REVIEW: *ASYMMETRIC JURISDICTION CLAUSES*

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Review of *Asymmetric Jurisdiction Clauses* (Brooke Marshall, Oxford University Press, 2023, ISBN 9780198868040)

A jurisdiction clause – also known as a choice of court agreement – is a contractual provision by which the parties agree to submit to the jurisdiction of named courts or, more commonly, courts in a named country or state. That is usually sufficient for those courts to be able to assume personal jurisdiction over the parties in any litigation between them that arises from the contract. If a jurisdiction clause is exclusive, the parties are taken to agree to litigate *only* in the named court. By and large, a court should generally respect that choice, and refuse to hear the proceedings unless it is itself the chosen court.[1] This is the most important means by which businesses 'buy in' to the jurisdiction of the popular international commercial courts in London, New York and Singapore. If the clause is non-exclusive, then the jurisdiction of the named court is likely to be upheld, but it is no breach of contract to litigate elsewhere. The provision is really an optional jurisdiction clause. *Whether* a jurisdiction clause is construed as exclusive or non-exclusive can differ between legal systems. The *effect* of an exclusive or a non-exclusive clause can also differ. In between these two classifications of jurisdiction clauses are 'asymmetric' clauses, in which one party to the contract has agreed to litigate in only one named court, but that is optional for another party who may sue in a number of courts – whether named or not. And whether an asymmetric clause is given the effect of an exclusive or non-exclusive clause can have profound consequences for the litigants.

In *Asymmetric Jurisdiction Clauses*,[2] Brooke Marshall plugs a growing hole in the literature on jurisdiction clauses, and she plugs it tightly. Asymmetric clauses are increasingly common in the standard form agreements used in financial markets but, although there is a significant journal literature on them, they are barely examined in the texts on private international law. The revered English authority *Dicey, Morris and Collins* deals with them in one short paragraph,[3] and

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1 A principle which, at times in Australia, has been honoured more in the breach than the observance: see Mary Keyes, *Jurisdiction in International Litigation* (Federation Press, 2005) 161–8; Mary Keyes, 'Jurisdiction under the Hague Choice of Courts Convention: Its Likely Impact on Australian Practice' (2009) 5(2) *Journal of Private International Law* 181, 198–204 <https://doi.org/10.1080/17536235.2009.11424357>.

2 Brooke Marshall, *Asymmetric Jurisdiction Clauses* (Oxford University Press, 2023).

3 Lord Collins of Mapesbury and Jonathan Harris (eds), *Dicey, Morris and Collins on the Conflict of Laws* (Sweet & Maxwell, 16th ed, 2022) vol I, 638–9 [12.075].

in Australia they also have only a single paragraph in one of the texts.[4] Until *Asymmetric Jurisdiction Clauses*, Richard Fentiman's *International Commercial Litigation* was the most extended analysis of these provisions in the common law of the Commonwealth,[5] but they have still only received brief mention in other specialised works.[6] Marshall's work will now easily qualify as the definitive resource on the question. *Asymmetric Jurisdiction Clauses* is comprehensive. It gives a broad account of different species of asymmetric clauses[7] and whether they can be philosophically justified,[8] before entering the main body of the work – a detailed analysis of different legal systems' approaches to the classification of asymmetric clauses and the effect given to them.[9] Marshall then presents an argument that the enforcement of asymmetric jurisdiction clauses should initially be required to satisfy human rights standards, especially the right to a fair trial.[10] She concludes with suggestions for finessing the drafting of asymmetric clauses – depending on what legal system orients the lawyer's perspective.[11] That should expand *Asymmetric Jurisdiction Clauses*' readership. These provisions will usually be contested in high value international commercial litigation. As a result, the parties will often have the resources and motivation to avoid that (by better adapted drafting) or, going back to the main body of the book, to engage expert lawyers who are able to leverage Marshall's legal analysis if litigation were to eventuate.

Although the author is Australian, *Asymmetric Jurisdiction Clauses* is written from a European perspective (in the geographic sense). It is, after all, based on Marshall's doctoral studies at the University of Hamburg. However, much is still practically relevant and important to the Australian practitioner. Unsurprisingly, given the market dominance of the London Commercial Court in international litigation, the English courts provide the largest body of jurisprudence that is examined in the book. Accordingly, English law is considered in chapter 7.[12] The common law is nevertheless dealt with more generically in this chapter, its making reference also to Australian, New Zealand and Singaporean decisions.[13] Most of those are Australian.[14] This chapter is therefore of direct relevance to Australian lawyers, so long as, when considering the effect of an asymmetric clause, the Australian courts' weaker approach to the enforcement of any aspect of the clause

