts determine the question of *forum conveniens* according to whether the non-nominated court is clearly a "more appropriate" forum, not whether it is an inappropriate forum, this inference provides no derogation effect. Nonetheless, a prorogation clause may have tactical significance in imposing the burden of showing strong factors in favour of trial elsewhere, even if it does not shift the legal or evidentiary burden.[46]

This brief overview of jurisdiction clauses reveals that the current labels are overly simplistic and risk fostering confusion. Without precisely defining the parties' bargain based on the clause's effect on jurisdiction, courts are likely to have problems in identifying the exact breach, or may apply the wrong tests in determining the exercise of jurisdiction. For instance, jurisdiction agreements with derogation effects may be identified as "non-exclusive", simply because they do not fit within the traditional exclusive clause category. Courts may then intuitively give greater weight

39 Yeo, above n 31, at 27. See also *British Aerospace plc v Dee Howard Co* [1993] 1 Lloyd's Rep 368 (QB).

40 At 27.

41 Briggs, above n 6, at 117.

42 See *Universal Specialties Ltd v Advanced Cardiovascular Systems Inc* HC Auckland CP162/95, 2 May 1996 at 7–8.

43 See the cases cited in Lin, above n 7, at 68–69.

44 Yeo, above n 29, at 336.

45 At 345.

46 At 350.

to these deceptively-labelled non-exclusive clauses, which, in turn, may lead to an unwarranted "levelling up" for true non-exclusive jurisdiction clauses.[47] The lack of clarity in defining the parties' contractual rights may explain the inconsistency in judicial treatment of jurisdiction clauses. This is distressing, given this is an area in which certainty is particularly valued. If the parties' bargain is to be actually enforced, extremist labelling must give way to a more rights-sensitive approach.

IV THE ACTUAL VALUE OF JURISDICTION CLAUSES

The Two Apparent Tests

With the effect of the jurisdiction clause dissected and new labels proposed, attention now turns to the discretionary tests that courts apply in deciding whether to exercise jurisdiction. In theory, at least, the *Spiliada* test applies to non-exclusive clauses whereas the *Eleftheria* test applies to exclusive jurisdiction clauses.

The *Spiliada* may be seen as the culmination of the *forum non conveniens* doctrine. The basic principle underpinning the doctrine is a search for a more appropriate forum, where the case may be tried more suitably for the interests of all parties and the ends of justice.[48] Since true non-exclusive clauses have no derogation effect, the relevant test for such clauses is forum non conveniens: the clause is just one of a number of factors in the weighing exercise.[49] *Spiliada* provides a two-stage test: first, the defendant bears the onus of proving that there is another available forum that is clearly more appropriate; secondly, if the defendant succeeds, the plaintiff must prove that it will not obtain justice in that forum owing to exceptional factors outside the substantive content of the judicial system.[50] Although New Zealand has unequivocally adopted *Spiliada*,[51] the weight given to the legion of factors considered under the first limb is "guided by no more specific [a] touchstone than the ends of justice".[52]

As for exclusive jurisdiction clauses, *The Eleftheria* has become the traditional starting point in considering whether to stay proceedings. Brandon Justice provides a range of factors to consider that may give rise to strong cause or reason for overriding the prima facie position of enforcing the jurisdiction clause. The onus of proving strong cause rests

47 See *Sabah Shipyard (Pakistan) Ltd v Islamic Republic of Pakistan* [2002] EWCA Civ 1643, [2004] 1 CLC 149 in which a jurisdiction clause with a wide or at least qualified derogation effect (the parties had expressly waived any objection to England as the convenient forum) was ostensibly classified as a non-exclusive jurisdiction clause, but had its inherent derogation effect nevertheless recognised by the Court when the Court granted an anti-suit injunction without proof of breach of legal or equitable rights.

48 *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 (HL) at 476.

49 Yeo, above n 29, at 324.

50 *Spiliada*, above n 48, at 474–478.

51 *Club Mediterranee NZ v Wendell* [1989] 1 NZLR 216 (CA).

52 *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 239.

on the breaching party.[53] New Zealand, along with most common law countries, has adopted the principles of *The Eleftheria*.[54] Therefore, while the analyses under both *Spiliada* and *The Eleftheria* largely encompass the same factors, different policy considerations drive each approach. *Spiliada* represents a neutral inquiry, where the applicant must merely demonstrate a more appropriate forum. In contrast, *The Eleftheria* is predisposed to holding parties to their bargain, resulting in a heavier burden of proof.

The Tests in Practice

Although *Spiliada* and *The Eleftheria* represent two distinct tests to be applied to non-exclusive and exclusive clauses respectively, in practice, courts have applied a contradictory range of tests to each clause.

1 Non-exclusive Jurisdiction Clauses

A possible test is the one enunciated above: a *Spiliada* analysis where the jurisdiction clause is merely of a number of factors for a court in considering whether to exercise jurisdiction. New Zealand courts appear to apply this test by giving little weight to non-exclusive jurisdiction clauses, though there are too few cases to distil a reliable trend.[55]

English courts, however, appear to protect local non-exclusive jurisdiction clauses as tenaciously as foreign exclusive jurisdiction clauses. Considering that New Zealand draws much of its conflict of law theory from English authorities, it is worth examining these approaches. Hobhouse J treated local non-exclusive clauses as pointing to a strong prima facie case that the nominated jurisdiction is an appropriate one.[56] It has further been said that foreseeable factors (such as the parties' residence and procedural advantages of the chosen jurisdiction) should be disregarded,[57] and that there is no difference between a local exclusive and non-exclusive jurisdiction clause: both require strong reasons for a court to override the parties' agreement.[58] It is unclear whether such authorities apply equally to foreign non-exclusive jurisdiction clauses. By parity of reasoning, they should.

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53 *The Eleftheria*, above n 28, at 99–100.

54 See *Carberry Exports (NZ) Ltd v Krazzy Price Discount Ltd* (1985) 1 PRNZ 279 (HC); and *Universal Specialties*, above n 42.

55 From scanning reports of New Zealand cases since 1990, there have only been three cases involving a non-exclusive jurisdiction clause. See also David Goddard and Helen McQueen "Private International Law in New Zealand" (paper presented to New Zealand Law Society Seminar, December 2001); and *Property & Asset Management Ltd v Digi-Tech (Australia) Ltd* (2000) 15 PRNZ 197 (HC).

