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Question 4

What are your views on the jurisdictional bases for recognition and enforcement? Do any of the currently proposed bases cause concern?

Article 5 of the Draft Convention sets up the jurisdictional bases for recognition and enforcement. Namely, if the judgment-rendering court does not exercise jurisdiction according to Article 5, the consequent judgment will not be recognized and enforced according to the Convention. However, a

comparative study shows that Australian direct jurisdiction rules under common law and statutes are not aligned with Article 5 in the following six important aspects.

1. Jurisdiction and service

In terms of structure, Article 5 of the Hague Draft Convention is heavily impacted by the European civil law for personal jurisdiction. In the civil-law tradition, jurisdiction and service of process are two separated issues. A court should determine whether it has jurisdiction first and, if the answer is positive, the court proceeds to serve the defendant. However, in common-law countries like Australia, jurisdiction and service of process are integrated. Under Australian common law, except that a defendant submits to the jurisdiction of the court, the court should consider whether the defendant is present in the forum so service within the forum is possible. If a court can serve the defendant with the initiating process, the court can exercise jurisdiction on this defendant. As *Laurie v Carroll* established, at the issue of the writ, the defendant ‘may be regarded as falling under the command of the writ as an exercise of jurisdiction’, it was the service of the writ which perfected the defendant’s duty to obey its command to appear before the court. If a defendant neither presents in the forum nor submits to its jurisdiction, Australian court considers whether it can exercise extraterritorial jurisdiction by granting leave to serve a defendant outside of the forum according to statutes such as the Service and Execution of Process Act 1992(Cth). However, Article 5 of the Draft Convention completely excludes service out of the consideration of jurisdiction. This is sharply different from the current structure of Australian law for personal jurisdiction.

Besides the structural conflict, a specific consequence of separating jurisdiction and service is that Australian judgments based on tag jurisdiction are not recognizable and enforceable under the Draft Convention. In Australia, it does not matter that the defendant’s presence in the forum is temporary.¹ Even if the defendant is merely in transit through the forum, if served with an initiating process, the forum has jurisdiction.² This is the so-called tag jurisdiction. For example, in *Evers v Firth*,³ both parties were Queensland residents and the plaintiff was injured in a motor accident there. Queensland imposed a three-year period statute of limitations, which barred the action. The solicitors for the plaintiff persuaded the defendant who was insured by the Queensland State Government Insurance Office to cross the border into NSW solely for the

¹ *Colt Industries Inc v Sarlie* [1996] 1 All ER 673; *Maharane Baroda v Wildenstein* [1972] 2 QB 283; *Mobil Oil Australia Pty Ltd v State of Victoria* (2002) 211 CLR 1 at 23, 36; [2002] HCA 27.

² *Grace v Macarthur*, 170 F Supp 442 (1959).

³ (1987) 10 NSWLR 22.

purpose of being served with a NSW writ. The NSW statute of limitations was six years which had not yet expired. The NSW Court of Appeal held that this was sufficient to attract jurisdiction. Under tag jurisdiction, as long as the defendant has been served in the jurisdiction, it is immaterial that the dispute has no connection with the forum.⁴ Although *Evers* is an inter-state case, its holding applies to cases involving foreign defendants. The Draft Convention separates jurisdiction and service. If its current structure is ultimately adopted and accepted by Australian delegation to the Hague Conference, tag jurisdiction, which has a long tradition in Australia, will be significantly challenged. The consequent judgments cannot be recognized and enforced according to the Convention.

