Justice Andrew Bell opines on arbitration and choice of court agreements

By Michael Douglas and Mhairi Stewart

Andrew Bell is a leader of private international law in Australia. His scholarly work includes *Forum Shopping and Venue in Transnational Litigation* (Oxford Private International Law Series, 2003) and several editions of *Nygh’s Conflict of Laws in Australia* (see LexisNexis, 10th ed, 2019). As a leading silk, he was counsel on many of Australia’s leading private international law cases. In February 2019, his Honour was appointed President of the New South Wales Court of Appeal.

Recently, in *Inghams Enterprises Pty Ltd v Hannigan* [2020] NSWCA 82, his Honour provided a helpful exposition of the principles applicable to dispute resolution agreements, including arbitration and choice of court agreements. His Honour dissented from the majority of Justices of Appeal Meagher and Gleeson.

**Background**

Inghams Enterprises, the Australian poultry supplier, entered a contract with Gregory Hannigan by which Hannigan would raise and feed chickens provided by Inghams.

The contract was to continue until 2021 but in 2017 Inghams purported to terminate the contract for alleged breaches by Hannigan. Hannigan successfully sought a declaration that the contract had been wrongfully terminated; see *Francis Gregory Hannigan v Inghams Enterprises Pty Limited* [2019] NSWSC 321.
In May 2019 Hannigan issued a notice of dispute to Inghams seeking unliquidated damages for losses he incurred between 8 August 2017 and 17 June 2019 while the contract was wrongfully terminated. Following an unsuccessful mediation in August 2019, Hannigan considered that clause 23.6 of the contract—extracted below—entitled him to refer the dispute to arbitration.

Hannigan’s referral to arbitration was premised by a complex and tiered dispute resolution clause: clause 23. Compliance with clause 23 was a precondition to commencing court proceedings. The clause also contained a requirement to provide notice of a dispute; to use ‘best efforts’ to resolve the dispute in an initial period; and to then go to mediation. If mediation were unsuccessful, then the clause provided that certain disputes must be referred to arbitration. Relevantly, clause 23 included the following:

‘23.1 A party must not commence court proceedings in respect of a dispute arising out of this agreement ("Dispute"), including without limitation a dispute regarding any breach or purported breach of this agreement, interpretation of any of its provisions, any matters concerning of parties’ performance or observance of its obligations under this agreement, or the termination or the right of a party to terminate this agreement) until it has complied with this clause 23.’

‘23.6 If:

23.6.1 the dispute concerns any monetary amount payable and/or owed by either party to the other under this agreement, including without limitation, matters relating to determination, adjustment or renegotiation of the Fee under Annexure 1 under clauses 9.4, 10, 11, 12, 13 and 15.3.3 …

23.6.2 the parties fail to resolve the dispute in accordance with clause 23.4 within twenty eight (28) days of the appointment of the mediator
then the parties must (unless otherwise agreed) submit the dispute to arbitration using an external arbitrator (who must not be the same person as the mediator) agreed by the parties or, in the absence of agreement, appointed by the Institute Chairman.’ (Emphasis added.)

Inghams sought to restrain the referral to arbitration and failed at first instance; see *Inghams Enterprises Pty Ltd v Hannigan [2019] NSWSC 1186*.

Inghams sought leave to appeal. In hearing the question of leave together with the appeal, then granting leave, the two key issues for determination by the Court of Appeal were:

- Whether a claim for unliquidated damages could fall within the scope of the arbitration clause which required claims to be concerning monetary amounts ‘under this agreement’ (the construction issue); and
- Whether Hannigan had waived his entitlement to arbitrate by bringing the proceedings in 2017 (the waiver issue).

**The construction issue**

Meagher JA, with whom Gleeson JA agreed, determined Hannigan’s claim for unliquidated damages for breach of contract was not a claim ‘under’ the contract and therefore did not fall within the terms of the arbitration clause in clause 23.

The phrase ‘monetary amount payable and/or owed’ referred to a payment obligation by one party to another. Read with the phrase ‘under this agreement’, the clauses required that the contract must be the source of the payment obligation to invoke the requirement to arbitrate. A claim for unliquidated damages was beyond the scope of the clause.

