



**SYDNEY CENTRE
FOR INTERNATIONAL LAW**
FACULTY OF LAW, UNIVERSITY OF SYDNEY



The UNIDROIT Principles of International Commercial Contracts: What Do They Mean for Australia?

Seminar Papers

- **Michael Joachim Bonell**, Professor of Comparative Law, University of Rome I (La Sapienza)
- **The Hon Justice Paul Finn**, Federal Court of Australia
- **Adjunct Professor Don Robertson**, Faculty of Law, The University of Sydney
- **Dr Luke Nottage**, Director, Comparative and Global Law Program, Sydney Centre for International Law, Faculty of Law, The University of Sydney



**The University
of Sydney**

**Sydney Centre Working Paper 7
June 2008**



Faculty of Law

“The UNIDROIT Principles of International Commercial Contracts: Present State and Prospects for the Future”

**Michael Joachim Bonell
Professor of Comparative Law,
University of Rome I (La Sapienza)**

Presented at:

**“The UNIDROIT Principles of International Commercial Contracts:
What Do They Mean for Australia?”**

**CLE Seminar, Sydney Law School,
25 June 2008**

1. It is a great honour and pleasure for me to be here and take the floor at this important seminar. Within the next half hour or so I shall first provide a general overview of what the UNIDROIT Principles are and what they have achieved so far in practice. I shall then offer you some suggestions and ideas as to how to promote the Principles from their present status as a mere soft law instrument. In so doing I strongly hope that there will be sufficient time left for discussion, thus enabling you to raise questions and comments on issues relating to the UNIDROIT Principles.

2. The UNIDROIT Principles of International Commercial Contracts – now available in their second enlarged edition of 2004 while a third edition is under preparation – are a non-legislative codification – or if you prefer, a “restatement” – of the law of international commercial contracts in general.

They are the product of a group of independent experts from all the major legal systems and geo-political areas of the world –

from Australia first Patrick Brazil and then Justice Finn who is with us today.

Apart from their wider scope – they cover virtually all the areas of general contract law: from contract formation, interpretation, validity, content, performance, non-performance and remedies to third party rights, agency, assignment and limitation periods – the only difference with respect to other internationally widely used soft law instruments, such as the INCOTERMS or the UCPs issued by the International Chamber of Commerce, is that they have been prepared under the aegis of an intergovernmental organisation such as UNIDROIT.

I think it is fair to say that in practice the reception of the Principles – emphatically welcomed by an eminent American scholar as “a significant step towards the globalisation of legal thinking” – has gone far beyond the initial expectations.

They have been taken by a number of national legislatures as a source of inspiration for the reform of their domestic contract laws.

Moreover, also in view of the fact that the Principles are available in virtually all the principal languages of the world, they are more and more frequently used by parties in negotiating and drafting cross border contracts.

Finally, and most importantly, not only arbitrators but also domestic courts increasingly refer in their decisions to the UNIDROIT Principles. In a number of decisions – all arbitral awards – they have been applied as the rules of law governing the substance of the dispute. In other decisions – by both domestic courts and arbitral tribunals – they have been used to interpret international uniform law instruments, in particular CISG. In still other decisions they have been invoked in support of a particular

solution adopted under the applicable domestic law or in order to fill gaps in the latter.

3. All is well then? Not necessarily. First and foremost, there can be no doubt that much remains to be done to make the Principles even better known to potential users world-wide.

We in Rome are doing our best – let me just mention UNILEX, a database on international case law and bibliography concerning the UNIDROIT Principles freely accessible on the Internet at <http://www.unilex.info> and which at present contains some 165 decisions from all over the world referring in one way or another to the UNIDROIT Principles. By the way, the total number of decisions of this kind is in fact much higher, but as you know most arbitral awards for not always compelling reasons remain confidential.

Yet obviously the Principles have to be promoted also in other parts of the world – and in this respect seminars such as our meeting today, bringing together both academics and practitioners, are certainly of utmost importance.

Equally beneficial are other initiatives such as – to remain in this region of the globe – the empirical evaluation of the utility of the UNIDROIT Principles as compared to other models of contract law recently undertaken by Professors Ellinghaus and Wright with the involvement of 1800 Australian university students, or the Annual Intercollegiate Negotiation Competition, sponsored by the Japan Arbitration Association and White & Case Law Office, in which students from Japanese and Australian Universities are invited to solve a hypothetical dispute on the basis of the UNIDROIT Principles.

Finally, a particularly significant recognition of the importance of the Principles is their formal endorsement by UNCITRAL, as happened last year. UNCITRAL has already endorsed other soft law instruments that have proved particularly successful in practice, such as INCOTERMS

or the UCPs. The fact that UNCITRAL now formally commends to the international legal and business community also the use of the Principles will definitely enhance their prestige and popularity worldwide.

4. Yet to increase in actual practice awareness of the Principles around the globe, important as it is, is not enough. Maybe it is time to think of ways to promote the Principles from their present status as a mere soft law instrument.

To be sure, the fact that the Principles are the product of a group of independent experts without direct involvement of governments undoubtedly has its advantages. Not only does it permit wider discretion in their preparation but also renders them more flexible and capable of rapid adaptation to the changing conditions in international trade practice.

Not surprisingly therefore there are those who openly state that the non-binding nature of the Principles, far from being problematic, makes them even more attractive. As pointed out by an eminent German scholar, “[...] the informal approach taken by the UNIDROIT Working Group has had a decisive influence on the success of the Principles [...] Informal, not formalized codification of transnational commercial law is the order of the day.”

However, the present status of the UNIDROIT Principles clearly also has its shortcomings. Like any other soft law instrument in the field of contract law they are binding only within the limits of party autonomy, whereas in the absence of voluntary acceptance by the parties, courts and arbitral tribunals will apply them, if at all, only if persuaded by their intrinsic merits.

Hence repeated calls for the transformation of the Principles into a binding instrument.

The legislative codification of the Principles would certainly be the most radical

way of promoting them from their present status as a mere soft law instrument.

But is it also the best way? I don't think so. After all, it is – to say the least – rather unlikely that governments will ever be willing to embark upon such a costly project as the transformation of the UNIDROIT Principles into an international convention.

In my opinion, there are other less radical but maybe even more appropriate options I would like to present to you in order to hear your comments.

5. A first significant step to promote the legal status of the UNIDROIT Principles would be a formal Recommendation by UNCITRAL to use them as a means of interpreting and supplementing the CISG.

