

# Change of gender in private international law: a problem arises between Scotland and England

*Written by Professor Eric Clive*

The Secretary of State for Scotland, a Minister of the United Kingdom government, has made an order under section 35 of the Scotland Act 1998 blocking Royal Assent to the Gender Recognition Reform (Scotland) Bill 2022, a Bill passed by the Scottish Parliament by a large majority. The Scottish government has challenged the order by means of a petition for judicial review. The case is constitutionally important and may well go to the United Kingdom Supreme court. It also raises interesting questions of private international law.

At present the rules on obtaining a gender recognition certificate, which has the effect of changing the applicant's legal gender, are more or less the same in England and Wales, Scotland and Northern Ireland. The Scottish Bill would replace the rules for Scotland by less restrictive, de-medicalised rules. An unfortunate side effect is that Scottish certificates would no longer have automatic effect by statute in other parts of the United Kingdom. The United Kingdom government could remedy this by legislation but there is no indication that it intends to do so. Its position is that it does not like the Scottish Bill.

One of the reasons given by the Secretary of State for making the order is that having two different systems for issuing gender recognition certificates within the United Kingdom would cause serious problems. A person, he assumes, might be legally of one gender in England and another in Scotland. There would therefore be difficulties for some organisations operating at United Kingdom level - for example, in the fields of tax, benefits and pensions. This immediately strikes a private lawyer as odd. Scotland and England have had different systems in the law of persons for centuries - in the laws on marriage, divorce, legitimacy, incapacity and other matters of personal status - and they have not given rise to serious problems. This is because the rules of private international law, even in the absence of statutory provision, did not allow them to.

In a paper on *Recognition in England of change of gender in Scotland: a note on*

*private international law aspects*[1] I suggest that gender is a personal status, that there is authority for a general rule that a personal status validly acquired in one country will, subject to a few qualifications, be recognised in others and that there is no reason why this rule should not apply to a change of gender under the new Scottish rules.

The general rule is referred to at international level. In article 10 of its Resolution of September 2021 on *Human Rights and Private International Law*, the Institute of International Law says that:

*Respect for the rights to family and private life requires the recognition of personal status established in a foreign State, provided that the person concerned has had a sufficient connection with the State of origin ... as well as with the State whose law has been applied, and that there is no manifest violation of the international public policy of the requested State ....*

So far as the laws of England and Scotland are concerned, there are authoritative decisions and dicta which clearly support such a general rule. Cases can be found in relation to marriage, divorce, nullity of marriage, legitimacy and legitimation. A significant feature is that the judges have often reasoned from status to particular rules. It cannot be said that there are just isolated rules for particular life events. And the rules were developed at common law, before there were any statutory provisions on the subject.

Possible exceptions to the general rule - public policy, no sufficient connection, contrary statutory provision, impediment going to a matter of substance rather than procedure - are likely to be of little if any practical importance in relation to the recognition in England of changes of gender established under the proposed new Scottish rules.

If the above arguments are sound then a major part of the Secretary of State's reasons for blocking the Scottish Bill falls away. There would be no significant problem of people being legally male in Scotland but legally female in England, just as there is no significant problem of people being legally married in Scotland but unmarried in England. Private international law would handle the dual system, as it has handled other dual systems in the past. Whether the Supreme Court will get an opportunity to consider the private international law aspects of the case remains to be seen: both sides have other arguments. It would be

extremely interesting if it did.

From the point of view of private international law, it would be a pity if the Secretary of State's blocking order were allowed to stand. The rules in the Scottish Bill are more principled than those in the Gender Recognition Act 2004, which contains the existing law. The Scottish Bill has rational rules on sufficient connection (essentially birth registered in Scotland or ordinary residence in Scotland). The 2004 Act has none. The Scottish Bill has a provision on the recognition of changes of gender under the laws of other parts of the United Kingdom which is drafted in readily understandable form. The corresponding provisions in the 2004 Act are over-specific and opaque. The Scottish Bill has a rule on the recognition of overseas changes of gender which is in accordance with internationally recognised principles.

The 2004 Act has the reverse. It provides in section 21 that: A person's gender is not to be regarded as having changed by reason only that it has changed under the law of a country or territory outside the United Kingdom. This is alleviated by provisions which allow those who have changed gender under the law of an *approved overseas country* to use a simpler procedure for obtaining a certificate under the Act but still seems, quite apart from any human rights aspects, to be unfriendly, insular and likely to produce avoidable difficulties for individuals.

[1] Clive, Eric, Recognition in England of change of gender in Scotland: A note on private international law aspects (May 30, 2023). Edinburgh School of Law Research Paper No. 2023/06, Available at SSRN: <https://ssrn.com/abstract=4463935> or <http://dx.doi.org/10.2139/ssrn.4463935>

---

## International commercial courts

# for Germany?

*This post is also available via the EAPIL blog.*

On 25 April 2023 the German Federal Ministry of Justice (*Bundesministerium der Justiz - BMJ*) has published a bill relating to the establishment of (international) commercial courts in Germany. It sets out to strengthen the German civil justice system for (international) commercial disputes and aims to offer parties an attractive package for the conduct of civil proceedings in Germany. At the same time, it is the aim of the bill to improve Germany's position vis-à-vis recognized litigation and arbitration venues - notably London, Amsterdam, Paris and Singapore. Does this mean that foreign courts and international commercial arbitration tribunals will soon face serious competition from German courts?

## **English-language proceedings in all instances**

Proposals to improve the settlement of international commercial disputes before German courts have been discussed for many years. In 2010, 2014, 2018 and 2021, the upper house of the German Federal Parliament (*Bundesrat*) introduced bills to strengthen German courts in (international) commercial disputes. However, while these bills met with little interest and were not even discussed in the lower house of Parliament (*Bundestag*) things look much brighter this time: The coalition agreement of the current Federal Government, in office since 2021, promises to introduce English-speaking special chambers for international commercial disputes. The now published bill of the Federal Ministry of Justice can, therefore, be seen as a first step towards realizing this promise. It heavily builds on the various draft laws of the Bundesrat including a slightly expanded version that was submitted to the Bundestag in 2022.

The bill allows the federal states (*Bundesländer*) to establish special commercial chambers at selected regional courts (*Landgerichte*) which shall, if the parties so wish, conduct the proceedings comprehensively in English. Appeals and complaints against decisions of these chambers shall be heard in English before English-language senates at the higher regional courts (*Oberlandesgerichte*). If the value in dispute exceeds a threshold value of 1 million Euros and if the parties so wish, these special senates may also hear cases in first instance. Finally, the Federal Supreme Court (*Bundesgerichtshof*) shall be allowed to conduct

proceedings in English. Should the bill be adopted – which seems more likely than not in light of the coalition agreement – it will, thus, be possible to conduct English-language proceedings in at least two, maybe even three instances. Compared to the status quo, which limits the use of English to the oral hearing (cf. Section 185(2) of the Court Constitution Act) and the presentation of English-language documents (cf. Section 142(3) of the Code of Civil Procedure) this will be a huge step forward. Nonetheless, it seems unlikely that adoption of the bill will make Germany a much more popular forum for the settlement of international commercial disputes.

### **Remaining disadvantages vis-à-vis international commercial arbitration**

To begin with, the bill – like previous draft laws – is still heavily focused on English as the language of the court. Admittedly, the bill – following the draft law of the Bundesrat of March 2022 – also proposes changes that go beyond the language of the proceedings. For example, the parties are to be given the opportunity to request a verbatim record of the oral proceedings. In addition, business secrets are to be better protected. However, these proposals cannot outweigh the numerous disadvantages of German courts vis-à-vis arbitration. For example, unlike in arbitration, the parties have no influence on the personal composition of the court. As a consequence, they have to live with the fact that their – international – legal dispute is decided exclusively by German (national) judges, who rarely have the degree of specialization that parties find before international arbitration courts. In addition, the digital communication and technical equipment of German courts is far behind what has been standard in arbitration for many years. And finally, one must not forget that there is no uniform legal framework for state judgments that would ensure their uncomplicated worldwide recognition and enforcement.

### **Weak reputation of German substantive law**

However, the bill will also fail to be a resounding success because it ignores the fact that the attractiveness of German courts largely depends on the attractiveness of German law. To be sure, German courts may also apply foreign law. However, their real expertise – and thus their real competitive advantage especially vis-à-vis foreign courts – lies in the application of German law, which, however, enjoys only a moderate reputation in (international) practice. Among the disadvantages repeatedly cited by practitioners are, on the one hand, the

numerous general clauses (e.g. §§ 138, 242 of the German Civil Code), which give the courts a great deal of room for interpretation, and, on the other hand, the strict control of general terms and conditions in B2B transactions. In addition - and irrespective of the quality of its content - German law is also not particularly accessible to foreigners. Laws, decisions and literature are only occasionally available in English (or in official English translation).

### **Disappointing numbers in Amsterdam, Paris and Singapore**

Finally, it is also a look at other countries that have set up international commercial courts in recent years that shows that the adoption of the bill will not make German courts a blockbuster. Although some of these courts are procedurally much closer to international commercial arbitration or to the internationally leading London Commercial Court, their track record is - at least so far - rather disappointing.

This applies first and foremost to the Netherlands Commercial Court (NCC), which began its work in Amsterdam in 2019 and offers much more than German courts will after the adoption and implementation of the bill: full English proceedings both in first and second instance, special rules of procedure inspired by English law on the one hand and international commercial arbitration law on the other, a court building equipped with all technical amenities, and its own internet-based communication platform. The advertising drum has also been sufficiently beaten. And yet, the NCC has not been too popular so far: in fact, only 14 judgments have been rendered in the first four years of its existence (which is significantly less than the 50 to 100 annual cases expected when the court was set up).

The situation in Paris is similar. Here, a new chamber for international commercial matters (*chambre commerciale internationale*) was established at the Cour d'appel in 2018, which hears cases (at least in parts) in English and which applies procedural rules that are inspired by English law and international arbitration. To be sure, the latter cannot complain about a lack of incoming cases. In fact, more than 180 cases have been brought before the new chamber since 2018. However, the majority of these proceedings are due to the objective competence of the Chamber for international arbitration, which is independent of the intention of the parties. In contrast, it is not known in how many cases the Chamber was independently chosen by the parties. Insiders, however, assume

that the numbers are “negligible” and do not exceed the single-digit range.

Finally, the Singapore International Commercial Court (SICC), which was set up in 2015 with similarly great effort and ambitions as the Netherlands Commercial Court, is equally little in demand. Since its establishment, it has been called upon only ten times by the parties themselves. In all other cases in which it has been involved, this has been at the instigation of the Singapore High Court, which can refer international cases to the SICC under certain conditions.

### **No leading role for German courts in the future**

In the light of all this, there is little to suggest that the bill, which is rather cautious in its substance and focuses on the introduction of English as the language of proceedings, will lead to an explosion - or even only to a substantial increase - in international proceedings before German courts. While it will improve - even though only slightly - the framework conditions for the settlement of international disputes, expectations regarding the effect of the bill should not be too high.

*Note: Together with Yip Man from Singapore Management University Giesela Rühl is the author of a comparative study on new specialized commercial courts and their role in cross-border litigation. Conducted under the auspices of the International Academy of Comparative Law (IACL) the study will be published with Intersentia in the course of 2023.*

---

# **Foreign Child Marriages and Constitutional Law - German Constitutional Court Holds Parts**



# of the German Act to Combat Child Marriages Unconstitutional





1RL.de, [https://commons.wikimedia.org/wiki/File:Bundesverfassungsgericht\\_IMG1634.jpg](https://commons.wikimedia.org/wiki/File:Bundesverfassungsgericht_IMG1634.jpg)

Update: the Court's press release is now available in English.

I.