The majority and Bell P thus disagreed on whether an assessment for unliquidated damages for breach of contract is ‘governed or controlled’ by a contract because the common law
quantum of damages considers the benefits which would have been received under the contract. The majority found that liquidated damages are a right of recovery created by the contract itself and occur as a result of a breach; unliquidated damages for a breach are compensation determined by the Court.

Bell P included provided a detailed discussion of the interpretation of dispute resolution clauses and considered the orthodox process of construction is to be applied to the construction of dispute resolution clauses. That discussion is extracted below. Bell P’s liberal approach was not followed by the majority.

The waiver issue

The Court found that Hannigan did not unequivocally abandon his right to utilise the arbitration clause by initiating the breach of contract proceedings against Inghams for the following reasons:

1. Hannigan did not abandon his right to arbitration by failing to bring a damages claim in the 2017 proceedings.
2. In 2017 Hannigan enforced his rights under clause 23.11 by seeking declaratory relief.
3. The contract explicitly required that waiver of rights be waived by written notice.
4. The bringing of proceedings did not constitute a written agreement not to bring a damages claim to arbitration.

It was noted that if Hannigan had sought damages in 2017 then Ingham’s waiver argument may have had some force.

President Bell’s dicta on dispute
resolution clauses

In his dissenting reasons, Bell P provided the following gift to private international law teachers and anyone trying to understand dispute resolution clauses:

Dispute resolution clauses may be crafted and drafted in an almost infinite variety of ways and styles. The range and diversity of such clauses may be seen in the non-exhaustive digest of dispute resolution clauses considered by Australian courts over the last thirty years, which is appended to these reasons. [The Appendix, below, sets out a table of example clauses drawn from leading cases.]

Dispute resolution clauses may be short form or far more elaborate, as illustrated by the cases referred to in the Appendix. They may be expressed as service of suit clauses… They may provide for arbitration… They may be standard form… They may be bespoke… They may be asymmetric… They may and often will be coupled with choice of law clauses… They may be multi-tiered, providing first for a process of mediation, whether informal or formal, or informal and then formal, before providing for arbitral or judicial dispute resolution…

Dispute resolution clauses are just as capable of generating litigation as any other contractual clause, and the law reports are replete with cases concerned with the construction of such clauses. The cases referred to in the Appendix supply a sample.

Such clauses have also spawned specialist texts and monographs…

The question raised by this appeal is purely one of construction. It is accordingly desirable to begin by identifying the principles applicable to the construction of a dispute resolution clause. …
It has been rightly observed that “the starting point is that the clause should be construed, just as any other contract term should be construed, to seek to discover what the parties actually wanted and intended to agree to”…

In short, the orthodox process of construction is to be followed…

In the context of dispute resolution clauses, whether they be arbitration or exclusive jurisdiction clauses, much authority can be found in support of affording such clauses a broad and liberal construction…

In Australia, unlike other jurisdictions, the process of contractual construction of dispute resolution clauses has not been overlaid by presumptions cf [some other jurisdictions]. Thus, in [Rinehart v Welker (2012) 95 NSWLR 221] at [122], Bathurst CJ, although not eschewing the liberal approach that had been adumbrated in both Francis Travel and Comandate to the construction of arbitration clauses, rejected the adoption of a presumption … the presumption was that the court should, in the construction of arbitration clauses, “start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal”, and that the clause should be construed in accordance with that presumption, “unless the language makes it clear that certain questions were intended to be excluded from the arbitrator’s jurisdiction…”

In [Rinehart v Hancock Prospecting Pty Ltd (2019) 93 ALJR 582], the plurality indicated that the appeals could be resolved with the application of orthodox principles of construction, which required consideration of the context and purpose of the Deeds there under consideration… In his separate judgment, Edelman J described as a “usual consideration of context” the fact that “reasonable persons in
the position of the parties would wish to minimise the fragmentation across different tribunals of their future disputes by establishing ‘one-stop adjudication’ as far as possible”… This may have been to treat the considerations underpinning [leading] cases… as stating a commercially commonsensical assumption…