4 Reid Mortensen, Richard Garnett and Mary Keyes, *Private International Law in Australia* (5th ed, LexisNexis, 2023) 94–5.
5 Richard Fentiman, *International Commercial Litigation* (Oxford University Press, 2nd ed, 2015) 79–88.
6 Eg, Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford University Press, 2008) 163, 166–7, 171–2; Adrian Briggs, *Private International Law in English Courts* (Oxford University Press, 2014) 245; Adeline Chong and Man Yip, *Singapore Private International Law: Commercial Issues and Practice* (Oxford University Press, 2023) 102.
7 Marshall (n 2) 17–25.
8 Ibid 77–120.
9 Ibid 121–298.
10 Ibid 299–326.
11 Ibid 327–40.
12 Ibid 251–98.
13 Ibid xxxiv–xxxv, xxxvii, 253.
14 Ibid xxxiv–xxxv.

that is considered exclusive is taken into account.[15] Another set of materials that may possibly become relevant to Australian lawyers is considered in chapter 4 on the Hague *Convention of 2005 on Choice of Court Agreements* ('*Choice of Court Convention*').[16] This is important in *Asymmetric Jurisdiction Clauses* because the Convention is implemented in the European Union and the United Kingdom (as well as in Mexico and Singapore). There was also an early expectation that it would be implemented in Australia by the passage of an International Civil Law Bill but, despite even more recent impetus, after 18 years that is still to happen. The Convention was partly implemented with New Zealand in the *Trans-Tasman Proceedings Acts*.[17] However, those aspects of the *Choice of Court Convention* that would affect a court's approach to an asymmetric jurisdiction clause – the Convention's broader definition of an *exclusive* jurisdiction clause – were not adopted in the *Trans-Tasman Proceedings Acts*. A principal purpose of the *Choice of Court Convention* is, at least for international contractual disputes, to address the problem of *lis pendens* – concurrent or related proceedings in different countries.[18] It does this by stronger guarantees that, where the parties agree beforehand to litigate in only one place, courts in other places will require that. In 2016, the Joint Standing Committee on Treaties recommended accession to the *Choice of Court Convention* so it may yet be implemented in Australia. As Marshall has previously written, implementation would have 'a mostly positive impact on Australian law', particularly in the greater respect it has for the terms of commercial parties' bargains and the associated reduction of enforcement costs.[19]

In *Asymmetric Jurisdiction Clauses*, Marshall gives a detailed account of the approaches taken, or likely to be taken, to different kinds of asymmetric clauses under European Union ('EU') law, and under the not-entirely-parallel *Lugano Convention* for the European Free Trade Area ('EFTA').[20] The EU and EFTA law is usually applied directly by the national courts of Member States, and it also directs to a Member State's national law questions of the substantive validity of jurisdiction agreements and of litigation involving parties in 'Third States' outside

15 Ibid 281–2.

16 Ibid 121–38. See *Convention of 30 June 2005 on Choice of Court Agreements*, opened for signature 30 June 2005, 44 ILM 1294 (entered into force 1 October 2015).

17 *Trans-Tasman Proceedings Act 2010* (Cth) s 20; *Trans-Tasman Proceedings Act 2010* (NZ) s 25; Reid Mortensen, 'The Hague and the Ditch: The Trans-Tasman Judicial Area and the Choice of Court Convention' (2009) 5(2) *Journal of Private International Law* 213 <https://doi.org/10.1080/17536235.2009.11424358>; Mary Keyes, 'Jurisdiction Clauses in New Zealand Law' (2019) 50 *Victoria University of Wellington Law Review* 631, 635–6, 639–43 <https://doi.org/10.26686/vuwlr.v50i4.6305>.

18 See Paul Beaumont, 'Hague Choice of Court Agreements Convention 2005: Background, Negotiations, Analysis and Current Status' (2009) 5(1) *Journal of Private International Law* 125, 133 <https://doi.org/10.1080/17536235.2009.11424355>.

19 Brooke Adele Marshall and Mary Keyes, 'Australia's Accession to the Hague Convention on Choice of Court Agreements' (2017) 41(1) *Melbourne University Law Review* 246, 282–3.

