

## ***Jurisdiction in International Litigation***

Mary Keyes

Federation Press, Sydney, 2005, ISBN 1 8628 7567 7, 305 pp

For everyone involved in cross-border litigation — litigants, lawyers and judges — the first and most important question to deal with is which court to litigate in. However, theorists in private international law have more often been preoccupied with the subsequent and idiosyncratic field of choice of law: once we are in court, what country's law will apply to the issues in dispute? Traditionally, in private international law the allied questions of jurisdiction and the enforcement of judgments across borders have served only to introduce, or frame, choice of law. And any theoretical or policy analysis of jurisdiction and judgments has been avoided.

The last decade, nevertheless, has seen original and provocative scholarship on international jurisdiction emerge in Australia, and Mary Keyes' work has been in its vanguard. *Jurisdiction in International Litigation* brings much of this work to fruition, and reveals to a wider public the insights of Dr Keyes' PhD research.<sup>1</sup> Even so, it would be hoped that Keyes' comprehensive critique of the Australian law of jurisdiction will not end with one edition of this book. Future accounts of the law of international jurisdiction will be even more important, and Keyes' work itself suggests some lines of inquiry that would be useful to pursue.

Further, there is the impressive quality of the scholarship. It is, I believe, no exaggeration to claim that *Jurisdiction in International Litigation* is the most significant book to have been published on the Australian law of jurisdiction since Sir Zelman Cowen's *Federal Jurisdiction in Australia* appeared in 1959.<sup>2</sup> Importantly, it gives even more than Cowen's evergreen study does, because *Jurisdiction in International Litigation* is an example of the greater practical and theoretical depths which legal scholarship has plumbed in the last half-century. Keyes has still done solid doctrinal groundwork, equal to Cowen's. But we learn more of both the practice of courts in litigation by empirical analyses of the outcomes of these international cases, and the theory that could give our adjudication a greater coherence than it currently possesses. The book should therefore be of greater interest to a broad market of scholars, practitioners and lawmakers. The last, in particular, should be reading this book carefully.

The predominant characteristic of the Australian law of jurisdiction that inevitably emerges from Keyes' close doctrinal study is its exorbitance. The compression of the detail of Australian rules of jurisdiction into one book reveals, quite dramatically, how frequently they both encourage and accede to a plaintiff's choice of an Australian court (see pp 51, 55–56, 60, 66, 85–86, 111–13). In the common law tradition, some equilibrium between the interests of the litigants is usually meant to be realised by the interplay of the law for

---

<sup>1</sup> Keyes (2004).

<sup>2</sup> Cowen (1959), and see Zines (2002).

establishing and for declining jurisdiction. Rules of court for establishing jurisdiction make courts available for plaintiffs, and discretions for declining to exercise a properly established jurisdiction afford opportunities for defendants to argue that litigation should be placed in some other, properly situated court (pp 206, 208). However, Keyes' account of the law concludes that the rules for establishing jurisdiction are 'over-inclusive' and that those for declining it are 'under-inclusive': a combination that makes the law of jurisdiction significantly plaintiff-oriented, and 'remarkably chauvinistic' (p 196). The extraordinary reach of Australian rules for establishing jurisdiction, which are certainly without parallel anywhere else in the developed Commonwealth, is well known, but it has never been so well documented. At their extremity is a New South Wales invention: the assumption of jurisdiction in any claim in tort (wherever in the world it occurred) on the ground that some damage has been suffered in the state, even if only in part (p 54). Arguably, this is nothing but a proxy for taking jurisdiction where the plaintiff is an in-state resident, as any loss of income caused by the tort will be carried by the plaintiff wherever he or she is.<sup>3</sup> It is 'exceptionally generous to plaintiffs' (p 54), and has added to the special assistance that Australian courts give to forum shoppers in personal injuries cases (p 212). *Jurisdiction in International Litigation* also usefully deals with jurisdiction in family law cases. Based as they can be on thin, insubstantial links with Australia (like the applicant's presence in the country or their citizenship), Keyes again concludes that the rules of family jurisdiction also 'are far too broad' (p 60).