56 *S & W Berisford*, above n 38, at 638.

57 *JP Morgan Securities Asia Private Ltd v Malaysian Newsprint Industries Sdn Bhd* [2001] 2 Lloyd's Rep 41 (QB) at 47.

58 See *Mercury Communications*, above n 38.

2 Exclusive Jurisdiction Clauses

A similar lack of consistency is apparent in enforcing exclusive jurisdiction clauses. Logically, the party seeking to breach should bear a heavier burden under an exclusive jurisdiction clause. But merely noting that a higher standard should apply does not assist the court in how to exercise discretion. New Zealand courts have been known to simply apply the principles of forum non conveniens, with the exclusive jurisdiction clause as either an important factor,[59] or even apparently as just one of a number of factors.[60]

Alternatively, the traditional *Eleftheria* test may be applied, where the applicant must show "strong cause" beyond matters of mere convenience.[61] *Kidd v van Heeren* illustrates a robust application of the "strong cause" test, where even though a number of factors pointed to New Zealand as the more appropriate forum, they were not sufficient to displace the strong presumption in favour of the foreign exclusive jurisdiction clause.[62] Foreseeable factors are sometimes disregarded in this exercise.[63] In *British Aerospace plc v Dee Howard & Co* (*British Aerospace*), the court considered that such factors may only be disregarded where parties freely negotiated the jurisdiction agreement.[64]

It should be noted that Hobhouse J has suggested in obiter that the court has no discretion to stay on grounds of *forum non conveniens* where there is both a local exclusive jurisdiction clause and jurisdiction as of right.[65] New Zealand courts have not expressly endorsed such a rule.

The Two Proposed Tests

The above smorgasbord of available tests undermines the value of jurisdiction clauses by reducing enforcement to a lottery game. Courts appear to have assimilated the two forms of discretion. This assimilation may largely be explained by three factors.

First, the criteria listed in *The Eleftheria* encompass the same factors as under the modern *forum non conveniens*. There is, therefore, the temptation to amalgamate both the tests and respective judicial attitudes, resulting in too much weight being given to non-exclusive clauses and

59 See *Bramwell v The Pacific Lumber Co Ltd* (1986) 1 PRNZ 307 (HC).

60 See *BR Films Partnership G-38 v Spin Interactive Ltd* HC Auckland CIV-2005-404-2295, 25 July 2005 where a forum non conveniens test was applied, with most attention focused on basic foreseeable factors of convenience and the foreign exclusive jurisdiction clause only very briefly noted as "provid[ing] support" towards the foreign forum. The foreseeable factors of convenience were found to outweigh the foreign EJC and foreign governing law of the contract.

61 See *Universal Specialties*, above n 42.

62 *Kidd v van Heeren* [2006] 1 NZLR 393 (HC).

63 *Perpetual Trustee Company Ltd v Downey* (2011) 21 PRNZ 28 (HC) at [35]; but see *Universal Specialties*, above n 42, and *Digi-Tech*, above n 55, where foreseeable factors were considered.

64 *British Aerospace*, above n 39, at 376.

65 *S & W Berisford*, above n 38, at 638.

too little weight to exclusive clauses. Secondly, English courts appear to possess strong homing tendencies, which are expressed by giving undue weight to local non-exclusive jurisdiction clauses. Such tendencies are unattractive in the conflict of laws quest for uniform decisions. Finally, the principles that guide a court in exercising jurisdiction are grounded on the distinction between exclusive and non-exclusive clauses. This distinction is misguided. Applying tests based on the ambiguous labels of "exclusive" or "non-exclusive" encourages confused application of the tests when courts intuitively try to give effect to derogation effects not explicitly recognised under the "non-exclusive" label. Therefore, rather than using unhelpful labels, the following discussion proposes tests based on the jurisdiction clause's effect on jurisdiction.

1 Jurisdiction Clauses with Only Prorogation Effect

True non-exclusive jurisdiction clauses should be considered as just another factor in a *Spiliada* analysis, with an addendum: the parties' residences become irrelevant.[66] This approach stands closer to New Zealand's current approach to non-exclusive jurisdiction clauses than the dominant English approach. It recognises the logical inference that parties have agreed that the nominated forum is appropriate — but does not go so far as to assert that the parties' agreement gives a strong prima facie standard of appropriateness akin to a wide derogation effect. Perhaps the English authorities were seeking to indirectly introduce a presumption of exclusivity. If so, this approach risks conflating the construction of a clause with the application of the appropriate test involving a true non-exclusive clause. Moreover, the English approach conflates the *existence* of jurisdiction with its *exercise*. A party is not precluded from later arguing against exercise of jurisdiction where he or she has merely designated a forum as "appropriate", rather than "most appropriate".[67] Instead, a party's residence should no longer be an arguable factor of inconvenience in all but the most exceptional of cases. Thus, natural forum principles should still apply to true non-exclusive clauses, with the only modification being the irrelevance of parties' residences.

Note that a more accurate recognition of the effect of true non-exclusive clauses would have been to reduce the weight given to all factors of convenience, rather than focusing on the parties' residence as an irrelevant factor. But without an objective standard of the weight given to factors of convenience in the first place, this risks degenerating the discretionary exercise into a prima facie position of enforcing the clause by ignoring entirely factors of convenience or foreseeable factors or both. A bright-line approach is proposed here to avoid such a risk without completely ignoring the parties' inferred agreement of the nominated forum as appropriate.

66 For similar argument see Yeo, above n 31, at 36–37.

67 At 36–37.

2 *Jurisdiction Clauses with Active Derogation Effect*

The Eleftheria presents itself as the logical starting point for determining the ideal test for jurisdiction clauses with active derogation effect ("derogation clauses").

(a) Reviewing *The Eleftheria* Factors

Each of Brandon J's much-cited factors will be considered in turn.[68] The first three may be considered together as factors of convenience and foreseeable factors:

(1) the relative convenience and expense of a trial, based on where evidence is located;

(2) the applicability of foreign law and the extent to which it differs from the forum's law; and

(3) the existence and degree of connection a party has to a particular country.

