

Jurisdiction in International Litigation

By Mary Keyes
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Dr Mary Keyes, Senior Lecturer in Law at Griffith University, Queensland, has written an excellent book on the Australian law relating to jurisdiction in (private) international litigation. Building, one suspects, on a doctoral thesis, the book contains a combination of theory and various proposals for reform with a detailed technical exposition of the law in this increasingly important area. With Sykes & Pryles' *Australian Private International Law* (1991) now hopelessly out of date, and Nygh and Davies' *Conflict of Laws in Australia* (2002) focussing on much more than jurisdiction, Dr Keyes' identification and analysis of recent Australian case law will be very useful for practitioners. (The discussion extends well beyond the significant brace of recent decisions by the High Court in this area.) So too, fresh insight may be gained from the way in which familiar material is conceptually organised. For example, there is a short but particularly useful discussion (at 63-67) in relation to the assertion of jurisdiction over corporations including the assertion of jurisdiction over a foreign parent carrying on business through a local subsidiary.

The technical discussion is largely contained in the chapters entitled 'Establishing jurisdiction in principle', 'Declining jurisdiction in principle' and 'Declining jurisdiction in practice' which together comprise almost half the book. One is reminded, in reading the first of these chapters, of the fact that the rules of the various Supreme courts (as well as the Federal Court) in relation to the bases for the assertion of jurisdiction over a foreign defendant are by no means uniform. Some care is required in drawing on interstate decisions. In the second of these chapters, Dr Keyes is critical of the 'looseness' of the Australian test for granting a stay of proceedings established in *Voth v Manildra Flour Mills Pty Ltd* (1991) 171 CLR 538 whereby proceedings will only be stayed if the Australian court is shown to be a 'clearly inappropriate forum'. She astutely observes (at 120) that:

'Personal and juridical advantages are capable of being manipulated by the plaintiff and reference to these advantages may be seen as a tacit approval of forum shopping. Although personal and juridical advantages must be 'legitimate' in order to be considered, the Australian cases provide no criteria to determine whether an advantage is legitimate.'

The chapter entitled 'Declining jurisdiction in practice' contains an empirical analysis of outcomes in jurisdictional disputes in Australia in the 10 year period from the landmark decision in *Voth*. One particularly interesting statistic is that, of the 24 cases decided which included a foreign exclusive jurisdiction clause, a stay of proceedings was only granted in slightly over 50 per cent of cases. Of the 71 cases considered containing no jurisdiction clause, a stay was granted and/or service was set aside/leave to proceed refused on the basis that the forum court was a 'clearly inappropriate forum' in just under 25 per cent of cases with no striking difference as between cases where the plaintiff was an individual as opposed to a corporation.

In various parts of the book, Dr Keyes advances a sustained criticism of the High Court's decision in *Akai Pty Limited v People's Insurance Co. Limited* (1996) 188 CLR 418, a case involving the interaction of a foreign exclusive jurisdiction and choice of law clause and a domestic statute (the Insurance Contracts Act) the operation of which was held by the majority to override the parties' contract as a mandatory law of the forum. Dr Keyes argues forcefully in support of the minority judgement of Dawson and McHugh JJ which gave primacy to the parties' contractual bargain. In an interesting footnote to this litigation, soon after the People's Insurance Company had failed in its attempt to have proceedings in New South Wales stayed by reason of the English exclusive jurisdiction clause, it obtained in both Singapore and England anti-suit injunctions restraining the continuation of the litigation in Australia, thus wholly undercutting the effect of the majority decision in the High Court.

Where exclusive jurisdictions clauses are contained in contracts of adhesion, however (and unlike the *Akai* case), Dr Keyes advances the interesting argument that they should be regarded as functionally equivalent to an exclusion clause in a domestic contract and that, whilst such clauses do not in terms purport to exclude the liability of the business, this will almost invariably be their practical effect because it will not be practically possible or economically feasible for a typical consumer to litigate abroad. This interesting contention has not, thus far, been recognised in Australian case law and, in light of decisions such as *Toll (FCGT) Pty Limited v Alphapharm Pty Limited* (2004) 79 ALJR 129, it is unlikely to find favour in the near future.

The book is neither a text book nor a practitioner's work insofar as it does not simply set out in a structured way the law relating to the establishment and exercise of jurisdiction. That is not to say that any student, academic or practitioner interested in these topics will not find an illuminating discussion of them in the work. They will. In this, they are assisted by a very good index.

Reviewed by Andrew Bell