Art. 7 CISG provides that the Convention should be interpreted and supplemented autonomously, i.e. according to internationally uniform principles and rules, whereas recourse to domestic law is admitted only as a last resort. In the past such autonomous principles and rules had to be found by judges and arbitrators themselves on an ad hoc basis. Now that the UNIDROIT Principles exist, the question arises whether they may be used for this purpose.

Among scholars opinions are divided. While according to the prevailing view the answer is in the affirmative, others deny the possibility of using the Principles to interpret or supplement the CISG on the basis of the rather formalistic argument that the former were adopted after the latter.

Despite such scholarly doubts, in practice not only arbitral tribunals but also domestic courts seem to have few if any scruples in referring to the Principles to interpret and supplement CISG.

Only in a few cases has this been justified – as I think it should – on the ground that the individual provisions invoked can be considered an expression of a general

principle underlying both the UNIDROIT Principles and the CISG.

Generally no explanation is given at all or it is argued that the Principles in their entirety coincide with or - to quote Justice Thomas of the Court of Appeal of New Zealand - “refine and expand” the general principles underlying the CISG referred to in Art. 7 (2) of the Convention, or represent “trade usages widely known in international trade” applicable in accordance with Art. 9(2).

So why not have UNCITRAL adopt a formal Recommendation to use the UNIDROIT Principles to interpret and supplement the CISG whenever the issues at stake fall within the scope of the CISG and the individual provisions referred to can be considered an expression of a general principle underlying both the UNIDROIT Principles and the CISG.

Such a Recommendation – a precedent of which may be seen in the Recommendation of 2006 regarding the interpretation of Arts. II (2) and VII (1) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards – would have the merit of promoting uniformity in the application of the CISG world-wide, while at the same time ensuring that in practice recourse to the UNIDROIT Principles is made only within the limits and on the conditions provided by Art. 7 CISG.

6. Another even more significant promotion of the legal status of the UNIDROIT Principles would be a formal recognition of the parties' right to choose the Principles as the law governing their contract.

One may think of a variety of situations in which parties to an international commercial contract – be they powerful “global players” or small or medium businesses – may wish to, and actually do, avoid the application of any domestic law and instead prefer to subject it to a genuinely neutral legal regime such as the UNIDROIT Principles.

Also an increasing number of Model Contracts prepared by international agencies such as the ICC or the ITC UNCTAD/WTO contain a reference to the Principles either as the exclusive *lex contractus* or in conjunction with other sources of law (e.g. a particular domestic law; general principles of law prevailing in a given trade sector; usages).

However, the effects of the parties' agreement on the application of the Principles vary considerably depending on whether such agreement is invoked before a domestic court or an arbitral tribunal.

Only in the context of international commercial arbitration parties are nowadays permitted – think of Article 28(1) of the UNCITRAL Model Law on International Commercial Arbitration – to choose a soft law instrument such as the UNIDROIT Principles as the law governing their contract in lieu of a particular domestic law.

By contrast, as far as court proceedings are concerned the traditional and still prevailing view is that the parties' freedom of choice is limited to a particular domestic law, with the result that a reference to the Principles will be considered as a mere agreement to incorporate them into the contract and as such can bind the parties only to the extent that they do not affect the mandatory provisions of the *lex contractus*.

To be sure, recently there have been some significant developments suggesting that things may change in the near future – suffice it to mention the 1994 Inter-American Convention on the Law Applicable to International Contracts, or the Official Comments to § 1-302 of the UCC, as revised in 2001, the latter expressly providing that parties may vary the effect of the Code's provisions by stating that their relationship will be governed by – quote – “recognised bodies of rules or principles applicable to commercial transactions such as the UNIDROIT Principles”.

On the other hand, it is fair to say that the Inter-American Convention has so far

been ratified only by 2 countries, and that in the UCC reference to the UNIDROIT Principles is made in the context of the section laying down the principle of freedom of contract and not in the context of § 1-301 dealing with the parties' right to choose the applicable law, with the consequence that a parties' agreement to have their contract governed by the UNIDROIT Principles will be respected only to the extent that the Code grants parties the right to derogate from its provisions.

Even more regrettable the latest developments in this field within the European Union. Indeed, while in 2005 the European Commission put forward a proposal to amend Art. 3 of the 1980 Rome Convention on the Law Applicable to Contractual Obligations to the effect that parties may choose as the applicable law not only the law of a particular State but also – quote – “principles and rules of the substantive law of contract recognized internationally”, this proposal was eventually vetoed by EU Member States, apparently concerned about the risk of excessive legal uncertainty deriving from the choice of a national principles and rules as the law governing the contract as compared to the alleged certainty and predictability of the choice of a particular domestic law.

Despite all that – or maybe just because of it – I think it would be a good idea formally to recognise at universal level the right of parties to an international commercial contract to choose as the governing law a soft law instrument such as the UNIDROIT Principles.

The Hague Conference on Private International Law would obviously be the most appropriate body to launch such a project, and it would have the merit of rendering the principle of party autonomy consonant with the needs of businesses engaged in international trade, while at the same time eliminating the totally unjustified differentiation in the parties' freedom to choose the applicable law depending on whether they decide to have their disputes

settled by arbitration or in court. By coincidence, according to the latest news the Hague Conference is currently exploring the possibility of preparing a parallel instrument to the 2005 Convention on Choice of Court Agreements and concerning choice of law in international contracts: what is proposed here could perfectly fit in that project.

7. I pass now – and with this I conclude – to a last and under the circumstances the most ambitious – way of fostering the legal status of the UNIDROIT Principles.

While I have already pointed out that transforming the Principles into an international convention is not a realistic and perhaps not even a desirable objective, it may still be worth considering adopting them in the form of a model law. The direct involvement of governments would certainly enhance the authority of the Principles; at the same time the risk that they might lose much of their innovative character and be reduced to the lowest common denominator among existing domestic laws is certainly less acute given the non-binding nature of the chosen instrument.

What still remains to be seen is whether the UNIDROIT Principles should be the subject of a model law on its own or be part of an even farther reaching project such as a Global Commercial Code.