Yesterday, on March 29, 2023, the German Constitutional Court published its long-awaited (and also long) decision on the German "Act to Combat Child Marriage" (Gesetz zur Bekämpfung von Kinderehen). Under that law, passed in 2017 in the midst of the so-called "refugee crisis", marriages celebrated under foreign law are voidable if one of the spouses was under 18 at the time of marriage (art. 13 para. 3 no. 2 EGBGB), and null and void if they were under 16 (art. 13 para. 3 no. 1 EGBGB) - regardless of whether the marriage is valid under the normally applicable foreign law. In 2018, the German Federal Court of Justice refused to apply the law in a concrete case and asked the Constitutional Court for a decision on the constitutionality of the provision.

That was a long time ago. The wife in the case had been fourteen when the case started in the first instance courts; she is now 22, and her marriage certainly no longer a child marriage. And as a matter of fact, the Constitutional Court decision itself is already almost two months old; it was rendered on February 1. This and the fact that the decision cites almost no sources published after 2019 except for new editions of commentaries, suggests that it may have existed as a draft for much longer. One reason for the delay may have been internal: the president of the Court, Stephan Harbarth, was one of the law's main drafters. The Court decided in 2019 that he did not have to recuse himself, amongst others for the somewhat questionable reason that his support for the bill was based on political, not constitutional, considerations. (Never mind that members of parliament are obligated by the constitution also in the legislative process, and that a judge at the Constitutional Court may reasonably be expected to be hesitant when judging on the unconstitutionality of his own legislation.)

II.

In the end, the Court decided that the law is, in fact, unconstitutional: it curtails

the special protection of marriage, which the German Constitution provides, and this curtailment is not justified. The decision is long (more than sixty pages) but characteristically well structured so a summary may be possible.

Account to the Court, the state's duty to protect marriage (art. 6 para. 1 of the Basic Law, the German Constitution) includes not only marriage as an institution but also discrete, existing marriages, and not only the married status itself but also the whole range of legal rules surrounding it and ensuing from it. Now, the Court has provided a definition of marriage as protected under the Basic Law: it is a union, in principle in perpetuity, freely entered into, equal and autonomously structured, and established by the marriage ceremony as a formalized, outwardly recognizable act. (Early commentators have spotted that "between one man and one woman" is no longer named as a requirement, but it seems far-fetched to view this as a stealthy inclusion of same-sex marriage within the realm of the Constitution.) The stated definition includes marriages celebrated abroad under foreign law. Moreover, it includes marriages celebrated at a very young age as long as the requirement is met that they were entered into freely.

A legislative curtailment of this right could be justified. But the legislator has comparably little discretion where a rule, as is the case here, effectively amounts to an actual impediment to marriage. Whether a curtailment is in fact justified is a matter for the classical test of proportionality: the law must have a proper and legitimate purpose; it must be suitable towards that purpose; it must be necessary towards that purpose; and it must be adequate ("proportional" in the narrow sense) towards the purpose, in that the balance between achieving the purpose and curtailment of the right must not be out of proportion.

Here, the law's purposes themselves - the protection of minors, the public ostracization of child marriage, and legal certainty - are legitimate. The worldwide fight against child marriage is a worthy goal. So is the desire for legal certainty regarding the validity of specific marriages.

The law is also suitable to serve these purpose: the minor is protected from the legal and factual burdens arising from the marriage; the law may deter couples abroad from getting married (or so the legislator may legitimately speculate; empirical data substantiating this is not available.) A clear age rule avoids the uncertainty of a case-by-case *ordre public* analysis as the law prior to 2017 had required.

According to the Court, the measures are also necessary towards these purposes, because alternative measures would not be similarly successful. Automatic nullity of the affected marriages is more effective, and potentially less intrusive, than determining nullity in individual proceedings. It is also more effective than case-by-case determinations under a public policy analysis. And it offers better protection of minors than forcing them to go through a procedure aimed at annulling the marriage would.

Nonetheless, the Court sees in the law a violation of the Constitution: the measure is disproportionate to the curtailment of rights. That curtailment is severe: the law invalidates a marriage that the spouses may have considered valid, may have consummated, and around which they may have built a life. Potentially, they would be barred from living together although they consider themselves to be married.

The Court grants that the protection of minors is an important counterargument in view of the risks that child marriages pose to them. So is legal certainty regarding the question of whether a marriage is or is not valid.

But the legislation is disproportionate for two reasons. First, the law does not regulate the consequences of its verdict on nullity. So, not only does the minor spouse lose the legal protections of marriage, including the right to cohabitation; they also lose the rights arising from a proper dissolution of the marriage, including financial claims against the older, and frequently wealthier, spouse. These consequences run counter to the purpose of protecting the minor. Second, the law does not enable the spouses to carry on their marriage legally after both have reached maturity unless they remarry, and remarriage may well be complicated. This runs counter to the desire to protect free choice.

The court could have simply invalidated the law and thereby have gone back to the situation prior to 2017. Normally, substantive validity of a marriage is determined by the law of each spouse's nationality (art. 13 para. 1 EGBGB). Whether that law can be applied in fact, is then a matter of case-by-case determinations based on the public policy exception (art. 6 EGBGB). That is in fact the solution most private international lawyer (myself included) preferred. The Court refused this simple solution with the speculation that this might have resulted in bigamy for (hypothetical) spouses who had married someone else under the assumption that their marriages were void. (Whether such cases do in

fact exist is not clear.) Therefore, the Court has kept the law intact and given the legislator until June 30, 2024 to reform it. In the meantime, the putative spouses of void marriages are also entitled to maintenance on an analogy to the rules on divorce.

### III.

The German Constitutional Court has occasionally ruled on the constitutionality of choice-of-law rules before. Its first important decision – the Spaniard decision of 1971 – dealt with whether the Constitution had anything to say about choice of law at all, given that choice of law was widely considered to be purely technical at the time, with no content of constitutional relevance. That decision, which addressed a Spanish prohibition on remarrying after divorce, already concerned the right to marry. Another, more recent decision held that a limping marriage, invalid under German law though valid under foreign law, must nonetheless be treated as a marriage for purposes of social insurance. Both decisions rear their heads in the current decision, forming a prelude to a constitutional issue that now resurfaces: the court is interested less in the status of marriage itself and more in the actual protections that emerge from a marriage.

The legal consequences of a marriage are, of course, manifold, and the legislator's explicit determination that the child marriage should yield no consequences whatsoever is therefore far-reaching. (Konrad Duden's proposal to interpret the act so as to restrict this statement to consequences that are negative for the minor is not discussed, unfortunately). Interestingly, the Court accords no fewer than one fifth of its decision, thirteen pages, to a textbook exposition of the relevance of marriage in private international law. Its consequences were among the main reasons for near-unanimity in the German conflict-of-laws field in opposition to the legal reform. Indeed, another fifth of the decision addresses the positions of a wide variety of stakeholders and experts –the federal government and several state governments, the Max Planck Institute for Comparative and International Private Law, a variety of associations concerned with the rights of women, children, and human rights as well as psychological associations. Almost all of them urged the Court to rule the law unconstitutional.

These critics will regard the decision as an affirmation, though perhaps not as a

full one, because the Court, worried only about consequences, essentially upholds the legislator's decision to void child marriages entered into before the age of sixteen. This is unfortunate not only because the status of marriage itself is often highly valuable to spouses, as we know from the long struggles for the acceptance of same-sex marriage rather than mere life partnership. Moreover, the result is the acceptance of limping marriages that are however treated as though they were valid. This may be what the Constitution requires. From the perspective of private international law, it seems slightly incoherent to uphold the nullity of a marriage on one hand and then afford its essential protections on the other, both times on the same justification of protecting minors. In this logic, the Court does not question whether the voiding of the marriage is generally beneficial to all minors in question. Moreover, in many foreign cultures, these protections are the exclusive domain of marriage. It must be confusing to tell someone from that culture that the marriage they thought was valid is void, but that it is nonetheless treated as though it were valid for matters of protection.

#### IV.

An interesting element in the decision concerns the Court's use of comparative law. Germany's law reform was not an outlier: it came among a whole flurry of reforms in Europe that were quite comprehensively compiled and analyzed in a study by the Hamburg Max Planck Institute (it is available, albeit only in German, open access). In recent years, many countries have passed stricter laws vis-à-vis child marriages celebrated under foreign law: France (2006), Switzerland (2012), Spain (2015), the Netherlands (2015), Denmark (2017), Norway (2007/2018), Sweden (2004/2019) and Finland (2019). Such reforms were successful virtue-signaling devices vis-a-vis rising xenophobia (not surprisingly, right-wingers in Germany have already come out again to criticize the Constitutional Court). Substantively, these laws treat foreign child marriages with different degrees of severity - the German law is especially harsh. However, comparative law reveals more than just matters of doctrine. Several empirical reports have demonstrated that foreign laws were not more successful at reducing the number of child marriages than was the German law, which is more a function of economic and social factors elsewhere than of European legislation. Worse, the laws sometimes had harmful consequences, not only for couples separated against their will, but even for politicians: in Denmark, one former



immigration minister was impeached after reports by the Danish Red Cross of a suicide attempt, depression, and other negative psychosocial effects of the law on married minors. And surveys have shown that enforcement of the laws has been spotty in Germany and elsewhere.

The Constitutional Court did not need to pay much attention to these empirical reports. In assessing whether annulling foreign marriages was necessary, the Court did however take guidance from the Max Planck comparative law study, pointing out (nos 182, 189) that the great variety of alternative measures in foreign legislation made it implausible that the German solution - no possibility to validate a marriage at age eighteen - is necessary. This makes for a good example of the usefulness of comparative law - comparative private international law, to be more precise - even for domestic constitutional law. If demonstrating that a measure is necessary requires showing a lack of alternatives, then comparative law can furnish both the alternatives as well as empirical evidence of their effectiveness. That comparative law can be put to such practical use is good news.

V.

The German legislator must now reform its law. What should it do? The Court has hinted at a minimal solution: consider these marriages void without exception, but extend post-divorce maintenance to them, and enable the couple to affirm their marriage, either openly or tacitly, once they are of age. In formulating such rules, comparative analysis of various legal reforms in other countries would certainly be of great help.

But the legislator may also take this admonition from the Constitutional Court as an impetus for a bigger step. Not everything that is constitutionally permissible is also politically and legally sound. The German reform was rushed through in 2017 in the anxiousness of the so-called refugee crisis. The same was true, with some modifications, of other countries' reforms. What the German legislator can learn from them is not only alternative modes of regulation but also that these reforms' limited success is not confined to Germany. This insight could spark legislation that focuses more on the actual situation and needs of minors than on the desire to ostracize child marriage on their backs.

Such legislation may well reintroduce case-by-case analysis, something private international lawyers know not to be afraid of. This holds true especially in view of the fact that the provision does not regulate a mass problem but rather a relatively small number of cases which is unlikely to create excessive burdens on agencies and the judiciary. If the legislature does not want to go back to the *ordre public* test, perhaps it could extend the provision of Article 13 para. 3 no. 2 for marriages entered into after the age of 16 to marriages entered into earlier. This would make the marriage merely annulable; in cases of hardship, the sanction could be waived. The legislator could also substitute the place of celebration for the spouses' nationality as the relevant connecting factor for substantive marriage requirements, as the German Council for Private International Law, an advisor to the legislator, has already proposed (Coester-Waltjen, IPRax 2021, 29). This would make it possible to distinguish more clearly between two very different situations: couples wanting to get married in Germany (where the age restriction makes eminent sense) on the one hand, and couples who already got married, validly, in their home countries and find their actually existing marriage to be put in question. Indeed, this might be a good opportunity to move from a system that designates the applicable law to a system that recognizes foreign acts, as is the case already in some other legal systems.

In any case, the Court decision provides Germany with an opportunity to move the fight against child marriage back to where it belongs and where it has a better chance of succeeding - away from private international law, and towards economic and other forms of aid to countries in which child marriage would be less rampant if they were less afflicted with war and poverty.