2. ‘Habitual residence’ in Article 5.1(a)

Following English tradition, Australia law generally uses ‘domicile’ and ‘ordinary residence’ to determine personal jurisdiction on a natural person in non-family matters. Domicile refer to a place that has the most significant mental and physical connection with a person. Three types of domicile exist: domicile of origin, domicile of dependence, and domicile of choice. Among them domicile of choice is often the most relevant to commercial cases. Before 1 July 1982, common law was applied to determine a person’s jurisdiction. Under common law, to establish a domicile of choice, a person should reside in a place with an intention to reside indefinitely. After 1 July 1982, domicile should be determined according to the Domicile Act, which provides that a person who is domiciled in a union but not in any one of the countries that together form part of the union is deemed to be domiciled in that country with which the person has for the time being the closest connection. In the modern world, people are often on the go rather than stay in one place indefinitely. Therefore, the concept of ‘ordinary residence’ is invented. It refers to a person’s abode in a particular place which he had adopted voluntarily and for settled purposes as a part of the regular order of his life for the time being, whether of short or of long duration.

In the field of family law, the Hague Child Abduction Convention and the Hague Child Protection Convention and relevant Australian municipal law use ‘habitual residence’. However, the proposed Hague Judgment Convention does not apply to family matters.⁵ Australian law is unsettled regarding whether ordinary residence is synonymous with habitual residence. In the UK,

⁴ *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 518; 172 ALR 625 at 630, at [14] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.

⁵ Art. 2.1.(b)(c)(d) of the Hague Draft Convention.

the two concepts are considered the same.⁶ The High Court of Australia also seemed to assume they are synonymous.⁷ Nevertheless, according to other adjudication, these two concepts are different. For example, *Cruse v Chittum* held that habitual residence requires a longer period of residence than ordinary residence does.⁸ *Re J (A Minor) (Abduction)* requires an ‘appreciable’ period of residence so as to be considered ‘habitual’.⁹ *Re J (A Minor) (Abduction)* also shows that it is legally possible for a person not to have an habitual residence at all.¹⁰ But the development of the concept of ‘habitual residence’ is mainly in family law contexts, how it plays out in commercial and other civil areas is unclear.

Article 5.1 (a) of the Draft Convention allows a court to exercise jurisdiction if a judgment debtor’s ‘habitual residence’ is in the forum. Considering the criticisms of domicile, it is unsurprising that the Draft Convention abandons this concept. The Convention leaves the meaning of ‘habitual residence’ to be determined by domestic laws of the judgment-rendering state. However, in Australia, ordinary residence is more widely used in commercial cases than habitual residence. Reconcile their meaning is necessary.

Moreover, ACT and Qld allow service outside of Australia when either party’s residence or place of business are in the forum.¹¹ Consequently, a judgment may be issued and the only base for a court to exercise jurisdiction is that the judgment creditor resides in the forum. Such judgment will not be recognizable and enforceable under the Convention since Article 5.1(a) requires a judgment debtor habitually resides in the forum.

3. ‘[A]t the time that person became a party to the proceedings in the court of origin’ in Article 5.1(a) and (b)

In Article 5.1(a) and (b) of the Draft Convention, the critical time for a court to determine whether it has jurisdiction is ‘at the time that person became a party to the proceedings in the court of origin’. However, in Australia law for personal jurisdiction, the critical time is ‘when initiating process was issued’. Initiating a claim includes the plaintiff prepares a writ, application, claim, originating summons, motion or petition, etc, files these documents and checked in the court

⁶ *Mark v Mark* [2005] 3 All ER 912 at 925.

⁷ *LK V Director-General, Dept of Community Services*, (2009) 237 CLR 582 at 596-8; [2009] HCA 9.

⁸ [1974] 2 All ER 940 at 942-3.

⁹ [1990] 2 AC 562 at 578.

¹⁰ [1990] 2 AC 562.

¹¹ ACT r 6501(1)(g)(ii); Qld r 124 (1)(g)(ii).

registry. When the court registry dates and stamps the documents, the initiating process is issued. Then the plaintiff must arrange for the initiating process to be ‘served’ on the defendant. When the defendant is served, the jurisdiction is established.