Such a Code – to be prepared in the form of a model law by UNCITRAL in co-operation with other interested international

organisations – should be a sort of consolidation of existing international uniform law instruments (e.g. CISG, the various transport law conventions, etc., as well as soft law instruments such as INCOTERMS, the UCP, etc.). The UNIDROIT Principles – this is my proposal – could play the role of the “general contract law” of the Code: more precisely, the Code could contain a provision declaring the Principles applicable to the specific contracts covered by the Code unless parties have excluded them by choosing another law or otherwise.

THE UNIDROIT PRINCIPLES: AN AUSTRALIAN PERSPECTIVE

Paul Finn
**(A judge of the Federal Court of
Australia)**

I intend to view the Unidroit Principles through the prism of Australian law and to suggest ways in which it may enrich our domestic contract law. That law, unhelpfully, has six potential sources – the common law, equity, Commonwealth statute, State or Territory statute, international instruments, e.g. the *Vienna Convention on the International Sale of Goods*, and finally the terms of contracts themselves. With much of contract law being simply default rules, the terms of a contract are, as I will suggest to you, of the utmost importance. But having such diverse sources for our law is a recipe both for incoherence and for inertia in legal development.

When I brought out *Essays on Contract* twenty years ago, a United States reviewer described in the following way Australian contract law as it emerged from the pages of that volume:

“It is interesting for its own sake. It appears to be a living museum of an earlier simpler age of the common law.”

I will let you ponder the justice of this. I will also let you ponder how our contract law would look and work were it not for the provisions of the *Trade Practices Act 1974*. What I wish to raise first is the subject of renovation of contract law. My obvious premise here is that Australian contract law is perhaps a little tired, perhaps a little inadequate to the world in which it now finds itself. It needs regeneration.

I would merely suggest that areas such as estoppel, the whole area of suspension and renunciation of rights dealt with variously by waiver, estoppel, variation and election, contract interpretation and the implication of terms, for example, could do with some attention as could long term contracts at least in

relation to such matters as termination for just cause (e.g. because of a breakdown of trust and confidence between the parties). This suggestion exposes a real difficulty for us.

While to me it has not been a self evident proposition that there should be one common law of Australia, such is clearly the law and has recently been reaffirmed by the High Court in *Farab Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22. An odd consequence of this insistence is to destroy in large measure what has been the refuge of traditional thinkers about our contract law. This is that parliament can change the common law, if it does not agree with judicial decision on it. The concomitant proposition is that ordinarily it is for the Parliament and not the courts, save in simple or clear cases, to vary or modify a settled rule or principle of the common law because it is ill-suited to modern circumstances. All one can now say is, with our one common law, it would require either heroic acts of cooperative federalism or the Commonwealth’s use of its legislative powers over corporations and trade and commerce (so far as they go) to effect significant changes to contract law across the nation.

The High Court has now cemented its position as the custodian of the vitality of our common law including for present purposes our contract law. It would not be appropriate for me to comment on how the High Court has performed and might perform that task, although I would say that the Australian community may well be entitled to feel that the Court itself has now an enhanced responsibility as a law maker in relation to the common law and its renovation.

I earlier referred to the terms of the contract as one of the important sources of contract law. In a very real sense modern contract law is developed in the offices of lawyers. My following comments are made with this reality in mind. And I will suggest there is a part for the Principles in that development and not merely as it relates to international transactions.

I preface what I have to say with the question: May we not with profit be able to look beyond the confines of our own shores in adapting our contracts and our contract laws to contemporary

requirements? Here I would merely add that my perception is that we are being asked to be less inclined to engage in comparative private law than we were even in the relatively recent past. If I am correct in this, it is unfortunate. We are too small a country to generate the range of problems capable of sustaining a self sufficient common law of contract. We have always borrowed from abroad. We do not seem to date to have let loose a legal rabbit.

Now let me turn briefly to the Principles of International Commercial Contract and I emphasise at the outset they have been designedly formulated, as Prof Bonell has suggested, with international commerce and not consumer transactions in mind. But they are in the main in the nature of default rules which can readily be incorporated into the terms of a domestic contract made in this country.

There is no doubt that the Principles contain much that is recognisable in many legal systems of the world even when it does not fully accord in its detail with the law of any particular country. However, there clearly are rules which are innovative when judged by the domestic law of many, if not most, countries. Simply by way of illustration, when the second working group formulated its rules on agency the primary rule adopted (subject to one narrow exception) was that where the agent does not disclose it is acting as an agent such that the third party deals with that agent as a principal, the agent's acts only bring about legal relations between it and a third party. In other words, there is no undisclosed principal rule such as is found in common law systems. The reason for this particular innovation is obvious enough especially in the context of international trade. Parties make their judgments about risks etc having regard to the identity of those with whom they know they are dealing. The undisclosed principal rule in this setting was perceived to be anomalous.

The obvious attraction of the Principles is that principled, coherent and unintelligible, a claim I do not consider we can confidently make for our own law. All I wish to do now briefly is to talk of major themes they reveal. The first, I need hardly enlarge upon, is party

autonomy. The Principles designedly give the parties an expansive capacity to determine the content of their contract and of the rules which are to be applicable to it. To that end the parties enjoy the power to modify or exclude the application of the Principles or parts of it.

The second dominant theme is what is called *favor contractus*, i.e. the aim of preserving a contract whenever possible thus limiting the number of cases in which its existence or validity may be questioned or in which it may be terminated before time. To this end a contract can be concluded, modified or terminated by the mere agreement of the parties without any further requirement and, importantly for common law purposes without consideration. An unusual instance of this theme to Australian eyes is the novel provision on hardship to be found in Articles 6.2.2 and 6.2.3. Hardship I might indicate is distinct from *force majeure*. All I will say of it for present purposes is that it permits, in stipulated circumstances, a party to request the renegotiation of a contract and, if there is a failure to reach agreement, to approach a court or arbitral body which may, if reasonable, either terminate the contract or adapt it with a view to restoring its equilibrium.

The third theme relates to the role that practices and usages have in the scheme of the Principles. Those of you familiar with the CISG will not be unduly surprised by Art 1.9 of the Principles. It provides that the parties are bound by any usage to which they have agreed and by any practices which they have established between themselves. Equally they are bound by a usage that is widely known to, and regularly observed in international trade by, parties in the particular trade concerned – except where the application of such a usage would be unreasonable. In a variety of contexts throughout the Principles reference is made to usages and practices either as providing an alternative to a rule or as a source of obligation. To give two examples, Article 4.3 indicates that regard is to be had to practices and usages in the interpretation of a contract. Likewise Article 5.1.2 treats them as a factor to be taken into account in determining whether an obligation should be implied in a contract.