The principle of bargain enforcement strongly supports disregarding such factors, as contracting parties are taken to know and accept these considerations.[69] The court would be "indulging in needless second guessing" if it were to consider these factors afresh.[70] Indeed, commercial parties would have also considered other important practical factors that the forum, for reasons of comity, may not have — for instance, the quality of justice that the forum could dispense and the relative experience of the judiciary.[71]

Conversely, it has been argued that there is a public interest in regulating justice to ensure that courts are not overburdened with long and complex matters or forced to "import" foreign witnesses.[72] Nevertheless, it is inappropriate for one forum to conclude this for another.[73] It is also unconvincing that the court should disregard foreseeable factors where the choice of forum was made for reasons of mutual convenience, but consider such factors where the choice of forum was only a side-effect from choosing the forum's law.[74] Courts are not generally concerned with the reasons why parties enter contracts, only that they did. Furthermore, even

68 *The Eleftheria*, above n 28, at 99–100.

69 Yeo, above n 29, at 326. Note that the arguments in this section assume an arms-length transaction between parties capable of some bargaining over terms.

70 Toh Kian Sing "Stay of Actions based on Exclusive Jurisdiction Clauses under English and Singapore Law (Part II)" [1991] SJLS 410 at 428.

71 At 422.

72 Edwin Peel "Exclusive jurisdiction agreements: purity and pragmatism in the conflict of laws" [1998] LMCLQ 182 at 223.

73 Bell, above n 19, at 323–324.

74 As argued by Yeo, above n 31, at 38.

if the neutral forum was only chosen to minimise the cost of judicial errors in applying the relevant neutral law, there is no reason to trivialise such a bargain by re-considering factors the parties considered when they made that bargain. As for the assertion that the parties could not have conceded the forum's disadvantages where the forum was not known in advance,[75] this ignores the fact that the uncertainty would often have been accounted for in the contract price in the form of a discount to the disadvantaged party and, in any case, that the parties knowingly assented to this greater risk in an exclusive jurisdiction agreement.

It is worth considering *British Aerospace*'s requirement that foreseeable factors may only be disregarded if the clause was freely negotiated. Acknowledgment of the significance of a freely negotiated agreement is scattered and inconsistent. Since every legally binding agreement must be freely negotiated in the legal sense, it has been suggested that this requirement implies a judicial power to enquire whether subjective consent existed in reality.[76] If subjective consent does not exist, a party that signed an agreement it did not read may be allowed to raise foreseeable factors in objecting to the exercise of jurisdiction, even if it could have read the agreement.[77] Such an interpretation surely goes too far in condoning the conduct of idle parties. A better view is that foreseeable factors may only be relevant in exceptional circumstances and in limited classes of contracts where bargaining power is particularly unequal, such as consumer contracts. Thus, while there is no absolute bar on the significance of foreseeable factors and factors of convenience,[78] such factors will not justify a stay in most cases.

Brandon J went on to propose factor (d) as a factor supporting stay: when the defendant does not have a genuine desire for trial in the foreign country, but is only seeking procedural advantages.[79] This factor has been accepted by New Zealand courts and is supposedly supported by the rationale that a court must protect its processes from being abused by parties.[80] Three points may be made here.

First, "genuine desire for trial" is not necessarily the natural opposite of the desire to "[seek] procedural advantages". The defendant may genuinely desire trial in a foreign country *because* of the procedural advantages offered by its courts. Factor (d) is better understood as two separate factors. A "genuine desire for trial" should relate to whether the litigation in the contractual forum amounts to frivolous litigation. This consideration operates outside the contractual framework and should not be mixed within the balancing process in determining whether to give effect to the jurisdiction clause. Consequently, it is only necessary to

75 See *The Eastern Trust* [1994] 2 SLR 526 (HC).

76 Yeo, above n 31, at 35.

77 At 35.

78 *Mercury Communications*, above n 38, at 41.

79 *The Eleftheria*, above n 28, at 100.

80 See *Kidd*, above n 62, at [57].

consider whether the defendant's desire to seek procedural advantages should be a valid factor in considering a stay.

This leads to the second point: factor (d) essentially stems from a hostile attitude towards forum shopping. Yet as discussed earlier, the offence underlying forum shopping is based on the illusory impropriety of law as "manipulable justice". Moreover, if a desire to exploit procedural advantages is illegitimate, then any jurisdiction clause made to gain procedural advantages should logically be invalid from the outset.[81] Since parties consider the forum's procedural advantages in negotiating jurisdiction clauses, this would effectively invalidate almost all jurisdiction clauses — which goes against the reality of widespread recognition of the jurisdiction clause's validity.

Finally, while a court may protect its processes from being abused, any relevant abuse must be an abuse of the process of the forum, not the foreign court.[82] Based on these arguments, the court should disregard the defendant's reason for litigating in the contractual forum when deciding to grant a stay.

This leaves factor (e), which is split into three parts. Sub-factor (e)(i) considers whether the plaintiff would be prejudiced by being deprived of security for its claim in the foreign court. Bell has observed that s 26 of the Civil Jurisdiction and Judgments Act 1982 (UK) has made sub-factor (e)(i) irrelevant as far as England is concerned, since s 26 allows for the retention and application of any security obtained in England to the decision of the foreign agreed forum.[83] New Zealand has no direct equivalent to s 26. Nevertheless, essentially the same result may be achieved from the inter-operation of arts 8 and 9 of sch 1 to the Arbitration Act 1996. Furthermore, *The Golden Trader* and *The Rena K* are accepted as good law in New Zealand.[84] These cases stand for the propositions that a court may require, as a condition of granting stay, that alternative security should be available to secure an arbitrait award,[85] and that where a plaintiff shows that the defendant is unlikely to satisfy an arbitrait award in his or her favour, the security available in the action in rem may be ordered to stand.[86] There is no reason to limit these propositions to arbitration cases. Finally, sub-factors (e)(ii) and (e)(iii), which consider whether the plaintiff is prejudiced by being faced with a foreign time bar and whether he or she will be unlikely to get a fair trial for political, racial, religious or other reasons, should only be applicable if these reasons were unforeseeable at time of contract.[87] The same arguments advanced against foreseeable factors are relevant here.

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81 Bell, above n 19, at 325.

82 *Kidd*, above n 62, at [67].

83 Bell, above n 19, at 326.

84 *Marine Expeditions Inc v The ship Akademik Shokalskiy* [1995] 2 NZLR 743 (HC) at 749–750.

