The Grass is not Always Greener:
Effects of Choosing Another Law as Governing Law

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Introduction

1. Practitioners acting for Western Australian producers of energy and resource commodities regularly advise upon and draft contracts with foreign purchasers. The advisors to those foreign purchasers may have a view upon which system of laws should govern the parties’ relationship under the contract. In any case, the Australian practitioner is faced in negotiations with pushing for a putatively close common law system to govern the contract (such as Australian, Singaporean or English law) on the one hand, as opposed to Chinese, Japanese or South Korean law, or some internationally recognised regime like UNIDROIT or the Convention on the International Sale of Goods (CISG), on the other hand.

2. It might be assumed that the common law English ancestry of both Australian and Singaporean law would make any concern about potential differences entirely hypothetical or academic. It might also be assumed that once the foreign purchaser’s advisors have accepted any of the three then the battle over governing law has been won. Such assumptions are not only wrong, but could prove costly for the energy or resources producer. There are, in fact, a number of significant differences between the contract laws as applied by Australian, Singaporean and English courts. A choice of governing law for a supply contract has to be made carefully, after giving some thought to the potential risks for the system of law chosen.

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3. This paper notes a number of key similarities and differences in areas that are likely to be of concern to producers and their advisors. The paper is not concerned with the drafting of the choice of law, forum or dispute resolution clauses. The paper has a focus upon those areas of contract law, equity and statutes on fair dealing in commercial transactions that are likely to be of most relevance to a dispute between an Australian producer and a foreign purchaser, as would be applied by the courts of Australia, Singapore and England.

4. The following areas are addressed:

(a) contract interpretation – approach and admissible evidence;

(b) contractual terms:

   (i) dichotomy of terms recognised – conditions, warranties and intermediate terms;

   (ii) take or pay obligations, penalty clauses and relief against penalties;

   (iii) good faith obligations – express or implied;

   (iv) sale of goods legislation - as to quality, price, payment and delivery;

(c) breach of contract – anticipatory breach, election to affirm and discharge for breach;

(d) remedies for breach of contract – test for remoteness, interest to perfect damages awards, approaches to mitigation of loss and disgorgement damages;

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1 That is dealt with extensively in other works.

2 The prevailing orthodoxy is respected herein, and we proceed on the basis that there is only one common law of Australia as applied by various federal, state and territory courts. See Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89.

3 We have endeavoured to note key differences perceived by us by reference to general materials available for each of English and Singaporean law. We anticipate that this may assist in discussions with non-Australian lawyers as to why choice of law is a significant matter.
(e) arbitration for dispute resolution – arbitration clauses, adequacy of arbitration procedure, attempts to litigate in breach of arbitration clauses and appeals and mechanisms to set aside awards;

(f) discharge by frustration – approaches of courts to remedies and force majeure clauses;

(g) security for payment mechanisms – the ‘unconscionability’ exception to autonomy principle for letters of credit and performance bonds; and

(h) when there is a dispute as to whether a contract was even formed – issues of the type considered by the High Court in *Masters v Cameron* (1954) 91 CLR 353.

5. There is a range of factors that do not form part of the substantive law of each nation that may influence a decision to choose governing law. These intangible factors are practical matters about pursuing dispute resolution processes in each of Australia, Singapore and England. Some of these matters are touched upon in the paper as they are also relevant to a choice of governing law.

6. Before examining each in turn, it is worth exploring the potential ramifications of disputes between a producer and a purchaser.

**Commercial implications of supply contracts**

7. Western Australian producers of energy and resources commodities often have a single customer or only a handful of key customers. Of course, a narrower customer base will, in most cases, expose a producer to more commercial risk than a larger, more diverse customer base composed of many customers with different nationalities.

8. The producer must have security of demand and, above all else, the certainty of sufficient cash flow.

9. If the producer has only recently entered production, then it may have such considerations as:
(a) finance obtained for the purchaser to construct its mine or platform and associated infrastructure, which finance has been provided on the basis of the specific supply contracts;

(b) discounting sales contracts or receivables to a finance house or a factoring company (perhaps with the need to assign payments in each case); or

(c) sale of book debts (sums owed to the producer by foreign purchaser) to a financier to avoid the need to borrow against them.

10. All producers, even those that have been producing for some time, will also have networked contracts, usually being inter-related carriage contracts.

11. Few producers will have sufficient storage capacity for their off-take to simply build up while a mine or well continues to be exploited but supply is not taken. Hence, there is a need for the energy or resources commodities to continue moving from mine, platform, crushing/screening facility or refinery, onwards to ultimate purchasers without much delay.

12. The supply contracts, whether they be short term (spot) arrangements, or medium term (1 to 2 year) arrangements or long term contracts (from a few years to decades), need to provide producers with security of cash flow and certainty of demand.

13. A producer relies heavily on its advisors to prepare easily enforceable payment provisions under supply contracts, a simple means of recourse in the event of breach, security for payment mechanisms and, if a dispute arises, efficient and accurate dispute resolution processes.

14. It is in this context that this paper seeks to provide a general guide as whether Australian, Singaporean or English law can best meet these objectives.

**Contractual interpretation**

15. There are some differences between Australian, Singaporean and English law on the interpretation of contracts.
16. In Australian law, the key items of distinction are:

(a) An ambiguity must be found for the interpretive exercise: *Western Export Services Inc v Jireh International Pty Ltd* (2011) 282 ALR 604 (referring to *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337). England and Singapore have no such requirement.

(b) The test for interpretation is to be discerned from a number of High Court decisions\(^4\) that, most recently, has led to significant efforts by first instance and appellate judges and commentators to discern the test.\(^5\)

(c) The materials which may be considered in the interpretive process appear to be narrower in Australia.

17. In England, Lord Hoffmann’s five rules laid down in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98; [1998] 1 WLR 896 are applied.\(^6\) In effect, as recently observed, almost everything is admissible to interpret a contract.

18. Singaporean law on contract interpretation can be said broadly to be following the English line. A number of Singaporean Court of Appeal decisions demonstrate a preference for Lord Hoffman’s formulations from *Investors Compensation*.\(^7\) However, the decision in *Zurich Insurance (Singapore) Pte \footnote{4} McCann v Switzerland Insurance Australia Ltd (2000) 203 CLR 579; Royal Botanic Gardens and Domain Trust v South Sydney City Council (2002) 240 CLR 45; Pacific Carriers Ltd v BNP Paribas (2004) 218 CLR 451; Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165; Wilkie v Gordon Runoff Ltd (2005) 221 CLR 522; International Air Transport Association v Ansett Australia Holdings Ltd (2008) 234 CLR 151; Western Export Services Inc v Jireh International Pty Ltd (2011) 282 ALR 604.}
delivered before Chartbrook, appears to suggest that Singaporean courts will, in rare cases (without defining the circumstances), accept evidence as to pre-contractual negotiations and subsequent conduct.\(^9\)

19. In practical terms, therefore, the ramifications would appear to be that:

(a) Australian courts continue to seek clear and uniform approaches – which can prolong a dispute (and an appeal may be lodged by one party); and

(b) English and Singaporean courts would allow resort to more diverse material in the interpretation of contracts then will Australian courts. This may have implications for the size, duration and cost of discovery processes.

**Dichotomy of terms recognised – conditions, warranties and intermediate terms**

20. Australia,\(^10\) Singapore\(^11\) and England\(^12\) have the same conceptual dichotomy for three types of terms of contracts – conditions, warranties and intermediate terms.

\(^{8}\) Affirmed in *Straits Advisors Pte Ltd v Behringer Holdings (Pte) Ltd* [2010] 1 SLR 760 and *Dovechem Holdings Pte Ltd (in liquidation) v Ng Joo Soon (alias Nga Ju Soon)* [2011] SGCA 35.


\(^{12}\) *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26.
21. If the parties contract out of applicable sale of goods legislation (which only recognises conditions and warranties), then the intermediate term analysis gives a convenient flexibility to the supply contract. For example, a term as to the time for delivery would be treated as a condition under the sale of goods legislation, but (subject to its language and a proper construction) as an intermediate term otherwise. A nominal breach – say, being 1 hour late – would not permit a party to terminate for that minor breach of the intermediate term, whereas if 10 days of delay was a significant breach, then termination may be permitted if appropriate in the circumstances.  

Take or pay obligations, penalties and relief against forfeiture

22. A take or pay obligation may be included in a contract for supply of energy or resource commodities. The clause will oblige the purchaser to take a quantity of the commodity and, if they cannot take delivery, to nonetheless pay for the commodity because supply had been made available by the producer. There is the obvious benefit to the purchaser of guaranteed supply and to the producer of certainty in cash flow.