The proper contemporary approach was eloquently articulated in the following passage in [Hancock Prospecting Pty Ltd v Rinehart (2017) 257 FCR 442] (at [167]) which I would endorse:

“The existence of a ‘correct general approach to problems of this kind’ does not imply some legal rule outside the orthodox process of construction; nor does it deny the necessity to construe the words of any particular agreement. But part of the assumed legal context is this correct general approach which is to give expression to the rational assumption of reasonable people by giving liberal width and flexibility where possible to elastic and general words of the contractual submission to arbitration, unless the words in their context should be read more narrowly. One aspect of this is not to approach relational prepositions with fine shades of difference in the legal character of issues, or by ingenuity in legal argument… another is not to choose or be constrained by narrow metaphor when giving meaning to words of relationship, such as ‘under’ or ‘arising out of’ or ‘arising from’. None of that, however, is to say that the process is rule-based rather than concerned with the construction of the words in question. Further, there is no particular reason to limit such a sensible assumption to international commerce. There is no reason why parties in domestic arrangements (subject to contextual circumstances) would not be taken to make the very same common-sense assumption. Thus, where one has relational phrases capable of liberal width, it is a mistake to ascribe to such words a narrow meaning, unless some aspect of the constructional process, such as context, requires it.” (Citations omitted.)
<table>
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<tr>
<th>Case Name</th>
<th>Citation</th>
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<tr>
<td>Tanning Research Laboratories Inc v D'Urton</td>
<td>(1986) 100 CLR 312</td>
<td>“The Arbitrators. Any controversy or claim arising out of, or relating to, this Agreement or the breach thereof, shall be settled by arbitration, in accordance with the rules, then prevailing, of the American Arbitration Association, and judgment upon the award rendered may be entered in any court having jurisdiction thereof.”</td>
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<td>HIH Australia ltd v National Distribution Services Ltd</td>
<td>(1996) 52 NSWLR 668; (1996) 180 ALR 366</td>
<td>“Or applying law and Arbitration This Agreement will be construed in accordance with and governed by the laws of New South Wales. Any controversy or claim arising out of or related to this Agreement or the breach thereof will be settled by arbitration. The arbitration will be held in Sydney, New South Wales and will be conducted in accordance with the provisions of the Commercial Arbitration Act, 1984 (as amended). The decision of the arbitrator(s) will be final and binding.”</td>
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<td>Francis Travel Marketing Pty Ltd v Single Atlantic Airways Ltd</td>
<td>(1996) 30 WAJR 131; ALR 422</td>
<td>“ARTICLE 19 Arbitration Any dispute or difference arising out of this Agreement shall be referred to the arbitrators in tandem of a single Arbitrator to be agreed upon by the parties hereto or in default of such agreement appointed or by the President for the time being of the Royal Aeronautical Society. The said provisions of the Arbitration Act 1985 and any statutory modifications or re-enactments therefore for the time being in force shall apply.”</td>
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<td>Allegis Pty Ltd v Maguire Insurance Co Ltd</td>
<td>(1997) 41 NSWLR 418</td>
<td>Article 19 Applicable Law This agreement shall in all respects be interpreted in accordance with the laws of England.”</td>
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<tr>
<td>Hi-Fert Pty Ltd v RJ Wallace Services Ltd</td>
<td>(1996) 131 FLR 422</td>
<td>“This Reinsurance is subject to English jurisdiction”, with a manuscript addition: “Choice of Law: English”</td>
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<td>Recyclers of Australia Pty Ltd v Hettinga Equipment Inc</td>
<td>(2000) 100 FCR 547; (2000) HCA 117</td>
