dispute settlement between the EUSFTA parties fell within the exclusive competence of the EU (at [298]–[303]). The AG thought that the previous cases applied to both ISDS and the horizontal settlement of disputes, putting them under the exclusive competence of the EU so far as they concerned FDI (at [523]–[544]). While the AG's Opinion is more coherent, the conclusion of the CJEU on ISDS is preferable since both the EU and the Member States can be respondents in such cases and that the latter's consent is needed as basis for incurring international responsibility and for arbitration. The CJEU's reasoning, however, is less convincing. As the Court noted itself, the ISDS provisions constituted the consent of the respondent to the submission of investment claims against them. Since the principle of consent is fundamental to conferring jurisdiction on international dispute settlement bodies, this principle would have been the better reason for finding a shared competence for both ISDS and the inter-partes mechanism.

The CJEU's conclusion that the EUSFTA should be concluded as a mixed agreement will have a considerable impact on the content and the form of future FTAs concluded by the European Union. The EU will have to decide whether to go through the lengthy and uncertain process of FTAs being ratified by all Member States, which proved difficult in the case of the EU-Canada Comprehensive Economic and Trade Agreement. Alternatively, the EU could conclude separate investment agreements together with the Member States or adopt a hybrid approach, excluding portfolio investments and ISDS from its FTAs, and risking making them much less attractive to third states.

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LAWFUL-ACT DURESS AND MARITAL AGREEMENTS

IN *Thorne v Kennedy* [2017] HCA 49, the High Court of Australia was presented with an opportunity to consider the operation and intersection of undue influence, unconscionable conduct and duress in the context of marital agreements. Despite hopes that the Court would seize the chance to resolve an important open question in respect of duress, the decision was instead marked by an unhelpful caution, offering little guidance on the law's future development.

The appeal before the Court concerned a challenge to two marital agreements. Ms. Thorne and Mr. Kennedy, the (pseudonymously identified) parties to the impugned agreements, met over the Internet in 2006. Mr. Kennedy was, at the time the parties met, a successful property developer,

with assets in the order of AUD18 million to AUD24 million. Ms. Thorne, who was then living in the Middle East, had no substantial assets and only a limited grasp of English. Mr. Kennedy indicated to Ms. Thorne at the outset of their relationship that any marriage between them would require Ms. Thorne to "sign paper" (at [5]), explaining that he wished to preserve his assets for his children.

In February 2007, Ms. Thorne relocated to Australia to live with Mr. Kennedy. Her position, in the wake of the relocation, was precarious. Had she then separated from Mr. Kennedy, she would have had no means of supporting herself and no visa entitling her to remain in Australia. The parties planned to marry on 30 September 2007. On or around 19 September 2007, Mr. Kennedy told Ms. Thorne that they would shortly meet with a solicitor to discuss the signing of a marital agreement, and that, if Ms. Thorne declined to sign the agreement, the wedding would be called off.

By the time Ms. Thorne was presented with the draft agreement, virtually all of the arrangements for the wedding were already in place. It is unnecessary to set out the full detail of the agreement, except to note that it was, in the opinion of the solicitor retained to give independent advice to Ms. Thorne, the least generous agreement she had ever seen. Indeed, if the parties separated within three years of marriage, with or without children, Ms. Thorne would receive nothing. Separation after that date would, without children, entitle Ms. Thorne to a mere AUD50,000. Against the strong advice of her solicitor and after only minor amendments, Ms. Thorne signed the agreement. Shortly after the wedding, Mr. Kennedy and Ms. Thorne entered into a substitute post-marital agreement in substantially the same terms. The parties separated in 2011. Ms. Thorne thereafter instituted proceedings, seeking orders that the marital agreements be set aside.

Australian courts, like their English counterparts, have historically evinced an unwillingness to enforce private agreements that exclude the jurisdiction to make financial orders upon divorce. Despite this historical scepticism, Australia has enacted a special statutory scheme which governs such agreements and sets out the circumstances in which they will be binding. Under this scheme, a financial agreement, if concluded in compliance with a number of procedural and formal stipulations, will, subject to certain limited exceptions, exclude the court's power to make financial orders. A key provision for present purposes is Family Law Act 1975 (Cth), s. 90KA, which provides, inter alia, that "[t]he question whether a financial agreement … is valid, enforceable or effective is to be determined by the court according to the principles of law and equity that are applicable in determining the validity, enforceability and effect of contracts and purported contracts".