23. But circumstances can change – a take or pay obligation that once met all parties’ requirements may no longer be economic for one party. For example, an alternative cheaper supply may be available to the purchaser or a higher price may be obtainable by the producer.

24. A starting point is an English decision, *M & J Polymers Ltd v Imerys Minerals Ltd*. There, Mr Justice Burton ultimately held that a take or pay clause could not amount to a penalty. This is because, in the ordinary take or pay clause, payment is not required because of a *breach* of contract. The clause contains a

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payment mechanism that the parties have chosen and it is not intended to be a pre-estimate of loss (like liquidated damages clauses).\textsuperscript{15}

25. In Australia the position would appear to be the same, with more authority to support it. In Interstar Wholesale Finance Pty Ltd v Integral Home Loans Pty Ltd (2008) 257 ALR 292; [2008] NSWCA 310, Allsop P undertook a close analysis of the leading authorities and, at [106], stated:

“...In my view, the expression of view by the primary judge that the doctrine of penalties (distinguished from relief against forfeiture) in the common law of Australia (using that expression to mean, relevantly here, the general law encompassing common law and equity) was not limited to circumstances of breach of contract was not open to his Honour. The intermediate appellate authorities in Australia, the persuasive view of a unanimous House of Lords, existing High Court authority and other views expressed in the High Court constrained the primary judge (and constrain this court) to limiting the application of the doctrine of penalties to circumstances of breach of contract. If a wider doctrine is to be enunciated in the form of that appearing in [75] of his Honour’s reasons, it is for the High Court of Australia to enunciate it. This is so not least because of the need to resolve the views of a number of justices of the High Court, including but not limited to a majority of the court in IAC (Leasing).”

26. This has been accepted by the South Australian Full Court in Diakos v Mason [2010] SASCFC 37 at [16] (per Gray J with Duggan and Kelly JJ agreeing) and the Victorian Court of Appeal in Ange v First East Auction Holdings Pty Ltd (2011) 284 ALR 638 at [85]-[94] (per Sifris AJA with Neave and Tate JJA agreeing). It is consistent with High Court authority, as Allsop P recognised. Indeed, throughout the most recent decision\textsuperscript{16} of the High Court of

\textsuperscript{15} In oil and gas circles M & J Polymers is viewed with suspicion: Marc Hammerson, Upstream Oil and Gas (Globe Law and Business, 2011) at [4.3.9] (p 308). This may be because Mr Justice Burton used some equivocal language in reaching his conclusion that an agreed payment mechanism in a take or pay clause could not in theory amount to a clause that operates punitively on breach.

\textsuperscript{16} Ringrow Pty Ltd v BP Australia Pty Ltd (2005) 224 CLR 656.
Australia on penalties, reference is made to penalty doctrine applying when there is a an obligation to pay ‘on breach’.

27. The only doubt that may exist for the Australian position is a recent (11 May 2012) grant of special leave to appeal to the High Court of Australia in the case of *Andrews v Australian and New Zealand Banking Group Limited* [2012] HCATrans 104. It appears that the appellant will call into question the correctness of Allsop P’s remarks in *Interstar*. Within the next year, there should be a clear answer from the High Court.

28. There is no clear indication as to the position in Singaporean courts. However, given that Singaporean courts have applied major penalties cases from England and reference is made to the House of Lords’ *Export Credits* case in leading Singaporean academic works, it appears likely that the same approach would be taken there.

**Endeavours clauses**

29. There is said to be a difference between Australian and English law on the approach to endeavours clauses.

30. Clauses requiring a party to use ‘best endeavours’, ‘all reasonable endeavours’ and ‘reasonable endeavours’ are commonplace in commercial contracts for prescribing the standard of performance of a contractual obligation. The general approach taken to construing endeavours clauses requires, as a starting point, recognition of the specific obligation in the clause. A plaintiff must state what conduct by the defendant would have been to a sufficient standard to fulfill the obligation. The plaintiff must show the defendant failed to meet that standard and particularise why it was reasonable for that minimum standard of performance to be attained. There are sensible limits on how these clauses are applied.  

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18 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 143-144; *OzEcom (in liq) v Hudson Investment Group Ltd* [2007] NSWSC 719; *Art Vanderlay Pty Ltd v Stewart* [2008] QSC 088 at [33].
31. In Australia no relevant difference exists between the standard constituted by the expression “all reasonable endeavours” and that constituted by the expression “best endeavours”.\(^\text{19}\) The best endeavours clause is seemingly equated to an all-reasonable endeavours clause – prescribing a standard of behaviour which is measured by what is reasonable in the circumstances. Similar statements exist in more recent cases.\(^\text{20}\)

32. However, English authority recognises differences between these two formulations. Two English cases are usually referred to in this regard - *Rhodia International Holdings Ltd v Huntsman International LLC* [2007] EWHC 292 and *Yewbelle Ltd v London Green Developments Ltd* [2007] EWCA Civ 475.\(^\text{21}\) English law has a spectrum upon which the different language of endeavours clauses work. The real difference is said to lie in ‘best endeavours’ clauses requiring a party to spend significant sums (although not to the point of ruin), whereas a ‘reasonable endeavours’ clause does not require sacrifice of one’s own commercial interests.

33. There is a remark by one Singaporean judge at first instance that appears to favourably adopt the English distinction, citing *Rhodia: Singapore Tourism Board v Children's Media Limited* [2008] SGHC 77 at [125].\(^\text{22}\)

34. The difference may be relevant for clauses in supply contracts which permit a purchaser to request more than their allocated amount of a resource or a

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\(^\text{19}\) *Transfield Pty Ltd v Arlo International Ltd* (1980) 144 CLR 83 at 101 per Mason J.

\(^\text{20}\) *Paltara Pty Ltd v Dempster* (1991) 6 WAR 85 at 89 per Malcolm CJ (Pidgeon J agreeing); *Pacific National (ACT) Ltd v Queensland Rail* (2006) ATPR (Digest) 46-268; [2006] FCA 91 at [875] per Jacobson J (“In my view, the alteration to the clause in the draft of 6 July 2005 to replace “reasonable endeavours” with “best endeavours” does not affect the scope or content of the obligation prescribed by the clause.”); *Wolseley Investments Pty Ltd v Gillespie* (2008) 13 BPR 24,813; [2007] NSWCA 358 at [51] per Tobias JA (Santow and Ipp JJA agreeing).

\(^\text{21}\) See also B Holland “Doing your best: making the most of the muddle of the “reasonable endeavours undertakings”” (2007) 18(10) *International Company and Commercial Law Review* 349. As a starting point for tips in drafting within the English law, see Richard Cumbley and Peter Church “UK - Should You Endeavour To Be Reasonable? “ (Linklaters website, article dated 5 June 2007) and “Endeavouring to understand endeavours obligations” (Herbert Smith website, article dated 9 September 2010).

\(^\text{22}\) There are comparatively few decisions from Singaporean courts on endeavours clauses. The leading cases are *MacarthurCook Property Investment Pte Ltd v Khai Wah Development Pte Ltd* [2007] SGHC 93 (at [60]-[75]) and *Travista Development Pte Ltd v Tan Kim Swee Augustine* [2007] SGCA 57 (at [18]-[29]).
commodity, and for the producer to make “best endeavours” or “reasonable endeavours” to deliver on that request.

**Good faith obligations**

35. The differences between Australian, Singaporean and English law have been well-documented elsewhere, but they are important to understand.

36. There is a diversity of Australian views (judicial and academic) that gives certainty as to one thing in Australia. It is easy to get into a dispute about breach of an alleged good faith obligation. This can be seen as arising from the following:

(a) The High Court of Australia is yet to consider a generally implied obligation of good faith in contracts generally. In a strong analysis of Australian decisions, Douglas Meagher QC demonstrates why, in his view, the High Court will not create such an obligation. There is nonetheless, strong academic support. Sir Anthony Mason has expressed the obligation in broad terms and as applying to all contracts. Justice Paul Finn has taken a similar approach. Dr Elisabeth Peden, in her work, appears to take a similar view also.

(b) Intermediate appellate courts have accepted implied good faith obligations in a number of cases. The implied obligation does,
therefore, form part of Australian law – the application of which falls to be considered on a case-by-case basis.

(c) Allsop P has recently extracted,\textsuperscript{29} from New South Wales cases, what he says is the usual content of the obligation:

(i) obligations to act honestly and with a fidelity to the bargain;

(ii) obligations not to act dishonestly and not to act to undermine the bargain entered or the substance of the contractual benefit bargained for;

(iii) an obligation to act reasonably and with fair dealing having regard to the interests of the parties (which will, inevitably, at times conflict) and to the provisions, aims and purposes of the contract objectively ascertained.