The fourth and final theme to which I would refer is perhaps the most dominant one in the Principles. It is enshrined in Article 1.7 which bluntly provides each party must act in accordance with good faith and fair dealing in international trade. Somewhat surprisingly you might think for a soft law instrument Article 1.7.2 provides “the parties may not exclude or limit this duty”. This is indicative of the function of good faith in setting the tenor of the Principles. The significance of this is most obvious in Article 1.6.2 which states that issues which are within the scope of the Principles but not expressly settled by them are as far as possible to be in accordance with their underlying general principles, hence the significance of good faith. I am of course quite mindful of the reluctance of many Judges and scholars in this country to accept the need for, or the appropriateness of, a duty of good faith and fair dealing in Australian contract law. Given the overwhelming acceptance of that principle in the legal systems of the world, I would have to say I find the Australian attitude mystifying and I have some difficulty in understanding why we, for example, are so hostile. Good faith is not a Trojan horse. All it requires is fidelity to the bargain struck by parties to a contract and fair dealing in light of that contract in its setting and of the parties conduct *inter se*. I would also have to say I am far from convinced that the place of good faith in our contract law is at all secure. Now, let me return to the Principles.

Article 1.7 is reflected in quite some number of more specific provisions of the Principles as, for example, Article 1.8 on inconsistent behaviour (or, to us, estoppel). It equally and obviously is manifest in Article 2.1.15. This deals with negotiations in bad faith. Because of its novelty it is worth referring to it in full. It provides:

(1) A party is free to negotiate and is not liable for failure to reach an agreement.

(2) However, a party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party.

(3) It is bad faith, in particular, for a party to enter into or continue negotiations when intending not to reach an agreement with the other party.”

The only additional examples it is necessary for me to give of specific “good faith type” principles are the duty to cooperate imposed by Article 5.1.3 and Articles 4.8 and 5.1.2 dealing respectively with supplying any omitted term or implying obligations.

Finally on this theme I would note additionally what is accepted as being an indirect application of Article 1.7. It relates to interpretation of a contract. Articles 4.1 and 4.2 provide that a contract shall be interpreted according to the common intention of the parties and, in the case of one party statements and conduct, in accordance with that party’s intentions “if the other party knew or could not have been unaware of that intention”. Article 4.3 goes on to provide:

“In applying Articles 4.1 and 4.2, regard shall be had to all the circumstances, including:

- (a) preliminary negotiations between the parties;*
- (b) practices which the parties have established between themselves;*
- (c) the conduct of the parties subsequent to the conclusion of the contract;*
- (d) the nature and purpose of the contract;*
- (e) the meaning commonly given to terms and expressions in the trade concerned;*
- (f) usages.”*

The departure in this from the rules of contract interpretation in this country is as marked as it is in my view sensible. It is unsurprising that a Court of Appeal judge in England has referred approvingly to Article 4.3 although she felt unable to apply it. I must confess I have taken a similar approach in decisions of my own.

The Principles do reflect a distillation of a vast wisdom about contract law from across the world. It is unsurprising they are having influence in the renovation of contract law in national and supra-national legal systems. Perhaps we also can learn from them for domestic purposes.

Comment: The case of long-term, relational contracts

Donald Robertson
Partner, Freehills
Adjunct Professor of Law, Sydney
Law School

25 June 2008

RELATIONAL CONTRACTS

1. The UNIDROIT Principles of International Commercial Contracts have made a surprisingly quick impact upon contract law globally. Professor Bonell has documented the immediate success of the UNIDROIT Principles.¹ They are in the form of a ‘restatement’, as if a code. However, they must inevitably develop the accretions of a common law system of reasoning as they have gaps which must be filled and contain concepts that require interpretation.
2. The UNIDROIT Principles are a truly impressive exercise in reducing the core principles of contract law to writing – a new *lex mercatoria*. The great bulk of these principles are uncontroversial and, as the UNIDROIT Principles demonstrate, there is a good deal of commonality between the common law and civil legal worlds in this respect.
3. The UNIDROIT Principles are therefore having an influence in many jurisdictions, not just European jurisdictions, with which Australian business is engaging in commerce.
4. They will become more important if the vision of the Rudd Government is achieved. The Commonwealth Attorney-General has said that it is the view of the Rudd Government ‘that we should promote the Federal Court as

the regional hub for commercial litigation.’²

5. If this vision is to become a reality, commercial parties should consider adopting a system of law that governs their contractual relationships that will be acceptable to non-Australian entities. The UNIDROIT Principles are an obvious choice.
6. Whether the UNIDROIT Principles continue to have influence will depend on whether they make sense to commercial people. This primarily means that they promote contractual certainty. They should also confine themselves to the core workings of contract law and not stray into territory that is better left to tort law, equity or restitution law.
7. A key test is whether the principles deal adequately with ‘relational contracts’. In the commercial world this is the typical contract.

‘Much economic activity takes place within long-term, complex, perhaps multiparty contractual (or contract-like) relationships; behavior is, in varying degrees, sheltered from market forces.’³
8. Relational contracts understand contracts as providing a ‘framework’ for transient and more permanent relationships and a ‘norm of ultimate appeal when relations cease in fact to work’. Contracts are one of the central institutions of capitalism.⁴ However, all contracts – but especially long-term contracts – are necessarily incomplete (unforeseen events are inevitable) and parties have a degree of ‘discretion’ in relation to how they perform

² The Attorney-General, The Hon Robert McClelland, *Australian Financial Review Legal Conference 2008*, 17 June 2008.

³ Victor Goldberg, ‘Relational Exchange: Economics and Complex Contracts’ in Victor P Goldberg (ed), *Readings in the economics of contract law* (Cambridge University Press, 1989), 16. Long-term contracts include not only contracts with lengthy periods of duration, but those which are operated on a continuing though indefinite period and terminable at short-notice.

⁴ Karl Llewellyn, ‘What Price Contract? An Essay in Perspective’ 40 *Yale Law Journal* 704 (1931). The seminal economic work is that of Oliver E Williamson, *The Economic Institutions of Capitalism* (Free Press, New York, 1985). An overview of the ‘new institutional economics’ which considers the role that ‘contract’ plays in private ordering is found in Eirik G Furubotn and Rudolf Richter, *Institutions & Economic Theory* (University of Michigan Press, 2nd ed, 2005), chapter 4.