Ms. Thorne thus relied on undue influence, unconscionable conduct and duress in seeking to have the financial agreements set aside. In the High Court, the plurality (Kiefel C.J., Bell, Gageler, Keane and Edelman JJ.)

held that the agreements were liable to be set aside for both undue influence and unconscionable conduct. Nettle J., in a short concurring judgment, agreed that the agreements ought to be set aside for unconscionable conduct. Gordon J. also agreed that the agreements should be set aside for unconscionable conduct, but explicitly rejected the contention that the agreements had been procured by undue influence.

Although the Court's treatment of undue influence and unconscionable conduct is instructive for what it reveals about the two doctrines' commonalities and points of difference, there is little on these doctrines in the judgments that could be thought surprising or unexpected. Every member of the Court found, without any real difficulty, that Ms. Thorne was under a "special disability" in respect of which Mr. Kennedy took unconscionable advantage. This conclusion rested largely upon the finding by the primary judge that "Ms Thorne's circumstances led her to believe that she had no choice, and was powerless, to act in any way other than to sign the prenuptial agreement" (at [2]). The plurality also, in dealing with undue influence, set out a series of factors, such as the "the emotional circumstances in which the agreement was entered including any explicit or implicit threat to end a marriage or to end an engagement" (at [60]), which may be of particular relevance when considering marital financial agreements. This guidance will be of considerable assistance to lower courts.

It is in its treatment of duress that the decision in *Thorne v Kennedy* is problematic. The key outstanding question in Australian law on duress relates to the question of whether the scope of the doctrine at common law is limited to cases involving threatened conduct which is, or would be, independently unlawful. Although Australian law for a time adopted a broad view of the doctrine's ambit, a restrictive approach prevailed in the decision of the New South Wales Court of Appeal in *Australia and New Zealand Banking Group Ltd. v Karam* [2005] NSWCA 344, (2005) 64 N.S.W.L.R. 149. Although this decision has been followed in a line of later cases, there remain other intermediate appellate courts that cleave to the broader view.

It might have been hoped, in light of the divergence, that the Court would take the opportunity to offer guidance as to the proper approach. Yet the plurality, pointing to both a lack of full submissions and the want of a need to decide the point, carefully avoided offering any view as to *Karam*'s correctness. A rather different approach was taken by Nettle J., who observed that an acceptance of an appropriately circumscribed doctrine of lawful-act duress "would better accord with equitable principle, and better align with English and American authority" (at [71]), before declining to offer, in conclusion, any clear view in the absence of "detailed argument and deep consideration of the ramifications of departing from *Karam*" (at [73]).

Irrespective of one's view as to the merits of recognising lawful-act duress, it is difficult to find the approach taken by the Court wholly satisfactory.

There is certainly every reason for an appellate court to exercise caution in respect of questions answers to which are not necessary for deciding a case. Such caution must be weighed with the responsibility of an apex court to offer guidance on vexed questions where an opportunity to do so presents itself. Doing so well is no mean feat. Yet a strong case can be made that the plurality here erred too far on the side of caution. As explicitly noted by their Honours, the question in issue was one of great moment. It has divided Australian courts. It was open to the High Court to direct the parties to those points on which argument was thought to be necessary.

The approach of Nettle J. poses even greater difficulties, placing many lower courts in the invidious position of being bound to follow a decision the correctness of which has been the subject of strongly negative, although ultimately inconclusive, comment in the High Court.

In summary, *Thorne v Kennedy* failed to deliver the guidance for which many had hoped. Indeed, perhaps its greatest value lies in its highlighting of the strengths and weaknesses of the Australian approach to marital financial agreements. In permitting parties to oust the jurisdiction of the court entirely where an agreement is valid at general law and the statutory requirements are met, Australian law, on the one hand, has opted for a relatively certain and inflexible approach to marital agreements, where the focus is on the circumstances of an agreement's formation. English law, on the other hand, is more flexible. Under the approach expounded in *Radmacher v Granatino* [2010] UKSC 42, [2011] 1 A.C. 534, a court "should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement" (at [75]). Such an approach takes into account not only the process of the agreement's formation but also its substantive content and the needs and identities of the parties. Each approach permits marital agreements to be controlled for unfairness, though there are here two different conceptions of unfairness at work, corresponding to the well-known (though blurred) distinction between procedural and the substantive unfairness. Thus, although there can be little doubt that the result in *Thorne v Kennedy* would have been no different in England, it is well worth noting that, under English law, the inquiry would not have been limited to a technical analysis of the applicability of vitiating factors in general law. Whether the closely-bounded analysis required by the Australian scheme is an appropriate price to pay for the certainty it offers is a question upon which policy-makers ought to reflect with care.

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