<td>Any dispute arising from this charter or any Bill of lading issued hereunder shall be settled in accordance with the provisions of the Arbitration Act 1996 and any subsequent Acts, in London, each party appointing an Arbitrator, and the two Arbitrators in the event of disagreement appointing an Umpire whose decision shall be final and binding upon both parties hereto. This Charter Party shall be governed by and construed in accordance with English Law. The Arbitrator(s) and Umpire shall be commercial men normally engaged in the Shipping Industry; any dispute to be referred to arbitration shall be included and interpreted under the law of the State of Iowa, and shall be subject to the terms and conditions listed below. Any Purchase Order issued by Buyer at a result of this quotation shall be deemed to incorporate the terms and conditions of this quotation. If there is any conflict between these conditions of sale and those of the Buyer, these conditions shall control. Arbitration All disputes hereunder, including the validity of this Agreement, shall be submitted to arbitration by an Arbitrator in Des Moines, Iowa under the Rules of the American Arbitration Association, and the decision rendered thereafter shall conclusively bind the parties. Judgment upon the award may be entered in any court having jurisdiction.”</td>
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<td>Apex Pty Ltd v Fomento Metal Protection &amp; Commodities Association</td>
<td>(1998) 90 FCR 39</td>
<td>“ARTICLE VII SERVICE OF SUIT The Reinsurer hereby agrees: 1. In the event of a dispute arising under this Agreement, the Reinsurers of the Company will submit to the jurisdiction of any competent Court in the Commonwealth of Australia. Such dispute shall be determined in accordance with the law and practice applicable in such Court. 2. Any summons or process to be served upon the Reinsurer may be served upon the Reinsurer at its address for service in New York, New York, USA. 3. Any summons or process to be served upon the Reinsurer may be served upon the Reinsurer at its address for service in New York, New York, USA. Any summons or process to be served upon the Reinsurer may be served upon the Reinsurer at its address for service in New York, New York, USA.”</td>
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<td>A&amp;H Casualty &amp; General Insurance Ltd v Ashbury v AJ Wallace</td>
<td>(1991) 160 HCA 118</td>
<td>“Arbitration Any disputes arising out of this Agreement or concerning its validity shall be submitted to the decision of a Court of Arbitration, consisting of three members, which shall meet in Australia. The members of the Court of Arbitration shall be active or retired members of the Bar or a member of a chambers engaged in the practice of insurance or Reinsurance business and a member of the Chamber of Commerce in Australia. The composition of the Court of Arbitration shall be determined by the President of the Chamber of Commerce in Australia. The arbitrators shall reach their decision primarily in accordance with the usages and customs of Reinsurance practice and shall be governed by all legal formalities. They shall reach their decision within four months of the appointment of the umpire.”</td>
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All disputes arising out of this contract shall be arbitrated at London and, unless the parties agree forthwith on a single Arbitrator, be referred to the final arbitrament of two Arbitrators carrying on business in London who shall be members of the Baltic Mercantile & Shipping Exchange and engaged in Shipping one to be appointed by each of the parties, with the power to such Arbitrators to appoint an Umpire. No award shall be questioned or invalidated on the ground that any of the Arbitrators is not qualified as above, unless objection to his action be taken before the award be made. Any dispute arising hereunder shall be governed by English law.
"This Agreement and the rights, obligations and relationships of the parties hereto under this Agreement and in respect of the Private Placement Memorandum shall be governed by and construed in accordance with the laws of England and all the parties irrevocably agree that the courts of England are to have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this Agreement or the Private Placement Memorandum or the acquisition of Commitments, whether or not governed by the laws of England, and that accordingly any suit, action or proceedings arising out of or in connection with this Agreement or Private Placement Memorandum or the acquisition of Commitments shall be brought in such courts. The parties hereby irrevocably agree to the extent not prohibited by applicable law, and agree not to assert by way of motion, as a defence or otherwise, in any such proceeding, any claim that it is not subject personally to the jurisdiction of such courts, that any such proceeding brought in such courts is improper or that this Agreement or the Private Placement Memorandum, or the subject matter thereof or thereof, may not be enforced in or by such court.