20 Marshall (n 2) 139–93. The current instruments are *Regulation (EU) No 1215/2012 of the European Parliament and the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast)* [2012] OJ L351/1 (the *Brussels I Regulation Recast*); *Convention of 30 October 2007 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters* [2007] OJ L339/3 (the *Lugano Convention*).

the EU and EFTA. In chapter 6, considerable attention is therefore given to the approaches taken to asymmetric clauses under French and German law.[21]

The larger part of *Asymmetric Jurisdiction Clauses* is a thorough analysis of how each (geographically) European legal system treats – or perhaps is likely to treat – the range of the different species of asymmetric clauses. To illustrate this, it is worth considering the issues that arise in English law and under the *Choice of Court Convention* for 'Rothschild clauses', the asymmetric clauses named after the decision of the Cour de cassation in *Madame X v Banque Privée Edmond de Rothschild*.[22] There are more kinds of asymmetric clause than Rothschilds,[23] and there is also a number of variants of Rothschild clauses.[24] However, a 'standard' Rothschild clause is expressed along the following lines:[25]

> X and Y agree that the courts of Ruritania shall have exclusive jurisdiction, although X shall not be prevented from taking proceedings in any other courts with jurisdiction. X may take concurrent proceedings in any number of courts with jurisdiction.

In this clause, the Ruritanian court is called 'the anchor court'. Party X is referred to as 'the option holder', as it has an option to litigate in courts other than the anchor court. Party Y has no options; under the contract it can sue only in Ruritania and so is called the 'the non-option holder'. Marshall's survey revealed that more than half of the asymmetric jurisdiction clauses found in the standard form contracts used in financial markets were Rothschild clauses.[26] This could suggest some 'path dependency' in their use.[27] Or, it could suggest a strategic agreement by which the option holder can optimise its prospects for successful litigation in the event of a dispute – '*ex post* unilateral forum shopping' – and yet prevent the non-option holder from optimising *its* prospects.[28] The option holder X is often a bank or other lending institution. The asymmetry between X and Y in their capacity to choose a court therefore tends to reflect an asymmetry in their bargaining position. According to Marshall, it also seems doubtful that the non-option holder Y might be able to secure any pricing advantage in the bargain with X that might be thought to be negotiable because of Y's broader exposure to an unfavourable forum should litigation eventuate.[29]

As chapter 7 on the treatment of asymmetric jurisdiction agreements under English law was written after Brexit, the analysis is freed of the structural niceties of the civil jurisdiction instruments applicable in the EU and EFTA.[30] Marshall describes the English courts as 'Third State courts par excellence',[31] although they

21 Marshall (n 2) 195–249. An impressive quality of *Asymmetric Jurisdiction Clauses* is also the extensive use of primary and secondary sources in the French and German languages.
22 Cour de cassation [French Court of Cassation], 11-26.022, 26 September 2012 reported in (2012) Bull civ no 7/176, 171–2.
23 Marshall (n 2) 20–2.
24 Ibid 17–20.
25 Adapted and simplified from ibid 18.
26 Ibid 74–5.
27 Ibid 75, 113.
28 Ibid 75, 119.
29 Ibid 118–20.
30 Ibid 251–2.
31 Ibid 252.

are also the courts in geographic Europe most likely to determine litigation that emerges from financial markets. The common law has 'a strong disposition to hold commercial parties to their bargain',[32] which means that slight differences in the drafting of the anchor limb of a standard Rothschild clause can affect its interpretation.[33] Furthermore, the English courts aim to give maximum effect to the parties' agreement on the question of jurisdiction.[34] English law also carries few constraints that would render a Rothschild clause unenforceable.[35]

It therefore appears that, under a standard Rothschild clause, the non-option holder Y will be held to the anchor limb of the clause. Accordingly, where Y sues in England but the anchor court is elsewhere, the English court will generally stay the English proceedings – unless there are strong reasons not to.[36] It is more often the case that the English court *is* the anchor court, and so X will also generally be entitled to an anti-suit injunction to restrain the non-option holder Y from proceeding in any other court.[37] Y will also generally be refused a stay of the English proceedings where X has litigated in the English anchor court.[38] Equally, if the option holder X is called on to defend proceedings brought by Y in the English anchor court, X will be taken to have submitted to its jurisdiction and is unlikely to be granted a stay of the proceedings.[39] However, where X opts to initiate litigation elsewhere, an English anchor court will generally respect X's rights under the optional limb of a Rothschild clause, and refuse an anti-suit injunction against X unless X's proceedings are vexatious or oppressive.[40] That may well be the case when the non-option holder Y had first brought proceedings in the English court and, at the time X brought parallel proceedings, the English proceedings were well-advanced.[41]

All of this simply demonstrates the usual armoury of the common law – a grant or refusal of a stay, a case management stay, an anti-suit injunction – for enforcing the terms of the parties' bargain, subject only to the 'misuse' of litigation to vex or oppress or to the application of mandatory rules or public policy to override the bargain. The deterrence of *lis pendens* also influences the granting of these orders.[42] A problem, therefore, that an English court confronts is reconciling these considerations when, as in a standard Rothschild clause, the parties have expressly agreed that 'X may take concurrent proceedings in any number of courts with jurisdiction'. Relying on *Dicey, Morris and Collins*' claim that an English court