---

# More on the Validity of the PDVSA 2020 Bonds

*Written by Mark Weidemaier, the Ralph M. Stockton, Jr. Distinguished Professor at the University of North Carolina School of Law, and Mitu Gulati, the Perre Bowen Professor of Law at the University of Virginia School of Law.*

Governments with no realistic prospect of paying their debts often gamble for redemption, trying desperately to avoid default. Political leaders, with good reason, fear that a debt default will get them thrown out of office. But in trying to hold power, sometimes by borrowing even more, they often make matters worse for the country and its people. A prime example involves the collateralized bonds issued by Venezuelan state oil company, PDVSA.

## Venezuela's Gamble

In 2016, PDVSA was about to default on its debt, as was the Venezuelan state itself. At that stage, it was already well beyond the point where the debt should have been restructured, given worsening domestic conditions. Instead, the Maduro government gambled. It conducted a debt swap in which investors exchanged unsecured PDVSA bonds for new ones due in 2020. To sweeten the deal, the PDVSA 2020s were backed by collateral in the form of a 50.1% interest in CITGO Holding, the parent company of U.S. oil refiner CITGO Petroleum. The deal bought a few extra years but put at risk the country's primary asset in the United States.

Even at the time, it was uncertain whether Venezuelan law authorized the transaction. The Venezuelan Constitution requires legislative approval for contracts in the national public interest. Maduro did not seek approval because opposition lawmakers controlled the National Assembly and had made clear they would not grant it. The deal went ahead anyway.

Times have changed. The United States recognizes Juan Guaidó as Venezuela's interim president (for now). The PDVSA 2020 bonds are in default. The

bondholders want their collateral. PDVSA has challenged the validity of the bonds. But the bonds include a choice-of-law clause designating the law of New York. Does this mean that validity is to be determined under New York law? John Coyle recently wrote a terrific post about the case and its significance on this blog. We write to provide some broader context, drawing from our article, *Unlawfully Issued Sovereign Debt*.

## **Sovereign Debt and Choice-of-Law Clauses**

The story of the PDVSA 2020 bonds is a common one in government debt markets. A government borrows money in dodgy ways or at a time of financial distress. Arguably, the debt contravenes domestic law, although the government may obtain legal opinions affirming its validity. The debt also includes a choice of law clause providing for the application of foreign law, typically that of New York or England. Later, a new government comes to power and disputes the validity of the debt. We have seen this pattern in Venezuela, Mozambique, Ukraine, Zambia, Liberia, Puerto Rico, and in other sovereign and sub-sovereign borrowers. (The pattern goes back even further – for a delightful treatment of the hundreds of such cases from the 1800s involving municipal debt, see [here](#)).

These cases raise what seems like a simple question: Does an international bond—i.e., one expressly made subject to foreign law—protect investors against the risk that the bond will later be deemed in violation of the issuer’s domestic law? Despite seeming simple, and how frequently the question arises, there is little clarity about the answer. New York law governs a big part of the sovereign debt markets, and the choice-of-law question in the PDVSA 2020 case has been certified to the New York Court of Appeals. Will that court’s decision offer clarity?

## **Variations in Clause Language**

Count us skeptical. The problem is not just the unpredictability of choice of law rules. It is that many choice-of-law clauses are drafted in perplexing ways, which leave unclear the extent of protection they offer to investors. Consider three examples. The first is from the PDVSA 2020 bond itself where the relevant language is capitalized (as if capitalization has some magic effect):

*THIS INDENTURE AND THE NOTES SHALL BE CONSTRUED IN ACCORDANCE WITH, AND THIS INDENTURE AND THE NOTES AND ALL*

*MATTERS ARISING OUT OF OR RELATING IN ANY WAY WHATSOEVER TO THIS INDENTURE AND THE NOTES (WHETHER IN CONTRACT, TORT OR OTHERWISE) SHALL BE GOVERNED BY, THE LAWS OF THE STATE OF NEW YORK WITHOUT REGARD TO THE CONFLICTS OF LAW PROVISIONS THEREOF (OTHER THAN SECTION 5-1401 OF THE NEW YORK GENERAL OBLIGATIONS LAW)*

This clause apparently seeks to extend New York law to the widest possible range of questions. Whether that includes the question of whether the bonds were validly issued is, as John’s post puts it, the “billion-dollar question.” And the answer is not clear. The decision by the New York Court of Appeals might provide some clarity on it . . . maybe.

But now consider this clause, from a Brazilian bond (emphasis ours):

*The indenture and the debt securities will be governed by, and interpreted in accordance with, the laws of the State of New York without regard to those principles of conflicts of laws that would require the application of the laws of a jurisdiction other than the State of New York . . . ; **provided, further, that the laws of Brazil will govern all matters governing authorization and execution of the indenture and the debt securities by Brazil.***

Does the bold text mean that investors cannot enforce a loan issued in violation of Brazilian law? We aren’t sure. As we discuss in the paper, it can be hard to identify questions of “authorization” and “execution,” especially in the context of sovereign borrowing. Consider the question whether a loan violates a constitutional or statutory debt limit. Does the debt limit negate the sovereign’s capacity to borrow, limit the authority of government officials to bind the sovereign, or make the loan illegal or contrary to policy? How one categorizes the issue will affect the answer to the choice-of-law question. Carve outs like this—which reserve questions of authorization and execution for resolution under local law—appear in around half the New York-law sovereign bonds we examined.

Finally, consider this clause from a Turkish bond (again, emphasis ours):

*[The] securities will be governed by and interpreted in accordance with the laws of the State of New York, except with respect to the authorization and*



*execution of the debt securities on behalf of Turkey and any other matters required to be governed by the laws of Turkey, which will be governed by the laws of Turkey*

What now? This “other matters” carve out is even odder than the one for questions of authorization and execution. It hints that additional, unspecified matters might be governed by the sovereign’s local law. Indeed, it implies that the sovereign’s own law might determine which issues fall within the “other matters” exception. If so, the clause potentially allows the government to create new exceptions to the governing law clause.

## **Conclusion**

Our discussions with senior sovereign debt lawyers have done little to dispel our uncertainty about the meaning of these clauses. They seem just as confused as we are. All we can say with confidence is that many choice of law clauses include traps for unwary investors. Until drafting practices converge on a consistent and coherent model, the choice-of-law question is likely to remain fodder for litigation.

[This post is cross-posted at Transnational Litigation Blog.]

---

# **Appeal on Merits in Commercial Arbitration?—An Overview**

(authored by Chen Zhi, Wangjing & GH Law Firm, PhD Candidate at University of Macau)

Finality of tribunal’s decision without any challenging system on merits issues has been well established and viewed as one of the most cited benefits of arbitration, which can be found in most influential legal documents such as 1958 New York Convention and UNCIITRAL Model Law on International Commercial Arbitration (issued in 1985, as revised in 2006).

Nevertheless, among all salient features of arbitration, finality of award is probably the most controversial one. In the investment arbitration, the question has been canvassed at length and has been serving as one of the central concerns in the ongoing reform of investment arbitration.[i] While in commercial arbitration, some practitioners and commentators are also making effort to advocate an appeal system. For example, a report by Singapore Academy of Law Reform Committee in February of 2020 strongly recommended introduction of appeals on question of law into international arbitration seated in Singapore,[ii] and has ignited a debate in this regard.

In legal practice, there are some legislations or arbitration institutions provide approaches allowing for the parties to apply for reconsideration of the award, which can be summarized into 3 categories: 1. The appellate mechanism conducted by state courts; 2. Appellate mechanism within the arbitration proceedings and; 3. Alternative to appellate mechanism by arbitration society.

This article will start by giving a brief introduction about the forgoing systems, and comment on the legitimacy and necessity of appellate mechanism in commercial arbitration.

## **1.Appelling mechanism before the court**

### 1.1 Appellate Mechanism in England

When it comes to appellate mechanism conducted by state courts, the appeal mechanism for question of law as set out in section 69 of 1996 English Arbitration Act(EAA) is one of the most cited exceptions. It is undeniable that Section 69 of EAA constitutes an appellate mechanism in respect of arbitration conducted by judicial institutions. Nevertheless, some clarifications shall be made in this regard:

(1) The appellate mechanism serves as a default rule rather than a mandatory one, which allows parties to contract out of it. Apart from an agreement which explicitly excludes the appellate system, such consensus can be reached by other means. One of the methods is the parties' agreement on dispensing with reasons for the arbitral award, which is overall a rare practice in the field of international commercial arbitration while frequently used within some jurisdictions and sectors. Another way is the designation of arbitration rules containing provisions eliminating any appeal system, such as arbitration rules of most world renowned

arbitration institutions. For instance, Article 26.8 of London Court of International Arbitration Rules (The LCIA Rules) explicitly stipulates that parties waive “irrevocably” their right to appeal, review or recourse to any state court or other legal authority in any form.[iii] Therefore, parties may easily dispense with the right to appeal by reference of arbitration before The LCIA Rules or under its rules.

(2) Albeit parties fail to opt out of such appeals, the court is still afforded with discretion on rejection of a leave to commence such appeal. As provided by Section 69 (3) of EAA, such leave shall be granted only certain standards are satisfied, *inter alia*, the manifest error in the disputed award or raise of general public importance regarding the debating question.

(3) The competence of the appealing court is confined to review the question of laws and shall not impugned on the factual issue. In other words, any alleged errors in fact finding by tribunal is out of the court’s remit. English courts are tended to reject efforts dressing up factual findings as questions of law, and have set up a high threshold regarding mixed questions of law and fact.[iv]

The abovementioned three factors have enormously narrowed down the scope of appellate system under Section 69 of EAA. Statistics in recent years also reveal the extreme low success rate in both granting of leave and overturning of the outcome. From 2015 to March 2018, more than 160 claims had been filed, while only 30 claims were permitted and 4 claims succeeded.[v] Hence, the finality of arbitration award is overall enshrined in England. Parties can hardly count on the appeal proceedings set forth in Section 69.

## 1.2 Appellate Mechanism Outside England

Some other jurisdictions have embedded similar appellate system, Canada and Australia employed an opt-out model like Section 69 of EAA.[vi] Other jurisdictions have adopted stringent limits on such appeal. In Singapore, appeal on merits of award is only provided by Arbitration Act governing domestic arbitration and not available in arbitration proceedings under International Arbitration Act. The Arbitration Ordinance of Hong Kong SAR of China provides an opt-in framework which further narrows down the use of appellate mechanism.

Appeal in the court is somehow incompatible with the minimal intervene principle as set out in legislations like UNCITRAL Model Law. Further, it will not only

enormously undermine efficiency of arbitration but also make the already-clogged state courts more burdensome. The important consideration about the appeal against question of law in the court is the development of law through cases,[vii] while it is not suitable for all jurisdictions.

## **2.Internal appellate of arbitration institution**

Apart from state courts, some arbitration institutions may have the authority to act as appellate bodies under their institutional rules, which can be summarized as “institutional appellate mechanism”. While such system can be observed in the arbitration concerning certain sectors such as the appeal board of The Grain and Feed Trade Association, it is rarely used by institutions open for all kinds of commercial disputes, with exceptions such as The Institute of Conflict Prevention and Resolution (CPR) and Judicial Arbitration & Mediation Services, Inc (JAMS).[viii]

Shenzhen Court of International Arbitration (SCIA) is the first arbitration institution in Mainland China who introduced optional appellate arbitration procedure into its arbitration rules published in December of 2018 (having come into effective since February 2019), enclosed with a guideline for such optional appellate arbitration procedure.