Deed of Adherence

"14. This Deed of Adherence and the rights, obligations and relationships of the parties under this Deed of Adherence and the Partnership Agreement and in respect of the Private Placement Memorandum shall be governed by and construed in accordance with the laws of England.

15. The Applicant irrevocably agrees that the courts of England are to have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this Deed of Adherence, the Partnership Agreement, the Private Placement Memorandum, or the acquisition of Commitments, whether or not governed by the laws of England, and that accordingly any suit, action or proceedings arising out of or in connection with this Deed of Adherence, the Partnership Agreement, the Private Placement Memorandum, or the acquisition of Commitments shall be brought in such courts. The Applicant hereby irrevocably agrees to the extent not prohibited by applicable law, and agrees not to assert by way of motion, as a defence or otherwise, in any such proceeding, any claim that the Applicant is not subject personally to the jurisdiction of such courts, that any such proceeding brought in such courts is improper or that this Deed of Adherence, the Partnership Agreement or the Private Placement Memorandum, or the subject matter thereof or thereof, may not be enforced in or by such court.

Faxtech Pty Ltd v ITL Optronics Ltd [2011] FCA 1320

"the agreement shall be interpreted, construed and enforced in accordance with the laws of England, and the parties submit to the jurisdiction of the competent courts of England (London)."
9.9 Governing law and jurisdiction

(a) This agreement is governed by the laws of Western Australia;

(b) Subject to clause 9.9(c)(iii)(G), the procedures prescribed in this clause will be strictly followed to settle a dispute arising under this agreement;

(i) within 45 Business Days of the dispute arising senior representatives from each party must meet in good faith, act reasonably and use their best endeavours to resolve the dispute by joint discussions;

(ii) failing settlement by negotiation, either party may, by notice to the other party, refer the dispute for resolution by mediation:

(A) at the Singapore Mediation Centre (SMC) in Singapore;

(B) with one mediator;

(C) with English as the language of the mediation; and

(D) with each party bearing its own costs of the mediation;

(iii) failing settlement by mediation, either party may, by notice to the other party, refer the dispute for final and binding resolution by arbitration:

(A) at the Singapore International Arbitration Centre (SIAC) in Singapore;

(B) under the United Nations Commission on International Trade Law Arbitration Rules (UNCITRAL) in force on the date of this agreement, which are deemed to be incorporated by reference into this clause;

(C) with English as the language of the arbitration;

(D) with one arbitrator;

(E) with the substantive law of the arbitration being Western Australian law;

(F) with English as the language of the arbitration; and

(G) with each party bearing its own costs of the arbitration.

(b) Subject to clause 16.2(d), the procedures prescribed in this clause will apply to the arbitration:

(i) within 10 Business Days of the dispute arising senior representatives from each party must meet in good faith, act reasonably and use their best endeavours to resolve the dispute by joint discussions;

(ii) failing settlement by negotiation, any party may, by notice to the other parties, refer the dispute for resolution by mediation;

(iii) failing settlement by mediation, any party may, by notice to the other parties, refer the dispute for final and binding resolution by arbitration:

(A) at the Singapore Mediation Centre (SMC) in Singapore;

(B) with one mediator;

(C) with English as the language of the Mediation; and

(D) with each party bearing its own costs of the Mediation;

(iv) failing settlement by mediation, either party may, by notice to the other parties, refer the dispute for final and binding resolution by arbitration:

(A) at the Singapore International Arbitration Centre (SIAC) in Singapore;

(B) under the United Nations Commission on International Trade Law Arbitration Rules (UNCITRAL) in force on the date of this agreement, which are deemed to be incorporated by reference into this clause;

(C) with English as the language of the arbitration;

(D) with one arbitrator;

(E) with the substantive law of the arbitration being Western Australian law;

(F) with English as the language of the arbitration; and

(G) with each party bearing its own costs of the arbitration.

(c) If any dispute arises out of or in connection with this agreement, including any question regarding the existence, validity, or termination of this agreement:

(i) prevents either party seeking urgent injunctive or declaratory relief from the Supreme Court of Western Australia in connection with the dispute without first having to attempt to negotiate and settle the dispute in accordance with this clause 9.9; or

(ii) requires a party to do anything which may have an adverse effect on, or compromise that party’s position under, any policy of insurance effected by that party.

16.2 Governing law and jurisdiction

(a) This document is governed by the laws of Western Australia;

(b) Subject to clause 16.2(d), the procedures prescribed in this clause 16 must be strictly followed to settle a dispute arising under this document:

(i) within 45 Business Days of the dispute arising senior representatives from each party must meet in good faith, act reasonably and use their best endeavours to resolve the dispute by joint discussions;

(ii) failing settlement by negotiation, any party may, by notice to the other parties, refer the dispute for final and binding resolution by arbitration:

(A) at the Singapore Mediation Centre (SMC) in Singapore;

(B) under the SMC Mediation Procedures;

(C) with one mediator;

(D) with English as the language of the mediation; and

(E) with each party bearing its own costs of the mediation.