The other side of the law of jurisdiction is the plea of *forum non conveniens*, or 'the inappropriate court', and related questions of concurrent proceedings in a foreign court and the effect given to contractual provisions by which the parties had previously submitted to the jurisdiction of the local court ('prorogation') or a foreign court ('derogation'). If successful, the plea allows a court, in its discretion, to decline a jurisdiction it is legally entitled to exercise. The Australian principles for declining jurisdiction were finally settled in 1990 in *Voth v Manildra Flour Mills Pty Ltd*,<sup>4</sup> and allow the court not to exercise its jurisdiction if it concludes that it is itself a 'clearly inappropriate forum' (pp 105–08).<sup>5</sup> On its face, this is the narrowest, most plaintiff-friendly version of the *forum non conveniens* principle in the common law world. Apart from the difficulty it presents to defendants who wish to argue the plea, Keyes' conceptual concern with the principle is that its relationship with the rules for establishing jurisdiction is incoherent. The dynamic of first establishing a broad jurisdiction, and then of declining it as a *forum non conveniens*, makes less sense than trying to craft rules for establishing jurisdiction that approximate the idea of a *forum conveniens* in the first place (pp 123–04).

---

<sup>3</sup> I believe there is still an argument that this rule could be constitutionally invalid: Mortensen (2006), pp 67–70.

<sup>4</sup> *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.

<sup>5</sup> *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 565.

Probably the most illuminating chapter in *Jurisdiction in International Litigation* is Chapter 5, which looks at what Australian courts actually do when confronted with an application to decline jurisdiction on the ground of *forum non conveniens*. Here, Keyes' analysis focuses exclusively on cases decided in Australian superior courts after *Voth* was handed down (pp 149–52). The sampling left 99 cases, a number significant enough for Keyes to have secured a general overview of how courts are using the limiting principles of *Voth* (as insignificant as they appear as doctrine) to restrain their jurisdictional overreach. Incoherent as the Australian law of declining jurisdiction is (pp 122–23), the empirical analysis proves that its effect is a highly exorbitant, parochial and plaintiff-oriented approach to the exercise of jurisdiction. Most revealing in this connection are the outcomes of cases classified according to whether there is a jurisdiction clause proroguing jurisdiction, a jurisdiction clause derogating jurisdiction, or no jurisdiction clause whatsoever. While Keyes is cautious about the interpretation of the data (p 162), the outcomes fall as we would expect. *Forum non conveniens* applications fail in *all* cases where there is a contractual prorogation of jurisdiction, in 77.5 per cent of cases where there was no jurisdiction clause involved, and in 45.8 per cent of cases where there is a contractual derogation from local jurisdiction (pp 162–75). These outcomes are also usefully analysed by reference to other variables: the location of evidence, governing law, different characteristics of the parties, whether a legitimate advantage is available if proceeding in the local court, and the availability of an alternative overseas court for the litigation. However, the large disparity evident in a comparison of the plain outcomes of cases involving prorogation and derogation clauses is enough to show the parochialism of Australian courts. As Keyes concludes: 'The rationales for enforcing foreign and local jurisdictional agreements are identical, and so they should be treated identically.' (p 168) She has proved that this is not happening, which raises a serious question about the practical impartiality of Australian courts when dealing with jurisdiction clauses in international litigation. And further proof of the reward Australian courts give to forum shoppers is provided by statistics that show that, despite the extreme exorbitance of the 'damage suffered in the state' ground of establishing jurisdiction, it is never constrained by the plea of *forum non conveniens* in personal injuries cases. Since *Voth*, the plea has simply never been accepted in a personal injuries case (pp 173, 188–89).

The chapter itself suggests paths for further empirical inquiry. A breakdown of the outcomes where a court was considering an exclusive or non-exclusive jurisdiction clause is one. The bare results relating to *forum non conveniens* applications are certainly nothing of which our courts can be proud. In 45.8 per cent of cases involving a derogation clause, an Australian court denies it any effect. But it is not entirely clear how deeply embarrassing this figure is until we know what proportion of those derogation clauses involved a submission to the *exclusive* jurisdiction of the foreign court. The figure of 45.8 per cent would tentatively suggest that some do. That naturally means an Australian court is holding proceedings against the terms of a jurisdiction clause, endorsing (and maybe rewarding) a breach of contract, and

possibly exposing the plaintiff to a claim in the foreign court for damages flowing from that breach — namely the financial advantage to the plaintiff of the forum shopping. Another line of inquiry might be to raise similar data on the practice of establishing jurisdiction. Even though plaintiffs are supposed to establish that the court is a *forum conveniens* when they need leave to serve process outside Australia or to proceed in the absence of a defendant's appearance, this only accounts for 5 per cent of cases involving a question of declining jurisdiction (p 151). Keyes cannot take this any further, but the suspicion must be that, in plaintiffs' applications for leave, courts either overlook the requirement of proving *forum conveniens*, or give it nothing more than a cursory glance. There is no space in the current edition of *Jurisdiction in International Litigation* for an extension of the analysis in this way, but a comparable account of the courts' practices in assuming jurisdiction would be a worthwhile addition to a larger work.