(d) There can be, depending on the proper construction of the contract at hand, implied obligations of good faith in exercising powers of termination\textsuperscript{30} and conducting negotiations.\textsuperscript{31} The obligation may arise in other contexts.

37. Importantly, in order to insulate against any assertion of good faith obligations, parties can take steps at the time of contracting to include specific wording that permits a party to exercise a power or discretion as they see fit entirely in their discretion, without regard to anyone else (or, if there must be

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\textsuperscript{29} Burger King Corp v Hungry Jack’s Pty Ltd (2001) 69 NSWLR 558 at [185] (Cf: Sundarajah v Teachers Federation Health Ltd (2011) 283 ALR 720 at [64]-[70]).

\textsuperscript{31} United Group Rail Services Ltd v Rail Corporation New South Wales (2009) 74 NSWLR 618 and Strzelecki Holdings Pty Ltd v Cable Sands Pty Ltd [2010] WASCA 222.
some give or take in negotiations – to specify the sorts of matters that could be considered in exercising the power or discretion).³²

38. In England, there is no implied obligation of good faith. The English are particularly skeptical of the concept,³³ which they are concerned will interfere with party autonomy in contract. Interestingly, in the latest edition of Treitel’s Law of Contract,³⁴ there is scant mention of ‘good faith’ – as compared to the chapter it might occupy in an Australian work.³⁵ Similarly, Sir Jack Beatson recognises it only in so far as it flows from civilian code into the Unfair Contract Terms Act 1977 (UK) (for consumer contracts).³⁶

39. This is not to say, however, that specific conduct may not under English law fall under the rubric of some other recognised doctrine, concept or commonly implied contractual obligation.³⁷ Nor can it be said that the odd English case

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³² Where a power is given to a party to a contract to be exercised in its sole discretion so as to bind the other, the terms of the contract are inconsistent with a constraint on the exercise of that power by considerations of reasonableness or good faith: Sundarajah v Teachers Federation Health Ltd (2011) 283 ALR 720 at [64] (and authorities cited therein). See also Sir Kim Lewison and David Hughes, The Interpretation of Contracts in Australia (Lawbook Co, 2012) at [6.14] (p 268) (and cases cited therein).


³⁵ In JW Carter, E Peden and GJ Tolhurst, Contract Law in Australia (LexisNexis Butterworths, 2007, 5th Edition) it is Chapter 2, after the introductory chapter and not in a segment of the book near dichotomy of terms or specially worded obligations. This prominence illustrates its perceived importance.


³⁷ In Douglas Meagher QC “Will good faith falter in the High Court?” (Unpublished paper delivered to LexisNexis Professional Development Conference, 7 March 2006, Melbourne), the author lists a series of duties under English law by reference to English cases, including: (i) an implied term that a party not of its own motion put an end to the continuance of an existing state of affairs necessary for the performance of the contract, (ii) an implied term not to prevent fulfillment of a condition precedent, (iii) an implied term not to rely on a party’s own breach to draw a contractual benefit, (iv), an implied term that a party will not prevent the other from performing the contract, (v) the doctrine of promissory estoppel, (vi) the rule in equity providing relief against forfeiture, (vii) an implied obligation to exercise due diligence or best endeavours to obtain a consent, approval or licence where such …from a third party is essential to the performance of the contract, (viii) the invalidation of penalty clauses, (ix) an implied term that a contractual discretion or power will not be exercised dishonestly, capriciously or arbitrarily, (x) an appropriate implied term as legal incident to express terms, not being the presumed intention of the parties, where that may be ‘reasonable’ and ‘of necessity’.
has not looked very similar to a common Australian good faith case.\(^\text{38}\)

However, it is plain to see that English law is considerably different to Australian law so far as a more general implied obligation of good faith, that may arise as a matter of construction in any contract, is concerned.

40. In Singapore a conservative approach has also been taken. In *Chua Choon Cheng v Allgreen Properties Ltd* [2009] SGCA 21, a comprehensive survey of Australian and English cases and literature on good faith was undertaken. The Court (Andrew Phang Boon Leong, Chao Hick Tin and V K Rajah JJA) held, relevantly, that:

(a) The position in *Walford v Miles* [1992] 2 AC 128 at 138 outlined by Lord Ackner is the law in Singapore (referring to 3 earlier decisions), that there is no obligation to negotiate in good faith ([55]); and

(b) The law in other jurisdictions is not clear and, until clarification of the “theoretical foundation” and “structure” of the doctrine occurs in other Commonwealth jurisdictions, it would be inadvisable “to attempt to apply it in the practical sphere” and this is “the strongest reason as to why [the Court] cannot accede to the … argument that this Court should endorse an implied duty of good faith in the Singapore context” ([60]).

41. It can be seen, therefore, that the Australian law differs greatly to Singaporean and English law in relation to the application of the doctrine of good faith in contract.

**Sale of goods legislation**

42. From our limited review of the sale of goods legislation in Western Australia,\(^\text{39}\) Singapore\(^\text{40}\) and England,\(^\text{41}\) it is possible to say that on key items

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\(^{38}\) *Berkeley Community Villages Ltd v Pullen* [2007] EWHC 1330 (Ch), almost looks as if it was decided according to Australian law and is something of an unrecognised watershed. See also *CPC Group v Qatari Diar Real Estate Investment Company* [2010] EWHC 1535 (Ch).

\(^{39}\) *Sale of Goods Act 1895* (WA).

\(^{40}\) *Sale of Goods Act* (Sing).

concerning quality, price, payment and passing of property, the acts are either identical or very similar.

43. This is consistent with the WA Law Reform Commission, in its inquiry into the Sale of Goods Act 1895 (WA) between 1995 and 1998, commenting upon the importance of uniformity with the English legislation and recommending only minor changes.42

44. The Australian trade practices legislation equivalent provisions on quality and fitness are for consumer sales, and are likely to be irrelevant for sale of energy and resources commodities.

45. Louis Chiam and Vishal Ahuja have noted that, in practice, long-term sales contracts usually exclude sale of goods legislation, and instead resort to general law principles.43 We would add that the parties have themselves usually designed, by careful drafting, very precise mechanisms which protect their rights in respect of passing of property, risk and title.

46. There is only one key difference which we wish to mention – which may be of interest to producers seeking to avoid commitments on short term or spot contracts.

47. Western Australia (like Tasmania) is the one of the last jurisdictions to retain the writing requirement for contracts over $20 in value: s 4. This may appear to many to be of no real consequence but it could be, especially in the face of a loose arrangement between purchaser and producer, whereby no formal head contract exists for spot purchases of iron ore (or coal).

**Breach of contract, election and discharge**

48. A key difference to be noted between Australian, Singaporean and English law is the approach to election upon one party’s actual or anticipatory breach.

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49. The Singaporean and English positions have been discussed as follows:44

“Although the aggrieved party’s right of election to discharge/affirm a contract following an actual/anticipatory breach is largely unqualified, the English case of White & Carter (Councils) Ltd v McGregor [1962] AC 413 suggests that this right is limited under English law. However, it is arguable that the limitation is less strict in Singapore. In MP-Bilt Pte Ltd v Oey Widarto [1999] 3 SLR 592, the Singapore High Court adopted the limitations set out in White & Carter v McGregor that the aggrieved party may only elect to affirm a contract (despite the other contracting party’s breach) if the aggrieved party was reasonably able to perform his or her part of the contract without the need for any cooperation from the party-in-breach and if the aggrieved party had a legitimate interest in doing so. However, the High Court stated that these limitations would not apply when the aggrieved party ‘is under a legal obligation or practical compulsion to complete performance of the contract in question and other contracts he has entered into on the basis of the contract in question.’ – at p 607. Consequently, it appears that an aggrieved party’s freedom to elect to affirm a contract may be less strongly curtailed in Singapore as compared with the case in England.”

50. Australia appears to follow the English position. In Cheshire and Fifoot’s Law of Contract, the learned authors observe that “English courts have conceded that the right is not entirely unrestricted: it cannot be exercised without a ‘legitimate interest’ in affirmation, or where the collaboration of the other party is necessary if the contract is to continue”.45 Reference is made to Australian cases said to follow this course – including J & S Chan Pty Ltd v McKenzie [1994] ANZ Conv R 610, Francis v South Sydney District Rugby

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Remedies for breach of contract

51. There are some major differences in remedies awarded by Australian, Singaporean and English courts for breach of contract.

52. All three nations’ courts accept that the aim of contract damages, explained in Robinson v Harman, is to put the plaintiff in the position as if the contract had been performed. This is uncontroversial.