85 *The Golden Trader* [1975] QB 348.

86 *The Rena K* [1979] QB 377.

87 Bell, above n 19, at 326.

(b) The Modified *Eleftheria*

Given the above analysis, one may understand the new "modified *Eleftheria*" in the following way. First, there is a strong prima facie position that the chosen forum is the most appropriate forum. Secondly, to override this position, the party seeking breach must prove "strong cause" based on either unforeseeable factors or factors outside its control. As such, applicants will very rarely be to able rebut the prima facie case for stay and successful arguments will generally fall under sub-factor (e)(iii) of the original *Eleftheria* test.

Nevertheless, a third factor may amount to "strong cause" to override the jurisdiction clause. The interest in avoiding a multiplicity of proceedings and inconsistent decisions may justify denying a stay.[88] The court's interest to avoiding prejudice to third-party rights not bound by the derogation clause may sway the court to allow breach so that all proceedings involving different parties may be heard in one forum. Courts have sought to balance the allowed breach of a jurisdiction clause by imposing conditions, such as immunising the non-breaching party from unfavourable legislation in the non-contracted forum that it would not have encountered in the contracted forum and receiving the breaching party's acknowledgement that it may be sued for damages for the breach.[89] Nevertheless, such an approach still undermines derogation clauses, which are made for more than just the purpose of avoiding unfavourable legislation. Accordingly, while the public interest argument is legitimate, it should only be allowed to prevail in exceptional cases.

It is true that the "modified *Eleftheria*" will constrain judicial discretion dramatically. But this should be seen as a desirable restriction. A discretionary system grants courts the flexibility to arrive at a solution that best meets parties' interests. Unfortunately, it also masks judicial subjectivity in attaching inconsistent weights to the same factors and risks reducing the test to a *Spiliada*-type analysis that gives too little weight to the derogation clause.[90] As long as the judge purports to apply *The Eleftheria,* an appellate court will be reluctant to interfere with the exercise of discretion.[91] A strict test is necessary to consistently give effect to the parties' bargain. Support is found in the recent case of *Perpetual Trustee Company Ltd v Downey* (*Downey*), where the New Zealand High Court approved of the notion,[92] put forward by Allsop J, that:[93]

> What really are of importance in weighing against the operation of the exclusive jurisdiction clause are: (a) the inconvenience, if any,

88 See *Donohue v Armco Inc* [2001] UKHL 64, [2002] 1 All ER 749.

89 See *Donohue*, above n 88.

90 Sing, above n 70, at 411–412.

91 At 412.

92 *Downey*, above n 63, at [34].

93 *Incitec Ltd v Alkimos Shipping Corp* [2004] FCA 698, (2004) 138 FCR 496 at [49].

> whether financial or other, caused to third parties; (b) the effect, if any, upon due administration of justice; and (c) any other appropriate public policy consideration ... .

The Court also observed that "[t]he party invoking the exclusive jurisdiction clause does not have to justify its choice [of forum]" and held that foreseeable factors at time of contracting do not count in favour of a stay.[94] The Court's endorsement of the proposed narrow test is striking. It is too early to tell whether this test will settle the troubled waters of derogation clause enforcement in New Zealand. Nevertheless, one may take heart from this development, though it is noted that soon after *Downey*, a *Spiliada*-type analysis was undertaken in a case involving an exclusive jurisdiction clause.[95]

V RETHINKING JURISDICTION CLAUSES: A PROGRESSIVE APPROACH

Thus far, it is clear that the present treatment of jurisdiction clauses suffers from regrettable inconsistency. This judicial treatment undermine commercial certainty, tempt shrewd defendants to escape unfavourable bargains and leave the integrity of the parties' contractual obligations to the vagaries of the forum.[96] Attention now turns to recent attempts at reform and the potential for revitalising the value of jurisdiction clauses in New Zealand.

The Trans-Tasman Treaty

In 2010, the New Zealand and Australian governments each passed a Trans-Tasman Proceeding Act 2010 ("TTPA" and "Aust TTPA" respectively) to implement the Agreement on the Trans-Tasman Court Proceedings and Regulatory Enforcement (Trans-Tasman Treaty) — the latter being a bilateral treaty aimed at harmonising the resolution of civil disputes between both countries.[97] While the dates of commencement for both Acts are yet to be set, the scheme will create a coherent civil jurisdiction and judgments regime, and endow Australian and New Zealand courts with jurisdiction as of right over every individual and corporation in the market area. This article focuses on the exercise of jurisdiction in the context of a jurisdiction clause in examining the Acts' impact on New Zealand law.

Section 24(2) of the TTPA confirms that non-exclusive jurisdiction

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94 At [33] and [35].

95 See *Seed Enhancements Ltd v Agrisource 2000 Ltd* HC Auckland CIV-2010-404-4243, 18 November 2011.

96 Note that other escape routes that fall outside the scope of this article include escape through mandatory rules, the public policy exception, single forum cases and at the enforcement stage.

97 Trans-Tasman Proceedings Act 2010 [TTPA]; Trans-Tasman Proceedings Act 2010 (Cth) [Aust TTPA]; and Agreement between The Government of New Zealand and The Government of Australia on Trans-Tasman Court Proceedings and Regulatory Enforcement (signed 24 July 2008) [Treaty].

clauses are just another factor in the *forum non conveniens* inquiry. However, contrary to the approach advocated earlier in this article, s 24(2) retains the parties' residences as a relevant factor. It is submitted that the parties' residences be given minimal weight in the discretionary exercise for reasons already outlined.

As for exclusive jurisdiction clauses, both Acts were drafted with compliance with the Hague Convention on Choice of Court Agreements (HCCC) in mind.[98] Thus, it is unsurprising that s 25 of the TTPA, which deals with exclusive jurisdiction clauses, echoes the wording of the HCCC in strictly enforcing exclusive jurisdiction clauses between New Zealand and Australia. Like the HCCC, the TTPA overhauls the court's role in the decision to enforce a jurisdiction clause so that a New Zealand court must: (a) stay proceedings where an exclusive jurisdiction clause designates an Australian court as the chosen court and;[99] (b) not stay proceedings where the clause designates a New Zealand court as the chosen court.[100] In short, the Acts remove the possibility of judicial intervention through a *forum non conveniens* inquiry where an exclusive jurisdiction clause exists. This restores much-needed certainty to the enforcement of such clauses in trans-Tasman proceedings. Considering that since 1990, New Zealand courts have overruled foreign exclusive jurisdiction clauses to take jurisdiction itself in 40 per cent of reported cases,[101] the TTPA will have substantial — and welcome — impact on New Zealand law on this area.