The theoretical evaluation of the law draws on the methods of governmental interest analysis. This is a school of critical inquiry that has been associated with approaches to choice of law in the United States,<sup>6</sup> and which Keyes has herself used in evaluating Australian choice of law rules.<sup>7</sup> The use of interest analysis for a critique of international jurisdiction is therefore relatively novel, but sensible (pp 15–17). The interests of the forum state, foreign states and individual litigants are considered. Although the purpose of the interest analysis in *Jurisdiction in International Litigation* is to evaluate the law as it has been given to us, Keyes' sifting of the case law also draws out the occasional references made in the judgments to the different interests that judges think are in play in a given contest over jurisdiction, as well as the interests that are protected by the law as it stands. For instance, Australian judges are notorious for expressing an abhorrence for forum shopping,<sup>8</sup> but the rules that the judges have themselves made have progressively enlarged opportunities for the practice. Judicial claims about the undesirability of forum shopping are therefore no real reflection of the actual forum state interests embodied in the law (pp 27–29, 212) — and frankly, it is preposterous that judges even think they can credibly voice these claims.

Keyes recognises the tensions that can exist between these interests, and that some uneasy balancing of interests will have to take place. Still, what is most revealing in her analysis is the lack of consideration given in Australian law to a foreign state's interests in the location of international litigation (pp 182–96). Following that, Keyes would prefer to see jurisdiction assumed by a local court only when 'the [Australian] state has a strong interest in making the courts available' (p 223). Her proposals for reform (which draw on international developments) circle around that idea (pp 253–72). As in any suggestion for reform, there could be quibbles about some of the details of these proposals. I, for one, do not think that, for the 'damage suffered in the state' ground of jurisdiction, adding a requirement that the plaintiff be

---

<sup>6</sup> Currie (1963).

<sup>7</sup> See Whincop and Keyes (2001), esp pp 13–16.

<sup>8</sup> Juenger (1994).

ordinarily resident in the state is more likely to guarantee a strong state interest in holding on to the litigation (p 263). Many of these cases merely collect connections with the state that are already by-products of the plaintiff's residence. However, in general the proposals for reform are modest and practicable. Keyes' central idea of bringing the grounds for establishing jurisdiction back to the point where they parallel a broader idea of *forum non conveniens* would not only give better effect to the legitimate interests of foreign states in international litigation; it would also be likely, in the first place, to minimise litigation over the courts' jurisdiction and improve the international enforceability of Australian judgments (pp 254–55). These are valuable parameters for reform of the field.

No doubt there are other areas of Australian law where there is also an obvious incongruence between stated judicial policy and practice. In the law of international jurisdiction, however, the gap between what judges say, and what they have done, could not be wider. *Jurisdiction in International Litigation* is the best and most thorough account of what judges say, and what they do, when holding or releasing cases with an international element — and of that disjunction of rhetoric and practice. Reform belongs mainly with the judges themselves. Although the courts say that reform is for parliament (p 121) and parliament has said it is for the courts (p 89), the judges are the ones who made the rules for establishing and declining jurisdiction. Even where the rules of general civil jurisdiction are in legislation, it is usually legislation — the rules of court — made by judges (p 252). Proposals for family jurisdiction do require amendment of the *Family Law Act* (pp 266–67), but this is one of the few areas for which the judges could legitimately duck responsibility.

*Jurisdiction in International Litigation* should be useful to all who need to know the detail of the law of jurisdiction, including litigators who also need to give accurate predictions as to what courts will do with pleas of *forum non conveniens*. I do hope there will also be later and larger editions of the book, as the need for close doctrinal analysis of this important field is only growing. But, above all, this book should be read, marked and digested by the judges of the High Court of Australia, who are best placed to get us out of the embarrassing mess that Dr Keyes has proved the Australian law of international jurisdiction to be.

### References

- Zelman Cowen (1959) *Federal Jurisdiction in Australia*, Oxford University Press.  
Brainerd Currie (1963) *Selected Essays in the Conflict of Laws*, Duke University Press.  
Friedrich K Juenger (1994) 'What's Wrong with Forum Shopping' 16 *Sydney Law Review* 5.  
Mary Keyes (2004) A Critical Analysis of Jurisdiction in International Litigation, unpublished PhD thesis, Griffith University, Brisbane.  
Reid Mortensen (2006) *Private International Law in Australia*, LexisNexis.  
Michael Whincop and Mary Keyes (2001) *Policy and Pragmatism in the Conflict of Laws* Ashgate.  
Leslie Zines (2002) *Cowen and Zines' Federal Jurisdiction in Australia*, 3<sup>rd</sup> ed, Federation.

— REID MORTENSEN