53. However, in three key areas of contract damages, differences can be observed.

Remoteness of damages

54. All three nations’ courts accept the foundational principles of remoteness, described as the limbs in Hadley v Baxendale. However, the approach to the general Hadley v Baxendale propositions does differ between each country.

55. It is useful to examine the statutory equivalent of the principles in Hadley v Baxendale.

56. For failure to deliver, a buyer’s remedy includes:

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47 [1843-60] All ER Rep 383; (1848) 154 ER 363.

48 [1843-60] All ER Rep 461; (1854) 156 ER 145.

49 Sale of Goods Act 1895 (WA), s 50(2); Sale of Goods Act (Sing) s 51(2); Sale of Goods Act 1979 (UK), s 51(2).
“The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller’s breach of contract.”

57. For breach of a warranty, the buyer’s remedy includes:\textsuperscript{50}

“The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.”

58. For the seller, the buyer’s non-acceptance entitles:\textsuperscript{51}

“The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer’s breach of contract.”

59. These are the first limbs of \textit{Hadley v Baxendale}.

60. The second limb of \textit{Hadley v Baxendale} is more complex. The same sections do not prevent reliance on such breaches for the purpose of second limb damages – namely, the damage, whilst not regarded as arising in the usual course of things, is, nevertheless, damage which might reasonably be supposed to have been in the contemplation of the parties, by reason of the knowledge of some special circumstances known to them at the time of entering into the contract.

61. Australia approaches the question, as the Western Australian Court of Appeal has set out,\textsuperscript{52} by focusing on what damage was in the contemplation of the parties at the time. After \textit{The Achilleas}, England approaches the question as whether the parties objectively intended that there should be an assumption of responsibility for the loss suffered. The Singaporean Court of Appeal

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\item \textsuperscript{50} \textit{Sale of Goods Act 1895} (WA), s 52(2); \textit{Sale of Goods Act} (Sing) s 53(2); \textit{Sale of Goods Act 1979} (UK), s 53(2).
\item \textsuperscript{51} \textit{Sale of Goods Act 1895} (WA), s 49(2); \textit{Sale of Goods Act} (Sing) s 50(2); \textit{Sale of Goods Act 1979} (UK), s 50(2).
\item \textsuperscript{52} \textit{Motium Pty Ltd v Arrow Electronics Australia Pty Ltd} [2011] WASCA 65 at [5], [72] and [116].
\end{itemize}
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undertook an extensive analysis of Lord Hoffman’s approach in *The Achilleas* and rejected it.\(^{53}\)

62. The difference in the law, therefore, is that in England there may be more scope for a defaulting party to raise arguments as to what was reasonably in contemplation than may be the case in Australia or Singapore.\(^{54}\)

63. Another point on remoteness is of relevance for long-term contracts. A decision of Batt JA in *National Australia Bank Ltd v Nemur Varity Pty Ltd* [2002] VSCA 18; (2002) 4 VR 252, and favourable remarks of Murphy JA in *Executrix of the Estate of Keith Malcolm Witcombe v Talbot and Olivier* [2011] WASCA 107 at [133]-[134], might be taken to suggest that in a ‘relational’ long term contract, knowledge of the defendant acquired during the course of the contract might be considered. From our initial researches, we have not found equivalent assertions in Singaporean or English law.

**Mitigation of loss**

64. The second is the approach to mitigation of loss. The law appears to be largely the same:

(a) In all three jurisdictions, there appears to be acceptance of the House of Lords’ leading statement in *British Westinghouse v Underground Electric Railways* [1912] AC 673 on obligations to mitigate loss.\(^{55}\)

(b) Kenneth Martin J in *Rizhao Steel Holdings Group Co Ltd v Koolan Iron Ore Pty Ltd [No 2]* [2010] WASC 385 at [76]-[79], perceived no difference between Australian law and Singaporean law, in quoting from V K Rajah JA’s reasons in the Singaporean Court of Appeal in *The 'Asia Star'* [2010] 2 Lloyd's Rep 121. In that case, at [32] in V K Rajah JA stated:

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\(^{53}\) *MFM Restaurants Pte Ltd v Fish & Co Restaurants Pte Ltd* [2010] SGCA 36.

\(^{54}\) B Dharmananda SC “Australian trends in damages for long term contracts” (presented at *Commercial and Legal Issues under Long Term Contracts* Conference on 4 May 2012 at The UWA Club) at [87]-[92].

“The concept of reasonableness in the context of mitigation is a flexible one. In essence, it bars an aggrieved party from profiting or behaving unreasonably at the expense of the defaulting party, and encapsulates complex interplaying notions of responsibility and fairness. As with any principle of law that encapsulates notions of fairness, the principle of mitigation confers on the courts considerable discretion in evaluating the facts of the case at hand in order to arrive at a commercially just determination. The principle embodies a fact-centric flexibility which, whilst remaining in harmony with sound business practice, stands in vivid contrast to the strictness with which rules in other areas of contact law are applied.”

(c) Consistent with the above, benefits accruing to the innocent party (plaintiff) are taken into account in the calculation of damages: Omak Maritime Ltd v Mamola Challenger Shipping Co [2010] EWHC 2026 (Comm).

65. The decision of Hammerschlag J in OneSteel Manufacturing Pty Ltd v BlueScope Steel (AIS) Pty Ltd [2011] NSWSC 1450 is of particular interest to those advising on resources and energy supply, and particularly in the iron ore industry. It is also illustrative of the above general principles of mitigation.

66. His Honour had to examine the obligation of OneSteel to mitigate its loss after BlueScope had breached its contract to purchase iron ore fines from OneSteel. OneSteel had options, under other contracts, with Chinese purchasers to require them to take ore that BlueScope did not take. BlueScope alleged that OneSteel failed to mitigate its loss by not exercising the options and requiring Chinese purchasers to take the ore.

67. His Honour did not accept this argument ([185]-[187]):

“185 In my view, far from establishing that BlueScope's conduct in not requiring the Chinese customers to take the iron ore was unreasonable in the circumstances, in my view, OneSteel acted entirely reasonably in not taking this course.”
Mr Andrew Roberts, OneSteel's Chief Executive Mining Consumables and Marketing, gave evidence, which I accept, to the following effect:

There was no prospect at all that any of the Chinese customers would accept delivery of an additional shipment of iron ore if OneSteel sought to enforce its option. Those customers were already seeking to delay or avoid non-optional shipments. In circumstances in which previously agreed shipments were being cancelled or delayed, I considered that it would be fruitless and commercially risky to try and sell an additional shipment.

If OneSteel had sought to enforce the option to make an additional shipment of iron ore, it would have been likely to damage the long term commercial relationship between OneSteel and that customer, as each of the contracts with the Chinese customers had a 10 year term. I thought the customer would be likely to form the view that OneSteel was being unreasonable in seeking to make an additional optional shipment at the sellers' discretion during a collapse in the global markets.

Even if OneSteel had sought to enforce an option, I thought the most likely outcome would be that the Chinese customer would not agree but more importantly they not would put into place a Letter of Credit. OneSteel's policy at the time (and now) was that it would not load and sail a vessel with iron ore (as title to the product passes when it is loaded over the vessel's railing) unless a letter of credit was in place to secure payment for the shipment. The practice of loading and shipping a vessel of iron ore without an [sic] Letter of Credit in place would be a very real and significant commercial risk to OneSteel particularly in the economic environment at the time.
The Chinese customers were suffering the same negative effects of the GFC as was BlueScope. This induced BlueScope to reduce its iron ore intake. Yet at the same time BlueScope suggests that it was incumbent on OneSteel to impose on its Chinese customers an obligation to take the shortfall which BlueScope had resolved it would not take. Its position is untenable.”

**Limitations on consequential loss**

68. The Victorian Court of Appeal’s decision in *Environmental Systems Pty Ltd v Peerless Holdings Pty Ltd* (2008) 19 VR 358 is a significant departure from English law. The Court held that a clause excluding liability for ‘consequential loss’ did not just exclude liability for damages arising under the second limb of *Hadley v Baxendale*, as a line of English authority holds, but also some damages that would arise under the first limb.

69. While each case will need to be decided by reference to the specific clauses of the contract, clauses in Australia may well be read in accordance with their terms rather than by reference to any constraint derived from a dissection of the principles in *Hadley v Baxendale*. We were unable to find a Singaporean case in point.

**Interest as damages – a proper measure of compensation**

70. Professor Burrows identifies in his excellent text, *Remedies for Torts and Breach of Contract* that awards of damages for breach of contract in English law could not provide simple interest on sums due until s 35A of the *Supreme Court Act 1981* (UK) permitted, and still did not provide compound interest. For example, *Alstom Ltd v Yokogawa Australia Pty Ltd (No 7)* [2012] SASC 49 at [286]-[289].