Yet the extent of this reform depends on the breadth of exceptions to rule of strict enforcement under s 25(1). Again, the spectre of the HCCC is apparent in the almost identically-worded exceptions provided in the Acts. Regarding the requirement for mandatory stay, the exceptions provided in the TTPA are clearly designed to activate only in truly exceptional circumstances. These circumstances include where the jurisdiction is null and void under Australian law, which is highly unlikely to differ from New Zealand law; where the parties lack capacity under New Zealand law, which is again highly unlikely to differ from Australian law; where the Australian court has decided not to determine the relevant matter(s), which is justified by the interest to ensure access to justice; and where the doctrine of frustration is likely to operate anyway.[102] Only the "manifest injustice" or public policy exception in s 25(2)(d) potentially opens the door to exercise judicial discretion. Courts should be guided by the Explanatory Report to the HCCC, which observes that "[t]he standard is intended to be high: the provision does not permit a court to disregard a choice of court

98 *Trans-Tasman Court Proceedings and Regulatory Enforcement: A Report by the Trans-Tasman Working Group* (Ministry of Justice, December 2006) at 17 [*Working Group Report*].

99 TTPA, above n 97, s 25(1)(a). See equivalent provisions in Aust TTPA, above n 97, s 20(1)(a); and Hague Convention on Choice of Court Agreements (opened for signature 30 June 2005, not yet in force), art 6 [HCCC].

100 TTPA, above n 97, s 25(1)(b); Aust TPPA, above n 97, s 20(1)(b); and HCCC, above n 99, art 5.

101 From scanning reports of New Zealand cases since 1990, six out of 15 foreign exclusive jurisdiction clauses were not enforced.

102 TTPA, above n 97, s 25(2); see also Aust TTPA, above n 97, s 20(2).

agreement simply because it would not be binding under domestic law."[103] Given that New Zealand and Australia "share a common law heritage and very similar justice systems" and the scheme is intended to reflect the "confidence ... in each other's judicial and regulatory institutions,"[104] one expects s 25(2)(d) to be very rarely invoked. Hence, it is clear that the exceptions do not introduce anything startlingly new to New Zealand and should leave much of the reform in s 25(1) unscathed.

The Hague Convention on Choice of Court Agreements

The Trans-Tasman Treaty is to be applauded for insisting on stricter enforcement of jurisdiction clauses than under common law, as well as safeguarding certainty at the enforcement stage by allowing final non-money judgments to be enforced between New Zealand and Australia.[105] Its reforms restore a valuable cost and risk-allocating clause to the disposal of businesses and individuals. But why should the Treaty's benefits be limited to trans-Tasman proceedings? The interest in reducing barriers to trade and upholding contractual commitments surely extends equally to other international transactions. Moreover, further reform is desirable. This may include introducing a presumption of exclusivity to encourage an efficient and more accurate construction of the parties' bargain, clarifying the proper governing law for determining the existence and validity of a clause, and generally redirecting judicial attention from unhelpful labelling to the precise effects of a jurisdiction clause. To this end, it is appropriate to consider the most significant international instrument of reform in the area of jurisdiction clauses: the HCCC.

The HCCC was negotiated and concluded in the framework of the Hague Conference on Private International Law, an intergovernmental organisation that aims to unify private international law. New Zealand, along with its main trading partners, is a member of the Hague Conference and was involved in negotiations of the Convention. The HCCC seeks to reinforce exclusive jurisdiction clauses, and ensure mutual recognition and enforcement of such clauses between contracting states. While, Mexico is the only state to have acceded to the HCCC so far, the United States and European Union signed the Convention in 2009 and other states such as Australia, Canada, Singapore and Hong Kong are considering ratification.[106] As for New Zealand, the official status remains "considering acceding to

103 Trevor Hartley and Masato Dogauchi "Explanatory Report on the Convention of 30 June 2005 on Choice of Court Agreements" (2007) Hague Conference on Private International Law <www.hcch.net> at [152].

104 *Working Group Report*, above n 98, at 6.

105 Treaty, above n 97, art 3(4).

106 See Richard Garnett "The Hague Choice of Court Convention: Magnum Opus or Much Ado About Nothing?" (2009) 5 J Priv Int L 161 at 166; and Rosehana Amin "International Jurisdiction Agreements and the Recognition and Enforcement of Judgments in Australian Litigation: Is There a Need for the Hague Convention on Choice of Court Agreements?" [2010] Aust ILJ 113 at 113–114.

the Convention."[107] A brief overview of the HCCC will underscore why New Zealand should update its consideration into accession soon.

1 Key Provisions

In the context of exclusive jurisdiction clauses, the Trans-Tasman Proceeding Acts excluded only consumer and employment contracts from their scope.[108] Regrettably, it was difficult to achieve a similar level of consensus in the international context. Although the HCCC covers cases concluded in civil or commercial matters, at least 18 named areas of law are excluded.[109] Moreover, the HCCC only covers cases which are international and involve an exclusive jurisdiction agreement.[110] Attention now turns to those arts that make up the essence of the Convention.

(a) Article 3: Exclusive Jurisdiction Agreements

Article 3 introduces a presumption of exclusivity in determining whether a jurisdiction clause is exclusive or non-exclusive. The article deems an agreement to be an exclusive jurisdiction agreement if it designates the courts of one contracting state, or one or more specific courts of one contracting state, for the purpose of deciding disputes. This reform should be most welcome in New Zealand. Despite the clear influence of the HCCC, the TTPA did not adopt a presumption of exclusivity, but continued the common law approach of construing the clause according to its wording and evident intention.[111] Given that the list and weighting of factors considered in the subjective construction process is notoriously amorphous, it is no wonder that the outcomes of such judicial construction remain so undesirably unpredictable.