SCIA’s Optional Appellate Arbitration Procedure provides an opt-in appellate system against the merits issue of an award where the below prerequisites are all satisfied: (1) pre-existing agreement on appeal by parties; (2) such appeal mechanism is not prohibited by the law of the seat; (3) the award is not rendered under expedited procedure set out in SCIA Arbitration Rules.[ix]

If all the above conditions are satisfied and one of the dispute parties intend to appeal, the application of appeal shall be filed the appeal within 15 days upon receipt of the disputing award and an appealing body composed of 3 members will be constituted through the appointment of SCIA’s chief. The appealing body is afforded with broad direction to revise or affirm the original award, of whom the decision will supersede the original award.[x]

The SCIA appellate mechanism is a bold initiative, while some uncertainties may arise under the current legal system in Mainland China:

First is the legitimacy of an internal appellate system under current legislation

system. Though the current statutes do not contain any provision specifying the institutional legitimacy of an appellate mechanism, while legal risk may arise by breach of finality principle set out in the Article 9 of PRC Arbitration Law, which expressly stipulates that both state court and arbitration institution shall reject any dispute which has been decided by previous award. In this respect, any decision by an appealing system, regardless of whether it is conducted by state court, is likely to be annulled or held unenforceable subsequently. Apparently, SCIA was well aware of such risk and set forth the first prerequisite for the system such that parties may circumvent the risk through designation of arbitral seat.

The second is the risk brought by designation of arbitration seat other than Mainland China while no foreign-related factor is involved. Current law in PRC is silent on the term of arbitration seat, even though the loophole may be well resolved by the new draft of revised Arbitration Law which has been published for public consultation since late July 2021,[xi] it is still unclear whether parties to arbitration without foreign-related factors have the right to designate a jurisdiction other than Mainland China. As per previous cases, courts across the jurisdiction has been for a long time rejecting parties' right to agree on submission of case to off-shore arbitration institutions provided that no foreign-related factor can be observed in the underlying dispute.[xii]If the same stance keep unchanged in respect of parties' consent on arbitration seat, parties' agreement on designating an off-shore seat to avoid the scrutiny will be invalidated and the SCIA appellate mechanism will thereby not be available.

Third is the possibility of contradictory results. In Mainland China, a domestic award is final upon parties and hence enforceable without any subsequent proceedings. With this regard, SCIA's appellate mechanism may create two contradictory outcomes in one dispute resolution proceeding under the current legal system. If the successful party seeks for enforcement of award by concealing the existence of appeal proceedings, the court will enforce it basing on its text. Even though the court is aware of the appeal proceedings in the course of enforcement, it is not obliged to stay the enforcement in absence of any legal basis. In other words, the appeal mechanism will be meaningless for all parties in case of the launch of enforcement proceedings .

### **3.Alternatives to appealing mechanism**



As mentioned above, in Mainland China there is no room for a review on merits system in commercial arbitration under Article 9 of PRC Arbitration Law. This article has been verbatim transplanted into the most recent draft of revised Arbitration Law which has been published for public consultation since late July 2021. Therefore, the much-cited bill brings no assistance in this regard.

With all that said, a few institutions have set up a special system called “pre-decision notification” as an alternative to mirror the function of appeal mechanism, which is said to be credited to Deyang Arbitration Commission of Sichuan Province dated back to 2004, according to a piece of news in August 2005 reported by Legal Daily, a nationwide legal professional newspaper run by the Supreme People’s Court.[xiii] Pre-decision notification allows for tribunal to notice parties their preliminary opinions about the case before rendering the final decision, and ask for parties’ comments within fixed duration. Tribunal’s preliminary opinions can be revised by the final award based on comments by parties, occurrence of new fact after deliberation, or merely on the tribunal’s own initiative.

One notable case about the pre-decision notification mechanism is decided by Xi’an Intermediate Court of Shanxi Province dated 18 April of 2018.[xiv] The case concerns an arbitration proceeding administered by Shangluo Branch of Xi’an Arbitration Commission where the tribunal dispatched preliminary opinion to parties at the outset, whilst ruled on the contrary in the final decision. The plaintiff (respondent of the arbitration proceeding) subsequently commenced an annulment proceeding against the award on the basis that the final decision is contradictory with the one set out in pre-decision notice (together with other reasons which were not relevant to the topic of this article), whilst the court refused to set aside the award by simply indicated that the reasons replied upon by plaintiff had no merits, without giving any further comment on such system.

In another noteworthy case which concerns the fact that tribunal ruled adversely after considering parties’ comments on opinion set out in pre-decision notice, in the annulment proceeding, the Guiyang Intermediate Court of Guizhou Province explicitly endorsed the legitimacy of pre-decision notification, by stating that even though it is not regulated in any current legislation, pre-decision notice can be viewed as an investigation method by means of tribunal’s query to the parties, instead of a decision by tribunal. Therefore, the discrepancy between pre-decision opinion and final award does not amount to annulment of the award.[xv]

The abovementioned court decisions are somehow problematic: the pre-decision notification is by no means a mere investigating tool for the tribunal. While the preliminary opinion is made and dispatched, it shall be deemed that the tribunal has taken the stance, which shall be distinguished from tribunal's query about facts or laws in a neutral and open minded manner which is widely accepted in commercial arbitration.[xvi] Therefore, subsequent comments by parties would constitute a *de facto* appealing mechanism before the same decision-making body, which will give rise to problems such as postponing the arbitral proceedings and the question of conflict of interest. Moreover, it probably produces unfairness for parties dissatisfied with the preliminary opinion may spare no effort to change the tribunal's mind by intervening tribunal's autonomy (even by taking irregular or illegal measures).

Overall, pre-decision notification is a highly controversial practice which received lots of criticisms, and hence does not constitute a mainstream system in China. None of the first-class arbitration institutions (including CIETAC, Beijing Arbitration Commission, Guangzhou Arbitration Commission, etc.) had ever embraced such system in the field of commercial arbitration. Some institutions are seeking to repeal or limit the use of such system. For example, Zunyi Arbitration Commission abolished such system in its rules released in 2018, while other arbitration commissions who are consistently strong champions of this system also opined that it is only used in rare cases with higher controversy and complexity.

Despite of these pitfalls and controversies, the courts' decisions clearly reveal that pre-decision notification system *per se* is not necessarily a breach of finality principle set out in arbitration legislation and hence feasible for parties if it is explicitly set out in applicable arbitration rules.

Pre-decision notification has been introduced into investment arbitration in recent years, Beijing Arbitration Commission has incorporated such system into its investment arbitration which was finalized and published in September 2019, which provides that the tribunal shall provide parties with the draft of award and seek for their comments, and may give proper consideration to the parties' feedback.[xvii] By the language, pre-decision notification will act as a mandatory rule while any investor-state case is being administered by this institution.

#### **4. Comments**

Several pertinent issues have been raised with regard to appellate mechanism in arbitration, which can be boiled down to several sub-issues including legitimacy, efficiency and fairness, as well as preference of parties.

#### 4.1 Legitimacy Perspective

According to leading legislations across the world, the competence of state court confined to procedural issues in respect of judicial review over arbitration award, with rare and narrow exceptions such as the public policy set out in UNCITRAL Model Law and New York Convention. With this respect, even though some commentators argue that an appeal on merits is not necessarily a breach of finality and minimal intervene principles set out in UNCITRAL Model Law,[xviii] a mandatory and all-catching appealing system encompassing both factual and legal issues conducted by state court is undeniably incompatible with modern arbitration legislation.

In this respect, an internal appealing mechanism conducted by arbitration institution seems to be less controversial in respect of legitimacy at first glance. While it may also be viewed as a breach of finality of award in the context of some specific legislations such as Article 9 of PRC Arbitration Law.

#### 4.2 Efficiency and Fairness

Finality principle in commercial perceivably enhances the efficiency of dispute resolution by relieving both parties and states from endless and burdensome appealing and reconsidering proceedings, while efficiency is not free from problem while the fairness issue is concerned, giving rise to pertinent considerations about correction of error, enhancement of consistency and the increase of transparency.

Nevertheless, the fairness argument is less convincing in the context of international commercial arbitration in which parties are seeking for a neutral forum in avoidance of local protectionism.[xix] Further, consistency and transparency is less concerned in the context of arbitration which is viewed to be tailored for individual cases while less public concerns are involved, comparing with litigation.

#### 4.3 Preference of Parties

It can be drawn from above analysis that there is no one-standard-fitting all approach for the appeal mechanism in commercial arbitration, in that scenario, parties' preference shall be taken into account by virtue of the autonomy nature of commercial.

An worldwide survey conducted by Queen Mary University in 2015 provides that 23% of the respondents were in favor of an appeal mechanism in commercial arbitration (compared to 36% approval rate in the same question about investment arbitration),<sup>[xx]</sup> which reveals a boost about 150% while compared with the rate in 2006 survey (around 9%). In 2018 survey, 14% of the respondents had selected "lack of appeal mechanism on the merits" as one of the three worst characteristics of arbitration.<sup>[xxi]</sup>

In a nutshell, statics reveals the increasing demand for appeal system, while it is premature to say that preference for appeal mechanism has been the mainstream in commercial arbitration, it has given rise to concerns by arbitration practitioners and proper response shall be made accordingly.

[i] See Elsa Sardinha, *The Impetus for the Creation of an Appellate Mechanism*, in Meg Kinnear and Campbell McLachlan (eds), *ICSID Review - Foreign Investment Law Journal*, Oxford University Press 2017, Volume 32 Issue(3) pp. 503 - 527S <https://www.sal.org.sg/sites/default/files/PDF%20Files/Law%20Reform/2020%20Report%20on%20the%20Right%20of%20Appeal%20against%20International%20Arbitration%20Awards%20on%20Questions%20of%20Law.pdf>

[ii] See Singapore Academy of Law Reform Committee, *Report on the Right of Appeal against International Arbitration Awards on Questions of Law February 2020*, available at

[iii] Article 26.8 of LCIA Arbitration Rules?coming into effective since October 2020?, available at [https://www.lcia.org/Dispute\\_Resolution\\_Services/lcia-arbitration-rules-2020.aspx](https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx)

[iv] See Teresa Cheng, *The Search for Order Within Chaos in the Evolution of ISDS*, CIArb's 45th annual Alexander Lecture on 16 January 2020, available at [https://www.doj.gov.hk/en/community\\_engagement/speeches/20200116\\_sj1.html](https://www.doj.gov.hk/en/community_engagement/speeches/20200116_sj1.html)

[v] Ben Sanderson et al., *Appeals under the English Arbitration Act 1996*?available at

<https://www.dlapiper.com/en/uk/insights/publications/2018/05/appeals-under-the-english-arbitration-act-1996/#:~:text=Section%2069%2C%20meanwhile%2C%20is%20a%20non-mandatory%20provision%20of,the%20English%20courts%20on%20a%20point%20of%20law.>

[vi] T. Dedezade, *Are You In or Are You Out? An Analysis of Section, 69 of the English Arbitration Act 1996: Appeals on a Question of Law*, 2 Intl. Arb. L.J. 56 (2006) available at <http://corbett.co.uk/wp-content/uploads/Taner-s-69-article.pdf>

[vii] Ibid.

[viii] See Rowan Platt, *The Appeal of Appeal Mechanisms in International Arbitration: Fairness over Finality?*, Journal of International Arbitration, Volume 30 Issue 5 p. 548 (2013)

[ix] See Article 68 of SCIA Arbitration Rules (coming into effective since 2019), available at <http://scia.com.cn/upload/20201027/5f97bf7833c8c.pdf>

[x] See SCIA Guidelines for the Optional Appellate Arbitration Procedure, available at <http://www.scia.com.cn/files/fckFile/file/SCIA%20Guidelines%20for%20the%20Optional%20Appellate%20Arbitration%20Procedure.pdf>

[xi] See Anton Ware et al., *Proposed Amendments to the PRC Arbitration Law: A Panacea?*, available at <http://arbitrationblog.kluwerarbitration.com/2021/09/09/proposed-amendments-to-the-prc-arbitration-law-a-panacea/>

[xii] See a seminal case (2013) 10670 by Beijing 2<sup>nd</sup> Intermediate Court in January of 2014, which concerns an award rendered in proceedings governed by KCAB, the court rejected enforcement of KCAB award by the reason that the underlying dispute did not have any foreign-related factor, despite of the fact that one party to the proceedings is an enterprise wholly subsidized by Korean citizens.