¹ Michael Joachim Bonell, ‘UNIDROIT Principles 2004 – The New Edition of the Principles of International Commercial Contracts adopted by the International Institute for the Unification of Private Law’ (2004-1) *Uniform Law Review* 5.

their contractual obligations,⁵ which obligations can be ‘evolutionary’ in nature.⁶

9. The presence of *discretion* in the performance of contractual obligations gives rise to particular legal challenges more like those found in public law. Finn J has stated that special rules should not apply to such contracts, but ‘particular rules of contract law have greater or less ease of application in relational contract settings’.⁷ There are 4 areas to which attention needs to be paid.
10. First, as Finn J also notes, there is a need, in relational contracts of significant duration, to adjust terms to accommodate changed or unforeseen circumstances.⁸
11. Second, we need to work out whether we have a preference for keeping the contract alive or terminating it. The common law, by means of the relatively blunt doctrine of frustration, struggles (often unsuccessfully) to preserve contractual relationships. In relational contracts, on the other hand, the preservation of the relationship is at the forefront. The preference for preserving the relationship explains the rules found in the UNIDROIT Principles for rules that aim to save rather than terminate the contract. This is an unusual stance for a lawyer in the Anglo-Australian tradition who is used to advising on questions of breach and the ability to terminate a contract. Specific performance, not damages, might now be seen to be the primary remedy.
12. Third, the presence of discretion within the parties to the contract requires us to grapple with questions of fault: duties of good faith and cooperation, best efforts

responsibilities, reasonableness and duties of care and loyalty are intended to deal with opportunistic behaviour.⁹ Many of the provisions dealing with relational contracts use the language of fault.

13. Fourth, more attention needs to be paid to contractual mechanisms for dealing with risk in relation to supervening events (including by way of silence). These mechanisms are hardly mentioned in most texts and rarely taught to students. Yet the devices are pervasive.

‘The risk of supervening events, including changes in the law, can be allocated by the parties in the agreement. The risk allocation devices or terms used include express conditions, pricing provisions with escalation clauses, force majeure clauses, tailor-made terms aimed at particular events, and flexible quantity terms, such as requirements or output contracts. In addition, there are situations where the contract is silent but the promisor assumes the risk because it was actually foreseen or discussed in the pre-contract bargaining and not allocated by the agreement. Silence in the light of events foreshadowed at the time of contracting is, in effect, tacit risk allocation.’¹⁰

PROVISIONS RELEVANT TO EXCUSE UNIDROIT Principles

14. The UNIDROIT Principles have some important, and in some cases ‘radical’ (to an Anglo-Australian lawyer)¹¹ provisions in relation to these matters.

⁵ Victor P Goldberg, ‘Discretion in Long-Term Open Quantity Contracts: Reining in Good Faith’ 35 *UC Davis Law Review* 319 (2002).

⁶ *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1 at [220].

⁷ *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1 at [224].

⁸ *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1 at [230].

⁹ George M Cohen, ‘The Fault that Lies within Our Contract Law’, University of Virginia Law School, The John M Olin Program in Law and Economics Working Paper Series, Paper 46 (2008).

¹⁰ Richard E Speidel, *Contracts in Crises: Excuse Doctrine and Retrospective Government Acts* (Carolina Academic Press, 2007), 193-194.

¹¹ Roy Goode, ‘International Restatements of Contract and English Contract Law’ (1997) 2 *Uniform Law Review* 231 at 243.

Article 6.2 Hardship

15. Even where performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations (Article 6.2.1). That much is orthodox. However, this rule is made subject to the presence of hardship.

16. Hardship is defined in Article 6.2.2.

‘There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party’s performance has increased or because the value of the performance has diminished, and

(a) the events occur or become known to the disadvantaged party after the conclusion of the contract;

(b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;

(c) the events are beyond the control of the disadvantaged party; and

(d) the risk of the events was not assumed by the disadvantaged party.’

17. It may be that this restates a form of frustration of purpose, although it is probably wider than that doctrine is currently understood. The language of this clause will strike an Australian lawyer as curious e.g. ‘equilibrium of the contract’. It does not mean ‘fairness’; nor ‘equality’. It requires an understanding of the purpose and intended effect of the contract on risk and reward. However, the language is perhaps no more curious than the ill-adapted language of ‘frustration’, which struggles to encompass several possible concepts – frustration of purpose, impossibility and impracticability.

18. The sting comes in the remedial provisions in Article 6.2.3.

- Reflecting the interest in keeping the transaction alive, the disadvantaged party is entitled to request renegotiation of the contract – the request must be made without undue delay and stating the grounds upon which it is based. That request does not itself entitle the party to withhold performance.

The negotiations are subject to the obligation of good faith in Articles 1.7 and 2.1.15 and cooperation (Article 5.1.3).

- Upon failure to reach agreement the parties can resort to court. The court may, if reasonable:
- terminate the contract (at a date and time to be fixed – note the difference to the doctrine of frustration) or
- ‘adapt’ the contract with a view to restoring its equilibrium.

19. The power to adapt (reformulate or adjust) contracts will always be controversial. It has been used only once in the US. There is one only case where the court actually reformed the contract, but there is clearly power to do so and other cases have considered the circumstances in which that power might be exercised.¹²

Article 7.1.7 Force majeure

20. This Article contains a restatement of the force majeure doctrine. An excuse is given for non-performance if:

- it was due to an impediment beyond the control of the contracting party;

¹² Aluminum Co of America Essex Group Inc 499 E Supp 53 (WD Pa, 1980) (relief granted by price clause failed); Oglebay Norton Co v Armco Inc 556 NE 2d 515 (Ohio, 1990). See Richard E Speidel, *Contracts in Crises: Excuse Doctrine and Retrospective Government Acts* (Carolina Academic Press, 2007), 231 – 234 who reviews the case law (Professor Speidel is a long-time supporter of the power of adjustment in relational contracts).

- the contracting party could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

21. There is nothing controversial about these terms, but there are many gaps in the provisions and they will need to be supplemented by contractual provisions for particular sorts of contracts, e.g. provisions in relation to make up of undelivered product due to the force majeure event.
22. The controversial and messy position in relation to what happens by way of restitutionary remedies in both this and hardship is currently being considered.¹³ It can do no worse than the legislative position in Australia.