71. Australian law, by the decision in *Hungerfords v Walker* (1989) 171 CLR 125 did provide such ‘perfection’ of damages – to reflect the commercial reality of funds lost.

For example, *Alstom Ltd v Yokogawa Australia Pty Ltd (No 7)* [2012] SASC 49 at [286]-[289].

72. Since the House of Lords’ decision in Sempra Metals Ltd v HMRC [2008] 1 AC 561, there has been a substantial shift in English law. It may be said that the position is the same in both Australia and England. Similarly, in Singapore, Chan Seng Onn J has favoured the approach in Sempra in the case of The Oriental Insurance Co Ltd v Reliance National Asia Re Pte Ltd.58

No accounts of profits for cynical breaches of contract

73. ‘Disgorgement’ damages, or an account of profits, for a cynical breach of contract are not available in Australia: Hospitality Group Pty Ltd v Australian Rugby Union Ltd (2001) 110 FCR 157.59 In England, the House of Lords’ decision in Attorney General v Blake [2001] 1 AC 268 permits this measure of damages in confined circumstances to be awarded for a cynical breach of contract.60

74. It seems that courts in Singapore have expressed some initial doubt about the English line of authority, but have not ruled it out: Teh Guek Ngor Engelin nee Tan v Chia Ee Lin Evelyn [2005] SGCA 19 at [17]-[18] (expressing doubt); Ng Bok Eng Holdings Pte Ltd v Wong Ser Wan [2005] SGCA 23 at [56]-[57]; Cheong Lay Yong v Muthukumaran s/o Varthan [2010] SGHC 59 at [57].

Arbitration clauses, procedures and enforcement of awards

75. A contract for the supply of commodities abroad may be the subject of contested arbitration.

58 [2008] SGHC 236 at [136]: “I believe that the House of Lords decision of Sempra Metals now focuses attention on the need to consider awarding compound interest as damages in appropriate cases and with such guidance from a pronouncement on this issue from the highest court in England, it throws open the door in common law jurisdictions to the possible award of compound interest in the nature of damages on claims for non-payment of debts as well as on other claims for breach of contract and in tort.”

59 See further B Dharmananda SC “Australian trends in damages for long term contracts” (presented at Commercial and Legal Issues under Long Term Contracts Conference on 4 May 2012 at The UWA Club) at [24]-[27].

76. By addressing different approaches to arbitration issues in Australia, Singapore and England, we do not seek to advocate that arbitration be an appropriate dispute resolution mechanism in all or any particular contracts. There are many reasons why arbitration might be selected or avoided.

77. However, we assume here that the parties have weighed up the costs and benefits of arbitration and favoured arbitration. We assume they have included an arbitration clause, which contains the usual components including the seat (place), mandatory resort to arbitration with carve out for urgent relief, the language of the arbitration, number of arbitrators, appointing authority, and applicable procedural law for the arbitration, and so on.

78. There can be disputes in determining which law applies to interpret the arbitration clause or agreement, or which procedures apply in the arbitration, but those are issues of some complexity that will arise rarely if a suitable clause is drafted.

79. It should be remembered that the procedural law of the arbitration, or the lex arbitri, will be the law of the seat of the arbitration.

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61 These are said to include speed, efficiency, confidentiality of process and expertise.

62 An informal study of the Corporate Counsel International Arbitration Group (CCIAG) in 2010 found that every single counsel surveyed thought that arbitration ‘takes too long’ and ‘costs too much’. See Lord Mustill’s classic remarks in “Arbitration: History and Background” (1989) 6(2) Journal of International Arbitration 43 at 54-55 (as to party engineered delay and obfuscation). See also Heydon J’s remarks in Westport Insurance Corp v Gordian Runoff Ltd (2011) 281 ALR 593 at [111] (under heading ‘The merits of arbitration’).

63 There are many options, including UNCITRAL Arbitration rules, International Chamber of Commerce (ICC) rules, Singapore International Arbitration Centre (SIAC) rules, LCIA rules and Australian Centre for International Commercial Arbitration (ACICA) rules.


Australian, Singaporean and English Courts all have a general pre-disposition to enforcing appropriate arbitration clauses. Singapore is reputedly and in fact a pro-arbitration state, acting to cure any deficiencies in procedure or process that would threaten this reputation. English law, as applied in the courts of England, appears to be of similar disposition. Australian approaches, on the other hand, are seen by the international arbitration community as antipathetic to the promotion of arbitration as an alternative dispute resolution mechanism. One example will suffice. The High Court’s decision in *Westport Insurance Corp v Gordian Runoff Ltd* (2011) 281 ALR 593 enables challenges to awards that are poorly reasoned. The international community was alarmed at this. It should also be recorded that in that very case, Heydon J stated:

The arbitration proceedings began on 15 October 2004 when Gordian served points of claim. This appeal comes to a close seven years later. The attractions of arbitration are said to lie in speed, cheapness, expertise and secrecy. It is not intended to make any criticisms in these respects of the arbitrators, of Einstein J, or of the Court of Appeal, for on the material in the appeal books none are fairly open. But it must be said that speed and cheapness are not manifest in the process to which the parties agreed. A commercial trial judge would have ensured more speed and less expense. On the construction point it is unlikely that the arbitrators had any greater relevant expertise than a commercial trial judge. Secrecy was lost once the reinsurers exercised their right to seek leave to appeal. The proceedings reveal no other point of superiority over conventional litigation. One point of inferiority they reveal is that there have been four tiers of adjudication, not three. Comment on these melancholy facts would be superfluous.

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68 *Westport Insurance Corp v Gordian Runoff Ltd* (2011) 281 ALR 593 at [111].
Arbitration – intangible factors

81. There are a number of intangible factors that do not form part of the substantive laws of Australia, Singapore and England that might be considered by advisors choosing dispute resolution mechanisms for a supply contract, by particular reference to the nature and size of the supply contract.

82. If a dispute arises, then the selection of courts or an arbitral seat for the determination of the dispute will usually be a matter of convenience to one party, and a matter of inconvenience to the other party. If Western Australian courts are chosen, then the foreign parties’ representatives (and witnesses) may have to regularly travel to Perth. Cost aside, it is inconvenient and time consuming – it can distract from core operations. It can even be a motivation, after sufficient aggravation from enduring such travel, for the purchasers’ management to settle the dispute.

83. The availability of specialist legal advisors to assist in the conduct of such a dispute is important. If Western Australian law is chosen as governing law, and the operations are in Western Australia, there is a significant advantage in using local practitioners who are familiar with local operations, markets and decision makers.

84. The costs of lawyers in each jurisdiction might also be sensibly compared. It is received wisdom that lawyers from England and the United States charge significantly higher rates.

85. The ability to collect evidence may also be significant. Processes of discovery, subpoena and using subpoenae against parties and non-parties abroad can be of great importance. For those including price review mechanisms in mid or long-term contracts, the ability to use forensic procedures to collect the evidence of market prices may be of critical importance. Of course, in Australia there are relatively few procedural impediments. A similar situation is likely to exist in England and in Singapore.

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69 See for example, A Martignoni “Gas Price Reviews: Charting the Misty Waters” (2010) AMPLA Yearbook 368 at 376-387 as to the main Australian decisions.
The cost of court fees can also be compared to the rates of arbitrators and dispute resolution centres. All dispute resolution centres publish their filing fees, and many publish schedules of rates for their panels of arbitrators. Here, the Singapore International Arbitration Centre (SIAC) and the Australian Centre for International Commercial Arbitration (ACICA) are relevant.

The speed of the decision makers must be understood. The Commercial and Managed Cases (CMC) List in the Supreme Court of Western Australia can case manage and determine matters within tight time frames. Singaporean and English courts could rival or beat the CMC List in efficiency. The choice of arbitrator and who makes the choice in default of agreement will be critical to determining how effective and efficient any arbitral tribunal is.

Singaporean courts are known to be arbitration friendly, and even have an arbitration bias, as there has been a general legislative and judicial policy in Singapore to make it a dispute resolution hub. Singapore has also recently passed amendments to the International Arbitration Act, to further support this approach.

Some Australian lawyers in the arbitration field have similarly been pushing for Perth and Sydney to become similar hubs for dispute resolution. The

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70 Singaporean courts are known to be arbitration friendly, and even have an arbitration bias, as there has been a general legislative and judicial policy in Singapore to make it a dispute resolution hub of Asia: Professor M Pryles “Singapore: The Hub of Arbitration in Asia” (SIAC Website, viewed on 14 May 2012). The Singapore International Arbitration Centre (SIAC) reports that it handled 198 new cases in 2010 and 188 new cases in 2011: SIAC, CEO’s Annual Report (2011, SIAC), p 5.