[xiii] See Li Yongli et al., *Enhancing Arbitration Legislation through Pre-Decision Notification*. Legal Daily, 16 August 2005, p. 12 (2005) 8 (2005) 16 (2005) 12

[xiv] 2018 Shan 01 Min Te No. 99?2018??01??99?

[xv] 2016 Qian 01 Min Te No. 48?2016??01??48?

[xvi] Per the common practice and well established principle, tribunals are free to delivery query to parties in respect of both factual finding and ascertaining law (*Jura Novit Curia*), while it shall be conducted in a manner that being prepared to consider legal positions advanced by the parties, irrespective of questions well known to the tribunal. See: *Revista Brasileira de Arbitragem, International Law Association Committee on International Commercial Arbitration Ascertainig the Contents of the Applicable Law in International Commercial Arbitration Report for the Biennial Conference in Rio de Janeiro, August 2008,*

[xvii] Article 42.4 of Beijing Arbitration Commission/Beijing International Arbitration Center Rules for International Investment Arbitration?available at [https://www.bjac.org.cn/page/data\\_dl/touzi\\_en.pdf](https://www.bjac.org.cn/page/data_dl/touzi_en.pdf)

[xviii] See Singapore Academy on Law Reform Committee: *Report of Appeal Against International Arbitration Awards on Questions of Law*, February 2020, available at <https://www.sal.org.sg/sites/default/files/PDF%20Files/Law%20Reform/2020%20Report%20on%20the%20Right%20of%20Appeal%20against%20International%20Arbitration%20Awards%20on%20Questions%20of%20Law.pdf>

[xix] Noam Zamir ,Peretz Segal, *Appeal in International Arbitration—an efficient and affordable arbitral appeal mechanism*’, in William W. Park (ed), *Arbitration International*, Oxford University Press 2019, Volume 35 Issue 1) p. 84.

[xx] See Queen Mary, 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration, p,8 available at [http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015\\_International\\_Arbitration\\_Survey.pdf](http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf)

[xxi] See Queen Mary & White Case, 2018 International Arbitration Survey: The Evolution of International Arbitration, p,8 available at [http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey—The-Evolution-of-International-Arbitration-\(2\).PDF](http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey—The-Evolution-of-International-Arbitration-(2).PDF)

---

# First Issue of 2021's Journal of Private International Law

The first issue of the *Journal of Private International Law* for 2021 was released today and it features the following articles:

Paul Beaumont, Some reflections on the way ahead for UK private international law after Brexit

Since 1 January 2021 the UK has moved out of the implementation period for its withdrawal from the European Union (EU) and it is an appropriate time to reflect on the way forward for the UK in developing private international law. This article considers the practical steps that the UK should take in the near future. There is significant work that the UK can do to progress its commitment to the “progressive unification of the rules of private international law” by improving its commitment to the effective functioning of several key Conventions concluded by the Hague Conference on Private International Law (HCCH). Some of these steps can and should be taken immediately, notably accepting the accessions of other States to the Hague Evidence and Child Abduction Conventions and extending the scope of the UK’s ratification of the Adults Convention to England and Wales, and Northern Ireland. Other things require more consultation and time but there are great opportunities to provide leadership in the world by ratifying the Hague Judgments Convention 2019 and, when implementing that Convention which is based on minimum harmonisation, providing leadership in the Commonwealth by implementing, at least to some extent, the Commonwealth Model Law on Recognition and Enforcement of Civil and Commercial Judgments. Within the UK, as a demonstration of best constitutional practice, intergovernmental cooperation between the UK Government and the devolved administrations should take place to consider how intra-UK private international law could be reformed learning the lessons from the UK Supreme Court’s highly divided decision in *Villiers*. Such work should involve the best of the UK’s experts (from each of its systems of law) on private international law from academia, the judiciary and legal practice. Doing so, would avoid accusations that Brexit will see a UK run by generalists

who give too little attention and weight to the views of experts. This use of experts should also extend to the UK's involvement in the future work of HCCH at all levels. The HCCH will only be able to be an effective international organisation if its Members show a commitment to harnessing the talents of experts in the subject within the work of the HCCH.

#### Reid Mortensen, Brexit and private international law in the Commonwealth

“Brexit is a trading and commercial opportunity for the countries of the Commonwealth, as it makes it likely that, for many, their access to United Kingdom (UK) markets will improve significantly. The question addressed in this article is whether, to support more open and trading relationships, Brexit also presents opportunities for the development of the private international law of Commonwealth countries - including the UK. Focusing on Australia, Canada, New Zealand and Singapore, as well as the UK, an account is given of the relationship between the different systems of private international law in these Commonwealth countries in the period of the UK's membership of the European Union (EU). Accordingly, consideration is given to the Europeanisation of UK private international law and its resistance in other parts of the Commonwealth. The continuing lead that English adjudication has given to private international law in the Commonwealth and, yet, the greater fragmentation of that law while the UK was in the EU are also discussed. The conclusion considers the need to improve the cross-border enforcement of judgments within the Commonwealth, and the example given in that respect by its federations and the trans-Tasman market. Possible directions that the cross-border enforcement of judgments could take in the Commonwealth are explored.”

#### Trevor Hartley, Arbitration and the Brussels I Regulation - Before and After Brexit

This article deals with the effect of the Brussels I Regulation on arbitration. This Regulation no longer applies in the UK, but the British Government has applied to join the Lugano Convention, which contains similar provisions. So the article also discusses the position under Lugano, paying particular attention to the differences between the two instruments. The main focus is on the problems that



arise when the same dispute is subject to both arbitration and litigation. Possible mechanisms to resolve these problems – such as antisuit injunctions – are considered. The article also discusses other questions, such as freezing orders in support of arbitration.

Maksymilian Pazdan & Maciej Zachariasiewicz, *The EU succession regulation: achievements, ambiguities, and challenges for the future*

The quest for uniformity in the private international law relating to succession has a long history. It is only with the adoption of the EU Succession Regulation that a major success was achieved in this field. Although the Regulation should receive a largely positive appraisal, it also suffers from certain drawbacks that will require a careful approach by courts and other authorities as to the practical application of the Regulation. The authors address selected difficulties that arise under its provisions and make suggestions for future review and reform. The article starts with the central notion of habitual residence and discusses the possibility of having a dual habitual residence. It then moves to discuss choice of law and recommends to broaden further party autonomy in the area of succession law. Some more specific issues are also addressed, including legacies by vindication, the relationship between the law applicable to succession, the role of the *legis rei sitae* and the law applicable to the registries of property, estates without a claimant, the special rules imposing restrictions concerning or affecting succession in respect of certain assets, as well as the exclusion of trusts. Some proposals for clarifications are made in that regard.

Stellina Jolly & Aaditya Vikram Sharma, *Domestic violence and inter-country child abduction: an Indian judicial and legislative exploration*

The Hague Convention on the Civil Aspects of International Child Abduction aims to prevent the abduction of children by their parents by ensuring the child's prompt return to his/her place of habitual residence. At the time of drafting the Convention, the drafters believed that non-custodial parents who were fathers perpetrated most of the abductions. However, the current statistics reveal the overwhelming majority of all abductors as primary or joint-primary caretakers. Unfortunately, it is unknown what exact proportion of these situations includes

abductions triggered by domestic violence. In the absence of an explicit provision of domestic violence against spouses as a defence against an order of return, for a parent who has abducted a child to escape domestic violence, the relevant defence is of “grave risk of harm” to and “intolerable situation” for the child under Article 13(1)(b) of the Convention. However, the lack of guidance on what constitutes “grave risk” and “intolerable situation”, at least in the past, and its operationalisation in the context of domestic violence brings in pervasive indeterminacy in child abduction. In 2012, the Hague Conference on Private International Law identified “domestic violence allegations and return proceedings” as a key issue and recommended steps for developing principles on the management of domestic violence allegations in return proceedings leading to the adoption of a Good Practice Guide on this issue in 2020.

The Ministry of Women and Child Development (WCD) and the Ministry of Law and Justice, India, cite that most Indian parents who abduct their children happen to be women escaping domestic violence abroad. Thus, they are victims escaping for themselves and their children’s safety. This research has summed up the judgments delivered by High Courts and the Supreme Court of India on child abduction between 1984 and 2019. Through judicial mapping, the paper discusses the cases in which battered women have highlighted and argued domestic violence as a reason against their children’s return. The paper evaluates whether the reason given by the two ministries against India’s accession to the Hague Convention is reflected in cases that have come up for judicial resolution and what are the criteria evolved by the judiciary in addressing the concerns of domestic violence against a spouse involved in child abduction. The paper analyses India’s legislative initiative, the Civil Aspects of International Child Abduction Bill, 2016 and assesses the measures proposed by the Bill for considering domestic violence against a spouse in abduction cases.

Kittiwat Chunchaemsai, Legal considerations and challenges involved in bringing the 2005 Hague Convention on Choice of Court Agreements into force within an internal legal system: A case study of Thailand

Thailand must consider two vital elements, namely its internal legal system and environment before signing the Hague Convention on Choice of Court Agreements 2005 (Hague Convention). This paper investigates whether the law of

Thailand in its current form is inconsistent with the Hague Convention. Articles 1-15 are examined to identify areas of inconsistency and to suggest appropriate solutions. This study finds that the internal legal system of Thailand is not quite in line with the Hague Convention. This conclusion leads to analytical recommendations to suit the needs of the current Thai legal system. Implementing these recommendations is necessary for Thailand if it intends to become a Party to the Hague Convention. Thailand must not only have a specific implementation act but must also review and revise the relevant laws appropriately.

Saeed Haghani, Evolution of *lex societatis* under Iranian law: current status and future prospects

There has been a growing attention to applicable law to companies (*lex societatis*) in Iranian legal research. A brief study of relevant legal literature leads us to a list of both disagreements and complexities on the subject. Meanwhile, a recent parliamentary effort on the issue, illustrates the importance of *lex societatis* in the eyes of the Iranian legislature. A comparative approach would be of great help in the analysis of the formation and evolution of relevant Iranian legal rules. This paper tries to provide the reader with a comprehensive view of the current transitory state of Iranian law regarding *lex societatis*.

---

**Facebook's further attempts to resist the jurisdiction of the**

# Federal Court of Australia futile

Earlier in the year, Associate Professor Jeanne Huang reported on the Australian Information Commission's action against Facebook Inc in the Federal Court of Australia. In particular, Huang covered *Australian Information Commission v Facebook Inc* [2020] FCA 531, which concerned an ex parte application for service outside of the jurisdiction and an application for substituted service.

In April, Thawley J granted the Commission leave to serve the first respondent (Facebook Inc) in the United States, and the second respondent (Facebook Ireland Ltd) in the Republic of Ireland. Through orders for substituted service, the Commission was also granted leave to serve the relevant documents by email (with respect to Facebook Inc) and by mail (with respect to Facebook Ireland Ltd).

Facebook Inc applied to set aside the orders for its service in the United States, among other things. Facebook Ireland appeared at the hearing of Facebook Inc's application seeking equivalent orders, although it did not make submissions.

On 14 September, Thawley J refused that application: *Australian Information Commissioner v Facebook Inc (No 2)* [2020] FCA 1307. The foreign manifestations of Facebook are subject to the Federal Court's long-arm jurisdiction.

The decision involves an orthodox application of Australian procedure and private international law. The policy represented by the decision is best understood by brief consideration of the context for this litigation.

## Background

The Australian Information Commission is Australia's 'independent national regulator for privacy and freedom of information', which promotes and upholds Australians' rights to access government-held information and to have their personal information protected.