A presumption of exclusivity will cure much of this uncertainty. Coasean bargaining theorem tells us that efficient default rules are those rules which implement the agreements that parties would have made in the absence of such default rules. A presumption of exclusivity is most likely to replicate the parties' bargain, since there are more types of jurisdiction clauses with derogation effects than with prorogation effects only. Since 1990, nearly 90 per cent of reported cases in New Zealand involving jurisdiction clauses were exclusive jurisdiction clauses.[112] Even if it is wrong, a costly default rule is better than no default rule if the cost of judicial error in construing the bargain is higher than the cost of

107 New Zealand Ministry of Foreign Affairs and Trade "International Treaties List as at July 2012: Private International Law" (July 2012) Treaties and International Law <www.mfat.govt.nz> at [63].

108 TTPA, above n 97, s 25(4); and Aust TTPA, above n 98, s 20(3).

109 HCCC, above n 99, art 1.

110 Art 1.

111 TTPA, above n 97, s 25(4).

112 From a review of New Zealand reports since 1990, 15 out of 17 cases involving a jurisdiction clause concerned an exclusive jurisdiction clause.

escaping the penalty default. It is likely that judicial error will generally be higher, given that parties would know their preferences better than a third party. The uncertainty from judicial construction is also a cost in itself. If the cost of the presumption is higher than the cost of negotiation and drafting to escape the presumption, parties will draft themselves out of the presumption. But in doing so, the parties will be forced to consider nuances of the less-than-absolute derogation or prorogation if they wish to draft anything more than either extreme. In effect, a presumption encourages more careful and precise drafting, which shifts the public cost of courts undergoing the difficult task of discerning parties' intentions to the parties themselves.

One also notes that the TTPA's failure to adopt the presumption was not owing to any strenuous objections, but simply because it was decided that if there was to be a move away from the common law position, it should encompass all disputes and not just trans-Tasman proceedings.[113] Adopting the HCCC addresses this concern. Nevertheless, the HCCC's narrow definition of an exclusive jurisdiction clause is not without criticism: it precludes jurisdiction clauses that designate the courts of two or more states, as well as asymmetric agreements, from benefiting under the Convention's enforcement scheme. This is unfortunate, for the excluded agreements are common in international contracts and there is no reason to treat them less favourably than the defined exclusive jurisdiction clause.[114]

(b) Articles 5 and 6: Obligations of the Chosen Court and Non-chosen Court Respectively

Articles 5 and 6 may be seen as the international equivalents of s 25(1) of the TTPA. Both articles work together to require stricter enforcement of jurisdiction clauses than under the common law and contain the same exceptions as under the TTPA. Article 5 imposes a positive duty on the chosen court to exercise jurisdiction, unless the agreement is null and void under the law of that state; while Article 6 provides symmetry in obliging the non-chosen court to suspend or dismiss proceedings, unless one of the exceptions already reviewed under the TTPA arises.

Another notable difference from the TTPA may be observed here. The HCCC provides a choice of law rule to settle a controversial question: which law should govern the validity of an agreement? New Zealand's current champion to answer this question appears to be the lex fori, if only by unexplained default.[115] Yet while the lex fori is attractive in it's

113 Reid Mortensen "A Trans-Tasman Judicial Area: Civil Jurisdiction and Judgments in the Single Economic Market" (2010) 16 Canta LR 61 at 66.

114 Note that a contracting state may provide for the recognition of clauses designating multiple forums by making a declaration under art 22 of the HCCC.

115 See *MH Publications Ltd v Komori (UK) Ltd* HC Auckland CIV-2007-404-6520, 17 September 2008 where, despite the proper law of the contract being English law, the Court referred to New Zealand law to decide whether the jurisdiction clause was incorporated.

simplicity, it endorses "judicial chauvinism" and allows costly reverse forum shopping.[116] Other options for the position of governing law are not without their faults: the putative proper law (which looks to the law of the contract) is expedient and best respects parties' bargains, but suffers from the problem of circularity and bias towards the party alleging the clause's existence; and the combined solution of utilising both the lex fori and putative proper law risks retaining the problems of both in its attempt to provide a "neutral" law.[117]

Indeed, logical and principled solutions are hard to find in deciding the question of the validity. Perhaps one may instead find support in an approach which is "widely sanctioned 'due to the lack of a better [solution]'".[118] Under the HCCC, a narrow version of the putative law approach wins out through arts 5(1) and 6(a), which provide that the law of the chosen court governs whether the jurisdiction clause is null and void. This choice of law rule is supported by the World Intellectual Property Organisation Arbitration Rules, which expressly adopts this rule,[119] as well as the Rome II Regulation and the US Restatement (Second) of Conflict of Laws, which both recognise that jurisdiction clauses can be powerful indications that parties intended the chosen court's law to govern disputes.[120] In fact, courts often assume that "parties make implicit choices of law by designating a particular physical location for an international arbitration" — an assumption more questionable than it would be in this context, since "the parties' choice of an arbitral location is likely to reflect other practical considerations, such as the convenience of the arbitrators".[121] It is submitted that the Convention's choice of law rule is justified by the attractive possibility of international agreement on this issue and the significant advantage of injecting certainty in an area where certainty is at a premium — unlike the lex fori approach. This, then, leads to a further question: should the HCC's choice of law rule extend to determining the *existence* of a jurisdiction clause?

Brand and Herrup assert that the meeting of minds is a separate and distinct inquiry from whether an agreement is null and void to be ruled

116 Adeline Chong "Choice of Law for Void Contracts and their Restitutionary Aftermath: The Putative Governing Law of the Contract" in Paula Giliker (ed) *Re-examining Contract and Unjust Enrichment: Anglo-Canadian Perspectives* (Martinus Nijhoff Publishers, Netherlands, 2007) 155 at 165.

117 For suggestions of a combined solution, see Adrian Briggs "The formation of international contracts" [1990] LMCLQ 192 at 200; and Chong, above n 120. The gist of a possible combined solution is as follows: (1) the lexi fori determines whether parties have reached agreement; (2) if so, the lexi fori identifies the putative proper law; (3) the putative proper law determines if the clause exists.

118 Jason Webb Yackee "Choice of Law Considerations in the Validity and Enforcement of International Forum Selection Agreements: Whose Law Applies?" (2004) 9 UCLA J Intl L & For Aff 43 at 95.

