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.)

Bell P's appendix

Schedule of Jurisdiction and Arbitration Clauses		
Case Name	**Citation**	**Clause**
Tanning Research Laboratories Inc v O'Brien	(1990) 169 CLR 332; [1990] HCA 8	"10. Arbitration. 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 obtaining, of the American Arbitration Association, and judgment upon the award rendered may be entered in any court having jurisdiction thereof."
IBM Australia Ltd v National Distribution Services Ltd	(1991) 22 NSWLR 466; (1991) 100 ALR 361	"9. Governing 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."
Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd	(1996) 39 NSWLR 160; (1996) 131 FLR 422	"ARTICLE 19 *Arbitration* Any dispute or difference arising out of this Agreement shall be referred to the arbitration in London of a single Arbitrator to be agreed upon by the parties hereto or in default of such agreement appointed by the President for the time being of the Royal Aeronautical Society. The and the provisions of the Arbitration Act 1950 and any statutory modifications or re-enactments therefore for the time being in force shall apply. (sic) ARTICLE 20 *Applicable Law* This Agreement shall in all respects be interpreted in accordance with the Laws of England."
Akai Pty Ltd v People's Insurance Co Ltd	(1996) 188 CLR 418; [1996] HCA 39	"Governing Law This policy shall be governed by the laws of England. Any dispute arising from this policy shall be referred to the Courts of England."

FAI General Insurance Co Ltd v Ocean Marine Mutual Protection & Indemnity Association	(1997) 41 NSWLR 117	"This Reinsurance is subject to English jurisdiction", with a manuscript addition: "Choice of Law: English"
Hi-Fert Pty Ltd v Kiukiang Maritime Carriers (No 5)	(1998) 90 FCR 1; (1998) 159 ALR 142	"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* 1950 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 Arbitrators and Umpire shall be commercial men normally engaged in the Shipping Industry. Any claim must be in writing and claimant's Arbitrator appointed within six months of the Vessel's arrival at final port of discharge, otherwise all claims shall be deemed to be waived."
Recyclers of Australia Pty Ltd v Hettinga Equipment Inc	(2000) 100 FCR 420; [2000] FCA 547	"*Applicable Law, Pricing and Terms of Sale*: Any contract between Buyer and Hettinga shall be governed, construed 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 as 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 USA under the Rules of the American Arbitration Association, and the decision rendered thereunder shall conclusively bind the parties. Judgment upon the award may be entered in any court having jurisdiction."
HIH Casualty & General Insurance Ltd (in liq) v RJ Wallace	(2006) 68 NSWLR 603; [2006] NSWSC 1150	"ARTICLE XVIII SERVICE OF SUIT The Reinsurer hereon agrees that: i. In the event of a dispute arising under this Agreement, the Reinsurers at the request 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. ii. Any summons notices or process to be served upon the Reinsurer may be served upon MESSRS. FREEHILL, HOLLINGDALE & PAGE M.L.C. CENTRE, MARTIN PLACE, SYDNEY, N.S.W. 2000 AUSTRALIA who has authority to accept service and to enter an appearance on the Reinsurer's behalf, and who is directed, at the request of the Company to give a written undertaking to the Company that he will enter an appearance on the Reinsurer's behalf. iii. If a suit is instituted against any one of the Reinsurers all Reinsurers hereon will abide by the final decision of such Court or any competent Appellate Court. ARTICLE XIX ARBITRATION: 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 executives of Insurance or Reinsurance Companies. Each party shall nominate one arbitrator. In the event of one party failing to appoint its arbitrator within four weeks after having been required by the other party to do so, the second arbitrator shall be appointed by the President of the Chamber of Commerce in Australia. Before entering upon the reference, the arbitrators shall nominate an umpire. If the arbitrators fail to agree upon an umpire within four weeks of their own appointment, the umpire shall be nominated 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 relieved of all legal formalities. They shall reach their decision within four months of the appointment of the umpire. The decision of the Court of Arbitration shall not be subject to appeal. The costs of Arbitration shall be paid as the Court of Arbitration directs. Actions for the payment of confirmed balances shall come under the jurisdiction of the ordinary Courts."
Comandate Marine Corporation v Pan Australia Shipping Pty Ltd	(2006) 157 FCR 45; [2006] FCAFC 192	"(b) London 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 is made. Any dispute arising hereunder shall be governed by English Law. …"
Armacel Pty Ltd v Smurfit Stone Container Corporation	(2008) 248 ALR 573; [2008] FCA 592	"21.3.1 This Agreement must be read and construed according to the laws of the state of New South Wales, Australia and the parties submit to the jurisdiction of that State. If any dispute arises between the Licensor and the Licensee in connection with this Agreement or the Technology, the parties will attempt to mediate the dispute in Sydney, Australia. 21.3.2 In the event that there is a conflict between the laws of the State of New South Wales, Australia and the jurisdiction in which the Equipment is located, then the parties agree that the laws of the State of New South Wales shall prevail. 21.3.3 If the licensee is in breach of this Agreement, the Licensee must pay to the Licensor on demand the amount of any legal costs and expenses incurred by the Licensor for the enforcement of its rights under this Agreement and this provision shall prevail despite any order for costs made by any Court."
BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd	(2008) 168 FCR 169; [2008] FCA 551	"(b) Any dispute arising out of this Charter Party or any Bill of Lading issued hereunder shall be referred to arbitration in accordance with the Arbitration Acts 1996 and any statutory modification or re-enactment in force. English law shall apply … (c) The arbitrators, umpire and mediator shall be commercial persons engaged in the shipping industry. Any claim must be made in writing and the claimant's arbitrator nominated within 12 months of the final discharge of the cargo under this Charter Party, failing which any such claim shall be deemed to be waived and absolutely barred."