Those legal rights are not as extensive as equivalent rights enjoyed in other places, like the European Union. Australian law offers minimal constitutional or statutory human rights protection at a federal level. Unlike other common law

jurisdictions, Australian courts have been reluctant to recognise a right to privacy. Australians' 'privacy rights', in a positivist sense, exist within a rough patchwork of various domestic sources of law.

One of the few clear protections is the *Privacy Act 1988* (Cth), (*'Privacy Act'*), which (among other things) requires large-ish companies to deal with personal information in certain careful ways, consistent with the 'Australian Privacy Principles'.

In recent years, attitudes towards privacy and data protection seem to have changed within Australian society. To oversimplify: in some quarters at least, sympathies are becoming less American (ie, less concerned with 'free speech' above all else), and more European (ie, more concerned about privacy et al). If that description has any merit, then it would be due to events like the notorious Cambridge Analytica scandal, which is the focus of this litigation.

Various manifestations of Australian governments have responded to changing societal attitudes by initiating law reform inquiries. Notably, in 2019, the Australian Competition and Consumer Commission ('ACCC') delivered its final report on its *Digital Platforms Inquiry*, recommending that Australian law be reformed to better address 'the implications and consequences of the business models of digital platforms for competition, consumers, and society'. The broad-ranging inquiry considered overlapping issues in data protection, competition and consumer protection—including reform of the *Privacy Act*. The Australian Government agreed with the ACCC that Australian privacy laws ought to be strengthened 'to ensure they are fit for purpose in the digital age'. A theme of this report is that the foreign companies behind platforms like Facebook should be better regulated to serve the interests of Australian society.

Another important part of the context for this Facebook case is Australia's media environment. Australia's 'traditional' media companies—those that produce newspapers and television—are having a hard time. Their business models have been undercut by 'digital platforms' like Facebook and Google. Many such traditional media companies are owned by News Corp, the conglomerate driven by sometime-Australian Rupert Murdoch (who is responsible for Fox News. On behalf of Australia: sorry everyone). These companies enjoy tremendous power in the Australian political system. They have successfully lobbied the Australian government to force the foreign companies behind digital platforms like Google to

pay Australian companies for news.

All of this is to say: now more than ever, there is regulatory appetite and political will in Australia to hold Facebook et al accountable.

## Procedural history

Against that backdrop, in March 2020, the Commission commenced proceedings against each of the respondents in the Federal Court, alleging ‘that the personal information of Australian Facebook users was disclosed to the *This is Your Digital Life* app for a purpose other than the purpose for which the information was collected, in breach of the *Privacy Act*’.

The Commissioner alleges that:

1. Facebook disclosed the users’ personal information for a purpose other than that for which it was collected, in breach Australian Privacy Principle (‘APP’) 6;
2. Facebook failed to take reasonable steps to protect the users’ personal information from unauthorised disclosure in breach of APP 11.1(b); and
3. these breaches amounted to serious and/or repeated interferences with the privacy of the users, in contravention of s 13G of the *Privacy Act*.

In April, the service orders reported by Huang were made. Facebook Inc and Facebook Ireland were then served outside of the jurisdiction.

## Facebook’s challenge to the orders for service outside of the jurisdiction: ‘no prima facie case’

Facebook Inc contended that service should be set aside because the Court should not be satisfied that there was a prima facie case for the relief claimed by the Commissioner as required by r 10.43(4)(c) of the *Federal Court Rules 2011* (Cth).

The Court summarised the principles applicable to setting aside an order as to service as follows (at [23]):

- An application for an order discharging an earlier order granting leave to serve out of the jurisdiction, or for an order setting aside such service, is in the nature of a review by way of rehearing of the original decision to grant leave to serve out of the jurisdiction.
- It is open to the party who sought and obtained an order for service out of the jurisdiction to adduce additional evidence, and make additional submissions.
- The onus remains on the applicant in the proceedings to satisfy the Court in light of the material relied upon, including any additional material relied upon, that leave ought to have been granted.

Facebook Inc accepted that although demonstrating a prima facie case is 'not particularly onerous', the Commissioner had failed to establish an arguable case; she had merely posited 'inferences' which did not reasonably arise from the material tendered: [28]-[29].

As noted above, the underlying 'case' that was the subject of that argument is in relation to the Cambridge Analytica scandal and alleged breaches of the *Privacy Act*.

The case thus turns on application of an Australian statute to seemingly cross-border circumstances. Rather than having regard to forum choice-of-law rules, the parties seemingly accepted that the case turns on statutory interpretation. The extra-territorial application of the *Privacy Act* depends on an organisation having an 'Australian Link'. Section 5B(3) relevantly provides:

*(3) An organisation or small business operator also has an Australian link if all of the following apply: ...*

*(b) the organisation or operator carries on business in Australia or an external Territory;*

*(c) the personal information was collected or held by the organisation or operator in Australia or an external Territory, either before or at the time of the act or practice.*

Facebook Inc argued that the Commissioner failed to establish a prima facie case that, at the relevant time, Facebook Inc:

- carried on business in Australia within the meaning of s 5B(3)(b) of the *Privacy Act*; or
- collected or held personal information in Australia within the meaning of s 5B(3)(c) of the *Privacy Act*.

## **Facebook Inc carries on business in Australia**

In *Tiger Yacht Management Ltd v Morris* (2019) 268 FCR 548 (noted here), the Full Court of the Federal Court of Australia ‘observed that the expression “carrying on business” may have a different meaning in different contexts and that, where used to ensure jurisdictional nexus, the meaning will be informed by the requirement for there to be sufficient connection with the country asserting jurisdiction’: [40].

The Court considered the statutory context of the Commissioner’s case, being the application of Australian privacy laws to foreign entities. The Court had regard to the objects of the *Privacy Act*, which include promotion of the protection of privacy of individuals and responsible and transparent handling of personal information by entities: *Privacy Act* s 2A(b), (d). Whether Facebook Inc ‘carries on business in Australia’ for the purposes of the *Privacy Act* is a factual inquiry that should be determined with reference to those broader statutory purposes.

The Commissioner advanced several arguments in support of the proposition that Facebook Inc carries on business in Australia.

One argument advanced by the Commissioner was that Facebook Inc had financial control of foreign subsidiaries carrying on business in Australia, suggesting that the parent company was carrying on business in Australia. (Cf *Tiger Yacht*, above.) That argument was rejected: [155].

Another argument turned on agency more explicitly. Essentially, the Commissioner sought to pierce the corporate veil by arguing Facebook is ‘a single worldwide business operated by multiple entities’: [75]. Those entities contract with one another so that different aspects of the worldwide business are attributed to different entities, but the court ought to pierce the jurisdictional veil. The Commissioner submitted that ‘the performance pursuant to the contractual



arrangements by Facebook Inc of functions necessary for Facebook Ireland to provide the Facebook service..., including in Australia, indicated that Facebook Ireland was a convenient entity through which Facebook Inc carried on business in Australia during the relevant period': [115].

Facebook Inc appealed to cases like *Adams v Cape Industries* [1990] 1 Ch 433, where the English Court of Appeal explained that, typically, a company would not be considered to be carrying on business within the forum unless: '(a) it has a fixed place of business of its own in this country from which it has carried on business through servants or agents, or (b) it has had a representative here who has had the power to bind it by contract and who has carried on business at or from a fixed place of business in this country' (at 529). (See also *Lucasfilm Ltd v Ainsworth* [2008] EWHC 1878 (Ch).)

Ultimately, the Court was not satisfied that Facebook Inc carried on business within Australia on the basis that Facebook Ireland conducted Facebook Inc's business in Australia: [117]. More accurately, the Commissioner had not established a prima facie case to that effect.

But the Commissioner *had* established a prima facie case that Facebook Inc *directly* carried on business within Australia.

Facebook Inc is responsible for various 'processing operations' in relation to the Facebook platform, which includes responsibility for installing, operating and removing cookies on the devices of Australian users. Facebook Inc appealed to case authority to argue that this activity did not amount to carrying on business in Australia. The Court thus considered cases like *Dow Jones v Gutnick* (2002) 210 CLR 575 and *Valve Corporation v Australian Competition and Consumer Commission* (2017) 258 FCR 190, which each addressed the territorial aspects of businesses that depend on communication on the internet.

The Court rejected Facebook Inc's argument that 'installing' cookies is to be regarded as equivalent to uploading and downloading a document (cf *Gutnick*). At the interlocutory stage of the proceeding, there was not enough evidence to accept Facebook Inc's claim; but there was enough to draw the inference that the installation and operation of cookies within Australia involves activity in Australia.

The Court concluded: 'the Commissioner has discharged her onus of establishing that it is arguable, and the inference is open to be drawn, that some of the data

processing activities carried on by Facebook Inc can be regarded as having occurred in Australia, notwithstanding that the evidence did not establish that any employee of Facebook Inc was physically located in Australia': [137]. It was thus concluded that the Commissioner had established a prima facie case that Facebook Inc carried on business within Australia: [156]. (Cf the reasoning of Canadian courts that led to *Google Inc v Equustek Solutions Inc* [2017] 1 SCR 824, noted here.)

## **Facebook Inc collected or held personal information in Australia**

The Court was assisted by responses provided by Facebook Inc to questions of the Commissioner made pursuant to her statutory powers of investigation. One question concerned the location and ownership of servers used to provide the Facebook service. Although Facebook Inc's answer was somewhat equivocal, it suggested that the platform depends on servers located in Australia (including network equipment and caching servers) to improve connection and delivery time. This was enough for the Court to make the relevant inference as to collection and holding of personal information within Australia: [170].

The Court had regard to the purposes manifested by the Explanatory Memorandum to the *Privacy Act* in concluding that 'the fact that the personal information is uploaded in Australia and stored on Australian users' devices and browser caches and on caching servers arguably owned or operated by Facebook Inc in Australia, it is arguable that Facebook Inc collected the personal information in Australia': [185].

Combined with the findings as to carrying on business, this was enough to establish a prima facie case that the extra-territorial application of the *Privacy Act* was engaged. The Court's orders as to service were not disturbed.

## **Concluding remarks**

The interlocutory character of this decision should be emphasised. The Court's findings on the territorial aspects of 'carrying on business' and data collection were each subject to the 'prima facie case' qualification. These are issues of fact;

the Court may find differently after a thorough ventilation of evidence yet to be adduced.

This decision is not anomalous. The assertion of long-arm jurisdiction over Facebook Inc indicates Australian courts' increasing willingness to pierce the jurisdictional veil for pragmatic ends. In my experience, most Australian lawyers do not really care about the multilateralist ideals of many private international law enthusiasts. The text of the Australian statutes that engage the case before them is paramount. Lawyers are directed to consider the text of the statute in light of its context and purpose: *Australian Securities and Investments Commission v King* (2020) 94 ALJR 293, [23]; *Acts Interpretation Act 1901* (Cth) s 15AA. Essentially, in the case of a forum statute with putative extraterritorial operation, a form of interest analysis is mandated.

I am OK with this. If the policy of the *Privacy Act* is to have any chance of success, it depends on its application to internet intermediaries comprised of corporate groups with operations outside of Australia. As an island continent in a technologically interconnected world, the policy of Australian substantive law will increasingly determine the policy of Australian private international law.

***Michael Douglas is Senior Lecturer at UWA Law School and Consultant at Bennett + Co, Perth.***

---

# **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, 10<sup>th</sup> 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 of [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
<i>Tanning Research Laboratories Inc v O’Brien</i>	(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.”
<i>IBM Australia Ltd v National Distribution Services Ltd</i>	(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 <i>Commercial Arbitration Act, 1984</i> (as amended). The decision of the arbitrator(s) will be final and binding.”
<i>Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd</i>	(1996) 39 NSWLR 160; (1996) 131 FLR 422	“ARTICLE 19 <i>Arbitration</i> 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 <i>Applicable Law</i> This Agreement shall in all respects be interpreted in accordance with the Laws of England.”
<i>Akai Pty Ltd v People’s Insurance Co Ltd</i>	(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.”
<i>FAI General Insurance Co Ltd v Ocean Marine Mutual Protection &amp; Indemnity Association</i>	(1997) 41 NSWLR 117	“This Reinsurance is subject to English jurisdiction”, with a manuscript addition: “Choice of Law: English”
<i>Hi-Fert Pty Ltd v Kiukiang Maritime Carriers (No 5)</i>	(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 <i>Arbitration Act 1950</i> 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.”