71 The amendments expand the scope of arbitral tribunals’ powers and relax the requirement in the Act that an arbitration agreement must be in writing, by recognising agreements that are concluded orally (or by other conduct) but put into writing later. For instance, an arbitration agreement made orally, but later recorded, will now fall within the scope of the Singapore IAA. This is consistent with the approach taken in the 2006 revisions to the Model Law. The amendments also allow Singaporean courts to review a ruling by an arbitral tribunal that it does not have jurisdiction to hear a dispute (a negative jurisdictional ruling). The IAA did not allow this, only enabling review of positive rulings as to jurisdiction. This amendment remedies such inconsistent treatment.

The amendments give ‘emergency arbitrators’ the same legal status and powers as that of any tribunal to ensure that any orders they make are enforceable.

The amendments went through with the Foreign Limitation Periods Bill, which settles which country's limitation laws apply to disputes fought in court or in arbitration in Singapore, which are governed by the law of another jurisdiction. Essentially, the applicable limitation period will be that of the governing law.
Australian Centre for International Commercial Arbitration (ACICA) has played an important part in this. It has become a prescribed appointing authority under the *International Arbitration Act 1974* (Cth) and *International Arbitration Rules 2011* (Cth), reg 4.

**Appeals, setting aside awards and enforcement of arbitral awards**

90. Once an arbitral award has been made, there are limited rights of appeal in all three jurisdictions, but there are still differences. In Australia\(^\text{72}\) only Model Law grounds can be used to set aside an award, while in Singapore\(^\text{73}\) the Model Law and an additional ‘natural justice’ ground can be relied upon. In England\(^\text{74}\) an appeal on a question of law lies, as well as a jurisdiction to set aside the award on the usual Model Law grounds.\(^\text{75}\)

91. One of the Model law grounds for setting aside an award is if the award is contrary to ‘public policy’.\(^\text{76}\) The public policy ground is controversial. There is international concern for its abuse by reviewing arbitral awards on unprincipled bases. Fraud on an arbitrator is generally considered against the public policy of most forums.

92. That is the ground which is invoked when a party has misled the arbitrator, perhaps by a witness who has perjured themselves or there has been a willful non-disclosure of evidence of significant misleading effect.

93. It appears that in Australia, the test for obtaining a judgment by fraud (in a court) is less demanding and rigorous than the test in England or Singapore for arbitral awards.\(^\text{77}\) As there is no authority in Australia as to the appropriate

\(^{72}\) *International Arbitration Act 1974* (Cth), s 16(1) (gives the Model Law, in the Schedule, the force of law) and Schedule 2, Art 34.

\(^{73}\) *International Arbitration Act* (Ch 143A) (Sing), s 24. As to the ‘natural justice’ ground see s 24(b).

\(^{74}\) *Arbitration Act 1996* (UK), s 69.

\(^{75}\) *Arbitration Act 1996* (UK), s 68.


\(^{77}\) The leading decision is that of Handley JA (with whom Heydon JA, as his Honour then was, and Hodgson JA agreed) in *Toubia v Schwenke* (2002) 54 NSWLR 46. His Honour said at
test for arbitral awards, it seems that the test applicable to judgments of courts will apply. Indeed, there is no reason why they should be treated differently.

94. It is clear, then, that the Australian law is that fault on the part of the innocent party in not discovering a fraud on the arbitrator will not deny that innocent party the ability to set aside the award. In England, a strong line of authority requires that the innocent party show that new evidence (which was denied because of perjury or fraud) could not have been produced at the trial with reasonable diligence on their part. There are comments as to the importance of upholding arbitral awards in the leading decision of the Singaporean Court of Appeal in AJU v AJT [2011] SGCA 41, which suggest that Singaporean courts would take a similar approach to English courts.

95. If an award (or judgment) is affected by fraud then the whole award (or judgment) is affected. It is well understood that ‘fraud unravels all’. Further, once fraud is shown, there is no discretion for the court to refuse to set aside

[37]: “I would not follow the dicta in Owens Bank Ltd v Bracco, Owens Bank Ltd v Etoile Commerciale SA, and the Federal Court even if there was no High Court decision on the point because, with respect, the dicta are contrary to principle and earlier authority. The assumption is that the court and the losing party were successfully imposed on by the fraud of the successful party, but relief should nevertheless be denied and the judgment allowed to stand because the defrauded party was careless or lacked diligence in the preparation of his case. Such a result would be contrary to long established and fundamental principles. Contributory negligence is not a defence to an action for fraud whether the relief claimed is rescission or damages. As Breman J said in Gould v Vaggelas (1985) 157 CLR 215 at 252: “A knave does not escape liability because he is dealing with a fool”. This was quoted with approval by Newnes M, as his Honour then was, in Ridout v O’Brien [2004] WASC 137 at [49].

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The difference between Australian and English law has actually been specifically noted by Mr Justice Norris in Smith v QBE Insurance (Europe) Ltd [2010] EWHC 3172 (Ch) at [40].

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Lazarus Estates Ltd v Beasley [1956] 1 QB 702 at 712 per Lord Denning MR ("No judgment of a court, no order of a minister can be allowed to stand if it is obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all the transactions whatsoever"); Re Hall; Ex Parte Chin [No 2] [2011] WASC 155 at [27]-[30]. See also DM Gordon QC “Fraud or new evidence as grounds for actions to set aside judgments – I” (1961) 77 Law Quarterly Review 358 and “Fraud or new evidence as grounds for actions to set aside judgments – II” (1961) 77 Law Quarterly Review 533. See also Steven Gee QC “The Autonomy of Arbitrators, and Fraud Unravels All” (2006) 22(3) Arbitration International 337.
the judgment.\textsuperscript{81} There remain difficult questions of law relating to setting aside arbitration awards under the Model Law, and the residual jurisdiction of courts of equity to set aside arbitral awards.\textsuperscript{82}

**Discharge of contract by frustration**

96. There are some subtle differences between the laws of frustration of Australia, Singapore and England.

97. We will come to these. It may be worth considering how a supervening event in the iron ore industry and explaining the magnitude of the potential risk to illustrate why focus on the law of frustration.

98. There are around a dozen major iron ore mines in Western Australia, each with its own integrated transport system. The risks of a cut in supply from such mines are easily visible. One can foresee that any number of the following problems could occur:

(a) A disaster at the iron ore mine such as collapse of a pit wall, flooding of a pit (given a Pilbara wet season downpour) or cyclones hurting or killing workers\textsuperscript{83} or destroying loading equipment (given the high incidence of cyclones in the Pilbara).

(b) Potential rail problems such as a collision on an integrated track, total failure of a computerised rail system, a major derailment, an act of terrorism on the infrastructure, the need for emergency track repair that takes time or a necessary bridge supporting track being out of service\textsuperscript{84} or collapsing.

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\textsuperscript{81} *Ridout v O’Brien* [2004] WASC 137 at [54].

\textsuperscript{82} For example, as explored for the New South Wales Supreme Court in *Harrison v Schipp* (2002) 54 NSWLR 738 for judgments. For arbitrations, it would perhaps form part of “the incoherent rag-bag of matters considered to be within the equity jurisdiction in the 19th century”, referring to the exclusive substantive jurisdiction for arbitral awards: Mike McNair “Equity and Conscience” (2007) 27(4) *Oxford Journal of Legal Studies* 659 at 664 and 665. See also *Brown v Brown* (1683) 1 Vern 157; (1683) 23 ER 384 and cases cited in the note that follow.

\textsuperscript{83} *Re Fortescue Metals Group Ltd; Ex parte Fortescue Metals Group Ltd* [2010] WASC 88.

\textsuperscript{84} As occurred in the case of Robe’s operations and outlined in the decision of *Woodley v Minister for Indigenous Affairs* [2009] WASC 251.
(c) Potential haul road problems, such as a road washed away during a wet season or rendered completely impassable.

(d) Potential port problems could include collisions by ships with a dock rendering it out of service, closure of port due to extreme weather conditions (such as the cyclones already mentioned), the extreme Pilbara tides changing seabed preventing ship access and requiring dredging for some time, an act of terrorism on the infrastructure or busyness of the port precluding access.

(e) There could be problems at sea as the ore is shipped abroad, including the possibility that pirates would see a worthwhile opportunity for corporate ransom, that ships could collide at sea, extreme weather (tidal waves or cyclone) would damage or sink a ship, the ship strikes a reef, the ship is seized by a foreign power with its iron ore cargo or there is an outbreak of war.