Other sources of law

23. A useful comparison can be made between the UNIDROIT Principles and other international instruments.

Exemption in Article 79 – CISG

24. This Article contains an excuse for performance so long as the failure can be proved to be due to an ‘impediment’ beyond the contracting party’s control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.
25. This provision is closer to a force majeure provision. It does not provide for court adjustment of the contract. It shields the party from a damages claim but leaves all other remedies intact.¹⁴

¹³ Professor Reinhard Zimmermann, *Draft Chapter on Unwinding Failed Contracts* (Study L – Doc. 105. April 2008).

¹⁴ For a comparison of the UNIDROIT Principles and CISG see John Felemegas (ed), *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods* (1980) as Uniform Sales Law (Cambridge University Press, 2007), 236-246.

Impracticability

26. The US Uniform Commercial Code deals with these circumstances in a different manner. In *UCC § 2-615 – Excuse for failure of presupposed conditions*, except so far as a seller has assumed a greater obligation, delay in performance in whole or in part, is not a breach of the seller’s duty if performance has become impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption of which the contract was made.¹⁵ This clause allows a seller to allocate production and deliveries in any way that is ‘fair and reasonable’ but requires (‘must allocate’) sales amongst its customers on a pro-rata basis.¹⁶
27. This is a ‘new synthesis’ of the development of the law regarding supervening events. It reflects a greater judicial intervention in US contract law than an Australian lawyer is comfortable with. Farnsworth states:

“The new synthesis candidly recognises that the judicial function is to determine whether, in the light of exceptional circumstances, justice requires a departure from the general rule that a promisor bears the risk of increased difficulty of performance.”¹⁷

28. This is a default rule that is often changed by express provisions, e.g. a force majeure clause. The rule has been adapted by the *Restatement Second, Contracts*, §261.

Principles of European Corporate Law

29. The Principles of European Contract Law are prepared by the Commission on

¹⁵ Other relevant provisions of the UCC include the obligation of substituted performance (UCC § 2-614).

¹⁶ Lord Morris of Borth-y-Gest expressed a view that a strong clause would be needed to allow breach of a contract by reference to other commitments: *Hong Guan & Co Limited v R Jumabhoy & Sons Limited* [1960] AC 684 at 700. But see Donaldson J in *Intertradox SA v Lesieur-Tourteaux SARL* [1977] 2 Lloyd’s Rep 146 at 155.

¹⁷ E Allan Farnsworth, *Farnsworth on Contracts* (Aspen, 3rd ed, 2004), §9.6.

European Contract Law. Like the UNIDROIT Principles they are not mandatory in nature and depend for their force on their acceptability to contracting parties (in this case, a class of person wider than commercial entities).

30. The PECL have, not surprisingly, many affinities with the UNIDROIT Principles. They contain similar provisions in relation to:

- Change of Circumstances – Article 6.111: Change of Circumstances.

Like the UNIDROIT Principles, this Article provides for court reformation of the contract. The PECL recognises that, absent such a provision, the parties to a contract might have an incentive to introduce appropriate clauses into their contracts.

‘But experience suggests that frequently the parties are not sufficiently sophisticated, or are too careless of their own interests, to do this; or they insert clauses which do not cover every eventuality.’¹⁸

There is no evidence given for this broad-ranging statement. Whatever the truth of this statement in consumer contracting, it seems unlikely to be true in international commercial contracts, where the parties do have an incentive to contract for their commercial needs.

- Impossibility: Article 8.108: Excuse Due to an Impediment

This Article is drafted in similar terms to UNIDROIT Principles 7.1.7.

POSSIBLE NEW DIRECTIONS – TERMINATION FOR ‘JUST CAUSE’

31. UNIDROIT are considering adding a new set of provisions in relation to termination of contracts for ‘just cause’, although these have proved to be controversial.¹⁹

32. The proposal:

- applies to contracts with a recurring obligation to do something positive (not to abstain from doing something). In some systems of law these are contracts which are characterised as relational contracts;
- requires notice within a reasonable period of time of becoming aware of;
- a just cause;
- does not preclude an action for damages.

33. The notion of a just cause is the critical term. The relevant draft states:

‘There is a just cause if, having regard to all the circumstances of the specific case and balancing the interests of both parties, the terminating party cannot reasonably be expected to continue the contractual relationship until the agreed termination date or until the end of the notice period.’

34. Whilst a lawyer in the Anglo-Australian tradition will probably think first of principles of breach allowing termination, and then of equitable principles, the examples given in the discussion paper are broader:

- the lost of mutual trust between parties to a licensing agreement due to late performance;
- sudden dramatic diminution of the financial capacity of a lessee;

¹⁸ Ole Lando and Hugh Beale, *Principles of European Contract Law*, Parts I and II (Kluwer, 2000), 323.

¹⁹ Professor François Dessemontet, *Position Paper with Draft Provisions on Termination of Long Term Contracts for Just Cause* (Study L – Doc. 104, January 2007).

- risk of imminent insolvency of a borrower.

ASSESSMENT

35. As Australian commerce grows more international in nature, there will be a need to find a common 'framework' by which contractual relationships are maintained. The UNIDROIT Principles and PECL are obvious sources of rules and institution building in this regard. This creates a fundamentally different legal environment in relation to risk-bearing for supervening events. This is not necessarily a good or bad thing, but it is something with which Australian business should come to grips.
36. The case law and literature in Australia about relational contracts is thin. The inclusion into the UNIDROIT Principles of concepts that deal with relational contracts is a challenge to Australian lawyers and courts to grapple with the issues that arise in a relational setting.
37. The UNIDROIT Principles will continue to prod us along this direction. However, that effort may stall if commercial parties believe that the rules in the new law merchant are too open-textured, allowing too much judicial intervention in contracting practices.
38. The debate about these matters in Australia has barely started. I look forward to the next edition of the UNIDROIT Principles and a healthy debate about the role that they play in commercial contracts in Australia.

“The UNIDROIT Principles of International Commercial Contracts: What Do They Mean for Australia?”