32 Ibid 254.
33 Ibid 256.
34 Ibid 273.
35 Ibid 259–72.
36 Ibid 281–2. Here, Marshall cautions that Australian courts are more likely than English courts to refuse a stay of proceedings for 'strong countervailing reasons' even though a clause derogates from the Australian courts' jurisdiction.
37 Ibid 277–8.
38 Ibid 278.
39 Ibid 279.
40 Ibid 280.
41 Ibid.
42 Ibid 282–5.

will allow concurrent proceedings to run 'at least where the agreement can be shown to be commercially rational', Marshall effectively suggests that orders to address *lis pendens* are more likely to be made where there is a greater overlap of the issues raised in the separate proceedings, and a greater likelihood of incompatible judgments emerging from them.[43] This, however, is unlikely to happen 'in all but the most exceptional cases'.[44]

The *Choice of Court Convention* differs from the common law in deeming that a jurisdiction clause is exclusive unless it expressly provides otherwise.[45] The effect of that classification is also stronger than it is with the common law, in that the Convention gives less discretion not to stay proceedings when an exclusive clause derogates from the jurisdiction of the forum court. As Marshall discusses in chapter 4, adjudication on asymmetric clauses under the *Choice of Court Convention* has regarded them as non-exclusive, although there is (asymmetric!) *obiter* from English judges who disagree over the classification of Rothschild clauses. In exploring these *obiter dicta* and the commentary on the Convention, Marshall observes that the conclusion that a Rothschild clause is 'exclusive' is 'difficult to sustain' but 'not impossible'.[46] A range of scenarios in which the option holder X and the non-option holder Y sue in different courts is explored. There is some possibility that a standard Rothschild clause could be considered exclusive under the *Choice of Court Convention* where the option holder X sues in the anchor court. However, there remains a problem in that, at the time of contracting, the clause is only exclusive to the non-option holder Y on condition that X does not opt to sue 'in any other courts with jurisdiction'. Marshall concludes that 'a unilateral waiver' by the option holder X of the whole clause or of the concurrent proceedings limb of the clause might make the clause exclusive, and so captured and enforceable under the *Choice of Court Convention.*[47] In suggesting improvements to drafting that might bring what is, in substance, a standard Rothschild clause within the Convention, she proposes that X and Y agree that the courts of Ruritania have exclusive jurisdiction regardless of which party initiates proceedings. However, in a separate clause, X is still effectively given its option to litigate elsewhere by recognising X's power to renounce the exclusive jurisdiction clause *before* litigation is commenced by either party in Ruritania 'by bringing proceedings in any other court with jurisdiction under the rules of private international law applicable to it'.[48] Marshall's revised draft also provides that the non-option holder Y then becomes entitled to bring any counterclaims against X in the same court.[49] She properly concedes that this might not work, but believes

43 Lord Collins of Mapesbury (ed), *Dicey, Morris and Collins on the Conflict of Laws* (Sweet & Maxwell, 15th ed, 2012) vol I, 564 [12-045], cited in Marshall (n 2) 286–7.

44 Marshall (n 2) 298. For drafting proposals to address the English courts' approach to the non-option holder Y bringing a counterclaim in a court other than the anchor in which the option holder X has sued, see 331, 337–8.

45 Ibid 124.

46 Ibid 127.

47 Ibid 133–4, 138.

48 Ibid 331.

49 Ibid.

that it addresses the *Choice of Court Convention*'s principal concern that *lis pendens* be prevented.[50]

With *Asymmetric Jurisdiction Clauses*, Brooke Marshall joins a small number of distinguished Australian conflicts lawyers to be published in Oxford's Private International Law Series: Peter Nygh,[51] Andrew Bell[52] and Richard Garnett.[53] She deserves this recognition. The book emerged from Marshall's doctoral studies, for which the International Chamber of Commerce's Institute of World Business Law awarded her the ICC Institute Prize in 2021. The complexity of the task in dissecting the rationale, legal classification and effect of asymmetric clauses should not be underestimated. The multiple perspectives taken through Marshall's account of the empirical surveys of the usage of asymmetric clauses, their philosophical justifications, the rational motivations of parties that sign them, the extensive private international legal analyses, the human rights problems and the practical drafting suggestions make *Asymmetric Jurisdiction Clauses* an extremely rich piece of scholarship. This must now be the definitive resource for courts, lawyers and legal scholars whenever, as is increasingly the case, they confront an asymmetric jurisdiction clause.

50 Ibid.

51 Peter Nygh, *Autonomy in International Contracts* (Oxford University Press, 1999).

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

53 Richard Garnett, *Substance and Procedure in Private International Law* (Oxford University Press, 2012).