The Work of the HCCH and Australia: The HCCH Judgments Convention in Australian Law

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Michael Douglas, Mary Keyes, Sarah McKibbin and Reid Mortensen published an article on how the implementation of the HCCH Judgments Convention would impact Australian private international law: 'The HCCH Judgments Convention in Australian Law' (2019) 47(3) Federal Law Review 420. This post briefly considers Australia's engagement with the HCCH, and the value of the Judgments Convention for Australia.

Australia's engagement with the HCCH

Australia has had a longstanding engagement with the work of the Hague Conference since it joined in 1973. In 1975, Dr Peter Nygh, a Dutch-Australian judge and academic, led Australia's first delegation. His legacy with the HCCH continues through the Nygh Internship, which contributes to the regular flow of Aussie interns at the Permanent Bureau, some of whom have gone on to work in the PB. Since Nygh's time, many Australian delegations and experts have contributed to the work of the HCCH. For example, in recent years, Professor Richard Garnett contributed to various expert groups which informed the development of the Judgments Project. Today, Andrew Walter is Chair of the Council on General Affairs and Policy.

Australia has acceded to 11 HCCH instruments, especially in family law where its implementation of HCCH conventions leads the Conference. However, with respect to recent significant instruments, it has lagged behind. For example, in 2016, Australia's Commonwealth Attorney-General's Department ('AGD')

recommended accession to the 2005 HCCH Choice of Court Convention through an 'International Civil Law Act'; it also recommended that the proposed legislation should give effect to the HCCH's Principles on Choice of Law in International Commercial Contracts. In November 2016, the Australian Parliament's Joint Standing Committee on Treaties supported both recommendations. Despite those recommendations, we are yet to see the introduction of a Bill into Parliament. We remain hopeful that 2020 will see progress.

Australia actively participated in the negotiation of the HCCH Judgments Convention and agreed to the final act. However, it is not a signatory. The mood within the Australian private international law community is that Australia will accede—the question is when. When it does, what would that mean? That is the focus of the article by Douglas, Keyes, McKibbin and Mortensen, who argue that accession ought to be welcomed.

The value of the HCCH Judgments Convention for Australia

Accession to the Judgments Convention would be a positive development for Australia. The Convention expands the grounds for recognising foreign judgments in Australia, especially in the recognition of foreign courts to exercise special jurisdictions giving rise to an enforceable judgment, and the enforcement of non-money judgments. The proposed grounds for refusal of recognition and enforcement broadly align to the current treatment of the defences to recognition and enforcement, and the bases for setting aside registration of foreign judgments, under Australian law. By harmonising Australia's private international law with that of other Contracting States, the Judgments Convention should provide greater certainty to Australian enterprises engaging in international business transactions with entities from other Contracting States. As an island nation, ensuring certainty for cross-border business is essential to the Australian economy.

For Australia, the primary advantage of the Judgments Convention is the capacity to enforce Australian judgments overseas. A party to cross-border litigation who obtains the benefit of an Australian judgment will have a clearer pathway to obtaining meaningful relief. The ability to enforce an Australian civil or commercial judgment internationally is extremely limited, with the exception of New Zealand. The Judgments Convention, if implemented in Australia, would both expand and reposition the ability to project Australian judicial power beyond New Zealand. Certainly, the Convention would enhance the ability to enforce judgments of the courts of the other Contracting States to the Convention in Australia. Equally, as a multilateral Convention, the Judgments Convention would enable Australian judgments to circulate among the other Contracting States to the Convention. That would be a most attractive outcome for the Australian judicial system. Non-money judgments, which currently have almost no extraterritorial reach, would become enforceable through the Convention. The recognition of judgments that emerge when Australian courts exercise special jurisdictions dealing with contractual, non-contractual and trust obligations is also a long overdue reform and would see the law relating to the international enforcement of judgments align more closely with the nature of modern commercial litigation. If adopted widely, the Judgments Convention will provide better access to the assets of judgment debtors and to defendants themselves. This will reduce the risks associated with cross-border litigation, and so with it, the risks to cross-border business.

A secondary effect of the implementation of the Judgments Convention is the pressure it may apply to the Australian rules of adjudicative jurisdiction that allow Australian courts to deal with international litigation. There remains a very substantial disparity between the extremely broad adjudicative jurisdictions claimed by Australian courts and the narrow jurisdictions that are allowed to foreign courts by

Australian courts considering whether to recognise foreign judgments. The Judgments Convention does not address this disparity, although the recognition of foreign judgments made when courts of origin exercise special jurisdictions somewhat narrows it. Unless the Australian rules of adjudicative jurisdiction are reformed, the enforceability of an Australian judgment in cross-border litigation will require a litigant's consideration of both the Australian rules of adjudicative jurisdiction and the different Judgments Convention rules of indirect jurisdiction. Ultimately, though, to get an internationally enforceable judgment, it would only be compliance with the Judgments Convention that counted.

In short, this article strongly recommends that Australia should accede to the Judgments Convention in order to modernise and improve Australian law, and to provide better outcomes for Australian judgment creditors. It would be timely for Australia also to refocus and continue its efforts on accession to the Choice of Court Convention.