CLE Seminar, Sydney Law School, 25 June 2008

“Afterthoughts”

© 10 July 2008

Dr Luke Nottage

From their first edition in 1994, the UNIDROIT Principles (also sometimes known as UPICC) covered more topics than the 1980 UN Convention on Contracts for the International Sale of Goods (CISG, in force from 1988 and incorporated into Australian law the following year). Especially during the final stages of negotiating CISG, several topics had to be omitted (eg, arguably, pre-contractual liability) or watered down (eg, direct and non-derogable obligations on contracting parties).²⁰ This was mainly to secure general acceptability particularly on the part of Anglo-Commonwealth states. Even when states had acceded to CISG, prima facie binding their firms selling goods to counterparts in other CISG member states (pursuant to Art 1(1)(a)), firms were permitted to opt out of CISG in whole or in part (Art 6). Anglo-Commonwealth courts and lawyers have not applied CISG as frequently or consistently as counterparts particularly from major civil law tradition jurisdictions. Yet CISG did establish a common language for addressing core issues of contract formation and performance.²¹

The first edition of UPICC heralded a new round of harmonization in this field, often reproducing wording from CISG. But the Principles added new or more specific

obligations (eg Art 1.8 on good faith and Art 2.1.15 on pre-contractual liability) not limited to international sales of goods, and generally applied on an opt-in basis. The second edition (2004) further expands coverage, into areas such as third parties, assignment and limitation periods.²² A Working Group is developing a third edition, including possible provisions on “termination for just cause”. This is expected to cover situations not amounting to excusable force majeure (Art 7.1.7, like CISG Art 79) or even “hardship” (Arts 6.1.2-3), or “fundamental non-performance” (or breach: Art 7.3.1).²³ Such topics are particularly important in long-term “relational contracts”, especially cross-border service transactions like distributorships or licensing contracts.²⁴ UPICC has moved with the times in developing new norms to govern trading in services, not just goods, just as the WTO added GATS (and TRIPS) to GATT in 1994.

Perhaps after many more decades of experience with CISG, and UPICC applied on a “soft law” basis, at least some of the Principles may be folded into a Protocol to CISG – and including, perhaps, narrower scope for firms in acceding states then to exclude provisions in that Protocol. Meanwhile, however, Professor Bonell outlines three softer means of expanding the already considerable usage of the Principles by judges (including of course Justice Finn), arbitrators, legislators, and lawyers negotiating and drafting cross-border commercial contracts.²⁵

Professor Bonell first suggests some form of Declaration from the UN recommending interpretation of CISG, including Art 7(2) requiring gaps in CISG to be interpreted in light of its general principles, in light of successive editions of UPICC. This might be useful, since there seem to be “many roads to Rome” (and

²⁰ See eg L. SPAGNOLO, *Opening Pandora's Box: Good Faith and Pre-Contractual Liability in the CISG* 21 (1) Temple International and Comparative Law Journal 261 (forthcoming 2008).

²¹ L. NOTTAGE, *Who's Afraid of the Vienna Sales Convention (CISG)? A New Zealander's View from Australia and Japan* 36 Victoria University of Wellington Law Review 815 (2005). See also H.SONO, *Japan's Accession to the CISG: The Asia Factor* 25 Journal of Japanese Law 195 (2008) and N. KASHIWAGI, *Accession by Japan to the Vienna Sales Convention (CISG)* 25 Journal of Japanese Law 207 (2008), available soon via http://www.law.usyd.edu.au/anjel/content/anjel_research_pap.html. The Japanese parliament approved Japan's accession on 19 June 2008.

²² M. J. BONELL, *UNIDROIT Principles 2004 - the New Edition of the Principles of International Commercial Contracts Adopted by the International Institute for the Unification of Private Law* 2004-1 Uniform Law Review 5 (2004).

²³ See <http://www.unidroit.org/english/documents/2007/study50/s-50-104-e.pdf>. Although these draft proposals may seem to leave considerable uncertainties, the hard reality is that national laws also still tend to leave uncertainties in the factual scenarios envisaged. See also eg V. TAYLOR *Continuing Transactions and Persistent Myths: Contracts in Contemporary Japan* 19 Melbourne University Law Review 352 (1993).

²⁴ See Donald Robertson's remarks prepared for this Seminar.

²⁵ See some of Justice Finn's judgments available via <http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=13619>.

possibly some dead-ends) on this point within current arbitral practice and influential academic commentary.²⁶

However, my first concern is that the “general principles” underlying UPICC (or, for Australians, their “vibe”²⁷) do not necessarily equate to those of CISG, which is crafted for less relational cross-border sales of goods. Hence, for example, the UPICC’s broader “hardship” provision, creating a potentially lower threshold (although still set quite high by arbitrators) for more flexible relief including duties to renegotiate or even “court adjustment” to restore contractual equilibrium. CISG adopts a more (neo)classical and “formal reasoning” based approach to such problems, partly reflecting less scope for them to arise in sales of goods.²⁸ Courts and even arbitrators from Anglo-Commonwealth jurisdictions, which have built up and often maintain substantive and procedural law along with supporting institutions to promote such formal reasoning, are more likely to emphasise such differences.

My related concern is that courts in those jurisdictions, in particular, are likely to take much less notice of some non-binding UN recommendation encouraging them to interpret in a particular (broader) way the Australian legislation incorporating CISG, despite its international origins and character. In other areas, the record of the Australian High Court over the last decade has been markedly less “internationalist” than even the House of Lords, which has undergone a sea change.²⁹ Lower courts in Australia have also struggled to generate globally-acceptable interpretations of the 1958 New York Convention on the

Recognition and Enforcement of Foreign Arbitral Awards, in its original formulation.³⁰ That makes me skeptical that UNCITRAL’s recommendation for a more liberal interpretation of the New York Convention’s writing requirement³¹ will have much independent effect in Australia. Formal reasoning based legal systems, with a strict hierarchy of courts and *stare decisis*, have more difficulty with diffuse “sources” of law.

Thus, although a Declaration is worth trying, I believe we are more likely to generate more engagement with UPICC within Australia from a second proposal by Professor Bonell. It should be made clear that courts, not just arbitrators in proceedings with the seat in Australia that are governed by the 1985 UNCITRAL Model Law on International Commercial Arbitration (ML-ICA, given force of law by s17 of the International Arbitration Act) are free to apply “rules of law” – including UPICC – as the governing law.³² This is especially important if we are to take seriously the Attorney-General’s recent promotion of the Federal Court as a hub for commercial litigation in the Asia-Pacific region.³³ Yet, despite Australia’s adoption of the Model Law in 1989 and other efforts, for various reasons we have not yet

³⁰ L. NOTTAGE, *Top Twenty Things to Transform in Australia’s International Commercial Arbitration Law* manuscript for the Australian ADR Reporter (Chartered Institute of Arbitrators – Australian Branch, www.arbitrators.org.au).