119 World Intellectual Property Organisation "WIPO Arbitration Rules" <www.wipo.int>, art 59(b).

120 Regulation 864/2007 on the law applicable to non-contractual obligations [2007] OJ L199/40, however note that Rome II supports the law of the chosen court as an implied clause only in its Recitals, not in its articles; and American Law Institute *Restatement of the Law: Conflict of Laws* (2nd ed, St Paul, Minnesota, 1971) § 187.

121 Yackee, above n 118, at 91.

by the lex fori.[122] Alternatively, Hartley and Dogauchi offer a compromise by stating that while consent should normally be decided by the law of the chosen court, the lex fori may decide consent in exceptional cases where the basic factual requirements of consent do not exist by normal standards.[123] But it is difficult to accept either position. The HCCC was crafted to set autonomous threshold standards for formal validity and achieved a hard-fought applicable law for substantive validity.[124] To treat consent as a separate issue from both formal and substantive validity potentially undermines the purpose, negotiated consensus and value of the Convention. Even exceptional circumstances identified by Hartley and Doguachi do not justify applying the lex fori.[125] In exchange for the strict choice of law rule to avoid forum shopping, courts were given flexibility in the art 6(c) "manifest injustice" exception.[126] Courts should resort to the art 6(c) exception in hard cases, not the lex fori. Hence, under the Hague Convention, New Zealand will enjoy a clear and efficient choice of law rule to govern both the existence and validity of a jurisdiction agreement.

(c) Article 8 and 9: Recognition and Enforcement of Judgments

Save for proceedings captured by the Trans-Tasman Treaty, it is not possible under common law and the statues presently in force to recognise and enforce non-money judgments made by a foreign court.[127] The Convention reverses this position. Article 8 requires contracting states to recognise and enforce the judgment of another contracting state designated in an exclusive jurisdiction agreement, including any non-money judgments. This strengthens the value of a jurisdiction clause by broadening the range of enforceable judgments made in foreign designated courts. Moreover, under art 8(2), the court requested to enforce is not allowed to review the merits of a case, which further protects the jurisdiction clauses from attacks at the enforcement stage.

As for the exceptions provided in art 9,[128] the grounds largely accord with those already existing under common law or s 6(1) of the Reciprocal Enforcement of Judgements Act 1934. In fact, the potential for escape through the ground of the foreign judgement being "manifestly incompatible with the public policy of the Requested State" is substantially narrower here than the same exception in art 6. New Zealand courts have

122 Ronald Brand and Paul Herrup *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents* (Cambridge University Press, Cambridge, 2008) at 40–41.

123 Hartley and Dogauchi, above n 103, at [94]–[95].

124 Paul Beaumont "Hague Choice of Court Agreements Convention 2005: Background, Negotiations, Analysis and Current Status" (2009) 5(2) J Priv Int L 125 at 139–140.

125 At 139–140.

126 At 139–140.

127 Section 3B of the Reciprocal Enforcement of Judgments Act 1934 allows enforcement of non-money judgments of foreign courts prescribed by orders of the Governor General, but no such orders have been made.

128 Article 9 is a rule favourable to recognition, as the requested forum may recognise the foreign judgements even where one of the defences apply: "Recognition or enforcement *may* be refused if —" (emphasis added).

"never been reported as applying public policy as a ground for refusing to enforce a foreign civil judgment".[129] Justice Thomas has observed that there is a public policy of deterring absconding debtors that gave compelling reasons to prefer recognition of foreign judgments.[130] While the Convention does not include a ground to withhold recognition from a judgment that was given by a court that exercised jurisdiction in breach of a jurisdiction agreement, courts should be reluctant to give such recognition, as doing so undermines the purpose of the HCCC in ensuring the effectiveness of jurisdiction agreements.

2 The HCCC and the Trans-Tasman Treaty

The adoption of the HCCC should be considered in the context of its relationship with the Trans-Tasman Treaty. In addition to the differences discussed above, two points of conflict may be identified between the two instruments.

First, the Convention may deem a jurisdiction clause to be exclusive where it would be characterised otherwise under the construction approach still preserved by the TTPA.[131] Such a conflict activates the art 26 give-way rules of the HCCC. Article 6(2) provides that the TTPA shall prevail where none of the parties is resident in a contracting state that is not party to the Treaty. Thus, where all parties are resident in New Zealand or Australia, the TTPA shall prevail; otherwise, the HCCC prevails. Nonetheless, a better solution would be to simply amend the TTPA to adopt a similar presumption of exclusivity. The presumption of exclusivity represents greater respect for foreign jurisdictions. If New Zealand and Australia are to adopt the HCCC, it would be incongruous for the HCCC to demand greater respect for foreign jurisdictions than the TTPA when the trans-Tasman scheme is meant to rest on the stronger confidence of New Zealand and Australia in each other's judicial systems as opposed to "more distant, dissimilar countries".[132] This supports extending the presumption to trans-Tasman proceedings.

Secondly, the TTPA provides a tighter enforcement regime than the HCCC by allowing for fewer defences which enable a judgment debtor to resist enforcement of a judgment than under the Convention or, indeed, the Reciprocal Enforcements of Judgments Act 1934. Here, art 26(4) of the HCCC ensures that the Convention gives way to the Treaty by setting itself as the floor upon which stricter rules on the recognition and enforcement of judgments may be built. The Convention therefore admirably retains the benefit of greater consensus under the Treaty. That said, the Trans-

129 Reid Mortensen "The Hague and the Ditch: The Trans-Tasman Judicial Area and the Choice of Court Convention" (2009) 5 J Priv Int L 213 at 228.

130 *Bolton v Marine Services Ltd* [1996] 2 NZLR 15 (CA) at 18–19.

131 See Mortensen, above n 139, at 239.

132 *Working Group Report*, above n 98, at 7.

Tasman regime itself may benefit from adopting art 9 of the Convention.[133] It has been suggested that a literal reading of the Trans-Tasman Treaty entitles an incompatible judgment to registration and enforcement, unless the rendering court concludes that registration justifies invoking the high-threshold public policy exception.[134] The rules of priority under art 9 of the Convention may assist in resolving the problem of incompatible judgments under the Treaty.