(iii) failing settlement by mediation, either party may, by notice to the other party, refer the dispute for resolution by arbitration:

(A) at the Singapore Mediation Centre (SMC) in Singapore;

(B) with one arbitrator;

(C) with English as the language of the arbitration; and

(D) with each party bearing its own costs of the arbitration.

(iv) failing settlement by arbitration, any party may, by notice to the other parties, refer the dispute for final and binding resolution by arbitration:

(A) at the Singapore International Arbitration Centre (SIAC) in Singapore or in Hong Kong;

(B) under the United Nations Commission on International Trade Law Arbitration Rules (UNCITRAL) in force on the date of this agreement, which are deemed to be incorporated by reference into this clause;

(C) with English as the language of the arbitration, the procedural rules in the SMC Arbitration Rules in force on the date of this agreement will apply to the arbitration;

(D) with the substantive law of the arbitration being Australian law;

(E) with English as the language of the arbitration; and

(F) with each party bearing its own costs of the arbitration.

(b) Subject to clause 16.2(d), the procedures prescribed in this clause 16 will apply to the arbitration:

(i) within 10 Business Days of the dispute arising senior representatives from each party must meet in good faith, act reasonably and use their best endeavours to resolve the dispute by joint discussions;

(ii) failing settlement by negotiation, either party may, by notice to the other party, refer the dispute for resolution by mediation;

(iii) failing settlement by mediation, any party may, by notice to the other parties, refer the dispute for final and binding resolution by arbitration:

(A) at the Singapore Mediation Centre (SMC) in Singapore;

(B) with one mediator;

(C) with English as the language of the Mediation; and

(D) with each party bearing its own costs of the mediation.

(iii) failing settlement by mediation, either party may, by notice to the other party, refer the dispute for final and binding resolution by arbitration:

(A) at the Singapore International Arbitration Centre (SIAC) in Singapore or in Hong Kong;

(B) under the United Nations Commission on International Trade Law Arbitration Rules (UNCITRAL) in force on the date of this agreement, which are deemed to be incorporated by reference into this clause;

(C) with English as the language of the arbitration, the procedural rules in the SMC Arbitration Rules in force on the date of this agreement will apply to the arbitration;

(D) with the substantive law of the arbitration being Western Australian law;

(E) with English as the language of the arbitration; and

(F) with each party bearing its own costs of the arbitration.

(C) with each party bearing its own costs of the arbitration.

(D) Nothing in this clause 9.9:

(i) prevents either party seeking urgent injunctive or declaratory relief from the Singapore International Arbitration Centre (SIAC) in Singapore or in Hong Kong;

(ii) with each party bearing its own costs of the arbitration;

(iii) with English as the language of the arbitration; and

(iv) with the substantive law of the arbitration being Western Australian law;

(v) with English as the language of the arbitration; and

(vi) with each party bearing its own costs of the arbitration.

This contract shall be construed in accordance with and governed in every respect by the laws of Singapore, and all disputes arising out of or in connection with this agreement shall be brought in the courts of Singapore.
1.2 Confidential Arbitration

(a) Where the disputing parties are unable to agree to an appointment of a mediator for the purposes of this clause within fourteen (14) days of the date of the notification or in the event any mediation is abandoned then the dispute shall at that date be automatically referred to arbitrations for resolution ("Referal Date") and the following provisions of this clause shall apply:

(i) In the event that no agreement on the arbitrator can be reached within three (3) weeks of the Referal Date, the arbitrator will be Mr Tony Fitzgerald QC (provided he is willing to perform this function and has not reached 74 years of age at that time), or in the event Mr Tony Fitzgerald QC is unwilling or unable to act, the Honorable Justice John Middleton (provided he is no longer a Judge of the Federal or other Australian Court and who has not reached 74 years of age at that time), and irrespective of whether either of these persons have carried out the mediation referred to above, or in the event neither is willing or able to act, the Honourable Justice John Middleton (provided he is willing to perform this function and has not reached 74 years of age at that time), and irrespective of whether either of these persons have carried out the mediation referred to above, or in the event neither is willing or able to act, the Honorable Justice John Middleton (provided he is willing to perform this function and has not reached 74 years of age at that time, and irrespective of whether either of these persons have carried out the mediation referred to above, or in the event neither is willing or able to act, the Honorable Justice John Middleton (provided he is willing to perform this function and has not reached 74 years of age at that time) or, in the event that neither is willing or able to act, a suitable and independent person to undertake the arbitration for resolution ('Referral Date') and the following provisions of this clause shall apply:

(ii) Any of the disputing parties request the abandonment.

(iii) The arbitrators nominated pursuant to paragraph 2(a)(ii) will agree on the selection of a third arbitrator within the time period provided in paragraph 2(a)(ii); the third arbitrator will be designated by the President of the Law Society of Western Australia and shall be a legal practitioner qualified to practice in the State of Western Australia for all purposes and whose decision shall be final and binding on the parties.

(iv) The arbitration will take place at a location outside of a Court and chosen to facilitate efficient and independent arbitrations and shall be conducted in accordance with the Commercial Arbitration Act of Western Australia and whose decision shall be final and binding on the parties.

(b) The dispute shall be resolved by confidential arbitration by the arbitrator agreed to by each of the disputing parties or appointed pursuant to paragraph 2(a)(ii) above or (if more than one is appointed pursuant to paragraph 2(a)(ii)) then as decided by or not less than a majority of them) who shall resolve the matter pursuant to the Commercial Arbitration Act of Western Australia and whose decision shall be final and binding on the parties.

(c) The arbitration will take place at a location outside of a Court and chosen to facilitate efficient and independent arbitrations and whose decision shall be final and binding on the parties.

(d) The arbitrator(s) will be to the extent allowed by law non-appealable, conclusive and binding on the parties and will be specifically enforceable by any Court having jurisdiction.

20.2 Confidential Arbitration

(a) Any dispute or claim arising out of or in relation to this deed shall be submitted to confidential arbitration in accordance with the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards then in force. There will be three arbitrators. If the parties to the dispute cannot agree to an arbitrator within fourteen (14) days of the date of the dispute arising or in the event that either of these persons have carried out the mediation referred to above, or in the event that neither is willing or able to act, the Honourable Justice John Middleton (provided he is willing to perform this function and has not reached 74 years of age at that time) or, in the event that neither is willing or able to act, a suitable and independent person to undertake the arbitration for resolution ('Referral Date') and the following provisions of this clause shall apply:

(i) The arbitrators nominated pursuant to paragraph 2(a)(ii) will agree on the selection of a third arbitrator within the time period provided in paragraph 2(a)(ii); the third arbitrator will be designated by the President of the Law Society of Western Australia and shall be a legal practitioner qualified to practice in the State of Western Australia for all purposes and whose decision shall be final and binding on the parties.

(ii) Any mediation will not impose an outcome on the disputing parties. Any award must be agreed to by the disputing parties; and (e) an arbitration agreement will be terminated if:

(i) any of the disputing parties request the abandonment.

(ii) the arbitrator(s) will be to the extent allowed by law non-appealable, conclusive and binding on the parties and will be specifically enforceable by any Court having jurisdiction.

21.1 This Deed shall be governed by and shall be subject to and interpreted according to the laws of the State of Western Australia, and the parties hereby agree, subject to all disputes hereunder being resolved by confidential mediation and arbitration in Western Australia, to submit to the exclusive jurisdiction of the Courts of Western Australia for all purposes in respect of this Deed.
Conclusion

Respectfully, Bell P’s dissenting reasons are to be preferred to those of Meagher JA, with whom Gleeson JA agreed. Bell P’s reasons are more consistent the weight of authority on construction of arbitration and choice of court agreements in Australia and abroad. On the other hand, the majority approach shows that Australian courts often do not feel bound to follow the solutions offered by foreign courts to common private international law problems.

Michael Douglas co-authored this post with Mhairi Stewart. This post is based on their short article first published by Bennett + Co.