(f) At each of these stages there is also the possibility of industrial disputation with workers, including strikes.

99. Such matters are all considerations when spreading risk, considering whether doctrines of frustration will likely apply or whether an appropriate force majeure clause can be drafted. 85 Australian, Singaporean and English law do not know any doctrine of ‘force majeure’, but it seems that each will pay due regard to the wording of a properly drafted clause in a contract.

100. In Australia the test for frustration was explained in Codelfa Construction Pty Ltd v State Rail Authority (NSW) (1982) 149 CLR 337, and a crisp restatement can be found in the decision of Nettle JA in oOh! Media Roadside Pty Ltd (formerly Power Panels Pty Ltd) v Diamond Wheels Pty Ltd [2011] VSCA

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116 at [70]. His Honour said “…that a contract is not frustrated unless a supervening event:

(a) confounds a mistaken common assumption that some particular thing or state of affairs essential to the performance of the contract will continue to exist or be available, neither party undertaking responsibility in that regard; and

(b) in so doing has the effect that, without default of either party, a contractual obligation becomes incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.”

101. The English law for frustration appears to focus on the multi-factorial approach of Rix LJ in Edwinton Commercial Corp. v Tsavliris Russ (The Sea Angel) [2007] 2 All R (Comm) 634. But there is no precise guidance as to a test for considering the range of potentially relevant factors. In this sense, the English approach to the law is less clear.

102. In Singapore, the test in Davis Contractors Ltd v Fareham Urban District Council [1956] AC 696 at 729, has been adopted by the Court of Appeal in RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd [2007] 4 SLR(R) 413 at [59] and applied.

103. It is at the remedial side of things that the law differs most.

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86 Blue Sky One Ltd & Ors v Mahan Air & Anor (Rev 1) [2010] EWHC 631 (Comm) at [138]-[143]; ACG Acquisition XX LLC v Olympic Airlines [2012] EWHC 1070 (Comm) at [178]-[179].

87 Although, not all judges appear to apply Rix LJ’s approach: Gold Group Properties Ltd v BDW Trading Ltd [2010] EWHC 323 (TCC) at [67]-[74].

88 “[f]rustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract”.

89 Holcim (Singapore) Pte Ltd v Kwan Yong Construction Pte Ltd [2008] SGHC 231 at [71]-[77]; Sheng Siong Supermarket Pte Ltd v Carilla Pte Ltd [2011] SGHC 204 at [72]-[77].
104. At common law, when a contract is discharged by frustration then it terminates automatically and the parties are freed from all obligations to be performed thereafter.\(^90\) This can lead to some unfair results.

105. Western Australia does not have a statute (where as some other states do). England has a *Law Reform (Frustrated Contracts) Act 1943* (UK).\(^91\) The statute allows a court to adjust the rights of the parties upon discharge of the contract by frustration. Singapore has the *Frustrated Contracts Act* (Cap 115, 1985 Rev Ed), which is largely identical to the English statute.\(^92\)

106. To illustrate the harshness, we modify the example given in *Treitel’s Law of Contract*.\(^93\) There is an agreement to sell 200,000 tonnes of iron ore by 4 shipments and payment is to occur within 3 days of receipt of all of the ore in North China. One ship has delivered. Upon a proper construction of the contract it is frustrated when the other 3 of the ships are severely damaged (so they cannot complete the journey and have lost a significant amount of their cargo) in a tropical storm. The producer may\(^94\) not be entitled to be paid for the first shipment that made it to China at common law, but under the statutes a court can make an allowance.\(^95\)

**Security for payment mechanisms – letters of credit and performance bonds**

107. Letters of credit and performance bonds have been described as the “crankshaft of modern trade”; the “life-blood of international commerce”.\(^96\)

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\(^92\) A decision on the Singaporean provisions at work is *Sheng Siong Supermarket Pte Ltd v Carilla Pte Ltd* [2011] SGHC 204.


\(^94\) It depends on whether an action for a restitutionary remedy may lie, which is not altogether certain.

\(^95\) Hence, being more certain.

They are important to secure performance of counter-parties’ obligations under contracts for supply.

108. Much can be said about the law relating to security for payment mechanisms.\textsuperscript{97} We note two major debates in the Australian law, which may lead to different results in Singapore and England. They are all-important to a Western Australian energy or resources producer.

\textbf{The unconscionability exception to the autonomy principle}

109. There is a general principle of autonomy. It requires the independence of the contract between the issuing bank and the beneficiary (here, the producer) and the underlying contract (being the sales contract between foreign purchaser and producer). It is because of the autonomy of the credit, bond or guarantee that the beneficiary (the purchaser) will be paid on demand or call to the bank, regardless of any conformity of goods under the contract between foreign purchaser and producer, or any other issue or dispute between them.

110. A line of Australian cases has involved assertions of ‘unconscionable’ calls on performance bonds, demand guarantees or letters of credit.\textsuperscript{98} Much attention has been given to the autonomy principle and the scope of exceptions to it.\textsuperscript{99}

\textsuperscript{97} A number of leading texts are mentioned below. A useful overview can be found in E McKendrick, \textit{Goode on Commercial Law} (Penguin, 4\textsuperscript{th} Edition, 2010) at Chapter 35.

\textsuperscript{98} Including \textit{Olex Focas Pty Ltd v Skodaexport Co Ltd} [1998] 3 VR 380, \textit{Clough Engineering Ltd v Oil & Natural Gas Corp Ltd} (2008) 249 ALR 458 and \textit{VI.SA. Australia Pty Ltd v Tzaneros Investments Pty Ltd} [2009] NSWSC 531; \textit{Redline Contracting Pty Ltd v MCC Mining (Western Australia) Pty Ltd} (No 2) [2012] FCA 1.

111. It is enough to say that given the fabric of Australian equitable doctrines and remedies and their supplementation by statutory versions,\(^\text{100}\) that there is significant room for argument in Australian courts to delay or prevent calls on letters of credit or performance bonds. Singaporean courts have, similarly, adopted an ‘unconscionability’ exception to calls on performance bonds.\(^\text{101}\)

112. On 9 May 2012, the Singapore Court of Appeal again affirmed the unconscionability exception in *BS Mount Sophia Pte Ltd v Join-Aim Pte Ltd* [2012] SGCA 28. The Court dismissed academic criticisms of it and confirmed that a close factual analysis is required in each case. The Court affirmed the decision at first instance that a strong *prima facie* case of unconscionability justified the continuance of the injunction restraining the Appellant’s call on the Bond pending arbitration.

113. English courts have not recognised an unconscionability exception. What has been called a broadly similar ‘good faith’\(^\text{102}\) requirement in calling upon a letter or credit or bond, may not be entirely consisted with decisions of the House of Lords and Court of Appeal in England, and has not been generally applied. English commentators have cautioned against such an exception, and rationalised some of these decisions as not actually creating a new exception.\(^\text{103}\)

114. The difference is relevant for Western Australian producers because security for payment mechanisms are a first line of defence against defaulting purchasers. Moreover, purchasers that wish to delay or avoid payment or seek to commence a dispute with a view to negotiating a lesser price (even after

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\(^\text{100}\) Sections 20-22 of Schedule 2 of the *Competition and Consumer Act 2010* (Cth) and the equivalents under and the *Australian Securities and Investments Commission Act 2001* (Cth).


\(^\text{103}\) Deborah Horowitz, *Letters of Credit and Demand Guarantees – Defences to Payment* (OUP, 2010) at Chapter 6 (Unconscionable Conduct).
delivery has occurred or as a ship is on its way to its destination without the
ability to return its energy or resource cargo), may seek to enjoin (injunct) the
bank from paying on a letter or credit or performance bond on the
unconscionability ground.

115. This can be done with apparently greater ease in Singapore and Australia.

116. If the dispute arises in Australia or is suitably connected to Australia, then the
statutory proscriptions against unconscionable conduct in sections 20-22 of
Schedule 2 of the *Competition and Consumer Act 2010* (Cth) (and the
equivalents under and the *Australian Securities and Investments Commission
Act 2001* (Cth)) can apply to support such an argument. Further, parties would
not be able to contract out of or avoid this position.104

117. If you consider that sections 20-22 create excessive difficulty in application
because of its breadth and the potentially infinite variety of relevant
considerations, then you are likely to be in agreement with Perram J. His
Honour noted:105

“The wisdom of giving statutory force to such ill-defined moral
precepts which of their nature are likely to vary between different
people and judges may seriously be questioned. Further, common
experience with litigation shows that the prescription of such vague
and contestable standards is apt to multiply disputation and prolong
litigation whilst parties debate the application of a rule whose content
is not only obscure but illusive. Worse, because most parties in
litigation regard themselves as being in the right, the insertion of a
standard resting on a moral precept such as conscience is likely to
mean that each side sees such a provision as assisting it. A less
wholesome incentive to the reduction of litigation is difficult to
imagine.”