<p><i>Recyclers of Australia Pty Ltd v Hetinga Equipment Inc</i></p>	<p>(2000) 100 FCR 420; [2000] FCA 547</p>	<p><i>"Applicable Law, Pricing and Terms of Sale:</i> Any contract between Buyer and Hetinga 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 ...</p> <p>...</p> <p><i>Arbitration:</i> 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."</p>
<p><i>HIH Casualty &amp; General Insurance Ltd (in liq) v RJ Wallace</i></p>	<p>(2006) 68 NSWLR 603; [2006] NSWSC 1150</p>	<p>"ARTICLE XVIII SERVICE OF SUIT</p> <p>The Reinsurer hereon agrees that:</p> <p>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.</p> <p>ii. Any summons notices or process to be served upon the Reinsurer may be served upon MESSRS. FREEHILL, HOLLINGDALE &amp; 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.</p> <p>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.</p> <p>ARTICLE XIX ARBITRATION:</p> <p>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.</p> <p>The members of the Court of Arbitration shall be active or retired executives of Insurance or Reinsurance Companies.</p> <p>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.</p> <p>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.</p> <p>The decision of the Court of Arbitration shall not be subject to appeal.</p> <p>The costs of Arbitration shall be paid as the Court of Arbitration directs.</p> <p>Actions for the payment of confirmed balances shall come under the jurisdiction of the ordinary Courts."</p>
<p><i>Comandate Marine Corporation v Pan Australia Shipping Pty Ltd</i></p>	<p>(2006) 157 FCR 45; [2006] FCAFC 192</p>	<p>"(b) London</p> <p>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 &amp; 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.</p> <p>..."</p>
<p><i>Armcel Pty Ltd v Smurfit Stone Container Corporation</i></p>	<p>(2008) 248 ALR 573; [2008] FCA 592</p>	<p>"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.</p> <p>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.</p> <p>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."</p>
<p><i>BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd</i></p>	<p>(2008) 168 FCR 169; [2008] FCA 551</p>	<p>"(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</p> <p>...</p> <p>(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."</p>
<p><i>Paharpur Cooling Towers Ltd v Paramount (WA) Ltd</i></p>	<p>[2008] WASCA 110</p>	<p>[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:"]</p> <p>"[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."</p> <p>"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."</p>

<p><i>Electra Air Conditioning BV v Seeley International Pty Ltd ACN 054 687 035</i></p>	<p>[2008] FCAFC 169</p>	<p style="text-align: center;">"20. Dispute Resolution</p> <p>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.</p> <p style="text-align: center;">Thereafter:</p> <p>(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</p> <p>(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.</p> <p>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.</p> <p>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."</p> <p style="text-align: center;">"25. Governing law and Jurisdiction</p> <p>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."</p>
<p><i>Ace Insurance Ltd v Moose Enterprise Pty Ltd</i></p>	<p>[2009] NSWSC 724</p>	<p style="text-align: center;"><u>Policy</u></p> <p>"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."</p> <p style="text-align: center;"><u>Expona Endorsement</u></p> <p>"Provided that all claims which fall under the terms of this endorsement, it is agreed:</p> <p>(i) the limits of liability are inclusive of costs as provided under supplementary payment in this policy.</p> <p>(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."</p>
<p><i>Global Partners Fund Ltd v Babcock &amp; Brown Ltd (in liq)</i></p>	<p>[2010] NSWCA 196; [2010] 79 ACSR 383</p>	<p style="text-align: center;"><u>Limited Partnership Agreement</u></p> <p>"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."</p> <p style="text-align: center;"><u>Deed of Adherence</u></p> <p>"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.</p> <p>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."</p>
<p><i>Faxtech Pty Ltd v ITL Optronics Ltd</i></p>	<p>[2011] FCA 1320</p>	<p>"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)."</p>

<p><i>Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd</i></p>	<p>[2013] WASCA 66; (2013) 298 ALR 666</p>	<p style="text-align: center;"><u>Asset Sale Agreement</u></p> <p>"16.2 Governing Law and Dispute Resolution</p> <p>(a) This agreement is governed by the laws of Western Australia.</p> <p>(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.</p> <p>(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;</p> <p>(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;</p> <p>(2) failing settlement by negotiation, either party may, by notice to the other party, refer the dispute for resolution by mediation:</p> <p>(A) at the Singapore Mediation Centre (SMC) in Singapore;</p> <p>(B) under the SMC Mediation Procedures;</p> <p>(C) with one mediator;</p> <p>(D) with English as the language of the mediation; and</p> <p>(E) with each party bearing its own costs of the mediation; and</p> <p>(3) failing settlement by mediation, either party may, by notice to the other party, refer the dispute for final and binding resolution by arbitration:</p> <p>(A) at the Singapore International Arbitration Centre (SIAC) in Singapore;</p> <p>(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;</p> <p>(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;</p> <p>(D) with the substantive law of the arbitration being Western Australian law;</p> <p>(E) with one Arbitrator;</p> <p>(F) with English as the language of the arbitration; and</p> <p>(G) with each party bearing its own costs of the arbitration.</p> <p>(d) Nothing in this clause 16:</p> <p>(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</p> <p>(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."</p> <p style="text-align: center;"><u>Guarantee Agreement</u></p> <p>"9.9. Governing law and jurisdiction</p> <p>(a) This document is governed by the laws of Western Australia.</p> <p>(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.</p> <p>(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:</p> <p>(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;</p> <p>(ii) failing settlement by negotiation, any party may, by notice to the other parties, refer the dispute for resolution by mediation; and</p> <p>(A) at the Singapore Mediation Centre (SMC) in Singapore;</p> <p>(B) with one mediator;</p> <p>(C) with English as the language of the Mediation; and</p> <p>(D) with each party bearing its own costs of the mediation; and</p> <p>(iii) failing settlement by mediation, any party may, by notice to the other parties, refer the dispute for final and binding resolution by arbitration:</p> <p>(A) at the Singapore International Arbitration Centre (SIAC) in Singapore or in Hong Kong;</p> <p>(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;</p> <p>(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;</p> <p>(D) with the substantive law of the arbitration being Western Australian law;</p> <p>(E) with one arbitrator;</p> <p>(F) with English as the language of the arbitration; and</p> <p>(G) with each party bearing its own costs of the arbitration.</p> <p>(d) Nothing in this clause 9.9:</p> <p>(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</p> <p>(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."</p>
<p><i>AAP Industries Pty Limited v Rehaud Pte Limited</i></p>	<p>[2015] NSWSC 468</p>	<p style="text-align: center;"><u>Supply Agreement</u></p> <p>"The agreed place of jurisdiction, irrespective of the amount in dispute, is Singapore."</p> <p style="text-align: center;"><u>Conditions of Purchase</u></p> <p>"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."</p>

<p><i>Rinehart v Rinehart (No 3)</i> (and <i>Rinehart v Welker</i>, in relation to the Hope Downs Deed; and <i>Rinehart v Hancock Prospecting Pty Ltd</i>, in relation to the Hope Downs Deed and April 2005 Deed of Obligation and Release)</p>	<p>(2016) 257 FCR 310  (and (2012) 95 NSWLR 221;  and [2019] HCA 13; (2019) 366 ALR 635)</p>	<p style="text-align: center;"><u>April 2005 Deed of Obligation and Release</u></p> <p>"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."</p> <p style="text-align: center;"><u>Hope Downs Deed</u></p> <p style="text-align: center;">"20. CONFIDENTIAL MEDIATION/ARBITRATION</p> <p>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.</p> <p style="text-align: center;">20.1 Confidential Mediation</p> <p>(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);</p> <p>(b) each of the disputing parties must attempt to agree upon a suitably qualified and independent person to undertake the mediation;</p> <p>(c) the mediation will be conducted with a view to:</p> <p style="padding-left: 20px;">(i) identifying the dispute;</p> <p style="padding-left: 20px;">(ii) developing alternatives for resolving the dispute;</p> <p style="padding-left: 20px;">(iii) exploring these alternatives; and</p> <p style="padding-left: 20px;">(iv) seeking to find a solution that is acceptable to the disputing parties.</p> <p>(d) any mediation will not impose an outcome on the disputing parties. Any outcome must be agreed to by the disputing parties;</p> <p>(e) any mediation will be abandoned if:</p> <p style="padding-left: 20px;">(i) the disputing parties agree;</p> <p style="padding-left: 20px;">(ii) any of the disputing parties request the abandonment.</p> <p style="text-align: center;">20.2 Confidential Arbitration</p> <p>(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;</p> <p>(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,</p> <p>(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;</p> <p>(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.</p> <p>(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.</p> <p>(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.</p> <p>(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.</p> <p>(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;</p> <p>(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. ...</p> <p>[21. the deed] shall be governed by and be subject to and interpreted according to the laws of the State of Western Australia."</p> <p style="text-align: center;"><u>August 2009 Deed of Further Settlement</u></p> <p>"16. The CS Deed and this Deed will be governed by the following dispute resolution clause:</p> <p>(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;</p> <p>(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.</p> <p>(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;</p> <p>(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</p> <p>(v) Despite the existence of a Dispute, the parties must continue to perform their respective obligations under this Deed."</p>
--	--	---

<i>Mobis Parts Australia Pty Ltd v XL Insurance Company SE</i>	[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."
<i>Parnell Manufacturing Pty Ltd v Lonza Ltd</i>	[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."
<i>Royal Bank of Scotland plc v Babcock &amp; Brown DIF III Global Co-Investment Fund LP</i>	[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."
<i>Australian Health &amp; Nutrition Association Ltd v Hive Marketing Group Pty Ltd</i>	(2019) 99 NSWLR 419; [2019] NSWCA 61	<p><u>Risk Transfer Agreement</u></p> <p>"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."</p> <p><u>Promotion Agreement</u></p> <p>"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."</p>

## 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.***

---

# Three Tickets, One Seat - A Methodological Anatomy Of The Indian Practice Of Determination

# Of Seat Of Arbitration

Written by Sankalp Udgata & Hetal Doshi, National Law University (NUSRL), Ranchi

The choice of arbitration as the default system of resolution of commercial disputes, which was initially restricted to the foreign parties is now being reciprocated by even the Indian parties, thus setting the stage for India being a global hub for commercial arbitration. Surprising as it is, commercial agreements worth billions have but a succinct recording of a seat of arbitration. Sloppy as they are, these poorly drafted dispute resolution clauses open the doors to a tsunami of litigation which simply intervenes and delay the entire resolution process thereby defeating the very virtue arbitrations proclaim to instil.

Since arbitrations are out-of-court proceedings, they do not by themselves command the authority of the sovereign. Therefore, every arbitration must be guided and overseen by a Court that has supervisory jurisdiction over it. This Court is the Juridical Seat of the arbitration as determined by the parties and the most important concept that the territorial situs of the Seat denotes. In absence of a positive determination by the parties in the arbitration agreement, the Tribunal or a Court whose supervisory jurisdiction is sought must first determine the Seat and consequently whether it has the jurisdiction, as the Juridical Seat, to hear the matter.