Paharpur Cooling Towers Ltd v Paramount (WA) Ltd	[2008] WASCA 110	[Background: "Clause 22 of the contract provides that when any dispute arises between the parties any party may give to the other party a notice in writing that a dispute exists. Clause 22 then sets out a process by which the parties are to endeavour to resolve the dispute. If they are unable to do so, Paramount (as Principal) at its sole discretion:"] "[S]hall determine whether the parties resolve the dispute by litigation within the jurisdiction of the courts of Western Australia or arbitration under the Commercial Arbitration Act. [Paramount] shall notify [Paharpur], by notice in writing, of its decision to refer the dispute to litigation or arbitration within 28 days of either [Paramount] or [Paharpur] electing that the dispute be determined by either litigation or arbitration." "'Dispute' means a dispute or difference between the parties as to the construction of the Contract or as to any matter or thing of whatsoever nature arising, whether antecedent to the Contract and relating to its formation or arising under or in connection with the Contract, including any claim at common law, in tort, under statute or for restitution based on unjust enrichment or for rectification or frustration or a dispute concerning a direction given and/or acts or failing to act by the Engineer or the Engineer's Representative or interference by the Principal or the Principal's Representative."
Electra Air Conditioning BV v Seeley International Pty Ltd ACN 054 687 035	[2008] FCAFC 169	"20. Dispute Resolution 20.1 If at any time there is a dispute, question or difference of opinion ("Dispute") between the parties concerning or arising out of this Agreement or its construction, meaning, operation or effect or concerning the rights, duties or liabilities of any party, one party may serve a written notice on the other party setting out details of the Dispute. Thereafter: (a) senior management of each party will try to resolve the Dispute through friendly discussions for a period of thirty (30) days after the date of receipt of the notice; and (b) if senior management of each party are unable to resolve the Dispute under Section 20.1(a), it shall be referred to arbitration in accordance with the Rules for the Conduct of Commercial Arbitrations of the Institute of Arbitrators and Mediators Australia. The number of arbitrators shall be 1. The place of arbitration shall be Melbourne, Australia. The language of arbitration shall be English. The arbitral award shall be final and binding upon both parties. 20.2 Pending the resolution of the Dispute under Section 20.1, the parties shall continue to perform their obligations under this Agreement without prejudice to a final adjustment in accordance with any award. 20.3 Nothing in this Section 20 prevents a party seeking injunctive or declaratory relief in the case of a material breach or threatened breach of this Agreement." "25. Governing law and Jurisdiction This Agreement is governed by the laws of Victoria, Australia. Subject to Section 20, the parties irrevocably submit to the courts of Victoria, and any courts of appeal from such courts, in relation to the subject matter of this Agreement."
Ace Insurance Ltd v Moose Enterprise Pty Ltd	[2009] NSWSC 724	<u>Policy</u> "Should any dispute arise concerning this policy, the dispute will be determined in accordance with the law of Australia and the States and Territories thereof. In relation to any such dispute the parties agree to submit to the jurisdiction of any competent court in a State or Territory of Australia." <u>Expona Endorsement</u> "Provided that all claims which fall under the terms of this endorsement, it is agreed: (i) the limits of liability are inclusive of costs as provided under supplementary payment in this policy. (ii) that should any dispute arise between the insured and ACE over the application of this policy, such dispute shall be determined in accordance with the law and practice of the Commonwealth of Australia."
Global Partners Fund Ltd v Babcock & Brown Ltd (in liq)	[2010] NSWCA 196; (2010) 79 ACSR 383	<u>Limited Partnership Agreement</u> "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 waive, 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 proceedings brought in such courts is improper or that this Agreement or the Private Placement Memorandum, or the subject matter hereof or thereof, may not be enforced in or by such court." <u>Deed of Adherence</u> "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 waives, 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 hereof 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)."

Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd	[2013] WASCA 66; (2013) 298 ALR 666	Asset Sale Agreement "16.2 Governing Law and Dispute Resolution (a) This agreement 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 agreement. (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; (1) within ten 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; (2) 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) 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; and (3) 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) to the extent, if any, that the UNCITRAL do not deal with any procedural issues for the arbitration, the procedural rules in the SIAC 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 one Arbitrator; (F) with English as the language of the arbitration; and (G) with each party bearing its own costs of the arbitration. (d) Nothing in this clause 16: (1) 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 16; or (2) 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." Guarantee Agreement "9.9. Governing law and jurisdiction (a) This document is governed by the laws of Western Australia. (b) Subject to clause 9.9(c)(iii)(G), the procedures prescribed in this clause 9.9 must be strictly followed to settle a dispute arising under this document. (c) If any dispute arises out of or in connection with this document, including any question regarding the existence, validity or termination of this document: (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; and (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; and (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 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) to the extent, if any, that UNCITRAL do not deal with any procedural issues for the arbitration, the procedural rules in the SIAC 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 one arbitrator; (F) with English as the language of the arbitration; and (G) with each party bearing its own costs of the arbitration. (d) Nothing in this clause 9.9: (i) prevents any 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."
AAP Industries Pty Limited v Rehaud Pte Limited	[2015] NSWSC 468	Supply Agreement "The agreed place of jurisdiction, irrespective of the amount in dispute, is Singapore." Conditions of Purchase "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."

Rinehart v Rinehart (No 3) (and *Rinehart v Welker*, in relation to the Hope Downs Deed; and *Rinehart v Hancock Prospecting Pty Ltd*, in relation to the Hope Downs Deed and April 2005 Deed of Obligation and Release)	(2016) 257 FCR 310 (and (2012) 95 NSWLR 221; and [2019] HCA 13; (2019) 366 ALR 635)	April 2005 Deed of Obligation and Release "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." Hope Downs Deed "20. CONFIDENTIAL MEDIATION/ARBITRATION In the event that there is any dispute under this deed then any party to his [sic] deed who has a dispute with any other party to this deed shall forthwith notify the other party or parties with whom there is the dispute and all other parties to this deed ('Notification') and the parties to this deed shall attempt to resolve such difference in the following manner. 20.1 Confidential Mediation (a) the disputing parties shall first attempt to resolve their dispute by confidential mediation subject to Western Australian law to be conducted by a mediator agreed to by each of the disputing parties and GHR (or after her death or non-capacity, HPPL); (b) each of the disputing parties must attempt to agree upon a suitably qualified and independent person to undertake the mediation; (c) the mediation will be conducted with a view to: (i) identifying the dispute; (ii) developing alternatives for resolving the dispute; (iii) exploring these alternatives; and (iv) seeking to find a solution that is acceptable to the disputing parties. (d) any mediation will not impose an outcome on the disputing parties. Any outcome must be agreed to by the disputing parties; (e) any mediation will be abandoned if: (i) the disputing parties agree; (ii) any of the disputing parties request the abandonment. 20.2 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 on that date be automatically referred to arbitration for resolution ('Referral 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 Referral 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 Honourable Justice John Middleton (provided he is no longer a Judge of the Federal or other Australian Court and provided he 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 that neither is willing or able to act, (ii) subject to paragraph (iv) below by confidential arbitration with one (1) party to the dispute nominating one (1) arbitrator, and the other party to the dispute nominating another arbitrator and the two (2) arbitrators selecting a third arbitrator within a further three (3) weeks, who shall together resolve the matter pursuant to the Commercial Arbitration Act of Western Australia and whose decision shall be final and binding on the parties; (iii) if the arbitrators nominated pursuant to paragraph 2(a)(ii) are unable to agree in the selection of a third arbitrator within the time provided in paragraph 2(a)(iii), the third arbitrator will be designated by the President of the Law Society of Western Australia and shall be a legal practitioner qualified to practise in the State of Western Australia of not less than twenty (20) years standing. (iv) in the event that a disputing party does not nominate an arbitrator pursuant to Clause 2(a)(ii) within twenty-one (21) days from being required to do so it will be deemed to have agreed to the appointment of the arbitrator appointed by the other disputing party. (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)(i) above (or if more than one is appointed pursuant to paragraph 2(a)(ii) then as decided by 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 endeavour to maintain confidentiality and mutually agreed to by the disputing parties and failing agreement in Western Australia and the single Arbitrator or the Chairman of the Arbitral Tribunal as the case may be will fix the time and place outside of a Court for the purposes of the confidential hearing of such evidence and representations as any of the disputing parties may present. If any of the parties request wheelchair access, this will be taken into account in the selection of the premises and parking needs. Except as otherwise provided, the decision of the single arbitrator or, if three arbitrators, the decision of any two of them in writing will be binding on the disputing parties both in respect of procedure and the final determination of the issues. (d) The arbitrators will not be obliged to have regard to any particular information or evidence in reaching his/their determination and in his/their discretion procure and consider such information and evidence and in such form as he/they sees fit; (e) The award of 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. the deed] shall be governed by and be subject to and interpreted according to the laws of the State of Western Australia"." August 2009 Deed of Further Settlement "16. The CS Deed and this Deed will be governed by the following dispute resolution clause: (i) the parties shall first seek to resolve any dispute or claim arising out of, or in relation to this Deed or the CS Deed by discussions or negotiations in good faith; (ii) Any dispute or claim arising out of or in relation to this Deed or the CS Deed which is not resolved within 90 days, will be submitted to confidential arbitration in accordance with the UNCITRAL Arbitration Rules then in force. There will be three arbitrators. JLH shall appoint one arbitrator, HPPL shall appoint the other arbitrator and both arbitrators will choose the third Arbitrator. The place of arbitration shall be in Australia and the exact location shall be chosen by HPPL. Each party will be bound by the Arbitrator's decision. (iii) A party may not commence court proceedings in relation to any dispute arising out of or in relation to this Deed or the Original Deed or the CS Deed; (iv) The costs of the arbitrators and the arbitration venue will be borne equally as to half by JLH and the other half by the non JLH party. Each party is responsible for its own costs in connection with the dispute resolution process; and (v) Despite the existence of a Dispute, the parties must continue to perform their respective obligations under this Deed."