104 There are some mandatory forum laws that cannot be escaped. See *Akai Pty Ltd v People's
Insurance Co Ltd* (1996) 188 CLR 418 and M Davies, A S Bell and P L G Brereton, *Nygh’s

105 *Transmarket Trading Pty Ltd v Sydney Futures Exchange Ltd* [2010] FCA 5 at [127].
Construction of the contract as to calling on the credit or bond

118. In all cases, the circumstances in which a call can be made is a matter of construction of the relevant credit or bond, and perhaps the other documents to the transaction.

119. There is an ongoing debate in Australian law as to the effect of clauses which condition a call on a credit or bond on the existence of an underlying dispute or breach of contract. The issue is whether a dispute must exist objectively or whether it is enough that the party calling on the credit or bond has a bona fide belief in the existence of a dispute or entitlement. This has been raised by MacFarlan JA in Lucas Stuart Pty Ltd v Hemmes Hermitage Pty Ltd [2010] NSWCA 283, by reference to the Full Federal Court’s decision in Clough Engineering Ltd v Oil & Natural Gas Corp Ltd (2008) 249 ALR 458.

120. It appears that a similar issue has arisen in Singapore in Magenta Resources (S) Pte Ltd v China Resources (S) Pte Ltd [1996] 3 SLR 62 (the case was dealt with on other points on appeal: [1997] 1 SLR 707). At first instance, the court required that delivery of the goods had not been in accordance with the contract, otherwise the beneficiary had wrongly called on the guarantee. In their text on documentary letters of credit, Peter Ellinger and Dora Neo, suggest that the preferable view is to only require that the beneficiary honestly believe that the other party has breached the contract.

121. Careful drafting of the supply contract might avoid the issue. The supply contract contains the obligations as between the producer and purchaser for the circumstances in which a call on a credit or bond can be made. Specifying that the producer can call on belief, or at their discretion, may be the solution.

106 Central Petroleum Ltd v Century Energy Services Pty Ltd [2011] WASC 211 at [14], [35]-[36] and Redline Contracting Pty Ltd v MCC Mining (Western Australia) Pty Ltd (No 2) [2012] FCA 1.


Contract formation

122. There may be some differences in emphasis Australian, Singaporean and English law on the formation of contracts. The key difference is what Australian lawyers know to be that area surrounding Masters v Cameron.\textsuperscript{109}

123. Naturally, a legally enforceable contract requires an agreement (offer and acceptance), consideration and the intention to create legal relations. In Australia, the fragmented exchange of correspondence or unexecuted documents said to form a contract can lead to arguments between parties as to the adequacy of those elements:

(a) that an agreement has not been reached given the difficulty of pinpointing an offer and acceptance;\textsuperscript{110}

(b) that there has not been any intention to create legal relations demonstrated by some uncertainty and postponement of agreement on all or some important matters;\textsuperscript{111} and

(c) that there is such uncertainty in what has been agreed that it is unenforceable, and a specific obligation or the whole agreement is void within the doctrine of uncertainty.\textsuperscript{112}

\textsuperscript{109} We have included this area in the paper because there are differences in the laws of Australia, Singapore and England to be seen and it may be of general interest. However, we are conscious of the fact that if there is a dispute as to whether a contract has been formed (which is what Masters v Cameron is concerned with), then it is not logically a consideration in this paper, which focuses on a choice of governing law for a concluded contract.

\textsuperscript{110} Although, the cases do not appear to succumb to the difficulty, as they suggest looking at all the circumstances and the objective intention of the parties. That is, they answer the ‘agreement’ question with the analysis conducted to determine intention to create legal relations – as in (b) – and seen, for example, in Weemah Park Pty Ltd v Glenlaton Investments Pty Ltd [2011] QCA 150 at [45]-[50] and Urusoglu v MSU Management Pty Ltd [2011] NSWSC 54 at [271]-[272] and cases discussed there.


\textsuperscript{112} As to which see Uranium Equities Ltd v Fewster (2008) 36 WAR 97 at [257] per The Court; Australian Goldfields NL (in liq) v North Australian Diamonds NL (2009) 40 WAR 191 at [6] per McLure JA (noting it is a doctrine to be defined by two limbs).
124. It is in respect of (b), that Masters v Cameron is concerned. Four well-known
categories are recognised.\textsuperscript{113} It has been said that Masters v Cameron style
questions arise more in Australia than in England.

125. The Supreme Court of the United Kingdom’s decision in RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Company KG [2010] 1 WLR 753 is the leading case in that jurisdiction. What can be seen is that the Court
reserved for English courts a broad inquiry into all the circumstances of a
dispute to examine whether the parties intended to create legal relations. There
are some general guiding principles for that inquiry, but they do not reach the
level of sophistication of those laid down by Australian courts – such as those

126. The Singapore Court of Appeal adopts the statement in RTS Flexible that it an
assessment depends “on all the circumstances” in Norwest Holdings Pte Ltd (in liquidation) v Newport Mining Ltd [2011] SGCA 42 at [24].

A potential uncertainty in Australia

127. On 22 March 2012, The Commonwealth Attorney-General released a
discussion paper ambitiously titled “Improving Australia’s Law and Justice
Framework - A discussion paper to explore the scope for reforming
Australian contract law 2012” (March 2012, Business Law Branch -
Australian Attorney-General’s Department).

128. It appears that the Commonwealth is interested in a range of questions,
including:\textsuperscript{114}

(a) What are the main problems experienced by users of Australian contract law?

\textsuperscript{113} See them extracted in Uranium Equities Ltd v Fewster (2008) 36 WAR 97 at [127]-[128].

\textsuperscript{114} Improving Australia’s Law and Justice Framework - A discussion paper to explore the scope
for reforming Australian contract law 2012 (March 2012, Business Law Branch - Australian
Attorney-General’s Department) at p iii.
Which drivers of reform are the most important for contract law?

Are there any other drivers of reform that should be considered?

What costs, difficulties, inefficiencies or lost opportunities do businesses experience as a result of the domestic operation of Australian contract law?

How can Australian contract law better meet the emerging needs of the digital economy? In what circumstances should online terms and conditions be given effect?

To what extent do businesses experience costs, difficulties, inefficiencies or lost opportunities as a result of differences between Australian and foreign contract law?

What are the costs and benefits of internationalising Australian contract law?

Which reform options (restatement, simplification or substantial reform of contract law) would be preferable? What benefits and costs would result from each?

How should any reform of contract law be implemented?

What next steps should be conducted? Who should be involved?

There is a potential legislative desire to create uniform contract laws in Australia.

In respect of (d) and (f), it would be near impossible to find empirical evidence of such matters.

In respect of (g)-(h), it might be observed that international restatements of contract laws – such as CISG and UNIDROIT do exist - yet Australian business and Australian lawyers have consistently not elected to incorporate them into contracts.

We will have to await the outcome of the inquiry.
Conclusion

133. This paper has sought to consider, within a confined context, such differences as are apparent in English, Australian, and Singapore law with a view to assisting advisors in the selection of a relevant governing law for the purposes of a commercial transaction.

134. While no one difference is of so drastic in nature that the selection of a particular system of law will be fatal, it may be seen that there are differences of substance, and such relevance to parties involved in energy and resource contracts.

135. Often, the choice of law will be a matter for negotiation, based upon the advisor’s familiarity with a particular system of law, rather than an understanding of any other system of law. It may that in the face of Australia’s trading partners and the relentless expansion of globalisation, we would all be better served by a deeper understanding of different systems of law.

136. It may be that some measure of international codification may, in the coming years, bring greater coherence than has been the case to date. Ultimately, however, the task of those called upon to advise in the context of energy and resources transactions will best advance by close attention to the terms within the contract. An ounce of clarity in concepts and clarity of exposition will be worth a ton of law. Such an approach sits comfortably with the respect given to the written text that each of the laws considered reveals.

137. Many considerations may ultimately affect the choice of law that is made. It is a matter for negotiation. Cultural considerations, tradition, the interests of financiers, and the differences that this paper has highlighted may all be a tipping point when it comes to the final selection. It may be that the choice, in a particular transaction, will not much matter. But it could be of quite immense significance. Therein lies the dilemma for it must, surely, be salt in the wound if the system of law one has deliberately chosen adds to one’s woes.