3 A Narrow Instrument of Implementation

It is clear that the Hague Convention adds little to trans-Tasman proceedings beyond that which is provided for under the TTPA. It has even been said that it is "hard to imagine that the private international law [system] of any mature legal system is very far removed" from the Convention, particularly in the light of *Donohue v Armco*.[135] In theory at least, New Zealand courts appear to endorse the same proposition that the HCCC may be seen to stand for: that there should be contractual analysis and strict enforcement of exclusive jurisdiction clauses. Yet in practice, the current treatment of jurisdiction clauses is indeed "far removed" from the required approach compelled under the HCCC. The case for accession may be understood in accordance with the reasons discussed below.

First, there are no significant disadvantages in adopting the Convention. This makes it all the more irrational for New Zealand to decline the advantages offered by the HCCC.

Secondly, while the TTPA may be seen as a stronger, tighter regime of enforcement than the HCCC, it is, by definition, limited in its geographical scope. The Hague Convention offers significant value to New Zealand as a broader instrument with which to implement many of the changes proposed in this article. For instance, New Zealand currently uses the least preferred governing law in terms of certainty to govern the existence and validity of a jurisdiction clause: the lex fori. Considering that the predominant reason for negotiating a jurisdiction clause is to secure greater certainty in transnational contracts, the lex fori is particularly undesirable. Articles 5(1) and 6(6) will supplant the lex fori default with a rule that validates party autonomy and returns certainty to the formation of exclusive jurisdiction clauses. Articles 5 and 6 also provide for stronger enforcement of exclusive jurisdiction clauses than even under the "modified *Eleftheria*" test. Under the Convention, judicial discretion is narrowly limited to the exceptions in arts 5 and 6. It also appears that the interest in avoiding parallel litigation and protecting third-party rights not bound by a jurisdiction clause may now only be addressed by an art 19 declaration to the extent that it applies. This stricter test reflects a stronger contractual perspective and interest in

133 Mortensen, above n 129, at 236–237.

134 At 240.

135 Briggs, above n 6, at 529.

infusing certainty into transnational contracts — which is commendable. The advantages of international uniformity and reciprocity outweigh the modest loss of the common law's flexibility under the already "modified *Eleftheria*" test.

Another major advantage of adopting the Hague Convention is the greater recognition and enforcement of judgments. The Convention allows any non-money judgment by a court of a contracting state designated in an exclusive jurisdiction agreement to be enforced. It may also enhance the recognition and enforcement of certain intellectual property rights, since the Convention does not exclude from its scope questions of validity and infringement of copyrights and related rights.[136] Furthermore, the Hague Convention is the first judgment recognition convention signed by both the European Union and the United States. Its widespread adoption would encourage future cooperation in the arena of international jurisdictional agreements and allow New Zealand to benefit from better recognition and enforcement of judgments with major trading powers.

Finally, as long as states refrain from liberal opting-out, courts interpret the escape provisions narrowly and states continue to accede to the Convention, the HCCC has value as an instrument of international harmony. In international law, uniformity leads to efficiency and certainty in commercial dealings, which encourages individuals to do business across borders. Without a harmonised approach to enforcing jurisdiction clauses, a jurisdiction clause only becomes as exclusive as the courts interpret it. A common standard will avoid such a failing. The HCCC offers an ideal solution that is preferable to the primarily unilateralist status quo of most countries and the "race to the proceedings" failing inherent in the European regime.

Admittedly, the impact of the HCCC should not be overstated. The conservative scope and requirement for reciprocity of the Convention mean that the changes implemented are considerably narrower than proposed. But adopting the HCCC into New Zealand law will be a significant symbolic act that may spark change in judicial treatment of jurisdiction clauses generally. In fact, the influence of the HCCC on New Zealand law is already apparent in the TTPA. There is no reason to restrict the HCCC's impact to only trans-Tasman cases. It is hoped that New Zealand courts will take their cue from legislative approval of the HCCC approach to extend the Convention's reforms, such as the presumption of exclusivity, even to cases which fall outside the scope of the Convention. A clear judicial statement will be desirable to enact such changes in New Zealand law. Furthermore, under art 22 of the HCCC, a state may extend the Hague Convention to non-exclusive jurisdiction agreements; that is, jurisdiction agreements that designate one or more courts of more than one contracting state. New Zealand should make such a declaration in adopting the HCCC. This will maximise the reforms inherent in the Hague Convention that "go

136 Amin, above n 106, at 126.

a long way to reduce the workload of courts and the expense to businesses of long court battles over essentially procedural points".[137]

In the end, the Hague Convention is only a stepping stone for New Zealand in its journey towards a more progressive treatment of jurisdiction clauses. The extent of the Convention's impact in reforming the treatment of jurisdiction clauses in New Zealand depends on the approach taken by the courts. Even if the Hague Convention is not adopted, many of the arguments for reform advanced above should be implemented in New Zealand. A progressive approach will validate party autonomy, enhance certainty in international trade, maximise the value of the parties' bargain, reduce costly delays in dealing with the problem of parallel litigation. The Convention simply provides a further impetus by linking this development with an international scheme. While far from perfect, it is hoped that recognition of the Convention's outweighing benefits will soon propel it to adoption into New Zealand law.

VI CONCLUSION

Jurisdiction clauses reduce costly uncertainty in international transactions and utilise party autonomy as an efficient means of resolving parallel litigation. Yet a contractual analysis of the present treatment of such clauses reveals that courts have largely rendered their value illusory. Simplistic labels obscure the parties' bargain; homing tendencies dominate; and judicial treatment is inconsistent in an area where there is a special need for predictability. A reform of the present approach is necessary to bridge the gap between the normative and actual value of jurisdiction clauses. This article has advanced suggestions for reform that may assist in building such a bridge. In particular, it has reframed jurisdiction clauses according to contractual rights; argued for new discretionary tests to achieve better consistency in strict enforcement; and advocated partial implementation of such changes and further reforms by extending the commendable trans-Tasman scheme through the Hague Convention. Ultimately, however, the extent to which the jurisdiction clause is salvaged rests on the courts themselves. It is hoped that reform will be pursued, whether by international instrument or judicial development, to revive the jurisdiction clause's value in providing "an important and substantial, and not [merely] a formal or technical, right" that empowers parties to overcome the conflict of laws' failure to provide certainty in transnational contracts.[138]

137 International Chamber of Commerce "ICC urges governments to ratify Hague Choice of Court Convention" (18 October 2007) <www.iccwbo.org>.

138 *Donohue*, above n 88, at [29].