Mobis Parts Australia Pty Ltd v XL Insurance Company SE	[2016] NSWSC 1170	"The place of jurisdiction for any dispute arising out of this Policy shall be Bratislava", with an anterior clause: "This Policy shall be governed exclusively by Slovakian law. This also applies to Insured Companies with a foreign domicile."
Parnell Manufacturing Pty Ltd v Lonza Ltd	[2017] NSWSC 562	"16.5 Governing Law/Jurisdiction. This Agreement is governed in all respects by the laws of the State of Delaware, without regard to its conflicts of laws principles. The Parties agree to submit to the jurisdiction of the courts of Delaware."
Royal Bank of Scotland plc v Babcock & Brown DIF III Global Co-Investment Fund LP	[2017] VSCA 138	"This Letter Agreement shall be governed by, and construed and interpreted in accordance with, the laws of the State of New York applicable to contracts executed in and to be performed in that State. Each of the parties hereto (a) consents to submit itself to the personal jurisdiction of the United States District Court for the Southern District of New York or any court of the State of New York located in such district in the event any dispute arises out of this Letter Agreement or any of the transactions contemplated by this Letter Agreement, (b) agrees that it will not attempt to deny or defeat such personal jurisdiction or venue by motion or other request for leave from any such court and (c) agrees that it will not bring any action relating to this Letter Agreement or any of the transactions contemplated by this Letter Agreement in any court other than such courts sitting in the State of New York. THE PARTIES HEREBY WAIVE TRIAL BY JURY IN ANY ACTION, SUIT, PROCEEDING OR COUNTERCLAIM BROUGHT BY EITHER OF THEM AGAINST THE OTHER IN ANY MATTERS ARISING OUT OF OR IN ANY WAY CONNECTED WITH THIS AGREEMENT."
Australian Health & Nutrition Association Ltd v Hive Marketing Group Pty Ltd	(2019) 99 NSWLR 419; [2019] NSWCA 61	Risk Transfer Agreement "The parties shall strive to settle any dispute arising from the interpretation or performance of this Agreement through friendly consultation within 30 days after one party asks for consultation. In case no settlement can be reached through consultation, each party can submit such matter to the court. The English Courts shall have the exclusive jurisdiction for all disputes arising out of or in connection with this Agreement." Promotion Agreement "This Agreement is governed by the law in force in New South Wales. The parties submit to the non-exclusive jurisdiction of the courts having jurisdiction in New South Wales and any courts, which may hear appeals from those courts in respect of any proceedings in connection with this Agreement."

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.