The Draft Convention does not define the meaning of ‘at the time that person became a party to the proceedings in the court of origin.’ If this phrase is understood as ‘when the initiating process is issued’ and ‘defendant is served with the process’, the court cannot exercise jurisdiction on a person who left the forum after initiating process was issued and who either knew that process had been issued or who left to evade service of process. However, established case law such as *Laurie v Carroll*¹² and the subsequent *Joye v Sheahan*¹³ hold that Australian court has jurisdiction and can order substituted service on the defendant in this circumstance. Therefore, in Australian contexts, ‘at the time that person became a party to the proceedings in the court of origin’ should be equivalent to ‘when the initiating process is issued’.

4. ‘[A] purposeful and substantial connection’ in Article 5.1(g)

In the Draft Convention, a judgment ruled on a contractual obligation must satisfy that the defendant's activities in relation to the transaction clearly constitute a purposeful and substantial connection to that State. There is no equivalent requirement of ‘purposeful and substantial connection’ in Australian law. Australian courts can order service outside the country, when a contract is made in the forum, the contract governed by the law of the forum, or breach of contract occurred in the forum.¹⁴ It is also unclear what can constitute purposeful and substantial connection under the Convention.

5. Harm in Article 5(1)(j)

Article 5(1)(j) of the Draft Convention applies to the judgment on tort and the act or omission directly causing such harm occurred in the state of origin. The provision explicitly prohibits a court in the place where the harm occurred to exercise jurisdiction. In contrast, Australian law allows courts to serve out when the forum is the place where the harm occurred. For example, In *Dow Jones & Co Inc*

¹² *Laurie v Carroll*, (1958) 98 CLR 310.

¹³ *Joye v Sheahan* (1996) 62 FCR 417 at 421.

¹⁴ FCt r 10.42, item 3 (c) ; ACT r 6501(1)(g)(iv); NSW Sch 6, (c)(iii); NT r 7.01 (1)(f)(iii); Qld r 124(1)(g)(iv); SA r 40(1)(d)(iii); Tas r 147 A(1)(h)(iii); Vic r 7.01(1)(f)(iii); WA O 10 r 1(1)(e)(iii).

v Gutnick, J Kirby held that defamation is to be located at the place where the damage to reputation occurs.¹⁵ Moreover, except West Australia, service out is permitted if the proceeding is ‘founded on’ or ‘in respect of harm suffered wholly or in part’ in the forum and ‘caused by a tortious act or omission wherever occurring’.¹⁶ It applies to any compensable harm caused by the tort, including medical expenses, diminish of earning capacity and other economic losses in the forum.¹⁷ The harm can even occur partly inside Australia and partly outside. The plaintiff is allowed to claim for recovery of global damage.¹⁸ This jurisdiction ground sharply contradicts with Art. 5(1)(j).

Allowing Australian courts to exercise personal jurisdiction on a foreign defendant has special significance to protect Australian victims for online tort. As Professor Mortensen argues that ‘especially given the dominance within the internet of American servers, those connections that focus on the defendant’s place of acting, or the place of uploading, would lead to the import of American standards of defamatory conduct.’¹⁹

6. Foreign immovable property in Article 5(1)(h) and Article 6(2)(3)

The Draft Convention restrains Australian courts to exercise jurisdiction on a foreign land. Article 5(1)(h) of the Draft Convention provides that, if the judgment ruled on a tenancy of immovable property, it should be given in the State in which the property is situated. The court in the place where an immovable property is located has exclusive jurisdiction on rights in rem in the property and a tenancy of the property for a period of more than six months.²⁰

Traditional Australian law for jurisdiction on foreign land follows the English case *British South Africa Co v Companhia de Mocambique*.²¹ This case establishes the so-called Mocambique rule: a court will not exercise jurisdiction in respect of the title to, or possession of, land situated abroad; and the court will not entertain an action for trespass to foreign land and even if the plaintiff’s title is not in issue. The Mocambique rule aligns with the Draft Convention. However, NSW has abolished the Mocambique rule. The Jurisdiction of Courts (Foreign Land) Act 1989 (NSW) provides that ‘the

¹⁵ (2002) 210 CLR 575; [2002] HCA 56 at 622.