However, arbitration in India has been a Hornet's nest if not a Pandora's box to say the least. Admittedly, the vast majority of problems associated with international commercial arbitrations taking place in India revolve around the uncertainty in the Courts' approach to determination of the seat when the parties have failed to choose one. The Indian Courts, much rather the Supreme Court of India ("**SCI**") has shown a consistent disparity in applying any particular method for determination of the Seat in such situations. This article aims to reconcile the various tests that the Supreme Court of India has applied over the years and attempts to plot their reasoning into three distinct methods for determination of a seat when the arbitration agreement fails to explicitly document one. This article also discusses the various factors relevant in each method with examples and can therefore serve as a catalogue for practitioners as well as valuable literature to the academia.

## I. Seat <=> Venue Method

Representing the most widely accepted view, this method is applicable when parties have at least chosen a particular geographic location as the venue for the arbitration to take place without specifically designating a Seat. Finally, setting the clock straight and reconciling to the globally accepted rules, the SCI in Soma JV case held that the venue of arbitration shall be the default Seat in absence of any *contrary indica*. (¶63)

For it to be the default Seat, the venue must exist in absence of any of the following factors that, over the years, the Court has found to be *contrary indications* to venue being the Seat.

- Designation of an alternate place as Seat

When there is an *express designation of the arbitration venue*, combined with a supranational body of rules governing the arbitration the venue shall be the seat unless the parties have designated *any alternative place as the seat*. (Shashoua, ¶34,42)

- Existence of a national set of *lex arbitri* or proper law

Despite having designated London as the venue of arbitration, the SCI held Bombay to be the Seat in the 2014 Enercon Case. In making this determination, the Court was heavily swayed by the fact that the laws specifically chosen by the parties in the contract to apply to different aspects of the dispute were Indian laws.

- Existence of an alternate place of making of award

Since it is necessary for the arbitral award to be made and signed at the place of arbitration as determined by Section 20 of the 1996 Arbitration Act (“**Act**”), an award made at one of the two designated venues resulted in the venue where the award was not signed was not the Seat in the Soma JV case.

- Venue of an arbitration proceeding

The Court has on several occasions differentiated between the venue of arbitration proceedings from the venue of an arbitration proceeding for the later cannot be construed as anything but a convenient location for the conduction of a



meeting. (2012 Enercon case)

## **II. Inverse Closest & Most Real Connection Method (“Inverse-CMRC”)**

The globally acclaimed CMRC test is used to determine either *lex arbitri* or the *proper law governing the arbitration agreement* when the *place of arbitration* has been decided as the same would be the law most closely connected to the choice of place. While the English Courts in Peruvian Insurance Case applied the law of the place of arbitration as the *lex arbitri*, in the Sulamerica Case, applied it to the proper law governing the arbitration agreement as they had the most real connection to the place chosen by the parties. India has also used the test in a peculiar way to apply the *lex arbitri* to the whole of the agreement. This proximity is essentially based on the *legal localisation of the place*.

However, India has been applying the above test somewhat inversely based on the *geographic localisation of the law* instead. Bemusing everyone, the SCI in Enercon Case applied the Inverse CMRC Method to determine the Seat to be India as it was most closely and intimately connected to the *lex arbitri* and the proper law of the contract, both of which were Indian. The Indian model seems to presume that the parties could not have contemplated a delocalised *lex arbitri* or proper law. Be that as it may, where a supranational set *lex arbitri* or proper law exists, the first method will prevail as these laws will not be sufficient *contrary indications*.

## **III. Cause of Action Method**

This is an unsuitable method of determination of seat. In this case, if the arbitration agreement does not reveal a Seat then the Courts of the place where the *cause of action* arose will be considered as the Juridical Seat of the arbitration. This is derived from the definition of ‘Court’ under Section 2(1)(e) of the Act which also includes the Court that would have jurisdiction over the question if it formed the subject matter of a suit.

Understanding this to mean that the legislature has intended to give jurisdiction to both the Court of arbitration and the Court having territorial jurisdiction over the place where the cause of action arose, concurrently, the SCI has caused tremendous controversy by in *Paragraph 96* of BALCO judgment. However, when read wholly and not in isolation, BALCO judgment very distinctly states that if *concurrent jurisdiction* were to be the order of the day, despite the seat having

been located and specifically chosen by the parties, party autonomy would suffer and therefore Courts were intended to exercise *supervisory jurisdiction* to the *exclusion* of other Courts as provided under Section 42. (Soma JV case, ¶51)

Therefore, since the application referred to under Section 42 can only be legitimately made to the Court of the Seat, this method is only useful where seat could not be determined by any of the above methods maybe owing to lack of any territorial nexus.

## **Conclusion**

The contradictory judgments of the English and Indian Courts over the determination of Seat in the Enercon case caused a delay of two years and has painted a Medusa of how the incongruous views of Courts across jurisdictions terrorise the development of international commercial arbitration. Therefore, arbitrations anchored in India or involving Indian parties must be planned in a manner eliding with the recent set of “pro-arbitration” trends in determination of Seat.

Although there is no specific order of precedence for application of these methods, their very nature and the manner of their application till date suggest that the Seat-Venue method takes precedence over the other two owing to its strong territorial nexus. Ideally thus, upon failure of this method owing to the presence of a sufficient *contrary indica*, should the Inverse-CMRC method be applied followed by the Cause of Action method as the last resort in this three-fold method for determination of Seat.

---

# **Brexit: No need to stop all the clocks.**

Written by Jonathan Fitchen.

‘The time has come’; a common enough phrase which may, depending on the

reader's mood and temperament, be attributed variously to Lewis Carroll's discursive Walrus, to Richard Wagner's villainous Klingsor, or to the conclusion of Victor Hugo's epigrammatic comment to the effect that nothing is as powerful as an idea whose time has come. In the present context however 'the time has come' refers more prosaically to another step in the process described as 'Brexit' by which the UK continues to disentangle itself from the EU.

On the 31<sup>st</sup>

of January 2020 at 24.00 CET (23.00 UK time) the UK ceases to be an EU Member State. This event is one that some plan to celebrate and other to mourn. For those interested in private international law and the conflict of laws in the EU or in the legal systems of the UK, celebration is unlikely to seem apt. Whether for the mundane reason that the transition period of the Withdrawal Agreement preserves the practical application and operation of most EU law concerning our subject in the UK and within the EU27 until the projected end point of 31<sup>st</sup> December 2020, or for deeper reasons connected with the losses to the subject that the EU and the UK must each experience due to the departure of the UK from the EU. If celebration is not appropriate must we therefore opt to mourn? This post suggests that mourning is not the only option (nor if overindulged is it a useful option) and sets out some thoughts on the wider implications for the private international laws of the UK's legal systems and the legal systems that will comprise the EU27 consequent on the UK's departure.

This exercise is

necessarily speculative and very much a matter of what one wishes to include in or omit from the equation under construction. If too little is included, the result may be of only abstract relevance; if too much is included, the equation may be incapable of solution and hence useless for the intended purpose of calculation. Such difficulties, albeit expressed in a non-mathematical form, are familiar to private international lawyers who while engaging with their subject routinely consider the macroscopic, the microscopic and many points in between. In what remains of this post I will offer some thoughts that hopefully will provoke further thoughts while avoiding useless abstraction and (at least for present purposes) 'useless' incalculability.

The loudest

calls for the UK to leave the EU did not arise from UK private international law, nor from its practitioners; few UK private international lawyers appear to have wished for Brexit as a means of reforming private international law. Whatever appeals to nostalgia may have swayed opinions in other sectors of the UK

and may have induced those within them to vote to leave, they were not expressed with reference to matters of private international law. Few who remember or know the law as it stood in any of the UK's legal systems prior to the implementation of the UK's accession to the Brussels Convention of 1968 would willingly journey back to the law as it then stood and regard it as an upgrade. Mercifully, aspects of this view are, at present, apparently shared by the UK Government and account for its wish, after 'copying and pasting' most EU law and private international law into the novel domestic category of 'retained EU Law', to then amend and allow that which does not depend on reciprocity to be

re-presented as a domestic private international law to be applied within and by the UK's legal systems: thus the Rome I and Rome II Regulations will be eventually

so 'imitated' within the legal systems of the UK. Unfortunately, many other EU provisions do require reciprocity, and thus cannot be 'saved' in this manner; for these provisions the news in the UK is less good.

There are however

other available means of salvage. Because the UK will no longer be an EU Member

State at 24.00 Brussels Time it may, but for the Withdrawal Agreement, thereafter participate more fully in proceedings and projects at the Hague Conference on Private International Law. The UK plans to domestically clarify the domestic understanding of certain existing Hague conventions, e.g. 1996 Parental Responsibility Convention, via the recently announced Private International Law (Implementation of Agreements) Bill 2019. Earlier in 2018 the UK deposited instruments of accession concerning conventions it plans to ratify at the end of the Withdrawal Agreement's transition period to attempt to retain prospectively the salvageable aspects of certain reciprocity requiring EU private international law Regulations lost via Brexit: thus, the UK plans to ratify the 2005 Choice of Court Convention and the 2007 Maintenance Convention.

After these ratifications it may be that the UK will also consider the ratification of the 2019 judgment enforcement convention, particularly if the EU takes this option too. In the medium and long term however, the UK, assuming it wishes to participate in an active sense, will have to accept the practical limitations of the HCCH as it (the UK) becomes accustomed to the differences, difficulties and frustrations of private international law reform via optional instruments that *all* the intended parties are entitled to refuse to opt-in to or ratify.

Over the medium term and longer term, it should additionally be noted that though the UK has left the EU it has not cast-off and sailed away from continental Europe at a speed in excess of normal tectonic progress: there may therefore eventually be further developments between the two. It may be that the UK can be induced at some point in the future, when Brexit has become more mundane and less politically volatile within the UK, to cooperate in relation to private international law in a deeper sense with the EU27; whether by negotiating to join the 2007 Lugano Convention or a new convention pertaining to aspects of private international law. If this last idea seems too controversial then maybe it would be possible for the UK to eventually negotiate with an existing EU Member State as a third country via Regulation 664/2009 or Regulation 662/2009 or perhaps via another yet to be produced Regulation with a somewhat analogous effect? Brexit, considered in terms of private international law, may well re-focus a number of existing questions for the EU27 pertaining to the interaction of its private international law with third States, whether former Member States or not.

What is however unavoidably lost by Brexit is the UK's direct influence on the development and particularly the periodic recasting of the EU's private international law: this loss cuts both ways. For the EU27 the UK will no longer be at the negotiating table to offer suggestions, criticisms and improvements to the texts of new and recast Regulations. For the EU27 this loss is somewhat greater than it might appear from the list of Regulations that the UK did not opt-in to as the terms of the UK's involvement in these matters permitted it to so participate without having opted-in to the draft Regulation.

The suggested loss

of influence will however probably be felt most acutely by the private international lawyers in the UK. Despite the momentary impetus and excitement of salvaging that which may be salvaged and ratifying that which may be ratified to mitigate the effect of Brexit on private international law, the reality is that we in the UK will have lost two of the motive forces that have seen our subject develop and flourish over decades: viz. the European Commission and the domestic political reaction thereunto. Post-Brexit, once the salvaging (etc.) is done, it seems unlikely that the UK Government will continue to regard a private international law now no longer affected by Commission initiatives or re-casting procedures as retaining its former importance or meriting any greater legislative relevance than other areas of potential law reform. The position may be otherwise in Scotland as private international law is a devolved competence that devolution entrusted to the Scottish Government. It may be that once the dust has settled and the returning UK competence related reforms have been applied that the comparatively EU-friendly Scottish Government may seek to domestically align aspects of Scots private international law with EU law equivalents.

For he who would mourn for the effect of Brexit on the subject of private international law, it is the abovementioned loss of influence of the subject at both the EU level and particularly at the domestic level that most merits a brief period of mourning. After this, the natural but presently unanswerable question of, 'What now?' occurs.

Though speculation is offered above, all in the short term will depend on the progress in negotiations over an unfortunately already shortened but technically still extendable transition period during which the EU and UK are to attempt to negotiate a Free Trade Agreement: thereafter for the medium term and long term all depends on the future political relationship of the EU and the UK.