³¹ See http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2006recom_mendation.html.

³² Compare Art 28(1) of the ML-ICA, but note that (absent such express choice of “rules of law”) arbitrators are only permitted to apply a national contract “law” under Art 28(2). UPICC’s usage might be increased by revisions to the ML-ICA (or national legislation adopting it, like Australia’s International Arbitration Act) authorizing arbitrators to apply “rules of law” also in the latter situation. In addition, ML-ICA Art 34(2)(a)(i) on setting aside of awards and Art 36(1)(a)(i) on enforcement of foreign awards could also be amended to allow the parties to choose “rules of law”, not just a national contract “law”, to govern the arbitration agreement itself. ML-ICA Arts 7 and 8, which have no express provisions on the applicable law for that agreement when it comes to staying court proceedings to allow international arbitrations to commence, could also be amended to allow it to be “rules of law” like UPICC. Similar amendments could be made through a protocol to New York Convention Art V (enforcement) and Art II (stays).

On the powers of courts (as opposed to arbitrators) regarding the proper law governing the underlying contract itself, Australia’s leading textbook on private international law gives no indication of whether “limits on choice” would force courts to exclude “rules of law” such as UPICC, and thus to apply only the contract “law” of a particular jurisdiction. See PE Nygh & M Davies, *Conflict of Laws in Australia* (7th ed 2002, Lexisnexis) pp 357-64. Legislative reform to allow at least express selection of “rules of law” is desirable.

³³ The Attorney-General, The Hon Robert McClelland, *Australian Financial Review Legal Conference 2008*, 17 June 2008 (cited in Donald Robertson’s commentary; see specifically para 5 of http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/Speeches_2008_17June2008-AustralianFinancialReviewLegalConference).

²⁶ See eg J. Y. GOTANDA, *Using the UNIDROIT Principles to Fill Gaps in the CISG*, in *Contract Damages: Domestic and International Perspectives* <http://ssrn.com/abstract=10192772007>).

²⁷ For non-Australians, see “The Castle” movie (1997, eg [http://en.wikipedia.org/wiki/The_Castle_\(film\)](http://en.wikipedia.org/wiki/The_Castle_(film))).

²⁸ See L. NOTTAGE, *Changing Contract Lenses: Renegotiations in English, New Zealand, Japanese, US and International Sales Law and Practice* 15 *Indiana Journal of Global Legal Studies* (and Sydney Law School Research Papers via www.ssrn.com) and eg the Arbitral Award of 30 November 2006 through the Centro de Arbitraje de México (CAM) – summary via <http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=13618&cx=1>

²⁹ J. CRAWFORD, *House of Lords and the High Court of Australia 1996-2008: A Comparison*, Inaugural Kirby Lecture on International Law, Australian Museum, Canberra, 26 June 2008.

succeeded even in developing Australia as a major arbitral venue in our region.

We also therefore need to give serious consideration to the third suggestion from Professor Bonell: elevating the Principles into a Model Law for International Commercial Contracts. Countries like Australia could then adopt or adapt all or part of this new Model Law as the basis for more comprehensive reform of its contract law, better reflecting the growth of relational transactions. Some norms also could be extended to (most) domestic dealings, just as New Zealand and Japan did with the 1985 ML-ICA.³⁴ The latter was successful partly because core provisions – limiting court intervention first in allowing arbitrations to get underway, and then in reviewing the arbitrators' awards – largely reproduced provisions or ideas from the 1958 New York Convention. After 20 years of experience with CISG, a Model Law based on UPICC similarly may find considerable traction.

However, the 1985 ML-ICA successfully added many more details compared to the New York Convention, especially regarding the middle phase of arbitral proceedings. In doing so, it was able to draw on many experiences of parties, lawyers and adjudicators considering the 1976 UNCITRAL Arbitration Rules. Those too applied on an opt-in basis. But so far UPICC has been less widely used than the UNCITRAL Rules for conducting arbitrations. Hence I would recommend a Model Law on International Commercial Contracts that limits itself, at least initially, to UPICC articles most frequently applied in practice. This would probably mean a Model Law based on the topics covered in the first edition, not the second edition or forthcoming third edition.

Even so, I would expect considerable resistance in Australia to updating our contract law based on such a Model Law. Some would probably advocate an even shorter and simpler

³⁴ L. NOTTAGE, *Japan's New Arbitration Law: Domestication Reinforcing Internationalisation?* 7 *International Arbitration Law Review* 54 (2004); L. NOTTAGE, *Reforming International Commercial Arbitration (Ica) Law: The U.N., New Zealand – Why Not Australia?* 7 *Australian ADR Reporter* (Chartered Institute of Arbitrators – Australian Branch) 15-19 via www.arbitrators.org.au (2008).

“Contract Code”.³⁵ But the most influential objections aimed at legislators would probably come from those familiar and sympathetic to more formal reasoning based Anglo-Commonwealth contract law. And unless and until key legal institutions supporting that particular vision of law undergo major change, they will probably prevail.³⁶ But at least a Model Law would prompt further philosophical, empirical and doctrinal debate in this country, and probably much more in Australia's major trading partners world-wide.

³⁵ M. P. ELLINGHAUS, T. WRIGHT, et al., *Models of Contract Law: An Empirical Evaluation of Their Utility* (Annandale, N.S.W.: Themis Press, 2005).

³⁶ See also the difficulties of developing in New Zealand even the neoclassical vision of contract law enshrined in the US Restatement – Second of Contracts (1981), despite the indefatigable efforts particularly of our Sydney Law School Visiting Professor this year, David McLaughlan. Compare D. MCLAUCHLAN, *The 'New' Law of Contract in New Zealand* [1992] *New Zealand Recent Law Review* 436 with L. NOTTAGE, *Form, Substance and Neo-Proceduralism in Comparative Contract Law: The Law in Books and the Law in Action in England, New Zealand, Japan and the U.S.*, PhD in Law thesis, Victoria University of Wellington Law (2002, available soon digitally via <http://researcharchive.vuw.ac.nz/>), especially chapters 1 and Part Two Introduction (both revised in 2007 and available via http://www.law.usyd.edu.au/anjel/content/anjel_research_pub.html).