¹⁶ FCt r 10.42, item 5; ACT r 6501(1)(1); NSW Sch 6, (e); NT r 7.01 (1)(k); Qld r 124 (1)(i); SA r 40 (1)(f)(ii); Tas r 147 A(1)(d); Vic r 7.01(1)(j).

¹⁷ *Sigma Coachair Group Pty Ltd v Bock Australia Pty Ltd* [2009] NSWSC 684 at [124]; *Flaherty v Girgis* (1987) 162 CLR 574.

¹⁸ *Flaherty v Girgis* (1985) 4 NSWLR 248 at 266-7.

¹⁹ Reid Mortensen, Richard Garnett and Mary Keyes, *Private International Law in Australia* (3rd edn, LexisNexis Butterworths 2015) 60.

²⁰ Art. 6 (b)(c) of the Draft Hague Convention.

²¹ [1893] AC 602.

jurisdiction of any court is not excluded or limited merely because the proceedings relate to, or may otherwise concern, land or immovable property situated outside NSW.’ Even in states and territories that still keep the Mocambique rule, courts are allowed to exercise jurisdiction on a foreign land in exceptional scenarios. For example, the courts of equity can exercise jurisdiction *in personam* in relation to foreign land against persons present within the forum in cases of contract, fraud and trust. Australian law does not distinguish tenancies more than six months from other tenancies, and allow courts to entertain an action to enforce the personal covenant to pay rent on a lease of foreign land.²² Therefore, courts not situated in the place where an immovable property is located can rule on the tenancy even if it is more than six months. Another exception to the Mocambique rule is that when a court exercises the undoubted jurisdiction, it is allowed to incidentally to investigate and determine the title for foreign lands if this determination is necessary for adjudication.²³ This exception goes beyond the exclusive jurisdiction under Article 6(2) of the Draft Convention.

7. Conclusion

The Draft Convention, if negotiated successfully and signed globally, can enable free circulation of Australian judgments around the world. However, many of its current jurisdiction bases for recognition and enforcement conflict with Australian law. Consequently, not all judgments rendered by Australian courts can benefit from this Convention. The current structure of Article 5 is dominated by the European civil law and improperly ignores the long tradition in Australia that service of process is integrated with jurisdiction. Although tag jurisdiction and jurisdiction based on the plaintiff’s domicile have been criticized as excessive by many academics, Australian legislatures and courts may not abandon these jurisdiction ground merely because the consequent judgments cannot be recognized and enforced according to the Draft Convention.

Question 5

What are your views on the grounds for refusing recognition or enforcement? Do any of the currently proposed grounds cause concern?

1. Defenses of Undue Process

²² *St Pierre v South American Stores Ltd* [1936] 1 KB 382.

²³ *Nudd v Taylor*, [2000] QSC 344.

Article 7 of the Draft Convention provides discretionary grounds for refusing recognition or enforcement. Article 7(1)(a)(i)(ii) and (c) address judgment tainted by undue process. Article 7(1)(a)(i) and (ii) are for undue service of document instituting the proceedings. Article 7(1)(a)(i) focuses on the situation that a defendant was not notified in sufficient time and in such a way as to enable him to arrange for this defence. Article 7(1)(a)(ii) has a broader scope dealing with any defectiveness related to undue notice. Among the three provisions, Article 7(1)(c) has the broadest scope covering any procedural issues that are manifestly incompatible with the public policy of the requested state. Article 7(1)(a)(ii) can be invoked only if the defendant is in the requested state, while Article 7(1)(a)(i) and (c) can be invoked by any defendants. Moreover, Articles 7(1)(a)(ii) and (c) explicitly allow the requested court to apply its own law to determine whether undue process exists. Article 7(1)(a)(i) provides that recognition and enforcement may be refused if the document instituting the proceedings was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defense, except that the defendant entered an appearance and presented his case without contesting the service, *provided that the law of the judgment-rendering state permitted notification to be contested*. It does not explicitly indicate the law of the judgment-rendering state should be applied to determine whether the service is proper, but impliedly such law should be applied. The major benefit of these provisions is to avoid the requested state to impose its standards of due process on foreign judgment-rendering courts, and meanwhile the requested state can be ensured to only recognize and enforce foreign judgments that do not violate its procedural natural justice.

However, Australian law takes a lightly different approach. Under Australian common law, Australian courts can reject the recognition and enforcement of a foreign judgment where no notice of proceedings was given to the judgment debtor, being the defendant in the foreign proceedings, even if the foreign law allows the judgment-rendering court to do so.²⁴ Moreover, *Adams v Cape Industries plc* held that even if the judgment-rendering proceeding was notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence, the recognition and enforcement of the judgment may still be rejected for a denial of natural justice, if the defendant is not properly advised of the consequences of a failure to appear.²⁵ Notably, *Adams* is not limited to the defendant who is in Australia at the time of service. Furthermore, Article 7(2)(v) of the Foreign Judgments Act 1991 (Cth) allows requested courts to apply Australian law to determine whether the default

²⁴ *Buchanan v Rucker* (1808) 9 East 192; 103 ER 546. This rule can be qualified when the judgment debtor voluntarily submitted to the jurisdiction of the judgment-rendering court and at the time of submission, he is aware that the law of the judgment-rendering court does not require notice.

²⁵ [1990] Ch 433 at 564-6.

defendant has received notice of the original proceedings in sufficient time to defend the proceedings. The Act explicitly provides it does not matter ‘whether or not process had been duly served on the judgment debtor in accordance with the law of the country of the original court’.²⁶

Therefore, compared with the Draft Convention, Australian law is more flexible and leave more discretion to the courts to determine due process issues.

2. Unclear Wordings in Article 7

Several wordings of Article 7 are so unclear and may probably lead to important confusions if the Draft Convention is adopted and implemented.

First, Article 7(1)(a)(ii) is specially designed for ‘the defendant in the requested State’. Article 7(1)(a)(ii) does not require the defendant should be habitually in the requested state or should remain in the requested state during the whole judgment-rendering proceeding. Literally, it means that the defendant is physically in the requested state when the service was conducted, even if the defendant is a foreigner and temporarily passes the requested state. It is doubtful why the Draft Convention disallows a requested state to apply Article 7(1)(a)(ii) to defendants who habitually/ordinarily reside or domicile in its territory but happen to be abroad at the time of service. It leads to an ironic situation that Australia has to recognize and enforce a foreign judgment against Australian residents who happen to be abroad at the time of service, when the foreign service of process is against Australian fundamental principles concerning service of documents. Moreover, if the defendant is a corporation, it is unclear how to determine a corporation is ‘in the requested State’. Does it require the corporation is *present* in the requested state according to the Australian common law for jurisdiction? Or does a foreign corporation, which operates a website that does not target the Australian market but is accessible to Australian consumers, is *in* Australia? These important questions are improperly left unanswered in the Draft Convention.

Second, Article 7(1)(a)(ii) of the Draft Convention is for service of documents that is ‘incompatible with fundamental principles of procedural fairness of the requested State’. Article 7(1)(c) is under the head of public policy but includes ‘situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State’. The question is whether Article 7(1)(c) requires the procedural unfairness to meet the high threshold of public policy.

²⁶ Article 7(2)(v) of the Foreign Judgments Act 1991 (Cth).

In Australian private international law, the defence that the foreign judgment is contrary to public policy is usually separated from that the foreign court acted contrary to natural justice. This is because, under Australian law, ‘the extent to which the enforcement of a foreign judgment is contrary to public policy must be of a high order to establish a defence’.²⁷ Public policy should refer to ‘the essential principles of justice and morality’.²⁸ Therefore, not every issue of procedural fairness is manifestly against Australian public policy. However, under the Draft Convention, defendants who are not in Australia at the time of service have to rely on Article 7(1)(c) for undue process other than service. If Article 7(1)(c) require undue process must meet the high threshold of public policy, judgment debtors will have a high burden of proof.

Third, Article 7(2) of the Draft Convention provides that recognition and enforcement may be postponed or refused if proceedings between the same parties on the same subject matter are pending before a court of the requested state, where the court of the requested state was seised before the judgment-rendering court and there is ‘*a close connection*’ between the dispute and the requested state. Notably, Article 5(1)(g) addresses jurisdiction on contractual disputes and requires that the defendant’s activities in relation to the contractual transaction should clearly constitute ‘*a purposeful and substantial connection*’ to the judgment-rendering state. Article 5(3)(a)(b) provides jurisdictional safeguards to IP infringement judgments and uses ‘*target*’ to describe the relationship between a defendant’s activity and the judgment-rendering state. The Draft Convention provides none definitions to these concepts, which may lead inconsistent practices and confusions in member states. Compared with ‘*a purposeful and substantial connection*’ and ‘*target*’, ‘*a close connection*’ may tend to be more broadly and flexibly defined so as to give little guidance as to when a foreign judgment that has some connection with the judgment-rendering state is sufficiently close.

²⁷ *Federal Treasury Enterprise (FKP) Sojuzplodoimport v Spirits International BV (No. 3)*, [2013] FCA 85 at [44] per Edmonds J.

²⁸ *De Santis v Russo*, 27 Fam LR 414 at 420-1, at [22].

Question 9

Are the suggested discretionary safeguards in the draft convention adequate for intellectual property matters?

Whether judgments that ruled on an intellectual property right or an analogous right ('IP Judgments') should be included in the Draft Hague Convention is deeply debated. The author is of the view that IP Judgments should be included in the Convention but member states should be allowed to make reservations if they want to opt out of recognition and enforcement of these judgments. Regarding IP infringement, the Draft Convention requires that judgments of an IP right required to be granted or registered should be issued by a court in the state in which the grant or registration of the right concerned has or is deemed to have taken place, and judgments of an unregistered IP right should be rendered by a court in the state for which protection was claimed.²⁹ Article 5(3)(a)-(b) of the Draft Convention provides two safeguards for defendants. The first is that the defendant did not act in the judgment-rendering state to initiate or further the infringement; or second, the defendant's activity cannot reasonably be seen as having been targeted at that state.

In Australian contexts, *Ward Group Pty Ltd v Brodie & Stone Plc*³⁰ well demonstrates the importance of the two safeguards for foreign defendants. In this case, an Australian plaintiff claimed declarations and injunctions for trade mark infringement and passing off against the UK defendants. The court dismissed the suit because the advertising on the UK defendants' global websites targeted potential purchasers anywhere in the world at large, rather than specially targeted or directed at customers in Australia. The court reached this conclusion not only because the UK defendants subjectively did not target the Australian market, but also objectively, no evidence showed that the defendants had ever sold any products infringing the plaintiff's trademark in Australia, and the case was solely based on a trap purchase conducted by the plaintiff's solicitor. This means the UK defendants did not use this trademark in Australia except in the trap purchase. The court held that the trap purchase demonstrated that the plaintiff consented to that particular sale in Australia. *Ward Group Pty Ltd* shows the potential causation between the two discretionary safeguards: because the UK defendants did not target the Australian market and no sale had been made in Australia except the trap purchase (the second

²⁹ Article 5(3)(a)-(b) of the Draft Convention.

³⁰ (2005) 143 FCR 479.

safeguard), the UK defendants did not use the Australian plaintiff's trademark in Australia (the first safeguard).

In the Draft Convention, it is still undecided whether these two safeguards should not compulsory or merely discretionary. They should be compulsory.

As for the first safeguard, in private international law, the place of the tort includes the place where the tort is committed and the place where the harm occurs. Article 5(1)(j) of the Draft Convention defines the place of act as the place where the tort is committed regardless of where the harm occurs. Therefore, the word 'act' in the first safeguard probably should be interpreted consistently with Article 5(1)(j). This means that the first safeguard requires, an IP infringement judgment cannot be recognized and enforced under the Draft Convention, if the judgment-rendering state is not the place where the infringement is committed.

Regarding the second safeguard, in Australian law, the place where a defendant target is usually the place where the harm of a tort occurs.

The Australian jurisprudence about online IP infringement can be traced back to defamation cases.³¹ The most important case is *Dow Jones & Company Inc. v. Gutnick*.³² Dow Jones, a U.S. company, published the Wall Street Journal newspaper and Barron's magazine and operated a subscription news site WSJ.com. Mr Gutnick contended that part of an article from Barron's magazine had defamed him. As Mr Gutnick lived in Victoria and much of his social and business life was there, he sued Dow Jones in the Supreme Court of Victoria, Australia. The key issue in this case was whether the defamatory article had been published in Victoria. Dow Jones had its editorial offices in New York City. Material for publication online would first be transferred from the author to a computer located in the editorial offices then to computers at Dow Jones' premises in South Brunswick, New Jersey where it was loaded onto six servers. Via these servers, subscribers could either browse *Barron's Online* or download the material to their computers.³³ Dow Jones argued that the article was published in New Jersey when it became available on the

³¹ For discussion of the development of personal jurisdiction rules in Australia, see Andrew Dickinson, 'The Future of Private International Law in Australia' (2012) Australian International Law Journal 1, 6–10. See also Martin Davies, Andrew Bell and Paul Le Gay Brereton, *Nygh's Conflict of Laws in Australia* (9th edn, LexisNexis Butterworths 2014) 83.

³² *Dow Jones & Company Inc. v. Gutnick*, [2002] HCA 56.

³³ Only five copies of the Barron's print edition were circulated in Australia. The Internet version of the magazine had 550,000 international subscribers and 1,700 Australian-based credit cards.

servers there. Dow Jones submitted that the publisher of online material should be governed by the law of the place where it maintained its web servers, ‘unless that place was merely adventitious or opportunistic.’³⁴ Otherwise, the publisher may have to comply with the law of every country on earth as they have no control over who downloads the information from its web server. The High Court of Australia disagreed and held that material published online was not available in comprehensible form until downloaded on to the computer of a person who has used a web browser to pull the material from the web server. The place from which the harmful conduct is committed is where that person downloads the material.³⁵ Therefore, the Court concluded that the article was published in Victoria when downloaded by Dow Jones subscribers.

Dow Jones demonstrates the meaning of ‘target’ in Australian common law. The recent case, *Australian Competition and Consumer Commission v Valve Corporation (No 3)* addresses the meaning of ‘target’ in Australian statute (e.g. *Australian Competition and Consumer Act 2010* (Cth)). In this case, the Federal Court of Australia considered whether Valve, a U.S. company, targeted Australian consumers so Australian courts can exercise jurisdiction.³⁶ Valve was a U.S. company based in Washington and operated an online game distribution network known as Stream. It submitted that it did not engage in conduct in Australia, because it held no real estate in Australia and hosted its website outside Australia, the Stream content was not ‘pre-loaded or stored’ on Valve’s servers in Australia, its business premises and staff were all located outside Australia, etc.³⁷ Valve argued that its representations online were not targeted anyone in Australia. It relied on *Bray v. F Hoffman-La Roche Ltd*, where the Federal Court of Australia held that if an infringer directed his or her statement from one place to another place and knew or even anticipated that it would be received by the infringe, the statement was made at the place to which it is *targeted*.³⁸ The court in *Valve* disagreed because the ‘targeted’ element was developed to determine where a common law cause of action arose and should not be automatically transplanted when the relevant question is a different statutory (e.g. *Australian Competition and Consumer Act 2010* (Cth)) question.³⁹ This question is also quite different from the jurisdiction with the closest and most genuine connection to the consumers’ contract.⁴⁰ The court concludes that Valve supplied goods in Australia because although the online representations made by Valve

³⁴ *ibid*, at para 20.

³⁵ *ibid*, at para 44.

³⁶ *Australian Competition and Consumer Commission v Valve Corporation (No 3)*, [2016] FCA 196.

³⁷ *ibid*, para 162.

³⁸ *Bray v. F Hoffman-La Roche Ltd* (2002) 118 FCR 1; 190 ALR 1; [2002] FCA 243 at paras 145-46.

³⁹ *Australian Competition and Consumer Commission v Valve Corporation (No 3)*, para 169.

⁴⁰ *ibid*.

were directed to the world at large, when a Australian consumer purchased a game or downloaded Stream Client the consumer had a relationship with Valve and representations were made in Australia under *Australian Competition and Consumer Act*.⁴¹ Alternatively, Valve also carried on business within Australia under s 5(I)(g) of the *Australian Consumer Law*⁴² because: (1) Valve had approximately 2.2 million Australian accounts and earned significant revenue from Australia; (2) although it has no real property in Australia, it had servers in Australia with a retail value of \$1.2 million, which were initially configured by an employee who travelled to Australia, and Valve paid to an Australian company into its Australian bank account for equipment involving servers; (3) although the Stream content was not ‘pre-loaded or stored’ on Valve’s servers in Australia, it was ‘deposited’ on Valve’s three servers in Australia when requested by a subscriber and would stay on the server if it was requested again in a particular period of time; (4) Valve expends a lot in Australia for the rack space and power to its servers and those expenses were paid by Valve to the Australian bank account of an Australian company; (5) Valve relied on third-party content delivery providers in Australia to provide proxy caching for Valve in Australia; and (6) Valve contracted with third-party service providers to provide content online in Australia and other places in the world, and Valve knew that the providers had servers in Australia.⁴³ therefore, the court held that it could exercise jurisdiction because Valve targeted Australian consumers and Australia is the place where the harm of Valve’s fraudulent activities occur.

Similarly, in *Norbert Steinhardt & Son Ltd v Meth*, a letter containing the relevant threats was written in the U.S. and received in the UK, and the court found that the threats were made in the UK where the harm of the threats occurs.⁴⁴

The above case law demonstrates that in Australia, the second discretionary safeguard, ‘the defendant did not target the activity to that state’ means that the recognition and enforcement of an IP judgment should be rejected under the Draft Convention, if the judgment-rendering state is not the place where the harm occurred.

⁴¹ The court explains that “[t]purchase of a game also required a consumer to click on a box that agreed to the terms of the Steam Subscriber Agreement. The consumer provided Valve with his or her location as Australia at the time of purchase. Indeed, Valve priced some games differently in Australia...The consumer might be told by Valve that ‘This item is currently unavailable in your region’”. *ibid*, paras 181 and 188.

⁴² s 5(I)(g) of the Competition and Consumer Act and Australian Consumer Law provides that “[e]xtended application of this Act to conduct outside Australia... (I)(g) bodies corporate incorporated or carrying on business within Australia...” For Australian Competition and Consumer Act, see <<https://jade.io/article/224884/section/165>>; for Australian Consumer Law, see <<https://jade.io/article/224884/section/591>>.

⁴³ *Australian Competition and Consumer Commission v Valve Corporation (No 3)*, para 198-205.

⁴⁴ (1961) 105 CLR 440 at 442.

In conclusion, the two safeguards should serve as preconditions for an IP infringement judgment to be recognized and enforced under the Draft Convention. If the judgment-rendering court is not in the state where the infringement is committed or where the harm of the infringement occurs, the consequent judgment should not benefit from the recognition and enforcement system under the Convention. The two safeguards should be compulsory rather than discretionary. In this case, Article 5.1(j) should be reconciled with Article 5.3(a)(b). As discussed above, Article 5.1(j) improperly excludes judgments issued by a court in the state where the harm of a tort takes place. If the second safeguard in Article 5.3(a)(b) becomes compulsory, Article 5.1(j) should be revised by using ‘the harm occurred or the act or omission directly causing such harm occurred in the State of origin’ to replace ‘the act or omission directly causing such harm occurred in the State of origin, irrespective of where that harm occurred’.